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Debating the Interface between International Law and Municipal Law: A Few Concerns Regarding the Relevance of the Traditional Debate, Primary of Law and Integration of the Legal Systems

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EDITORIAL

The year 2020 saw major events having national and international significance. Amidst all that, was the entry of deadly virus resulting in all the forces – political and economic – to concentrate on only one task of containing the spread of virus. Here is an account of legal and political responses to major issues that cropped up during this time.

The Government's decision of abrogation of special status of Jammu and Kashmir resulted in suspension of internet services in the valley for security reasons. This issue was raised before the Supreme Court in *Anuradha Bhasin* v. *Union of India*, [Writ Petition (Civil) No. 1031 of 2019]. The Supreme Court noted that Internet has become an important tool to carry out economic activities and certain trades are completely dependent upon Internet. In this context the Court held that exercise of freedoms under Art. 19(1)(a) and 19(1)(g) through the medium of Internet are constitutionally protected rights and indefinite suspension of Internet is not permissible.

A sigh of relief during this period was that the trial of accused in *Nirbhaya's case* saw a closure when Curative Petition and other pleas filed by convicts in *Nirbhaya* gang rape and murder case were dismissed by the Supreme Court in *Vinay Sharma* v. *State of NCT of Delhi*, [Curative Petition (Criminal) Nos. 7-8 of 2020] and in *Pawan Kumar Gupta* v. *State of NCT of Delhi*, [Special Leave Petition (Criminal) No. 547 of 2020]. After a long battle, the convicts were hanged to death at Tihar Jail.

A major cause of concern was the deteriorating Air quality of Delhi. Burning of wastes, industrial emissions, vehicular emissions being the chief causes, stubble burning by farmers in U.P, Punjab and Haryana too contributed to air pollution immensely. In this regard, in *M. C. Mehta* v. *Union of India*, [Writ Petition(s) (Civil) No(s). 13029 of 1985], the Supreme Court issued directions in an interim

order. Among others, the directions include implementation of parking policy and implementation of Lambda under P.U.C. programme in Delhi (It is a test to check pollution levels in vehicle emissions).

The year began with continued nationwide protest against the controversial *The Citizenship (Amendment) Act, 2019*. Many raised concerns that this amendment might affect India's secular standing. Several petitions were filed before the Supreme Court challenging the constitutional validity of the amendment Act. The Supreme Court directed issuing of notice to the Central Government and matter is still pending before the Court. However, Supreme Court observing that democracy and dissent go hand in hand, in *Amit Sahni* v. *Commissioner of Police,* (Civil Appeal No. 3282 of 2020) ruled that Shaheen Bagh which is a public place cannot be occupied indefinitely for expressing dissent as it causes encroachments and obstructions.

The issue of possibility of civil judges to seek direct recruitment to the post of District Judge was decided by the Supreme Court in *Dheeraj Mor* v. *Hon'ble High Court of Delhi*, (Civil Appeal No. 1698 of 2020). The Court noted that 7 years continuous practice being the necessary requirement, civil judges are not eligible to be considered for direct recruitment to the post of District Judges. Nevertheless, they can be promoted to the post of District Judge as per the rules.

Year 2020 will be remembered for outbreak of coronavirus pandemic. What emerged in Wuhan in China as cluster of pneumonia cases was later identified as new virus affecting lives of millions. Entire world was affected with this deadly virus and in India too there was an exponential growth in number of people getting infected with virus. WHO declared it as a 'pandemic' on 11/3/2020. India too notified it as 'epidemic disease' under *The Epidemic Diseases Act, 1897* and declared Covid-19 pandemic as 'notified disaster'.

Preventing the spread of this virus in India with such a huge population was a horrendous task before the Government of India. Strict social distancing was the initial response and strategy for containment of the virus. Covid 19 was a biological disaster affecting entire nation. The Centre and States invoked provisions of *The Epidemic Diseases Act, 1987*, *The Disaster Management Act, 2005* and various state specific public health legislations to address the health crisis. One such measure under *The Disaster Management Act, 2005* was imposition of

nationwide lockdown to ensure social distancing from 25th March 2020 for 21 days.

Imposition of nationwide lockdown led to loss of jobs, loss of employment opportunities and loss of livelihood. Lockdown affected the informal and unorganized sector the most. Migrant labourers did not have the economic capacity to survive during lockdown nor had any means to travel back to their hometown. So they walked thousands of miles to reach their hometown along with small kids and elderly. Crores of migrant workers walked home to survive. It was a struggle to survive. Many of them got infected with corona virus.

At this point of time, a petition (*Alakh Alok Srivastava* v. *Union of India*, Writ Petition (Civil) No. 468/2020) was filed before the Supreme Court seeking directions to government to provide basic amenities to migrant workers on road. The Court dismissed the petition. The Court's silence towards the plight of poor workers was subjected to criticism nationwide. Later it took *suo moto* action in *In re: Problems and Miseries of Migrant Labourers*, [*Suo Motu* Writ Petition (Civil) No. 6/2020] and took cognizance of the issue and observed that the measures taken by government were inadequate and issued a slew of interim directions on 28/5/2020. In the meantime various High Courts also took cognizance of violation of fundamental rights of migrant workers.

It was the civil society consisting of NGOs and individuals who came forward and extended helping hand to migrant workers by providing them with food and shelter and also arranging for their travel. It can be said that the civil society played a very important role during these testing times.

The Supreme Court directed the government to transport all migrant workers within 15 days on 9/6/2020 in *In re: Problems and Miseries of Migrant Labourers* [*Suo Motu* Writ Petition (Civil) No. 6/2020]. Further, the Court observed that the movement of labourers was under force of circumstances and therefore state governments may withdraw complaints lodged against labourers under Sec. 51 of *The Disaster Management Act, 2005* for violating social distance norms.

Amidst the crisis, India passed the four Labour Codes largely consolidating the existing labour legislations. *The Code on Wages* was passed in 2019, but the other three codes *Social Security, Industrial Relations* and *Occupational Safety,*

Health and Working Conditions were passed subsequently in September 2020 after replacements were made based on the suggestions of the Standing Committee on Labour.

The Indian Government with an intention of bringing transformation and transparency in the agriculture sector enacted three legislations, *The Farmers' Produce Trade and Commerce (Promotion and Facilitation) Act, 2020, The Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Act, 2020* and *The Essential Commodities (Amendment) Act, 2020*. These legislations were further aimed at revolutionizing the agriculture by introducing electronic trading accelerating and facilitating the growth with private investments in building supply chain and promoting employment. Consequently, the laws triggered protests from the farmers across the country who demanded their abrogation. The Supreme Court holding that right to protest as a part of fundamental right subject to public order in *Rakesh Vaishnav* v. *Union of India*, [Writ Petition (C) No. 1118/2020] refrained from interfering with protest. It further directed the protests to be non-violent and not to bring destruction to any life or property.

The spread of virus had reached prisons and there was need for immediate action. The Supreme Court took *suo moto* action in *In re: Contagion of Covid 19 Virus in Prisons* [*Suo Motu* Writ Petition (C) No. 1/2020] and directed the states and union territories to constitute High Powered Committees to identify the prisoners who can be released on parole. Further, on 13/4/2020, the Supreme Court passed another order in this case directing to release 'declared foreigners' from Assam's detention centres if they have completed 2 years in detention.

Imposition of lockdown nationwide affected Courts too. The Supreme Court and High Courts throughout India regulated their functioning and restricted to hearing of urgent matters only. Functioning of trial courts was suspended completely for some time until a new Standard of Practice was adopted incorporating social distancing norms. This caused difficulty for litigants to file cases and applications within the period of limitation provided under various laws. The Supreme Court took *suo motu* cognizance of the situation in *In re: Cognizance for extension of limitation* [*Suo Motu* Writ Petition (Civil) No(s). 3/2020] and extended the period of limitation w.e.f. 15/3/2020 until further orders.

Responding to the situation, Courts were quick enough to adopt technology and shift to online mode to provide access to justice. Courts embraced newer ways of functioning, heard matters via video conferencing using various platforms and allowed litigants to file cases online. The Supreme Court and other Courts came up with guidelines for e-filing of cases. Courts handled thousands of cases through digital hearing. The idea of e-courts project conceived under 'National Policy and Action Plan for Implementation of Information and Communication Technology (ICT) in the Indian Judiciary – 2005' got a boost and was operationalized during the pandemic. Lot of technological improvements and adaptations were made during this period. The way the governments and the public responded to challenging issues during this period, proves that this great nation with its professional abilities and cultural ethos stand always geared up to successfully meet them.

With this note, the Karnataka State Law University is releasing this volume with articles on diverse subjects and intriguing aspects. The Convocation address by Hon'ble Mr. Justice Mohan Shantangoudar forms the initial section of this volume. It is followed by an enthralling discussion on 'Changing Facets of Constitutionalism in India' by Mr. Mohan V. Katarki. Mr. Sudhish Pai's riveting article on 'Rule of Law and Justice: Role of Judges' critically elucidates the active role played by the judiciary in nurturing the principle of rule of law. Prof. (Dr.) P. Ishwara Bhat's work on 'Application of Constituent Assembly Debates in the Interpretation of Constitutional Provisions of Fundamental Rights and Welfare', with extensive reference to precedents, illuminates the importance of the CAD as an interpretive aid in expanding the scope of fundamental rights. The article by Prof. (Dr.) G.B. Patil on 'Power of Contempt of Court in India: An Overview' encapsulates the increasingly intensified debate on conceptualizing the essentials of contempt with detailed deliberation upon its application. Following it is another fascinating article of contemporary relevance by Prof. (Dr.) Sandeepa Bhat B. on 'Concept of Medical Negligence, Development in India and Inherent Limitations'. Prof. (Dr.) T.R. Subramanya and Ms. Chanjana Elsa Philip's work on 'An Overview of Sentencing Process: Dilemma Faced by Judges while Awarding Death Penalty', goes beyond the legality of the death penalty to comprehend the predicament of judges while awarding such sentences. Mr. Girish K.C.'s article on 'Functioning of Federalism in India to Combat Covid-19' is of great contemporary significance as it explores the possible actions against Pandemic within the federal structures. The article on

'*The Consumer Protection Act 2019*: A New Milestone in Empowering E-Consumers' by Dr. Bheemabai S. Mulage, provides the latest insights regarding the changes brought to the consumer protection laws especially in the light of growing E- consumerism. The last article of the volume by Dr. Akhila Basalalli, on 'Debating the Interface between International Law and Municipal Law: A Few Concerns Regarding the Relevance of the Traditional Debate, Primacy of Law and Integration of the Legal Systems', examines the relevance of the theories that conceptualize the relationship between the two legal systems through the TWAIL scholarship, especially in the light of ongoing integration and normative convergence.

We hold the scholarship of these legal luminaries in highest regard and appreciate their sincere efforts and investment of time in contributing their works to our journal.

-Editorial Board

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CONVOCATION SPEECH*

Hon'ble Mr. Justice Mohan Shantangoudar**

A very good morning to the esteemed Chancellor, the Vice-Chancellor, distinguished guests, teachers, staff, proud parents, dear students, and up-and-coming advocates. I thank the University for inviting me to be a part of this joyous occasion, and extend my heartiest congratulations, especially to the young students who are reaping the fruits of the hard work undertaken by them over the years.

In India, it is a common practice for elders to ask the much-dreaded question 'What next?' after one's education is completed. However, actually speaking, there can be no full stop to one's learning process. There is a lot more for you all to imbibe over the course of the next few years. This Convocation may mark the end of your formal education, but it also commences the beginning of your real education, which is an infinite process. I would therefore advise that the question we should be asking is not what is to come next, but what is it that we are doing to improve ourselves right now.

One recent trend that I have observed in young lawyers, when they plan for future career prospects, is that they mostly appear to be attracted to careers in law firms. It is certainly a lucrative option for those who are inclined towards transactional work. Research-oriented students tend to explore policy work and academia, which are also interesting career options. What worries me, however, is

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* Convocation speech delivered on the occasion of 4th Convocation organised by Karnataka State Law University, Hubballi on 14th March, 2020.

** Judge, Supreme Court, New Delhi.

that even out of the brave few who do opt for litigation, most choose to practice at the appellate Court level. Our trial Courts have therefore become the Cinderellas of the judiciary.

This is strange, because notwithstanding the aversion of young law students to a career in the trial Courts, either as a lawyer or a judicial officer, trial Court litigation continues to boom. Even laypersons are well acquainted with the problems of frivolous litigation and excess pendency before the trial Courts. It is essentially a vicious cycle. Since competent persons do not join trial Court practice, the pool for elevation to the Bench is also limited. The respect that the decision of a trial Court should command also gets compromised. At the same time, errors and miscarriages of justice committed by the lower Courts increase the burden for the appellate Courts.

Additionally, the mismanagement of the lower Courts encourages the filing of meritless litigations by those who wish to use the law as a tool for harassment and intimidation. Even where the judges are good, the lawyers will be incompetent and unethical, which hinders efficient resolution of cases. Looking at this state of affairs, those who do wish to take up lower Court practice are discouraged and the cycle continues. Hence, there is an urgent need for talented persons to rejuvenate the lower judiciary.

Of course, the blame for this cannot be assigned to law students. In fact, most young law students enter college dreaming of using the law as an instrument for social change and development. However, somewhere along the line, cynicism creeps in, and students become inclined towards more materially rewarding careers, such as the position of an associate with a corporate firm or with a reputed senior at the High Court or the Supreme Court. The problem is structural in nature. Our society is such that earning a square meal has to take precedence over our internal job satisfaction and professional desires. Hence, students nowadays are more inclined to undertake clerical work in corporate law firms for a premium salary than to join practice before the lower Court.

It is true that at the initial stage, earnings from trial Court practice will not be commensurate with those from a corporate career. Why then should one take up a trial Court practice or consider a career as a District Judge? The answer is: facts. The law, though a difficult creature to tame, is not that hard to acquire knowledge of. It may be learned from commentaries and treatises or by mere reading of statutes, without having to attend Court every day. On the other hand, applying the law to facts, and gaining mastery over those facts is a different exercise altogether. The appellate Courts only go into questions of law or Constitutional questions, and these arise in very few matters. If the trial Court has not made a finding in one's favour on facts, one's cause is lost at the outset. Therefore, the trial Court judgement forms the cornerstone of the entire case, and without good argumentation and adjudication at the trial Court level, any appeal will be a meaningless endeavor.

Today, if I were to ask you to give a brief explanation of Article 14 of the Constitution, it would be easy for you to write down a one paragraph summary based on what you have learnt during your constitutional law course. However, to understand the demarcation of properties in a civil suit, or to prove the 'last seen' circumstance in a criminal trial requires knowledge based on years of observation, which can only be gained from trial Court practice. It is true that the maximum rate of pendency of cases in the country is before the subordinate Courts, but the silver lining in this is that it is the officers in these Courts who enjoy exposure to the most diverse range of matters. To learn the law is one thing, but it is over here that you will glean information about economics, politics, psychology, forensic science and the day-to-day realities of the human condition.

I not remember a particularly interesting case I had witnessed in Court where a burn injuries victim had given two dying declarations. The first one, upon which she had given her thumb impression, implicated the accused, whereas the second one was non-incriminatory. I vaguely remembered from my Evidence course in college that in a case involving divergent dying declarations, the Court would have to assess the other material on record to find out which version was true. But this is only abstract theory-how does one actually ascertain which version is true?

In cross-examination, the defense counsel pointed out to the Court that due to the burn injuries, the victim's body had assumed a 'pugilistic' posture or the 'boxer's pose' in which her fists were clenched and her elbows and knees were fixed in a fetal position. Hence, it would have been impossible for her to have sat upright and put her fingerprint on the dying declaration, as the investigating officer had deposed. This was the first time I learnt that such a term existed in the medical jurisprudence relating to burn injuries. This is only an example of course, there are many such gems of knowledge which can be gleaned from trial Court practice.

Even if you ultimately wish to build a practice at the appellate Court level, trial Court practice is a crucial stepping stone towards the same. This is because, it is only at the trial Court that you learn the intricacies of procedural law. There have been many instances when parties have come to the High Court or Supreme Court with a beautiful case on merits, but have lost on account of some grave procedural irregularity at the lower Court level. For example, no matter how detailed the grounds in a suit are, one's effort will go to waste if the Court finds that the specific pleadings required to be mentioned by law are absent. The difference between a First Information Report and a complaint, a summons case and a warrant case, the procedure for executing a decree and other such technicalities will always be Greek to you unless you actually witness the process happening in front of you. That is why I always tell young lawyers that the plinth of a good law practice is at the trial Court level.

The same potential for learning also exists if you are considering a career as a judicial officer in the lower Courts. It is the district judicial officers who possess the capacity to render justice at the grass root level. A well-reasoned trial Court judgement is unlikely to be challenged before or reversed by the appellate Courts, and it saves litigants from the financial and psychological hassles of continuing Court proceedings. The information that you pick up about local and regional customs, and the skillset of applying the law to facts, will also hold you in good stead if and when you are elevated to the higher judiciary.

I can understand that those of you who come from modest backgrounds, or who are the first generation lawyers in their family, may find the prospect of starting

out with a trial Court practice daunting. I can only give you my own example. I remember that when I had just joined my senior's practice, I was barely earning enough to make ends meet. Even then, I used to take up *pro bono* cases in an effort to help out those who were in need of legal counsel and lacked the resources to access the same. In such matters, the clients would often get food or fruits in lieu of lawyers' fees. Such was the large-heartedness of those people that they would share that food with me in the course of our interactions in office, even though they themselves had barely anything. It was from my experiences as a junior that I learnt that one can find kindness and assistance in the most unexpected of places.

Therefore, do not consider it essential that you should have a godfather or a blue-blooded family background to succeed in this profession, or in any field for that matter. Yes, it is important to meet and socialize with the 'right' people to climb up the ladder of progress, but it is not essential. The real 'right' people are those who will help you navigate through the complexities of adulthood and a new career, and face the challenges that come your way.

It is for this reason that I always advise junior advocates that they should not worry about starting their practice with a senior merely because of the name-tag and prestige attached to that person, be it at the trial Court or any other Court. The ideal senior is not someone whose name is always in the headlines and who charges lakhs of rupees per hearing. These details may speak of someone's capabilities as a lawyer, but it has no bearing on whether they will be an effective teacher and guide to you. Hence, it is important that you find someone who is willing to take the time out to give you constructive feedback on your work, correct your mistakes, and refer you to clients when the time comes for setting up your own chamber.

A good senior is also crucial for helping you imbibe professional ethics. There exists a myth amongst certain members of the Bar that one must be talented in the art of deception and forgery to be a successful lawyer. I strongly feel that if lawyers focused more on the art of persuasion and cross-examination, they would be more benefited. Resorting to trickery may help gain clientele and earn profits in the short

term, but it will cause long-term damage to one's reputation at the Bar, which is a crucial factor for someone being considered for designation as Senior Advocates or for elevation to judgeship. I know of many instances where talented advocates have lost out on golden opportunities because of adverse remarks on their character.

I would also advise all the budding advocates before me today to be careful and to maintain dignity and propriety in their interactions with the Bench and their fellow members of the Bar. Creating a false and defamatory impression in front of litigants or the general public that a particular judge is in one's favour is manifestly immoral. This is especially because judges do not have the time or the media to clarify all such specious allegations. One should think twice even before circulating such a rumour, as it could have serious implications for the independence of the judiciary. Similarly, trying to bribe or undertake 'settlements' with the other side without clients' knowledge, making misrepresentations to the clients or to the Court, are all practices which should be frowned upon.

I would, moreover, implore that young lawyers especially focus on exploring alternate dispute resolution strategies instead of following the same old trend of protracted adversarial litigation. There is a stereotypical notion that lawyers get matters adjourned or move superfluous interim applications so that they can earn more revenue from additional Court appearances. Therefore, it is heartening to see that there is a counter-revolution happening in the legal profession wherein disputes are now sought to be resolved through arbitration and mediation. However, this is yet to acquire mainstream appeal, and parties still end up approaching the Courts to challenge arbitration awards and mediation settlements. It is up to incoming batches of lawyers to sensitize clients and co-operate with alternate dispute resolution facilitators so as to ensure that these do not become dispute prolongation mechanisms.

Remember that it is your duty to honestly assess the strengths and weaknesses of your clients' case, and advise them to prefer settlement over litigation if the same would be more beneficial for them. As lawyers, your paramount duty is to assist the Court in reaching an equitable solution for all parties involved. You should

avoid pleading frivolous grounds or proffering false evidence because you believe it would further your interests or because your client has instructed you to do the same.

I have also noticed that senior advocates tend to use their juniors as props for seeking adjournments, under the wrong impression that the Court may not be inclined to hear submissions from a fresher. However, you all should be warned that I, and many of my brother and sister judges at the Supreme Court, as well as other Courts, follow a practice of making juniors argue, as we think the same is important for honing their talents. When we were young, most of us did not have these opportunities, and hence we want that our successors should get the chance to at least acquire some basic experience before they start independent practice.

Hence, I would advise that even if your senior is sending you to Court only to request a pass-over or an adjournment, you should be well-acquainted with the matter. It is not that since the senior counsel is arguing the matter, the primary responsibility for reading the case files lies with him and you are a mere puppet being strung along under his directions. The senior and junior advocates work as a team. Also, you should never take the Court's mood for granted. In case the Bench on a given day is inclined to finally dispose of a case, it would be better if you could at least make some basic submissions on the matter.

It is to be remembered that the judges are not your enemies. The judges bear no condescension or ill-will towards you. No matter how intimidated you may feel by the Bench, you must bear in mind that the judges have also been in your place. If they find that the junior is not in a position to argue the case effectively, they will call for the senior counsel or adjourn the case. But do not be tongue-tied merely because a judge asks you to start arguing the case in the absence of your senior. You should have the presence of mind to at least keep the Court engaged by giving details of the facts and the impugned judgement till your senior arrives. Learning how to think on your feet is an important skill for advocates.

Once you have acquired these fundamentals of procedure and Court strategy from trial Court practice, shifting to advocacy at the appellate level will be a smoother

ride. At the appellate Court level, two things will distinguish you from your peers. The first is if you have a firm background in trial Court practice, as I have mentioned earlier. The second is if you have done the required amount of background reading. As advocates, we are prone to rote learning legal provisions and case citations without understanding their true import and origins. Statutory interpretation and study of jurisprudence are regarded as mere academic exercises. However, you would be surprised to learn how much the outcome of a case may turn upon resolving the ambiguity in one word of a sub-clause of a legal provision.

This is why I encourage recently graduated lawyers to start looking at the 'Extra Reading' portions of their syllabus once they have commenced their practice. For those who wish to practice constitutional law, a reading of the Constituent Assembly Debates is a *sine qua non*. Even otherwise, the Debates provide an interesting glimpse into the socio-political bedrock upon which our country's laws and policies are framed. The Centre for Law and Policy Research has set up a very easily navigable website for those who wish to explore this subject in detail. Apart from this, it is also useful to read '*The Framing of India's Constitution*' by B. Shiva Rao, for more contextual understanding of the framing of Constitutional provisions.

For general reading, *Salmond on Jurisprudence*, H.M. Seervai's *Constitutional Law of India, The Indian Evidence Act 1872* by Sir James Fitzjames Stephen, and *Principles of Criminal Law* by Andrew Ashworth are other examples of literature that will enrich your critical thinking and legal reasoning skills. This is by no means an exhaustive list, but it suffices to say that if you read these commentaries, and are up-to-date with all the landmark Supreme Court judgements, particularly Constitution Bench decisions, you will have an unparalleled foundational knowledge of the law.

You may be thinking, it is very easy for someone to deliver these homilies in a speech, but how are these to be inculcated in practice? A lot of the advice I have given you today will be easier to follow if you remember that merely because you have now graduated, and are on your way to becoming self-sufficient adults, it

does not mean that your career is now the be-all and end-all of your life. A lot of the shortcuts taken and mistakes made by young adults happen because they keep chasing the golden goose of professional success without focusing on other aspects of their personality. Yes, your career is important, but it does not define who you are. If you focus on being a good human being, following professional ethics and being a committed worker will not be difficult tasks.

It is also important that just as you indulged in extracurricular activities such as sports and cultural programs during college, you continue the same after you join work. The present generation of lawyers has become so bound to their desks and offices, they rarely indulge in any physical activity outside of running around the Courts, and all of their intellectual energy is devoted to reading files and researching case laws. It is no wonder then that by the time they reach middle age, they complain of chronic exhaustion, depression and various lifestyle related ailments.

Therefore, do not hesitate from taking out some time every day to exercise, practice a musical instrument or dance form, indulge in some artistic activity or read a good non-legal book. This will not be an impediment to your career goals, but will actually help you flourish as both your mind and your body require certain 'recharging' activities if they are to function at an optimum level. If you are mentally and physically healthy, your interactions with others will also be full of spirit and zest, and you will be able to build useful connections and acquire a good professional reputation accordingly.

Once you have mastered the art of self-care, you can focus on your duty to take care of the nation. It is interesting to observe that both here, as well as abroad, it is lawyers who have often been at the forefront of major socio-economic and political reforms. In the United States, out of 44 Presidents, 26 Presidents have been advocates. Advocates have also played an instrumental role in removing segregation in schools and evolving mechanisms against gender and racial discrimination at the workplace in the U.S. Similarly, in India, there are several examples of advocates who went on to become prominent freedom fighters and

statesmen. Mahatma Gandhi, Dr. B.R. Ambedkar, Lokmanya Tilak, Lala Lajpat Rai, Vallabhbhai Patel and Jawaharlal Nehru are only a few examples of advocates who have played a pivotal role in charting out an independent destiny for the country.

Even presently, it is advocates who are using the law as a tool for evolving rights and reforms previously unknown to the polity. As much as the law is made and interpreted in accordance with prevailing societal mores, sometimes the law takes the lead in enlightening people and carving out space for new ideologies. It is sustained effort by hard-working and socially conscious advocates which has led to the evolution of guidelines for tackling sexual harassment of women at the workplace in the *Vishakha* case, recognition of transgender identities in *NALSA* v. *Union of India*, the decriminalization of homosexuality in the *Navtej Johar* case and the recognition of the right to privacy in the *Puttaswamy* case. More recently, the Supreme Court has held that female army officers are eligible for permanent commission and command roles, which is an important milestone for recognition of gender equality norms in the country.

Of course, it cannot be expected that you will bring about a complete overhaul of all archaic codes and revolutionize the society as soon as you leave University. However, you must start laying the groundwork now itself. Commit yourself to a cause, no matter how small it may look in the overall scale of things. Those of you who care about accessibility to justice must assist on *pro bono* PIL's or legal advisory work whenever and wherever possible. The Legal Services Committees of our Courts are always in need of talented young advocates to help those who lack the resources to navigate the complexities of law and Court procedures. You can also set up, or volunteer at, legal counseling centers for vulnerable groups such as slum-dwellers, homeless persons, domestic violence survivors, acid attack survivors, juvenile delinquents and other such socio-economically disadvantaged persons.

For those who wish to do non-legal work, there are several social activities in which having a legal background can serve as a useful asset. Those of you who wish to participate in public affairs can start by taking an interest in municipal

issues—for example, campaigning for the maintenance of your neighborhood, improvement of roads around your locality, promoting the use of open spaces and a clean environment, and so on. Undertaking social work such as a teaching fellowship for underprivileged children, or volunteer work in orphanages and old age-homes, is also a good way of helping those from different backgrounds. Your knowledge of municipal laws, educational laws, laws for senior citizens, etc. will be valuable to the people you work for.

I am sure you all would have plenty of other innovative ideas for bettering your surroundings and making a contribution to society. In our limited capacity, irrespective of our own personal constraints, we must do whatever we can to improve the lives of others. This is especially given our knowledge of the law and the vast impact that it can have, if used correctly, on societal structures.

I am pleased to observe this passion for making a difference and the desire to reach for the stars in my young friends present at today's occasion. The experience of attending a Convocation ceremony indeed invokes a peculiar mixture of exuberance and nervousness for all graduating students. Right now, you all stand at a precipice between the naivety of student life and the alien terrain of your professional career and its accompanying responsibilities. You all must be wondering: Do I have what it takes to succeed? And what if I do not?

I would suggest that you take this moment to pause any anxious thoughts flowing through your mind and give yourself a pat on the back for having made it to this stage. It is important to remember at every stage of your life that ultimately, you are the best judge of your own self. Irrespective of what you may or may not have accomplished in the past, or the horizons you may go on to scale in the future, so long as you are true and confident to yourself, you need not be influenced by the judgments of others.

I would like to conclude with this oft-cited quote from the Bhagwad Gita, *'Karm karo par phal ki chinta mat karo'*-Perform your duties without expecting the fruit of your work. Of course, it is human nature to expect some material reward in return for your efforts. However, so long as your basic needs are being

met, and your conscience is satisfied that you are fulfilling your personal and professional duties to the best of your abilities, you need not worry too much about the future. If you have determination and focus, the universe will make your goals materialize for you. I have no doubt that you all possess the capability to excel in whatever it is that you put your minds to. All the best for the future, and God bless you all.

CHANGING FACETS OF CONSTITUTIONALISM IN INDIA*

Mr. Mohan V. Katarki**

The proposition "changing facets of constitutionalism in India" if read narrowly, may confine the discussion to the changing facets of constitutionalism which are now being witnessed. However, if broader interpretation is adopted, which I propose to adopt, it should involve consideration of the facets of constitutionalism which changed even before 1950. The history, undoubtedly has its influence on the present and future of constitutionalism.

Constitution and Constitutionalism

As we all understand, the Constitution is a framework of norms wiring the political structure. However, every framework of norms is not a constitution in the modern sense. The modern constitution became necessary when the social contract theory of State advanced by David Hume and John Locke gained acceptance. It propounded that the birth of a State is not founded in the divine right but in the consent of those whom the State governed. The sophistication in the constitution was subsequently influenced by the doctrine of rule of law. With the advent of judicial review in US[1], began the intellectual analysis of the constitution in the early 19th century. The constitutional principles have evolved, because constitution is a living document and it is supposed to survive for years and decades to come. The

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1 *Marbury* v. *Madison*, 5 US 137.

constitutional changes occur by both formal amendment of constitution and or by judicial interpretation. The latter have had more profound effect in the last hundred years in offering new facets of the constitution. If I may say, constitution is shaped as diamond. It is cut to improve its radiance, brilliance, etc.

Emergence of India as a political entity

Historically, it is undisputed that the territory corresponding to Indian sub-continent was, *strictosensu*, not a political entity. In the ancient times 'Bharat' and in the middle ages 'Hindustan' were used to describe this land mass, but these references were to a geographical entity and not a political entity. However, after the Battle of Plassey in 1773, third Anglo Mysore War in 1799 and third Anglo Maratha War in 1818, defeat of Sikhs in 1839 and annexation of Awadh in 1857 after suppressing the patriotic rebellion, the British imperialism forged India into a political entity. It's an unintended gift of British imperialism. India took its definitive shape as British India and as Native States after the abolition of British East India Company's rule (EIC) and transfer of power to the British Crown in 1858.

Colonialism and Constitutionalism in India

It may sound paradoxical but true that the modern constitutionalism came to India with British imperial power. Though British East India Company (EIC) was granted charter in 1600 for trading in India, the birth of constitutionalism in India traces to the assumption of legislative or parliamentary control by the British Parliament in 1773, when it passed *The Regulating Act of 1773 inter alia* restructuring British East India Company and regulating its powers. During company's rule under *Regulating Act*, the constitutional tension was witnessed between judiciary and Governor General in Council. Lord Chief Justice Impey asserted that he derives his powers from British crown directly. But, the clash ended in unfortunate impeachment proceedings in British Parliament against both Chief Justice Impey and Governor General Warren Hastings. The rule of Supreme

Court was described by Lord Macaulay as reign of terror.[2] Finally, after patriotic rebellion in 1857, the British Parliament enacted the *Govt. of India Act of 1858* abolishing the EIC's rule and vested responsibilities directly in the British Crown with regard to the territory which was directly under British control known as British India. During the first phase of 61 years from 1858 to 1919, British India had a hardwired bureaucratic State. Though rule of law was guaranteed by an independent judiciary and government's role was limited by law, the important facet of constitutionalism was missing. The people had no role in the governance. In the second phase after the enactment of *Govt. of India Act of 1915-19*, the British Parliament granted provincial autonomy and envisaged limited role for the people in a dyarchial system. However, this failed. The third phase was decisive. A responsible system of Govt was introduced under the *Govt. of India Act of 1935*. Besides British India, which was a colony of Britain, about one third of the present India was part of Native States. The important among them were Hyderabad, Mysore, Kashmir and Baroda. These Native States (Indian States) were under the hereditary dynasty of princely families, but they were subject to overall suzereignty or Paramountcy of British Crown exercised through the Secretary of State for India in London. The legal status of Native States was debatable. The tie with British crown was not constitutional. It was not international. It was also not feudal. These States enjoyed internal sovereignty but, external sovereignty was fully surrendered to British crown. Hence, they were semi sovereign States.[3]

Constitution of India, 1950

The British exited India after portioning British India into dominion of India and Pakistan on 15.08.1947. The sovereign power vested in the British Parliament

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2 Herbert's Cowell's *History and Constitution of the Courts and Legislative Authority* (Wentworth Press, 7th edn., 2012) pp 41-46.

3 Chapter XIII of *The Native States of India* by Sir William Lee-Warner (Macmillan and Company Ltd., 1910).

over the territory of British India was transferred to the Constituent Assemblies of India and Pakistan under the provisions of *The Indian Independence Act of 1947*. The Native States were granted liberty to decide their future. However, they signed the Instrument of Accession and finally merged into India. The Constitution of India (COI) was framed by the Constituent Assembly as a sovereign body in 1950. It is a political pact among people to define the binding rule of conduct for governance of India and to reserve basic rights to themselves. However, the mantle of interpreting the COI fell on the Supreme Court. Undoubtedly, since then, the Constitution is what the judges have said in their judgements. The many facets of COI have been defined, redefined and chiselled by the Supreme Court in the last seven decades. No doubt, the Supreme Court of India and Parliament crossed swords on several occasions. But, such tension is not unhealthy in upholding democracy and rule of law.

Property – Lost the battle

The right to property is and was an important right along with rights to body and mind. The original Constitution, under Art. 19 (1)(f) guaranteed right to own property and under Art. 31 guaranteed against taking of the property by the State without a procedure established by law. Soon after 1950, a direct clash between property rights and State's power started. The agrarian reforms pushed by the State Govts. under the national policy to do away with Zamindari and absentee landlord system to empower tillers of land led to series of judgements and parliamentary responses in the form of validating acts amending the COI. The battle ended with Supreme Court upholding the insertion of Articles 31A, 31B and 31C and diluting the right to property. The Parliament finally by *The Constitution (Forty Fourth Amendment) Act of 1978* buried right to property by deleting Art. 19(1)(f) from the COI. In place of Art. 31, Parliament has inserted Art.300A. But, overriding powers vested in the State under Arts. 31A, 31B and 31C has left little life in Art. 300A.

Basic Structure - A meta Constitutional norm.

The Supreme Court in *Keshavananda Bharati* v. *State of Kerala*[4] upheld several provisions of constitutional amendments promoting the agrarian reforms and dilution of right to property. But, at the same time, it cost the Parliament its plenary power to amend the constitution. Supreme Court read into Art. 368 of the COI the basic structure doctrine as an implied limit on the power of Parliament to amend the COI. The doctrine as meta constitutional principle is the singular contribution of the Supreme Court to the constitutional jurisprudence. Whether, a sovereign Parliament, as John Austin understood, can be saddled with higher law beyond its reach is a matter of debate between positivists and natural law proponents. The doctrine of basic structure has been considered in several other nations.[5]

***Triple Talaq* regenerated *Royappa* putting legislative wisdom on judicial trial.**

The Article 14 guaranteed right to equality or right against discrimination. It is the basic principle of rule of law that, the State shall treat people equally and without any discrimination. However, the Supreme Court evolved the test of classification. But, in due couse of time, it was found that classification test is unsatisfactory. The Constitution Bench of Supreme Court in *E.P. Royappa* v. *State of Tamil Nadu*[6] enunciated the test of arbitrariness. The test of arbitrariness became much easier tool to test vast number of State actions in the regulations, employment, educational admissions etc. However, there was ambiguity whether this test will apply against the legislative actions. But, S.C. decision in *Triple Talaq case*[7] clarifies that the legislative actions ought to meet the test of arbitrariness. This has virtually opened scope for challenging several legislations particularly penal laws on the

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4 (1973) 4 SCC 225.

5 *See,* Yaniv Roznai, *Unconstitutional Constitutional Amendments* (Oxford University Press, Oxford, 2017) pp. 47-71.

6 (1974) 4 SCC 3

7 *Shayara Bano* v. *UOI,* (2017) 9 SCC 1 at 71 (Nariman and Lalit JJ).

ground of arbitrariness. The Govt. which defends legislations in Court will be hard put to defend the legislations as non arbitrary. This may call for tearing the curtain in a given case to see what compelled the legislature to enact a particular legislative measure. The legislative wisdom, is thus, under challenge.

Maneka liberated life and liberty

The constructional developments that changed the constitutional outlook with regard to common man is the historic judgement in *Maneka Gandhi* v. *UOI*[8] in 1978. The Supreme Court overruled its Judgement[9] and held that the law must meet the test of reasonableness. Subsequently, Supreme Court held that, the guarantees of life and personal liberty in Art. 21 is not only a negative right as freedom but, it is a positive guarantee as claim in *Unni Krishnan* v. *State of AP.*[10] This has changed the constitutional narrative. The positive right implies a claim, which is different from right as freedom.[11] By redefining the freedom or liberty into a claim against the State, an obligation has been cast on the State to take active steps or measures to protect the life and personal liberty which includes host of rights namely right to livelihood, right to education, right to food, right to health, right to shelter, right to protection of environment, right to pollution free water, etc. The socialist States have constitutional obligations placed on the State to provide education, health services, etc, but there is no provision for judicial enforcement of such rights in these constitutions. However, Supreme Court of India has made this obligation on the State under Art. 21 as an enforceable obligation. The Supreme Court has also gone ahead and ruled that the wrongs committed by violating rights guaranteed under Art. 21 are actionable by payment of compensation in *Rudal Shah* v. *Bihar.*[12] A person who has no shelter can approach the Supreme Court or

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8 (1978) 1 SCC 248.

9 *A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27.

10 (1993) 1 SCC 645 666 and 731.

11 *See* Hofieldian concept of rights discussed at pages 224 to 234 in Fitzgerald P J, *Salmond on Jurisprudence* (Universal Law Publishing Co Ltd., New Delhi, 12th edn., 2012)

12 (1983) 4 SCC 141.

High Court seeking shelter. Similarly, a person can ask for food, pollution free water etc. However, while judicially enforcing such claims against the State, the Supreme Court has recognized financial constraints and its own constraint in directing the legislature.[13] This facet of our Constitution is unlike US Constitution which has only recognized negative rights. But, we are in tune with international law and progressive democracies. *The United Nations International Covenant on Economic, Social and Cultural Rights, 1966* mandates that the socio economic rights be guaranteed as claims against the State. The South African Constitution (Arts. 26, 27 and 29) has expressly recognized positive rights or claims against the State. Of course, similar to South African experiment in Art. 29, Art. 21A has been enacted by *The Constitution (Eighty Sixth Amendment) Act, 2002* (from 2010) in India by expressly making right to education a positive right or claim against the State.

What may unfold ?

The facets of Constitutionalism which may unfold *in futoro* will depend on issues that may confront the institutions and people. The constitutionalism which changed in tune with times is not an assurance that it may adapt itself to challenges. The religious and cultural rights are likely to pose greater challenges in coming days. The "Artificial Intelligence" which mechanically functions on the instruction embedded in algorithm may jeopardise liberties, if not tamed. The demand for police State to handle the fallout of catastrophic events may turn out to be more dangerous than the disaster itself. However, the hope lies in "We the People" who have given the Constitution to themselves. Every generation owes a duty to itself to adapt the Constitution and Constitutionalism.

[13] *See, Dharwad District PWD* v. *State of Karnataka*, (1990) 2 SCC 396 at 406.

RULE OF LAW AND JUSTICE: ROLE OF JUDGES

Mr. V. Sudhish Pai*

Abstract

Main task of Judge is to improve justice delivery system. There must be an independent judiciary to protect the citizen against excesses of executive and legislative power. What happens, if the judiciary itself was to be guilty of excesses and transgression of authority, is the question that remained unanswered. Rule of law must first apply to judiciary. The author analyses the role of judges in making the judicial system conform to higher standards. Justice is an ideal, which has concerned itself with adjustment of human relations that has engaged man since time immemorial. The article takes critical look on the role of judiciary in establishing just and fair society.

Keywords: Rule of law, Role of judiciary, Liberty and Equality.

Men throughout the period of their civilized existence have longed for a higher standard outside themselves by which their own man made laws may be tested. Culture is one such 'standard of all wise and beautiful things'- the expression of our 'best self' which we share with others. Society and State are the expression of our 'collective best self'. Natural law is the higher law to which man made laws hope to conform. Constitutions are that higher standard.

Constitutional democracy cannot exist in any real sense without the rule of law. Constitutional democracy is one where the majority will and rule is controlled

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and directed by constitutionalism, the essence of which is limited government under a fundamental law. Rule of law is considered as the greatest gift of the common law. It is the badge of a free people.

Rule of law embodies the hard fought gains in the common law traditions of England, the culmination of a long and bitter struggle against royal tyranny. With the waning of royal authority came the supremacy of Parliament. It did not necessarily mean legitimacy and therefore the need arose to evolve ways and means for protection from the power of Parliament itself. The check on Parliamentary supremacy is the doctrine of government of enumerated powers which is the fundamental postulate of the rule of law.

The greatest impress of the English common law is on the Bill of Rights. While in England people fought for rights against an arbitrary executive, in the United States of America, the written constitution operated as a limitation upon all organs set up by the Constitution- the executive, the legislature and also the judiciary. Rule of law is the subservience of the executive to the legislative will. But in countries with a written constitution the legislature also is subordinate to constitutional rights and values and constitutional limitations. That is the concept of the reign of law. Thus in India, we have not only the rule of law, but also the absolute reign of law.

Under rule of law, the law is pre eminent and is a check against abuse of power while under rule by law; the law can serve as an instrument for government to suppress in a legalistic fashion. The Constitution is meant to impart such a momentum to the living spirit of the rule of law that democracy and liberty may survive in India beyond our own times. Thus the rule of law in all its facets, ramifications and implications underpins the Constitution.

In his eminently readable book[1] *The Rule of Law*, Lord Bingham, one of the finest legal minds of recent times elucidates that the rule of law is not an arid legal doctrine, but is the foundation of a fair and just society, a guarantee of responsible

[1] Lord Bingham, *The Rule of Law* (Penguine Books Ltd., London, 2011)

government and an important contribution to economic growth, as well as offering the best means yet devised for securing peace and cooperation.

The concept of rule of law was not unfamiliar in India. Ancient India was studded with republics. The king had no unbridled power. He was also under the law. Society was governed by moral law-*Dharma* which had an underlying concept of justice. Indeed the *Brihadaranyaka Upanishad*[2] says- 'Law is the king of kings, far more powerful than they, by its strength as by that of the highest monarch, the weak shall prevail over the strong.' *Dharma* may be said to be the fountain-head of the rule of law. Gandhari's ringing words in the *Mahabharata,* "May the righteous one win" embody one of the earliest tidings of the rule of law.

Rule of law symbolizes an enlightened civil society's efforts and quest to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes licence. *The Universal Declaration of Human Rights (1948)* states in its Preamble[3] that human rights should be protected by the rule of law. Today the concept of the rule of law is more comprehensive. Sixty years ago in 1959, the International Commission of Jurists (ICJ) declared that the rule of law is not merely to safeguard and advance civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and human dignity may be realized.[4]

It is also significant to note that there cannot be a fair process of globalization unless it is accompanied by an effective rule of law structure and made subject to its discipline. It is lamentable that the painful reality is that societies in transition, while promoting economic liberalization, often ignore the need for the discipline of the rule of law and the imperatives of social justice to regulate the operations of the market. Unregulated market and uncontrolled freedom tend to degenerate into licence to maximize private profits by any means. That would be a constitutional sacrilege.

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[2] *Brihadaranyaka Upanishad,* 1-4-14.

[3] UDHR.

[4] *Available at* https://www.icj.org/wp-content/uploads/1959/01/Rule-of-law-in-a-free-society-conference-report-1959-eng.pdf.

To define rule of law is, in a way, to limit an otherwise broad principle or rather a combination of principles and a range of legal values. Scholars call it a rare and protean principle of our political tradition which has withstood the ravages of time. It is venerated by all shades of political opinion. It represents the 'spirit of legality' that every action of public authority should manifest a 'legal pedigree.'

In its operational dimensions, rule of law has at least three basic and fundamental assumptions: the law making must essentially be in the hands of a democratically elected legislature, subject of course to any power in the executive in an emergent situation to promulgate ordinances effective for a short duration when the legislature is not in session as also to enact delegated legislation in accordance with the guidelines laid down by the legislature; the other is that even in the hands of a democratically elected legislature, there should not be unfettered legislative power; and lastly there must be an independent judiciary to protect the citizen against excesses of executive and legislative power. This is, of course, the ideal. The question naturally arises and remains unanswered as to what happens if the judiciary itself were to be guilty of excesses and transgression of authority. The answer obviously is the judges' own wisdom and sense of self-restraint. Aharon Barak, the very distinguished former President of the Israeli Supreme Court points out that the principle of the rule of law applies first and foremost to judges themselves who do not share the legislators' freedom in freely creating new tools.[5]

Rule of law does not content itself with ensuring legality. It goes further to speculate on the limits on the extent of power government can have. The question is not just what legal authority government has for what it seeks to do. More significantly it is 'what legal powers ought the government to have.' Thus the rule of law is concerned not merely with the existence of a law but also its normative content.

The major premise of the rule of law mandates that the law shall be general, equal and certain; it shall be administered by independent judges; that the legislature

[5] Aharon Barak, Begin and the Rule of Law 10 (3) *Israel Studies* (the Right in Israel, Fall, 2005) pp. 1-28.

be separate from the judiciary and the executive and that there is no punishment except as provided by a pre existing law. This is the constitutional principle against retrospective penal legislation. Providing ethical touchstones for the morality of the law, like a Bill of Rights and such other constitutional limitations reflect the philosophy and ideology of the rule of law.

We recall Thomas More's celebrated answer to his daughter and son-in-law who wanted a man they regarded as evil to be arrested: "Yes, I'd give the Devil the benefit of law, for my own safety's sake," which resonates through history and is the message of rule of law over centuries.[6] As Rousseau said, the first of all laws is to respect the laws.

It is, however, necessary and important to recognize that rule of law is not an end in itself, but only a means. It is meant to enable the law to promote social good. Sacrificing too many social goals at the altar of the rule of law will, as Joseph Raz said, tend to make the law itself hollow and barren.[7]

Justice is the greatest interest of man on earth, it is the ligament which holds civilized beings and civilized nations together.[8] The concept of justice is concerned with the adjustment of human relations. Justice is an ideal that has engaged man since time immemorial. Aristotle divided justice into 'corrective' and 'distributive'.[9] Corrective justice is represented by the law of torts- doing justice between two parties. Distributive justice is concerned with the distribution of goods in the society based on relative claims of each individual. Here we are concerned with the latter.

The modern view of justice seeks to transform society itself for the realization of certain human values. Civilization involves the subjection of force to reason and the agency of such subjection is the law. The end of all law is said to be justice. But

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[6] Robert Bolt, *A Man For All Seasons* (Bloomsury, London, 1995)

[7] Joseph Raz, "The Moral Significance of Sacrifice" 14(559) *Columbia Public Law Research Paper* (2017). *available at*: https://scholarship.law.columbia.edu/faculty_scholarship/2051

[8] Daniel Webster, *available at*: https://www.brainyquote.com/quotes/daniel_webster_118341

[9] Aristotle, *Nicomachean Ethics*, V.

as Dean Roscoe Pound said, "We do not mean justice as the ideal relation among men. We mean a regime, we mean such an adjustment of relations and ordering of conduct as will make the goods of existence, the means of satisfying human claims, to have things and to do things, go round as far as possible without the least friction and waste."[10]

Rawl's theory of justice, though propounded much later, is best reflected in our Constitution. All social values- liberty and opportunity, income and wealth and the bases of self respect are to be distributed equally, unless an unequal distribution of any or all of these values is to everyone's advantage. Injustice is simply inequalities that are not to the benefit of all. The Constitution envisages and endeavours to ensure the former and remove the latter. That is the Constitutional vision of justice. The ideal is to achieve the goals in Part IV while protecting the rights under Part III. The consummation of the Constitution is when justice reaches out to everyone, everywhere as contemplated and mandated by the Constitution. The idea of justice permeates the entire Constitution.

In endeavouring to entrench the Constitutional vision of justice and realize the Constitutional goals, all the three wings have a part and responsibility. Here we look at the role of the judiciary.

Civilization is sometimes said to be the degree to which men are sensible to wrong doing and desirous to right it. The hallmark of a society claiming to be civilized is its ability to do justice. A State is successful when its people have the confidence and assurance that they are living in a just society under the protection of law and an adequate legal system. The function of the judiciary is to act as a civilizing force in the body politic. The judiciary contributes to the existence of a just society and to the civility of the nation, the civilizing function of the judge being the 'removal of a sense of injustice,' as Lord Devlin put it.[11]

Peace is the fruit of justice. A peaceful and orderly society is what we all look for. Justice is what all beings seek and which cements the fabric of a secure

[10] Roscoe Pound, *Justice According to Law* (Yale University Press, New Haven, 1951)
[11] P. Devlin, The Judge 3 (1979)

society. The Constitution apart from being a legal document is also, and even more, a political and social testament created to secure the goals set out in the Preamble- justice, liberty, equality and fraternity.

The Constitution speaks of justice- social, economic and political. Equality of opportunity is the soul of social equality and social justice and is perhaps the most important foundation that supports the democratic polity. One cannot hope to enjoy one's rights individually if others are not treated equally. Economic and social inequalities rupture the fabric of civil society. An inclusive society fuelled by inclusive growth is imperative. That is the challenge of conflict of social institutions and an inequitable economic order. Wealth has a social mission. It must find expression and fulfillment in human well being with a sensible balance between economic growth and advancement of the welfare of society as a whole. Equality is not wooden but real equality. "To recognize marked differences that exist in fact is living law, to disregard practical differences and concentrate on some abstract identities is lifeless logic." Equity is essentially fairness. In India equity is absorbed in the law. Access to justice is extremely important. Everyone has a right to be assured that impartial justice is accessible and affordable. Lord Neuberger said, 'Laws delays and the cost of litigation including lawyers' fees negate the rule of law.' When justice is denied expectations may darken into depression and engender despair, rebellion and anarchy.

Public Interest Litigation or Social Action Litigation is conceived as a jurisdiction grounded in the enforcement of basic human rights of the disadvantaged who are unable to reach the court on their own and rendering justice to them. The whole object of it is now hijacked in some way by promiscuous misuse, to borrow the language of Krishna Iyer, J. , of the process and the legal provisions.

The judiciary is to be an arm of the social revolution with its duty to 'keep the charter of government current with the times and not allow it to become archaic or out of tune with the needs of the day' as Douglas, J. observed in his Tagore Law Lecture.[12] The great theme in the history of our constitutional law is the concept of

[12] Justice Douglas in his Tagore Law Lectures From Marshall To Mukherjea.

law as a check upon public power. That idea has been given practical reality in the decisions of the courts, which decisions are, to paraphrase Holmes, J. a virtual magic mirror in which we see reflected our whole constitutional development and all that has meant to the nation. That is the operational desideratum of the rule of law.

Fair, impartial justice is one of the most cherished constitutional goals and values. But we must distinguish the Constitution, and law in general, from those passionate, personal commitments which are called justice. The Courts, in our scheme of things, administer justice according to law. In an ideal society law and justice will match and there will be the rule of justice. But a practical working democracy seeks to be governed by the rule of law. As the Supreme Court observed in *S.P.Gupta's* case[13] "A court of law has no power to give effect to any right not recognized by law. It is also not the function of a Court of justice to enforce or give effect to moral obligations which do not carry with them legal or equitable rights. It seems to be a very formidable proposition indeed to say that any court has a right to enforce what may seem it to be just, apart from the Constitution and the laws."

This contest and reconciliation between conflicting principles and goals is not limited to law. "When in any field of human observation, two truths appear in conflict, it is wiser to assume that neither is exclusive, and that their contradiction, though it may be hard to bear, is part of the mystery of things." But as Frankfurter, J. points out judges cannot leave such contradictions as part of the mystery of things, they have to adjudicate and if the conflict cannot be resolved, it is their task to arrive at an accommodation of the contending claims. This is the great challenge for a judge and "the agony of his duty."

There is the story that two of the greatest figures in American law, Justice Holmes and Judge Learned Hand had lunch together and thereafter as Holmes began to drive away in his carriage, Hand, in a sudden onset of enthusiasm, ran after him, shouting, "Do justice, Sir, do justice." Holmes stopped the carriage and rebuked Hand: "That is not my job. It is my job to apply the law." "Perfect justice,"

[13] *S.P. Gupta* v. *President of India and Ors.* AIR 1982 SC 149.

said Addison, "is the attribute of the divine, but to do so to the best of our ability is the glory of man."

The concept of justice for all under equal law equally administered is not self executing. It becomes alive and has existence by and through its administration and application by judges dedicated to the idea that it is their affirmative duty to see that justice is done and its attainment depends upon the fulfilment of those affirmative duties and objectives of the judges.

Law must be stable yet it cannot stand still. Stability without change would be decline and change without stability anarchy. The Constitution provides for stability without stagnation and growth without destruction of essential values. The role of a judge is to close the gap between life and law. Bearing in mind that law is coeval with society- that law exists for man and not *vice versa*, the judge has to make a proper balance between the need for change and for preservation. He has thus to adapt the law to the felt necessities of the time and society with its shifting emphasis and differing needs.

As Aharon Barak said a judge's main tool is balancing and weighing which involves the duty to identify the values, the interests and the policies involved and to realize their relative importance at the point of conflict and thus give effect to the prevalent values and principles. An awareness of the constitutional concepts and an adherence to the constitutional values is both relevant and essential in improving justice delivery.

The view of that great political scientist Prof. Ernest Barker[14] is that justice is the synthesis of liberty, equality and fraternity. It is the thread that runs through all these values and makes them parts of an integrated whole. It reconciles their conflicts and contradictions. Justice is the basic idea behind liberty, equality and fraternity. It is the final goal to which liberty, equality and fraternity should conform. Barker describes the relationship between liberty and equality as justice joining or

[14] Ernest Barker, *Principles of Social and Political Theory* (Clarendon Press, Oxford, 1951)

fitting together not only of persons, but also of principles. The transcending final principle which can balance each of these principles against the others is justice. The principle of justice demands not only formal liberty and equality but also a change in those social conditions which stand in the way of the enjoyment of liberty and equality by ordinary men and women. We thus see in this the fusion and intermingling of the Preambular objectives and note how important all this is in justice delivery.

Justice does not exist in substantive law alone. It is dependent on the fairness of procedure. Justice cannot be reached by the mere application of substantive law alone to the purported facts the truth or falsity or even the existence of which is not determined by a fair procedure. It is also important to note that judges don different hats and exercise different jurisdictions sitting as judges in the same court. It is, therefore, essential that they are always conscious of it and exercise a particular jurisdiction in tune with its nuances.

A judge ought to be sensitive to the weight of his office and the constraints it imposes. He should be self critical and open minded and without any arrogance. He should be sensitive to tradition, which means a sense of history and an appreciation of precedent. Every judgment is like a link in a chain. In our justice dispensation system the ultimate guarantee of justice being done is the personality of the judge.

It is to be remembered that while speed and despatch are necessary and important, they should not result in sacrificing the cause of justice. A judge should never allow the rights of parties to be prejudiced merely to sub serve the constant importuning 'to speed up work.' It is the court's duty to give the parties and their cause the calm and deliberate hearing, consideration and study that the ideal of justice demands. "Each cause is entitled to, demands and must be given consideration as the most important of matters 'to the end that justice may be done between the parties." To maintain the confidence of the citizen and to achieve a just disposition of the cause of the parties, a judge's credo must include his affirmative duty to be an instrumentality of justice.

It has been rightly remarked that judges tend the gate between order and anarchy. To the extent judges can dispense justice and articulate reasons why their decisions are just, they remove from persons otherwise disaffected the feeling of injustice; they preserve our system of ordered liberties. It may be said that the affirmative duties of the judge arise from and exist because of the ever evolving concept of his role in the rendition of justice.

People revere the concept of justice and abide by the law as construed by the Courts. The great sensitivity as to the role of our Courts is our broad popular conception of and faith in justice. It is in a way this which underlies our notion of judicial integrity. Society leaves to the judges the task of vindicating the rights of those who cannot do it for themselves in the expectation of judicial integrity. Integrity in common parlance denotes honesty, straightforwardness and uprightness. But judicial integrity is all this and something more. The essential attribute of this one may say is "a passion for justice informed by a deep and abiding morality, a compassion that propels the judge to a just conclusion even when the party or issue before the bar is unpopular."

In the ultimate analysis the essence of a judge is the courage of conviction and the willingness to reach the result that his understanding of the law tells him is right, not that which the polls foretell as most popular. Indeed Aristotle told us long ago that judges should be the personification of justice.

It is apposite to quote again from Lord Bingham's book.[15]

> "If judges were themselves to exercise powers which properly belong elsewhere it would be a usurpation of authority and they would themselves be acting unlawfully. As Lord Hailsham pointed out in his 1983 *Hamlyn Lectures*, Thomas Fuller's warning- 'Be you never so high, the Law is above you'- applies to judges no less than ministers. But in properly exercising judicial power to hold ministers, officials and public bodies to account the judges usurp no authority.

[15] *Supra* note 1.

> They exercise a constitutional power which the rule of law requires that they should exercise. This does not of course endear them to those whose decisions are successfully challenged. .....This is the inescapable consequence of living in a state governed by the rule of law. There are countries in the world where all judicial decisions find favour with the powers that be, but they are probably not places where any of us would wish to live."

This, in a way, encapsulates all that may be said about the rule of law.

APPLICATION OF CONSTITUENT ASSEMBLY DEBATES IN THE INTERPRETATION OF CONSTITUTIONAL PROVISIONS ON FUNDAMENTAL RIGHTS AND WELFARE

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Abstract

Constituent Assembly Debates (CAD) provide rich philosophical resource helping in constitutional interpretation. CAD discourse links past to the present, and calls for meticulous care in locating the ultimate purpose towards which both the subjective and objective purposes are to be set into action. Both haphazardness and partisan approach shall be avoided in invoking the support of CAD for any specific proposition. Constitutional jurisprudence of Fundamental Rights and the Directive Principles of State Policy has greatly gained by reference to CAD. By not following the extreme approaches of strictly adhering to the original intention or totally discarding CAD from consideration, the Indian judiciary has done a commendable task which has produced a comfortable consequence.

Key words: Constituent Assembly Debates, Constitutional Interpretation, Fundamental Rights and Welfare.

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Introduction

The Constituent Assembly (CA) as a constitution making forum has the task of reflecting and crystallizing people's perception along with identifying fundamental values and goals of the nation. This provides justification for relying on its proceedings in deciphering the intention underlying its various provisions when judiciary interprets them. The deliberations of members in CA might have taken different shades and directions making the identification of collective decision a difficult task. Further, lapse of time might have introduced new understandings in response to the changed social and economic circumstances. Clinging invariably to the original intention would be obstructing the change process. Thus, looking for guidance in the past while interpreting a living document is a predicament of Janus faced person. The Indian Judiciary, by paving the mid-way path between originalism, which strictly adheres to the intention of founding fathers[1] and 'living tree doctrine', which believes in Constitution as a living organism growing in response to changed socio-economic and political circumstances[2] has faced such a situation. The inherent thrust for social transformation and flexible language of the constitutional provisions enable the judiciary to strike a balance between continuity and change. The use of CAD enables such a task. CAD is one of the external aids helping the interpretation of the Constitution among other external aids like legislative drafts, international law, foreign judgments, juristic writing, dictionaries, etc. Internal aids include the constitutional text, preamble, definitions, schedule and language of the specific clauses. Literal interpretation, purposive interpretation, living organism approach, consequentialism, progressivism, structuralism (holistic interpretation) that

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1 This presupposes in US adherence to the original intention of the Framers and Ratifiers and public understanding at the time of adoption. *See* Lawrence B Solum "What is Originalism? The Evolution of Contemporary Original Theory" in Grant Huscroft and Bradley W Miller (eds.), *The Challenge of Originalism: Theories of Constitutional Interpretation* (Cambridge University Press, 2011) pp.12-41.

2 This is a major line of constitutional interpretation in Canada. *See Edwards* v. *AG Canada,* (1930) AC 124.

overarches the provisions, chapters and parts of the constitution are some of the interpretation techniques with which CAD has to compete, coordinate and integrate.

In order to be recognised as an influential tool of interpretation, a systematic approach is required about its use. Identifying the dominant view of the House instead of relying upon the stray thoughts of individual members is one such method of systematic approach. Another approach is by understanding the subjective purpose as expressed in the speeches and voting decisions, balancing them with the objective purpose of the text, relation and structure of the constitution in order to promote the ultimate purpose that reflects the philosophy and spirit of the Constitution.[3] In India, the judiciary was initially ambivalent in using CAD in constitutional interpretation. The *Kesavananda Bharati* judgment[4] gave a great fillip towards using CAD in progressive interpretation of the Constitution. The present paper avoids theoretical discussion about the original intention theory and the living tree doctrine as it is already done in the first part of another paper on application of CAD in the jurisprudence of constitutional amendment. It discusses about application of CAD in interpreting the provisions of Part III and Part IV of the Constitution and assesses the contribution of this method of interpretation to the constitutional jurisprudence. It argues that unless the judiciary handles the CAD (and other historical materials) systematically, has clarity about three types of purposes and the method of combing them, it will be failing in drawing the distillate wisdom of the past.

Fundamental Rights

The background out of which constitutional provisions in Part III arose has influenced the judiciary in interpreting them, though not uniformly or with similarity

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[3] Aharon Barak, , *Purposive Interpretation in Law*, Tr. Sari Bashi (Princeton University Press, 2005, Rept. Universal Law Publishing Co., 2007) p. 120.

[4] In, *Kesavananda Bharati* v. *State of Kerala*, AIR 1973 SC 1461 S.C. observed that Constituent Assembly debates are not conclusive but that, in a constitutional matter where the intent of the framers of the Constitution is to be ascertained, the Court should look into the proceedings and the relevant data, including the speeches, which throw light on ascertaining the intent.

of consequences. A less enthusiastic approach was started in *A. K. Gopalan,* when the Court considered it inappropriate to take into consideration the individual views of members of the drafting committee of CA or of Parliament or Convention to construe the meaning of any clause when doubts arose, although it was permissible to refer for examining whether any phrase or word was considered at all.[5] In contrast, a high water mark of CAD's motivating impact can be found in Justice Vivian Bose's observation in *Anwar Ali*:[6]

> "I cannot blot out their (constitutional provisions) history and omit from consideration the brooding spirit of the times. They are not just dull lifeless words static and hide bound as in some mummified manuscript, but living flames intended to give life to a great nation and order its being, tongues of dynamic fire potent to mould the future as well as guide the present. The Constitution must, in my judgment, be left elastic enough to meet from time to time the altering conditions of a changing world with its shifting emphasis and differing needs."

The learned judge also viewed that the collective mind of the CA responded to the experience of freedom struggle and reflected the mood of people to produce pregnant phrases expressing the spirit of democratic republic. The judicial approach veers between these two approaches in this sphere, which got a stable stance from *Kesavananda Bharati* onwards in increasingly relying on CAD.

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[5] *A. K. Gopalan* v. *State of Madras*, AIR 1950 SC 27; per Kania CJ relying upon *Municipal Council of Sydney* v. *Commonwealth*, (1904) Com. L R 208; *United States* v. *Wong Kim Ark* 19 US 649 at 699; *Administrator General of Bengal* v. *Premlal Mallick* 22 I. A. 107. This approach was followed in *State of Travancore Cochin* v. *Bombay Company Ltd.*, AIR 1952 SC 366 and other cases up to *Kesavananda Bharati* v. *State of Kerala*, AIR 1973 SC 1461.

[6] Vivian Bose J. in *State of West Bengal* v. *Anwar Ali Sarkar*, AIR 1952 SC 75 (6: 1) paragraphs 85, 86.

Applicability of Part III upon Personal Law

The question whether fundamental rights are applicable against personal law was addressed by the Bombay High Court in *Narasu Appa Mali* by making a recourse to the CAD.[7] Chief Justice M. C. Chagla and Justice P. B. Gajendragadkar traced the legislative history of the definition of 'laws in force' in Article 13 (3) (b), and found that the use of words 'personal law and customs having the force of law' in the definition of the phrase under Section 112 of the *Government of India Act 1915* and the absence of words 'personal law' in Article 13 (3) (b) reflected the intention of the Framers of the Constitution to exclude personal law from the purview of fundamental rights. Justice Gajendragadkar viewed that the personal laws were mixed up with the religion and culture, and hence reforms were difficult which the legislature had to face in the course of implementing the DPSP on Uniform Civil Code under Article 44, and it was not left for resolution by Part III-based challenges. Other High Courts tested the statutory personal laws under Articles 14 and 25 and upheld the same.[8] Both the approaches have saved the constitutional validity of reformative measures. But the latter has the opportunity of purging personal law from the perspective of fundamental rights. Further, the analysis in *Narasu Appa* is confined to legislative history, where the argument was based on presumption. In the CAD on present Article 13 (draft Article 8) which took place on 25th to 29th November, 1948 there is no reference to Section 112 of the *Government of India Act 1915*, and the CA members did not deliberate on the non-inclusion of 'personal law' in the definition. Hence, attributing such a subjective purpose to the constitution makers on the basis of presumption was a superficial

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[7] *State of Bombay* v. *Narasu Appa Mali*, AIR 1952 Bom 84; although in *Sri Krishna Singh* v. *Mathura Ahir* the Supreme Court observed that fundamental rights are not applicable to personal law, it was obiter dicta as it was not essential for the decision of the case, and the observation was without referring to *Narasu Appa* and CAD. *See* for contrast, in *Indian Young Lawyers Association* v. *State of Kerala*, AIROnline 2018 SC 243.

[8] *Srinivasa Aiyer* v. *Saraswati Ammal*, AIR 1952 Mad 193; *Hasinam Baruniton Singh* v. *Thokcham Ningol Haisnam Ongi Bhani Debi* AIR 1959 Manipur 20; *Gogireddy Sambireddy* v. *Gogireddy Jayamma* AIR 1972 AP 156.

treatment of CAD. Had the High Court in *Narasu Appa* referred to the Drafting Committee's note about the interconnection between the two inclusive definition clauses in Article 13 (3), the error of confining the scope of 'law in force' to statutory law could have been avoided. This point was clearly made out by Justice D. Y. Chandrachud in the *Sabarimala* judgment.[9] The argument that customary personal law which excluded the entry of women to a temple was outside the ambit of constitutional challenges was rejected by this reasoning.

In *Shayara Bano*,[10] where the Court by 3: 2 majority struck down the practice of *triple talaq* as unconstitutional, Chief Justice Khehar and Justice Abdul Nazeer in their dissent extensively relied upon speeches of some of the CA members whose proposals for amendment to the draft were rejected by the CA.[11] Mr. Mohammad Ismail Saheb spoke in support of a proposed clause to exclude the reformative measures under draft Article 19 (present Article 25) pertaining to religion in the field of personal law and proposed clause for non-binding character of UCC (draft Article 3 and present Article 44) upon any section, group or community. Mr. Naziruddin Mohammed spoke supporting the proposal for insisting on consent of the community before change of their personal law. Mr. Mahboob Ali Baig Sahib Bahadur argued in favour of non-application of UCC upon personal law of citizens. Mr. Pocker Sahib Bahadur's proposal stood for liberty of any section, group or community to keep their personal law in spite of UCC. All of them reiterated that personal law was essential aspect of religion. Shri K. M. Munshi, Dr. B. R. Ambedkar, Shri Laxmikanth Maitra, Shri Alladi Krishnaswamy Iyer, and Shri Ananthasayanam Ayyangar categorically opposed these proposals. Shri K. M. Munshi stated that the personal law was relating to social relation, succession or inheritance and had nothing to do with religion; that religion, instead of covering whole field of life, was to be confined to its proper area; and that personal law was

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9 *Indian Young Lawyers Association* v. *State of Kerala*, AIROnline 2018 SC 243 paragraph 92 to 98.

10 *Shayara Bano* v. *Union of India* AIR 2017 SC 4609.

11 CAD 3rd November 1948, Volume VII 540-552.

to be divorced from religion and be subject to secular reforms. He cited from the practices of Middle Eastern countries where substantive reforms were introduced into Muslim personal law.[12] Dr. Ambedkar referred to the Muslims in North Western frontiers and Central Provinces following Hindu Law and Muslims in Malabar following *Marumakkathayam law* of Hindus, and stated that the personal law is not religion-specific but depended on the social and cultural practice.[13] Maitra elaborated on secular character of the polity and justifications in reforming personal law. Shri Alladi Krishnaswamy Iyer pointed out the influence of interface of cultures in personal law reforms as experienced in Europe and argued that UCC did not invade the domain of religion. The CA rejected the proposed amendments. Thus overwhelming view of CA was not to regard personal law as an immutable aspect of religion. Chief Justice Khehar and Justice Nazir, by relying on the rejected views, ignored the dominant voice of the CA to separate personal law from religion.[14] This goes against the precaution required in using CAD that one shall not be swayed by the rhetoric of individual speech but shall consider the rational choice that underlies the overwhelming and subjective intention of the whole House. Further, it does not connect to the objective purpose of fundamental human rights enshrined in various provisions and underplay the idea of welfare and reform. In contrast, the majority worked on the objective purpose of removing arbitrary practices that impinge equality, liberty and dignity and empowering the vulnerable.[15] It is surprising that Chief Justice Khehar and Justice Nazir gather strength from CAD for the proposition that personal law is elevated to the position of fundamental right. Still surprising is

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[12] *Ibid.*, 547-548.

[13] *Ibid.*, 551.

[14] *Shayara Bano* v. *Union of India* AIR 2017 SC 4609 at 4758-59 paragraph 172: "There can be no doubt, that the 'personal law' has been elevated to the stature of a fundamental right in the Constitution." It was also observed that all Constitutional Courts shall respect them and nullification of personal law was unthinkable.

[15] Justice Rohington Nariman, Justice U.U. Lalit and Justice Kurian Joseph.

the mechanical reading of Sri Krishna Singh[16] which had favoured cultural pluralism and fragmented way of reading *Sarla Mudgal*[17] which is essentially a pro-UCC pronouncement. Undoubtedly Justice R. M. Sahai held that with the expanded recognition of religious practices, marriage, inheritance, divorce and conversion also get linked with overt religious practices like saptapadi or conversion process etc. Nowhere did he or Kuldip Singh J. state that personal law is part of religion. On the other hand, Justice Sahai said, "Freedom of religion is the core of our culture. Even the slightest deviation shakes the social fibre. 'But religious practices, violative of human rights and dignity and sacerdotal suffocation of essentially civil and material freedoms, are not autonomy but oppression.' Therefore, a unified code is imperative both for protection of the oppressed and promotion of national unity and solidarity."[18] Further, Justice Kuldip Singh in the same case analyses that Article 44 entails that there is no necessary connection between religion and personal law in civilised society.[19] He laments about unjustified delay in implementation of UCC and issued directions to the Government in this regard. UCC's possible contribution to the national integration as contemplated in CAD and *Shah Bano judgment*[20] has also influenced the activist approach in *Sarla Mudgal*.

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[16] Sri *Krishna Singh* v. *Mathura Ahir*, AIR 1980 SC 707 where the Court declined to examine the validity of customary rule of succession recognising *Shudra* to succeed as *Mahanth* by making a bald statement that personal law is outside the Part III based challenges whereas *Shastras* had declined the *Shudra* right. In *Madhu Kishwar* v. *State of Bihar* AIR 1996 SC 1864 the Chota Nagpur legislation conferring exclusive right of succession to male survivors and customary right of tribal women to have right of maintenance from the family home were not disturbed on account of right to equality but the majority of the Court recognised right to maintenance as a facet of right to life.

[17] *Sarla Mudgal* v. *Union of India* AIR 1995 SC 1531; for judicial self restraint by not entertaining challenges on Muslim Women (Protection of Rights on Divorce) Act 1986 *see Ahmadabad Women Action Group* v. *Union of India*, AIR 1997 SC 3614.

[18] *Ibid.*, 1540 paragraph 45.

[19] *Ibid*; also *see John Vallamattom* AIR 2003 SC 22902 paragraph 44; also see *Masilamani* AIR 1996 SC 1697.

[20] *Mohd. Ahmed Khan* v. *Shah Bano Begum*, AIR 1985 SC 945.

Right to Equality

Against the umpteen forms of discriminations and social inequalities, the constitution makers have chosen dynamic and multi-faceted concept of equality as an instrument of reform. The journey of equality jurisprudence started gloriously in *Anwar Ali Sarkar*[21] with an inspiring reference to CAD has grown tremendously. In interpreting the provisions on protective discrimination coming under Articles 15 (3), 15 (4), 16 (1), 16 (4), and abolition of 'untouchability' (Article17) and titles (Article 18) references to CAD can be found.

In *Independent Thought*,[22] the Supreme Court referred to the CAD in order to understand the background of Article 15(3). In response to the amendment suggested by K. T. Shah for inclusion of Scheduled Castes and Scheduled Tribes within the said clause, Dr. Ambedkar suggested that he certainly favoured special provisions for women and children with a view to integrate them into the society and to take them out of patriarchal control and that similar type of integration might not be forthcoming against SC/ST due to segregationist approach of the society. Thus Article 15 (3) contemplated discrimination in favour of women and children, a form of affirmative action to their advantage. Justice Sujata Manohar has observed in *P. B. Vijayakumar*[23] that elimination of socio-economic backwardness of women, their improvement and elevation of their status were the purposes with which Article 15 (3) was inserted.

In the matter of reservation in promotion for SC/ST JusticeV. R. Krishna Iyer in *N. M. Thomas*[24] used the views expressed by Dr. B. R. Ambedkar to the effect that political equality shall be instrumental in achieving social and economic equality

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[21] AIR 1952 SC 75.

[22] *Independent Thought* v. *Union of India*, AIR 2017 SC 4904; (2017) 10 SCC 800 per Justice Madan Lokur; also *see* for affirming in *Joseph Shine* v. *Union of India*, AIR 2018 SC 4898.

[23] *Government of Andhra Pradesh* v. *P. B. Vijayakumar*, (1995) 4 SCC 520; AIR 1995 SCW 2586.

[24] *State of Kerala* v. *N. M. Thomas*, AIR 1975 SC 490.

and removing the contradictions.[25] He also referred to the Gandhian thoughts of assimilating the *bhangis* into Hindu society. The idea that reservation is a means to an end made him to evolve the propositions that reservation shall benefit weakest of the weak; that reservation claim shall not be over-claimed extravagantly as it is justified on the basis of necessity alone; and that lasting solution could come only from improving the social environment.[26]

In *Indra Sawhney*[27] case the majority judgment by Justice B. P. Jeevan Reddy, while ascertaining the original intent underlying the words 'backward class of citizens' refers to CAD with caution: 'We are aware that what is said during these debates is not conclusive or binding upon the court because several members may have expressed several views, all of which may not be reflected in the provision finally enacted." However, since the above words were inserted by Dr. B. R. Ambedkar with justifications given in CA,[28] the Court found no reason to ignore his views. Again for prescribing a ceiling limit of 50 percent of posts in reservation, the majority relied on the words of Dr. Ambedkar that in order to balance between the first principle of equality and the claim of backward classes of citizens, reservation shall be confined to minority of posts only.[29] The Court pointed out that nobody in the CA suggested for reservation in proportion to population.[30] The Court did not consider 'backward class' in Article 16 (4) as equivalent to socially and educationally backward in the light of categorical view of Dr. Ambedkar that 'backward class' in Article meant only those who 'were not so far had a proper look–in so to say into the administration'.[31] The Court also conceded diversity of backwardness varying

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25 CAD November 26, 1949.

26 AIR 1975 SC 490 at 529 paragraph 144.

27 AIR 1993 SC 477.

28 That the idea of giving entry to hitherto excluded community was massively supported in spite of theoretical position of equality of opportunity, and that the word 'backward' will confine the benefit to the deserving class only. Paragraph 79.

29 Paragraph 94-A, 109, 162, 434, 481, 530 of the judgment and CAD Vol. VII, pp.700-703.

30 Paragraph 440.

31 Paragraph 583, 588.

from region to region in the light of Dr. Ambedkar's observation in CAD that 'backwardness was left to be determined by the local government'.[32] However, Dr. Ambedkar's view that backward classes meant a collection of certain castes was not relied upon because of CA's choice of the word 'classes' rather than 'castes'.[33] In *Ashok Kumar Thakur,*[34] meaning of the words 'socially and educationally backward classes' was left for future generations to decide in the light of Founding Fathers' aspiration to build casteless society. While reference to CAD moulded qualitative and quantitative restrictions on reservation policy in both the cases, the Court was cautious in ensuring that subjective purpose is not overwhelming the objective purpose.

In dealing with the argument that States have the power of making inner groups among SCs as a part of executing power of making reservation, the Supreme Court in *E. V. Chinnaiah*[35] referred to CAD, especially the view of Dr. Ambedkar that the power of preparing and notifying the list of Scheduled Castes was exclusively vested with the President, and subsequently with the Parliament and the States had no power of 'disturbing' the list. The Court also noted the rejection by the CA the proposal made by a member providing for State's power to make alteration subject to the power of the central government. The Court gathered support from these points to infer that the central Government's power in making the list is final and that consultation with the Governor took care of the interests of the State. In *Chinnaiah*, the Court laid sole emphasis on the subjective purpose, and hence disregarded the objective purpose that the benefit of reservation shall go to the weaker of the weakest, which Dr. Ambedkar also had argued for a balanced position wherein the exemption made in favour of reservation will not ultimately eat up the rule altogether.[36] The present author had criticised the *E. V. Chinnaiah* judgment

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[32] Paragraph 637, CAD, Vol. VII 701.

[33] Paragraph 642.

[34] (2007) 4 SCC 361.

[35] *E. V. Chinnaiah* v. *State of Andhra Pradesh*, 2004 AIR SCW 6419.

[36] CAD, Vol. VII, p.701.

earlier on account of neglecting the most deserving beneficiaries, injustice arising out of changed situation that persons without any disadvantage also get the benefit of reservation at the cost of the weaker of the weakest. This position gets recognition in *Davinder Singh* case[37] where the Supreme Court's Five Judges Bench recommended for reconsideration of *E. V. Chinnaiah* in view of the need for objective identification of the reservation beneficiaries. The Court referred to Dr. Ambedkar's view but said that the sub-classification was to achieve the very purpose for which original classification was made for the purpose of reservation; that reservation is a dynamic instrument and persons or classes who progressed by socio-economic development should make way for the persons who have lagged behind; and that states have the power of equitably fixing the method, extent and percentage of reservation within the categories of Scheduled Castes, which does not disturb but in fact promote the objective of reservation policy. The Bench considered the case as fit for transcending *stare decisis* rule in order that the anomalies are set right and the reservation benefit is not confined to elite community within the scheduled castes.

References to CAD have strengthened the Article 17 jurisprudence in *Appa Balu Ingale*[38] in contrast to hesitant approach in cases that did not use CAD. In *Shastri Yagnapurushdasji*, a case decided in 1966 on temple entry matter, the Supreme Court did not refer to CAD.[39] The Court dismissed the appeal against Bombay High Court's judgment that had regarded Swaminarayan sect as part of Hindu religion and not separate denomination, and hence bound by the law providing for temple entry by all sections of Hindu society including the 'untouchables'. It relied on Article 17 and the supporting legislations and pointed out the fundamental

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[37] *State of Punjab* v. *Davinder Singh* Civil Appeal Number 2317 of 2011 judgment dated 27.8.2020

[38] *State of Karnataka* v. *Appa Balu Ingale*, AIR 1993 SC 1126.

[39] *Shastri Yagnapurushdasji* v. *Muldas Bhundardas Vaishya*, AIR 1966 SC 1119; in *Venktaramana Devaru* v. *State of Mysore* AIR 1958 SC 255, although the matter involved temple entry under a statute, the Court did not refer to Article 17 nor to CAD but decided the case from the perspective of relation between Article 2 (2) (b) and Article 26.

change that has taken place after the abolition of 'untouchability'. In *Appa Balu Ingale*,[40] Justice K. Ramaswamy extensively gathered support from the writings of Dr. B. R. Ambedkar and Gandhiji about the social evil of untouchability and the speech made by Dr. Ambedkar in CAD arguing for application of political democracy to bring social democracy. The Court's rejection of benefit of doubt rule in circumstances of constitutionally condemned offence is influenced by exposure to CAD. By undertaking more elaborate study of the CAD and other historical and sociological materials Justice D. Y. Chandrachud in the *Indian Young Lawyers Association case*[41] arrives at a conclusion that omission to give a definition of 'untouchability' in the Constitution, treating untouchability as slavery and deep inroad to human dignity, and linking 'untouchability' to purity-pollution issue necessarily give an impression that treating women as untouchable during menstruation is also a kind of 'untouchability' to be dealt under Article 17.[42] Tracing the approach of CA and drafting committee members that 'untouchability' in all its form shall be abolished and its practice shall be punished, he refers to the point made out by Prof K. T. Shah that women are also treated as untouchables during certain period. Stigmatization of impurity as untouchability ought to be tackled by extending its application to the situation of women. According to him the punctuation around the word 'untouchability' did not obstruct the wider ambit of its connotation. In contrast, Madam Justice Indu Malhotra referred to the word "untouchability" as used in Article 17, denoting specific understanding of the caste-based exclusion prevailed for centuries as expressed in the views of Shri V. I. Muniswamy Pillai and Dr. Monomohan Das.[43] She took note of H. M. Seervai's view that its historical background shall be considered rather than its literal meaning; Prof. M. P. Jain's view that social boycott resulting in caste based exclusion shall be its criterion; and

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[40] *State of Karnataka* v. *Appa Balu Ingale*, AIR 1993 SC 1126.

[41] *Indian Young Lawyers Association* v. *State of Kerala*, AIROnline 2018 SC 243.

[42] *Ibid.*, paragraphs 70 to 85 of the judgment by Justice D. Y. Chandrachud; the Court declined anticipatory bail to persons accused of multiple frauds on people costing huge loss.

[43] *Ibid.*, paragraph 14.1 to 14.7 of the judgment by Justice Indu Malhotra.

the views expressed by judges in earlier cases like *Devaru*, *Yagnapaurushdasji* and *Appa Balu* that caste based social exclusion is its essence. These point out that the CAD is also a subject of interpretation, and might bring different meanings. The standpoint of Justice Indu Malhotra is based on more focused understanding of subjective intent and connecting it into objective of eradication of specific social evil. Justice Chandrachud looks to the larger social transformation of rendering gender justice, which becomes farfetched insofar as Article 17 is concerned.

For understanding the implication of Article 18 in the matter of conferment of Bharat Ratna and Padma awards, the Supreme Court extensively referred to CAD in *Balaji Raghavan.*[44] The CA members like Sri K. M. Panikkar, Sri M. R. Masani, Sri Prakasha, Sri T. T. Krishnamachari, and Dr. B. R. Ambedkar and constitutional advisor Sri B. N. Rau had made a clear distinction between titles and awards in recognition of merit, achievement and service at the national level. The Court recognised the power of conferring such awards subject to strict compliance with proper procedure and norms in order to avoid abuses.

Right to Freedoms (Articles 19-22)

In the matter of freedoms under Article 19, since CAD concentrated more on grounds, extent and manner of restrictions, whenever the judiciary had to deal with these issues, it inclined to refer to CAD. The Supreme Court in *Romesh Thapar*[45] referred to the CAD which had deleted the word 'sedition' from the draft clause on restrictions and pointed out that the framers had no wish of restraining freedom of speech and expression on ground of public tranquillity. Hence, it set aside the restraint as unconstitutional. The Court in *S. Rangarajan*[46] referred to the framers' intention of striking a balance between liberty of expression and social interests listed in Article 19 (2), and found a justification for pre-censorship, which is not permissible in the US because of guarantee of the right in absolute manner. The

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[44] *Balaji Raghavan* v. *Union of India*, AIR 1996 SC 770.

[45] *Romesh Thapar* v. *State of Madras* AIR 1950 SC 121; also see *Brij Bhushan* v. *State of Delhi*, AIR 1950 SC 129; *Kedar Nath* v. *State of Bihar*, AIR 1962 SC 955.

[46] *S. Rangarajan* v. *P. Jagjivan Ram*, AIROnline 1989 SC 1.

framers' intention to make right to freedom of speech and expression basic to democracy and protection of other fundamental rights was the basis for treating the right as 'preferred freedom' in *Ramlila Maidan Incident* case.[47] The classic test on 'reasonable restriction' in *V G Row*[48] was product of Court's thinking about the need for objective criteria in the light of vicissitudes about due process feared by Constituent Assembly. In *Subramanian Swamy*[49] the Court referred to CAD, following *SR Chaudhury*[50] and *Kesavananda*,[51] to find out whether meaning of the word 'defamation' in Article 19 (2) is restricted by words used along with it such as 'incitement to offence', and the Court arrived at a negative conclusion on the point holding the *noscitur sociis* principle not applicable in the instant case.

The protections under Article 20 against convictions for offences reflect the framers' protest against the arbitrary and repressive practices by the British and clear acceptance of specific components of due process of law as practised in the US. In *Transmission Corporation*[52] and *Phoolan Devi*[53] cases, while favouring liberal interpretation of Article 20 (1), the Court referred to the constitutional history. The foresight of framers of the constitution in extending the protection against self incrimination under Article 20 (3) to pre-trial stage was remembered and relied on in *Nandini Satpathy* case.[54] In *Selvi* case[55] this line of reasoning was extended in carving out procedural safeguards in case of application of narco analysis or lie detector test.

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47 *In re Ramlila Maidan Incident* 2012 AIR SCW 3660.

48 *State of Madras* v. *V G Row*, AIR 1952 SC 196.

49 *Subramanian Swamy* v. *Union of India*, AIR 2016 SC 2728; per Dipak Misra J. paragraph 61-71.

50 *S R Chaudhury* v. *State of Punjab*, AIR 2001 SC 2707; (2001) 7 SCC 126.

51 *Kesvananda Bharati* v. *State of Kerala*, AIR 1973 SC 1461.

52 *Transmission Corporation of AP* v. *Ch Prabhakar*, AIR 2004 SC 3368.

53 *Phoolan Devi* v. *State of UP*, 1997 Crl L J 4134.

54 *Nandini Satpathy* v. *P L Dani*, AIR 1978 SC 1025 paragraphs 31 and 40.

55 *Selvi* v. *State of Karnataka*, 2011 AIR SCW 3011.

The growth of constitutional jurisprudence under Article 21 has transcended the framers' expectations by all leaps and bounds, provoking the judiciary to observe, "On account of liberal interpretation of the words 'life' and 'liberty' in Article 21, the said Article has now come to be invoked almost as a residuary right, even to an extent which the founding fathers of the Constitution never dreamt of."[56] But initially there was a restrictive approach. Since CAD on Article 21 was a story of half-hearted rejection of the 'due process' clause, judiciary had two alternatives: one, by following the common law method of interpretation, saying that CAD is not relevant and then developing procedural justice jurisprudence on a clean slate; and second, by following the US models of originalism saying that CAD is relevant, but searching for positive energy and building a grand tradition of procedural justice. In *A. K. Gopalan*,[57] the Supreme Court by 4: 1 reasoned as follows: since there is no ambiguity about the expression 'procedure established by law' it is not necessary to make a resort to CAD or report of its drafting committee; the CA had first considered to use 'due process' clause but later on after due deliberation rejected that expression and opted for 'procedure established by law', which meant that reference to any explanation on due process clause is not relevant for Article 21; and hence the content of CAD did not help the applicant for a position that law under Article 21 should be just. The CAD had focused on procedural fairness and dangers of substantive due process and the advantages of judicial action for procedural justice. Although there was a low key treatment of CAD, the case is not an authority for excluding the consideration of CAD. In fact, by nullifying a provision in the *Preventive Detention Act* that had exempted the executive from filing statement of facts that led to detention, the Court was giving effect to the wishes of CA members that procedural fairness is the key for effective protection of personal liberty.

References to CAD by the majority judges and sole dissenting judge in the *Habeas Corpus case*[58] show the possibility of double edged use of CAD. The

[56] *Narinderjit Singh Sahni* v. *Union of India*, AIR 2001 SC 3810.

[57] *A K Gopalan* v. *State of Madras*, AIR 1950 SC 27.

[58] *ADM Jabalpur* v. *Shivakant Shukla*, AIR 1976 SC 1207.

sole dissenting judgment of Justice H. R. Khanna strongly argued in favour of executive's duty to abide by the Constitution, and hence respect personal liberty of persons in spite of suspension of rights during emergency.[59] He cited from Dr. B. R. Ambedkar's speech as follows:

> "No constitutional Government can function in any country unless any particular constitutional authority remembers the fact that its authority is limited by the Constitution and that if there is any authority created by the Constitution which has to decide between that particular authority and any other authority, then the decision of that authority shall be binding upon any other organ. That is the sanction which this Constitution gives in order to see that the President shall follow the advice of his Ministers, that the executive shall not exceed in its executive authority the law made by Parliament and that the executive shall not give its own interpretation of the law which is in conflict with the interpretation of the judicial organ created by the Constitution."[60]

The learned judge stated that judicial scrutiny of executive action is an integral part of the Constitution and that causing constitutional imbalance by allowing the executive to prevail over the legislature and judiciary was never in the contemplation of framers of the Constitution. In contrast, the majority judgment of Justice Y. V. Chandrachud made a superficial reference to CA as composed of politicians, statesmen lawyers and social workers who had experienced the travails of incarceration had resolve to put Article 22 clauses (3) to (7) as a necessary evil in the very beginning of his judgment. To the argument that personal liberty is anterior to the making of the Constitution and the framers were aware of such a position in incorporating fundamental rights, the learned judge replied, "The right to personal liberty has no hall-mark and therefore when the right is put in action it is

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[59] Paragraph 198.

[60] Speech in CAD October 14, 1949, Vol. X.

impossible to identify whether the right is one given by the Constitution or is one which existed in the pre-Constitution era."[61] Justice P. N. Bhagwati gathered support from precedents to the view that the constitution makers did not recognise natural rights.[62] The difference between the majority and dissenting view in the *Habeas Corpus* case is owing to the fact that the dissent is based on proper and thorough understanding and creative use of CAD, which yielded comfortable result, in contrast to the approach of the majority.

In *Maneka Gandhi*[63] case, a game changer in constitutional jurisprudence, reference to CAD was confined to limited issues such as whether the freedom of speech and expression had extra territorial existence. Perhaps, reference to CAD on Article 21 was felt as not rewarding. The majority viewed that as the purpose of free expression is enabling development of personality which was within the contemplation of constitution-makers, its scope could not be confined to the geographical limits. Justice Bhagwati observed,[64]

> "The constitution-makers recognised the spiritual dimension of man and they were conscious that he is an embodiment of divinity, what the great Upanishadic verse describes as "the children of immortality" and his mission in life is to realise the ultimate truth. This obviously he cannot achieve unless he has certain basic freedoms, such as freedom of thought, freedom of conscience, freedom of speech and expression, personal liberty to move where he likes and so on and so forth. It was this vast conception of man in society and universe that animated the formulation of fundamental rights."

This approach of purpose-promotion and holistic understanding of all rights in an integrated manner became a trend setter for so many positive rights in

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[61] Paragraph 451.

[62] Paragraph 548.

[63] AIR 1978 SC 597.

[64] Parahraph 70.

subsequent cases. Regarding the major issue about just, fair and reasonable procedure of law, the Court relied upon interrelationship of rights under Articles 14, 19 and 21 rather than CAD. The development of procedural fairness inspired the Court in *Francis Coralie Mulin*[65] to recognise positive rights of life by engrafting the element of dignity into right to life. But in this and other cases on positive rights like food, health, environment, and means of livelihood there is no reference to CAD. But the ethos of transformative constitutionalism worked to bring that effect. The shift from procedural justice to substantive rights could take place because of the thrust given by the framers to transformative constitutionalism.

Right Against Exploitation

The social purpose and economic mission with which the framers proceeded towards prohibition of trafficking in human beings, forced labour of various forms and hazardous child labour have motivated the judiciary to interpret the Articles 23 and 24 in a manner which would promote the socio-economic objective of the Constitution. Accordingly in the *Asiad Construction*[66] case the word 'forced labour' was interpreted to include the circumstances arising from economic compulsion which leaves no alternative but to work at wages lower than minimum wages.[67]

In *Prison Labour* case[68] questions arose whether prisoners could be compelled to work while undergoing imprisonment, whether the wage shall be paid to them, and if so at what rate. The Supreme Court referred to the CAD. The original draft provision had an exception *viz.*, 'except as a punishment for crime whereof the party shall have been duly convicted', which was abandoned after elaborate discussion. Dr. B. R. Ambedkar summed up at the end by stating that Clause (2) of Article 23 enabled the State to impose compulsory service for public purposes, which took care of compulsory prison labour. The Court tested the practice

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65 *Francis Coralie Mulin* v. *The Administrator Union Territory of Delhi,* AIR 1981 SC 746.

66 *People's Union for Democratic Rights* v. *Union of India*, AIR 1982 SC 1473.

67 *Sanjit Roy* v. *State of Rajasthan*, AIR 1983 SC 328.

68 *State of Gujarat* v. *Hon'ble High Court of Gujarat*, (1998) 7 SCC 392; AIR 1998 SC 3164.

of compulsory prison labour on the touchstone of 'public purpose' and upheld it as a measure of reformative punishment but subject to payment of wages after due deductions under the *Minimum Wages Act*. In another case, the question, whether the requirement upon aspirants for super-speciality in medical college to work for a short period on a decent stipend in government hospitals especially after getting admission to medical colleges with informed consent for subsidized education amounted to forced labour or whether the situation fell under the exception provided under Article 23 (2) was decided by the Supreme Court by invoking the intention of constitution makers. The Court concluded that it fell under the exception clause.[69]

While interpreting Article 24 which prohibits the practice of child labour in hazardous works, the Supreme Court's reference to CAD had a very positive effect. The Court said in *M. C. Mehta*[70], "Our Constitution makers, wise and sagacious as they were, had known that India of their vision would not be a reality if the children of the country are not nurtured and educated." They also referred to Articles 45, 47 and 39 where State's positive duty for primary education and health hinted about exclusion of child labour.[71] In a PIL on protection of child prostitutes and children of prostitutes while providing remedy after referring to Article 39 (e) and (f) the Court mentioned how they reflected the great anxiety of the Constitution makers to protect and safeguard the interests and welfare of the children of our country.[72]

Freedom of Religion and the Concept of Secularism

The Supreme Court's perception about the minds of makers of the Constitution about the concept of religion and limitations on religious freedom made it to establish the foundation of the jurisprudence of religious freedom on sound

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69 *Association of Medical Super-speciality Aspirants and Residents* v. *Union of India* AIR Online 2019 SC 873 para 35.

70 *M. C. Mehta* v. *State of Tamil Nadu* 1997 AIR SCW 407.

71 The Court mandated for payment of Rs. 20,000 by the employers of child labour for promoting education soon after release from child labour.

72 *Vishal Jeet* v. *Union of India*, 1990 Cri L J 1469.

pedestal in the pioneering case, *Lakshmindra Thirtha Swamiar*.[73] Referring to the definition of religion in an American case which confined it to aspects of faith only, the Court said that this could not have been in the contemplation of constitution makers. It gave a broader definition of religion, which is classic and followed even today, including both system of beliefs and varieties of its practices.[74] Again, it referred to the absolute guarantee of religious freedom in the American and Australian constitutional texts but limitations evolved by judiciary in the course of interpretation, and held that the constitution makers incorporated the limitations into the constitutional text.[75]

The issue of temple entry reform was litigated in *Venkatramana Devaru*.[76] There is no reference to CAD as the latter has also no specific focus on that matter. In *Indian Young Lawyers Association* case,[77] CAD on 'untouchability' was referred to by one of the judges, Justice D. Y. Chandrachud, whereas the dissenting judge Justice Indu Malhotra considered such reference as irrelevant as exclusion in case of women in Sabarimala temple was not based on caste.

The controversy on extent of right to religious conversion came before the Supreme Court in *Rev. Stainislaus* case,[78] an appeal from two High Court judgments. The Court approach was analytical, working on the relation between freedom of conscience and freedom to propagate religion and State's power to maintain public order. Chief Justice A. N. Ray while rendering the unanimous judgment did not refer to CAD, although Prof. K. T. Shah, Shri. Loknath Maitra, Mr. Mohamed Ismail Sahib, Pandit Lakshminath Kanta Maitra, Shri. Rohini Kumar

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73 *Commissioner H. R. E.* v. *Lakshmindra Thirtha Swamiar*, AIR 1954 SC 2828.

74 *Ibid.*, paragraph 17 "A religion undoubtedly has its basis in a system of belief or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being; but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress."

75 *Ibid.*, paragraph 22.

76 *Venkatramana Devaru* v. *State of Mysore*, AIR 1958 SC 255.

77 *Indian Young Lawyers Association* v. *State of Kerala*, AIR Online 2018 SC 243.

78 *Rev. Stainislaus* v. *State of Madhya Pradesh*, AIR 1977 SC 908; (1977) SCC 677.

Chaudhari and Shri T. T. Krishnamachari spoke against right to convert others into one's own religion as a component of religious freedom and Shri K. M. Munshi was in favour of recognising conversion by free exercise of conscience as a part of freedom of propagation of religion. As in many of his other judgments, here also, the learned judge abstained from gathering support from the CAD. It appears, since the Court had clear understanding of the meaning of the clause by use of internal aid, there was no need to use the external aid like CAD.

The meaning of the phrase 'religious instruction' occurring in Article 28 was at issue in *Aruna Roy* case[79] where the NCERT's curriculum plan provided for comparative study of religions as part of cultural study. The Court extracted from the CAD the conversation between Shri Lakshmikanth Maitra, Shri H. V. Kamath, Shri Shibban Lal Saxena and Dr. B. R. Ambedkar on the implication of the phrase. Dr. Ambedkar explained with illustration the distinction between religious instruction and study or research on religions. Presence of dogmatic or indoctrinating intention was the feature of religious instruction. The Court dismissed the petition challenging the validity of curriculum which provided for comparative study of religions.

On the idea of secularism, again, support was drawn from CAD in *S. R. Bommai* case.[80] The view of Pandit Lakshmikant Mitra on secularism was extracted and accepted as explaining the core principle of secularism.[81]

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79 *Aruna Roy* v. *Union of India*, (2002) 7 SCC 368; AIR 2002 SC 3176.

80 *S. R. Bommai* v. *Union of India*, AIR 1994 SC 1918.

81 "By Secular State, as I understand, it is meant that the State is not going to make any discriminations whatsoever on the ground of religion or community against any person professing any particular form of religious faith. This means in essence that no particular religion in the state will receive any state patronage whatsoever. The State is not going to establish, patronize or endow any particular religion to the exclusion of or in preference to others and that no citizen in the State will have any preferential treatment or will be discriminated against simply on the ground that he professed a particular form of religion. In other words, in the affairs of the State the preferring of any particular religion will not be taken into consideration at all. This I consider to be the essence of a secular State. At the same time we must be very careful to see that in this land of ours we do not deny to anybody the right not only to profess or practice but also propagate any particular religion."

Cultural and Educational Rights

The judicial approach towards Articles 29 and 30 centres round an approach that the makers of the Constitution incorporated them to allay the fears in the mind of minorities about prevalence of an atmosphere congenial to the growth of their culture,[82] and hence, a generous, liberal and sympathetic approach should weigh with the courts while construing them.[83] One of the admirable developments in this sphere is judicial effort of linking objective purpose with subjective purpose (as reflected in the CAD) in order to promote the ultimate purpose. While the ultimate or philosophical purpose can be found in establishing a multicultural society which is happy, harmonious and tolerant, the objective purpose as reflected in the constitutional text suggests an equitable approach of empowerment that satisfies both equality and secularism. The use of CAD is instrumental in filling the gap, synchronising the components and connecting the links. The culmination in the integration of the trio can be found in the *T. M. A. Pai Foundation*[84] case, decided by a Bench of eleven judges of the Supreme Court. In delineating the relation between Article 29 (2) and Article 30 (1) by resolving the delicate conflict between equality and secularism; in identifying the basis for determination of minority status of any community; and in accommodating regulatory power over maladministration under Article 30 (1) CAD was used by an approach of protectionism. The majority judgment rendered by Chief Justice B. N. Kirpal extensively discussed the decisional law which had in turn used CAD.[85] Its initial discourse and concluding observations

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82 *In re Kerala Education Bill*, AIR 1958 SC 956 paragraph 32.

83 *Ahmedabad St. Xavier's College Society* v. *State of Gujarat* (1975) 1 SCR 173 per Justice H. R. Khanna; Justice Quadri and Justice V. N. Khare in *T.M.A. Pai Foundation* v. *State of Karnataka* (2002) 8 SCC 481; approvingly cited by Justice Rohington Nariman in *Chandana Das* v. *State of West Bengal*, AIR Online 2019 SC 1129.

84 *TMA Pai Foundation* v. *State of Karnataka*, 2002 AIR SCW 4957.

85 In *re Kerala Education Bill* AIR 1958 SC 956; *Rev. Father Proost v. State of Bihar*, AIR 1969 SC 45; *Frank Anthony Public Employee's Association* v. *Union of India* AIR 1987 SC 311; *Sidhajbhai Sabhai* v. *State of Bombay*, AIR 1963 SC 540.

on pluralist society, idea of empowerment through education and the need for unburdening the private educational institutions from excessive state regulation, hint about the ultimate purpose. The Court balanced between autonomy of minority educational institutions with equal rights of citizens in general to get admissions to educational institutions getting grants in aid from the government without discrimination, but did not agree with a 50 per cent limit on minority seats laid down in *St. Stephen* case.[86] Justice V. N. Khare in his concurring judgment widely referred to the CAD for pointing out that the right under Article 30 (1) is limited by the right under Article 29 (2) because of paramount consideration given to equality and secularism in both the provisions. Justice Qadri inferred from the language of Article 30, which contains no phrase like 'Subject to other provisions of this Part' as in Article 25, the framers intended that the right available to minorities in the matter of admission is not to be shared with non-minorities. Justice Variava and Justice Ashok Bhan made elaborate reference to CAD, especially the views of Shri K. M. Munshi and Smt. Poornima Banerji, to draw an inference that application of Article 29 (2) upon Article 30 does not give any scope for separate seats for minorities but are to be shared with non-minorities on the basis of merit once the minority institution gets grant in aid from the government. Again, equality and secularism are invoked in support of this proposition. This raises a doubt whether instead of resolving the controversy, CAD supplies arguments for both the sides and confounds the confusion. This is an inherent limitation of subjective intention, which ought to be remedied by synchronising with the objective and philosophical intention. The majority and Justice V. N. Khare navigated comfortably with a compass of ultimate purpose. Another thing to be noted is that all the judges allowed all sorts of educational institutions within the ambit of the words 'educational institutions of their choice' in Article 30 (1) in spite of the fact that CAD was confined to education up to the age of 14 years. From the angle of economic empowerment through education in the changed circumstance, this is appropriate development especially when the phrase 'of their choice' has wider meaning.

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86 *St. Stephen College* v. *University of Delhi*, AIR 1992 SC 1630.

Impact of CAD on Property Right Jurisprudence

The absence of CAD discourse is glaring in early property right judgments in spite of the fact that the CA members enthusiastically expressed their aspirations for economic justice, far-reaching agrarian reforms and protection of legislative determination of compensation to the zamindars and landlords in case the State laws were in the process of enactment at the time of commencement of the Constitution but received the President's assent. In *Kameshwar Singh* case[87] the Bihar High Court held *The Bihar Land Reforms Act 1950* as unconstitutional as the exemption given in Article 31 (4) did not protect the challenge based on Article 14. The non-obstante clause covering whole Constitution also did not rescue the law from unconstitutionality. When the operation of Article 31 (2) is excluded, unless similar exclusion was made *vis-a-vis* Article 14, equality principle had to be applied. Since there were different rates of compensation for persons having different extent of land, there was violation of Article 14. Justice Shearer relied upon an Australian High Court's observation that the views expressed by Parliamentarians differ from one another in the matter of the merit, object and meaning of the proposed legislative policy, and hence need not be referred to in the course of interpretation.[88] Hence, the CAD discourse about finality of legislative decision about fixation of compensation was kept away from discussion. But the learned judge stated that the President while giving approval for the legislation should have enquired into the issue whether the principle for determination of compensation was not amounting to fraud upon the Constitution, which the CA members wanted to avoid. Justice Reuben while concurring with the decision about violation of equality in the matter of compensation, differed on the point of public purpose by relying on CAD. Thus, haphazard approach about reliance on CAD had caused ambivalence and obstruction to the goal of economic justice. Incorporation of Articles 31-A and 31-B and the Ninth Schedule took place to overcome this difficulty.

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87 *Kameshwar Singh* v. *State of Bihar*, AIR 1951 Pat 91.

88 Latham C. J. in *State of South Australia* v. *The Commonwealth*, (1941) 65 CLR 373.

Throughout the judgments in *Bela Banerjee*,[89] *Subodh Gopal*[90] and *Vajravelu Mudaliar*[91] the requirement of paying compensation equivalent to market value in case of expropriation of agricultural land was insisted without looking into the broad consensus in CAD about finality of legislative determination of compensation in case of large scale agrarian reforms in order to promote economic justice and requirement of fair compensation in case of acquisition for development purposes like road, rail and dams. *Kesavananda Bharati* is a crucial decision that considered CAD as relevant, and relied on the parliamentary discussion relating to Article 31-C for upholding it.[92] The view of Jawaharlal Nehru while piloting the First Constitution Amendment Bill that 'in big social changes or schemes of social engineering, inevitably some people may suffer but that for better security of land and growth of more food it was essential' was noted in upholding an agrarian reform in *Gwalior Rayon* case.[93] The Supreme Court in *Waman Rao*[94] traced the genesis of land reforms law to the socio-economic policy that constituted part of the basic structure of the Constitution as could be gathered from CAD. The view of Jawaharlal Nehru that protections under Articles 31-A and 31-B strengthen the real intention of the constitution makers was relied upon.[95] In *Jilubhai Kachar*[96] the Supreme Court stated that CAD made it clear that the tiller of the soil shall be conferred with right to property directly under the state without the exploitative intervention of the intermediaries. The framers' reliance on the western concept of

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89 *State of West Bengal* v. *Mrs. Bela Banerjee*, 1954 SCR 558: (AIR 1954 SC 170).

90 *State of West Bengal* v. *Subodh Gopal Bose*, 1954 SCR 587: (AIR 1954 SC 92).

91 *P. Vajravelu Mudaliar* v. *Spl. Deputy Collector, Madaras*, (1965) 1SCR 614 : (AIR 1965 SC 1017).

92 *Kesavananda Bharati* v. *State of Kerala* AIR 1973 SC 1461.

93 *State of Kerala* v. *Gwalior Rayon Silk Manufacturing and Weaving Co Ltd.*, AIR 1973 SC 2734.

94 *Waman Rao* v. *State of Maharashtra*, AIR 1981 SC 271.

95 *Ibid.* In *Minerva Mills* v. *Union of India* AIR 1980 SC 1789, similar view was adopted.

96 *Jilubhai Nanbhai Kachar* v. *State of Gujarat*, 1994 AIR SCW 4181.

eminent domain is pointed out in *K. T. Plantation Company* case.[97] This could bring in reasonable compensation in case of expropriation of property.

From the above it follows that from the angle of economic justice a comfortable position relating to property right could be attained when the Courts referred to CAD and understood the basic thrust of socio-economic reforms and avoidance of exploitation in property relations. As a corollary, when CAD was ignored the capitalistic position of property right got asserted. Even after deletion of property right, the policy of protecting the agrarian and economic reforms still continue in Part III, and even in matters relating to Article 300-A, the philosophy of economic justice and economic security continue to be relevant. Identification of this ultimate purpose is crucial in linking the subjective and objective purposes.

Right to Constitutional Remedy

Article 32 was considered in CAD as 'the most important without which the Constitution would be a nullity',[98] a 'valuable right fundamental to all fundamental rights',[99] and one which puts the fundamental rights beyond passions and vicissitude of party politics'.[100] Enforcing a fundamental right itself is a fundamental right. In *Bandhua Mukti Morcha*[101] the Court perceived the reason which drove the constitution makers not to define 'appropriate proceeding' in any particular way:

> The Constitution makers deliberately did not lay down any particular form of proceeding for enforcement of a fundamental right nor did they stipulate that such proceeding should conform to any rigid pattern or straight jacket formula as, for example, in England, because they knew that in a country like India where there is so much of poverty, ignorance, illiteracy, deprivation and exploitation, any insistence on a

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97 *K. T. Plantation Co. Ltd.* v. *State of Karnataka*, 2011 AIR SCW 5356.

98 Dr. B. R. Ambedkar, CAD 9th December 1948; also *see* Shri B. Pocker Sahib Bahadur, CAD 9th December 1948.

99 Shrimati Dutga Bai, CAD 9th December 1948..

100 Rev D. Souza, CAD 9th December 1948.

101 *Bandhua Mukti Morcha* v, *Union of India*, AIR 1984 SC 802.

> rigid formula of proceeding for enforcement of a fundamental right would become self-defeating because it would place enforcement of fundamental rights beyond the reach of the common man and the entire remedy for enforcement of fundamental rights which the Constitution makers regarded as so precious and invaluable that they elevated it to the status of a fundamental right, would become a mere rope of sand so far as the large masses of the people in this country are concerned.

This meant that CAD made judiciary free to innovate in the matter of constitutional remedies. The CA members entertained a belief that listing of prominent prerogative writ remedies was a perfect choice. Dr. B. R. Ambedkar stated that the remedies were products of thousands of years of experience in Great Britain, which can hardly be improved upon even by person with the most fertile imagination.[102] But Indian judiciary was not complacent. In underplaying *locus standi* rule, evolving and shaping PIL through procedural inventions, in combining writs, expanding their reach and efficacy, in treating laches and developing restitutory remedy and rich jurisprudence of directions Indian judiciary went far ahead of the British counterpart, which would really make the architect of the constitution happy.[103]

CAD and Welfare: Interpreting the Directive Principles of State policy

Bringing social transformation through a constitution was a major goal of the Constitution makers. They contemplated Part III and Part IV as the fit instruments for this purpose. The very title of Part IV, 'Directive Principles of State policy' (DPSP) mixes principles with policies. Principles stand for verified propositions and binding norms entailing rights and obligations whereas policies are community aspirations, objectives to be attained or approach to be followed. Policies might be socially viable and desirable, but economically not readily implementable or politically

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[102] Dr. B R Ambedkar, CAD, Vol. VII, p.952.

[103] *See* P. Ishwara Bhat, *Fundamental Rights: A Study of their Interrelationship* (Eastern Law House, Kolkata, 2004) Ch. 7.

requiring wooing the support of the community. Since both have common objectives, adequate interstices and common historical roots in the freedom struggle, filling the gap by an integrated reading of them, whenever possible or persuaded, becomes appropriate. But the judicially enforceable character of fundamental rights (FRs) and the lack of judicial sanction for non-implementation of DPSP wedged the dichotomy between the two. Hence, history of their relation was not so smooth, and after two decades only the process of mixing started. Two important purposes for which CAD is referred in the context of DPSP are: one about their relationship with FRs; and two, about their content and direction.

In *Srimathi Champakam Dorairajan*,[104] the contending parties did not invoke CAD. The case involved community-wise reservation of seats in professional College, which basically violated right to equality. While quashing the communal GO as unconstitutional, the Supreme Court observed, "The directive principles of State policy cannot override the provisions found in Part III but have to conform to and run as subsidiary to the Chapter of Fundamental Rights."[105] But so long as FRs are not infringed in the course of implementing DPSP and also conform to other provisions of the Constitution, they are implementable. The Court adopted a laudable approach in *Chandra Bhawan*[106] by looking into the objective of DPSP, flexibility involved in their implementation and the need to satisfy the hopes and aspirations aroused by the constitution. Application of the *Minimum Wages Act* was accordingly upheld. *Kesavananda Bharati* judgment brought big change in the status of DPSP.[107] The judges extensively relied upon CAD. Justices Shelat and Grover described FRs and DPSP as the conscience of the constitution, and the

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104 *State of Madras* v. *Srimathi Champakam Dorairajan*, AIR 1951 SC 226. Similar approach was followed in *Mohd. Hanif Qureshi* v. *The State of Bihar*, AIR 1958 SC 731; *In re Kerala Education Bill*, 1957, AIR 1958 SC 956.

105 *Ibid.*, paragraph 8.

106 *Chandra Bhawan Boarding and Lodging, Bangalore* v. *State of Karnataka*, AIR 1970 SC 2042.

107 *Kesavananda Bharati* v. *State of Kerala*, AIR 1973 SC 1461.

constitution makers had the dominant objective of ameliorating and improving the lot of the common man and bringing social justice. Justices Hegde and Mukherjee observed that the founding fathers evolved them on the basis of their life experience and irrepressible love for socio-economic justice. Justice A. N. Ray, who is usually reluctant in citing from CAD, held that the framers of the Constitution wanted a social structure which would avoid the acquisitive economy of private capitalism and the regimentation of a totalitarian State. Justice K. K. Mathew referred to the vision of makers of the Constitution about future society with liberty, equality and justice as ideals for every citizen. Thus, in upholding Article 31-C on the ground that both FRs and DPSP are instruments of human rights and socio-economic justice, reference to CAD played a great role. *Kesavananda Bharati* became a trend setter for invoking CAD and for other laudable approaches. Extending this approach, using DPSP as court's duty and to determine the reasonableness of restriction started.[108] The *Minerva Mills* judgment carried the CAD discourse on DPSP to new heights.[109] Justice Y. V. Chandrachud extensively dealt with the genesis of DPSP in Motilal Nehru Committee report, Sapru Committee report, Congress resolutions and CAD; referred to the views of Gandhiji, Jawaharlal Nehru and other leaders; and noted the socio-economic philosophy that inspired the CA members like Santhanam, Dr. Radhakrishnan and others while speaking about DPSP or Objectives Resolution. He considered Parts III and IV as two wheels of the chariot, both being important. Justice P. N. Bhagwati in *National Textile Workers Union* case[110] picked up the spirit of constitution makers about law's creative role in response to the changing social and economic circumstances. In evolving unnamed rights like right to environment, health, education, means of livelihood and so on under Part III, DPSP provided doctrinal support.[111] Direct or vague reference to

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108 *U. P. State Electricity Board* v. *Hari Shankar Jain*, (1978) 4 SCC 16; *Jalan Trading Co.* v. *D. M. Aney*, (1979) 3 SCC 220; AIR 1979 SC 233.

109 *Minerva Mills* v. *Union of India*, AIR 1980 SC 1789 paragraphs 58-65.

110 *National Textile Workers Union* v. *P. R. Ramakrishnan*, AIR 1983 SC 75; (1983)1 SCC 228.

CAD had helped in such reasoning. In *Mirzapur Moti Kureshi* judgment by Chief Justice Lahoti there is elaborate discussion of case law on relation between Part III and Part IV drawing support from CAD.[112]

On the content and direction of DPSP, CAD throws useful light. In *Mahesh Chandra*[113] the Supreme Court gathered support from Gandhiji's writings and the views of founding fathers emphasising on rural self-sufficiency and the idea of mixed economy and held that mere default in repayment of loan was not justifiable ground for taking possession of the land by the State Finance Corporation. In Ranganatha Reddy, while upholding the law taking over stage carriage buses as for public purpose and providing for fair compensation Justice V. R. Krishna Iyer observed, "Our constitution-makers have had due regard to the felt necessities of the time and the philosophical and political theories about what would best serve the country's progress; and so we have grounded ourselves on these solid prescriptions undeflected by speculative niceties lent by literal study and possible injuries inevitable in reshaping society."[114] Relying on this approach, Justice Chinnappa Reddy developed the concept of socialism in *Sanjeev Coke*[115] and held that the distribution of material resource under Article 39 (b) is not confined to state-owned resources. Similarly, liberal interpretation of the clause on equal justice

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111 *M. C. Mehta* v. *Union of India*, (Oleum gas leak case) AIR 1987 SC 965; (1986) SCC 176; *Rural Litigation Kendra* v. *State of UP*, AIR 1985 SC 652; *Vincent* v. *Union of India*, AIR 1987 SC 990; (1987) 2 SCC 165; *Paschim Banga Khet Mazdoor Samiti* v. *State of West Bengal*, AIR 1996 SC 2426; (1996) 4 SCC 37; *Mohini Jain* v. *State of Karnataka*, AIR 1992 SC 1858; *Unni Krishnan* v. *State of Andhra Pradesh*, AIR 1993 SC 2178; *Olga Tellis* v. *Bombay Municipal Corporation*, AIR 1986 SC 180; (1985) 3 SCC 545.

112 *State of Gujarat* v. *Mirzapur Moti Kureshi Kasab Jamat* AIR 2005 SC 212.

113 *Mahesh Chandra* v. *Regional manager*, UP Financial Corporation (1993) 2 SCC 279; 1992 AIR SCE 3629.

114 *State of Karnataka* v. *Shri Ranganatha Reddy* (1977) 4 SCC 471 paragraph 85.

115 *Sanjeev Coke Manufacturing Co.* v. *Bharat Coking Coal Ltd.*, (1983) 1 SCC 147.

for all keeping in mind the intention of makers of the amendment bringing Article 39-A could gather support from original intention.[116]

In the matter of Panchayat Raj institution, judiciary has taken the assistance of CAD. There is extensive discussion in *Bhanumati* [117]case on what transpired in CAD about incorporation of Article 40.[118] Although it was grudgingly accepted, its potentiality of acting as an instrument of social engineering is perceived by the members. The views of Rajendra Prasad, M. A. Ayyangar, S. C. Mazumdar, N. G. Ranga, Surendra Mohan Ghosh, Seth Govind Das and others exhibited subjective purpose. On the other hand, little role was assigned to Panchayat Raj by the majority which believed in parliamentary model. The ultimate purpose was gathered from the spirit of self governance, people's participation and proletariat's assertion as expressed in the political philosophy of democracy reflected in various sources including joint statement of Bhagat Singh and Matukeswar Dutta in a criminal trial which ended in their martyrdom. The shift of Panchayat Raj system from unit of self-government to institution of self government with full fledged powers and responsibilities with periodical elections and accountability hinted about the objective purpose.

In *Sarla Mudgal*,[119] the subjective purpose reflected in the view of Jawaharlal Nehru that uniform civil code (UCC) will be brought when the time is ripe and society is ready for receiving it; the objective purpose underlying Article 44 included promotion of equality; and the ultimate purpose comprehended upholding dignity, gender justice and welfare. The Court found no reason to abstain from its implementation. It noticed continuance of same debate about homogeneity versus diversity blocking the process of implementation. In view of injustice to women

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116 *Ranjan Dwivedi* v. *Union of India*, (1983) 3 SCC 307; *Hussainara Khatoon* v. *Home Secretary, State of Bihar*, (1980) 1 SCC 98; *Centre for Legal Research* v. *State of Kerala*, (1986) 2 SCC 706.

117 *Bhanumati* v. *State* of U.P 2010 AIR SCW 6470.

118 Also see *Usha Bharti* v. *State of UP* 2014 AIR SCW 2421.

119 *Sarla Mudgal* v. *Union of India*, 1995 AIR SCW 2326.

occurring from circumvention of the law through fraudulent conversion, the Court issued direction for implementation of the goal of UCC. In *Ahmadabad Women Action Group* case,[120] the claim for writ of mandamus to enact UCC was declined by citing reasons about cultural diversity and the need for voluntary initiative. In *Shayara Bano* the same approach was continued in the dissenting view with a different note that personal law has a dimension of religion.[121] The constitution makers while discussing on UCC had clear concern for reform of personal law to make the position of woman better. This aspect seems to have influenced in providing remedies in *Madhu Kishwar* and *Danial Latifi* cases without nullifying the discriminatory law.[122]

Interface with other Principles of Interpretation

Reference to CAD does not operate in isolation. Being a historical resource, CAD has inherent limitations. It can guide but will not foreclose. It helps in charting the contours of progressive interpretation by invoking the wisdom of constitution makers.[123] When meaning of any clause is to be developed by focusing on the text and its relations with other provisions of the Constitution it may provide input by pointing out what was the thinking of the founding fathers.[124] Specific types of decisions such as rejection of a proposal or acceptance of an amendment help the judicial reasoning. Purposive interpretation also goes hand in hand with CAD.[125] Although there is an approach that only after exhausting internal aids one shall turn to external aids in case of doubt,[126] CAD is not relegated to the secondary position. That approach has a corollary in the proposition that objective purpose will be

120 *Ahmadabad Women Action Group* v. *Union of India*, 1997 AIR SCW 1620.

121 *Shayara Bano* v. *Union of India*, AIR 2017 SC 4609.

122 *Madhu Kishwar* v. *State of Bihar* (1996) 5 SCC 125; *Danial Latifi* v. *Union of India*, (2001) 7 SCC 740.

123 *See* discussion on positive right cases under Freedoms, *supra*.

124 *See* cases on right against exploitation and freedom of religion, especially temple entry.

125 *See* the cases on relation between Part III and Part IV.

126 *B. Prabhakar Rao* v. *State of Andhra Pradesh*, AIR 1986 SC 210.

preferred over subjective purpose because of the latter's varying versions and the former's certainty. Insofar as consequentialism is concerned which insists on fair result irrespective of the tool of interpretation,[127] CAD facilitates such a position because of its flexibility.

Conclusion

The above survey of case law made through the lens of CAD can yield the following inferences:

During the 70 years of constitutional development, constitutional interpretation has unfolded an exponential growth of fundamental rights. Although reference to CAD has inclination to freeze the thoughts to the times of constitution making and has potentiality of blocking progressive growth of the constitutional law, which was the reason for hesitation in applying CAD, in fact, no such untoward development took place. On the other hand, non-application of CAD obstructed the cause of economic justice in early property right cases. With a big change in *Kesavananda Bharti* that reference to CAD is appropriate but courts are not bound by it, CAD began to play a crucial role. But its role is one of opening up the ways of thinking and not closing down the choices. Its greatest use in times of crisis in the *Habeas Corpus* case during emergency by Justice H. R. Khanna to uphold rule of law even in a circumstance of suspension of rights illustrates its high potentiality

Reference to CAD is one of the prominent tools of interpretation. It is not antagonistic to other tools like progressive, purposive, structural and literal methods of interpretation. There is synergy in their combination. This is explicit in cases on right to equality. In cases on reservation, use of CAD, structuralism and purposive interpretation has the consequence comfortable result. References to CAD have always reminded the intention with which CA members drafted and incorporated the provisions. Relying on stray thoughts of individual members which are not representative of the view of the whole House is not building confidence as can be seen in the dissenting judgment in *Shayara Bano* case.

[127] G P Singh, *Principles of Statutory Interpretation* (Lexis Nexis, New Delhi, 14th edn., 2019) p.145.

Gathering support from CAD for new ideas like positive rights of life even when CAD has not directly spoken about it is one of the creative judicial craftsmanship. The constitution makers' perception of dignity of human being (*amrutasya putra*) with potentiality of realising mission of life could also inspire the judiciary in building up positive right jurisprudence under Article 21. Thus the present status of widened understanding of Article 21 is not far-fetched from the CAD discourse.

Anchoring the judicial reasoning in ultimate purpose is a task that requires reflective thinking about the basic philosophy underlying the relevant concepts. Using the subjective purpose to analyse the objective purpose for promoting the ultimate purpose shapes the judicial reasoning on appropriate lines. As can be seen in judicial approach relating to cultural and educational rights and right to property, this has a great advantage of balancing the competing interests.

Confining to CAD with an original intention approach would have obstructed the tremendous growth of the jurisprudence of constitutional remedies. As in the case of Article 21, here also, giving effect to the living tree doctrine has enabled emergence of innovative procedures and dynamic instruments like public interest litigation.

It is pertinent to note that understanding the spirit and philosophy of DPSP has guided the judiciary in using the subjective views expressed in CAD to expound the meaning of clauses used in Part IV and their synergy-some relation with Part III. As the DPSP is couched in the language of advice, the vagueness involved in the statement of ideals could be made good by invoking CAD.

On the whole, reference to CAD has enriched the constitutional law on FRs and DPSPs by providing useful insights to fill the gap and resolve the problem at hand.

POWER OF CONTEMPT OF COURT IN INDIA : AN OVERVIEW

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Abstract

The Indian Constitution is based upon the concept of Rule of Law and for achieving this cherished goal, the framers of Indian Constitution have assigned the special task to the judiciary. Among various organs of the government, judiciary the guardian of the rule of law holds key positions, for it is deemed as not only the third pillar, but also the central pillar of democracy. In order to facilitate the judiciary to perform its duties and functions effectively, the dignity and authority of the courts have to be respected and protected at all costs. This power is recognized and has been given a fundamental status by the Constitution of India. The framers of the Indian Constitution recognized the maintenance of dignity of court as one of the cardinal principles of rule of law in a democratic set up. The power and authority to uphold the majesty of the judiciary, has been entrusted to the judiciary itself by empowering it with contempt jurisdiction.

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One can understand the use of contempt penalizations for enforcement of law, but it is archaic to use it to silence the criticism in the name of scandalization. If criticism amounted to scandalization, the individual judge should initiate action for defamation rather than using very highly, arbitrary, self-imposing, summary powers to punish for contempt. The honor of the judges, the judiciary and the state institution through which the judges are supposed to serve the people, is promoted and protected by the openness of the judges and the judiciary to criticism. Intolerance to scrutiny and lack of openness equates the judges and the judiciary with a dictatorship. It should be obvious to anyone that respect for the Courts cannot and does not depend on the existence of this power. It depends entirely on how the actions of the judges and the Courts are perceived by the people.

The present law of contempt is of a colonial vintage and so our Courts, like American courts, must restructure it to suit the ethos of the Constitution and functionally fit the values of free expression and other fundamental rights. It is time to tell the people that the independent inestimable judiciary is also part of our great democracy.

In the light of this, it is felt that there is no place for contempt powers in a modern judicial system, and definitely not in the form it is currently manifested in. This paper seeks to provide an analytical framework of "Power of Contempt of Court in India: an Overview." Legal framework and role of judiciary are analysed and evaluated.

Key Words: Contempt of Court, Rule of Law and Indian Constitution

"We are not final because we are infallible, but we are infallible only because we are final." **Justice Jackson**[1]

[1] *Brown* v. *Allen*, 344 U.S. 443 (1953).

Introduction

Rule of law is the basic rule of governance of any civilized democratic polity. It is a foundational feature of our Constitution and the right to obtain judicial redress is a feature of its basic structure.[2]Judicial independence is one of the facets of rule of law. It is through the Courts that the rule of law reveals its meaningful content. Protection of the administration of justice is, therefore, as imperative as its existence for the civilized functioning of any free and egalitarian social order.[3] The Indian Constitution is based upon the concept of Rule of Law and for achieving this cherished goal, the framers of Indian Constitution have assigned the special task to the judiciary. Among various organs of the government judiciary, the guardian of the rule of law holds key positions, for it is deemed as not only the third pillar, but the central pillar of democracy. In order to facilitate the judiciary to perform its duties and functions effectively, the dignity and authority of the courts have to be respected and protected at all costs. This power is recognized and has been given a fundamental status by the Constitution of India.[4] The framers of the Indian Constitution recognized the maintenance of dignity of Court as one of the cardinal principles of rule of law in a democratic set up. The power and authority, to uphold the majesty of the judiciary, has been entrusted to the judiciary itself by empowering it with contempt jurisdiction.

The law of contempt secures public respect and confidence in the judicial process and provides the sanction for any act or conduct which is likely to destroy or impair such respect and confidence. The contempt jurisdiction allows the court of records[5] to punish the contemnor for scandalizing the judiciary and for

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2 *State of Haryana* v. *Bhajan Lal* (1992) Supp (1) 335, *Minerva Mills Ltd.* v. *Union of India* (1980) 3 SCC 625.

3 Samaraditya Pal, *The Law of Contempt: Contempt of Courts and Legislatures* (Lexis Nexis, Butterworths Wadhwa, Nagpur, 4th edn., Rept, 2011) p. 6.

4 Supreme Court Project Committee, *Restatement of Indian Law of Contempt of Court* (The Indian Law Institute, New Delhi , 2011) p.4.

5 In common law jurisdictions, a court of record is a court that keeps permanent records of its proceedings. In many jurisdictions, courts that have the power to fine or imprison, must be courts of record. Traditionally, a court of record was required to have its own unique seal, which was used to authenticate its judgments and copies of its records.

disobedience of its orders. It is now well settled that independently and apart from other statutory law relating to contempt, the Supreme Court and the High Court's by reason of Articles 129 and 215 respectively,[6] have inherent power to punish for contempt of the courts.[7] Chinnappa Reddy J, speaking for the Bench rightly said, "The strains and mortification of litigation cannot be allowed to lead litigants to tarnish, terrorize and destroy the system of administration of justice by vilification of judges. It is not that judges need to be protected, judges may well take care of themselves. It is the right and interest of the public in the due administration of justice that has to be protected."[8] Thus, the law of contempt is intended to safeguard the interests of administration of justice, which must necessarily be fearless, impartial and upright.[9] One of the basic principles of any civilized system of justice is that a person is entitled to fair trial free from prejudice.

After independence, the judiciary in the country is under a constant threat. The need of the time is to restore confidence amongst the people for the independence of the judiciary, its impartiality and the glory of law has to be maintained, protected and strengthened. The confidence in the Courts of Justice, which the people possess, cannot in any way be allowed to be tarnished, diminished or wiped out by contumacious behaviour of any person. The only weapon of protecting itself from the onslaught on the institution is the long hand of Contempt of Court left in the armory of judicial repository which, when needed, can reach

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[6] In Indian Constitution, Article 129, makes the Supreme Court the 'Court of Record'. A court of record is one whose records and judicial proceedings are preserved for perpetual memory having evidentiary value binding on all other Courts. Thus the Supreme Court shall be a court of record and shall have all the powers of such Court including the power to punish for contempt of itself. Article 215 of the constitution of India also says that, "every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself."

[7] *Sukhdev Singh Sodhi* v. *Chief Justice and Judges of the PEPSU High Court,* AIR 1954 SC 186.

[8] *Asharam M. Jain* v. *A. T. Gupta,* AIR 1983 S.C. 1151.

[9] William Benton, *The Encyclopedia Britannica* (Encyclopedia Britannica, Inc., London, 15th edn., 1974) p. 167.

any neck howsoever high or far away it may be.[10] But the contempt jurisdiction which is extraordinary in its character should not be used for the personal protection of judges. This jurisdiction is applied against any authority or person whenever there is any kind of interference in the administration of justice. The judiciary uses the weapon of contempt jurisdiction to maintain the supremacy of law when interference is caused by the executive or the individual or the press.[11]

The stature of the judicature is so high and its powers so wide that any action designed to debunk, defile or denigrate the great dignity and impartial integrity of the institution is regarded as an invasion on the people's faith in the Court's fearless, bias-free, favour-free functionalism and its solemn credibility as a constitutional instrumentality of justice. Hence, any attempt to shake the people's confidence in the courts, amounts to striking at the very root of the system of democracy, and deserves to be condemned.[12]

The imperatives for the judiciary in India are obvious. It has a duty to protect, promote and fulfill the constitutional guarantees. The judiciary must be open and transparent with a clear conscience that it is not beyond criticism. For this, it must be accountable to the people, which it is bound to serve. The judiciary in India is the last hope of a fragmented society. When it fails to respect its responsibilities, it will bring insurmountable peril to the country and its people.[13]A judicial scandal has always been regarded as far more deplorable than a scandal involving either the executive or the legislature. The American Bar Association recognized in the canons of professional ethics that judicial conduct is a matter of importance far beyond the courtroom. Its conduct has a direct impact upon the life of ordinary people.

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[10] Aiyer's, *Law on Contempt of Courts with Law on Contempt of Parliament, State Assemblies and Public Servants* (Delhi Law House, Delhi, 3rdedn., 2004) p. 20.

[11] K. Balasankaran Nair, *Law of Contempt of Court in India* (Atlantic Publishers and Distributers, New Delhi, 2004) p. 9.

[12] Surinder Puri, *Iyer's Law on Contempt of Court* (Delhi Law House, Delhi, 2004) p.25.

[13] Bijo Francis "India's judiciary is not a holy cow" *Column: Incredible India* (June 09, 2008).

Evolution of the Law of Contempt

Although essentially the law of contempt has its origin in English law, it is not entirely an imported concept. The age old systems to protect courts or assemblies (*sabhas*) point to an indigenous development of contempt law. In his epoch making manual on governance, *Arthashastra,* Kautilya wrote, "Any person who insults the King, betrays the King's council, makes evil attempts against the King shall have his tongue cut off."[14] Further, he said, "When a judge threatens, browbeats, sends out or unjustly silences any one of the disputants in his court, he shall first of all be punished."[15] Interestingly, the scheme aimed to protect, against the violation of the administration of the King's Justice not only protected those administering it but also those for whose benefit it is administered. Contempt law has ancient origins and has evolved over time through various phases of the monarchical legal system and one can in fact find the genesis of the concept in the prehistoric divine origin theory[16] and also the more recent theory of the Social Contract.[17] As the primary function of the early Monarch was protection of his subjects and consequently administration of justice, it was of utmost importance that his position should be beyond question.[18] As society evolved, the authority of the king came to be vested in the office of the Judge who performed the functions as per the delegated mandate. If the authority of the king is beyond question, so should be the authority of the

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[14] V. G. Ramachandran, *Contempt of Court* (Eastern Book Company, Lucknow, 1976).

[15] *Ibid.*

[16] The theory of Divine Origin of the state is the oldest theory concerning the primary origin of state, according to which, the state is established by a Supreme Being, i.e., God, who rules the state directly or indirectly through someone regarded as an agent. This theory provided the foundation for most ancient and medieval monarchies.

[17] Social Contract describes a broad class of legal and political theories, whose subjects are implied agreements by which people agree to maintain a certain social order. Such social contract implies that the people give up some rights to a government and other authority in order to receive or jointly preserve social order. Its main proponents are Thomas Hobbes, John Locke and Jean-Jacques Rousseau. (Later day thinkers like John Rawls are also regarded by some scholars as being amongst the social contractualist.)

[18] J. F. Oswald, Contempt of Court 1 (1911).

Judge who is a direct representative of the king himself. If the King's authority could not be questioned, then authority of the Courts could not be questioned, too.[19] If the King could not be abused or scandalized, so also the Courts could not be abused or scandalized. Hence, it is clear that the law of Contempt of Court has ancient roots and has evolved through the ages.

The law of contempt received statutory recognition in the form of the *Contempt of Court Act, 1926.* Since it was not a comprehensive piece of legislation it was replaced by the *Contempt of Court Act 1952.* However the scope of the 1952 Act was not wide enough to define as to what constitutes contempt of the court. The *1952 Act* was repealed and replaced by the *Contempt of Court Act 1971* upon the recommendation of the committee set-up in 1961. The Committee under the chairmanship of the late Shri H.N.Sanyal, the then additional Solicitor General made a comprehensive examination of the law and problems relating to contempt of court in comparison with various foreign countries.[20]

Analysis of the *Contempt of Court Act 1971*

The law of contempt is primarily designed to balance the freedom of expression with the judiciary's quest to maintain its authority and safeguard public order. Initiation of contempt proceedings is not a substitute for execution proceedings, though at times that purpose might also be achieved. However, a decree holder who does not take steps for execution of the decree in accordance with the prescribed procedure, should not be encouraged to initiate contempt proceedings for the same purpose[21]. Broadly speaking, contempt of court falls into three general areas:

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[19] Thomas Mcintyre Cooley, "Blackstone's Commentaries on the Laws of England: in Four Books" 168 (2003).

[20] With the purpose of consolidating and amending the law relating to contempt of court, the Ministry of Law had set up a Committee in July, 1961 under the chairmanship of Shri H.N. Sanyal, the then Additional Solicitor General of India. This committee submitted its report on February 28, 1963.

[21] *Supra* note, 4, p.34.

- Violation of an order of a Court,
- Interference in the judicial process, and
- Criticism of a judge, his or her judgment, or the institution of the judiciary.

Defining Contempt

Contempt in its simple literal meaning is disgrace, scorn or disobedience.[22] Contempt in its legal conception means disrespect to that which is entitled to legal regard.[23] The difficulty and vagueness start at the definition stage itself. It is in fact the feeling of a person towards another person or thing that he considers despicable. The contempt is disrespect to the court or legislative body or the persons connected with Courts or parties to the proceedings or legislative body.[24] The expression 'Contempt of Court' has been a recognised phrase in English law from the 12th century.[25] If administration of justice has to be effective, respect for its administration has to be fostered and maintained and it is out of rules framed by Court in this behalf that the law of contempt has grown. From rudimentary rules devised for the limited purpose of securing obedience to the orders of courts, they evolved in the course of time to elaborate and far reaching doctrines and extraordinary procedures. Right till the present century, these doctrines and procedures were never subjected to legislative scrutiny with the result that the law of contempt had, as it were, a wild growth. Each new precedent was not declaratory but creative of law. Each new type of attack on the administration of justice received a corresponding elaboration or extension of the contempt law. As Craies has said, "the ingenuity of the judges and of those who are concerned to defeat or defy justice has rendered contempt almost protean in its character".[26] And even now it

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[22] Tekchand J., *The Law of Contempt of Court and of Legislature* (The University Book Agency, Allahabad. 4th edn., 1997)

[23] *In Re Kaluram,* AIR 1966 M.P. 342 .

[24] *R.*v. *Williams Thomas Shipping Co. Ltd.* (1930) 2 Ch. 368.

[25] As paraphrased from Sir John Fox, *History of Contempt of Court* (Clarendon Press, Oxford, 1927) pp.1-32.

[26] Arthur L. Goodhart, "Newspapers and Contempt of Court in English Law" 48 (6) *Harvard Law Review* (Apr. 1935) pp 885-910 p. 886.

may well be said the categories of contempt are not closed.[27] The result is that there are contempts and contempts ranging from mere disobedience to orders of Court and involving only a wrong of a private nature as between the parties to a suit at one end and contempts involving physical violence or large-scale blackmail or mudslinging by means of publication[28] on the judge at other end.

It is for these reasons that judges and jurists have not succeeded in formulating a comprehensive and complete definition of the concepts of Contempt of Courts. The Shawcross Committee observed:

"Not the least of difficulties in this field (definition) is that contempt, being a growth of the common law, has no authoritative definition or limitation it can be defined in the most general terms."[29]

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[27] For example; *Pratapsingh* v. *Gurbaksh singh* Cr.Appeal Nos; 128 and 129 of 1959, where the Supreme Court by a majority held that a disciplinary proceeding instituted while a case is pending under the authority of an executive instruction (as distinguished from a condition of service) which required a Government servant to exhaust all his executive remedies before resorting to a court of law amount to contempt of court.

[28] In the words of Blackstone, "some of these contempt may arise in the face of court; as by rude and contumacious behaviour; by obstinacy; perverseness or prevarication; by breach of the peace or by willful disturbance whatever; others in the absence of the party; as by disobeying or treating with disrespect the king's writ or the rules or process of the court by perverting such writ or process to the purposes of private malice, extortion or injustice by speaking or writing contemptuously of the court, judges acting in their judicial capacity by printing false account (or even true ones without proper permission) of causes then pending in judgement and by anything, in short, that demonstrates a gross want of that regard and respect which, when ones courts of justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost among the people (Blackstone's commentaries Vol. IV at p.285).

[29] Shawcross Committee Report at p.4.

This Committee was constituted under the chairmanship of Lord Shawcross by the International Commission of Jurists (British Section) which found that the law of contempt was unsatisfactory in quite a few important respects and also made recommendations in 1959. *The Administration of Justice Act 1960* was based on recommendation of this very committee.

The definition of 'contempt' cannot be exhaustive. The fortiori what is contumacious is for the Court to decide. Its discretion cannot be confined within the four walls of a definition.[30] In the words of one of our own judges, it is indeed difficult and almost impossible to frame a comprehensive and complete definition of Contempt of Court. The law of contempt covers the whole field of litigation itself. The real end of judicial proceeding, civil or criminal, is to ascertain the true facts and dispense justice. Anything that tends to curtail or impair the freedom of the limbs of judicial proceeding must of necessity result in hampering the due administration of law and in interfering with the course of justice.[31]

Contempt of Court is not defined anywhere with precision. To quote Oswald's 'Contempt of Courts':

"Contempt of Court is so manifold in its aspects that it is difficult to lay down any exact definition of the offence.[32] As it appears from the old cases, the term 'Contempt' in its legal acceptance, primarily signifies disrespect to that which is entitled to legal regard; but as a wrong purely moral or affecting an object not possessing a legal status, it has in the eyes of the law, no existence. In its origin, all legal contempt will be found to consist in an offence more or less direct against the sovereign himself, as the fountain- head of law and justice or against his Palace, where justice was administered."[33]

Further he says:

It is not that it was not possible to define, but the definition cannot be exhaustive. Contempt of Court may be said to be constituted by any conduct that tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with or prejudice parties, litigant or their witnesses during the litigation. The Court may be scandalised or humiliated in a number of ways sometimes

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[30] *Ahmed Ali* v. *Superintendent, District Jail, Tezpur*, 1987 Cr.L.J. (1845) (Gau.).

[31] Sanyal Committee Report (1963) IV Ch., Para 1.

[32] *Miller* v. *Knox*, (1878) Bing N.C. 574, Per William J. at p.589,

[33] Oswald's, *Contempt of Courts* (Butterworth & Company, 3rd edn., 1910) p.1.

intentionally, sometimes unknowingly. Hence, except for general guidelines, no exhaustive definition has been attempted; judicial decisions are the only guide in deciding the question, as to whether the act complained of amounts to "Contempt of Court".[34]

However, the term "Contempt" has been defined under the *Contempt of Court Act,* as follows:

According to Sec. 2, the *Contempt of Court Act 1971* means:-

(a) "Contempt of Court" means civil contempt or criminal contempt;

(b) "Civil contempt" means willful disobedience to any judgment, decree, direction, order, writ or other process of a Court or willful breach of an undertaking given to a Court;

(c) "Criminal contempt" means the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which—

(i) scandalizes, or tends to scandalize, or lowers or tends to lower the authority of, any Court; or

(ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or

(iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner;

From the Preamble to the *Act of 1971*, it is clear that it is not the dignity of individual judges that the Act seeks to protect, but the administration of justice and judicial proceedings.[35] The *Contempt of Court Act* is introduced in order to prevent unjust and unfair trials. No publication, which is calculated to poison the minds of jurors, terrorize witnesses or parties or to create an atmosphere in which the administration of justice would be difficult or impossible, amounts to contempt.

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[34] *Ibid.*, pp.5-6.

[35] *Brahma Prakash Sharma* v. *State of Uttar Pradesh*, AIR 1954 SC 10, 13.

The juristic question regarding the object of contempt law has been variously interpreted. An early common law judgment, believed to be the *locus classicus* on the subject of contempt by attacks on judges, is one prepared by Sir Eardley Wilmot in the case of *R.* v. *Almon*,[36] in 1765. Almon had published a pamphlet allegedly libeling the Kings Bench. The judgment, which has been largely accepted as correctly stating the law said:

"Arraignment of the justice of judges is arraigning the king's justice, it is an impeachment of his wisdom and goodness in the choice of his judges, and excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them. To be impartial, and to be universally thought so are both absolutely necessary for justice and which so eminently distinguishes and exalts it above all nations on earth."

The question that needs to be addressed here is, whether this immunity is justified even if the judges compromise on impartiality, which is the most basic quality he is expected to follow. If the courts themselves have in people's opinion compromised justice, do they still deserve absolute privilege against criticism? The view that justice is not a cloistered virtue and therefore, must be allowed to suffer the scrutiny and respectful, even if outspoken comments of ordinary people, has been accepted.[37]

In fact, the principal objective of the parliament in enacting the *Act of 1971* is to "define and limit the power of certain Courts, in punishing Contempt of Courts and to regulate their procedure in relation thereto."[38] The Apex Court has captured this objective spirit of the enactment, when Sabharwal J. issued a call to the judges.[39]

"A question whether there is Contempt of Court or not is a serious one. The Court is both the accuser as well as the judge of the accusation. The Court

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[36] (1765) Wilm. 243.

[37] *In Re BholaNath*, AIR 1961 Pat 1, 8.

[38] The *Act of 1971* replaces and repeals the *Contempt of Courts Act 1952*.

[39] AIR 2005 SC at p. 2480 para (25).

has to act therefore with a great circumspection. It is only when a clear case of contemptuous conduct not explainable otherwise arises then the contemnor must be punished."

In a similar strain, Chief Justice P.B. Gajendragadkar[40] had expressed, "We ought never to forget that the power to punish for contempt large as it is must always be exercised cautiously, wisely and with circumspection. Frequent or indiscriminate use of this power in anger or irritation would not help to sustain the dignity or status of the Court, but may sometimes affect it adversely. If judges decay, the Contempt Power will not save them and so the other side of the coin is that judges, like *Caesar's* wife, must be above suspicion.

The Courts must realize that the best way for the Court to protect its image is not by unleashing the contempt whip, but by a thorough and gradual process of self introspection. This understanding has been succinctly surmised by Lord Denning in *R* v. *Commissioner of Police of the Metropolis, Ex parte Blackburn (No. 2),*[41]

"Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself. It is the right of every man, in Parliament or out of it, in the press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest..."

Justice Black of the U.S. Supreme Court who wrote in 1941: "The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited solely in the name of preserving the dignity of the bench, would probably

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[40] AIR1965 SC 745

[41] (1968) 2 QB 150.

engender resentment, suspicion and contempt much more than it would enhance respect."

Justice Douglas in the landmark case of *Craig* v. *Harney*,[42] observed that:

"The law of contempt is not made for the' protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate." Similarly Lord Morris in *Macleod* v. *St. Aubin,*[43] very rightly observed that the power summarily to commit for contempt is considered necessary for the proper administration of justice. It is not to be used for the vindication of a judge as a person. In that case he must resort to action for libel or criminal information.

Justice AmuaSekyi of the Supreme Court of Ghana who wrote that "courts must have regard to the right of every person to express himself freely and openly on all matters of public concern whether pertaining to the actions of the executive, the legislature or the judiciary. The ordinary laws of libel were the only check on any abuse of the right of free speech in circumstances such as these." (dissenting judgment in the *Republic* v. *Mensa Bonsu* case).[44]

Scandalisation of the Court is a species of contempt and may take several forms. A common form is the vilification of the judge. When proceedings in contempt are taken for such vilification is of the Judge as a judge or it is the vilification of the Judge as an individual. In *Queen* v. *Gray*,[45] it was rightly observed that if the vilification is of the judge as an individual then the Judge is left to his private remedy and the Court has no power to commit for contempt. If the vilification is of the Judge as Judge then the court will proceed to exercise the jurisdiction with scrupulous care and in cases, which are clear, and beyond reasonable doubt.

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[42] 331 US 367,376 (1947).

[43] (1899) A.C. 549.

[44] Zahid F. Ebrahim is an advocate of the High Courts in Pakistan, and a faculty member of the S.M. Law College at Karachi University. This is an edited version of an article written for "Interights and Article 19's Joint Litigation Project on Freedom of Expression" 16(20) *Frontline* (Sep. 25 - Oct. 08, 1999).

[45] (1900), 2 QB 36.

Press, Free Speech and Contempt of Court in India

Free press[46] is the hallmark of a democratic society. Though freedom of speech and expression include freedom of the press also,[47] it has no special privileges, which are enjoyed by the legislature"[48] or the head of the state.[49] Free Press has always been in the heart of India's body polity.[50] In a democracy fair criticism of the working of all the organs of State should be welcome and would in fact promote the interests of democratic functioning. The right of fair criticism provides that a person shall not be guilty of Contempt of Court for publishing any fair comment on the merits of the case which has been heard and finally decided.[51] Judges and Courts are not unduly sensitive or touchy to fair and reasonable criticism of their judgments fair comments even if outspoken but made without maturity or attempting to impair the administration of justice and made in good faith in proper language do not attract any punishment for contempt of court.[52] Chief Justice Sabyasachi Mukherjee observed, in *Shiv Shanker's* case[53] to criticize a Judge fairly albeit

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[46] According to R.C.S. Sarkar, freedom of the Press has three important elements. They are, freedom of publication, freedom of circulation and freedom of access to all sources of information. R.C.S.Sarkar, *The Press in India, 1984*.p.35.

[47] *RomeshThappar* v. *State of Madras*, AIR 1950 SC 124; Also *See, Brij Bhushan* v. *State of Delhi*,AIR 1950 SC 129.

[48] Art. 105 of the Constitution guarantees special privileges to Parliament and its members, which include freedom of speech, immunity from legal proceedings for anything said in Parliament and also for the publication made under the authority of Parliament. Corresponding provision with regard to state legislature is contained in Art. 194.

[49] Art. 59 and Article 158 and the Second Schedule of the Constitution of India guarantee certain privileges to the President of India and Governor of a State.

[50] Even long before independence of India, Pandit Jawaharlal Nehru, the first Prime Minister of free India, protesting against *Press Act 1910* asserted "I would rather have a completely free press with all the dangers involved in the wrong use of that freedom than a suppressed or regulated press".

[51] *Vincent Panikulangara* v. *Gopala Kurup,* 1982 Cr.L.J .2094.

[52] *In Re RoshanLalAhuja,* 1993 Supp 4 SCC 446.

[53] AIR 1988 SC 1208.

fiercely, is no crime but a necessary right. Where freedom of expression sub serves public interest in reasonable measure, public justice cannot gag it or manacle it.

The debate of the overriding effect of the contempt law over the fundamental right under Article 19(1) (a) has been a burning issue among jurists, policy makers and reformists. In *E.M.Sankaran Nambbodiripad* v. *T. Narayanana Nambiar*[54] it has been held that while Article 19(1) (a) guaranteed the freedom of speech and expression, Article 19(2) showed that it was also intended that contempt of court should not be committed in exercising that right. The liberty of free expression is not to be compounded with license to make unfounded allegations of corruption against the judiciary. The abuse of the liberty of free speech and expression carries the case nearer the law of contempt.[55] The Contempt of Court jurisdiction is exercised not to protect the dignity of an individual judge but to protect the administration of justice from being maligned.[56]

However it is observed in the recent past that judges were assigning to themselves the task of reviving their self-esteem under the guise of judiciary dignity, curbing the fundamental right to speech which includes fair criticism. The Supreme Court in *Rajesh Kumar Singh* v. *High court of Judicature of Madhya Pradesh, Gwalior Bench*[57] severely criticized judges for assigning to themselves the task of resurrecting the judiciary's dignity and observed that judges think the judiciary's dignity is so brittle that it crashes the moment a judgment is criticized or a judge's integrity is questioned. While dealing with the matter, Justices RV Raveendran and Lokeshwara Singh Panta opined, "Judges, like everyone else, will have to earn respect. Court should not readily infer an intention to scandalize Courts or lower the authority of Courts unless such intention is clearly established." Freedom of the press is basically the freedom of the individuals to express themselves through the media or the press.[58] *In re Harijai Singh and Anr*[59] the Supreme Court has

[54] AIR 1970 SC 2015: 1970 (2) SCC325

[55] *M.R.Prashar* v. *Dr. Farooq Abdhullah* (1) 1984 Cr. L.C. 433.

[56] *Supreme Court Bar Association* v. *Union of India & Others*, AIR 1998 SC 1895.

[57] AIR 2007 SC 2725.

[58] *Srinivas Mohanty* v. *Dr. Radhanath Rath,* (84) 1997 *CLT* 648.

[59] AIR 1997 SC 73.

pointed out that a free and healthy press is indispensable to the function of a true democracy but, at the same time, cautioned that the freedom of Press is not absolute, unlimited and unfettered at all times and in all circumstances.

According to Lord Atkin's, "Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny of respectful, even though outspoken, comments of ordinary men.[60] Lord Denning in his Book "Road to Justice" observed that Press is the watchdog to see that every trial is conducted fairly, openly and above broad but the watchdog may sometimes break loose and has to be punished for misbehaviour.

Justice Cardozo[61] of the United States Supreme Court described freedom of expression as "the matrix, the indispensable condition, of nearly every other form of freedom." Yet, in many countries, the courts of law, the ultimate guarantors of free expression, have found it difficult to come to terms with free speech critically directed at the courts themselves.

Justice Felix Frankfurter a celebrated jurist and judge observed in *Pennekamp* v. *Florida.*[62] If men, including Judges and journalists were angels, there would be no problems of Contempt of Court. Angelic Judges would be undisturbed by extraneous influences and angelic journalists would not seek to influence them. The power to punish for contempt, as a means of safeguarding Judges in deciding on behalf of the community as impartially as is given to the lot of men to decide, is not a privilege accorded to Judges. The power to punish for Contempt of Court is a safeguard not for Judges as persons but for the function which they exercise." Further, he observed "A free press is not to be preferred to an independent judiciary, nor an independent judiciary to a free press. Neither has primacy over the other, both are indispensable to a free society. The freedom of the press in itself presupposes an independent judiciary through which that freedom may, if necessary, be vindicated. And one of the potent means for assuring judges their independence is a free press".

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[60] *Ambard* v. *Attorney General of Trinidad and Tabago* (1936) AC322,335.

[61] *Palko* v. *Connecticut* (1937),

[62] (1946) 90 Led 1295 at p.1313.

Mr. Soli Sorabjee, Ex Attorney General justified robust criticism of judgments; however, severe and painful, as necessary for effective functioning of the judiciary under a democratic set-up. An "activist judiciary", that intervenes in public matters to provide a corrective to a corrupt, dysfunctional executive, surely has to be more, not less accountable. To a society that is already convulsed by political bankruptcy, economic distress and religious and cultural intolerance, any form of judicial intolerance will come as a crippling blow. If the Judiciary removes itself from public scrutiny and accountability, and severs its links with the society that it was set up to serve in the first place, it would mean that yet another pillar of Indian democracy will crumble. A judicial dictatorship is a fearsome prospect as a military dictatorship or any other form of totalitarian rule.[63] Should Courts become intolerant of criticism or expressions of dissent, it would mark the beginning of the end of democracy.

Power of Contempt of Court *vis-à-vis* Truth as Defence

The courts in India, have time and again denied the defence of truthfulness or factual correctness in the law of contempt. However, such justification is a complete defence to an action for libel. This kind of an attitude of the Indian Courts has its roots in the pre independence days when even the decisions of the Courts were largely guided by colonial interests.[64] Such attitude continued even after independence as can be observed in the case of *Advocate General* v. *Seshagiri Rao*.[65] The inherent flaw in such an approach of the judiciary was realized, by the National Commission to Review the Working of the Constitution (NCRWC) headed by the distinguished former Chief Justice of India, M.N. Venkatachaliah, in its report stated Judicial decisions have been interpreted to mean that the law as it now stands, even truth cannot be pleaded as a defence to a charge of Contempt of Court. This is not a satisfactory state of law.[66] A total embargo on truth as justification

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[63] *In re Arundhati Roy* AIR 2002 SC 1375.

[64] *In re Tushar Kanti Ghosh. Editor, Amrit Bazar Patrika, and Anr.,* AIR 1935 CAL 419 (FB).

[65] AIR 1966 AP 167.

[66] Report of the National Commission to Review the Working of the Constitution (Universal Law Publishing Co. Pvt. Ltd. Delhi) p.139.

may be termed as an unreasonable restriction. It would, indeed, be ironic if, in spite of the emblems hanging prominently in the court halls, manifesting the motto *'Satyameva Jayate'* in the High Courts and *'Yathodharmastathojaya'* in the Supreme Court, the Courts could rule out the defence of justification by truth. The Commission is of the view that the law in this area requires an appropriate change.[67] The Committee further recommended that an appropriate amendment by way of addition of a proviso to Article 19(2) of the Constitution to the effect that, in matters of contempt, it shall be open to the Court on satisfaction of the bona fides of the pleas and of the requirements of public interest to permit a defence of justification by truth.[68]

Nevertheless after a long period of anticipation, *The Amendment Act of 2006* made a significant change in the Act itself by providing in Section 13 of the Act that justification by truth can be a valid defence if the Court is satisfied that it is in public interest and the request for invoking the said defence is *bona fide*.[69] Though truth is made a defence in 2006 amendment to *The Contempt of Court Act 1971* woos of critics of the judiciary is unending, because the defence is made conditional and again left to the discretion of the judges. This discretionary power of the Court was utilised in the *Mid-Day Newspaper* case[70] and the contemnors were denied the defence of truth. This was despite the fact that it was inappropriate on the part of the then Chief Justice to preside upon a Bench taking a decision which had a direct bearing upon the business fortunes of his sons; which may clearly seem to be a case of nepotism in the eyes of the public even if it was not so in reality. Thus, the fact remains that the Court turned down a *bona fide* request for availing the said defence irrespective of the fact that it was a newspaper report in public interest. However, the action taken against the newspaper once again raised doubts in the minds of the common man regarding the propriety of the Contempt jurisdiction of the Court.

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[67] *Supra* note, 63, p.140.

[68] *Ibid.*, p. 77.

[69] Section 13(b) *The Contempt of Courts Act* 1971.

[70] *Court on its Own Motion* v. *M.K. Tayal and Ors.*, MANU/DE/8520/2007.

Distinction between Defamation and Contempt of Court

A defamatory statement upon the conduct of a judge in respect of his judicial duties may certainly come under Section 499 of *Indian Penal Code* and it may be open to judge to take steps against the libeler in the ordinary way for vindication of his character and personal dignity as a judge; but such defamatory statement may or may not amount to Contempt of Court, which is something more than mere defamation and is of different character. In defamation, injury is to a private individual whereas in Contempt of Court the injury is to the public at large. What is made punishable in the *IPC* is the offence of defamation; as defamation and not as Contempt of Court. However, if defamation of a court/judge amounts to contempt of court, proceeding can certainly be taken under *the Contempt of Courts Act*, quite apart from the fact that other remedy may be open to the aggrieved officer under Section 499, of *Indian Penal Code.*

The fact that a statement is defamatory so far as the judge is concerned does not necessarily make it contempt. The distinction between a libel and contempt was pointed out by a committee of the Privy Council, in the 'famous case of *Ambard* v. *Attorney-General for Trindad and Tobago*,[71] to which a reference was made by the Secretary of State in 1892. The facts of the case in brief are that a man in the Bahama Islands, in a letter published in a colonial newspaper criticized the Chief Justice of the colony in an extremely ill chosen language which was sarcastic and pungent. There was a veiled insinuation that he was an incompetent judge and a shirker of work and writer suggested in a way that it would be a providential thing if he were to die. A strong board constituting of 11 members reported that the letter complained though it might have been made the subject of proceedings for libel, was not, in the circumstances, calculated to obstruct or interfere with the course of justice or the due administration of the law and therefore did not constitute a contempt of court.It was followed and approved by the High Court of *Australia in King* v. *Nicholls.*[72]

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[71] 1936A.C. 322.

[72] 12 Com LR 280.

The same principle was reiterated by Lord Atkin in the case of *Debi Prasad* v. *Emperor*.[73] In that case the appellant had suggested falsely that the Chief Justice of the Allahabad High Court had, in his administrative capacity, issued a circular to the Judicial Officers under, his jurisdiction enjoining on them to raise contributions to the war-funds which, it was said, would lower the prestige of the Court in the eyes of the people. In holding that the imputation did not constitute Contempt of Court but, at the most, a personal defamation of the Chief Justice in his individual capacity.

In one of the landmark judgment on the law of contempt of court in India, Justice Mukerhjee in *Bathinda Ramakrishna Reddy* v.*The State of Madras*,[74] speaking for a five judge bench (PatanjaliShatri C.J., Mehr Chand Mahajan, Mukherjee, Das Chandrasekhara Aiyar, J.J) observed that "A libeler's reflection upon the conduct of a judge in respect of his judicial duties may certainly come under Section 499 of *IPC* and it may be open to the judge to take steps against the libellor in the ordinary way for vindication of his character and personal dignity as a judge, but such libel may not amount to Contempt of Court" Justice Mukherjee in *Reddy's*,[75] case cited with approval, the observations made by Privy Council in *Surendra Nath Banerjee* v. *The Chief Justice and Judges of the High Court.*[76] The Privy Council said that although contempt may include defamation but an offence of contempt is something more than defamation and is of a different character. When the act of defaming a judge is calculated to obstruct or interfere with the due course of justice or proper administration of law it would certainly amount to contempt. The observations made by Justice Mukherjee in the *Reddy's* case were again applied in *Brahma Prakash Sharma* v. *State of Uttar Pradesh.*[77] Distinguishing defamation from contempt, Justice Mukherjee in Sharma's case[78]

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[73] AIR 1943 PC 202.

[74] 1952 SCR 425.

[75] *Ibid.*

[76] ILR 10 Col 109, p. 131.

[77] 1953 SCR 1169.

[78] *Ibid,* p. 1179.

observed that when attacks or comments are made on judge or Judges, disparaging in character and derogatory to their dignity, case should be taken to distinguish between what is a libel on judge and what amounts really to Contempt of Court.

The concept of Contempt of Court has evolved gradually. It has a very important role to play in the administration of Justice. Its object is not to protect corrupt Judges but to maintain independence of Judiciary. However, the contempt jurisdiction being of extraordinary nature should be sparingly used by the Courts.

Present Scenario

Threat of contempt has insulated the judiciary even further from any semblance of accountability. Veiled threats, *suo moto* notices, motions by advocates and advocate general against the journalists and politicians for Contempt of Court became common now-a-days.

The *Arundhati Roy* case[79] has been the focal point of any discussion on the contempt powers of the Court in recent times. After the final judgment on the Narmada dam, the Narmada Bachao Andolan (NBA) staged a *dharna* in front of the Supreme Court. A group of lawyers filed a FIR against Medha Patkar, Arundhati Roy and Prashant Bhushan alleging that they had shouted slogans against the Supreme Court and had hence committed Contempt of Court. The Court issued a notice asking why they should not be punished. All three respondents denied that they had committed any contempt and asserted that they had a right to criticize the judiciary and its decisions in exercise of their freedom of speech guaranteed by the Constitution. When that matter was heard, it was revealed that the petitions were frivolous, they suffered from various procedural flaws, and none of the charges made against any of the three respondents could be established. The Court had to concede that had its registry carefully scrutinized the petition, perhaps even a notice might not have been issued, and hence, the three persons were acquitted.

But the court took *suo motu* notice of the contemptuous statements contained in Arundhati Roy's affidavit and issued a fresh notice of contempt. Arundhati Roy

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[79] AIR 2002 SC 1375.

pointed out in her affidavit that there seemed to be an inconsistency in the approach of the Court to the urgency of the contempt proceedings in comparison to other serious issues.[80]

As a case in point, she mentioned the Tehelka scandal, where some political leaders were caught red-handed on the camera taking bribes from spurious arms dealers during a sting operation conducted by the news agency, Tehelka. Though that was an exceedingly grave issue concerning national security, the then Chief Justice of India refused to allow a sitting judge to head the judicial enquiry into that scandal on the ground that there were no judges available in the Supreme Court at that time. Arundhati Roy scathingly termed this reasoning as very ironical and cynical in comparison to the alacrity of the same Court when the issue of contempt arose against these three individuals. It was more so because the notices were issued based on an 'absurd, despicable, entirely unsubstantiated petition. The writer went further to say that such a response of the Court indicated a 'disquieting inclination on the part of the Court to silence criticism and muzzle dissent; to harass and intimidate those who disagree with it. There is certainly a certain amount of impertinence in the language used, but there is nothing to suggest that the writer imputed any *mala fides* to the Court. It was a mere suggestion, which on a sympathetic reading would appear completely inoffensive. However, the Court chose to react otherwise, and although it acted with no evil intention, it certainly did more harm to its reputation and credibility and Arundhati Roy was sent to jail for one day for Contempt of Court.

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[80] In her affidavit, Ms. Roy said, "On the grounds that judges of the Supreme Court were too busy, the Chief Justice of India refused to allow a sitting judge to head the judicial inquiry into the Tehelka scandal, even though it involves matters of national security and corruption in the highest places. Yet, when it comes to an absurd, despicable, entirely unsubstantiated petition in which all the three respondents happen to be people who have publicly — though in markedly different ways — questioned the policies of the government and severely criticised a recent judgement of the Supreme Court, the Court displays a disturbing willingness to issue notice."

It is clear to any reasonable mind, from the words used in the affidavit that the allegation was not that the Court was motivated, but that the Court allowed itself to be used as an agent to stifle criticism and dissent, by external elements who are motivated. It is clear from the context that Arundhati Roy had not tried to impute motives to the Court, and any harm to its reputation if any, was unintentional.[81] Admission of the contempt proceeding and subsequent conviction of Ms. Roy on these grounds brought the contempt powers of the Court under severe scrutiny.

In light of the *Arundhati Roy* case, we can have a better understanding of such travesties of justice when two earlier instances of contempt proceedings are compared. One being the *Shivshankar's* case[82] wherein harsh criticism of the judiciary was held not to be contemptuous; and the other is the *Namboodiripad's* case.[83] In the latter case, Namboodiripad had been convicted for contempt for a speech which was a pure theoretical statement on the role of the judiciary from a Marxist perspective. While criticizing the lack of a standard code for execution of contempt proceedings, the critics have pointed out that the fact that Shivshankar was a former judge of a High Court and later a minister in the central government was the difference between him and Namboodiripad. Zaheera Sheik, victim and witness of communal violence was imprisoned for contempt.[84] In 2007 the Court forced Vijay Shekhar – a journalist with a television news channel who exposed the caucus of a corrupt magistrate, his Court staff and some lawyers in Gujarat state in a "warrants for cash" scam – to apologize to the court or face a term in jail for Contempt of Court. The conviction and sentencing of journalists in Mid-Day newspaper case[85] in 2007 for publishing information about the conduct of Justice Sabharwal, a Supreme Court judge, had brought to the fore the issue of judicial accountability. But the issue soon died a natural death, since no one wanted to get

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[81] S.P. Sathe, "Accountability of the Supreme Court" *Economic and Political Weekly*, (April 13, 2002) p. 1383.

[82] *P.N. Dua* v. *P. Shiv Shanker and Ors.*, AIR 1988 SC 1208.

[83] *E.M. Sankaran Namboodiripad* v. *T. Narayanan Nambiar*, AIR 1970 SC 2015.

[84] AIR 2006 SC 1367.

[85] *Supra* note, 67

into trouble with the Court. This attitude is an extension of the Supreme Court's earlier "allergy" towards bringing transparency into the Indian judiciary.

The concept of public admiration is also one that needs to be examined, especially in the context of public response to media articles or television programmes. The recent *Wah India* case[86] brings to light how the gullibility of the readers is often overestimated, making the media vulnerable to the offence of 'Scandalizing the Court.' The basis for initiating contempt proceedings against the making an imputation that some Judges of the Delhi High Court were not perceived in the most honest light by some senior advocates whose ratings the magazine had collated. Essentially, the question boiled down to whether the ratings that senior advocates had assigned to judges based on parameters like integrity, understanding of law, and courtroom behaviour was challenging the credibility of the judiciary on the whole. Incidentally the overall ratings were not especially dramatic, as almost all judges secured more than 30 out of 60, and very few less than 40, out of the total of the 31 sitting judges who had been ranked. By accusing the magazine of questioning the credibility of the judiciary, it is clear the court perceived that the readers would be swayed by the results of this survey so much so that they would doubt its credibility far more than they would have earlier. This in itself is incredulous; all this survey did was to show a mirror to the inner workings of the judiciary and revealed discrepancies that are in fact present in all institutions. Rather than making a self-introspection into its flaws, the Court took exception to the survey. Ultimately, Madhu Trehan tendered an "unconditional and unqualified apology and expressed deep regret for the article published" and the court reserved its judgment in the case. However, what needs to be noted is that by overestimating the naivety of the public, or at least projecting itself as doing so, the Court in fact did more harm than good to its reputation. The 'scandalous' aspect of the entire episode was the unforgiving and uncalled for response of the court more than the survey that had been conducted.

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[86] *Shri Surya Prakash Khatri &Anr.*v. *Smt. Madhu Trehan and Others*, 2001Cri.L.J. 3476.

Another interesting case is *Amicus Curiae* v. *Prashant Bhushan.*[87] The lawyer-activist Prashant Bhushan appeared in the Tehelka magazine, where he alleged that some former Chief Justice of India had been corrupt, the Supreme Court issued notice for Contempt of Court, Bhushan filed a long and detailed affidavit in response to the notice, seeking to justify his comments. Months later, Bhushan's father, the venerated Shanti Bhushan, senior advocate and former Law Minister, filed an application in the same matter, seeking to be impleaded as a contemnor. The details of his allegations were submitted to the Court in a sealed cover. He demanded that the matter be heard by a Full Bench of the Supreme Court and not by a few judges "handpicked" by the then Chief Justice. He dared the judges to convict him saying that he would be happy to spend time in jail for the cause of judicial integrity. On *prima facie* satisfaction that there were sufficient grounds for taking action on its own motion, the Court initiated *suo motu* action by directing issue of notice to the Respondents.

The use of contempt jurisdiction in *Justice Karnan's* case[88] in place of a more protracted and often abortive process of impeachment may be attractive but it has far reaching consequences in the maintenance of constitutional balance between different organs of the government and their exclusive domain. Impeachment of a judge is a core premise of parliamentary sovereignty. The use of contempt jurisdiction in this case constitutes an insidious tip-toeing of the judiciary into what is a parliamentary prerogative. Recently, a three Judge Bench, headed by Justice Arun Mishra, took *suo motu* notice of tweet and issued notice of Contempt of Court to Mr. Bhushan" for undermining the dignity and authority of the Institution of Supreme Court in general, and the office of the Chief Justice of India in particular". The Bench coupled this with another tweet of Mr. Bhushan in which he says that in the last 6 years, democracy has been destroyed in India, and that historians will mark the role of the Supreme Court in this, especially the last 4 CJIs. It followed it up by listing yet another citation of contempt against Mr. Bhushan,

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[87] *Amicus curiae* v. *Prashant Bhushan,* (2010) 7 SCC 592.

[88] *Sri Justice S. C. Karnan* v. *Hon'ble Supreme Court of India,* AIR 2017SC, 3191.

this time in a 11-year-old case where he allegedly said in 2009 that half of India's last 16 Chief Justices were corrupt.

It is regrettable that judges believe that silencing criticism will harbour respect for the judiciary. On the contrary, surely, any efforts to artificially prevent free speech will only exacerbate the situation further. As was pointed out in the landmark U.S. case of *Bridges* v. *California*[89] "an enforced silence would probably engender resentment, suspicion, and contempt for the bench, not the respect it seeks". Surely, this is not what the Court might desire.

Already, contempt has practically become obsolete in foreign democracies, with jurisdictions recognising that it is an archaic law, designed for use in a bygone era, whose utility and necessity has long vanished. Canada ties its test for contempt to real, substantial and immediate dangers to the administration, whereas American Courts also no longer use the law of contempt in response to comments on judges or legal matters. The American Supreme Court judges were severely criticized for the judgment in *Bush* v. *Gore*[90] in the strongest and vilest terms by leading academicians in law journals. But no offence was taken or contempt initiated.

In England, too, from where we have inherited the unfortunate legacy of contempt law, the legal position has evolved. After the celebrated *Spycatcher* judgment was delivered in the late 1980s by the House of Lords, the British tabloid, the *Daily Mirror*, published an upside-down photograph of the Law Lords with the caption, "You Old Fools". Refusing to initiate contempt action against the newspaper, one judge on the Bench, Lord Templeton, reportedly said, "I cannot deny that I am Old; It's the truth. Whether I am a fool or not is a matter of perception of someone else. There is no need to invoke the powers of contempt."[91]

The U.K. Law Commission in a 2012 report recommending the abolition of the law of contempt said that the law was originally intended to maintain a "blaze of glory" around Courts. It said that the purpose of the offence was not

[89] 314 US 252(1941).

[90] 531 US 98 (2000).

[91] 1987 3 All ER 316.

"confined to preventing the public from getting the wrong idea about judges... but that where there are shortcomings, it is equally important to prevent the public from getting the right idea". Even when, in 2016, the *Daily Mail* ran a photo of the three judges who issued the Brexit ruling with the caption "Enemies of the People", which many considered excessive, the courts judiciously and sensibly ignored the story, and did not commence contempt proceedings[92].

Though this may be an expedient tool in deserving cases, the method is fraught with dangers of abuse in the future, which may unsettle the fine balance of separation of powers under the Constitution. It is well known that hard cases make bad laws and the exercise of contempt jurisdiction against a constitutional functionary in overlapping cases must therefore be conducted with necessary circumspection and caution.[93]

Nature of Contempt Proceedings

Contempt proceeding is *sui generis*. Contempt proceedings though not criminal, are of quasi-criminal nature. It has peculiar features which are not found in criminal proceedings. Contempt proceedings do not partake the character of a traditional list. In the legalistic sense a contempt proceeding is not a dispute between two parties but is "primarily between the court and the person who is alleged to have committed the Contempt of Court"[94] The contempt proceedings are peculiar because:

- Contempt of Court is not an offence within the meaning of section 4(2) of the criminal procedure code. The alleged contemnor is also not an accused within the meaning of section 5 of the *Indian Oaths Act 1873*. Similarly accused contemnor is also not a person accused of an offence within the meaning of Article 20(3) of the Constitution. An offence under the criminal jurisdiction is tried by a Magistrate or a judge and the procedure of trial is

[92] See 2018 AC 61

[93] Smita Chakraburtty, "The Curious Case of Justice Karnan" 52 (18) *Economic & Political Weekly* (6th May, 2017).

[94] *Supra* note, 3, p. 31.

regulated by the *Cr.P.C.* which provides an elaborate procedure for framing of charges, recording of evidence, cross-examination, argument and the judgment. But charge of contempt is tried on summary process without any fixed procedure as the court is free to evolve its own procedure. Neither *Cr.P.C.*[95] nor the *C.P.C.* provisions are strictly applicable to the contempt proceedings.

- The *Contempt of Courts Act* however, provides for procedures under Section 14, 15, 17 and 18. But, how far these statutory procedures if at all affect the inherent jurisdiction of the High Courts and their power to adopt their own procedure, or indeed, to follow their own procedures is still an open question.
- The procedure in contempt cases is summary, unaffected by the law of evidence. In *Supreme Court Bar Association* v. *Union of India,*[96] a Constitution Bench described the special jurisdiction to punish for contempt as an "unusual type" combining "*the jury, the judge and the Hangman*" and explained this apparent anomaly on the ground that the court was not adjudicating upon any claim between litigating parties.[97] Contempt proceedings do not partake the character of a traditional list. In the legalistic sense contempt proceeding is not a dispute between two parties but is "primarily between the Court and the person who is alleged to have committed the Contempt of Court".[98] The person who informs the court brings to the notice of the court that anyone has committed contempt if such Court is not in the position of a prosecutor. He is simply assisting the Court so that the dignity and the majesty of the court are maintained and upheld.[99]

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[95] *Sukhdev Singh* v. *Tej Singh* 1954 SCR 454.

[96] 1998(4) SCC 409.

[97] *Ibid* , p.429.

[98] *State of Maharashtra* v. *Mahaboob S. Allibhoy* 1996(4) SCC 411.

[99] *Supra* note, 90.

- In contempt cases, the judges have the power to decide in their own case. The Court can *suo motu* start the proceedings, and sometimes the Court expects the public prosecutor to lay the information. The judge in effect is the prosecutor, the witness and the Judge. Even as regards contempt, the decision as to whether an act or word substantially interfered with justice, or whether they qualify as free criticism, whether in fact truth can be a defence, is ultimately at the discretion of the judges themselves. Although this practice militates against the basic principles of natural justice, it has never really been questioned.[100]

Observations made by Jurists on Power of Contempt of Court in India

- Former Chief Justice Verma has said misuse of contempt power was reason for erosion of credibility of the judiciary.[101]
- Krishna Iyer, J. observed, "It has to be admitted frankly and fairly that there has been erosion of faith in the dignity of the Court and in the majesty of law and that has been caused not so much by the scandalising remarks made by politicians or ministers but the inability of the Courts of law to deliver quick and substantial justice to the needy."[102] "The contempt power is a case of survival after death; a vague, vagarious and jejune branch of jurisprudence, which is of ancient British vintage. It has colonially incarnated as part of the *corpus juris* of the Indian Republic"[103]

[100] There are two basic principles of natural justice:

(i) Audi alteram partem: No one shall be condemned unheard,

(ii) Nemo in propria causa judex, esse debet: No one shall be a judge in his own case *See*, I.P. Massey, Administrative Law 201 (2008). When deciding on contempt cases, the court itself decides on a matter in which it believes that it has been wronged, and is thus an aggrieved party. It is our understanding that the court when judging a contempt petition, amounts to violation of the second principle of natural justice being *'Nemo in propria causa judex, esse debet'*.

[101] Inaugural Address by Justice J.S. Verma, "Has the Judiciary turned its back on the poor? A report on Seminar (Indian Society for International Law, New Delhi, 4th November, 2006)

[102] *Baradakanta Mishra* v. *Registrar of Orissa High Court*, AIR 1974 SC 710

[103] *Mulgaokar's* case, AIR 1978 SC 727.

- As has been rightly said by Justice Markandey Katju, there is a lack of uniformity in contempt cases because even after 'contempt' was defined in *The Contempt of Courts Act 1971* there was no definition offered regarding 'what constitutes scandalizing the Court', or 'what prejudices, or interferes with the course of justice'. Thus there is still a huge scope left for the Court to intentionally or unintentionally utilize the power of contempt proceedings in an attempt to reassure itself of its authority and dignity. This is certainly not a welcome development at a time when there have been a number of instances of members of the judiciary being brought under the scanner for alleged nepotism and even corruption. The contempt power in a democracy is only to enable the Court to function effectively, and not to protect the self esteem of an individual judge.
- Evaluating the law relating to *The Contempt of Court Act 1971*, senior advocate Fali Sam Nariman pointed out that "The Law of Contempt –is it being stretched too far?" said the offence of scandalizing the court is a mercurial jurisdiction in which there are no rules and no constraints. Further, he pointed out that "It would be absurd to say that although Article 124 (4) provides for the removal of a judge for proved misbehaviour, no one can offer proof of such misbehaviour except on pain of being sent to jail for Contempt of Court". This is a glaring defect in our judge-made law, that needs to be remedied - hopefully by the judges themselves; if not, reluctantly then by Parliament."[104] He said the contempt jurisdiction "is mercurial, unpredictable and capable of being exercised differently in different cases and by different judges in the same court."
- Senior Advocate Rajeev Dhawan wrote: Following the Punjab revelations of judicial corruption case and the Karnataka 'sex' scandal implicating its High Court judges, both required investigation. Both revelations were sought

[104] C.L. Agarwal Memorial Law Lecture at Jaipur (December 2004).

to be silenced. How does one uncover judicial corruption and misbehaviour? There is no complaint mechanism. The moment an allegation is made against a judge, contempt notices may be issued. The Bar and the media are the best place to expose judicial corruption. If both are to be stifled, we will be left nowhere.[105]

- Arun Jaitley, former Law Minister, said he has been perturbed over the courts in India using their power of contempt to compel journalists to reveal their confidential sources. He said that legislative measures might become necessary to curb an improper use of the contempt power.

Points to ponder

In the light of the above study and research the following points are placed to ponder upon:

- There are two reasons for the uncertainty in the law of Contempt of Court. In *The Contempt of Court Act 1952* there was no definition of 'contempt.' Secondly, even when a definition was introduced by *The Contempt of Court Act 1971* (vide Section 2), there was no definition of what constitutes scandalizing the court or what prejudices, or interferes with the course of justice. What could be regarded as scandalous earlier may not be regarded as scandalous today and what could earlier be regarded as prejudicing or interfering with the course of justice may not be so regarded today.[106]
- The definition of the Contempt of the Court in the *1971 Act* is too exhaustive, leaving much to the discretion of the judge or judges in interpretation of what constitutes contempt of court, no specific guideline is provided under the definition so as to confine the judicial interpretation in the contempt proceedings. Thus there is still a huge scope left for the Court to intentionally or unintentionally utilize the power of contempt

[105] Rajeev Dhavan, "Contempt of Truth" *The Hindu* (December 13, 2002).

[106] 2007 Cri.L.JJour/16 XII Justice Markandey Katju, Judge, Supreme Court of India.

proceedings in an attempt to reassure itself of its authority and dignity. This is certainly not a welcome development at a time when there have been a number of instances of members of the judiciary being brought under the scanner for alleged nepotism and even corruption.

- Although modern law is thought to be rational and free from superstition and myth, we see that it often clings on to archaic conceptions of the Court, often misplaced in today's context. The law of contempt is an excellent example of this dichotomy between rationality and mythology surrounding the judiciary. The concept originated in English medieval monarchies as a way to preserve the unchallengeable authority of the king, who was believed to be the fountainhead of justice. The authority of God as the last word was believed to be manifested in him, the human sovereign. Therefore, in this new, 'democratic' era, this protection of the judiciary against criticism as well as the procedure for its trial appears problematic.
- The Parliament, while enacting *the Contempt of Courts Act 1971*, has clearly carved out certain exceptions to the exercise of the power of contempt. Section 3 of the Act takes a person out of the purview of contempt law if he has published any matter which interferes or tends to interfere with the course of justice in connection with any civil or criminal proceedings provided at the time of publication he had no reasonable grounds for believing that proceedings are pending. In other words, the want of knowledge of the criminal proceedings pending or imminent would be complete defense to a person accused of contempt on the ground that he has published any matter calculated to interfere with the course of justice in connection with such proceedings. Under Section 4, fair and accurate reporting of judicial proceedings is not contempt. Similarly, by virtue of section 5, even fair criticism of judicial act is not to be considered contempt.[107] And Section 13 of the Act that

[107] Virender Kumar, "Free Press and Independent Judiciary: Their Juxtaposition in the Law of Contempt of Court" 47 *Journal of Indian Law Institute* (2005) pp. 454-455.

justification by truth can be a valid defence if the Court is satisfied that it is in public interest and the request for invoking the said defence is *bona fide*.[108] Carrying out exceptions to contempt law shows the clear legislatures intent the prime purpose of enactment is to limit the scope and sweep of the contempt law rather than enlarging it.

- Further, in today's democratic era, judges are no longer acting on behalf of the king, and the higher authority sought to be protected by contempt law is not clearly described. Indirectly, the judges in fact get their authority from the people, and so it follows that at some level, they must remain answerable to them. This transformation in the political and social structure has given the judiciary an indispensable role: to remain completely independent and unbiased in the administration of justice for all. Thus, it appears strange and illogical that the basis of contempt law lies in the fact that it must protect the authority of the Courts in the eyes of people. It needs to be understood that in a democracy, the Courts derive their ultimate authority from the people, and a law muzzling dissent and criticism from the people defies all logic.

Conclusion

Contempt of Court has been described as 'The Proteus of the Legal World assuming an almost infinite diversity of forms[109]. Two questions need to be considered- the first being what the court aims to protect by this law, and second, what are the images of justice that it seeks to preserve. Now, *the Contempt of Courts Act 1971* defines criminal contempt as that which 'scandalizes the court' or 'prejudices judicial proceedings' without providing any explanation of these key terms. However it becomes clear that the vagueness of this term is not accidental, and coupled with the fact that judges are deciding their own case, this clause has

[108] Section 13(b) *The Contempt of Courts Act 1971.*

[109] Joseph Moskovitz, "Contempt of Injunction Civil and Criminal" 43 *Columbia Law Review* (1943) p.780.

led to many legal atrocities that have in fact lowered the reputation of the judiciary. The uncertainty of the law is justified by the need for flexibility; however the greater evil that comes with this, cannot be ignored. Although it is the administration of justice that this law aims to protect, it often ends up being used to protect individual judges. Furthermore, whether the dignity of the judiciary can be preserved by procedures that essentially contravene principles of fairness emerges as another dilemma.

One can understand the use of contempt penalizations for enforcement of law, but it is archaic to use it to silence the criticism in the name of scandalization. If criticism amounted to scandalization the individual judge should initiate action for defamation rather than using very highly, arbitrary, self-imposing, summary powers to punish for contempt. The honor of the judges, the judiciary and the state institution through which the judges are supposed to serve the people is promoted and protected by the openness of the judges and the judiciary to criticism. Intolerance to scrutiny and lack of openness equates the judges and the judiciary with a dictatorship. It should be obvious to anyone that respect for the courts cannot and does not depend on the existence of this power. It depends entirely on how the actions of the judges and the courts are perceived by the people.

The present law of contempt is of a colonial vintage and so our courts, like American courts, must restructure it to suit the ethos of the Constitution and functionally fit the values of free expression and other fundamental rights. It is time to tell the people that the independent inestimable judiciary is also part of our great democracy.

The insightful observations of Justice Frankfurter require to be always remembered: "Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions. Just because the holders of judicial office are identified with the interests of justice they may forget their common human frailties and fallibilities.... Therefore judges must be kept mindful of their limitations and their ultimate responsibility by a vigorous stream of criticism expressed with candor however blunt. ... Courts and judges must take their share

of the gains and pains of discussion which is unfettered except by laws of libel, by self-restraint and by good taste. ... Nor should restrictions be permitted that cramp the feeling of freedom in the use of tongue or pen regardless of the temper or the truth of what may be uttered.... Since courts, although representing the law, are also sitting in judgment, as it were, on their own function in exercising their power to punish for contempt... it is always better to err on the side of tolerance and even disdainful indifference."

One can do no better than refer to David Pannick and Judge Jerome Frank. "The judiciary is not the least dangerous branch of government. Judges are not 'mere lions under the throne.' They send people to prison and decide the scope and application of all manner of rights and duties with important consequences for individuals and for society, we should (in the words of Justice Oliver Wendell Holmes) 'wash ... with cynical acid' this aspect of public life. Unless and until we treat judges as fallible human beings whose official conduct is subject to the same critical analysis as that of other organs of government, judges will remain members of priesthood who have great powers over the rest of the community, but who are otherwise isolated from them and misunderstood by them, to their mutual disadvantage

As Chief Justice Warren Burger warned, "A Court which is final and unreviewable needs more careful scrutiny than any other. Unreviewable power is the most likely to self indulge itself and the least likely to engage in dispassionate self analysis.... In a country like ours, no public institution, or the people who operate it, can be above public debate. Our Courts have done so on many occasions. But there have also been instances of Courts being over sensitive which is neither necessary nor desirable. That is nothing but contempt powers being designed to try to maintain a good public image for the judiciary. The attitude and ability to shrug off is what is required and commendable!

In the light of this, it is felt that there is no place for contempt powers in a modern judicial system, and definitely not in the form it is currently manifested in. A more relaxed system will reflect greater confidence on the part of the judiciary,

and may find inspiration from the famous quote of Chief Justice Marshall of the US Supreme Court, "Power of judiciary lies not in deciding cases, nor in imposing sentences, nor in punishing for contempt, but in the trust, confidence and faith in the common man."

CONCEPT OF MEDICAL NEGLIGENCE, DEVELOPMENTS IN INDIA AND INHERENT LIMITATIONS

Prof. (Dr.) Sandeepa Bhat B.*

Abstract

Medical negligence as a concept is more spoken but less understood especially due to the absence of any set standard for its determination. Developing the jurisprudence on medical negligence requires knowledge in the areas of both medicine and law. Unfortunately, such a cross-discipline expertise is difficult to find. Indian experience of dealing with medical negligence cases has been far from satisfactory. After the Supreme Court's verdict to bring medical negligence cases within the purview of the Consumer Protection Act, there has been a tremendous increase in cases against doctors, paramedical staff and hospital authorities. As these cases are filed by the litigants before consumer fora for speedy relief, there is very little scope for detailed investigation. Majority of such cases reflect the ignorance of litigants as well as deciding authorities, and consequently, a via media is reached by awarding some compensation to complainants. This is resulting in more and more frivolous complaints in the zeal to obtain monetary benefits. On the contrary, the medical fraternity is going for medical indemnity insurance and defensive medicine practices, which are increasing the cost of medical services. Thus, the uncertainty in the determination of medical negligence cases in India is leading to a vicious circle of patients trying to get undue benefit by suing the doctors after the treatment, and doctors and hospitals charging the patients excessively to recover the cost of paying compensation in medical negligence cases.

Key words: ***Bolan test, Bolitho test, Consumer Protection Act,*** **Contract of Personal Service and Defensive Medicine.**

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Introduction

Human life, before the advancement of medical sciences, was fleeting due to several unseen life threatening diseases with no cure. With the advancements in medical sciences, there has been a remarkable turnaround in this position, resulting in marked improvement of conditions of human life, both quantitatively and qualitatively. The persons responsible for such turnaround (doctors in the eyes of patients) were revered by the society as God.[1] Doctors were held in high esteem in the society since they possessed the skills indispensable for saving human life, and in doing so, they rendered invaluable service to the society. In this backdrop, it was natural for the society to forget that doctors are also mortal beings and can err while carrying out their duties. Hence, many believe that the medical practitioner has cure for every bodily condition, and therefore, his failure to cure any disease would amount to medical negligence.

Though the above belief is one-sided, and is patently wrong, what amounts to medical negligence has been difficult to define in precise terms. The concept of medical negligence is meant to operate as a balancing point between high societal expectation and individual interest of doctors. The important point for consideration in medical negligence is the manner in which the doctor discharges his duties or conducts himself.[2] Whenever a patient approaches a doctor, the former would be under the belief that the latter possess special knowledge and skill to treat him, and under such circumstances the doctors are impliedly under a legal duty to exercise due diligence and act in conformity with the prevailing medical standards in treating the patient. The concept of medical negligence is based on the premise that the

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1 The traditional belief in India is reflected in the statement "*Vaidyo narayano harihi*", which means that a doctor is God's incarnation. See Bhaskara P. Shelley, "Preserving the Passion and Attractions of Clinical Medicine: Shaping the Medical Students of the Future" 5(2) *Archives of Medicine and Health Sciences* (2017) pp. 145 - 153 at p. 145.

2 Anoop K. Kaushal, *Medical Negligence and Legal Remedies* (Universal Law Publishing Co. Pvt. Ltd., New Delhi, 3rd edn., 2004) p. 8.

doctor's failure to meet this basic requirement, much against the reasonable expectations of the patient, should not go unpunished.

Over the years, the judiciary has developed tests for the determination of medical negligence on case by case basis. Hence, it is pertinent to analyse those tests for first understanding the concept of medical negligence. Added to this, legal developments in India have also taken place in terms of providing remedy to the victims of medical negligence through different laws. But unfortunately, there are still certain practical concerns in this overlapping area of medicine and law. Therefore, it is pertinent to probe into the practical limitations of laws relating to medical negligence with a view to balance the interests and rights of patients with that of doctors.

Concept of Medical Negligence

The developments in medical science have given a wrong impression that every medical condition is treatable and any unsuccessful attempt in curing the patient would amount to medical negligence. Hence, it is significant to clarify that a doctor is not infallible and cannot be held liable for any and every instance of injury to a patient. He can only be held liable for medical negligence if he breaches the duty that he owes towards his patient and consequent to that the patient suffers any damage.[3]

The word 'negligence' is derived from the Latin word '*negligentia*', which means "not to pick up something".[4] The Black's Law Dictionary defines negligence as "The omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do. It must be

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3 S. V. Joga Rao, "Medical Negligence Liability under the Consumer Protection Act: A Review of Judicial Perspective" 25(3) *Indian Journal of Urology* (Jul-Sep 2009) pp. 361 - 371 *available at* <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2779962/>

4 *See* 'What Exactly is Negligence?', *available at* <https://www.ledgerlaw.com/what-exactly-is-negligence/>

determined in all cases by reference to the situation and knowledge of the parties and all the attendant circumstances."[5] As per Lord Wright, "Negligence means more than heedless or careless conduct, whether in omission or commission; it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owed."[6]

In the Indian context, the actionable negligence in the field of medicine has been clarified by the Supreme Court in *Jacob Mathew* v. *State of Punjab*[7]. The Supreme Court quoted and endorsed the definition given in Law of Torts textbook authored by Ratanlal and Dhirajlal and mentioned that "Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property."

The above definitions indicate the fact that there are three major components of medical negligence. They are: (i) Defendant's legal duty of care, that is, the doctor's duty towards the patient, (ii) Breach of such duty, and (iii) Consequential damage. The existence of a legal duty towards the patient is presumed once the doctor undertakes to treat the patient. However, this legal duty is confined to use the best practices and standards in treating the patient and not to be misconstrued as an absolute duty to cure the patient from any medical condition. Hence, breach of the duty is to be understood from the perspective of deviation from established standards or practices of treatment, which is analysed and assessed through the established 'reasonable man test'. Damage and causation are also crucial ingredients in case of medical negligence, as cause of action would arise only when the complainant suffers damage consequent to the breach of legal duty on the part of treating doctor.[8] It is significant to note here that mere establishment of damage is

5 Definition of negligence, *available at* <http://thelawdictionary.org/negligence>

6 *See Lochgelly Iron and Coal Co.* v. *M. Mullan* (1934) AC 1; 77 Sol Jo 539.

7 (2005) 6 SCC 1.

8 Tushar Kumar Biswas, "Fallibility of God! Revisiting the Criminal Liability of the Medical Professionals for Negligence in India" 31 *Medicine & Law* (2012) pp. 405 - 417 at p. 410.

not sufficient, but the patient needs to establish that the damage is arising out of negligence of the doctor. In other words, the complaining party should establish that but for the negligence of the doctor; the patient would not have suffered damage.

Historical Development of the Concept

Early History

The origin of the concept of medical negligence is found as early as four thousand years back. *Code of Hammurabi*, which was developed in Babylonia approximately twenty centuries prior to the Christian era, is considered as the oldest known source where 'medical negligence' finds mention.[9] *Hammurabi*, the king of Babylon promulgated a law which mandated that a physician whose patient loses an eye as a result of a surgery should have to pay for it by having his hands chopped off. In ancient Egypt and Rome, physicians were punished with banishment or death for malpractice.[10]

The first ever recorded case on medical negligence under the English law has been *Stratton* v. *Swanlond*[11], which was in the year 1374. The plaintiff in this case had contended that he had suffered an injury in his hand as a result of alleged wrong treatment rendered by the defendant surgeon. However, the Court did not find the surgeon liable for negligence, since he had acted with due diligence. This judgment has served as foundation of modern medical negligence suits with the position that the compliance with the due care requirement is key for the doctors to escape from any liability for medical negligence.

The first ever case of medical malpractice resulting in recovery of damages is said to be during the reign of Henry IV (1367-1413).[12] The decision in this case

9 Karunakaranma Mathiharan, "Supreme Court on Medical Negligence" 31(2) *Economic and Political Weekly* (2006) pp. 111 - 115 at p. 112.

10 Tapash Kumar Koley, *Medical Negligence and Law in India, Duties, Responsibilities and Rights* (Oxford University Press, Oxford, 3rd edn., 2014) p. xvi

11 Y. B. 48 Edw. 3, fol 6, pl. 2 (1375) (Eng).

12 DeBance, Mich. 12 Hen. IV, m. 615, Yorks Arch. Soc. Rec., Ser. XVIII, p. 78 as cited in Theodore Silver, "One Hundred Years of Harmful Error: The Historical Jurisprudence of Medical Malpractice" *Wisconsin Law Review* (1992) pp. 1193 - 1241 at p. 1196.

was rooted in the standard of care to be followed by persons who practiced a "common calling"[13]. The standard of care to be employed by the medical practitioner as a skilled professional was that of another reasonably competent person practicing the same profession under similar state of affairs, and failure to comply with such standard of care resulted in action for trespass. Such standard of care in cases of common calling existed even in the absence of any express agreement entered into with the recipients of service.[14] Hence, in the field of medicine the duty to meet the standard of reasonable person begins from the moment the medical practitioner starts treating the patient.

Standard of Care

The determination of standard of care to be applied in medical negligence cases has developed through the judgments of English Courts. The decision in *Bolam* v. *Friern Hospital Management Committee*[15] started a new era in the determination of standard of care. In this case, the patient claimed compensation for injury suffered by him during the course of undergoing electro convulsive therapy. His argument was that there was a medical negligence in not giving him muscle relaxants and not restraining him during the course of therapy. He also argued that there was no warning given to him about the risk involved. However, the Court disagreed with the arguments of the plaintiff by relying heavily on expert opinion, which was though divided, held to be adequate enough to represent the practice (contrary to plaintiff's claims) accepted as proper by a responsible body of medical professionals. While putting forward the test, which is popularly known as *Bolam test*, McNair J. observed the following:

> I myself would prefer to put it this way, that he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a

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13 Common calling is generally understood as skilled profession.

14 Theodore Silver, "One Hundred Years of Harmful Error: The Historical Jurisprudence of Medical Malpractice" *Wisconsin Law Review* (1992) pp. 1193 - 1241 at p. 1196.

15 (1957) 1 WLR 583; (1957) 2 All ER 118.

> responsible body of medical men skilled in that particular art. I do not think there is much difference in sense. It is just a different way of expressing the same thought. Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view.[16]

This opened the golden era for doctors in the United Kingdom with the accused doctors escaping liability by producing expert evidence to testify their course of actions. The Bolam test, for example, was followed in *Whitehouse* v. *Jordan*[17], *Sidaway* v. *Bethlem Royal Hospital Governors*[18], *Maynard* v. *West Midlands Regional Health Authority*[19], and *Wilsher* v. *Essex Area Health Authority*[20]. These developments resulted in giving upper hand to the doctors not only in terms of imparting medical treatment but also in terms of deciding the fate of judicial verdicts on medical negligence. The patients were relegated with fewer rights in the doctor-patient relationship.[21]

The free ride of the doctors due to the gap in the practice of Bolam test has been curtailed by the subsequent judgment in *Bolitho* v. *City and Hackney Health Authority*[22]. In this case, the doctor failed to attend the patient; a two years old boy having respiratory problems. The boy had a cardiac arrest resulting in catastrophic brain damage. In a complaint by his mother, it was argued that the duty doctor should have attended the patient and the boy should have been intubated to prevent damage. While the defendant doctor primarily argued that she never got

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16 *Ibid*, 587.

17 (1981) 1 All ER 267.

18 (1985) AC 871.

19 (1985) 1 All ER 635.

20 (1988) AC 1074.

21 Kim Price, "Towards a history of medical negligence" 375(9710) *The Lancet* (16 January 2010) pp. 192 - 193 at p. 192.

22 (1997) 4 All ER 771.

the message to attend the patient as her bleep was not working due to flat batteries, she also contended that she would not have intubated due to the risk posed by it to children even if she had attended the patient. The expert opinion was divided with five doctors testifying the claim of the plaintiff that the boy should have been intubated to avoid damage and three doctors supporting the defendants by expressing that intubation was not the appropriate step in the case.

The House of Lords in delivering the judgment observed that the "responsible body of medical men" and "competent reasonable body of opinion"[23] mentioned by McNair J. in *Bolam* case coupled with the terms "respectable body of professional opinion" used by Lord Scarman in *Maynard's* case[24] clearly indicate that the court has to be satisfied that the opinion expressed by the body of experts has a logical basis. This would necessarily require weighing of the risks against the benefits to reach a reasonable conclusion. In this process, the judge needs to be satisfied that "in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter."[25] This meant that the judge would have option to choose between two bodies of expert opinion and reject an opinion which is logically not defensible. Going by this reasoning, despite five experts supported the plaintiff's view and only three experts supported the defendant's view, the House of Lords held in favour of the defendants by stating that the practice of not intubating the child in this case is supported by the expert opinion that is logically defensible. This indicated that the number of experts expressing a particular opinion is not relevant but how far the judge is convinced about the logical basis of expert opinion is significant. Thus, it is the court that sets the law and decides the fate of the medical negligence cases and not the medical profession/professionals.

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[23] *Supra* note 15, p. 588.

[24] *Supra* note 19, p. 639.

[25] *Supra* note 22.

The above judgments in *Bolam* and *Bolitho* cases have influenced the decision-making in medical negligence cases not only in the United Kingdom but also in various jurisdictions including India. Though the *Bolitho* test has brought in the limits, the *Bolam* test is still used as the major test in many jurisdictions while deciding medical negligence cases. There is also an argument that nothing much has changed in practical terms after the *Bolitho* case since the judge's determination of logically defensible opinion is much dependent on the advice of medical professionals.[26]

Developments in India

Historically, the doctor-patient relationship has been considered to be fiduciary in nature, given the trust and confidence to be reposed by one against the other. In the Indian context, the doctors were revered as God with the famous saying "*vaidyo narayano harihi*".[27] Hence, the patients had subjected themselves completely to the mercy of doctors in the olden days. This didn't mean that medical negligence was unknown in India, as the reference to it can be seen as early as in the Code of Conduct of the ancient text of Charaka's oath.[28] Subsequent references can also be seen in *Sushruta Samhita*[29], *Manusmriti*[30] and *Arthashastra*[31]. However, with the doctors having such a high esteem in the eyes of patients, practical invocation of medical negligence proceedings against the doctors was never seen. Hence, the doctors enjoyed a privileged position and engaged themselves

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26 *Supra* note 21, p. 193.

27 *Supra* note 1.

28 *See* generally J. Singh, *et al.*, "Contributions of Ancient Indian Physicians – Implications for Modern Times" 58(1) *Journal of Postgraduate Medicine* (2012) pp. 73 - 78.

29 *Ibid.*

30 *See* Dhiraj B. Patil, Apeksha D. Patil and Kiran V. Pawar, "Study of Medico-Legal Cases of Negligence Admitted and Judgments Delivered under Consumer Forum in Sangli District" 2(4) *Journal of Ayurveda and Integrated Medical Sciences* (2017) pp. 45 - 51 at p. 46.

31 *Ibid*, p. 45.

in the art and science of medicine with no fear of medical negligence suits filed against them.

As the time passed on, the society started to relook into the reason behind worshipping of doctors. The patients started to subject themselves to the treatment by doctors under the belief that "doctors know it best".[32] This led to respecting doctors for their knowledge, skill and judgments in the field of medicine rather than considering them to be incarnation of God. Moving forward, the developments in the twenty first century have resulted in a paradigm shift in the relative position of doctors and patients. Globalization and commercialization have swept every field including medicine.[33] With the commercialization of the medical profession, the patients are not satisfied with the services of doctors and medical negligence cases are increasing. Thus, the medical profession has slowly moved towards being the subject of scrutiny by the Courts. The consumer dissatisfaction coupled with the patients' increasing awareness of their rights has resulted in a further move from "doctors know it best" to "patient's right to decide".[34] Thus, patient autonomy has taken precedence over the doctors' liberty to opt the course of action, which has given a clear upper hand to patients over doctors in their mutual relationship.

Legal Developments in India

Prior to the CPA

Before the enactment of *The Consumer Protection Act 1986* (*CPA 1986*), there were three different remedies sought by the victims in the case of medical negligence. The major civil remedy was in the form of claiming compensation for

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[32] Dagmar Wujastyk, "Medical Ethics in the Sanskrit Medical Tradition" in Shyam Ranganathan (ed.), *Indian Ethics*, (Bloomsbury, London, 2017) pp. 277 - 298 at p. 285.

[33] Tapash Kumar Koley, *Medical Negligence and Law in India, Duties, Responsibilities and Rights* (Oxford University Press, Oxford, 3rd edn., 2014) p. 4.

[34] See Henry Bodkin and Laura Donnelly, "The end of doctor knows the best as the medics are told to let patients make their own decision about treatment" *The Telegraph* (27 October 2016).

negligence under the Law of Torts. The Law of Torts action for negligence in India has got roots in English common law; however, Indian experience with medical negligence cases under Law of Torts has a relatively short history.[35] In fact, the number of medical negligence cases filed in India before the enactment of *CPA 1986* has been negligible.[36]

The fact that the principle of tortious liability has been borrowed from English common law finds specific mention in the decisions of the Supreme Court. For instance, in *Rajkot Municipal Corporation* v. *Manjulben Jayantilal Nakum & Others*[37], K. Ramaswamy J. observed:

> there is no statutory law in India, unlike in England, regulating damages for tortious liability. In the absence of statutory law or established principles of law laid by this Court or High Courts consistent with Indian conditions and circumstances, this Court selectively applied the common law principles evolved by the Courts in England on grounds of justice, equity and good conscience (vide *Ramanbhai Prabhatbhai's* case). Common law principles of tort evolved by the Courts in England may be applied in India to the extent of suitability and applicability to the Indian conditions. Let us consider and evolve our principles in tune with the march of law in their jurisprudence of liability on tort.[38]

Thus, the standard that has been made applicable in deciding medical negligence cases has been the test of negligence as routinely applied in Law of Torts. References are made by the Courts to the foreign judgements and developments that have taken place over the period of time in establishing the standard of care to be exercised by the medical practitioners. Thus, in the absence of statutory law, the decisions on medical negligence cases were made by undertaking a detailed investigation of facts of the case, and weighing and balancing the interests of different stakeholders.

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35 *Supra* note 33, p. 30.

36 *Supra* note 9.

37 (1997) 9 SCC 552.

38 *Ibid*, p. 567.

Action for breach of contract and action under Section 1A of *The Fatal Accidents Act 1855*[39] were the other two civil remedies available before the *CPA 1986*. The landmark judgment of *Indian Medical Association* v. *V.P. Shantha*[40] explicitly mentions that doctors can be sued under contract or tort law on the ground of their failure to exercise reasonable skill and care. A suit for breach of contract can be filed against the doctor when a contract exists between the physician and the patient. Such a contract is mainly based on a fiduciary relationship, and financial considerations are not relevant for its enforcement. It is also to be noted that the written contract might not be entered between a doctor and a patient in all cases; however, the existence of fiduciary relationship brings in the notion of implied contract, once the doctor starts treating a patient. Consequently, the doctor is duty bound to exercise reasonable care and skill, and provide best possible treatment to the patients. Failure to discharge this duty may result in breach of contract by the doctor.

The action under the *Fatal Accidents Act* was based on default or negligence- more or less similar to action under law of torts.[41] However, it had a limited domain as it was applicable only in case of death. The statistics before the *CPA 1986* show that medical negligence cases in India are usually filed under the law of torts even though there was sufficient scope for contending breach of implied contract by the doctor.[42]

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39 Sec. 1A: Suit for compensation to the family of a person for loss occasioned to it by his death by actionable wrong – Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued, shall be liable to an action or suit for damages, notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as amount in law to felony or other crime.

40 1995 (6) SCC 651.

41 *See Municipal Corporation of Delhi* v. *Subhagwanti & Others* 1966 AIR 1750; 1966 SCR (3) 649.

42 *See* Shraddha Singh, "Medical Negligence and Remedies to the Patients" (2016) p. 9, *available at* <https://astrealegal.com/wp-content/uploads/2016/12/MEDICAL-NEGLIGENCE.pdf>

Added to above-mentioned remedies, Section 20A of the *Indian Medical Council Act 1956* as amended in 1964 empowered the Medial Council of India to prescribe standards of professional conduct and etiquette and a code of ethics for medical practitioners in India. If the medical negligence is in violation of those standards, disciplinary action could be taken against the errant medical practitioners. However, this provision saw the light of the day only in 2002 when the *Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2002* came into being nearly forty six years after the enactment of the primary legislation. A long list of omission and commission on the part of medical practitioner, which may render him liable for disciplinary action, is provided in the 2002 Regulations. Hence, a person aggrieved of medical negligence can also approach the Medical Council for disciplinary action against the medical practitioner under the 2002 Regulations.

Finally, criminal law remedies were also available to the victims of medical negligence under the *Indian Penal Code*. Action under Section 304A[43] of the *Indian Penal Code* was available in case of death of the patient caused by rash or negligent act of the medical practitioner. In the circumstances wherein the patient does not die but suffers injury due to rash or negligent act of the medical practitioner, Sections 337[44] and 338[45] of the *Indian Penal Code* were attracted. The Courts in

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[43] Causing death by negligence - Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

[44] Causing hurt by act endangering life or personal safety of others - Whoever causes hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

[45] Causing grievous hurt by act endangering life or personal safety of others - Whoever causes grievous hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with impris-onment of either description for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both.

India have always emphasised that the kind of negligence required for criminal conviction is 'gross negligence' and not the ordinary negligence. However, the determination of 'gross negligence' and drawing a line of distinction between ordinary negligence and gross negligence had been a difficult task. In *Jacob Mathew* v. *State of Punjab*[46], the Supreme Court emphasised on the requirement of *mens rea* for criminal offenses and held that degree of negligence must be very high to constitute criminal negligence. Hence, if the magnitude of negligence falls below this high degree, action can only be under civil law.

After the Entry into Force of the CPA

Consumer protection is not a new concept. Its origin can be witnessed in the *Vedic* Period (5000 BC - 2500 BC).[47] Punishments were prescribed for food adulteration, excess charging of prices, fabrication of weights and measures and sale of forbidden articles in the interest of consumers. *Manusmriti, Arthashashtra, Yajnavalikasmriti, Naradasmriti, Brihaspatismriti* and *Katyayanasmriti* have also revised the punishments for these offenses.[48] Many of these texts also provided for mechanism to check the quality and rates of marketable commodities.[49] The service providers, including the physicians, were also subject to specified standards. Failure to adhere to such standards and carelessness in treating patient, if resulted in physical deformity or injury, attracted punishment dependant on the seriousness of the patient's deformity.[50]

The British rule in India shifted the focus from welfare of consumers to protecting their economic interest, and thus, the concept of consumer protection

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46 AIR 2005 SC 3180.

47 V. Balakrishna Eradi, *Consumer Protection Jurisprudence* (Lexis Nexis Butterworths, New Delhi, 2005) p. 3.

48 *Ibid*, p. 4.

49 *Ibid*.

50 *Ibid*, p. 6.

took backseat during this period.[51] Efforts for restoring back to the era of consumer protection began after independence with the promulgation of various legislation like; *The Monopolies and Restrictive Trade Practices Act 1969*, *The Prevention of Food Adulteration Act 1945*, *The Standards of Weights and Measure Act 1976*, and *The Trade and Merchandise Marks Act 1958*. However, these efforts were found to be inadequate due to the heavy reliance of these laws on the civil Court proceedings for dealing with violations. This in turn meant that the consumer had to undergo a lengthy and expensive legal process for seeking justice. Thus, the practical scenario didn't change much and the businessmen continued to exploit consumers.[52]

While the search for active protection of consumer rights was going on, the United Nations General Assembly passed a resolution providing guidelines for consumer protection.[53] The passing of *The Consumer Protection Act 1986* in India has been heavily influenced by the UN General Assembly Guidelines, and therefore, *CPA 1986* tries to incorporate the fundamental aspects of the Guidelines.[54] The *CPA 1986* tries to address the issue of protecting the consumer interests in the era of cutthroat competition, which in the zeal to reduce cost has resulted in compromising the quality of products and services. It has provided cost effective and speedy relief to the consumers by establishing the speedy grievance redressal bodies in the form of consumer fora/commissions at national, state and district

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51 *Ibid*, p. 7.

52 *Ibid*, p. 11.

53 UN GA Res. A/RES/39/248, 16 April 1985. It is further expanded in 1999 by the Economic and Social Council in its Resolution No. E/1999/INF/2/Add.2, 30 August 1999, and subsequently, revised in 2015 by the UN General Assembly via Resolution No. A/RES/70.186, 4 February 2016.

54 S. Malik, *Commentaries on the Consumer Protection Act 1986* (Law Publishers (India) Pvt. Ltd., Allahabad, 2nd edn., 2000) p. 30.

levels. These fora/commissions, due to simplicity of proceedings, quickly dispose of the cases filed before them. The *CPA 1986* clothes consumer fora/commissions with the powers that a Civil Court possesses under the *Code of Civil Procedure 1908* while trying a case.[55]

Despite the *CPA 1986* was designed to cover the consumer interest in both goods and services, the health services remained outside the purview of the *CPA 1986* for the first ten years due to the discontent and resistance of the medical fraternity. After the enactment of the *CPA 1986*, consumers of medical services started to move to consumer fora/commissions for seeking remedy in case of medical negligence. However, the Medical Council of India had expressed its displeasure and had challenged the application of *CPA 1986* to medical services. It contended that *The Indian Medical Council Act 1956* and the Code of Medical Ethics adequately governed the conduct of medical practitioners, and they also provided satisfactory redressal mechanisms to the consumers of medical services.[56] The arguments were also directed towards the exclusion of 'contract of personal service' from the definition of service under Section 2(1)(o) of the *CPA 1986*[57].

The debate on the application of the *CPA 1986* to medical services was put to an end by the Indian Supreme Court in its landmark judgement in *Indian Medical Association* v. *V.P. Shantha*[58]. While favouring the application of *CPA 1986* to medical services, the Supreme Court distinguished 'contract of personal service' from 'contract for personal service'. It observed that the 'contract of

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55 Sec. 13(4), CPA 1986.

56 "Regulating Medical Care" 30(46) *Economic and Political Weekly* (1995) pp. 2899 - 2900 at p. 2899.

57 Sec. 2(1)(o): "service" means service of any description which is made available to potential [users and includes, but not limited to, the provision of] facilities in connection with banking, financing insurance, transport, processing, supply of electrical or other energy, board or lodging or both, [housing construction,] entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service.

58 *Supra* note 40.

personal service' would come into picture in case of master-servant or employer-employee relationship. In the absence of any such relationship between the medical practitioner and patient, the service rendered by the medical practitioner cannot come under 'contract of personal service'. Such service would be within the ambit of service rendered under 'contract for personal service', which is not excluded in the definition of 'service' under the *CPA 1986*. The Supreme Court also observed that the disciplinary control of professional bodies under the *Indian Medical Council Act* over the medical services would not preclude them from the purview of the *CPA 1986*.

Bringing the medical services within the ambit of the *CPA 1986* in India has resulted in opening the floodgates for filing medical negligence cases against medical practitioners, hospital authorities and others for deficiency in medical service. While the spurt in cases can be attributed to the decision in *V.P. Shantha*[59], it cannot be denied that the increasing awareness of the patients about their rights has also contributed to the rise in medical negligence cases. The simplicity of proceedings, cost effectiveness and speedy disposal of cases by the consumer fora/commissions are the major attractions for the aggrieved parties to approach the consumer fora/commissions in medical negligence cases. Number of cases of medical negligence filed during the last decade in the consumer fora/commissions is alarming and giving an indication of a flourishing business of litigation for the lawyers.[60] The statistics reveal that the number of medical negligence cases filed before the consumer fora/commissions in India has increased from 183 in the year 2000 to 3,510 in the year 2017.[61]

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59 *Ibid.*

60 As found in a major research project undertaken by the author in the State of West Bengal. Sandeepa Bhat B. "Medical Negligence and Consumer Protection in West Bengal: Need for Expanding the Role of the Judiciary" sponsored by the West Bengal Judicial Academy, Kolkata (2015-17) *See* also <https://health. economictimes. indiatimes.com/news/industry/medical-litigation-cases-go-up-by-400-show-stats/50062328>

61 Dr. Mukesh Yadav, "Statics of Medical Negligence Cases filed in Various Consumer Courts of India" *available at* <https://www.researchgate.net/project/Study-of-medical-negligence-cases-decided-by-Consumer-Court-NCDRC-SCDRC-DCDRC-in-India>

In 2019, the *CPA 1986* was replaced with *The Consumer Protection Act 2019* (*CPA 2019*)[62] with a view to provide extended protection to the consumers. Being a complete consumer-friendly regime, the *CPA 2019* establishes Central Consumer Protection Authority (CCPA) to not only regulate violations of consumer rights but also to promote, protect and enforce the rights of consumers as a class.[63] The *CPA 2019* establishes Consumer Disputes Redressal Commissions at the District, State and National levels along with the new limb of consumer mediation cells attached to them.[64] Even the territorial and pecuniary jurisdictions of consumer commissions are widened to favour the consumers. While the pecuniary limits are increased drastically, the territorial jurisdiction is tilted in favour of consumers by allowing them to file cases in places where "the complainant resides or personally works for gain."[65] With the development in technology, the *2019 Act* permits online hearing and proceedings through video conferencing facilities. All these developments have further eased the consumers' recourse under *CPA 2019* to file medical negligence cases against the doctors.

Analyzing the Debacle

On perusal of developments in India, we can find that there is a shift from the doctors' best judgement theory to patients' autonomy. This development is in consonance with the increased significance of personal autonomy in the twenty first century, which we have borrowed from developments in the western countries. However, this brings forward the question; how far are the patients capable of making best judgment about their body? This concern is more in a developing country like India, with poor literacy rate, when compared to the Western countries. Given the high possibility of patients' or their family members' wrong understanding, often their judgement may be in conflict with that of doctors, and consequently,

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62 Act No. 35 of 2019.

63 Sec. 10(1), *CPA 2019*.

64 See Chapter V, *CPA 2019*.

65 Sec. 36, *CPA 2019*.

when the treatment does not result in their expected results, they feel that the doctors are negligent. Thus, in every case of death of patients, the strong general conviction is that the doctors were negligent in treating the patient. This perception is furthered with the increased medical expenses and commercialization of medical facilities. The current medical expenses in the private hospitals are so much that the patients or their relatives would always feel dissatisfied with the services received when compared to that of the expenses incurred by them in medical treatments.

Meanwhile, the developments in consumer protection laws in India provided easy access to consumers of medical services to approach consumer fora/ commissions for cheap and quick disposal of disputes. This opened floodgates for medical negligence litigations by increasingly dissatisfied sections of patients and their relatives. With the availability of consumers' local jurisdiction to file cases under the *CPA 2019*, the number of cases against the medical fraternity would further increase. Unfortunately, the highly technical nature of the medical negligence cases seems to be outside the comprehension of the members of consumer fora/ commissions. Since medicine is a specialized domain, the standard of care to be considered in the determination of medical negligence is not easy to decide. Expert opinions need to be obtained from medical practitioners to understand the individual case of the patient/victim and the requisite standard of care, which varies from case to case. Such expert testimonies would be provided by both sides to support their arguments in medical negligence cases, posing difficulty for the members of consumer fora/commissions to decide. Added to this, the time limit on the disposal of cases[66] by the consumer fora/commissions prevents the effective process of cross-examination to find the truth and compels the members of the consumer fora/commissions to give hurried judgements. Thus, the question on credibility of

[66] Regarding the proceedings before District Commissions, reference can be made to Sec. 38, *CPA 2019*.

the entire process of decision-making in medical negligence cases in India remains unanswered.

While the negligence based claims are increasingly brought under *CPA* against medical practitioners, legal practitioners are enjoying complete freedom from such claims. One might argue that the legal practice comes under the 'contract of personal service', given the fact that the lawyers are representatives of clients before the courts of law. However, just like medical practitioners having expertise in the field of medicine, legal practitioners are also persons with independent expertise in the field of law. The clients approach legal practitioners for hiring legal services just like the patients who approach medical practitioners for availing medical services. In both situations, the service recipient approaches the service provider under the belief that the latter is better equipped with individual expertise and capable of rendering services by following requisite standards of care. Due to their expertise, both medical practitioners and legal practitioners are at liberty to take independent decisions while rendering services. Hence, the distinction between 'contract of personal service' and 'contract for personal service', as noted by the Supreme Court in *V.P. Shantha*[67], becomes blurry.

The pro-consumer approach of consumer fora/commissions, or at least a fear of unnecessary harassment and loss of reputation of doctors in the process of medical negligence litigation, has brought a chilling effect on the practice of medicine. The medical practitioners are resorting to more and more legal compliances in terms of documentation and prescriptions, thereby, wasting most of their time and energy in equipping themselves to defend possible medical negligence cases rather than utilizing them for the best treatment of patients. In order to fool proof their position, the medical practitioners are prescribing a plethora of tests for every patient, especially to negate possible arguments about their failure to make best judgement in detecting health ailment/s of patients. Thus, the medical practitioners

[67] *Supra* note 40.

are moving more and more towards defensive medicine techniques, and thereby, the cost of treatment is also increasing.[68]

Another recent development in shouldering the burden of liability from the side of medical practitioners is found in the form of professional liability insurance coverage.[69] The insurance companies have started to provide coverage for payment of compensation by the doctors to the victims of medical negligence cases. Though the medical practitioners have found some respite in professional liability insurance coverage, this is not a long-term viable solution for a variety of reasons. First, it is well to be borne in mind that the insurance companies are business-oriented and are keen on making profit out of the premiums collected by them for providing insurance coverage. They are not victim-oriented, and quite often eager to invoke exclusion clauses, which are cleverly embedded in the insurance policies, to defeat the interests of both medical practitioners and patients. Second, a comprehensive and exhaustive coverage of liability would require payment of higher premiums by the medical practitioners, which in turn are passed on to the patients as consultancy charges. Thus, the cost of treatment has increased over the period of time with the introduction of professional liability insurance in the field of medical practice.[70] Third, even if professional liability insurance succeeds to pay adequate compensation

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68 M. Sai Gopal, "Defensive medicine catching on" *The Hindu* (22 December 2011) *available at* <https://www.thehindu.com/news/cities/Hyderabad/defensive-medicine-catching-on/article2735965.ece> *See* also Vicky Pathare, 'To avoid attacks and cases of negligence, doctors asking for CT scans, entire blood culture tests for minor illness', *Pune Mirror*, 24 June 2019, *available at* <https://punemirror.indiatimes.com/pune/cover-story/extra-cautious-against-violence-doctors-take-to-defensive-medicine/articleshow/69918830.cms>

69 *See* generally Manoj Chandra Mathur, "Professional Medical Indemnity Insurance - Protection for the experts by the experts" 68 (1) *Indian Journal of Ophthalmology* (2020) pp. 3 - 5.

70 Meghana S. Chandra and Suresh Bada Math, "Progress in Medicine: Compensation and medical negligence in India: Does the system need a quick fix or an overhaul?" 19 Supp.(1) *Annals of Indian Academy of Neurology* (2016) pp. 21 - 27, *available at* <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5109756/>.

for the victims of medical negligence, it would result in the development of a lackadaisical attitude in the medical fraternity. With the shield of professional liability insurance, the medical fraternity would be prone to behave irresponsibly. Hence, in all the above situations the patients as consumers would be at loss.

Conclusion and the Way Forward

Though the concept of medical negligence is not of recent origin, developments in dealing with medical negligence cases have been witnessed in the last few decades. Before the enactment of *CPA 1986*, medical negligence cases were rarely found in India. The Supreme Court's verdict in *V.P. Shantha*[71] made a sea change in the Indian jurisprudence on medical negligence with the opening of doors of consumer fora/commissions for medical negligence cases. An unprecedented growth in the medical negligence cases filed before the consumer fora/commissions has almost paralyzed the consumer fora/commissions not just due to heavy workload but also due to the lack of expertise in deciding the cases. As discussed above, this is not a healthy development in protecting the interests of any of the stakeholders in the field of medicine. While on the surface, it may seem to compel the medical practitioners to act more responsibly to avoid negligence in treatment, in its core, it fails to deliver. With more and more medical negligence cases, the autonomy of doctors in practicing medicine is curtailed. Though the Supreme Court, in *Martin F. D' Souza* v. *Mohd. Ishfaq*[72], has observed that the law is a watchdog, and not a bloodhound, and as long as doctors do their duty with reasonable care, they will not be held liable even if their treatment was unsuccessful, these words cannot boost the morale of doctors until there is reduction in frivolous litigations against them and some predictability is brought in deciding medical negligence cases.

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[71] *Supra* note 40.

[72] (2009) 3 SCC 1.

The inherent limitations of consumer fora/commissions in dealing with medical negligence cases make them ineffective and unsuitable for deciding medical negligence. Unpredictable outcomes of medical negligence cases decided by consumer fora/commissions are instrumental in leading to an unending vicious circle of jeopardising the interests of the medical practitioners, and subsequently, the patients and their family members. While medical practitioners are always under the fear of medical negligence suits against them, the patients and their family members would feel the heat of defensive medicine and increased cost of medical treatment. Therefore, a balance needs to be struck between the need to render justice to patients in appropriate cases of medical negligence and to protect the medical practitioners from frivolous complaints.

While creating awareness among patients and the public in general about medical negligence is significant in avoiding frivolous complaints, at the justice dispensation level, the requisite balance of interests can only be struck with bridging the gap between law and medicine. If we have to continue with consumer fora/ commissions as the key decision making authority in medical negligence cases or alternatively, shift to any other Court/forum, members of consumer fora/commissions or judges (as the case may be) need special training in dealing with medical negligence cases. They need to be acquainted with the basic fact that the field of medicine, unlike mathematics, is not perfect rather filled with uncertainties. Apart from this, the judiciary needs to be supported by a team of medical experts to decide on the requisite standard of care in each case of medical negligence. Instead of relying on random expert witnesses submitted by the complainants and respondents, which are completely subjective, it is better to seek independent opinions from the experts. For this purpose, it is advisable to have a list of independent medical experts maintained at every State and district level for seeking advice by the judiciary in medical negligence cases. Depending on the nature of the case, three members may be chosen from the list to constitute a medical expert board for each case by the decision making authority for seeking independent advice in

deciding medical negligence cases. Such a system would infuse confidence in the mind of medical practitioners, and thereby, we can ensure that the observations of the Supreme Court in *Martin F. D' Souza*[73] would become the reality. As a consequence, the patients and the public in general would also be saved from the wrath of defensive medicine and increased cost of treatments.

[73] *Ibid.*

AN OVERVIEW OF SENTENCING PROCESS: DILEMMA FACED BY JUDGES WHILE AWARDING DEATH PENALTY

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Abstract

The 'criminal justice system' is not a structure which has been planned as a system nor is it so organized that the several interlocking parts operate harmoniously. Nonetheless, it has considerable social significance in its own right. The custodial principle of sentencing policy is that, the sentence imposed on an offender should reflect the crime he has committed and it should be proportionate to the gravity of the offence. Hence it is necessary to strike a balance between the wrong or the offence on one hand demanding the imposition of the rational and logical punishment, which in turn would have a reference to the doctrine of proportionality in sentence. Such act of balancing is indeed a difficult task. In the absence of a formula which could decide the gravity of crime, the discretionary judgement in the facts

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of each case is the only way in which such judgement may be equitably distinguished. It is in this background the courts have to strike a balance in mitigating circumstances which could be termed as special or adequate circumstances on one hand and the crime and the impact of such a crime on the society on the other.

When sentencing as a topic is discussed, one of the frequent issues confronted with is Disparity and Discrimination. It is fairly well established that a major source of disparity in sentencing is the difference in penal philosophy among judges and magistrates. Hence it will be extravagant to claim that there is a settled core of these principles and policies, which can be drawn together and put forward as a coherent group. This article aims to discuss a plethora of judicial decisions to bring out the disparity and discrimination in sentencing by different courts. It would particularly concentrate on the disparity in sentencing guidelines followed by the judiciary at the time of awarding death sentences and the injustice caused to a convict by denying him the constitutional right to be treated like his fellow convicts. Reliance would also be placed on latest judicial decisions and the Law Commission Report (2015) to show that, the circumstances and the test referred to in Bachan Singh have taken a bit of back seat in the sentencing process and that the whole concept needs a fresh look.

Key words: Proportionality of punishment and Death Sentence.

The Criminal Justice System dispenses justice by apprehending, prosecuting and punishing individuals who break the law out of which 'punishing' becomes the most difficult stage in the whole system. Punishment a painful treatment rests on moral reasons, the expression of moral condemnation, in response to rule

infringements[1]. Thus censure or condemnation becomes the defining feature of punishment which stems from an authoritative source, the State.

Though the State legislations prescribe the range of punishments to be granted in each offence, it doesn't describe the mode of applicability of it in the given situations. Granting of punishment happens after the criminal trial conducted determines the guilt of the accused in the offence charged. The determination of an appropriate punishment out of the alternatives permitted by law becomes important at this stage. It is while determining the appropriate punishment that the process called 'sentencing' comes up. This burden of deciding the most appropriate punishment in the given circumstances is taken up by the judges. It is at this point that a judge faces his first challenge with regard to granting a punishment which is justified or relevant. In order to achieve this, it is necessary to strike a balance between the wrong of the offence on one hand demanding the imposition of the rationale and logical punishment which in turn would have a reference to the doctrine of proportionality in sentence[2].

The application of proportionality while granting punishment is thus a much debated issue particularly when it comes to the question of granting death penalty. This is one of the main reason for which death penalty is being argued to be abolished. The researcher in this article would be attempting to analyze the issues faced by judges in the sentencing process while granting capital punishment and a few suggestions in solving those issues keeping in mind the Indian scenario.

India being a Colony of Britain retained several laws put in place by the British. The *Indian Penal Code 1860*, the *Code of Criminal Procedure 1898* and the *Evidence Act 1861* were the predominant criminal laws among them.

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1 Andrew Novak, *The Global Decline of the Mandatory Death Penalty- Constitutional Jurisprudence and Legislative Reform in Africa, Asia and the Caribbean* (Ashgate Publishing Ltd., New York, 1st edn. 2014) p. 147.

2 Susan Easton and Christine Piper, *Sentencing and Punishment: The Quest for Justice* (Oxford University Press, Oxford, 2nd edn. 2005) p. 201.

Death sentence found place in the criminal statute through the *IPC* where 6 kinds of punishments were mentioned. According to Section 367(5) of the *1898 Code of Criminal Procedure* if death penalty was an option in the punishment provided then the Courts were obliged to give reasons as to why the Court decided not to impose a sentence of death. This situation changed through the 1955 Amendment to the Cr.P.C. where Section 367(5) was repealed and Courts were not anymore obliged to give reasons as to why capital punishment was not granted in a particular case. A perusal of the cases during this period until 1973 have rarely discussed on the validity of having death sentence in the penal policies but have always denied granting the accused death sentence in cases of absence of evidence on proper trial procedures.

The attitude towards the death penalty received considerable attention after the 1973 Amendment to the Cr. P. C. where Section 354 (3) was added. Contrary to the old Section, the new Section made it mandatory on the Courts to give special reasons for granting death penalty in a particular case. This was a significant change that happened with regard to granting death penalty to the extent that it could be granted only in special circumstances with special reasons mentioned for such sentences. At this juncture it is pertinent to note the fact that India's constitutional regime bears many similarities to the Unites States, governed by principles of federalism under a written constitution that protects the rights of the accused and limits the state power of criminal punishment in highly abstract terms[3]. During the 1970's both countries experienced the first constitutional challenges to the death penalty as a result of progressive advances in constitutional jurisprudence that made such challenges possible for the first time. India followed *Furman* v. *Georgia*[4] in developing its own sentencing framework. The creation of the 'rarest

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3 James R. Acker, *Questioning Capital Punishment: Law, Policy and Practice* (Routledge Publications, New York, 2014) 154.

4 408 U.S. 238 (1972).

of the rare' formula in *Bachan Singh's* case was partly a reaction by the Supreme Court of India after the backlashes that occurred in various states of the United States following the attempt of the U.S Supreme Court to abolish death penalty in *Furman's* case.[5] But the moratorium in the US remained only for four years which ended with the Supreme Court decision in *Gregg* v. *Georgia*.[6]

At the same time, the Indian Apex Court deeming it imprudent to judicially abolish capital punishment, elected instead to curtail the circumstances in which the punishment could be granted. With no doubt it has to be admitted that it is these guidelines which have curtailed the circumstances where death penalty can be granted that have been successful in bringing down the executions in the country.

There also came a legislative protection in the form of post-conviction procedure under Section 235 (2) of the Cr. P. C. which mandated the judge to give the accused a hearing on the question of sentence, a procedure which if not followed before the sentence is pronounced vitiated the trial.[7] This step also reaffirmed the fact that the legislators went in favor of capital punishment which is still reflected in the latest 2019 Amendments to criminal law making few offences punishable with death penalty as an alternative. Thus the *'Bachan Singh'* formula read along with Sec. 235(2) of the Cr.P.C. succeeded in distinguishing the most heinous crimes from the rest. To quote a few examples: The 2002 sentence against the Islamic militants for attacking the Indian Parliament; the 2003 sentence given to eight members of the Yadav caste for a massacre of nineteen Dalit villagers; the sentence against Dara Singh, a Hindu nationalist who killed an Australian missionary and her two sons in 1999 by setting their car on fire while they were asleep inside- all these stand as a good example where the Indian judiciary remained highly neutral above

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5 David T. Johnson and Franklin E Zimring, *The Next Frontier: National Development, Political Change and the Death Penalty in Asia* (Oxford University Press, Oxford, 2009) at p. 438.

6 428 U.S. 153 (1976).

7 *Santa Singh* v. *State of Punjab*, (1976) 4 SCC 190.

all political, religious or caste divisions. But over the years, as offences started increasing year by year the delay in execution and the changing attitude of the judiciary started reflecting *Discrimination and Disparity* in the judgements passed.

A Reflection on the sentencing policy followed by the Indian Judiciary Post 1995 in deciding Death Penalty cases

The role of the judge in the sentencing hearing, like any other hearing, is a difficult one of taking into account all of the relevant factors and legal principles and coming to the correct decision in all of the circumstances. Despite a long tradition which claimed that judges merely ascertain the law and do not make it, it is now recognized that this position is somewhat artificial and illusory. It is being generally accepted that judges are to be left with discretion, so that they adjust the sentence to fit the particular combination of facts in an individual case.

At the outset, as an introduction to the subject matter of sentencing by judges, it is pertinent to quote the case of *Ahmed Hussain Vali Mohd. Saiyed and another* v. *State of Gujarat*[8] where it was held:

The object of awarding appropriate sentence should be to protect the society and to deter the criminal from achieving the avowed object of law by imposing appropriate sentence. It is expected that the Court would operate the sentencing systems so as to impose such sentence, which reflects the conscience of the society and the sentencing process has to be stern where it should be. Any liberal attitude by imposing meager sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result wise counter-productive in the long run and against the interest of the society which needs to be cared for and strengthened by a string of deterrence inbuilt in the sentencing system[9].

Hence, the custodial principle of sentencing policy is that, the sentence imposed on an offender should reflect the crime he has committed and it should be

[8] (2009) 7 SCC at p. 254

[9] *Ibid.*

proportionate to the gravity of the offence[10]. In a majority of offences, the I.P.C. and other penal laws provide punishment of imprisonment of varying terms. The law normally prescribes maximum punishment to be awarded in respect of an offence and except in a very few cases, it does not prescribe the minimum term of imprisonment. The penal policy is to give wide discretion to the Court in awarding the appropriate sentence after considering the various factors which are aggravating and mitigating.[11] In most of the countries around the world, the principal sources of sentencing law are legislation and judicial decisions. But in the Indian Criminal Justice Administration, each judge exercises his discretion according to his own judgement and there is no guidance in this regard in order to select the most appropriate sentence in each case. There is therefore no uniformity. But that punishment must be proportionate to the offence is recognized as a fundamental principle of Criminal Jurisprudence around the world. In *Weems* v. *United States*[12], the petitioner had been convicted for falsifying a public document and sentenced to 15 years of what was described as '*cadena temporal*', a form of imprisonment that included hard labor in chains and permanent civil disabilities. The U.S. Supreme Court, however, declared the sentence to be cruel not only in terms of length of imprisonment but also in terms of shackles and restrictions that were imposed by it. That punishment for crime should be graduated and proportionate to the offence, is a precept of justice, declared by the Court. It is also important to quote the principles laid down by the court in *Vikram Singh's*[13] case. The Honorable Supreme Court made a thorough study on the principle of proportionality laid down by various jurisdictions around the world and summed up that:

a) Punishments must be proportionate to the nature and gravity of the offense for which the same are prescribed.

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10 *Rajkishore* v. *State of U.P.* MANU/UP/0826/2016.

11 *Ibid* at p. 349.

12 217 U.S. 349 (1910).

13 MANU/SC/0901/2015.

b) Prescribing punishments is the function of the legislature and not the Courts.

c) Courts, however, have the jurisdiction to interfere when the punishment prescribed is so outrageously disproportionate to the offence or so inhuman or brutal that the same cannot be accepted by any standard of decency.

d) In dealing with questions of proportionality of sentences, capital punishment is considered to be different in kind and degree from sentence of imprisonment. The result is that while there are several instances when capital punishment has been considered to be disproportionate to the offence committed, there are very few and rare cases of sentences of imprisonment being held disproportionate[14].

In *Mahesh* v. *State of U.P*[15], it was observed that "proportion between crime and punishment is a goal respected in principle and in spite of errant notions; it remains a strong influence in the determination of sentences. The practice of punishing all serious crime with equal severity is now unknown in civilized society, but such a radical departure from the principle of proportionality has disappeared from law only in recent times. Quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequence"[16].

At this juncture the notable case of *Swamy Shardhananda* v. *State of Karnataka*[17] needs a special mention. This case stands as a typical example of where the court was reluctant in confirming the death sentence of the accused and exercised its discretion in determining the sentencing policy of granting life imprisonment even though it felt that the crime committed by the accused was very grave and highly depraved. The Apex Court observed:

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14 *Ibid* at para 49.

15 MANU/SC/0246/1987.

16 *Ibid.*

17 AIR 2008 SC 3040.

The inability of Criminal Justice System to deal with all major crimes equally effective and the want of uniformity in the sentencing process by the Court lead to a marked imbalance in the end results. On the one hand there appears a small band of cases in which the murder convict is sent to the gallows on confirmation of his death penalty by this Court and on the other hand there is a much wider area of cases in which the offender committing murder of a similar or a far more revolting kind is spared his life due to lack of consistency by the Court in giving punishments or worse the offender is allowed to slip away unpunished on account of deficiencies in the Criminal Justice System. Thus the overall larger picture gets asymmetric and lop-sided and presents a poor reflection of the system of criminal administration of justice. This situation is matter of concern for this Court and needs to be remedied[18].

The principles a Court needs to follow during death sentencing has been time and again been laid down and upheld in a catena of judicial decisions starting from *Bachan Singh* v. *State of Punjab*[19]. Thorough studies of these principles and cases where these principles may be applied have been analyzed by the Apex Court in *Sunil Dutt Sharma* v. *State (Govt. of NCT of Delhi)*[20]. The Court in this case tried to find an answer to the question as to whether imposing a particular sentence on an offender remains to be elusive or the sentencing parameters in this country are bound to remain judge centric. The Court observed that "the difference is not in the identity of the principles but lies in the realm of application thereof to individual situations"[21]. The principles have been clearly evolved[22] and securely entrenched but there is no consistency existing in the judicial approach.

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18 *Ibid* at para 34.

19 (1980) 2 SCC 684.

20 MANU/SC/1030/2013.

21 *Ibid* at para 10.

22 *See* generally, *Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684; *Jagmohan Singh* v. *State of U.P.*, (1973) 1 SCC 20; *Machi Singh and others* v. *State of Punjab*, (1983) 3 SCC 470.

Hence it is understood that though the sound jurisprudential basis for imposing a particular sentence has been concretely laid down, the fact remains that, sentencing continues to stagnate as a highly individualized and judge centric issue. The recent case of *Vikram Singh and others* v. *Union of India*[23] stands as a good example to this statement made. In this case, Abhiverma a 16 years old boy was kidnapped for ransom which was an act by itself attracting death penalty but he was murdered in the process. The Court observed the incident to be a tragic scenario where the plight of the hapless victim in the grip of his kidnappers was ignored. The statement made by the Court in this scenario was that *the horror, distress and the devastation felt in the family on the loss of an only son.* Considering the facts of the case, the Court felt that death sentence was just, fair and reasonable, even by the standards of rarest of rare cases.

But at the same time in the case of *Ashok Debbarma* v. *State of Tripura*[24], the Court was concerned with a tragic incident in which a group of Armed Extremists set fire to twenty houses belonging to a group of linguistic community of Bengal settlers, in which 15 persons lost their lives, which included women and children and causing extensive damage to their properties. The Court, though considered the gravity of the crime and the factors like extreme social indignation, crimes against innocent villagers, who are a linguistic minority, which included women and children, felt in the interest of justice that the principles laid down in *Swamy Shradananda's*[25] case was to be applied and altered the death sentence to that of imprisonment for life for twenty years without remission.

Thus the same Sentencing Court felt it a need to grant death penalty for the loss of only son but felt it unnecessary to grant it for the loss of fifteen innocent people including women and children.

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23 MANU/SC/0901/2015

27 (2014) 4 SCC 747.

25 *Supra* note. 17.

Another important case where the Apex Court showed concern with regard to the sentencing policy that has to be followed in death sentences was the case of *The Registrar General, High Court of Karnataka v. Mohammad Bin Beerankutti*[26]. Here, the Court tried to distinguish between two kinds of criminals. One group of criminals, committing offences for the reason of infidelity of the wife, domestic quarrels, land dispute, property disputes etc., who are well behaved social beings to the entire society at large, except to the victim of crime. In the other category, for example where crimes are committed for gainful motive etc., the Court observed that anybody in the society could be indiscriminate target of crime.

The Court observed:

> The offenders who commit murder for trivial reasons cannot be equated with the offenders who commit murders for gainful motives indiscriminately targeting the society at large and it would be unjust to weigh both of them in the same scale. In other words, if both the categories of offenders are punished with imprisonment of life, there would be no rational discrimination in the sentencing policy. The accused whose criminal propensity is limited only to individual or individuals and the accused whose criminal propensity is harmful to the society at large should not be treated alike in the matter of sentencing policy. Therefore, in the latter category of cases depending upon the manner and magnitude of the acts of accused, the death sentence should be imposed considering it as a rarest of rare case[27].

Keeping in mind the observation made by the Court in the above mentioned case, a reference to the cases of *B. Kumar* v. *Inspector of Police*[28] and *Rajkumar* v. *State of M.P*[29] needs a mention. *B. Kumar's*[30] case was a criminal appeal filed

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26 MANU/KA/1437/2010.

27 *Ibid* at para 22.

28 (2015) 2 SCC 346.

29 (2014) Cri.L.J 1943.

30 *Supra* note. 39.

by the accused for the commutation of death into life imprisonment. The appellant had been charged and convicted for committing the rape of the prosecutrix and slitting her throat and decamping with jewelry; further for the death of her brother, who saw the accused committing rape and for slitting the throat of another sister who saw the accused kill the boy. The most important question that the court faced was whether the circumstances of the case rightly attracted death penalty. The Court made a note of the fact that the appellant was apprehended after about six years. The Court highlighted on the two fundamental objectives of penology which apply even in grotesque cases: a) Deterrence and b) Reformation.

It was held that though the act of appellant is not justified, his main act was not to commit murder but to satisfy his lust. Moreover, the possibilities of reformation was analyzed, particularly since for a period of six years after the incident and before, he was apprehended, there was no evidence of the appellant having committed any other offence. Death penalty was commuted to life imprisonment.

Further in *Rajkumar's*[31] case, though the court graded the incident as heinous for having committing rape and ultimately death of a fourteen year old girl by a person whom the child addressed as '*mama*', it hesitated to bring the incident under the category of 'rarest of rare'.

Certain serious offences have to be dealt sternly and ruthlessly otherwise the youth of the country would be lured to take the path of crime for easy life and livelihood remains a fact to certain judges which gives all the more reasons to call sentencing policies as judge centric, at least in cases where death penalty is to be granted[32].

There can be a plethora of other judicial decisions which can be laid down as examples to show the difference in sentencing policies by different Courts in

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[31] *Supra* note. 40.

[32] *Ibid.*

situations where facts were similar or even that finding cases to be falling under the rarest of rare category forming new policies to deviate from the established principles.

However, it is also significant that there are cases where the factors taken into consideration for commuting death penalty were given a go-bye in cases where the death penalty was confirmed. One of the reasons pointed out by the judiciary for the disparity is the fact that though the judiciary grants punishment of death penalty, the executive commutes it into life imprisonment.

To borrow the wordings of Robert Ingersoll as quoted by the Hon'ble Apex Court in *Maru Ram* v. *Union of India*[33] would be apt. He said "we, as Judges, have no power to legislate but only to invigilate. In the current state of things and ethos of society we have to content ourselves with the thought that, personal opinions apart, a very long term in prison for a murderer cannot be castigated as so outrageous as to be utterly arbitrary and violative of rational classification between lifers and lifers and as so blatantly barbarous as to be irrational enough to be struck down as *ultra vires*"[34]

A useful reference at this juncture can be the case of *Shankar Kisanrao* v. *State of Maharashtra*[35] where the Court had to deal with an appeal concerning a gruesome murder of a minor girl with intellectual disability after subjecting her to series of acts of rape by a middle ages. In this case the Court made a thorough study on the high number of commutations made by the executive. It went forward to hold that "... though the courts have been applying the rarest of rare principle , the executive has taken into consideration some factors not known to the courts for converting a death sentence to imprisonment for life... Death Penalty and its execution should not become a matter of uncertainty nor should converting a death

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33 MANU/SC/0159/1980.

34 *Supra* note. 43 at para 52.

35 (2013) 5 SCC 546.

sentence into imprisonment for life become a matter of chance. It does prima facie appear that two important organs of the state i.e.; the judiciary and the executive are treating the life convicts convicted of an offence punishable with death with different standards. While the standard applied by the judiciary is that of the rarest of rare principle, the standard applied by the executive is not known...."[36]

The obvious questions that arises at this juncture is whether similarly placed people in similar circumstances are treated differently in the guise of different principles which are basically subjective to the mind of a judge (judge centric) as well as by the executive in the form of Remission and Commutation under Sections 432 and 433A of *Criminal Procedure Code* respectively. If so the next question which apparently arises is 'Doesn't such discrimination violate the principles of equality enumerated under Article 14 as well as the right to life enshrined under Article 21 of the Constitution?" The public which speaks in favor of death penalty may be swayed against capital punishment by evidence that the death penalty cannot in practice be applied without an unacceptable degree of unfairness, arbitrariness or discrimination; that it too frequently produces error or other unwarranted practices... or that it cannot be enforced without undue cruelty. In *Mohammed Farooq* v. *State of Maharashtra*[37] the Supreme Court had stated that "in order to bring about some objectivity and uniformity in the application of death penalty, the 'consensus approach' should be adopted, whereby the death penalty should be imposed only if there is unanimity vertically across the various tiers of the court system, as well as horizontally across the benches"[38].

At this juncture, it is pertinent to quote the Law Commission of India on Death Penalty, 2015[39] where it was observed that, *the death penalty operates in the system that is highly fragile, open to manipulation and mistake, and*

[36] *Ibid.*

[37] (2010) 14 SCC 641.

[38] *Ibid* at p.165.

[39] 262nd Law Commission Report (2015).

evidently fallible. However objective the system becomes, since it is staffed by humans, and thus limited by human capacities and tendencies, the possibility of error always remains open, as has been acknowledged by the world over, including the most highly resourced legal system[40]. The Commission in its fifth chapter titled Sentencing in Capital Offences has dealt with the fallibility of the Criminal Justice System and the death penalty. The Report also quoted instances where the Supreme Court itself has acknowledged high rate of error in the application of doctrine of 'rarest of rare'. A perusal of *Santhosh Kumar Bariyar* v. *State of Maharashtra*[41], *Shankar KisanraoKhade* v. *State of Maharashtra*[42] and *Sangeet* v. *State of Haryana*[43] will bring to light the fact that, the court has acknowledged error in sixteen cases, involving death sentences to 20 persons. Further the court in *Dhananjay Chatterjee* v. *State of West Bengal*[44] the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenseless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals[45]. Similarly the passing of the sentence of death must elicit the greatest concern and solicitude of the judge because, that is one sentence which cannot be recalled[46]. Post *Bachan Singh* capital sentencing has come into the folds of constitutional adjudication by virtue of the safe guards enumerated under Articles 14 and 21 of our Constitution. However, the passage of 36 years since the decision and the change in global and constitutional landscape has made the 262nd Report of Law Commission to re-evaluate the constitutionality of death penalty. The Commission has observed that, the options of reforming the present

40 *Ibid* at p. 167.

41 (2009) 6 SCC 498.

42 (2013) 5 SCC 546.

43 (2013) 2 SCC 452.

44 (1994) 2 SCC 220.

45 *Ibid* at para 15.

46 *Shankarlal Gyarasilal Dixit* v. *State of Maharashtra*, (1981) 2 SCC 35.

system to remove the concern regarding arbitrariness and disparate application of the death penalty are limited. On the one hand, as *Bachan Singh*, and subsequently *Mithu* v. *State of Punjab*[47] have held, judicial discretion cannot be taken out of the sentencing process. A sentencing process without discretion may be more consistent, but will also be equally arbitrary for ignoring relevant differences between cases. In such a system sentencing is likely to be severely unfair and would definitely not remain a judicial function[48].

But it is felt that the above observations made by the Courts need a rethinking. This is because, the *Bachan Singh* doctrine is not followed anymore as a *stare decisis* as Courts have started bringing out their own guidelines and exercising their discretion either in the light of *Bachan Singh* or otherwise.

Another example of laying down guidelines was once again seen in the case of *Shivanand Vishnu Gurav and Others* v. *State of Karnataka*[49] where in the Court while dealing with the question of whether the case fell under the category of 'rarest of rare' discussed a few guidelines to be followed by the Courts in such circumstances. It observed:

There is no compartmentalized circumstances which decide a case as one of rarest of rare cases. Therefore, it has to be seen that, the choice as to which one of the two punishments provided for the murder is the proper one in a given case. It all depends upon the facts and circumstances of each case. The Court has to exercise its discretion judicially and on well- recognized principles after balancing all the mitigating and aggravating circumstances available in the case. Of course, when there are no legal or statutory guidelines to declare a case as rarest of rare case, then it should be by means of exercising judicial discretion, on the basis of well recognized judicial precedents and principles which are emerged from the

47 (1980) 2 SCC 684.

48 *Supra* note.2 at p. 170.

49 CRL A. No. 2549/2012. Judgement delivered on 20/8/2016 by Hon'ble Justice H. Billappa and Hon'ble Justice K.N. Phaneendra.

various decisions, and after balancing all the mitigating and aggravating circumstances of the case. The Court should also bear in mind that on the basis of the facts on record, whether there is something uncommon about the crime which renders sentence for imprisonment for life totally inadequate and calls only for imposition of death sentence...In order to strike a balance between the aggravating circumstance and mitigating circumstance, the Court has to rely upon the rulings which dealt with the subject.[50]

This case is a reflection of the fact that the lack of a legislative sentencing guideline and no reliance on the doctrinal principles laid down through decided case laws are bringing the Courts to dilemma which becomes difficult for them to reach a conclusion without disparity.

At this juncture it also becomes pertinent to quote the case of *Accused 'X'* v. *State of Maharashtra*[51] wherein the Supreme Court in a criminal appeal upheld the judgement of the lower Courts and death sentence under Section 302 of the IPC was imposed. The Court in this case held that:

> *Any increase or decrease in the quantum of punishment than the usual levels need to be reasoned by the trial Court. However, any reasoning dependent on moral and personal opinion/ notion of a judge about an offence needs to be avoided at all costs.*

The Court also held that *in India sentencing is mostly led by 'guideline judgements' in the death penalty context, while many other countries like U.K. and U.S.A. provide basic framework in sentencing guidelines.*[52] Reiterating *Sunil Dutt Sharma's* case the Court observed that achieving sentencing uniformity may not only require judicial efforts, but even the legislature may be required to step in.[53]

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50 *Ibid* at p. 119 at para 72.

51 MANU/SC/0536/2019.

52 *Ibid* at Para.49.

53 *Ibid* at Para 50.

It may also be noted that the Court way back in 2008 in the case of *State of Punjab* v. *Prem Sagar*[54] commented on the *Sentencing Reform Act of 1984* which created the U.S. Sentencing Commission to promulgate binding sentencing guidelines in response to a regime of in determined sentencing characterized by broad judicial discretion over sentencing....

Conclusion

Courts need guidance on the magnitude of the discount, its relevance to variables such as the timing of the plea, the complexity of the case and other variables. This guidance is provided in almost all jurisdictions like in the U.S. and the U.K. The picture becomes even more complicated when a judge enters the zone of personal mitigation. A myriad of factors has been looked into here through analysis of various judicial pronouncements, which have been pointed out as factors which do not remain uniform among various judges. But ultimately as the facts stand today, judges are left with the burden of deciding the just and the unjust; the appropriate and the inappropriate which will not solve the issues of disparity and discrimination as it stands today. Some guidance will be useful regarding the relative weight to be accorded to different aggravating and mitigating factors which are clearly not all equally important. This is not to say that precise weights could be or should be assigned to factors, rather that if a factor is particularly important, sentencers should be aware of this fact. Otherwise they become free to develop their own hierarchies of impact resulting in the disproportionality pointed out as a lacuna in the existing law.

As already mentioned, the situation in India is such that the legislature does not show any intention of abolishing the punishment of death penalty from the annals of criminal law which is all the more clear from the latest amendments that are made in 2013 to Section 376 A of the *Indian Penal Code* according to which under Section 376 A, the punishment shall be punishable with rigorous imprisonment

[54] 2008 CriL. J. 3533.

for a term which shall not be less than twenty years but which may extent to imprisonment for life which shall mean imprisonment for the remainder of the person's natural life, or with death. Furthermore, in 2019 there was yet another amendment made to the *POCSO (Amendment) Act*, which is important to the present topic. Section 6 of the Act underwent a change in the punishment prescribed. Accordingly, whoever committed aggravated penetrative sexual assault is to be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for the remainder of natural life of that person and shall also be liable to fine or with death.

An analysis of the judicial pronouncements along with the legislative provisions mandate a sentencing hearing under Section 235(2) of the Cr. P.C. a procedure which if not followed goes to the extent of vitiating a trial.[55] But the extent of compliance of this provision which plays a major part in the sentencing process has become more of a procedural matter than being used as an opportunity to learn the factors to be considered during sentencing. Hence it is suggested that provisions for a Pre- Sentencing Inquiry Report is to be formulated which will help the judges to learn the factors which will be helpful in processing a proper sentencing policy. Furthermore, it has become a desideratum to have a statutory sentencing Council which will at the pre-confirmation stage of a death penalty by the High Court help the Courts in analyzing all matters of procedure and evidence regarding the case before it. These new concepts if brought in through a legislative framework will help the Courts to focus on equality and fairness, particularly while selecting a harsher punishment like death penalty.

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55 *Santa Singh* v. *State of Punjab,* AIR 1976 SC 2386.

FUNCTIONING OF FEDERALISM IN INDIA TO COMBAT COVID-19

Mr. Girish K C*

Abstract

In federalism there is distribution of powers between different levels government and they operate in their independent sphere without interfering in the functioning of other level of government. In India there is no rigid water-tight compartmentalization of distribution of power between Union and States. The spread of corona virus has put to test the federal form of governance. All levels of government acted with utmost coordination and cooperation in combating the spread of corona virus. The approach adopted by the Centre invoking the provisions of the Disaster Management Act 2005 announcing the nationwide lockdown and requesting the States and Union Territories to implement the guidelines was well received and supported by States without resorting to friction by relying on the principle of autonomy of States. The States took many effective measures under the Epidemic Diseases Act 1897 to break the chain of transmission of corona virus much before the measures initiated by Centre. Local self-governments also played a very significant role and worked in perfect collaboration with State Governments to prevent spread of Covid-19. The functioning of federalism in combating pandemic was guided by the principles of cooperative federalism.

Key words: Federalism, Covid-19 and Co-operative Federalism.

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Introduction

Outbreak of Covid-19[1] a public health crisis has affected all spheres of economy and posed a great threat to life of human beings in an unprecedented manner. The Government had to take immediate steps to prevent the loss of life of its people. Schools and Colleges were closed, all economic, social and religious activities were restricted, public transport system got affected and people were ordered to 'Stay at Home'. Both Union and State Governments started taking measures to address the challenges resulted from Covid-19. Local self governments also have played very important role in dealing with the issues which has arisen out of Covid-19 in collaboration with State Governments. There is reliance by Union on States and States on Local self governments to overcome the problems emerged out of Covid-19. All levels of government worked together with utmost coordination to flatten the curve and mitigate the effects of the crisis. Cooperative federalism operated in the highest degree with greater magnitude ever witnessed in past few decades to deal with pandemic wherein response is Union Supported, State run and locally executed.[2] There is need to understand the role of Centre, States and local governments in addressing the emerging concerns like spread of epidemic or natural disaster within the constitutional structure. The textual provisions of the Constitution relating to federalism were put into practice during pandemic in our legal system and all other federations across the globe. There are two views as to operation of federalism during pandemic in Indian legal system. One view is that it is an executive activism which is being displayed by the Centre to address the issues which has arisen out of outbreak of pandemic within the federal framework. The subject matters like inter-state trade and commerce[3] and inter-state migration;

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1 Covid-19 is the infectious disease caused by the most recently discovered corona virus. This new virus and disease were unknown before the outbreak began in Wuhan, China, in December 2019. Covid-19 is now a pandemic affecting many countries globally.

2 Nancey J. Knauer, "The Covid-19 Pandemic and Federalism: Who Decides?" 23 (1) *New York University Journal of Legislation and Public Policy* (2020).

3 Entry 42 of List-I of the Seventh Schedule to the Constitution.

inter-state quarantine[4] are falling under the purview of Union List. The other view is that Centre has made use of pandemic situation to super impose its policies in the areas which are traditionally considered to be the domain of States and thereby diluted the state autonomy.[5] The pandemic has resulted in the development and recognition of new phase of federalism wherein States have accepted the policies of Centre. The approach of Centre resulted in the loss of fiscal autonomy in a centralized federalism.[6] The Centre has encroached the domain of States with regard to the subject matters which are specifically mentioned in State List to name a few: Public health and sanitation;[7] intoxicating liquor;[8] burials and cremations;[9] and markets and fairs.[10] The states have agreed to these measures initiated by Centre due to financial crisis faced by them.

The major focus of the paper is to deal with above issues in the context of federalism and its operation during pandemic. The provisions of the Constitution, legislations and its application to deal with the issues due to outbreak of Covid-19 in the context of administrative relations between Centre and States are discussed. Approach adopted by many States in taking measures much before Central Government announced nationwide lockdown in addition to implementing the guidelines and directions issued by the Central Government to prevent the spread of corona virus will also be discussed. The paper does not focus on the detailed measures initiated by Union and States in exhaustive manner rather it analyses the coordinated efforts made by all levels of governments including local government

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4 Entry 81 of List-II of the Seventh Schedule to the Constitution.

5 Anirudh Burman, "How Covid-19 is changing Indian Federalism", *available at* How COVID-19 is Changing Indian Federalism - Carnegie India - Carnegie Endowment for International Peace (last visited on 24/11/20.)

6 M Govind Rao, "States' Loss of Fiscal Autonomy in a Centralised Federal System" *The India Forum* June (2020), *available at* ww.theindiaforum.in/article/states-loss-fiscal-autonomy-centralised-federal-system (last visited on 10/08/20.)

7 Entry 6 of List-II of the Seventh Schedule to the Constitution.

8 Entry 8 of List-II of the Seventh Schedule to the Constitution.

9 Entry 10 of List-II of the Seventh Schedule to the Constitution.

10 Entry 28 of List-II of the Seventh Schedule to the Constitution.

in combating problems of Covid-19 recognizing the importance of cooperative federalism in tackling the crisis like Covid-19. The relevant provisions of the Constitution and legislations are analysed so as to arrive at conclusion whether coercive federalism or cooperative federalism came into operation to combat Covid-19 pandemic.

Covid-19 and its Effects

The spread of corona virus affected all sectors of economy and all aspects of human life. Migrant laborers got stranded due to non availability of transport facilities to move to their hometowns and faced severe problems relating to food, shelter and medical facilities;[11] farmers were not able to transport the crops grown to the market and even if they manage to transport it to market there was no one to purchase it resulting in a situation wherein farmers started throwing fruits, flowers and vegetables to gutter;[12] there was non-availability of adequate primary health care facilities due to the fact that private doctor clinics/dental clinics were closed down due to which people were not in a position to get medical treatments for even small ailments like tooth pain, ear pain and stomach ache;[13] many people were not in a position to attend funeral of their parents and other relatives; industries, transport sector, construction work, hotels, malls, cinema theatres and all most all commercial activities came to stand still and many people including corona warriors died in fighting the battle against spread of corona virus. There was more pressure on health sector to provide medical facilities to the persons affected with corona virus. Due to shortage of bed in hospitals patients were made to lie-down on floors of the

[11] Geeta Pandey, "Corona Virus in India: Desperate Migrant Workers Trapped in Lockdown", *available at* http:// www.bbc.com/news/world-asia-india-52360757 (last visited on 10/09/20.)

[12] Huileng Tan, "Farmers Forced to Throw Fruits and Flowers as Corona Virus Disrupts Supplies", available at htpps://www.cnbc.com/2020/05/01/coronavirus-disrupts-supply-demand-farmers-throw-flowers-milk-fruit.html (last visited on 07/07/20.)

[13] Varsha Torgalkar, "Private Doctors Closing Clinics due to Covid-19 Fear", *available at* https://www.newsclick.in/ % 20In% 20Pune% 2C% 20Private% 20Doctors% 20Closing%20Clinics%20Due%20to%20COVID-19%20Fear (last visited on 12/09/20.)

hospital. The persons died out of corona virus at times did not receive decent burial by the district administration.[14]

What has been discussed above as effects of Covid-19 is only illustrative not exhaustive. In this situation the government has to take immediate steps to contain the spread of virus so that many lives can be saved. Both Central and State governments sprang into action to deal with health crisis arisen out of pandemic. In a country like India where there is written Constitution with rule of law, the distribution of power in a federal form of governance between different levels of government takes place through constitutional provisions and each level of government has to exercise its power within the parameters of the Constitution.[15] This situation has posed a great challenge to different levels of government to combat effects of Covid-19. In this context it is very much essential to understand the legal framework in India and how there was coordinated and collaborated efforts by all levels of government to prevent the spread of corona virus.

Legal Framework in India

Indian Constitution provides for federal form of governance[16] wherein there is distribution of powers between different levels of government. The distribution of power takes place between Central Government and State Governments vertically as well as horizontally. Constitutional status was attributed to local self-government by inserting 73rd and 74th amendment to the Constitution within our federal structure. States are empowered to confer powers and assign functions to local government by enacting legislation. The subject matter on which powers and

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[14] Suraksha, "Covid-19 Dead Bodies Thrown into Single Pit", *available at* ww.deccanherald.com/state/gadag-haveri-ballari/ballari-shocker-covid-19-dead-bodies-thrown-into-single-pit-dc-replaces-field-team-855405.html (last visited on 18/08/20.)

[15] Federalism, *available at* https://ncert.nic.in/textbook/pdf/jess402.pdf (last visited on 10/10/20.)

[16] Robert Garran defines federalism "as a form of government in which the sovereignty or political power is divided between the Central and State governments, so that each of them within in its own sphere and is independent of the other".

functions that can be assigned to local self government is provided under Eleventh and Twelfth Schedule of the Constitution. The power is distributed between Union and States in legislative, administrative as well as financial sphere. Both levels of government are autonomous in the sphere allotted to them and one level of government should not interfere in the functioning of other level of government.

The theoretical distribution of legislative power between Union and States can be understood by looking into Articles 245-254 read with Seventh Schedule to the Constitution. Seventh Schedule consists of three lists namely, List-I or Union List, List-II or State List and List III or Concurrent list. The State legislature is having legislative competence to enact laws within its territorial limits on all subject matters specified in State List. The Parliament is empowered to legislate on the subject matters specified in Union List and both State legislature and Union Legislature can enact legislations on the subject matters specified in Concurrent List. When legislation enacted by State is inconsistent with legislation enacted by the Centre on the subject matter specified in Concurrent list then the law enacted by State becomes void to the extent of inconsistency.[17] In India there is no rigid water tight compartmentalization of distribution of powers between Union and States like how it exists in classical federation of USA. The Constitution itself contains certain specific provisions which enable the Centre to exercise the powers which is assigned to the states.[18]

The executive power of Union is vested with President and the executive power of States is vested with the Governor of the State. The executive power of Union and States is co-extensive with that of its legislative power.[19] The administrative relation between Centre and States is very unique in comparison

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[17] Article 254 of the Constitution of India.

[18] *See* Articles 249, 250, 252 and 253.

[19] Chapter 3.1.02, Sarkaria Commission Report on Centre State Relations, *available at* interstatecouncil.nic.in/wp-content/uploads/2015/06/CHAPTERIII.pdf (last visited on 10/10/20.)

with other classical federal systems. There is no separate central administrative machinery to implement the laws passed by the Union legislature. Most of the laws enacted by the Parliament are implemented through States and Constitution imposes an obligation on States to exercise their executive powers so as to ensure compliance to the laws passed by the parliament[20] and not to exercise its executive power so as to impede or prejudice the exercise of executive power of the Union.[21] There is also power vested with Centre to issue directions and States are bound to obey the directions failing which the situation can be brought within the purview of failure of constitutional machinery in State enabling Centre to impose President's rule in the State.[22]

There is allocation of taxing power between Union and States by textual provisions of the Constitution. There is an institutional mechanism with constitutional sanctity to determine the ratio of distribution of tax-sharing revenue between Centre and States. It is the Finance Commission of India which recommends the vertical and horizontal distribution of revenue between Union and States.[23] The imbalance in vertical and horizontal distribution of revenue is addressed through the concept of grant-in-aid. The Constitution provides for cooperation and coordination between different levels of government with predominance of Union in legislative, administrative and financial sphere which influenced the jurists, political thinkers and eminent scholars to characterize Indian federal system as quasi-federal in nature.

The application of textual provisions of Constitution and relevant legislations within federal structure and the coordinated efforts made by Centre, State and Local government to combat spread of corona virus can be understood by looking into the measures initiated by different levels of government.

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20 *See* Article 256 of the Constitution of India.

21 *See* Article 257 of the Constitution of India.

22 *See* Article 365 of the Constitution of India.

23 Finance Commissions - A Historical Perspective, *available at* https://fincomindia.nic.in/ Show Content.aspx? uid1=2&uid2=1&uid3=0&uid4=0 (last visited on 17/09/20.)

Measures Initiated by Government of India

The Central Government has initiated various effective measures to tackle the effects of Covid-19 by invoking the provisions of the *Disaster Management Act 2005*. The *Disaster Management Act* provides for effective management of disasters. The National Disaster Management Authority has issued National Disaster Management Guidelines in the year 2008 which specially deals with biological disaster management including situation of pandemic.[24] The *Disaster Management Act* provides for formulation of disaster management plans at national and state level. The National Disaster Management Plan 2016 also specially makes a reference to biological disaster including epidemics.[25] The Central Government declared Covid-19 as notified disaster[26] and many other States including State of Kerala notified Covid-19 as disaster and permitted to make use of State Disaster Response Fund to prevent the spread of corona virus.[27] The application of provisions of the *Disaster Management Act* to deal with pandemic is unexceptionable.

Lockdown has been resorted to as powerful tool by Central Government to prevent the community spread of corona virus. Lockdown guidelines were issued by the Ministry of Home Affairs regulating the activities during lockdown period relying on the provisions of the *Disaster Management Act*. The Centre also requested the States to implement the lockdown measures in letter and spirit by exercising their powers under the *Disaster Management Act*.

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[24] Chapter 4.6, Management of Pandemics, *available at* http://nidm.gov.in/pdf/guidelines/new/biological_ disasters.pdf (last visited on 10/09/20.)

[25] Goutham Shivshankar, "Debating the Applicability of India's Disaster Management Law to Covid-19", *available at* http://adminlawblog.org/2020/05/19/goutham-shivshankar-debating-the-applicability-of-indias-disaster-management-law-to-covid-19/ (last visited on 05/09/20.)

[26] India Declares Covid-19 a 'Notified Disaster' *available at* https://economictimes.indiatimes.com/news/politics-and-nation/india-declares-covid-19-a-notified-disaster/articleshow/74631611.cms?from=mdr (last visited on 19/07/20.)

[27] *Available at* http://sdma.kerala.gov.in/wp-content/uploads/2020/03/17-03-2020.pdf (last visited on 18/09/20.)

The Lockdown guidelines issued by Centre regulated minute activities like only one person should travel in bike, only two persons should travel in car, only 20 persons should attend funeral, only specific number of persons should attend marriage, closing down shops and markets, restriction on gathering of people for sports or entertainment. Theoretically speaking guidelines issued by Centre transgresses the domain of States.[28] Technically speaking States are not bound to follow the directions issued by the Centre if it interferes with the subject matters specified in List-II of Seventh Schedule to the Constitution and Centre cannot enforce these directions even through court of law.

The approach adopted by Centre when it invoked the provisions of the *Disaster Management Act* to issue lockdown guidelines to break the chain of transmission of Covid-19 was not in the nature of super imposition of directives but it was in the nature of a request made by Centre to the States and Union Territories to join hands to fight against spread of corona virus by concentrating on 'stronger together model'. This approach adopted by the Centre is very much evident by looking to the fact that the way in which communication was made to States and Union Territories by Union Home Secretary requesting them to strictly implement the lockdown measures in letter and spirit without providing any relaxations by exercising their powers under the *Disaster Management Act 2005*. The screen shot of the document is produced below for the convenience of readers:

Press Information Bureau
Government of India
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MHA requests States/UTs to implement Lockdown Measures in Letter and Spirit to fight COVID-19

New Delhi, April 1, 2020

Union Ministry for Home Affairs (MHA) had issued consolidated guidelines on lockdown measures to be taken by the Ministries/Departments of Government of India and States/UTs Governments/Administrations, so as to break the chain of transmission of the COVID-19 in the country.

It was observed that some States/UTs are allowing exceptions beyond what has been permitted under lockdown measures, as contained in Consolidated Guidelines issued by MHA under DM Act 2005.

In pursuance of this observation, Union Home Secretary, Shri Ajay Kumar Bhalla has written to all State Chief Secretaries and UT Administrators requesting them to strictly implement lockdown measures in letter and spirit, by exercising their powers under the Disaster Management Act, 2005, to fight COVID-19.

[28] Anubhav Khamroi, "Federalism and Covid-19: Analyzing the 'National Importance' Justification of the Centre", *available at* http://lawschoolpolicyreview.com/2020/08/08/federalism-and-covid-19-analysing-the-national-importance-justification-of-the-centre/ (last visited on 10/09/20.)

The compliance to the measures adopted by Centre by invoking the *Disaster Management Act* was smooth in our federal structure because of the fact that the States are under an obligation to exercise their executive power so as to ensure compliance to laws passed by the Parliament and Centre is having power to issue directions to States for that purpose under Article 256 of the Constitution. Article 257 of the Constitution makes it very clear that the executive power of the State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union and the Union is having power to issue directions for that purpose. Careful analysis of these provisions leads to the fact that States cannot disobey or act contrary to the guidelines or directions issued under the *Disaster Management Act*.[29] If the State disobeys to the directions of the Central Government the consequence is provided under Article 365 and it is valid ground for Centre to invoke Article 356 of the Constitution.[30]

After going through the provisions of the Constitution dealing with administrative relations between Centre and States and provisions of the *Disaster Management Act* it is very clear that there is statutory basis for Central Government to take measures to prevent spread of corona virus and there is an inbuilt mechanism within the Constitution to ensure compliance by States to the directions issued by Centre.

Measures Initiated by State Governments

State Governments in addition to implementing the guidelines and carrying out the directions issued by the Centre took various effective measures to prevent spread of corona virus within the federal structure. The *Epidemic Disease Act 1897* empowers both Centre and State to take measures to prevent the spread of epidemic diseases. Union is empowered to take measures to prevent spread of epidemic diseases at ports of entry and exit. State Governments also can

[29] M.P.Jain, *Indian Constitutional Law* (LexisNexis, Gurgaon,7th edn., 2014) pp. 692-693.

[30] D D Basu, *Commentary on the Constitution of India* (LexisNexis, Gurgaon, Vol. 10, 8th edn., 2012) pp.11126-11127.

take preventive measures within their territorial limits. The State Governments took many preventive steps like: closing down educational institutions including schools, colleges and universities; prohibiting large public gatherings and directing private companies to allow employees to work from home, etc. In fact many State Governments took steps much before Central Government took measures to curb the effects of Covid-19 to name a few Kerala, Karnataka and Orissa.

Kerala

The Government of Kerala declared health emergency in the month of February 2020 and issued health advisory to track, indentify and test all the travelers who come from China and directed them to remain in isolation for 28 days. Guidelines for testing, quarantine, hospital admission and discharge of Covid-19 affected patients were issued much before lockdown was announced by Central Government.[31] The Kerala Government has issued *Kerala Epidemic Diseases Ordinance 2020* by virtue of Entry 6[32] of List II of Seventh Schedule of the Constitution. The Ordinance empowers the State Government: to take measures to prevent spread of epidemic diseases in Kerala; to notify any disease as epidemic disease; to make regulations to prevent the spread of epidemic disease. The regulations can be made on various subject matters like: closing state borders; restriction on public and private transport; quarantining of persons who are coming from other States; Closing down of shops, restaurants, commercial establishments, etc. Imprisonment up-to two years and fine up-to rupees 10,000/- or both can be imposed as penalty for contravention of the regulation.[33] The *Travancore Cochin Public Health Act 1955* is a comprehensive legislation which can be applied to prevent the spread of Covid-19. The Act prohibits a person infected with

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[31] Anoop Ramakrishnan, "Kerala Government's Response to Covid-19", *available at* https://www.prsindia.org /theprsblog/kerala-government's-response-covid-19-january-30-2020-april-22-2020 (last visited 26/08/20.)

[32] Entry 6 of List II deals with 'public health and sanitation'.

[33] *Available at* https://Kerala.gov.in/documents/10180/ce65de73-20c0-468d-8122-300b4da6cee0 (last visited on 08/0820.)

infectious diseases to make use of libraries, public transport and other public places. The State can compulsorily admit an infected person to hospital and take other measures to prevent the spread of infectious disease.[34]

Karnataka

The Government of Karnataka also took many effective steps to prevent spread of corona virus. It invoked the provisions of the *Epidemic Diseases Act 1897* and issued an order to close down educational institutions, malls, marriage hall and cinema theatres as a preventive measure much before nationwide lockdown was announced by the Central Government. Karnataka Government notified *Karnataka Epidemic Diseases Covid-19 Regulations 2020* on 11th March 2020 to deal with problems of outbreak of corona virus. Under this Regulation: Any person with travel history to any Covid affected country must report to the nearest government hospital; All hospitals should have flu corners for screening of suspected Covid-19 cases; directions were issued to hospitals to collect the travel details of patients with covid symptoms and isolate for a period of 14 days; information of all such cases should be provided to office of District Health and Family Welfare immediately.[35] Section 144 of *Criminal Procedure Code* was also being made use of in many districts to prevent large gathering of people in addition to sealing down state-borders.[36] The toll free number was provided to seek assistance to those who are having symptoms of or infected by corona virus. *Seva Sindhu* portal was extensively made use of to grant permission to international and inter-state travelers to return to their home State. The government has also setup fever clinics,

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[34] P. Ishwara Bhat, "The Social Dimensions of Laws During Pandemics" *VBCL Law Review* Special Edition (2020), pp. 1-23.

[35] *Available at* https://www.simpliance.in/files/news/Karnataka%20Epidemic%20Diseases,%20 COVID-19%20 Regulations,%202020.pdf (last visited on 10/10/20.)

[36] Supriya Menon, Governance in Times of Corona Crisis: Karnataka's Response, *available at* http://practice connect.azimpremjiuniversity.edu.in/governance-in-the-time-of-crisis-karnatakas-response-to-the-corona-pandemic/ (last visited on 21/10/20.)

recognized more laboratories to test the blood samples and to collect throat swab to detect the infection of corona virus, mobile applications were developed to register the details of interstate travelers and to track the people who are quarantined.

Odisha

The Government of Odisha issued an order on 16th March 2020 according to which foreign returnees have to mandatorily register in Covid portal within 24 hours of their arrival and quarantine themselves for 14 days.[37] On 18th March 2020 Government issued the *Odisha Covid-19 Regulations 2020*. The regulation specified that both the Government and private hospitals in State of Odisha should have separate Covid-19 isolation facility.[38]

Role of Local Governments

Local self governments have played very important role in dealing with the issues which have arisen out of Covid-19. Local governments were very proactive in containing the spread of corona virus. District administration has made use of the services of employees several departments including education department. Teachers of Government Primary School, High School, Pre-University College, Degree College and Universities were assigned with several duties by the deputy collector of the district like: doing health survey by visiting each home; containment watch; sealing down the house and locality; registering the details of passengers who come from other states at bus stations, railway stations and airports; collecting details at district borders through setting up check posts and allowing the persons by subjecting them to thermal scanning, etc. The effort made by Bhilwara District

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[37] Akhil N.R., "Odisha Government's Response to Covid-19", *available at* https:// www.prsindia.org/theprsblog/ odisha-government's-response-covid-19 (last visited on 12/08/20.)

[38] Notification issued by Government of Odisha, Health and Family Welfare Department on 18/03/20, *available at* https://health.odisha.gov.in/pdf/Regulation-Regarding-Covid19-8301.pdf (last visited on 10/08/20.)

in State of Rajasthan to prevent the spread of corona virus was well recognized and appreciated by the Central Government.[39]

The success of implementation of measures initiated by Centre and States under various legislations to overcome the problems created by spread of corona virus is dependent on the effective functioning of local self governments.[40] Local Governments were in front line to serve the people affected by corona virus in managing quarantine centers and community kitchens. Local Governments also played a very significant role in: seal down process; maintaining cleanliness by carrying out sanitization; creating awareness among people and doing health survey. Pandemic has taught us lesson that there is need to strengthen the local governments in a systematic manner because they are the institutions which spring into action mode in any occurrence of disaster.

Functioning of Federalism to Combat Covid-19 Cooperative or Coercive

Cooperative federalism prevails in a federal system where there is cooperation and coordination among different levels of government in performing their functions. Corwin defines cooperative federalism as "the national Government and the States are mutually complementary parts of a single governmental mechanism all of whose powers are intended to realize the current purposes of government according to their applicability to the problems in hand".[41] If the Central Government super imposes its policies on the States and encroaches the domain of State then it leads to Coercive federalism. Coercive federalism is defined as a

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39 "Centre may Adopt Bhilwara Model to Contain Spread of Covid-19" in Other Hotspots, *available at* https://economictimes.indiatimes.com/news/politics-and-nation/centre-may-adopt-bhilwara-model-to-contain-spread-of-covid-19-in-other-hotpsots/articleshow/75021963.cms (lat visited on 10/11/20.)

40 Vimal V. and Dr. Vipin Chandran K P "The Role of Local Governance During Covid-19 Pandemic: Evidence from Kerala Experience" 8 (8) *International Journal of Research-Granthallayah* (2020) pp. 319-327.

41 Jones (*et al.*), *Texas Politics Today*, *Cengage Learning* (Boston USA, 18th edn., 2017) p. 35.

relationship between the national government and States in which the former directs the States on policies they must undertake.[42]

Pandemic situation has forced the legal systems to inevitably recognize the necessity for strengthening the cooperative federalism without which the issues arisen out of the crisis cannot be dealt effectively by one level of government.[43] The coordination and cooperation from all other levels of government are *sine qua non* to provide solutions to the problems created by pandemic. Pandemic has provided platform to realize the potential of intergovernmental cooperation and coordination in curbing the menace of outbreak of spread of corona virus. Within the existing legal framework the centre has devised innovative steps in administrative sphere to combat the unprecedented health emergency which has arisen out of spread of novel corona virus.

Though the approach adopted by Central Government was criticized as a unilateral step taken by Centre when it announced first lock down without consulting States, subsequently the Prime Minister involved Chief Ministers of States in series of discussions and deliberations through video conferencing with regard to extension of lock down initially imposed.[44] This shows that the Central government has made an attempt to obtain views from all stake holders who are involved in prevention of spread of Covid-19.

There was need to ensure consistency in the application and implementation of various measures across the country which necessitated the Centre to issue guidelines by invoking provisions of the *Disaster Management Act* without which even India would have failed like United States of America to evoke proper

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[42] *Ibid*, p. 38.

[43] Rekha Saxena, "Federalism and Covid-19 Crisis: Centre-State Opposite Relations in Pandemic Federalism – India", *available at* www.forumfed.org/wp-content/uploads/2020/04/IndiaCOVID3.pdf (last visited on 24/11/20.)

[44] *Available at* http://theprint.in/india/pm-modi-holds-meeting-with-chief-ministers-to-decide-on-extension-of-21-day-lockdown/399909/ (last visited on 19/10/20.)

coordinated response in dealing with problems of pandemic.[45] India and Australia were in a position to make cooperative federalism functional in their legal system to yield desired result in combating Covid-19 but United States of America went with inconsistent and Un-coordinated response by different levels of government in addressing the issues relating to combating pandemic.[46] The States have not surrendered themselves to the command and control approach in India but acted in rational manner by understanding the intensity of the situation and noble cause behind the measures initiated by Centre.

The sanctity of cooperative federalism can only be retained through consultative process in addition to collaboration and coordination among different levels of government. If the consultative process is eroded in making policy decisions then it leads to emergence of coercive federalism. Coercive federalism is repugnant to constitutional philosophy. Pandemic won't respect or understand the constitutional demarcation of powers between Centre and States in a federal structure. Harmony between Centre and State is so essential in dealing with a biological disaster of a greater magnitude which affected quality of lives of millions of people. In India whole governmental machinery worked as one composite and integrated unit to combat pandemic by displaying constitutional commitment to the cause of welfare of the people. In a welfare State there is greater necessity of collaborative or cooperative federalism. Martin Painter, emphasizes the importance of negotiations among different levels of government in a federal system. He says "the practical exigencies in fulfilling constitutionally sanctioned functions should bring all governments from different levels together as equal partners based on negotiated

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45 Ross K. Baker, "Donald Trump's Laissea Faire Federalism is as Toxic as Covid-19", *available at* http://www.usa today.com/story/opinion/2020/07/14/donald-trump-federalism-coronavirus-covid-19-response-column/5424862002/ (last visited on 10/09/20.)

46 Niranjan Sahoo, "India and Australia's Federal Systems Have Responded Fairly Well to Covid-19 but the US System Hasn't", *available at* http://www.orfonline.org/research/india-and-australias-federal-systems-have-responded-fairly-well-to-covid-19/ (last visited on 23/11/20.)

cooperation for achieving the common aims and resolving the outstanding problems".[47]

After carefully analysing the provisions of the Constitution and *Disaster Management Act,* it is very clear that the Centre has not acted in a manner to destroy the sanctity of federal principles so as to erode the State autonomy in initiating measures to prevent the spread of corona virus. States conducted themselves in a very rational and appropriate manner keeping in mind protection of interest of people so as to realize the objective of welfare State by strengthening the hands of Centre in implementing the guidelines and directions issued by the Union to combat Covid-19 without creating roadblocks resorting to friction mode relying on principle of state autonomy.

Conclusion

There was a collaborated effort by Centre and States within the parameters of constitutional demarcation of powers to effectively deal with problems of Covid-19 wherein health is subject matter specified in State list and infectious disease control is mentioned in Concurrent list necessitating the Central Government to play a decisive role. Pragmatic federalism has come into operation to its optimum extent to deal with unexpected upheaval due to spread of corona virus which required innovative strategy within the framework of federal governance which transcends the rigid technicalities to provide swift remedy in an appropriate manner. The pragmatic efforts of both Union and State can be seen in enforcing lockdown and their subsequent gradual relaxations.

Federalism with strong centralizing tendency in India has paved way for Central government to play a very significant role in ensuring swift national response clubbed with States' approach to respond to the measures initiated by Centre instead of creating friction relying on the principle of autonomy of States has proved to be more effective than that of American model of dual federalism with rigid watertight

[47] *Govt. of NCT Delhi v. Union of India*, (2018) 8 SCC 501, para 115.

compartmentalization of powers creating roadblocks in providing swift national response with cooperation of States in addressing the issues relating to combating pandemic.

Pandemic has put to test the operation of federal form of governance all over the world. India proved that it can withstand the on onslaught of Covid-19 within the federal structure as ordained by the Constitution and dealt with situation in a swift, coordinated and effective manner by giving more emphasis to cooperative federalism. Based upon discussions made above it is very clear that In India federal governance during pandemic was governed by the principles of cooperative federalism than that of competitive federalism or coercive federalism.

THE CONSUMER PROTECTION ACT 2019 : A NEW MILESTONE IN EMPOWERING E-CONSUMERS

Dr. Bheemabai S. Mulage*

Abstract

Technological developments, research backed intensive marketing strategies, entry of multinational corporations, globalization, hedonism, quality of governance, scarce of natural resources, etc. have made the market system more complex and position of consumer more vulnerable, confused, weak and exploited. The present day market is fully under the control of producers. He has the right to design, distribute, advertise and price his product. Therefore, the most essential product becomes very expensive and the consumer has left only the right of not buying it. Buying and selling goods and services through the internet has become a busting business in today's world. The success of e-commerce in any given country depends on the existence of the relevant legal framework. However, to protect the interest of consumers and reach his expectations, the Consumer Protection Act 1986 has been amended three times but the problems remain unresolved. The Act 1986 was proved to be an inefficient piece of legislation for not keeping pace with the new market dynamics, multi-layered delivery chains, and innovative and often misleading advertising and marketing machinery. The popularity of e-commerce and technology has urged the need of new legislation. To promote, protect and enforce the rights of the consumers' as a class, the government of India has introduced a comprehensive framework by enacting the new Consumer Protection Act 2019. In this background, the article examines the contours of e-commerce and its effect on consumers by analyzing the effectiveness of the redressing system established under the CPA 2019.

Key words: E-Commerce, Consumer Protection and *Consumer Protection Act.*

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Introduction

Globalization[1] and digitalization[2] have drastically changed consumer behavior in the past few years and the contemporary era has seen an exponential development in the purview of online shopping in India. Online shopping is a part of 'online commerce', which has gained a huge momentum in the recent past and become one of the fastest developing regions around the world. The amount of trade conducted electronically has grown dramatically since the spread of the internet and the use of ICT in business has enhanced productivity and encouraged the greater customer participation all over the world. Web sellers with an intention to spread their business and gain more profit have developed the different market strategies to attract consumers. Due to the influence of market strategies and digitalization, most of the consumers prefer to avail their goods[3] and services[4]

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[1] Thomas Larsson, *The Race to the Top: The Real Story of Globalization* (Cato Institute, Washington D.C., 2001) p. 9; globalization is the process of the shrinking of the world, the shortening of distances, and the closeness of things. It allows the increased interaction of any person on one part of the world to someone found on the other side of the world, in order to benefit. Martin Albrow and Elizabeth King (Eds.), *Globalization, Knowledge and Society* (Sage, London, 1990) p. 8; "...all those processes by which the peoples of the world are incorporated into a single world society."

[2] The conversion of text, pictures, or sound into a digital form that can be processed by a computer.

[3] Section 2 (52) of *Central Goods and Services Tax Amendment Act 2019* defines "goods" means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply; 'Goods' have been also defined under Section 2(7) of the *Sale of Goods Act 1930*, to include every kind of movable property, including stocks, shares, crops, grass, severable objects, etc. It is supplemented by the definitions of movable and immovable property under Section 3(36) and Section 3(26) of the *General Clauses Act 1897*.

[4] Section 2 (102) of *Central Goods and Services Tax Amendment Act 2019* defines "services" means anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode from one form, currency or denomination to another form, currency or denomination for which a separate consideration is charged.

through websites[5] this has increased the probability of consumer exploitation in the present day market. The tremendous increase in the volume and consumer base for the e-commerce markets has urged the corresponding development of a legal framework, which should efficiently regulate its functioning and offer remedial measures for the grievances of the consumers. Besides, it is the responsibility of the government to provide a legal framework for e-commerce while allowing the domestic and international trade to expand its horizons.

However, the *The Consumer Protection Act* 1986 was amended many times to bring the Act in accordance with changes brought about by economic liberalization[6], globalization of markets and digitalization of products and services.

Basically the idea of *The Consumer Protection Act* 1986 is to give equal opportunity to consumers as well as the trader to put their points and have equal bargaining positions which in this electronic commerce era is a bit problematic. The concept of distributive justice, which is embodied in Article 38[7] and

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[5] Website means a group of World Wide Web pages usually containing hyperlinks to each other and made available online by an individual, company, educational institution, government, or organization. *Available at*, https://www.merriam-webster.com/dictionary/website, (last visited on 25.06.2020.)

[6] Liberalization of trade is the removal or reduction of restrictions or barriers on the free exchange of goods between nations. These barriers include tariffs, such as duties and surcharges, and nontariff barriers, such as licensing rules and quotas. Economic liberalization is the reduction of state involvement in the economy.

[7] Constitution Article 38 - State to secure a social order for the promotion of welfare of the people

1. The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of national life.
2. The State shall, in particular, strive to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

39[8] of the Indian Constitution is to remove the economic inequalities resulting from the dealings and transaction between unequals in society and to bring on equal position both in terms of rights and obligations. But the practical implementation of the *CPA 1986* was far from fulfilling its desired objective of being a socio-economic legislation, which sought "to provide for better protection of the interests of consumers." Therefore, the tremendous increase in the popularity of e-commerce and technology[9] has urged the need of new legislation. To promote, protect and enforce the rights of consumers as a class by providing a comprehensive framework the government of India has introduced the new *Consumer Protection Act* 2019.

Background of *The Consumer Protection Act* 2019

Prior to the Industrial Revolution, the needs of human beings were very few and these needs met through exchange of one's goods with the others catering to their mutual requirements. There was no competition as the concept of market

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[8] Article 39 - Certain principles of policy to be followed by the State. The State shall, in particular, direct its policy towards securing—

a. that the citizens, men and women equally, have the right to an adequate means to livelihood;

b. that the ownership and control of the material resources of the community are so distributed as best to sub serve the common good;

c. that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

d. that there is equal pay for equal work for both men and women;

e. that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

f. that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

[9] Technology means the branch of knowledge that deals with the creation and use of technical means and their interrelation with life, society, and the environment, drawing upon such subjects as industrial arts, engineering, applied science, and pure science. *available at* https://www.dictionary.com/browse/technology, (last visited on 25.04.2020.)

was not in vogue at all. However, the idea of industrialization,[10] globalization and modernization[11] has ushered radical changes in the lives of human beings as regards the goods and articles consumed by them in their day-to-day life. The consumer goods flooded the market and the traders started adopting various devices to sell the goods manufactured by them. Consumers relied upon the goods sold by the trader which emboldened the traders to monopolize the market. Traders abused and exploited the consumer under the principle of "*Caveat Emptor*"[12] by selling adulterated and poor quality products with an object to make profit at every cost. There were no measures to check the dereliction on the part of the traders unless the same amounted to serious offence. However, due to the increase in the number of goods that could not be readily examined by the buyer, the Court began to limit "*Caveat Emptor.*" The business community has powerful well-organized organizations to secure their interests against the unorganized and mostly illiterate and poor consumers in India. Therefore, the worst sufferers of the industrial growth and development are the consumers in India. The suffering of consumers from lots of undesired elements such as misleading advertisements,[13] underweight goods, unsatisfied services etc. have led to consumer movement all over the world.[14]

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[10] Arthur O'Sullivan, Steven M. Sheffrin, *Economics: Principles in Action* (Upper Saddle River, New Jersey Pearson Prentice Hall, 2003) p. 472, *available at* https:// www.scribd.com/doc/55444148/Economics-Principles-in-Action-Arthur-Sullivan-Steven-M-Sheffrin. Industrialization is the period of social and economic change that transforms a human group from an agrarian society into an industrial society, involving the extensive re-organization of an economy for the purpose of manufacturing.

[11] Modernization is the processes of starting use the most recent methods, ideas, equipment etc. so that something becomes or seems more modern.

[12] *Caveat Emptor* is a Latin phrase, the English translation of this phrase is "let the buyer beware." It is a legal principle that places the due diligence burden of a transaction on buyers. It means that the buyer alone is responsible for checking the quality and suitability of goods before a purchase is made.

[13] Section 2(28) of *The Consumer Protection Act 2019*: 'Misleading Advertisement' in relation to any product or service, means an advertisement, which-

1. falsely describes such product or service; or
2. gives a false guarantee to, or is likely to mislead the consumers as to the nature, substance, quantity or quality of such product or service; or
3. conveys an express or implied representation which, if made by the manufacturer or seller or service provider thereof, would constitute an unfair trade practice; or
4. deliberately conceals important information.

[14] BrianW.Harvey, *The Law on Consumer Protection and Fair Trading* (Butterworths London, 5th edn., 1996) p.13.

Developed countries like the United States of America and the United Kingdom were the first to realize the need to protect the interest of consumers. Consequently, in the year 1986 to protect the basic consumer rights Government of India has enacted *The Consumer Protection Act* 1986. Though the concept of consumer protection is not new to countries like India, the enactment of *The Consumer Protection Act* 1986 is a milestone in the history of the country's socio-economic legislation. The Supreme Court in *Indian Medical Association* v. *V. P. Shantha*[15] discussed the legislative history of passing of *The Consumer protection Act* 1986. This Act has been enacted with an aim to ensure that the act of consumption is not only safe, but is also one, which is fair to consumer expectations. The Supreme Court in *Charan Singh* v. *Healing Touch Hospital*[16] has held that the *The Consumer Protection Act* is one of the benevolent pieces of legislation intended to protect a large body of consumers from exploitation.

Prior to this enactment, there are number of pre-constitutional and post constitutional laws that aim at the protection of the consumer interests. Some of these legislations are *The Indian Penal Code 1860; The Sale of Goods Act 1930; The Agricultural Produce (Grading and Marketing) Act 1937; The Drugs and Cosmetics Act 1940; The Drugs and Magic Remedies (Objectionable Advertisements) Act 1954; The Prevention of Food Adulteration Act 1954; The Monopolies and Restrictive Trade Practices Act 1969; The Standard of Weights and Measures Act 1976* and *The Bureau of Indian Standards Act 1986.*[17]

Aftermath of liberalizations, privatization[18] and globalization the horizons of 'market' and 'consumer' have expanded.[19] Any person who uses any product or services was termed as a consumer. Over the last few years, India too embraced

[15] AIR 1996 SC 550.

[16] AIR 2000 SC 3138.

[17] G.B.Reddy's, *Law of Consumer Protection* (Gogia Law Agency, Hyderabad, 2009) pp.1-6.

[18] Privatization is the act of selling an industry, company or service that was owned and controlled by the government, so it becomes privately owned and controlled, *available at* https://dictionary.cambridge.org/dictionary/english/rivatization, (last visited on 25.10.2019.)

[19] *Supra* note 12.

e-commerce as a newer and modern face of business entrepreneurship. Since 1991, after India's economy has liberalized with an outlook to assimilate through the world economy, the prerequisite to assist over with policy and procedural reforms in international trade has become the basis of countries' vocation and monetary policies. Modern technology has made available the rapid increase in the variety of goods and services.[20] Consequently, the past few years have perceived a revolution in technology with the extensive growth of the Internet. Online commerce or electronic commerce as a portion of IT uprisings became extensively used in global trade as well as in the Indian economy.[21] E-commerce has been gaining traction over the past few years and *The Consumer Protection Act 1986* does not have any provisions to deal with these transactions. While India is transforming itself into a forerunner in the ICT arena, its laws must be relevant to the transition. Not only should the laws be applicable to innovations in e-commerce but they should also be on par with and sensitive to the legal developments taking place worldwide including consumer protection. Therefore, the Government of India has provided a comprehensive framework both for direct selling and for online selling through its new *The Consumer Protection Act 2019*. As per the new Act, all the laws that apply for direct selling would also be applicable for e-Commerce.

Defining E-commerce and Consumer

Commerce is a communicative transaction between two parties playing very familiar roles: buyer and seller. For the transaction to occur, one party must do the selling, and the other party must do the buying, and these two parties must share a basic understanding of how the transaction is generally supposed to flow. Whereas in e-commerce, the buying and selling of goods or services takes place with the help of Internet. E-commerce encompasses "any form of business transaction in which the parties interact electronically rather than by physical exchanges or direct physical contact."[22] E-commerce relates to the website of the

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[20] Tiwari Garima, *Understanding Laws: Consumer Rights* (Lexis Nexis, Noida, 2014) p.7.

[21] Nuzhat Parveen Khan and Unanza Gulzar, "Online Shopping in India: Issues and Challenges with Special Emphasis on the Consumer Protection Bill, 2015" 3(3) *Jamia Law Journal* (2018) p.8.

[22] Ivonnely Colon Figg, "Protecting the New Face of Entrepreneurship: Online Appropriate Dispute Resolution and International Consumer to Consumer Transaction" 12 *Fordham Journal of Corporate & Financial Law* (2007) pp.230,234.

vendor, who sells products or services directly to the customer from the portal using a digital shopping cart or digital shopping basket system and allows payment through credit card, debit card or electronic fund transfer payments.

The United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) broadly define e-commerce as the process of using electronic methods and procedures to conduct all forms of business activity. It encompasses the production, advertising, sale and distribution of products via telecommunication networks."[23]

Roger Clarke defines e-commerce as "the conduct of commerce in goods and services, with the assistance of telecommunications and telecommunications based tools."[24]

The UNCITRAL Model law on E-commerce refers to e-commerce transactions carried out by means of electronic data interchange and other means of electronic communication, which involve the use of alternatives to paper-based methods of communication and storage of information.

The WTO Work Programme on Electronic Commerce defined "electronic commerce" to mean "the production, distribution, marketing, sale or delivery of goods and services by electronic means."[25]

As per Section 2(7) of *The Consumer Protection Act 2019*, a person is a consumer who avails the services or buys any goods for self-use. In *Regional Provident Fund Commissioner* v. *Shivkumar Joshi*,[26] the Supreme Court held that, the definition of consumer is wide and covers in its ambit not only the goods but also services, bought or hired, for consideration. In *Lucknow Development*

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[23] *Available at* https://www.unescap.org/sites/default/files/embracing-e-commerce-revolution.pdf, (last visited on 29.10.2019.)

[24] Helge Huffman, *Consumer Protection in E-commerce* (University of Cape Town, 2004)p.2, *available at* http://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=19E965EBB55CD63414198B98A19A9C2A?doi=10.1.1.96.7671&rep=rep1&type=pdf, (last visited on 24.10.2020.)

[25] *Available at* https://www.questia.com/read/109098928/the-race-to-the-top-the-real-story-of-globalization, (last visited on 24.10.2020.)

[26] (2000) 1 SCC 98.

Authority v. *M.K. Gupta*,[27] the Supreme Court held that the consumer definition is in two parts. The first deals with goods and the other with services. Both parts first declare the meaning of goods and services by use of wide expressions. In case if a person buys any goods and avails any services for resale or commercial purpose, then he is not a consumer. The new *The Consumer Protection Act 2019* broadens the definition of the consumer by including both online and offline transactions through electronic means, teleshopping, direct selling or multi-level marketing.

E-commerce as the New Face of Entrepreneurship

E-commerce as part of the information technology revolution became widely used in the world trade in general and Indian economy in particular. As a symbol of globalization, e-commerce represents the cutting edge of success in this digital age and it has changed and is still changing its way of business. The commercialization of the internet has driven electronic commerce to become one of the most capable channels for inter-organizational business processes.[28] The internet is principally borderless, as it connects consumers and business across the world, decreases transaction costs and the costs for delivery and facilitates the comparison of a wide range of services throughout the globe.[29] This has helped consumers in gaining information about the available goods and services, which improves the decision-making process. Owing to its lower transaction costs, e-commerce has caused a steady increase in the number of sellers and suppliers in the market thus increasing diversity and competition in the market. Thus, e-commerce has rightfully categorized as the new face of entrepreneurship, which encompasses existing companies, organizations, small business and individual online traders.[30] The development of e-

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[27] AIR 1994 SC 787.

[28] Sarbapriya Ray "Emerging Trend of E-Commerce in India: Some Crucial Issues, Prospects and Challenges" 2(5) *Computer Engineering and Intelligent Systems* (2011), *available at*, http://citeseerx.ist.psu.edu/viewdoc/download?doi= 10.1.1.475.3372 & rep=rep1&type=pdf, (last visited on 29.05.2020.)

[29] D.Naresh Kumar (Ed.), *Consumer Legal Encounters* (The Icfai University Press, Hyderabad, 2008) p.114.

[30] Ivonnely Colon Figg, "Protecting the New Face of Entrepreneurship: Online Appropriate Dispute Resolution and International Consumer to Consumer Transaction" 12 *Fordham Journal of Corporate & Financial Law* (2007) p.238.

commerce has reformed traditional commerce, subjecting consumers in e-commerce transactions to greater risks, while offering only a weak bargaining position when it comes to their rights. The concept and implementation of e-commerce came to the fore in 1999 and it is widely perceived that e-commerce is still at its nascent stage and has not fully realized its potential especially in emerging markets such as India, which brings us to the role of *Consumer Protection Law.*

Reasons for the Growth of E-commerce

Time plays a vital role in all the things and online shopping is not exempted from this. If a person plans to buy some products, first of all he has to allot a time to go and search for the products to know about the availability, if the product is not available in the first shop, then he has to move to another shop. However, all these difficulties can be erased by means of online shopping. The emergence of the Internet has created a dynamic electronic marketplace, where a new species of e-commerce corporations are taking root.[31] Internet users rapidly increased day by day throughout the world. People use the internet to communicate with each other and to make easy business transactions. They can get anything through the internet at their doorsteps. The New *Consumer Protection Act 2019* inspires hopes to solve legal problems of business conduct in the virtual era.

Challenges Posed by Electronic Contracts

The advent of electronic commerce in modern commercial transactions has posed a great challenge on the law of consumer protection. E-commerce allows consumers to purchase goods through transactions that are agreed, settled and transferred in an open network environment. As a result, several problems are of concern to the consumers, which needs to be addressed are:

a. Abuse of Personal Information

When a person plans to buy a product from online means, he must register in a particular online website and also have to comply with other terms and conditions of the e-seller/e-retailer. The basic requirements of most of the online shops are

[31] Nitish Singh and Sumit Kundu, " Explaining the Growth of E-Commerce Corporations (ECCs): An Extension and Application of the Eclectic Paradigm" 33 *Journal of International Business Studies* (2002)pp. 679–697.

name, address, phone number, job details, annual income, date of birth etc., so there is a likelihood of transferring the personal information of e-consumers to their subsidiary companies or to some other unknown persons. Hence, it is truly a threat to the concerned people's privacy.

b. Problematic Delivery

One of the major problems faced by consumers is delay in delivery. The online shops will not give any assured date of delivery. Sometimes they clearly specify too, it is not accurate; instead, they use the clause 'may', 'within'. Further the e-consumer is asked to acknowledge safe delivery by affixing a sign on a paper or on another electronic device before the concerned product is inspected by him. Thus, the delivery is very complicated when we compare it with traditional shopping.

c. Ignorance of Complaint and the Problem in Refund

As there are plenty of consumers online, there is responsibility on shoulders of online shopping website owners to create a separate cell or wing in their website to assist consumers but in practical they provide only the email id to submit the feedback and the complaint. In some websites, they provide official telephone numbers. But, when a problem arises and the consumers try to contact by means of email id or telephone number, it ends in no response or inadequate response. Only very few websites refund the money to consumers and have taken due care to deal with e-consumers problems. Most of the sellers try to ignore complaints from e-consumers problems. Most of the sellers try to ignore complaints from e-consumers regarding delay and deficiency[32] in products and they are not ready to refund or exchange for their faults.

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[32] Section 2(11) of *the Consumer Protection Act 2019*: 'deficiency' means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service and includes-

1. any act of negligence or omission or commission by such a person which causes loss or injury to the consumer; and
2. deliberate withholding of relevant information by such person to the consumer.

d. Consumer Duty

Even after a paradigm shift from *Caveat Emptor* to *Caveat Venditor*,[33] the manufacturers and service providers of all the sectors are exploiting consumers. Consumers' consciousness determines the effectiveness of consumerism. Therefore, it is the duty of the consumer to identify his/her rights and protect them. They must be aware of their rights, raise voice against exploitation and seek redressal for their grievances.

Key Provisions of New *Consumer Protection Act 2019*

Some of the important provisions of the new *Consumer Protection Act 2019* are as follows:

E-commerce

One of the key guidelines in the *Consumer Protection Act 2019* is E-commerce. E-commerce platforms (Amazon, Flipkart, Myntra, Ajio, etc.) are required to disclose the details of the sellers. Apart from the manufacturers, product liability would also include the sellers as well as the service providers i.e. the e-commerce aggregators.

Redefined Rights of Consumers

The *Act 2019* redefined the rights of the consumers in the following manner:

- Right to be protected against the marketing of goods and services that are hazardous to life and property;
- Right to be informed about the quality, quantity, potency, purity, standard and price of goods or services before, during and after the transaction to protect the consumer against unfair trade practices;[34]
- Right to be assured wherever possible access to a variety of goods and services at competitive prices;

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[33] *Caveat Venditor*: Tacit warning to the seller that, unless they expressly disclaim any responsibility, they will be held liable if the sold items are found defective in any way or vary from the specifications.

[34] Unfair Trade Practice refers to any unfair method or deceptive practice adopted for promoting the sale, use or supply of any goods, or for the provision of any service.

- Right to be heard and to be assured that consumers' interests will receive due consideration in appropriate consumer fora/commissions;
- Right to seek redressal against unfair trade practices and unscrupulous exploitation of consumers;
- Right to seek redressal for deficiency of service;
- Right to consumer education;
- Right to effective cooperation in establishing the standards of the products and other related acts regarding consumer protection; and
- Right to test the goods prior to purchase.

The nature of open internet networks during electronic transactions creates a number of threats including privacy and security violations.

The Central Consumer Protection Authority

The Consumer Protection Act 2019 contains a provision to constitute the Central Consumer Protection Authority (CCPA) by the Central Government. The purpose of CCPA is 'to promote, protect and enforce the rights of the consumers.' CCPA is an investigative wing headed by a Director General who conducts inquiries and investigations into any violations relating to consumer rights, unfair trade practices and misleading advertisements. *The Consumer Protection Act 1986* did not contain such regulatory provisions.

The Functions of CCPA

The main functions of CCPA are as follows:

- Inquiring the violations of consumer rights;
- Investigating violations and proceeding with prosecution as appropriate;
- Pass orders to recall any goods or withdraw services that are deemed to be hazardous;
- Issue orders in regard to reimbursement of the price paid by customers for such services;
- Issues directions to the appropriate personnel in regard to any false or misleading advertisement to either discontinue or modify it;

- Imposing penalties in respect to any violations;
- Issues notices to educate consumers in relation to unsafe goods and services.

The Consumer Disputes Redressal Commissions

The *CPA 2019* contains provision to set up the Consumer Disputes Redressal Commissions (CDRCs) at various levels i.e. at district, state and national. In *Common Cause, A Registered Society* v. *Union of India*,[35] the Supreme Court pointed out in very clear terms that the *Consumer Protection Act* has aimed at establishing dispute resolution forums at grass root level so that large body of consumers of the country residing at rural and urban regions can access these forums easily and with little cost. The Act has reposed mandatory responsibility in the State and Central Government to establish a three-tier mechanism called consumer disputes at grass root level. These forums have to be set up and administered in an effective manner to fulfill this spirit of the legislation. Decentralization and increased scope for participation is a crucial characteristic of the *Consumer Protection Act*.

Each of these levels of three-tier mechanism have varying jurisdiction based on the value of goods and services for which the complaint is being made. The Supreme Court in *Sudha Jain* v. *Chief Manager*, [36] has held that the pecuniary jurisdiction of the forum is based on claims and not reliefs granted. However, it does not mean that the complainant is at liberty to mention any arbitrary value in the complaint petition. When a complaint is filed in the State Commission, and it appears to the Commission that the amount claimed is exaggerated, it has to provide hearing to the parties and return the petition to the parties for presentation before a proper forum.

Consumers can File Complaints (also through online) with the District CDRCs regarding any of the following matters:

- Defective goods or services;
- Overcharging or deceptive charging on goods and services;

[35] AIR 1993 SC 1403.

[36] (2005) 5 SCC 717.

- Offering services or sale of goods which can be hazardous to life or not safe;
- Any unfair or restrictive trade practices.

In *Mahindra and Mahindra Ltd.* v. *Union of India*,[37] the Supreme Court on how to determine a trade practice as restrictive trade practice held:

> "Whenever, therefore, a question arises before the Commission or the Court as to whether a certain trade practice is restrictive or not, it has to be decided not on any theoretical or a priori reasoning, but by inquiring whether the trade practice has or may have the effect of preventing, distorting or restricting competition. This inquiry obviously cannot be in vacuum, but it must depend on the existing constellation of economic facts and circumstances relating to the particular trade. The peculiar facts and features of the trade would, be very much relevant in determining whether a particular trade practice has the actual or probable effect of diminishing or preventing competition and in the absence of any material showing these facts or features, it is difficult to see how a decision can be reached by the Commission that the particular trade practice is a restrictive trade practice."

The Appellate Process

The parties involved in the complaint have the right to appeal in the higher forums in respect to any ruling provided in the respective CDRCs.

- Any appeals from the district CDRC would be heard in the State CDRC.
- Appeals from State CDRCs would be taken up in the National CDRC.
- The final appeal beyond National CDRC would be taken up by the Supreme Court.

Product Liability

Product Liability[38] is a key aspect introduced in the Act that would benefit the consumers. Under the provisions of this Act, a manufacturer or a service provider

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[37] (1979) 2 SCC 529.

[38] Product liability means the liability of a product manufacturer, service provider or seller to compensate a consumer for any harm or injury caused by defective goods or deficient service. To claim compensation, a consumer has to prove the defect or deficiency in goods or services.

would be required to compensate the consumer in case of any loss or injury due to a manufacturing defect[39] in the product or a poor service. This differs from the provision of 1986 Act where only the cost of the product was compensated by the manufacturer or the service provider and not the cost of the loss or injury as in the current *Act 2019*.

Mediation

The Consumer Protection Act 2019 has introduced a new chapter on mediation as an alternate dispute resolution mechanism, in order to resolve the consumer dispute faster without having to approach the Commissions and parties are allowed to settle their disputes through mediation either in whole or in parts. In *Bijoy Sinha Roy* v. *Biswanath Das and Ors.*,[40] Supreme Court held that to achieve the objectives of the *Consumer Protection Act* there is need for devising mechanism for speedy trial and to adopt an Alternative Dispute Resolution Mechanism.

The Consumer Protection Act 2019 provides for the establishment of a Consumer Mediation Cell at each level i.e. District, State and National Commission. The Commissions can, at any stage of the proceedings, direct the parties to have their matter settled by mediation, where it appears that there exists a possibility of resolution of the dispute through mediation. In case the mediation is successful, the terms of such agreement shall be reduced into writing accordingly. Where the consumer dispute is settled only in part, the Commission, shall record the settlement of the issues, which have been settled, and shall continue to hear the remaining issues involved in the dispute. Suppose if mediation is not successful, the respective commission shall within seven days of the receipt of the settlement report, pass a suitable order and dispose of the matter accordingly.

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[39] Section 2(10) of the *Consumer Protection Act 2019*: 'defect' means any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force or under any contract, express or implied or as is claimed by the trader in any manner whatsoever in relation to any goods or product and the expression 'defective' shall be construed accordingly.

[40] Civil Appeal No. 4761 of 2009.

Guidelines Regarding Misleading Advertising and Endorsers

The Act lays down guidelines for any misleading advertisements for a product or service, which affects the consumer. It could lead to a prison term of two years and a fine, which can be up to Rs. 10 Lakhs. Any subsequent offence could lead to an imprisonment of up to 5 years and a fine extending to Rs. 50 Lakhs. New Act has the provisions, which allow CCPA to fix the liability even on the endorser of any misleading advertisement. It can also prohibit an endorser from making endorsement for any product or service for a period of one year if found necessary. Any subsequent violation could result in prohibition from endorsing any product or service for a period of 3 years. This is expected to make the brand ambassadors exercise due diligence on the veracity of the claims being made about a product or a service before choosing brands to endorse. The Act simplifies consumer litigation and takes cognizance of emerging trends, but implementation remains a challenge.[41]

Conclusion

The matters relating to violation of rights of consumers, unfair trade practices and false or misleading advertisements are prejudicial to the interests of the public and consumers. The advertisements of goods and services in the television, newspapers and magazines influence the demand for the same by the consumers although there may be manufacturing defect, imperfection, or shortcoming in the quality, quantity and the purity of the goods or there may be deficiency in the services rendered. The *CPA 2019* has overcome this by covering buying of goods, hiring or availing of any services via any electronic mode, teleshopping, direct selling or even multi-level marketing, by widening the definition of consumer under Section 2(7). The *CPA 2019* is a positive step towards reformation and development of consumer laws, in the light of dynamically changing socio-economic developments. Technology played an important role during Covid-19 pandemic. The internet and other electronic networks make it possible for more and more people all over the world to conquer physical distance, especially during the Covid-19 pandemic.

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[41] *Available at* https://www.questia.com/read/109098928/the-race-to-the-top-the-real-story-of-globalization, (last visited on 24.10.2020.)

Besides this, the electronic filing of complaints & permission to attend the hearing through video conference are very important steps in simplifying the process of complaints. Further, the idea of mediation also helps in quicker disposal of cases. With the inclusion of e-commerce under the structure of consumer laws, the Act takes cognizance of the emerging trends in the marketplace. However, it remains to be seen how all the new provisions will be implemented since it will require augmenting the physical & human resources at every level and that will require additional allocation of funds both by the Central & State Governments.

DEBATING THE INTERFACE BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW: A FEW CONCERNS REGARDING THE RELEVANCE OF THE TRADITIONAL DEBATE, PRIMACY OF LAW AND INTEGRATION OF THE LEGAL SYSTEMS

Dr. Akhila Basalalli*

Abstract

The interface between international and municipal legal systems has moved from segregation towards convergence and integration. The changing contours of sovereignty are evident by the blurring divide between the two legal systems. This process is manifested by relaxing the requisite of transformation of treaties and elevating status of customary norms to 'law of the land'. The Indian Courts too have emanated a varied set of judicial techniques. Considering contemporary developments, the paper examines the relevance of the monist-dualist debate, questions the primacy of law in the event of conflict and pursues the trending integration.

International and national legal systems have long been witnessing a systematic and normative convergence. Until the 20th century, international law was mainly concerned about the external engagements, but the modern international law has encroached upon the subject matters that were essentially state-centric. This systematic convergence is evident across the disciplines of human rights, environment, labour laws, refugee law, commercial laws, maritime law to name a few. As Starke observes that "nothing is more essential to a proper grasp of the subject of international law than a clear understanding of its relation to state law".[1] Higgins further stresses on the need for a good grounding in both municipal and international law if there is to be a real understanding of the relationship between the two.[2] The first segment of the paper explores the relationship between the two

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1 Starke J.G. "Monism and Dualism in the Theory of International Law", *British Yearbook of International Law*, 63, (1936).

2 Michael Kirby," The Growing Rapproachment between International Law and National Law", in A. Anghie and G. Sturgess (eds.) *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry*, 333-354, 333 (Kluwer Law International, Hague 1998).

legal systems through the traditional theories while the second questions their relevancy. It ventures into the new theories that are put forth as alternatives to the traditional theories. This is followed by the deliberation upon the primacy of law in the event of conflict between the norms of two legal systems and traces the trends of their integration. The paper finally examines the effects of such trends in primacy and integration through the prism of third world studies.

Traditional Schools of Thought

The discussion regarding relationship between international law and municipal law begins with the theoretical understanding of such relationship by the two traditional schools of thought; schools of monism and dualism. McDougal opined about the traditional schools as "scholarly opinion for several decades has ranged from the view at one extreme that international law is not a law at all but mere rules of morality through varying versions of dualism to a monistic conception at the other extreme that international law dictates the content of national laws."[3] The monism- dualism classification is used in two different contexts; firstly, to understand the relationship between domestic law and international law and secondly, to describe a particular state's policy with regard to the effect of international law under its domestic law.[4] However, the choice of international law's model today, monist or dualist, is an expression of State's confidence in modern international law.[5]

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[3] Myres McDougal, "The Impact of International Law upon National Law: A Policy-Oriented Perspective", in Myres S. McDougal and W. Michael Reisman (eds.) *International Law Essays: A Supplement to International Law in Contemporary Perspective,* 437- 480, 439 (The Foundation Press, New York 1981).

[4] David Sloss, "Treaty Enforcement in Domestic Courts": A Contemporary Analysis in David Sloss (eds.) *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study*, 5 (Cambridge University Press, Cambridge 2009).

[5] Prabhakar Singh, "Indian International Law: From a Colonized Apologist to a Subaltern Protagonist" 23 *Leiden Journal of International Law* 96 (2010).

Monism

Monism is based on the assertions[6] of supremacy of international law over the national law. Monism finding its roots in the writings of the scholars of natural law who attached the concept of state sovereignty to construction of law[7]. The jurists of natural law advocated that sovereignty represented no more than a competency given by international law, identified as a part of the wider '*ius naturea.*'[8] However, the idea of 'delegation of sovereignty to the state by international law' was replaced by 'the will of the state' through the profound works of Vattel and Hegal. Vattel asserted that "Every sovereign state is free to determine for itself the obligations imposed upon it" while Hegel explained it further by interpreting the state as "a metaphysical reality with value and significance of its own, endowing it with the will to choose whether it should or should not respect international law."[9]

The monists argue that the existing laws are understood to be part of the law of the world community. The emphasis on world community signifies the approach towards "universalism".[10] The monists believe that there is no future to nationalist jurisprudence and only transnational legal process can draw national legal systems closer.[11] Monist theory lays its foundation in the idea of a unitary

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6 Monism found its position in the early writings of Emile Durkheim and Leon Duguit. Few recent expositors of monism are Hans Kelsen, Josef Kunz, George Scelle, Alfred Verdross and Hugo Krabbe.

7 Suarez and Bodin expressed the notion of superior legal order which delegates the sovereignty to states.

8 *Supra* note 1 at 68.

9 *Ibid.*, at 68.

10 Alexander Somek, "Monism: A Tale of the Undead" in Matej Avbelj and Jan Komarek (eds.) *Constitutional Pluralism in the European Union and Beyond*, 343- 380 (Hart Publishing Ltd, Oxford 2012); Alexander Somek,, Monism: A Tale of the Undead, U Iowa Legal Studies Research Paper No. 10-12 2 (2010), *available at* :https://ssrn.com/abstarct=1606909 (last visited on March 23, 2019).

11 Harold Koh, "International Law as Part of Our Law"98 *American Journal of International Law* 52 (2004).

legal system i.e. the law is to be understood in unity as they are of the same system of norms.[12] It is based on three principle assumptions[13] namely:

1. The origin and the sources of national law and international law are essentially the same. As Kelson argues, the source of national law are legislations and customs likewise, the treaties and customs form the sources of international law. The method of law-making is different in national and international law but it is not different in principle.[14]
2. Both spheres of law simultaneously regulate the conduct of individuals, hence cannot be independent of each other. There is no difference between international and national law with respect to the subjects of the obligations and rights established by the two legal orders as the subjects are in both cases individual human beings. The national legal orders directly determine the conduct of the individuals whereas, international legal order leaves to the national legal order the determination of the individuals whose behaviour forms the content of the international obligation.[15]
3. The two systems are in their essence group of commands which bind the subjects of law independently of their will. There is no subject matter which can be regulated only by national law and not by international law. Every matter that is, or can be, regulated by national law is open to regulation by international law.[16]

Monists find that national and international law have identical subjects, sources and contents. It is argued that jurisprudence is science, and the object of science is formed by unity and cognition.[17] It premises the idea that there has to be unity

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[12] Rosalyn Higgins, "*Problem and Process: International Law and How we Use It*" 205 (Oxford University Press, New York1995).

[13] Emmanuel Margolis, I "Soviet Views on National and International Law" 4(1) *The International and Comparative Law Quarterly* 117 (1955).

[14] Hans Kelson, "*Principles of International Law*" 404 (Rinehart and Company, New York 1952).

[15] *Ibid.*, p. 402.

[16] *Ibid.*, at 406.

[17] *Supra* note 1 at 74.

relations between international law and municipal law. For monist, international law is simply part of the law of the land, together with the more familiar areas of national law.[18] Since international and municipal law belong to a single legal order, international law becomes directly applicable in municipal law without any express adoption which is termed as the theory of incorporation. All international law norms i.e. treaties, customary international law or general principles will be directly applicable in municipal law without any change in their content or character. In this method, a complete unification is reached as the norms with same content are valid in all the states[19] and international norms are applicable without changing their content. The jurist namely Gentili, Grotius, Vattel and Pufendorf argue for the development of rules on treaty interpretation recognizing the importance of universal methodology independent of state's will.[20] The advocates of direct application advance reasons such as firstly, the effectiveness of international law is likely to enhance with direct application as it decreases the likelihood of national authority refusal or neglect to provide the transformation to the treaty.[21] Secondly, the direct application assures that all the parties will carry out their obligations. Finally, it recognises the rights of an individual in the legal system i.e. when a treaty contains norms designed to be applicable to individuals, the individuals can base their claims on the treaty norms without the need for government's intervention or an act of transformation.[22] The automatic incorporation is said to operate unless there is some clear provision of national law such as a statute or judicial decision which precludes the application of an international norm.[23] There can hardly be any instance

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18 *Supra* note 2 at 333.

19 Karl J. Partsch, "Encyclopedia of Public International Law"10 *Max Planck Institute for Comparative Law and International Law* 247(1987).

20 Aust Philipp Helmut, Rodiles Alejandro and Staubach Peter, "Unity or Uniformity? Domestic Courts and Treaty Interpretation" 27 *Leiden Journal of International Law* 80 (2014).

21 John H. Jackson, "Status of Treaties in Domestic Legal System: A Policy Analysis" 86(2) *American Journal of International law* 321(1992).

22 *Ibid.*, at 322.

23 Martin Dixon, *Textbook on International Law* 240 (Oxford University Press, New York 2007).

where the statute or judicial decision has obstructed implementation of treaty as treaty requires consent of state. However, when the application of general international law is provided in state constitutions and new developments in customary international law are not recognised by such states, they may enact rules in this regard by preventing the supremacy of international law.[24]

Monists regard dualism as a threat to the health and effectiveness of international law. They argue that more dualistic a state's constitutional jurisprudence, the greater the risk of slippage in that state's compliance with international law.[25] They further argue that with the supremacy of national constitutions and independence of governmental entities in relation to international law, the compliance with international relations has weakened. The scepticism against monism may be for reasons namely, firstly, it being misused as the policy or method to direct and control the states as integration of two systems can lead to the subordination of internal law to international law. The argument is furthered in the light of Eurocentric nature of international law where under the banner of unification and international cooperation the sovereignty of the third world is compromised. The monists argue for the global state that essentially comes into existence with the unification of legal systems. Chimni opines that "there is now a global network of legislators, judges, bank officials and police officials trying to collectively address common global problems. Such networks are the first step in aggregating the functional processes necessary for the formation of a global state".[26] Monism, secondly contends, that every subject of municipal law finds its source in international law.[27] A few subjects like diplomatic agents, immunity from the local jurisdiction, territorial waters etc., draw their source from international law and the generalization that every subject of municipal law has its source in international law may be inappropriate. Thirdly, there is advocacy towards primacy of international law over municipal law. Borchard explaining the dualist view states that "international law is a special variety of law

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[24] *Ibid.*, at 247.

[25] Louis Henkin, "Implementation and Compliance: Is Dualism Metastasizing", 91 *Proceedings of the Annual Meeting (American Society of International Law)*, 515(1997).

[26] B.S. Chimni, "International Institutions Today: An Imperial Global State in Making" 15(1) *European Journal of International Law*, 20 (2004).

[27] *Supra* note 19 at 247.

operating between entities called states which are theoretically considered equal".[28] International law is applicable mainly through a state. So international law cannot claim supremacy over municipal law.

Dualism

Dualism's early affiliation was in the positive law since the positivist considered international law not as law but as mere positive morality. However, dualist model gained popularity and appreciation among the Marxist scholars[29] as a suitable model for the socialist and newly independent states. Chimni argues that "at present, international law is unable to respond to the expectations of a vast majority of the peoples of the third world, both in terms of maintaining global order and despite its exponential growth in recent years, promoting social justice."[30] He further observes that "the international legal process is being used to control the content of national laws in crucial areas of economic, political and social life, as also to relocate powers from sovereign states to international institutions in order to facilitate their surveillance and development."[31] It is argued that dualism's emphasis on state supremacy minimizes the external intervention thereby protecting the interests of the third world nations.

The traditional dualist conception of the relationship between international law and municipal law was developed by Heinrich, Triepel and subsequently by Strupp, Dionisio Anzilotti, Gaetano Morelli, Angelo Piero Sereni and Walter Rudolf. The positivist method stresses on aspects like state sovereignty and supremacy of the state thereby asserting that international law is formed by the consent of states.[32] Historically only those states that could not contribute to modern international law

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28 Edwin Borchard, "The Relation between International Law and Municipal Law" 27(2) *Virginia Law Review*,139(1940).

29 B.S. Chimni, "An Outline of a Marxist Course in Public International Law" 17 *Leiden Journal of International Law* 17(2004).

30 B.S. Chimni, "A Just World under Law: A View from South Proceedings of the Annual Meeting 100 *American Journal of International Law* 17(2006).

31 B. S. Chimni, "Marxism and International Law: A Contemporary Analysis" 34(6) *Economic and Political Weekly* 346(1999).

32 Malcolm H. Shaw, *International Law*, 121 (Cambridge University Press, Cambridge 2007).

were found to have dualistic or sceptical approach.[33] Although it is evidently demonstrated that international law existed historically, and the modern international law has largely ignored the plurality of cultures and civilizations.[34]

Triepel and other supporters of dualist theory explained the relationship of international law and municipal law upon supremacy of the state and existence of two systems of legal orders. In this way the two legal orders, international and national are described as "two spheres that at best adjoin one another but never intersect".[35] Though few scholars do not support hierarchy and primacy of laws, they uphold the argument of existence of two separate legal orders. Machiko Kanetake, for instance argues that as a matter of formal relations between domestic and international legal orders, the proposition of dualism to separate them has a powerful explanatory force. Drawing attention to the directions in the treaty regarding its implementation under domestic law, she holds that that "the formal legal effect of international law within the domestic legal order is contingent on an authorising rule of domestic law and vice versa"[36]

This theory is termed as dualism as it considers the existence of two separate orders viz., international law and municipal law. The two orders are seen as self-contained and differ from each in three respects for the following reasons. First, international law and municipal law differ with regard to their sources. The origin of the two branches is completely different. Triepel treats the two legal systems as originating from different sources. He contends that the source of international law is formed by the common will i.e., *Gemeinwille* of states.[37] The inter-relation between municipal legal system and state is based on, firstly, all the legal rules

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[33] *Supra* note 5 at 96.

[34] Yasuki Onuma, *A Transcivilizational Perspective on International Law*, 480 (Martinus Nijhoff Leiden, Boston 2010).

[35] Janne Nijman, and Nollkaemper, *International Perspectives on the Divide between National and International Law*,7 (Oxford University Press, Oxford 2007).

[36] Machiko Kanetake, The Interfaces between the National and International Rule of Law: A Framework Paper in MachikoKanetake and Andre Nollkaemper(eds.) *The Rule of Law at the National and International Levels: Contestations and Deference,* 11-41, 37 (Hart Publishing Ltd, Oxford 2016).

[37] Starke, J.G. *Introduction to International Law*, 75 (Aditya Books Pvt. Ltd, New Delhi 10th edition 1994).

which express the will of the dominating class in the state society and secondly, that they function within the society. Hence, if an independent state exists the corresponding separate municipal legal system must also exist.[38] When independent states interact, they establish an international system. Thus, international legal system is not formed as a result of merging of independent sovereign states but as a result of interaction of these sovereign entities. States have their internal structures and processes which do not dissolve in this international system, but maintain their sovereignty and independence being outside of the system and interact with the system through the state. In the words of G.I.Tunkin,

> It is of paramount importance to keep constantly in mind that the main components of the international system-state-exists above all outside this system. This fact makes the relations between the international system and its environment quite specific.[39]

The doctrine of sovereignty and state-will are regarded as the corner stones of the dualist approach. It asserts that international law and internal law coexist without uniting. Secondly, international law and municipal law differ regarding the relations and the subjects they regulate. The municipal law is the law regulating the conduct of the individuals within its territory, whereas international law is a set of rules regulating relations between states. As D'Amato describes "the objects of domestic law are people; the objects of international law are states".[40] The growth of international law has shown its expansion on subject matters which were essentially under the domestic jurisdiction. It is no longer possible to clearly define and separate exclusive fields of application of both laws for instance, human rights, environment, nationality, extradition etc.[41] Various multilateral and bilateral instruments on the above-mentioned subjects were earlier the subjects on which

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38 R.A Mullerson, "Functioning of International Law and Internal Law of States", 24 *Indian Journal of International Law*, 41(1984).

39 *Ibid.*, at 41.

40 Anthony D'Amato, "Is International Law Coercive", *Northwestern University School of Law Public Law and Legal Theory Series*, 6 (2008).

41 S.K. Agrawala, *International Law Indian Courts and Legislature*, 269 (Bombay: Tripathi Pvt. Ltd., Bombay 1965).

states alone had the authority. The overlapping of subject matter in both spheres raises a strong argument against the premise of separate systems of regulation. Mullerson explains that international law which is functioning within the international system contains rules aimed at regulating the subjects outside the international system are not because of same system of regulation but because of the interplay between international law and municipal has become inevitable.[42] It happens because the external social relations, their conditions or trends influence interstate relations to such a degree that state finds it necessary to conclude an international agreement on the framework limiting their capability to regulate such relations individually, like in human rights. State cooperated in the field because of flagrant violation of human rights.[43] There are issues on which one state can produce a desired effect only when accompanied by similar measures in other countries like in the field of environment protection. Therefore, a need for interstate cooperation arises.[44] There are some rules in international law which are aimed at regulation of relations with the participation of individuals because such relations often move beyond state boundaries.[45] It may be argued that the international law and municipal co-exist, even though there must be certain amount of convergence when required, but it does not justify the proposition that both international law and municipal law have the same sphere of operation.

Thirdly, international law and municipal law also differ with respect to their substance. International law is a law between sovereign states and is formed by common will of the states. It is thereby viewed by dualists as weaker law compared to municipal law. When the functioning of international law is analysed, it is pertinent that without municipal law it is impossible to give effect to international law. The international legal position of a state is crucial in creating rules of international law.[46] It is not international law that creates states but states that create international law. The influence of municipal law in international law is the determinant for

[42] *Supra* note 38 at 44.
[43] *Ibid.*, at 44.
[44] *Ibid.*, at 45.
[45] *Ibid.*, at 45.
[46] *Ibid.*, at 46.

creation of rules of international law.[47] Hence international law is dependent on municipal law for its creation and correspondingly has higher validity than international law.

Other dualists dissent from the argument that international law gets validity only through the municipal law and municipal law has correspondingly higher status than international law. Both municipal law and international law are equally important in their respective spheres of application. As Oppenheim opines,

> neither can international law per se create or invalidate municipal law, nor can municipal per se create or invalidate international law. International law and Municipal law are in fact two totally and essentially different bodies of law which have nothing in common except that they are branches but separate branches of the tree of law.[48]

There is very little emphasis on will of state like other dualists who consider it important for creation of international law and that there is no need for the primacy of one over the other as long as they are separate legal orders. However, there have been contradictions in considering international law as a law of the land. Mullerson points out that "when norms of international law are designed for the regulation of international relations of non-authoritative nature the most suitable method of implementation is that of reference than declare international law to be a part of law of land."[49]

With the clear distinction between the branches of law on the basis of source, substance and subjects, establishing a link between these two systems for providing an effective coordination becomes pertinent. Since both international and municipal law are two separate branches of law, international law must undergo a process of transformation into municipal law to be domestically applicable. This process of municipal legal implementation of international law can take mainly two forms, firstly, states may enact rules of municipal law which partly reproduce rules of international law to suit the socio-economic condition of a state by adapting

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[47] *Ibid.*, at 46.

[48] *Supra* note 3 at 440.

[49] *Supra* note 38 at 48.

them. Secondly, state may sanction an application of international law rule in a manner that it requires reference of municipal law.[50] Partsch views that,

> the process of transformation into municipal law changes three aspects of international law; the validity of the norms are based on state authority, state as subjects of international law are replaced by the subjects of international legal order and the content of international norm is changed.[51]

The assessment of both theories incline towards dualism as a preferred model for developing states as it provides some room for adaptation and flexibility in implementing norms of international law. Rather than *verbatim* application, the process of transformation vests the states with certain amount of autonomy in adopting or implementing international law keeping their best interest. The national courts benefit from this school as international normative content is available in the form of transformed domestic law and the tedious process of investigating into the application of international law is avoided.

The Marxist scholars view monist school and its preposition of supremacy of international law to be dominated by the capitalist jurisprudence. As Chatterjee points out that globalization cannot be wished away and that what is called for is 'flexible, mixed and variable anti-empire politics'.[52] The dualists argue monism to be an attack on the institution of national sovereignty as it supports the imperialistic political aim of establishing supranational organizations, monistic theory would justify intervention into the internal affairs of small and medium sized countries.[53] It is argued that neither universality nor its promise of global order and stability make international law a just equitable and legitimate code of global governance for the Third world and for establishing an egalitarian world order, there is the task not

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[50] *Ibid.*, 47; for example, there can be a provision inserted which states that the international treaties concluded by a state regarding a particular issue must be referred along with the provisions of its national laws regarding that issue.

[51] *Supra* note 19 at 246.

[52] B.S. Chimni, "Alternative Visions of Just World Order: Six Tales from India" 46 *Harvard International Law Journal*, 396 (2005).

[53] Kazimierz Grzybowski, *Soviet International Law and the World Economic Order* 18 (Duke Press Policy Studies, Durham and London, 1987).

only of restructuring international law but also the municipal legal system.[54] TWAIL basically describes a response to this condition that is both reactive and proactive. Its reactive means is to respond to international law as an imperial project and proactive approach is to seek the internal transformation of conditions in the third world.[55] It is further viewed that the old dualistic theories prevent the municipal systems from being held prisoner by former colonial powers under the post-independent agreements. The developing states need to be free of these agreements' effects on domestic structures in order to move in the direction of socialism.[56] To ensure the confidence of the third world countries, international law has to recognise and accommodate the alternative voices of TWAIL.[57]

Persistence of Monist- Dualist Debate

Many scholars have argued the relevance of the traditional monism- dualism debate in the contemporary time. There are many reasons for these notions to lose their relevance. One of the primary reasons is the expansion of international law under the globalization. As globalization advanced, the development of international law swept through the domains that were essentially state centric. This has led to the multiplicity and overlapping of norms resulting in the increased interface between the two legal systems. The idea of globalization to materialize required the establishment of international organizations with the supra-national authority. These international organizations supplanted the domestic laws with the international normative order. As Chimni argues "the chief task of international institutions is to facilitate the operation of transnational capital by creating appropriate economic and social conditions."[58] Hegde further observes that "regardless of state's intent, international legal norms embodied through various treaties and agreements have

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[54] John N. Hazard, Kiev: Izdatel'stvoob'edineniiaVishaShkola"78 (1) Review *of V.G Butkevich, The American Journal of International Law* 250(Jan. 1984).

[55] Matua Makau and Antony Anghie "What is TWAIL?" 94 *Proceedings of the Annual Meeting (American Society of International Law)* 31(2000).

[56] *Supra* note 54at 250.

[57] *Supra* note 5 at 96.

[58] *Supra* note 26 at 2.

influenced domestic legal framework."[59] The notion of state sovereignty has lost its sanctity and relevance over the years with the development of international law and international organizations. The fragmentation of international law also forms an important reason for the fading relevance of monism and dualism. Few of the sectorial regimes like human rights, environment, refugee laws, extradition among many others have become the subjects of transnational interest. As a response of the changing scenario, the states have deserted their orientation towards one school of thought. The state practice copes with change occupying neither monism nor dualism, but a middle ground. The above-mentioned issues may appear as a chain of events resulting from globalization, but each one of them is a specific reason in itself for the losing relevance of the traditional doctrines.

The scholars have exhibited their disappointment regarding the monist-dualist debate many ways. Although the term "monist" and "dualist" are used to describe different types of domestic legal systems, the actual legal system of many states do not fit neatly into either of these two categories.[60] Bogdandy views the theories of monism and dualism as "intellectual zombies of another time and they should be laid to rest or deconstructed because their arguments are considered as hermetic, the core assertions little developed and not linked to the contemporary theoretical debate."[61] Such opinions have necessitated the establishment of coordination between the two branches of law which puts the present theoretical issues in perspective. The jurists are of the opinion that the dichotomy of monism and dualism conflicts with the way in which international and national courts behave. Denza while criticising the traditional theories states that,

> in their opinion to classify a state as monist or dualist does not greatly assist in describing Constitutional approach to international obligation, in determining how its government and Parliament will proceed in order to

[59] V. G Hegde, "International Law in the Courts of India"19 Asian *Yearbook of International Law,* 66 (2013).

[60] *Supra* note 4 at 5.

[61] Armin Von Bogdandy, "Pluralism Direct Effect and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law" 6(3-4) *International Journal of Constitutional Law* 400 (2008).

> adopt or implement a new treaty or in predicting how its courts will approach the complex question which arise in litigations involving international law.[62]

Rosalyn Higgins argues that though monism- dualism debate provide answers for the questions regarding the relationship between international law and domestic law on the philosophical level, but the actual answers are given only when an issue is adjudicated. In reality, she opines that there is usually little explanation or discussion of the larger jurisprudential matters in the domestic court hearing. In her words,

> Whichever view you take, there is still problem of which system prevails when there is a clash between the two. One can give answers to that question at the level of legal philosophy; but in the real world the answer often depends upon the tribunal answering it (whether it is a tribunal of international or domestic law) and upon the question asked.[63]

The Court's increasing willingness to forsake dualistic certainties therefore lends support to Brownlie's observation that the theoretical constructs of monism and dualism have tended to obscure the realities of the status of international law in the domestic legal system.[64] Veronica Fikfak also argues that the monist-dualist debate fails to capture the role of domestic court in relation to international law. She further opines that the monism-dualism debate neglects the role of the domestic judges in defining the "part" in an attempt to internalise international law. She argues that,

> Traditionally, international law becoming a "part' of domestic law depends on whether a jurisdiction is considered 'monist' or 'dualist'. The labels such as "monism" and "dualism" are unhelpful because they present the question of bindingness as an issue decided extra-judicially, most often by other branches of government which make international law "part" of domestic law- by a Parliament which brings international law into domestic law, or by the Executive that assents to it at a domestic level. [65]

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62 Eileen Denza, "The Relationship between International and National Law", in Malcolm D. Evans (eds.) *International Law,* 418 (Oxford University Press, New York 2010).

63 *Supra* note, 12 at 206.

64 Hunt Murray, *Using Human Rights Law in English Courts* 42 (Hart Publishers Oxford 1998).

65 Veronika Fikfak, "International Law before English and Asian Courts: Finding the Judicial Role in the Separation of Powers" 3 *Asian Journal of International Law* 272 (2013).

Crawford suggests disaggregation from the notion of "part" than fiddling with terms such as "adoption" and "transformation". He lists out four elements of Lord Mansfield's rule, later adopted by Lord Denning,

a. Judicial knowledge- the courts acknowledge the existence of a body of international law, whose content is not a matter of evidence but of argument.

b. Judicial authority- in any matter where the courts acknowledge international law to be relevant or to govern, they may apply international law as the rule of decision.

c. Judicial integration- international law is not same in every domestic legal system but the latter should be assumed to be consistent with it.

d. Judicial precedent- a rule of international law applied in this way remains a rule of international law; it is not indigenized or domesticated. If international law changes, then so does the decision based on it.[66]

Though monism is adopted in many constitutions it's only of nominal significance because when the interests of imperial government come into conflict with the rules of international law, imperialistic lawyers rely on the rules of municipal law.[67] Somek, a firm advocate of Kelson's monism questions the existence of dualism. Dualists contend that public international law is grounded in the state constitution which means that either the customary international law or the treaty norms get their validity only after being recognised by the domestic law. Somek refers this attribute to that version of Kelson's monism which is no longer talked about, namely monism with primacy of state laws.[68] Automatic incorporation does not guarantee the applicability of international law in the domestic legal order as domestic law may allow direct effect of certain sources of international only or of some elements within such source or may permit the local constitution or even

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[66] James Crawford, "International Law in the House of Lords and the High Court of Australia 1996-2008: A Comparison", 28 *Australian Book of International Law* 6 (2009).

[67] *Supra* note 53 at 18.

[68] *Supra* note 10 at 9.

subsequent ordinary law to override international law.[69] In all circumstances the reception of international law into the domestic legal order is regulated by domestic law more or less stringently.[70] It can be further argued that there is no such thing as monism properly called.

Dualism on the other hand has lost its relevance, firstly, as most of the common law systems that had their firm roots in the dualist model have been directly incorporating customary internation al law into their legal systems. Secondly, the requirement of transformation has been relaxed by the domestic courts of the dualist states with respect to a few of international instruments. The domestic courts of these dualists state have also been found giving effect to the informal international instruments. It therefore appears to be impossible to characterize a as strictly dualist.

Many states fall along a continuum between pure monism and total dualism in their approach to international law. Both these schools have failed to capture a clear picture of the prevailing trend in the state practice through a theoretical lens. As a result of this many jurists have developed alternate theories to explain the interface between the two legal systems.

Alternate Theories

Doctrine of Co-ordination

There have been some theoretical attempts to harmonize the dichotomy between monism and dualism through a third approach. This approach may be called the 'co-ordination approach' put forth by Fitzmaurice and Rousseau. The relationship between international law and municipal law is explained as,

> the entire monist dualist controversy is unreal, artificial and strictly beside the point, because it assumes something that has to exists for there to be controversy at all and which in fact does not exist - namely a common field

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[69] International Law Association, "Preliminary Report, Study Group: Principles on the Engagement of Domestic Courts with International Law", 6 (2012); Antonios Tzanakopoulos was Co- Rapporteur of the Study Group.

[70] *Ibid.*, at 6.

> in which the two legal orders under discussion both simultaneously have their spheres of activity.[71]

They argue that the difficulty with both monism and dualism is that these two schools of thought are based on the faulty premise that international legislation and municipal legal system have one and the same sphere of operation. In reality the two systems do not conflict as systems, for 'any conflict between them in the international field would fall to be resolved by international law, because in that field international law is only supreme. If a state in its conduct, goes beyond its sphere of activity, or exceeds its competence, as delimited or determined by international law, it will internationally be guilty of illegal excess and consequently of a breach of international law"[72] It means that the domestic laws that are in conflict with international law do not get automatically abrogated.[73] The two systems simply co-exist, but on different planes. A domestic law which conflicts with an international obligation may lead to incurring state responsibility in the international legal order, but this would have no legal relevance in the domestic legal order.[74] In this reality, the states make efforts to harmonize their domestic legal order with that of international community, whatever legal technique they may employ through the monist doctrine or the dualist doctrine in order to attain unification is not of much significance. [75]

The co-ordination doctrine is not totally different from the traditional theory of dualism. Though the doctrine was formulated to provide solution from the traditional doctrines it reinstates few principles of dualism. Like dualism, this theory argues that the municipal law and international law are separate, independent legal orders having application in their individual different fields. The interaction between them becomes necessary for the effective implementation of international law.

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71 Peter Malanzcuk, *Akehurst's Modern Introduction to International Law* 64 (Routledge, New York 1997).

72 Hisashi Owada, "Problems of Interaction between the International and Domestic Legal Order" 5 *Asian Journal of International Law*,252 (2015).

73 Ian Brownlie, *Principles of Public International Law* 33 (Oxford University Press, New York 2008).

74 *Supra* note 72 at 252.

75 *Ibid.*, at 252.

Doctrine of Pluralism

Armin Von Bogdandy is the chief architect of the pluralist doctrine. He considers monism and dualism to be unsatisfactory as they are little developed and dismisses the opposing views as illogical. He opines that "monism and dualism should cease to exist as doctrinal and theoretical notions for discussing relationship between international law and national law."[76]

Pluralism like dualism is based on the assertion that international law and municipal law are two separate distinct legal orders. Pluralism does not strictly separate legal orders but views that there exists interaction among them. For the interaction of the legal regimes, Bogdandy devised the method of coupling i.e. coupling international law and the municipal law. This process of coupling is achieved by two doctrine: 'doctrine of direct effect and doctrine of consistent interpretation'.[77] The doctrines have their bases in constitutional law. The doctrine of consistent interpretation, which is also called as the Charming Betsy doctrine[78] after a case before United States Supreme Court, where the court held that "an act of Congress ought never to neglect the law of nations if another possible construction is available."[79] This is also known as the harmonious construction doctrine. This doctrine states that while interpreting a statute if two possible constructions are available, then the court must adopt the interpretation which is in harmony with the international law, thereby avoiding the conflict between two the laws.

The doctrine of direct application of international law means that international law is directly implemented into the municipal law without undergoing any transformation. The direct application of international law is manifested through the direct implementation of treaties and customary international law into the domestic legal order. The courts and other government bodies will look at the

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[76] *Supra* note 61 at 400.

[77] *Ibid.*, at 401.

[78] *Murray* v. *The Schooner Charming Betsy* 6 U S (2) 64(1804).

[79] 6 U.S.(2 Cranch) 64, *available at* http://supreme.justia.com/cases/federal/us/6/64/ (last visited on 22 December 2019).

international law as a source of law like the way they look at their constitution, statutes, judicial precedent or any other instrument of domestic law.

Legal Pluralism is explained differently by other scholars. It differs from Bogdandy's conceptualization of pluralism on three grounds; firstly, it asserts the existence of plurality of legal orders, rather than duality; secondly, it argues for the heterarchical relationship between the legal orders by embracing the diversity; and finally, it assumes frequent interaction between overlapping legal orders rather than the separateness of legal orders and refuses to give superiority *per se* to any of them.[80] If there an instance of conflict showing deference and opposite views, then the court has to reason and enquire whether there exists a threat to the values and principles. This judicial dialogue is termed as 'alternating irritation' that in order to be constructive neither of the legal systems should impose their own view on each other and must attempt to accommodate diversity.[81]

This theory is criticised on the ground that it fails to provide a coherent system of solving conflict among the legal orders.[82] Since the theory lacks to provide systematic channels of operation, there might be uncertainty and instability during the course of interaction among the diverse legal orders.

Doctrine of Constitutionalism

Over two decades, European constitutionalists have proposed the idea of European constitutionalism. After transcending the monist school, the constitutionalism claims to be a whole new branch within the constitutional thought. The constitutional pluralism holds that the national constitutions of the states and their European Constitution are ultimately equally self-standing sources of constitutional authority that overlap heterarchically over a territory.[83] This line of thought is extended to international law too. The constitutionalisation theory holds

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[80] Denis Preshova, Legal Pluralism: New Paradigm in the Relationship Between Legal Orders, in Marko Novakovic (eds.) *Basic Principles of Public International Law: Monism and Dualism,* 288- 308, 299 (Institute of International Politics and Economics, Belgrade 2013).

[81] *Ibid,* at 301.

[82] Alina Kaczorowska, Public *International Law* 130 (Routledge, Abingdon 2010).

[83] Klemen Jaklic, *Constitutional Pluralism in the EU* 5 (Oxford University Press, Oxford, 2014).

that international law is in the process of being constitutionalised. It proposes the transfer of the function of domestic constitutions of liberal democracies to international law in order to improve the effectiveness and fairness of the international legal order.[84] It also holds that the ultimate beneficiary of the international legal order is the individual. The advocates of constitutionalism in the global level consider that the transnational constitutionalism is institutionally located in the United Nations, its Charter functioning as a written Constitution for post-war world order. International law is protected and projected as a single juristic category for the international rules like customary international law, *jus cogens*, human rights, treaties for world order. They have special facility to organise the international order in a constitution like way by adding coherence and integrity to the whole.[85]

Kumm while arguing for constitutionalist model for legitimizing international law outlines four essential principles.[86] The first of these is the formal principle of international legality. This principle lays out the presumption in favour of authority of international law that citizens should regard themselves as constrained by international law and set domestic legal institutions to ensure compliance with international law. The second element is the principal of jurisdictional legitimacy or subsidiarity that begins with replacing the concept of state sovereignty. The third principle of procedural legitimacy ensures adequate participation and accountability. The final element is the outcome.[87]

However, the constitutionalism resembles with monism as both emphasise on uniformity and universality and argue for the primacy of international legal order. Since the origin of this theory was in European Constitutionalism, Joerges criticizes it as "European law is often perceived as an autonomous body of law, striving for

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84 *Supra* note 82at 131.

85 Neil Walker, "Constitutionalism and Pluralism in Global Context", in Matej Avbelj and Jan Komarek (eds.) *Constitutional Pluralism in the European Union and Beyond*, 17-38, 22 (Hart Publishing Ltd., Oxford 2012).

86 Mattias Kumm, The Legitimacy of International Law: A Constitutionalist Framework of Analysis, 15(3) *European Journal of International Law*, 917(2004).

87 *Ibid.*,

the harmonization, and often even the uniformity, of rules. Such a perception, however, is overly simplistic and incomplete. Since the uniformity of its meaning cannot be ensured through the adoption of a common text one could argue there is no such thing as a common European law."[88] Roberts further argues that there are Belgium, Dutch, English, French, German, Italian and many other versions of European law. She adds that "in essence, there are as many European laws as there are relatively autonomous legal discourses, organized mainly along national, linguistic and cultural lines."[89] Therefore arguing for a single constitution among the diversified national constitutions may result in the under-representation of few states. This argument can be extended to the international law, that constitutionalism results in the creation of global state.

The loss of relevance of monism and dualism is due to variety of reasons like firstly changing reality in international law in that international law is now fragmented and secondly by state practice. Higgins opines that "for those who think the monist-dualist debate is passé, I also think it right that the difference in response to a clash of international law and domestic law in various domestic courts is substantially conditioned by whether the country concerned is monist or dualist in its approach."[90] She argues that the monist-dualist debate is not out-dated, but "the difference in response to a clash of international law and domestic law in various domestic courts is substantially conditioned by whether the country concerned is monist or dualist in its approach".[91] She argues that not everything is dependent upon whether a country accepts monist or dualist view, even within a given country, different courts may approach differently to the problem of the relationship between international law and national law.[92]

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88 Anthea Roberts, Comparative International Law? The Role of National Courts in Creating and Enforcing International Law, 60(1) International *and Comparative Law Quarterly*,79 (2011).

89 *Ibid*, at 79.

90 *Supra* note 12 at 206.

91 Rosalyn Higgins, International Law and the Avoidance, Containment and Resolution of Disputes, Recueil *Des Cours: Collected Courses of the Hague Academy of International Law 1991-V*, 266 (Kluwer Academic Publishers, Hague).

92 *Ibid.*, at 266.

The distinction between monism and dualism may appear not to be helpful because for the reason that both approaches are reflected in the state practice within a domestic legal system. Despite this, theories of monism and dualism continue to occupy a predominant position in the domestic courts and tribunals as and when the dispute with foreign element arises. Irrespective of their relevance, these theories are important as an orientation of a state towards international law is reflected through the school of thought it follows.

Primacy of Law in an Event of Conflict

In an event of conflict between international law and domestic law, the international legal order ordains prevalence of the former over latter. Partsch observes that on the international level international law is supreme and that this supremacy is valid in relation to any provision of internal law whatever its ranking in the municipal order may be.[93] This principle is reflected in Article 13 of the Draft Declaration on Rights and Duties of the State submitted by the International Law Commission to the General Assembly in 1948 which states that "Every state has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitutions or its laws as an excuse not to perform this duty."[94]

The Article 27 of the Vienna Convention on Law of Treaties 1969 reiterates the text of the above provision. Within the International Law Commission, three views were taken at different times during the course of its work on the law of treaties. First view that was taken by Sir Hersch Lauterpatch was that municipal law prevailed over international law. The opposite view was taken by Sir Gerald Fitzmaurice who asserted on the supremacy of international law over municipal law. In due course, the third view emerged that international law takes precedence

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93 *Ibid.*, at 372.

94 The Draft declaration was annexed to the UN General Assembly Resolution 375(IV) of 1949. It is to be noted that although the UNGA commended the Draft Declaration as a significant contribution to the progressive development and codification of international law, it never concretized into a hard law. *Supra* note 82, p. 131.

over municipal law unless there is a manifest violation of internal law which is invoked as a ground for invalidating the consent of a state to be bound by a treaty.[95]

It was based on a Pakistani amendment at the first session of the Vienna Conference. While introducing amendment Pakistani delegation gave reasons that "states sometimes invoked their international obligations." The purpose of the amendment by Pakistan was to curb that practice by expressly stating the principles of good faith and of the pre-eminence of international law.[96] The Venezuelan, Argentinean and Iranian delegation criticized the provision for its supremacy over the domestic laws. However, Article 27 was adopted at its 72nd meeting by 73 votes to two, with 24 abstentions.[97] The high number of abstentions reflected the hesitations of some states to recognise the supremacy of international law over municipal laws and powers. The Article 27 provides that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to Article 46".

The exception to the compliance is only allowed when there is an internal provision that is of fundamental importance. Article 46 of the VLCT 1969 states that (1) A state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. (2) A violation is manifest if it would be objectively evident o any state conducting itself in the matter in accordance with normal practice in good faith.

The Article 27 of the VCLT 1969 represents the dualist understanding of international legal order and considers the two legal systems as separate and distinct from each other. This provision highlights the importance of the national legal system and hold that an international norm cannot as such quash or invalidate a national

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95 T.O. Elias, *The Modern Law of Treaties*, 45 (Sijthoff International Publishing Company Netherland, 1974).

96 *Ibid.*, at 46.

97 Coasta Rica and Guatemala have excluded the application of Article 27 to their Constitution. Mark E.,Villiger *Commentary on the 1969 Vienna Convention on the Law of Treaties* 371 (MartinusNijhoff Publishers, Leiden 2009).

piece of legislation contrary to the international rules. If inconsistence arises, international law can only enjoin a state to change its legislation and it will be for such state to decide whether or not to comply and in the affirmative through its domestic mechanism.[98] If a treaty is violated it would be a violation of an international obligation unless it is shown that there existed a manifest violation of a rule of internal law of fundamental importance.[99]

The principle of Article 27 is iterated by international court and tribunals in various instances. In Alabama Claims Arbitration,[100] the US sought damages from the Britain for the damages caused by the ship Alabama which the Britain had claimed neutral. The US claimed that the United Kingdom had breached its neutrality and violated the provision of Treaty of Washington that had stipulated the rules of neutrality. Though Britain had declared neutrality, it allowed the building of ship for the private buyers for the purpose of war. Britain referred to the English law that it could not regulate the conduct of the private contracts. The arbitral award held that

> the government of Her Majesty cannot justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed. It is plain that to satisfy the exigency of due diligence and to escape liability, a neutral government must take care...that its municipal law shall prohibit acts contravening neutrality.[101]

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98 Antonio Cassese, "Towards a Moderate Monism: Could International Rules Eventually Acquire the Force top Invalidate Inconsistence National Laws?" in Antonio Cassese (ed.) Realising Utopia: *The Future of International Law*, 187-199 at 191-192. (Oxford University Press, Oxford 2012).

99 Prem Varma, "Position Relating to Treaties Under the Constitution of India" 17(1) *Journal of the Indian Law Institute*,130(1975); Article 6 of VLCT.

100 *United States of America* v. *United Kingdom*, available *at* legal.un.org/riaa/cases/vol_XXIX/125-134.pdf (last visited on 20 July 2019).

101 The ship Enrica, built in Birkenhead was designed as a warship. After she left the UK and sailed to the Azores, her name was changed to Alabama and was fitted with guns and loaded with ammunitions. Also see *supra* note 82, at132.

In the case Treatment of Polish Nationals and Other Persons,[102] the Poland sought from the High Commissioner a decision regarding unfavourable treatment of Polish nationals in Danzig, which was a free state formed by Treaty of Versailles 1919. This case was referred to the PCIJ by the League for advisory opinion. The PCIJ held that,

> A state cannot rely as against another state, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted, on the other hand, a state cannot adduce as against another state its own constitution with a view to evading obligations incumbent upon it under international law or treaties in forces. Applying these principles to the present case, it results that the question of the treatment of Polish nations or other persons of Polish origin or speech must be settled exclusively on the basis of the rules of international law and the treaty provisions in force between Poland and Danzig.[103]

However, a few instances of the state practice of primarily a monist state exhibits resistance to adhere to the earlier principle. The *La Grand, Avena* and *Medellin* cases show absence of uniformity in the state practice with respect to Article 27 of VCLT 1969. In these cases, the US Court's reluctance in giving effect to the Vienna Convention on Consular Rights though being a state party to the Convention and the Optional Protocol (until *Medellin's* case) is highlighted. The *La Grand case (Germany* v. *United States of America)*[104] was the proceeding that was filed by Germany against the US before International Court of Justice (I.C.J.) The La Grand brothers, German nations were convicted for the offence of armed robbery and murder and the US Court had passed execution orders against them. The German government raised the issue of non-compliance with right to consular access by US thereby violation of Vienna Convention on Consular Relations 1963. It sought the intervention of I.C.J. after one of the La Grand brothers was executed. The I.C.J. issued the provisional measures directing the US to take

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[102] *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, (1932) PCIJ Series A/B no 44 *available at* www.icj-cij.org/pcij/serie_AB/AB_44/01/Traitment_nationaux_polonais_Avis_consuiltatif.pdf (last visited on 20 January 2020).

[103] *Ibid.*, at 24.

[104] *Germany* v. *United States of America*, (2001) ICJ Rep 466 *available at* www.icj-cij.org/docket/files/104/7736.pdf (last visited on 20 January 2020).

required measures to stay the execution of the convict until its decision. Despite the I.C.J. ruling, the US authorities executed the convict. The US questioned the jurisdiction of the ICJ that it cannot play the role of ultimate court of appeal in the national proceedings. The Court ruled that it had jurisdiction[105] based on Article 1 of the Optional Protocol to the Vienna Convention concerning the Compulsory Settlement of Disputes 1963[106] and held that,

> there exists a violation of an international obligation. If necessary, it can hold that a domestic law has been the cause of this. But it has not found that a US law whether substantive or procedural in character is inherently inconsistent with the obligation undertaken by the US in the Vienna Convention. The case of violation in the present case was caused by the circumstance in which the procedural default rule was applied, and not by the rule as such.[107]

The Court holding US liable for international wrongful acts sought assurance that US will comply with the international obligations. It is the reiteration of Article 27 i.e. neither a rule nor a procedure arising from a rule can be claimed as an excuse for non- compliance with the international law.

Similar to the *La Grand* is the *Avena* case (*Mexico* v. *United States of America*)[108], where the US was again found liable for not complying with the Vienna Convention on Consular Rights. The Mexican government instituted proceedings against US arguing that US had failed to provide consular access to 54 Mexican nations. The US had convicted and sentences all 54 nationals. The Court issued provisional measures concerning three out of 54 cases as they faced the risk of execution in short period. It ordered for the stay of execution pending

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[105] *Ibid.*, para 36.

[106] Article 1 of Optional Protocol states that "Disputes arising out of the interpretation or the application of the Convention shall lie within the compulsory jurisdiction of the International court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol."

[107] *Supra* note 104.

[108] *Mexico* v. *United States of America*, (2004) ICJ Rep 12, *available at* www.icj-cji.org/docket/files/128/8188.pdf (last visited on 20 January 2020).

the final judgement.[109] The Court in its final judgement held that the US had breached its obligations of the Vienna Convention by not informing the convicts of their rights guaranteed under the Convention and depriving them from the consular access. It held that the US must by its own choice of means review and reconsider the convictions and sentences of the convicts. The Court held that the "clemency process as currently practiced within the US does not appear to meet the requirement and that it is therefore not sufficient in itself to serve as an appropriate means of review and reconsideration".[110] The Court held that ruling in *Avena* has its application not just to the Mexican nations but to all the other foreign nationals.

The other case that reignited the monist-dualist debate is *Medellin* v. *Texas*.[111] In this case, Medellin, a Mexican nation was convicted of rape and murder in Texas. He appealed to the Supreme Court that the Texas authorities have failed to inform him of his right of consular access and such detention was unlawful under the Vienna Convention on Consular Rights. The petitioner brought a second appeal after the President of US then issued a memorandum (based on the I.C.J. decision on Avena) directing the Courts to review the orders of conviction pertaining to the cases that involved foreign nations consular relations. During the proceedings of this case, two issues surface; whether the I.C.J. decisions are to be observed by the US Courts, and if the US courts were to give effect to the memorandum issued by the President to honour treaties. The Court answered in negation that the I.C.J. judgement are non self- executory in nature and hence they need not be given effect absent Congress authorization. The memorandum issued by the President was merely an attempt of enforcement of ICJ decisions which arenon self-executory by nature.

The American position is well explained as "the Supreme Court remains resistant to law which emanates from outside the American democratic process,

[109] *Ibid.*, at 42, para 59.
[110] *Ibid.*, at 58, para 143.
[111] MANU/USSC/0067/2008.

or which lacks a clear domestic imprimatur as applicable US law."[112] The US commitments towards international law is criticised to swing between the self-executory and non self-executory international instruments. Though the US Constitution accords international law status on par with its domestic legislations allowing the direct operation of the international instruments in its domestic legal system,[113] the US Courts are found avoiding the international obligation by categorizing them into the non self-executory commitments requiring a sanction from the senate. Their approach is best described as adopting pick and choose international law for domestic applicability. Although a formally monist American system has distinguished itself over the last years because of its material or jurisprudential values, dualism resulting from national judge's reluctance to incorporate international law into domestic law has a far fetching effect. This tendency has been called nationalist.[114] Attitude of US towards international law is of exceptionalism, unilateralism and general distrust of international law and institutions.[115]

The debate over primacy of laws surfaced in European Union in the famous *Kadi* case[116], when the European Court gave precedence to the EU law over the UN Security Council Resolution. In this case, EU was criticised for adopting a

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[112] Note, "Constitutional Courts and International Law: Revisiting the Transatlantic Divide" 129 *Harvard Law Review* 1366(2016). *Republic of Nicaragua* v. *United States of America* 1986 ICJ 14, the US did not participate, arguing that the ICJ lacked jurisdiction. It further blocked enforcement of the judgment by UNSC denying Nicaragua compensation.

[113] Article VI of the U.S. Constitution reads "that all the treaties made or which shall be made under the Authority of the US, shall be supreme Law of the Land; and the Judges in every States shall be bound thereby, anything in the constitution or laws of state to the contrary notwithstanding."

[114] Saida El Boudouhi, National Judge as an Ordinary Judge of International Law? Invocability of Treaty Law in National Courts 28 *Leiden Journal of International Law* 291 (2015).

[115] *Supra* note 112 at 1362.

[116] *Kadi P. and Al Barakaat International Foundation* v. *Council and Commission* (2008) ECR I-6351, *available at* https://www.asil.org/insights/volume/12/issue/22/kadi-al-barakaat-v-council-eu-ec-commission-european-court-justice (last visited on 15 January 2020).

dualist approach. During 1999, the UNSC adopted resolutions requiring the member states to freeze the funds and financial resources of the people who were associated with Osama Bin Laden. As a result of this UN Sanctions Committee added Yasin Kadi and the Barakaat International Foundation to the list whose assets were to be freezed. Kadi and the Foundation brought actions seeking the annulment of the EU Regulation 881/2009 which implemented UNSC measures, arguing that it breached their fundamental rights under EU law to a fair hearing, use of property and effective judicial review. The Court of First Instance of the European Communities (CFI) dismissed both actions reasoning that it lacked jurisdiction to review the EU regulation. However, the Court checked if it violated the *jus cogens* and since the resolution did not violate any of the pre-emptory norm, it dismissed the action. On appeal ECJ rejected the CFI's ruling and held that the court has the jurisdiction to lawfulness of an international obligation when such obligation breaches the European Treaty's foundational principles like that of fundamental rights. The ECJ ultimately annulled the Regulation 881/2002 on two grounds; firstly, the plaintiff's rights to be heard and to secure judicial review of their rights were patently not respected and secondly, it found that the Regulation unjustifiably restricted Kadi's right to property. It observed that the law which are inconsistent with the fundamental principle of EU will be invalid. This case received a mixed response from the international community.[117] The human rights internationalist applauded the judgement as it protected the human rights while the monist expressed their discontent. It was criticised for adopting dualist stance and being unfaithful to the international law.[118] However, it is important to note from the judgement that the ECJ gave precedence to its EU law only in situations when there was violation of fundamental rights. It is also hypothesized that had there been no threat to the fundamental principle of EU law concerning human rights, the UNSC resolution would continue in its operation. The European Court of Justice again in *Mox Plant* case[119] held that EU as a sovereign and its laws can override any other legal structure.

[117] *Supra* note 112 at 1373.

[118] Juliane Kokott and Christoph Sobotta, The Kadi Case- Constitutional Core Values and International Law-Finding the Balance 23(4) *European Journal of International* Law 1015-1024(2012).

[119] *Mox Plant, available at* www.haguejusticeportal.net/index.php?id=6164(last visited on 21 January 2020).

The scepticism towards the international dispute resolution has also been expressed by non-participation in the proceedings. For instance, in *Artic Sunrise Ship*[120] case, when Russia seized the Artic Sunrise that crewed Greenpeace activist within its EEZ, the Netherlands filed a case at the ITLOS since the ship flagged Dutch Flag. The Russian Federation however, did not participate in the arbitration stating that its refusal to accept the UNCLOS jurisdiction. Similarly, in the *South China Sea Arbitration,*[121] the arbitration examined the historic rights as asserted by China and the sources of maritime entitlement of the disputed area, status of maritime features and lawfulness of certain actions by China that Philippines alleges to be in violation of the UNCLOS.[122] However, China declined to participate in the proceeding of the ITLOS as it viewed the principle subject matter in dispute as political and beyond the jurisdiction and competence of the Tribunal.[123]

The Indian practice on the other hand is dictated by the Constitutional mandate that India has to foster respect to international treaties and international law and solve the disputes amicably through arbitration.[124] Further the explicit provision Article 253 in the Constitution gives effect to international instruments and the ambit of the provision is broad to include settlements, decisions and awards of international dispute resolution mechanism. The Indian approach is mostly of compliance with international law and the dispute resolution systems within the multilateral framework. In the words of Hegde, "While India continued to contest and negotiate its bilateral dispute settlement obligations, it appeared to be more politically flexible as regards its 'consent' to trigger dispute settlement mechanism

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[120] *The Arctic Sunrise Arbitration (Netherlands* v. *Russia)*, PCA Case No. 2014-02 *available at* https://pca-cpa.org/en/cases/21/(last visited on 21 January 2020).

[121] *The Republic of the Philippines* v. *The People's Republic of China,* PCA Case No. 2013-19 *available at* https://pca-cpa.org/en/cases/7/(last visited on 21 January 2020).

[122] *Ibid.*

[123] Ted L. Mc Dorman, The South China Sea Arbitration, 20(17) *ASIL Insights,* (2016) available *at* https://www.asil.org/insights/volume/20/issue/17/south-china-sea-arbitration(last visited on 22 January 2020).

[124] Article 51 of the Constitution.

in the multilateral context."[125] A few instances in the ITLOS[126], ICJ[127] and WTO[128] support the stance that India has largely complied with the multilateral dispute resolution.

In the events of engagement with international law at domestic level, the Indian Courts at first instance confirm that India follows a dualist model in the initial part of the judgement, though deviations are sought at the later stages. In a case before Indian court, *I. P. Geetha* v. *Kerala Livestock Development Board Ltd.*,[129] the Kerala High Court held that "Jurisprudentially India is Dualistic, but Article 51 (c) exhorts the nation to respect the international covenants. On the hand, Article 253 speaks of Parliament's power to give effect to international conventions"[130]. However, in the event of conflict between international law and municipal laws, the Indian Courts have given preference to harmonious construction thereby encouraging an interpretation that effectuates both the norms. The state practice that emphasizes on harmonious construction mostly accord equal importance to international and municipal laws. In *Additional District Magistrate, Jabalur* v. *S. Shivakant Shukla,*[131]

> Equally well established is the rule of construction that if there be a conflict between the municipal law on one side and the international law or the provisions of any treaty obligations on the other, the courts would give effect to municipal law. If however, two constructions of the municipal law are possible. The court should lean in favour of adopting such construction as would make the provisions of the municipal law to the in harmony with the international law or treaty obligations.[132]

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[125] V.G. Hegde "India and International Settlement of Disputes" 56(1) *Indian Journal of International Law* 40 (2016).

[126] See Enrica Lexie, Bengal Maritime Arbitration.

[127] See Right of Passage, Marshall Island, Jadhav case.

[128] See India-Quantitative Restriction, India- Agricultural Products, India –Solar Cells.

[129] 2015 (1) KHC 165.

[130] *Ibid.* para 51.

[131] AIR 1976 SC 1207.

[132] *Ibid.*, at 1259, para 169.

The Indian practice has been clear that in case of inevitable conflict and impossibility of harmonious construction, municipal law prevails over international law. In *Gramophone Co of India Ltd* v. *Birendra Bahadur Pandey*,[133] the Court held that,

> "National courts will endorse international law but not if it conflicts with national laws. National courts being organs of the national state and not organs of international law must perforce apply national law if international law conflicts with it. But the courts are under an obligation within legitimate limits, to so interpret the municipal statute as to avoid confrontation with the comity of nations or the well-established principles of international law. But if conflict is inevitable, the latter must yield"[134]

The reiteration of the above principle is seen in *Vellore Citizens Welfare Forum* v. *Union of India and Others*,[135] *Supreme Court in People's Union for Civil liberties (PUCL)* v. *Union of India and Another*,[136] *A.P. Pollution Control Board* v. *Prof. M.V. Nayudu (Retd.) and Others*[137] among many others.

Though international legal order holds the primacy of international law over the domestic laws, the state practice holds a position otherwise. It is however noteworthy to observe that the resistance against primacy of international law over municipal law is from the Global North, despite international law being characterized as Eurocentric. They are offering a selective and sceptic deference.[138]

Towards Integration

The theoretical foundations segregate the states into monist and dualist, but the state practice blurs the divide. The strictly dualist states have exhibited the trends towards integration. A study by Waters examines sample of ninety-two

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[133] 1984 SCR (2) 664.

[134] *Ibid.*, at 666; The court arrived at this interpretation after referring Trend text Trading Corpn. v. Central Bank, (1977) I All E.R. 881; West Rand Central Gold Mining Co. v. The King, (1905) 2KB 391; Lauterpacht in International Law (General Works).

[135] (1996) 5 SCC 647.

[136] (1997) 1 SCC 301.

[137] (1999) 2 SCC 718.

[138] *Supra* note 5 at 96.

judicial opinions on human rights from the Australia, Canada, New Zealand and the United States to trace the trends in integration.[139] The Indian practice also shows similar patterns across disciplines of human rights, environment, gender rights, refugee rights, law of sea to name a few. In the case of *Vishaka and Others* v. *State of Rajasthan and others*,[140] the Court held that "international conventions and norms are to be read into them in the absence of enacted domestic law occupying the fields when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be given to international conventions and norms from construing domestic law when there is no inconsistency between them and there is a void in the domestic law.[141] The case of *Shatrughan Chauhan* v. *Union of India,*[142] referred to the international instruments like Resolution 2000/ 65 of the UN Commission on Human Rights, the Question of Death Penalty urging all states that still maintain death penalty not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person[143] The Court also considered the Report of the Special Rapporteur on Extra-Judicial Summary or Arbitrary Execution by UN Commission on Human Rights on 'Restrictions on the Use of Death Penalty'. It is noteworthy that these instruments that Court referred are soft norms in nature. Further in *National Legal service Authority* v. *Union of India,*[144] the decision has special section dedicated to 'India to Follow International Conventions'.[145] The Court refereed to Yogyakarta Principles though not ratified by India, and held that "if the principles are found consistent with the fundamental rights guaranteed under Indian Constitution, they must be recognized and followed."[146]

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[139] Melissa A. Waters, "Creeping Monism: The Judicial Trend Towards Interpretive Incorporation of Human Rights Treaties" 107(3) *Columbia Law Review* 653 (2007).

[140] AIR 1997 SC 3011.

[141] AIR 1997 SC 3011, 3014, para 8.

[142] MANU/SC/0043/2014; AIR, 2014 SC (Supp.) 1376.

[143] *Ibid.*, para 73.

[144] MANU/SC/0309/2014.

[145] *Ibid.*, para 47-53.

[146] *Ibid*, para 53.

The decision concerning refugees in *Ktaer Abbas Habib Al Qutaifi* v. *Union of India*,[147] questioned the deportation by the Government and held that the principle of '*Non Refoulement*' is the principle which prevents all such expulsion or forcible return of refugees and should be followed by the Central Government in accordance with Article 51 of the Constitution.[148] In the case of *Vellore Citizens Welfare Forum* v. *Union of India & Others*,[149] the precautionary principle, polluter pays principle and sustainable development that had crystallized to be the international customary law were considered as part of law of the land. In *M/S. Entertainment Network* v. *M/S. Super Cassette Industries*,[150] the Court points out six instances where international law could be used in interpreting municipal law (i)As a means of interpretation;(ii)Justification or fortification of a stance taken;(iii)To fulfill spirit of international obligation which India has entered into, when they are not in conflict with the existing domestic law;(iv) To reflect international changes and reflect the wider civilization; (v) To provide a relief contained in a covenant, but not in a national law;(vi) To fill gaps in law.

The trends in the judicial precedents indicate the blurring of distinction between monist and dualist constructions. The use of international law as the interpretative aid is evident in many cases. The requirement of transformation of international law into municipal law has been considerably relaxed. Hence, international law is read into the municipal as long as they are consistent with the municipal laws.

Remarks

The spur in globalization has resulted in the multiplicity of norms, fragmentation of international law and overlapping of legal systems. The relevance of the monist-dualist debate in the contemporary period has given rise to following observations. The state practice[151] doesn't fall within the strict compartments of total transformation or incorporation but occupies a middle ground. However, the

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[147] MANU/GJ/0433/1998.

[148] *Ibid.*, para 3.

[149] AIR 1996 SC 2715.

[150] 2008(37) PTC 353 (SC).

[151] Mostly the common law jurisdictions.

international legal process recommends the unification of the legal systems and blurring of national barriers. This necessitates the likelihood of compliance among the states and ensures that all the parties carry out their international obligations. Dualism, nonetheless, is viewed with cynicism as an infectious disease[152] and the approach adopted by the states that have least contributed to international law. The scholarship of the Global South has critically argued that international law is euro-centric and sociologically neutral. That it largely aims at universalism, unifying the norms and has ignored the socio-economic struggles of the third world. This scepticism has historical associations starting from the legal justification international law had provided for the colonization to the facilitation of neo-liberalism though the international institutions and normative structures in the contemporary period. International law devoid of promoting social justice has become the tool used to control the political and economic conditions in the Global South. After having made these arguments, the paper speculates if the dualism and transformation is appropriate model for the third world. This not only promotes self- preservation by minimizing the external intervention, but also (a) provides policy space by allowing treaty to be transformed into a local statute; (b) to be tailored according to the requirement and usage of an implementing state; (c) the autonomy exists with the Parliament as to the usage of the terminology while structuring the statute like some of the ambiguity may be elaborated by the legislation while making the statute or legislator may wish to limit the application to portions of the treaties or apply it in the ways that may not fully confirm to the international obligation;[153] (d) the Parliament may delay the transformation of treaty as per the socio-economic needs of the state. The direct application/incorporation affects the countries whose constitutions provide for very little democratic participation in the treaty making process. Most of the constitutions do not provide a formal role to the Parliament or structuring the government and the control over foreign relations is held by certain elites.[154] When the treaty negotiations do not follow the democratic process, the

[152] Gaja Giorgio "Dualism: A Review" in Janne Nijman and Andre Nollkeamper (eds.) *New Perspectives on the Divide between National and International Law*, 52 (Oxford University Press, New York, 2007).

[153] *Supra* note 21 at 325.

[154] *Ibid.*, at 323.

transformation serves as an important democratic check on the treaty making process.[155] The direct effect brings the treaties into operation immediately as soon as they are concluded thereby affecting the policy space of state. Hence the paper reiterates the observation of the TWAIL scholarship that transformation model is best suited for the Global South.

The domestic courts on the other hand are facilitating integration of the legal system by adopting incorporative techniques. The domestic courts are not hesitant in reading international law into municipal law, directly incorporating international norms or giving effect to un-ratified or informal instruments if they are consistent with domestic laws. It may hence be inferred that with the diminishing divide between the legal systems, there is greater inclination towards unification.

[155] *Ibid.*, at 324.

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