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FOREWORD

Nirma University Law Journal provides a new and exciting way of exploring the changing dynamics of law. The journal is designed to cover a broad spectrum of contemporary issues, which are set within the framework of a changing global scenario; highlighting the catalytic nature of legal frameworks for the society. The result is a coherent exposition which offers the reader a clear overview of the broader thematic influences on the law generally whilst also focusing more specifically on current manifestations of legal questions.

Thought leaders of today emphasize the need to embody all disciplines in one spectrum to analyze problems with creative zeal. Education in the real sense is the spirit of enquiry resulting in new knowledge and path breaking insights on mundane ideas and ways of living. The Journal aims to encourage writings that are inter-disciplinary in nature expounding contemporary issues across discipline like Sociology, Political Science, Public policy and Economics in the context of Law. It showcases contemporary issues and challenges specific to law; with an inter-disciplinary approach towards knowledge. It is the endeavor of the Institute to become the beacon of legal education by encouraging synthesis of knowledge and best practices cutting across academia and research fraternity.

We thank all the contributors for their ingenuity in expressing new ideas and hope that the journey of legal research is fruitful for the fraternity and students at large.

Prof. (Dr.) Purvi Pokhariyal
Chief Executive, Nirma University Law Journal
Director, Institute of Law, Nirma University

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ISSUES FACED IN CROSS BORDER TRADE SECRET LICENSING AGREEMENTS: AN INSIGHT INTO TRADE SECRET LICENSING BETWEEN INDIA AND USA

Rijuta Mohanty*

Abstract

This paper analyses the issues faced in cross border trade secret licensing particularly between India and the US. Trade secrets are a part of intellectual property; different countries have their own trade secret protection regimes. Globalization and Liberalization have encouraged countries to open their borders to foreign investment necessitating for business owners to protect their Intellectual property abroad. To have a successful business, it is imperative to protect the business processes and technical know-how from the global competitors. Whereas most developed economies like the US have separate trade secret protection laws, India does not have specifically tailored laws for trade secret protection. Indian courts have recognized trade secret protection as a part of breach of confidentiality in contracts. These lacunas in the Indian trade secret protection laws often pose a challenge for foreign companies wanting to invest in India.

Keywords: *Cross Border, Trade, Protection, Intellectual Property, Confidentiality.*

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DEFINITION IN THE INTERNATIONAL SCENARIO

The practice of intentionally keeping secret, a piece of information which is capable of commercial exploitation, so as to confer a competitive advantage on those possessing such information is termed as "Trade Secret". The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is the first multilateral instrument dealing with Trade Secrets. Section 7 of the agreement provides protection to the undisclosed information under Article 39. 2.

Perusal of Article 39 of TRIPS establishes the following characteristics of trade secrets

- Non availability of the knowledge in the public domain
- The secret must not be already known to the public
- Commercial value of the information on account of it being a secret
- Diminish in value of the secret after disclosure of the information

TRIPS Agreement provides protection to information which is secret and owing to its secrecy has a commercial advantage, though the agreement does not treat undisclosed information as a property but it requires the owner of such information to take reasonable steps in protecting the trade secret.

Trade secret under the US legal system:

The Restatement third of unfair competition and uniform Trade Secrets Act of United States deals with trade secrets. The meaning under the US system is not very different from the definition in the TRIPS Agreement. The Restatement although does not per se define "trade secrets," it has however enlisted certain factors to be considered while determining whether particular information is a trade secret[1].

[1] *See* Restatement Third of unfair Competion and uniform trade secrets.

- Accessibility of the information in public domain
- Extent of the knowledge available to employees and other staff of the business
- The adequate measures taken by the holder to protect the information
- Competitive value of the information
- Money spent in developing the information

***Trade secret under the Indian legal system*[2]:**

Unlike the US, India does not have a codified law for trade secret protection. There is no specific legislation in India to protect trade secrets and confidential information. In the absence of a codified definition the Indian courts use the following three factors in determining what information falls under the category of trade secrets.

1. Must not be generally known or readily accessible by people who normally deal with such type of information.
2. Must have commercial value as a secret.
3. The lawful owner must take reasonable efforts to maintain its secrecy.

On the basis of the characteristics of trade secrets discussed above, it can be observed that the meaning used by both US and India are not very different from the definition of trade secrets under article 39.2 of TRIPS.

IMPORTANCE OF LICENSING TRADE SECRETS:

The owner of a trade secret has exclusive rights to use the trade secret only until it remains a secret. Once the owner discloses his trade secret it becomes a de facto license to use the trade secret. Unlike, the other IP licensing agreements in the case of trade secrets, apart from the secret the owner does not have any other right. The licensee does not pay to use the information

[2] Kamakhya Shrivastav, *Trade secrets in the Indian courts* (2012).

but rather for the disclosure of the information. A secret may remain secret only until it has not been disclosed; therefore it is imperative to draft the licensing agreement strategically so that the disclosure does not affect the potential benefits of the secret and outweighs the threat of losing it. Licensing a trade secret gives the licensor an opportunity to derive benefits in the form of royalty and the licensee an opportunity to use the technology or know how.[3]

CROSS-BORDER LICENSING: ISSUES

With an increase in cross-border mergers, technology is no longer confined within the limits of a particular territory. Tech transfers are also a part of cross-border merger agreements. Intellectual property of the target company is usually transferred by a licensing agreement wherein licensing of patents, trademarks and copyrights is comparatively easier, cross-border licensing of trade secrets may be a cumbersome process with an increased risk of losing a valuable proprietary interest abroad.[4] Cross border trade secret licensing requires the disclosure of confidential know how, the licensor must consider the market strength and the trade secret protection regime of the destination country. The licensor must consider potential cultural and legal differences between the countries involved in the transaction. The issues that a licensor may face during a cross border trade secret licensing have been discussed below:

a. Cultural differences:

Cultural differences and linguistic barriers are amongst the major challenges in cross-border trade secret licensing that make the negotiations and drafting of the agreement a difficult process. Both licensor and licensee should have a mutual understanding of the subject matter of the trade secret. To tackle the issues faced due to cultural and linguistic barriers it is important that the agreement be carefully drafted

[3] *Maxim v. Tsotsorin*, Practical Considerations in Trade secret licensing.
[4] *Id.*

with references to foreign or any other international law that provides a clear understanding of the rights envisaged in the agreement.

b. Laws of the foreign country:

While drafting a licensing agreement the different legal systems must be taken into consideration. A country might otherwise have a similar legal system but it might not have a strong IP law regime. The domestic laws of the destination country may be such that it would interfere with the effective enforcement of the trade secret licensing agreement. Weak protection of trade secrets in the destination country can prove to be a challenge for licensor in case of a misappropriation. Apart from weak protection, insufficient availability of remedies is another challenge. Insufficient remedies against misappropriation may fail to prosecute infringers, thereby, leaving the licensor injured. Further, the courts in the destination country may fail to keep the trade secret confidential during legal proceeding. During a legal proceeding a trade secret may be revealed in front of the court, if due care is not taken.[5]

Due Diligence of domestic laws of the destination country is imperative before licensing a trade secret. The licensor should evaluate the following laws of the destination country.

- Intellectual Property law: The protection accorded to IP in destination country.
- Controls on the exports: The licensor should evaluate the export controls imposed by the domestic country and whether such controls would cause hindrance to the effective enforcement of the licensing agreement.
- Antitrust laws: The antitrust laws including restraint of trade laws should also be considered and evaluated by a licensor before licensing a trade secret.

[5] *Id.*

- Product liability: This law particularly is beneficial for the licensor. A licensor should evaluate whether domestic laws of the destination country would attach certain liabilities toward the licensor through the acts of the licensee.
- Tax laws: Another important field of law that should be evaluated by the licensor before licensing trade secret is the tax law of the destination country.[6]

Apart from considering the above mentioned domestic laws, the licensor should also evaluate the existence of any diplomatic relations between his home country and the destination country. In case of a future misappropriation of the trade secret caused due to the acts of the government of the destination country the licensee may seek diplomatic protections from his home country against the infringing actions of the government of the destination country.

c. Procedural and Substantial Issues:

Procedural issue is another potential problem faced in drafting trade secret licensing agreement. Procedural issues mainly involve a conflict between the licensor and the licensee in choosing the applicable law, determining the jurisdiction and extent of involvement of International law.[7] The agreement should include an arbitration clause for resolving disputes arising there from.

TRADE SECRET PROTECTION REGIMES OF SOME COUNTRIES:

1. European Union (EU): On May 26, 2014 the EU established a new framework for the protection of trade secrets, under the new framework a single legal regime should be adopted by the EU member states. The

[6] Elizabeth A Rowe, *Sharon K Sandeen, Trade Secrecy and International Transactions: Law and Practice* (2013).
[7] MARKT/2011/128/D, *Study on trade secrets and confidential business information in the Internal Market*, EUR. COMMISSION (Apr. 2013).

main aim of this framework is to promote fair and honest competition and cross border tech transfers. Under the new framework common terms and definitions were specified in order to tackle the issues of cultural or linguistic barriers in cases of cross border licensing. This framework further resolves the problem of losing secrecy in a court proceeding by providing for the preservation of secrecy during the court proceedings[8].

2. China, Germany, Poland and Japan: Under the legal systems of China, Germany and Japan the trade secrets are protected under the general laws of unfair competition[9].

3. France: Both the Criminal code and the labour court deal with trade secrets in the French legal system.

4. India: India and certain other common law countries focus more on the breach of contract rather than misappropriation of the trade secret and trade secret protection in India is limited to contracts and employment relationships and therefore making it difficult to succeed in misappropriation claims in India.

CROSS-BORDER TRADE SECRET LICENSING BY US (LICENSOR) TO INDIA (LICENSEE): A HYPOTHESIS

Trade secret protection regime in the US is codified i.e. trade secrets in US are protected under the statutes at both the Federal as well as the State level, with effective remedies in case of a misappropriation. India, however, does not provide statutory protection to trade secrets and has no effective remedies for misappropriation of trade secrets per se. The lack of effective trade secret protection laws in India would endanger a US licensor's trade secret, unless certain contractual mechanisms enforceable in India are not provided in the licensing agreement. Under Indian laws a US licensor may

[8] New EU framework for protection of trade secrets, COUNCIL OF THE EUROPEAN UNION, PRESSE 306, 10200/14 (2014).
[9] Jennifer Brant, *Trade secrets: Tools for Innovation and Collaboration* (2014).

engage an Indian service provider which may in turn employ a subcontractor with respect to any business. If the Indian sub- contractor misappropriates the trade secret the licensor, the licensor has the remedy only to hold the Indian service provider liable for the disclosure by the sub-contractor, under the contract and tort laws of India.[10]

In a cross-border licensing between a US firm (licensor) and an Indian firm (licensee) if an ex- employee/agent of the licensee misappropriates or discloses the trade secret of the licensor to a competitor, the licensor cannot bring a misappropriation claim against the ex-employee/agent as the Indian courts do not recognize disclosure of trade secrets as an offence. In 2002 an ex-employee of an Indian software company called geometric software solutions limited tried to disclose a software source code that belonged to a US company Solid works which was a client of Geometric Software. Source codes in India are treated as trade secrets and the courts in India do not recognize misappropriation of trade secrets, despite having evidences the US Company could not succeed in a misappropriation claim against the ex-employee. In another similar case an employee of a software development centre based in India tried to misappropriate source codes by transferring them to personal e mail account, although misappropriation was identified on time the US company due to the lack of effective trade secret protection laws in India could not be successful in its claims of misappropriation against the employee. Due to lack of effective trade secret protection laws in India, it is unlikely that a US based licensor would succeed in misappropriation claims.

A US licensor can take some steps to protect its trade secret. Some of the steps include signing of non- disclosure and non -compete agreements that are recognised and enforceable in India. In case of sub-contracting there should be a contractual relationship between the licensor and the sub-

[10] Sonia Baldia, *Off shoring to India: Are your trade secrets and confidential information adequately protected.*

contractor so that in case of misappropriation by the subcontractor, the licensor can claim against him.[11]

Confidentiality Agreement:

Confidentiality agreement also known as non-disclosure agreement is signed between a licensor and licensee in a trade secret licensing agreement. Under the non-disclosure agreement the licensor may restrict the licensee's use of the trade secret. Indian courts in various cases have held that if a confidentiality agreement is reasonably necessary to protect the licensor's interest in his trade secret then such agreements are enforceable.[12] Further, the licensor should sign a confidentiality agreement with the licensee and the licensee may sign a confidentiality agreement with its employees to ensure that the trade secret is not misappropriated by its employees. All employees owe a duty of fidelity to their employer even after termination of the employment. Thus, the confidentiality agreements should be drafted in a manner that it remains valid even after termination of employment. Indian courts further recognize a "springboard theory" under this theory a licensor whose trade secret has been leaked to a competitor may be able to protect his "head start" in the trade secret. India having derived its laws from England, bases the confidentiality on equity rather than on contractual relationships. However, the confidentiality agreements are valid and enforceable under the Indian law and any other subsequent agreement entered into by the licensor and the licensee to protect the confidential information is also valid and enforceable.

Section 27 of the Indian Contracts Act, provides that any agreement restraining a trade is void and unenforceable. The defendant is likely to use this provision against the licensor in case of a non-disclosure or confidentiality agreement. In such a situation the licensor must draft the agreement in a manner so as to keep it within the ambit of reasonable

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[11] *Id.*

[12] Majumdar and Co., *Contracts of confidentiality*, *available at* http://www.majmudarindia.com/pdf/Contracts%20of%20confidentiality%20and%20noncompete%20with%20employees.pdf (last visited, Oct. 30th, 2016).

restraint of trade in order to be successful in a claim of breach of confidentiality agreement.

Non-Compete Agreements:

Under the non-compete agreement the employer signs an agreement with the employees under which the employees are restricted from either joining or starting a same or similar business as that of the employer. The purpose of such agreements is to ensure that the employee does not misappropriate the trade secrets of the employer that he may have learned during the course of his employment.

Unlike the US legal system, non-compete agreements in the Indian legal system are not so effective. The Indian Constitution in Art 21 provides that everyone has the right to livelihood and non- compete agreements most likely restraint livelihood. Section 27 of the Indian Contracts Act makes all agreements restricting trade void ab initio and is, thus, unenforceable. However, Indian courts have constantly upheld reasonable restraint on trade. Indian courts have held that a negative covenant that restrains the use of trade secrets is valid and enforceable.[13] The US based licensor in order to make a non-compete agreement enforceable must consider the following points while drafting a non-compete agreement.

- employee after the termination of his employment only for a limited period; such a restriction falls within the ambit of reasonable restrictions and is enforceable in the Indian courts.
- The licensor, in the non-compete agreement may specify a certain distance within which the employee would be restricted to work in a competing business provided the distance specified is reasonable, the licensor may also specify a reasonable time limit in the agreement within which the employee would be restricted from joining or starting a same or substantially similar business as that of the licensor subsequent to the termination of his employment.

[13] Singh and Associates, *Non-Compete clause in the Indian Law of Contracts: An Insight*.

Although there is not much protection to confidentiality under the Indian Contracts Act, the Information Technology Act and the Right to information Act provide protection to confidential information. These are some of the measures that a US licensor may use in order to protect the misappropriation of trade secrets by the employees of either their firms that are based in India or the firms of which they are a client.

Remedies available in the Indian legal system:

The US licensor may use civil and equitable remedies against the breach of confidence. The following remedies are available in case of breach of confidence;

a. Injunction:

A US licensor may seek injunction as a remedy against the misappropriation of the trade secret. If the licensor successfully obtains an injunction then the licensee is estopped from breaching the confidentiality and misappropriating the trade secret. The licensor has to prove a prima facie case and irreparable loss or injury to get injunction.

b. Compensatory damages:

Apart from obtaining an injunction a US licensor may also claim compensatory damages. The damages in such cases are measured at the market value of the confidential information. While determining the amount of damages the courts usually consider the following:

- The market value of the trade secret
- The strength of the market in which the secret exists
- The reasonable care taken by the licensee in preventing the disclosure of the trade secret

While drafting a trade secret licence agreement with an Indian licensee the US licensor may include a clause of compensatory damages in the agreement so that it is easier for him to claim damages in case of a breach.[14]

c. Alternate remedies available:

As discussed earlier, India does not recognize misappropriation of trade secrets and if a licensor wishes to litigate his claims of misappropriation in the Indian courts it is likely that due to the lack of effective measure to protect the trade secret in the proceeding of the case, the trade secret may be disclosed openly in the court leading to a subsequent loss of the trade secrets. Therefore, the US licensor should resort to arbitration rather the court litigation.

CROSS-BORDER TRADE SECRET LICENSING BETWEEN INDIA (LICENSOR) AND US (LICENSEE): A HYPOTHESIS:

Trade secrets are given statutory protection in the US under both the Federal and State laws. Indian licensor has the following remedies in case of misappropriation of his secret by anyone including the licensee.

Injunction: The licensor may obtain an injunction for any actual or threatened loss of trade secrets

Damages: The plaintiff may claim for the following damages:

1. Lost profits: the profits lost by the licensor due to the misappropriation of the trade secret.
2. Unjust enrichment: The licensor may seek restitutionary damages against the misappropriation of the trade secret on the basis that the licensee (defendant) had been unjustly enriched by misappropriating the trade secret. The plaintiff may also seek exemplary or punitive damages against a wilful misappropriation of his trade secret.

[14] *Supra* note 10.

3. Royalty: The plaintiff may seek a reasonable royalty against the misappropriation of the trade secret.

The Federal Government of the US grants protection to the trade secrets under the Economic Espionage Act (EEA). The EEA makes disclosure or misappropriation of the trade secrets a criminal offense. A conviction under the EEA may result in fine up to 250,000 dollars for individuals and 5 million dollars in case or corporations or ten years of imprisonment or both.[15]

DRAFTING CONSIDERATIONS IN CROSS-BORDER TRADE SECRET LICENSING AGREEMENTS

General Principles:

Cross-border trade secret licensing agreements may be difficult for the licensee to understand due to cultural and linguistic barriers as discussed in the previous chapter. The courts of the destination country may interpret the terms of the agreement in a manner that might be detrimental to the licensor. It is therefore pertinent to draft the licensing agreement in plain, unambiguous and simple language. In other words the agreement should be unambiguous, concise and easy to understand.[16]

Defining the terms:

In cross-border trade secret licensing agreements the terms should be properly defined so as to ensure that the licensee understands the intended meanings of the terms as incorporated in the agreement. Further, if the licensing agreement involves other IP rights as well, then the terms of the trade secrets should be laid down in a separate agreement or should be mentioned in a separate section of the agreement so as to avoid any confusion. The agreement should clearly define the area in which the trade secret licensing is sought.

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[15] *See* EEA.

[16] Tariq Ahmad, Protection Of Trade Secrets (2013).

Defining the subject matter of the licensing agreement:

The subject matter of the trade secret is the most important part of a trade secret licensing agreement; therefore the subject matter should be clearly defined. It can be defined either in the licensing agreement or by referring to other documents that supplement the agreement. Whether the secret is a technology or know how should be laid down in the agreement, an absence of this might narrow the legal protections available. While drafting the agreement it is important to make a distinction between the product itself and the trade secret. It must be clearly distinguished that the license agreement is only for the trade secret and not for the product.

Determining the grants and the prohibitions:

The license agreement should clearly lay down the grants and prohibitions on the licensee. Under these provisions the rights of the licensee should be laid down in clear and unambiguous terms i.e. what the licensee is authorized to use and what he is prohibited from using. While drafting the grants it should be kept in mind that only those grants are given to the licensee that the licensor contemplates and scope of the grants should be limited to only what the licensor contemplates. The licensee should be prohibited from disclosing the trade secret or using it to an extent it exceeds the licensee's requirements. Further, while drafting a cross border trade secret licensing agreement it must also be presumed that the licensee may use the technology of the destination country and make certain improvements to the trade secret. The licensor should thus, include a grant back provision in the licensing agreement under which the licensee should grant back all the improvements it made in the secret to the licensor.

Another concern that should be kept in mind while drafting a trade secret licensing agreement, by the licensor is the loss of trade secret to third parties by way of either sale of business or mergers. In such a case by virtue of the ownership of the original licensee it is likely that the trade secret of the licensor may be disclosed to the third parties, whom the licensor did not

intend disclosing the secret. Keeping in mind such a situation the licensor in the licensing agreement may specify that

- The licensee would terminate the agreement in case of a change of ownership.
- The licensor may prohibit the licensee from further assigning the trade secret to a third party without the prior approval of the licensor and may even prohibit sub assigning the trade secret.

Protective safeguards and Confidentiality:

The peculiar feature of a trade secret is its secrecy and therefore certain safeguards and confidentiality clauses should be spelt out in the licensing agreement so as to ensure that the secrecy is maintained. The licensor may use certain security measures in order to keep the secrecy intact. Some of the measures may be

- To limit the access of the secret only to certain people i.e. only a particular group of people should be allowed access to the trade secrets
- Signing confidentiality and non-compete agreement with the employees.
- Laying down measures to restrict public accessibility to the trade secret
- Develop measures to avoid the disclosure of the trade secret after the termination of the license.

Royalty clause:

The royalty clause includes the remuneration that is to be paid by the licensee in return of the trade secret license. Royalty clause is not given importance in a trade secret licensing agreement, unlike in other IP licensing agreements. A trade secret license agreement should be drafted in a manner so as to ensure that the licensor does not suffer damages due to hidden sales in cases where the royalty is to be paid to the licensor on the basis of sales. It

is important to include the clause in a trade secret licensing agreement that even after the trade secret becomes known to the public the licensee's liability to pay royalty to the licensor does not terminate.

Remedies:

The most important part of a trade secret licensing agreement is the clause of remedies. The licensor should include a clause of remedies under which the effective remedies in case of a subsequent misappropriation should be clearly laid down. Apart from the remedies a termination clause should also be included in the agreement, under which the licensor reserves the right to terminate the license in case of any breach of confidentiality. In cross border trade secret licensing agreements owing to the difference in laws of the counties it is advised to include an arbitration clause so as to ensure effective legal protections to the trade secrets and also in order to reduce the risks of unenforceability of a foreign award in a destination country. If not resorting to arbitration then the licensing agreement should clearly lay down the choice of law which shall govern any dispute concerning misappropriation of the trade secret, this will eliminate any conflict when two different legal systems are involved. It is advisable to resort to the international arbitration under the ages of International Chamber of Commerce (ICC) when the licensor and licensee follow different legal systems/cultures/languages. Resorting to the ICC, though safe, is not be cost effective, therefore, while licensing trade secrets internationally the licensor should seek the advice of a legal expert from the destination country to reduce any potential or substantial risks.

CONCLUSION AND RECOMMENDATIONS:

For technology to be distributed globally, it is pertinent to have effective protective measures for protection of trade secrets abroad. Different countries have different laws and in some countries the trade secret and confidentiality protection regimes may be stronger than others. Apart from inadequate legal protections to trade secret, legal fragmentations even within

a country make collaborations and sharing of know how difficult. There are certain protective measures that can be taken at both personal and governmental level in order to ensure that global technology transfer incentives are not limited due to the lacunas in the legal protection.

Measures to be taken at individual/firm level:

If both the licensor and licensee are firms then the firms should endeavour to develop an effective trade secret protection policy and should try to incorporate the same in the company's code of conduct so as to ensure that all the employees of the company follow the protective policies strictly. The firms apart from manual measures should also strive to develop digital measures that help in keeping the information confidential. In a hierarchical management system the company should ensure that only the top level management has access to the confidential information. In other words the company should develop measures to limit the access of the confidential information to all the employees. The companies should further educate their employees about the duty of confidentiality they owe towards their employers. One way to do so is by including the confidentiality terms in their employment agreements. The firms should undertake to protect the trade secrets licensed to them from being disclosed to third parties either due to sale of business or merger. The firms should inform the licensor about any proposed change of ownership well in advance and should not assign the licensors trade secret to the third party without the consent of the licensor. The firm may terminate the licensing agreement with the licensor and should ensure that the trade secret of the licensor is protected even after the termination of the licensing agreement[17].

Conjoining the trade secret legislations globally:

Intellectual Property laws, unlike civil and criminal laws are more global and with the advent of technological inventions and cross border sharing of technology it is important to have such international legislations that conjoin the various trade secret laws from different jurisdictions. One of the major

drawbacks in enforcing a trade secret licensing agreement is the legal fragmentation of the trade secret protection laws. Thus, the legislators of different countries should aim at integrating their domestic trade secret protection laws with the international standards of protection. The benefit of conjoining trade secret legislation would provide a certainty of law in cases of trade secret misappropriation. Legislators should try to integrate trade secret laws in free trade agreements and treaties. The TRIPS agreement is the first international covenant to deal with trade secrets, the policymakers should try to integrate the domestic trade secret protection laws with the provisions of the TRIPS agreement. Trade secret misappropriations should be made an offence for which the states should accord civil and criminal punishment. Further the legal systems should try to develop effective remedies in case of actions against misappropriation of trade secrets.

[17] Jennifer Brant and Sebastian Lohse, Trade Secrets: Tools for Innovation and Collaboration.

CHIEF JUSTICE JOHN MARSHALL AND MARBURY V. MADISON: REVISITED

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Abstract

The decision of Chief Justice John Marshall in Marbury v. Madison has enjoyed global prominence as the origin of judicial review in the United States of America and even abroad. This paper examines the claim and determines whether or not in fact the claim is rightly placed. The paper adopts content analysis of some of the existing literature on the subject matter while also subjecting the decision of the Court delivered by Chief Justice Marshall to linguistic appraisal to enable a clearer picture of the claim. The paper argues that before Marbury, there had been authoritative or persuasive precedents on the subject matter whether in the United States or elsewhere in the common law countries, but the Chief Justice only closed his judicial lens against them to create a myth around his judgment. The paper contends further that the origin of judicial review, which Marshall referred in 1810, almost seven years after Marbury in Fletcher v. Peck remains the natural law; that a written constitution that is also claimed as empowering judicial review is only a positivisation of natural law dictates. The paper contends also that though the judgment that of Marshall, the idea that of Hamilton.

Keywords *- Marbury v. Madison, judicial review, Hamilton, natural law.*

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INTRODUCTION

Most modern constitutions[1] incorporate judicial review in one form or the other,[2] and reasons for the judicial intervention in constitutional disputes most likely are similar or identical since the philosophical jurisprudence is to ensure fundamental rights,[3] democracy[4] and limited government.[5] Power in its very nature can be so maddening to no limits if the province of the power so granted or delegated are not well carved-out in the instrument constituting the power.[6] Constitution creates institutions of government and designs their respective competencies for the purposes aforementioned. The constitution further as a way of ensuring constitutional compliance[7]within

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[1] Most nations of today have written constitutions and written constitutions have become intimate fellows with judicial review not just because the constitutions are written, but certainly because most written constitutions are supreme. Besides, the United Nations declaration of human rights in 1948 makes judicial review an integral part of the new international legal regime for the protection of rights. It would be noted that the emergence of regional grouping such as the African Union and the European Union has also made the practice judicial review more prominent as a consequence of the superior nature of most of the regional enabling instruments over the nations' municipal laws. *See* Abacha v. Fawehinmi, (2000) 4 S.C. (pt. II), 1; (2000) 6 N.W.L.R. (pt. 660), 228.

[2] Judicial review has also gained ground in the Arab world. *See* for example, M. Abdelaal,*Religious Constitutionalism in Egypt: A Case Study,* 37 FLETCHER F. WORLD AFF., 35-51 (2013), S.Mahmoudi, *The Sharî'a in the New Afghan Constitution: Contradiction or Compliment* (last visited July 5, 2013) http://www.zaoerv.de accessed, M. Abu-Karaki, R. Faqir, &M. Marashdah, *Democracy & Judicial Controlling in Jordan: A Constitutional Study*,4(2) J. POL. & L., 180-195 (2011).

[3] M. Schor, *Mapping Comparative Judicial Review,* 7 WASH. U. GLOB. STUD. L. REV. 257, 265-267 (2008).

[4] *See* H. Spector, *Judicial Review, Rights, and Democracy,* 22 L. & PHIL. 285, 314-323 (2008). The Courts in Nigeria have also concretized the claim that judicial review has democratic values and can therefore not be regarded as anti-democratic. The recent political games in the country has shown clearly that without the courts standing firm on the side of constitutionalism and the rule of law through the review system, the democratic process would have long been truncated. *See* A. Shehu, *Judicial Review and Judicial Supremacy: A Paradigm of Constitutionalism in Nigeria,* 11(1) I.C.L.R. 43, (2011). *See* also, Udeh v.Okoli (2009) 37 N.S.C.Q.R. 496, Odedo v. INEC (2008) 36 N.S.C.Q.R. (Pt. II) 919, Bala Hassan v. Babangida Aliyu (2010) 43 N.S.C.Q.R., 139, Albert Akpan v. Bob (2010) 43 N.S.C.Q.R. 409, Atiku v. Yar' Adua (2008) 33 N.S.C.Q.R. (Pt. II) 650, Ehuwa v. INEC (2006) 28 N.S.C.Q.R. 545, Ezeigwe v. Nwaulu, (2010) 41 N.S.C.Q.R. 500, Amaechi v. INEC, (2008) 33 N.S.C.Q.R. (Pt. I) 332.

[5] Shehu, *supra* note 4.

[6] This is an essence of written constitutions; they in most cases create institutions of government and grant each the powers as are found necessary for the benefit of all.

[7] A written Constitution is usually supreme and the super structure upon which all the substructures rely for existence. The Constitution is the organic law of the state and all the organs must just execute the provisions; the courts also only interpret the constitution and cannot rewrite its provisions. *See* generally, Inakoju v. Adeleke, (2007) 29 N.S.C.Q.R. 958 at 1052, Attorney-General of Lagos State v. Attorney-General of Federation (2004) 20NSCQR 99.

the competencies by the executors design a method of compliance assurances so that the essence of creating the institutions and their respective powers (security and welfare of the people)[8] is not lost to the whim and caprices of those who are charged with execution of those powers; the elected state officials who in their various constitutional capacities are bound to execute the mandate of the people as their representatives in government.

It is significant that judicial intervention in either constitutional or administrative disputes may not depend in all situations on written constitutions.[9] Countries without fully-written constitution, for example Britain, have judicial review of some kind. This may be in the form of judicial control of delegated legislation or exercise of discretionary power that has been age long practiced in common law jurisdictions.[10] Adoption of judicial review as a form of constitutional control may not also always depend on presidential system. Countries with parliamentary system also adopt judicial review. For example, Nigeria practiced parliamentary system during the post-independence era (1960-65), but the judiciary demonstrated strong judicial courage, albeit activism, in invalidating executive actions or statutes as being incompatible with the constitution.[11]

Much puzzling is the availability of such review under the military governments in Nigeria. The undemocratic and revolutionary nature of military regime would perhaps suggest lack of respect for constitutionalism.[12] On the contrary, actions of the government were often weighed by the

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[8] *See* §14(2) (d), Nigerian Constitution, 1999.

[9] *See* A. Shehu, *The True Foundation of Judicial Review: A View from Nigeria,* 2(1) JINDAL GLOBAL L. REV. 217, 221-224 (2010).

[10] *See* for detail discussion, S. DE-SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW (1978), E. MALEMI, ADMINISTRATIVE LAW (2008).

[11] *See* for a detailed study of judicial review under a parliamentary system: Doherty v. Balewa (1961) All N. L. R. 630, 633-641, Olawoyin v. Commissioner of Police (1961) All N.L.R 213, Adegbenro v. Attorney-General of Federation v. Balewa and Others (1962) All N.L.R. 337, 346, Akintola v. Aderemi and Other (1962) All N.L.R 440, 475-476 and Williams v. Majekodunmi, (1962) All N.L.R. 410.

[12] *See* Lakanmi v. Attorney-General (Western Nigeria), 1 UNIV. OF IFE L. R. (1971), Adamolekun v. The Council of University of Ibadan, (1968) N.M.L.R. 253.

judiciary on the scale of the decrees[13] to ensure that though military government is revolutionary, there was still need for constitutionalism by ensuring that actions of government were guided by the extant decrees.[14]

However, several reasons have been canvassed in support of judicial review; democracy, federalism, constitutionalism and the rule of law.[15] There is no doubt that more than any normative concept, judicial review has generated extensive intellectual discuss particularly in American constitutional jurisprudence.[16] There has been large volume of literature examining the origin of the concept and concluding.[17]Also available in the literature are arguments on the desirability of such judicial intervention in purely legislative matters contending that rather than the unelected few judicial officials, the job should better be left with the American people, the electorate.[18] There have also been strong debates on justifications of the exercise hinging most strongly for support on human rights[19] and democracy.[20]

The debates have been, quite interestingly stimulating and indeed intellectually provoking, such that it may be concluded that the long age of the practice of judicial review in America has engendered an age-long study of the concept with no end in sight. The study may continue to generate and regenerate around the origin of the concept in America, and by extension, in other jurisdictions especially those with presidential constitutions; Ghana and Nigeria, for example.

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[13] The Military used Decrees rather than the Constitution as the foundation of its legal order each they toppled the democratically elected government.

[14] Adamolekun v. The Council of University of Ibadan, (1968) N.M.L.R. 253.

[15] *See* generally, Shehu, *supra* note 4. *See* P. Hogg. & A. Bushell, *The Charter Dialogue between the Courts and Legislatures*, 35(1) OSGOODE HALL L. J. 75, 76-78 (1997), L. Henkin & John Marshall, Globalized *Proceedings,*148(1) AM. PHIL. SOC'Y 53, 58-61 (2004).

[16] This is perhaps because the practice gained ground in the United States as a Product of judicial activism or because it is one of the issues that were of interest to some of the founders (Hamilton, for example) of American Constitution.

[17] Shehu, *supra* note 9 at 218-232.

[18] L. D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

[19] *See* J. Griffith, *The Brave New World of Sir John Law,*63(2) MOD. L. REV. 159, 160-162 (2000).

[20] *See* V. Kuic, *Law, Politics and Judicial Review,* 52(2) REV. POL. 265, 273-278 (1990).

The decision of Chief Justice John Marshall in *Marbury v. Madison* had enjoyed global prominence as the origin of judicial review in the United States of America and even abroad. Some scholars have however argued that the claim is a misplaced one because ever before 1803 courts in the United States had been in the practice of annulling or voiding statutes that were inconsistent with the fundamental law. This paper, therefore, examines the origin or establishment of the concept of judicial review in American constitutional jurisprudence and the role played by John Marshall,[21] the fourth American Chief Justicein either establishing or reaffirming judicial review in *Marbury v Madison*.[22] As the main focus of the paper, part two is all about the controversial decision in the *Marbury* examining whether or not in fact the decision was the origin of judicial review in the United States. It is argued that the glory attributed to the Marshall's decision is misplaced because the simple fact that Marshall did not reference and rely on any precedent would not mean absence or lack of authoritative or persuasive precedent or that judicial precedent was unknown to American jurisprudence. The third part of the paper examines the origin of judicial review within the American context, concludes that the source cannot be divorced from the natural law and argues further that though Marshall refused to allude to natural law in *Marbury*, he later had cause to adopt natural law doctrine; "the general principles which are common to our free institutions" and distinguished this from provisions of the Constitution of the United States of America. Part four deals with the role of Hamilton's Federalist paper and argues that it must have plaid a tremendous role in the emergence of judicial review and that a careful reading of the decision in *Marbury* shows some linguistic similarity with Hamilton's constitutional theory contained in the *Federalists No. 78*. The fifth part is the concluding remark dealing in a summary the findings of the paper.

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[21] For a brief history of Chief Justice John Marshall, *see* C. Hobson, *Defining the Office: John Marshall as Chief Justice,* 154 U. PA L. REV. 1421, 1421-1426 (2006).

[22] 5 U.S. 137; 1 Cranch 137; 2 L. Ed. 60; 1803 U. S. LEXIS.

THE CONTROVERSIAL MARBURY v. MADISON

Did Chief Justice Marshall established, affirmed, or "reaffirmed" the power of the judiciary to interpret the Constitution and declare a law void where it conflicts with the constitution? The prominence of *Marbury* certainly shaped jurisprudential discuss even beyond the American constitutional jurisprudence. In the case, Marshall, without referring to any precedent on the power of the courts in America, declared void any act of the Legislature repugnant to the constitution. He argued that review by the courts is an incidence of written constitutions:

> *"Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be that an act of the legislature repugnant to the constitution is void... If an act of the legislature repugnant to the constitution is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory, and would seem, an absurdity too gross to be insisted on."*[23]

The Chief Justice ably stressed further that it is the emphatic province of the judiciary to say what the law is; expound and interpret the law.[24] Indeed, that had been the primary responsibility of the courts whose judicial personnel have trained in the science of the law, which include the interpretation mechanisms to enable the judges determine the intention of the makers of the law and apply the rules so discovered to the cases before them. Certainly, when cases are brought before the courts and the need arises for application

[23] *Id.*
[24] *Id.*

and or interpretation of the relevant laws, the legislature is not brought before the court to tell the judge the real intention of the lawmakers. Even if the legislature is before the court, it cannot be heard by the court unless it is a party. Also, as a party, its interpretation of the law as applicable in the case would not bind the judge; but may be of any assistance. It is the exclusive jurisdiction of the court to interpret the law and discover the intention of the lawmakers. This had been the trend the world over ensuring certainty in the contents and application of law, and again establishing precedents,[25] which themselves serve as authority and guiding sources for interpretation of statutory provisions in subsequent cases.

There may be no need, however, for precedent in coming to conclusion as done by Marshall in espousing the primacy of the judiciary. Since the essence of judiciary is interpreting statutes to discover the rules of law in them. He may also be absolved for asserting, as he did, on the primacy of the constitution as the fundamental and paramount law of America. He, however, relied on precedents in *Fletcher v Peck*.[26] He never so relied on any other precedent in *Marbury*, whether of foreign jurisdiction that may only be persuasive or even of the Supreme Court itself. Could this be deliberate or was there no precedent worthy of being relied upon to come to that conclusion on judicial review? Precedent in the situation of *Marbury* was essential not only because the court had a duty to establish its source of power; the basis of judgment, the power of the court to adjudicate in the matter backed-up with relevant statutory or constitutional source. This is the only way the court would not be engaging in judicial arbitrariness, lawlessness, recklessness and arrogance. It may however be that the phrase "judicial review" was a later day coinage by Corwin, it does not suggest, as would be pointed-out later, absence of judicial intervention in legislative and

[25] The principles of separation of powers from the early stage emphasized this division of powers and reserved the power of interpretation of the law to the judges who are ably trained in the science of the law.

[26] 10 U.S.87. For discussions on Judicial precedent in U.S., *see* J. Komarek, *Judicial Lawmaking and Precedent in the Supreme Courts* (last visited Aug. 8, 2014), www.pravo.uniz.hr/_download/repository, J. Loughram, *Some Reflections on the Role of Judicial Precedent,* 22(1) FORDHAM L. REV. 1, (1953), C.J. Reid, *Judicial Precedent in the Late Eighteenth and Early Nineteenth Centuries: A Commentary on Chancellor Kent's Commentaries,* 5(1) AVE MARIA L. REV. 47, (2007).

executive actions resulting in avoidance of such executive or legislative actions.

It would be inordinate to assume that there were no judicial precedents on judicial review worthy of reliance by 1803 in America, though there may be no one established particularly by the Supreme Court. Sheldon, like Engdahl, Treanor, Wood and Farber, amongst others, is correct that before *Marbury*, "a number of state courts had negated acts of their legislature",[27] though the power was shared with the legislatures and the councils of revision.[28] This presupposes that judicial review, may prior to 1803 be narrow and inclusive, was not unknown in the American legal system and only became exclusive and expansive from 1803 *Marbury v. Madison*.

The inclusiveness and narrowness of judicial review then couple with lack of assertiveness by the courts were due to the fact the judges then were concerned with acts and actions of the political branch of government which infringed upon functions of the courts.[29] Also, the courts were said to be reluctant to void legislative measures because those who drafted the American constitution were in the legislature, the bar and the courts to remind the judges of the meaning of the constitution.[30] The judges were also said to be concerned with their careers, which "were often in the hands of the legislators".[31] Were all these to be taken evidentially, as usual, they assisted

[27] C.H Sheldon, *Judicial Review and the Supreme Court of Washington 1890-1986,* 17(1) PUBLIUS 66, 71-72 (1987), D. Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review,* 42 DUKE L. J. *279, 286-289* (1992). According to him "...the dozen or so years before Marbury v. Madison, constitutional questions were decided in the federal Circuit Courts on at least a score of known occasions. Reliable information was scarce even then; but Congress was aware of at least some of the cases, and affirmed the practice they represented. Sometimes state measures, and sometimes acts of federal executive officials, were disregarded as unconstitutional in the Circuit Court cases. Occasionally, the constitutionality of federal statutes was scrutinized as well. Several of the Justices at Circuit, and in 1794 all of them together as the Supreme Court, held Congress's 1792 Pension Act unconstitutional; yet even that was not the first time the Justices discussed, as a group, judicial determination of constitutional questions.", W.M. Treanor, *Judicial Review Before Marbury,* 58 STAN. L. REV. 455, 457-458, G. Wood, *The Origin of Judicial Review Revisited, or How the Marshall Court Made More out of Less,* 56(3) WASHINGTON & LEE L. REV. 787, 793-798 (1999), D.A. Farber, *Judicial Review and its Alternatives: An American Tale,* 38 WAKE FOREST L. REV. 415, 421-424 (2003).

[28] Sheldon, *supra* note 27 at 72.

[29] *Id.* at 73,

[30] *Id.*

[31] *Id.*

the conclusion that there was judicial review before 1803, but the courts were not in place to assert the concept in its present form. There is a golf between theory and practice; between availability and usage, and there is a difference between the existence of judicial power and the actual practice of it to scrutinize and void where necessary the action of the executive or the legislature. This may be the case of power without application.

Thus, that Marshall neither found nor relied on any precedent to come to conclusion as he did, thereby generating robust discuss on origin of review may be deliberate and to content himself with the rhetoric philosophical foundations of review that were prior to 1803 common discuss.[32] It would not be true therefore that the origin of judicial review in the United States has become the stuff of myth as Schor would want to drag through our throats.[33] Judges are human and members of their societies and cannot be isolated from influences of the happening in the societies in which they are called to administer justice through the instrumentality of the law. This suggests, therefore, that the philosophical foundation for judicial review in America must have been laid ever before 1803 and certainly this must have partly influenced the decision in *Marbury's* case the Chief Justice though he refused and neglected to acknowledge such philosophical foundations as espoused by Hamilton at the Philadelphia Convention.[34]

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[32] L. Gerald, *Iredell Reclaimed: Farewell to Snowiss's History of Judicial Review,* 81(3) KENT L. REV. 861, (2006).

[33] Schor, *supra* note 3 at 261.

[34] *See* the Federalist Paper No. 78. Hamilton insisted "The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing. Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void…"

[35] Stephen B. Presser, *Some Alarming Aspects of the Legacies of Judicial Review and of John Marshall,* 43(4) WILLIAM & MARY L. REV. 1495, 1504 (2002).

Short of accusing Chief Justice Marshall of plagiarism in the *Marbury's* case, Presser,[35] while reconstructing the history of judicial review, opines rather subtly that "the legacy of John Marshall could not be judicial review, because it is clear to anybody who consults the historical record that Marshall, in *Marbury,* was simply invoking the doctrines of judicial review set out by Hamilton in *The Federalist No. 78*, and many others before and after."[36] He stresses further, but in a more sublime manner, that "It was Chase's exposition of *The Federalist No. 78* in the 1800 *Callender*[37]case (with Marshall in the audience) that was reproduced, almost word for word, in *Marbury."*[38] Much he refused and neglected to reference, even for distinguishing the facts, some of the cases that have dealt with issues connected with judicial review. The reasons for such neglect of existing judicial precedents on matters of constitutionality or legality of statutes or executive action can only be located within judicial rascality, arrogance and unwarranted and dangerous departure from common law tradition of following precedents in appropriate cases like *Marbury*. As at 1803 America was not in shortage of judicial review cases whether at state or federal level; he was thus truly "less concerned with principles and precedents, and more concerned with expedience."[39]

NATURAL LAW AND JUDICIAL REVIEW

It would be an eternal error to think of analyzing the growth of judicial review in America without tarrying a little to look at the influence the natural law had on the plain of the minds of ever critical Americans and which had impressed on them the idea of a written constitution, breaking away from the canny British unwritten-common law constitution. The same natural law with the idea that no man has the right to oppress another man influenced the American Revolution. Judging from this summary would afford an opportunity of clearly seeing through the lens the real or actual origin of American styled constitutional review.

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[36] *Id.*
[37] United States v. Callender, 25 F. Cas. 239 (C.C.D. Va. 1800) (No. 14, 709).
[38] Presser, *supra* note 35 at 1507.
[39] *Id.* at 1510.

Before *Marbury*, natural law contributed to the development of the institution that had come to be known as judicial review, any positive law that is in conflict with the unwritten law of nature was void and invalid.[40] There is no doubt therefore that natural law contributed to the development of judicial review in America.[41] Corwin,[42] though strongly articulated the "higher law"[43] origin of judicial review in America, he equally with strong conviction pointed to the fact that courts in America "at times ventured to review legislative acts in relation to an unwritten higher law, referring to Sir Edward Coke's dictum in Dr. Bonham's case.[44] Although Coke did not refer expressly to any form of "higher law", be it written or unwritten, he believed in 'common right and reason' that any Act of Parliament which is against common right and reason, or repugnant or impossible to be performed would be controlled by the common law and it would adjudge such Act of Parliament to be void.[45]

Elucidated, this would mean that the court had a duty to examine an Act of Parliament for compliance with "common right and reason" and where it is found to be non-compliant the court would so declare and the Act becomes repugnant or impossible of performance thereby becoming void. Further, by that token, the question does not arise that a void Act of Parliament may bind the court. This means that any such Act ceased to be law upon its avoidance by the common law. What then is different between Coke's and Marshall's basis of validity of an Act of Parliament? In Cokean conception, "common law and reason" while in Marshall's, the written constitution, but the test of validity remains constantly the province of the court. Yet it is arguable, as opines by Spector that Marshall embraced Coke's view of judicial duty in *Marbury*.[46] It is however significant to note that "common

[40] J. OMOREGBE, AN INTRODUCTION TO PHILOSOPHICAL JURISPRUDENCE 171 (1997).
[41] Leslie F. Goldstein, *Popular Sovereignty, the Origins of Judicial Review, and the Revival of Unwritten Law,* 48 J. POL. 51, 62-65 (1986).
[42] E.S.Corwin, *Judicial Review in Action*, 74 (7) U. PA L. REV. 639 (1926).
[43] *Id*. at 639.
[44] *Id*. at 639-641.
[45] *Id*. at 640. *See also* G.L McDowell, *Coke, Corwin and the Constitution: "The Higher Law Background Reconsidered"*, 55(3) REV. POL.393, 393-397 (1993).
[46] H. Spector, *Judicial Review, Rights and Democracy,* 223(4) L. & PHIL. 285, 312-314 (2003).

rights and reason" have their roots in the ever-living natural law, and written constitutions, like that of America, Ghana, Nigeria and India are only positivisation of abstract ideals of natural law.[47] Corwin's[48] reference to Dr. Bonham's case, as McDowell[49] argues, was never cited in most early American cases as a foundation for judicial review in the country is incontrovertible as there is clear evidence to that on the records. This would not at the same time suggest absence of influence of English juridical science in America, on the bar and the bench, including of course on the Supreme Court of Chief Justice Marshall in *Marbury*, himself having been trained and tutored in the English legal tradition. The colonial history and experience of America and the legal training of the early American Lawyers would not in quick allow for dichotomy between American juridical science and the common law tradition of the English judges. McDowell, inspite of his attack on Corwin's idea on Cokean influence in early American doctrine of judicial review would seem to agree that colonial experience had forced Americans "to Knit together the English traditions under which they had so long lived…"[50] Also, that Americans embrace the notion of natural law can be seen and read in the constitution.[51]

Marshall had cause to accede to natural law in *Fletcher v Peck*[52] where he declared that "either by the general principles which are common to our free institutions, or by the particular provisions of the constitution of the United State, the law in question was void." In this instance, Marshall had cause to distinguish between the "general principles which are common" and the Constitution. While he particularized the constitution, he did not do so for what he referred to as the general principles which are common to the free institutions. These general principles should be taken to mean what Coke referred to as "common rights and reason." Certainly, Marshall, lawyer

[47] M. Cappelletti, *Judicial Review in Comparative Perspective,* 58(5) CALIF. L. REV. 1017, 1032-1033 (1970).
[48] Corwin, *supra* note 42.
[49] McDowell, *supra* note 45 at 397-400.
[50] *Id.* at 413.
[51] *See* Preamble to the Constitution.
[52] 10 U.S. 87; 6 Cranch, 87.

trained in the best English legal tradition, has his characteristics and ideas, whether intrinsic or extrinsic and this may have informed his latter day recourse to principles of natural law.[53] This indeed indicates that the influence of natural law still has universal acceptability and that notwithstanding the popular sovereignty or the will of the people as contained in the popular written constitutions limiting the powers of the authorities in government, the limits by natural law are still prevalent against the acts of the political branches of any government. And that is constitutionalism beyond the written constitutions.

The American model of judicial review by any means developed whether pretentiously or otherwise from the understanding of hierarchy of laws contention. The two higher laws; the first higher law ascending to the second higher law (the written constitution) deriving its authority from the consent of popular sovereignty and representing the will and desires of the people on the mandate they have given to their governors in their collective capacity as the originator of the contract of governance and in fact the final authority in that respect. The authority of the people being originally a consequence of the free will with which nature endowed them and which they decided to exercise through the people they have so chosen to direct their mundane affairs. Though the men that occupied the executive and legislative branches may have been directly chosen by the people in direct elections or collegiate, the men of the bench are most often chosen by the people indirectly through the hands and acts of the executive and legislative officials. Truly, the men chosen for the bench by the elected representatives of the people and are charged with the duty of evaluating the compliance of those who have chosen them to ascertain, with the dare consequence of nullity, the mandate granted them by the people, such power derived from their free will and the judiciary is the instrument through which the people ensure stability in government.

[53] *Id.* at 139. "...It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the state of Georgia was restrained, either by general principles, which are common to our free institutions, or by the particular provisions of the constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void."

When there is any deviation from the people's mandate or an allegation of an infraction of the will of the people as epitomized by the constitution the judiciary is called upon to determine the truth and extent of it all. The constitutional ideas and norms being products of free will cannot be isolated from its origin; it is to ensure justice, equity and fairness in all affairs of the state as ordained by nature.

HAMILTON AND JUDICIAL REVIEW

From this stand point and by his powerful statement of the constitutional theory in *Marbury*, Marshall never brought anything new to the people than he reaffirmed what other people have strongly echoed. Alexander Hamilton, on Saturday, June 4, 1788 argued strongly on the relationship between the constitution and "any particular act proceeding from the legislative body."[54] Before that, he educated the conventioneers on the essence of a limited constitution (which should be taken to mean limited government in which the powers of the executive, legislative and even judicial branches are limited by the written constitution)[55] and which limitation can be preserved in practice through no other means than the judiciary for the "reservations of particular rights and privileges."[56] Hamilton constitutional theory in this respect may be looked as establishing certain concepts: 1. Limited government; 2. Peoples mandate; 3. Judicial review; and 4. Rights and privileges.

The idea of limited government presupposes supremacy of the constitution; all powers emanated from the people and through the constitution to the branches and beyond the clear mandate, except as may be incidental and not incremental, no more. So, to ensure that the mandate of the people prevails

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[54] THE FEDERALIST NO. 78, *available at,* www.4uth.gov.ua/usa/english/facts/funddocs/fed/federa80.htm.

[55] The powers of national governments are now being further gradually curtailed notwithstanding their written constitutions as a result of the emergence of international constitutionalism now exercising some form of control on the powers of national governments through the instrumentality of rules of international and regional laws such as the UN Charter, Universal Declaration of Rights, African Charter on Human and Peoples' Rights and the EU Act.

[56] *Id.*

over the whims and caprices of the state officials the judiciary is endowed with the power of oversight over the other branches so that any legislative or executive action "contrary to the tenor of the commission under which it is exercised"[57] can be annulled by the judicial or legal representatives of the people; the courts. A clear understanding of the spirit behind a written constitution as had been aptly demonstrated by Hamilton at the convention underscores the fact that:

> *"A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."*[58]

The executive and the legislative branches are bodies of the political representatives of the people with their clear and limited mandate and the judiciary is the judicial or legal policing branch to watch over the other arms and enforce the people's mandate anytime they have exceeded the mandate or exercised the mandate in a manner not envisaged or which is opposed to the clear manifestation of the mandate. Besides, except a matter that is political in nature, the power of the judicial representatives ostensibly knows no bound in relation to putting acts of the political branches on compliance scale to determine their justifiability or constitutionality. Unfortunately, the convention did not conclude on the matter of judicial review; neither to be nor not to be. This presumably was responsible for the pride of place with which the decision in *Marbury* had ever since been greeted as the origin of

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[57] *Id.*
[58] *Id.*

judicial review. Far from it, an understanding of a careful comparison of the language of Hamilton's statement and the language of the decision of Marshall in the celebrated *Marbury* leads to presumption that Marshall only adopted Hamilton's advocacy in support of judicial review without any new idea except substituting some words where so convenient. Roland is certainly right to regard the decision in *Marbury* as political, that Marshall was "afraid of being impeached and removed from the court if he ruled in favor of Marbury."[59] Understandably, the decision may be political since Marshall refused to refer to any precedent in the annals of strong judicial authorities whether to rely on same or to distinguish the cases and decide on a new theoretical or normative concept grounded within the primacy of the constitution. It may also be political if really he was apprehended of the consequences that may follow a decision in favor of *Marbury*. Thus, a linguistic analysis of the language of the decision in *Marbury* and the words of Hamilton coupled with the inability of Marshall to refer to and or rely on any judicial precedent is conclusive of the voice of Marshall but ideas of Hamilton.

CONCLUSION

This paper examines whether or not it is true that Chief Justice John Marshall established judicial review in *Marbury v. Madison* or that he simply affirmed or reaffirmed the concept in that case. Far from it, the concept had been in use ever before Marshall and *Marbury* and the origin could be traced to natural law[60] and the judicial activism of Justice, Sir Edward Coke in Dr. Bonham's case.[61] The mere fact of a written constitution with the supremacy clause notwithstanding, the constitutional ideal is the codification of natural law ideal.[62] Thus, it may be that the appellation *Judicial Review* may not have come into being in the early period of the practice until 1910.[63] This does not suggest, as neither did Marshall's refusal

[59] J. Roland, Marbury v. Madison*, 5 U.S. 137 (1803),* COMMENTARY, *available at,* www.constitution.org/USSC/005-137jr.htm.
[60] Corwin, *supra* note 48 at 642.
[61] *Id.*
[62] Shehu, *supra* note 9 at 232-234.

to refer to or rely on any judicial precedent, the absence of decided review cases. There are historical and judicial records indicating that there were before Marbury, as stated by Wood, cases of review between 1780s and 1790s.[64] Treanor, objecting as it were to glorification of Marbury and the hollow pretention of Marshall in the case, accounts for thirty-eight review cases, thirty-one out of which statutes were invalidated.[65] Further, the truth is as Presser puts it:

> *"To be honest, the legacy of John Marshall could not be judicial review, because it is clear to anybody who consults the historical record that Marshall, in Marbury, was simply invoking the doctrines of judicial review set out by Hamilton in The Federalist No. 78, and many others before and after."*[66]

And yet, Hamilton, by his choice of words in the Federalists, must have imbibed the natural law ideals and follow in thought the Cokean perception.

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[63] Wood, *supra* note 27 at 788.
[64] *Id.* at 793, 797, 798.
[65] Treanor, *supra* note 27 at 457-458. *See* also Whittington, K.E., *Judicial Review of Congress Before the Civil War*,97 GEO. LAW REV. 1257, 1266-1270 and the supposed comprehensive appendix (table of review cases), 1330-1331.
[66] Presser, *supra* note 35 at 1504.

A PLIGHT OF RIGHTS FROM WRONG: STORY OF THE THIRDS

Shourajeet Chakravarty*

Abstract

What is fundamental to men cannot be taken away by any law, irrespective of the importance attached to such a law. Sexual orientation and sexual activities are personal for every human being. Sexual orientation is intrinsic to a person's nature and personality and interfering with it in any manner may lead to extreme consequences. This paper first attempts to introduce the reasons of the prevailing social divide in relation to homosexuality. Secondly, the paper attempts to identify the discrimination meted to homosexual individuals by formulation of legislation; such as Section 377 of the Indian Penal Code. The paper attempts to present the situation related to this issue in three parts; 'the present'; 'the wrong'; and 'the right'. For this, the paper discusses litigations related to the same issue, i.e. the case of 'S.K.Kaushal v. Naz Foundation', the concept of rights, the duty of the judiciary and its use of discretion. Finally it concludes how the re-criminalization of Section 377 has given rise to discrimination towards the people belonging to the LGBT community and is also violating their fundamental rights.

Keywords*: Discretion, Dworkin, Homosexuality, Section 377, Taking Rights Seriously*

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INTRODUCTION

People have always feared, what they do not understand, the uncommon has always been discriminated against. This research paper delves into the rights of the LGBT community, people who have been forced to lead a secluded life. The society has forced their rules over them, which in turn has violated their natural rights. Every individual is born with some unique characteristics, to unique conditions and for reasons unique to them. No person, walking on the face of this earth is the same; their differences are determined by the conditions they face, their physical, physiological and psychological needs and behavioural patterns. Biological similarity too, cannot be expected to be present in individuals, even within the same species. Everyone is unique in their own way.

The human race has evolved manifold over many millenniums and with it has evolved the concept of society. It is the fundamental nature of human beings to live in a social construct, in a setup surrounded by people similar to them. Hobbes, Locke and Rousseau construed the social contract theory to understand this behaviour in humans to form society. According to this theory, man lived in the state of nature, which was brutish, dangerous, unkind and unsafe, where man had to live by the laws of the nature and only the strongest survived. Life was short, inconsistent, and brutish and he was always afraid of death. To eliminate this, men formed the Social Contract, so that they can live together and protect each other, live a long, happy and safe life and escape the laws of nature. Social members supported each other. According to the principle of social contract, men gave up all their rights, but for a few, which were so fundamental to them that they could not be separated from them, i.e., the existence of those rights was fundamental to their human existence. All other rights were given up by men to form a social contract which would govern them, rule over them so that they can lead a safe life. It has to be noted, that before the formation of this social contract, man was free, had all the powers and no duty; but he was burdened with duties to respect other's right upon the formation of the social contract.

Upon the formation of society, broad classifications were made, i.e. genders were defined; *males & females;* but what men don't understand, they fear. The third gender was always present within the society, but as they were not fit for any of the broad classifications made by the society, they were forced to hide their existence. The weird lot, the unknown people, the man-women; they were called names yet were forced to live under cover, away from the main society; and here started discrimination which continues till date.

Sexual orientation is a natural phenomenon.

In nature and human society it is found that majority of individuals exhibit such sexual behaviour that male and females mate to produce offspring; as such they have been termed as 'opposite genders' and are expected to behave in a certain manner as approved by the society. However, existence of one type of behaviour in nature does not negate the existence of the other. Divergent sexual behaviour can be observed in every species found in nature including humans. This is a process of natural selection and nothing is wrong about it. Historically, divergent sexual behaviour has been misconstrued due to lack of knowledge and research, and has been wrongly attributed to the practise of dark arts, demonic behaviour, medical condition, etc. Man fears what he doesn't understand, and it is clear that the society never understood homosexuality, bi-sexuality or trans-genders. For the same reason, the society has created many laws which in turn were and are detrimental to people of the LGBT group. One such law is the Section 377 of the Indian Penal Code, which criminalizes any unnatural (non-vaginal) sexual intercourse. This research paper discusses the rights of people belonging to the LGBT community and the position of the judiciary to correct the same and argues against the unjust provision.

THE PRESENT POSITION

The case of *S.K.Kaushal v. Naz Foundation*[1] is the landmark judgment which re-criminalized unnatural sex between two consenting adults. Basically, the

[1] Suresh Kumar Koushal v. Naz Foundation, (2014) 1 S.C.C. 1.

judgment reaffirmed the much debated Section 377 of the Indian Penal Code which criminalizes all unnatural sexual intercourse; which involves penile penetration of any kind. This also included the acts of Sodomy as well as sexual intercourse between two consenting males or females. Section 377 of the Indian Penal Code which was enacted during the British administration in India in the year 1860; formulated an offence for having carnal intercourse against the order of nature with any man, woman or animal (bestiality) and deemed it punishable by imprisonment for up to ten years or fine or both.

This piece of legislation has been discriminating with people belonging to the LGBT community or now generally addressed as, 'the third gender' from the time of its enactment. A plea to end this atrocious Section was taken up by the NAZ Foundation; and the NGO filed various writ petitions in the Delhi High Court from the year 2001 so as to declare Section 377 of the Indian Penal Code void to the extent that it penalized sexual acts between two consenting adults in private; according to the writs, this legislation was in violation of the provisions of the Constitution of India, specifically, Article 14[2] which ensures and guarantees equality before the law to everyone, Article 15 which mandates the eradication of discriminatory acts, provisions, etc., Article 19(1)(a)-(d) which provides for freedom of speech, gathering in a peaceful assembly, association and movement and Article 21 which guarantees the right to life and personal liberty.

The *Naz Foundation* Judgment argued that the law had a discriminatory effect because it was predominantly used against any homosexual conduct, thereby criminalizing activity practiced more often by homosexual men and women. It was argued that this would jeopardize HIV/AIDS prevention methods by driving homosexual men and other sexual minorities underground. It was further argued that, as private consensual relations were protected under Article 21 of the Constitution of India, Section 377 was

[2] Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

invalid as there was no compelling state interest to justify the curtailment of a fundamental freedom. The *Naz Foundation* also argued that Section 377 violated Article 14 on two grounds: firstly, because it was unreasonable and arbitrary to criminalize non-procreative sexual relations, and secondly, because the legislative objective of penalizing "unnatural" acts had no rational nexus with the classification between procreative and non-procreative sexual acts.[3] The Delhi High Court after rejecting the Writ once in the year 2004 remitted it in the year 2006. Yet the High Court in the year 2009 passed a judgment holding the Section 377 of IPC as unconstitutional to the extent that it violates the Fundamental Rights of the people of the LGBT community as it violated their right to equality, non-discrimination as well as right of privacy and to live with human dignity. Thus the High Court in its own virtue de-criminalized sexual intercourse between two consenting individuals of either gender. The case of *S.K.Kaushal v. NAZ Foundation*[4] was an appeal to the Supreme Court against the Judgment of the Delhi High Court in *Naz Foundation*, under a Special Leave Petition. The Supreme Court overruled the decision of the Delhi High Court stating that the High Court had erred in its decision and held without much analysis that section 377 of the IPC was not in contravention with the Fundamental Rights as numerated in the Constitution.

In the appeal, the appellants contented that the decision of the High Court was totally erroneous for the want of foundational facts on which it might have been established that Section 377 actually violated Articles 14, 15 and 21 of the Constitution of India and thus violated the Fundamental Rights of people of the LGBT community. Moreover, as the respondents in their earlier petition had mentioned that the impugned Section increased the threat of AID/HIV, the appellants questioned the validity of their statistical data. Furthermore, the appellants contended that the Section so in question was actually a gender neutral provision and thus was not in violation of Article

[3] *Case Summary NAZ Foundation Case*, EQUAL RIGHTS TRUST (Apr. 15, 2016), http://www.equalrightstrust.org/ertdocumentbank/Case%20Summary%20Suresh%20Kumar%20Koushal%20and%20another%20v%20NAZ%20Foundation%20and%20others.pdf.

[4] *Supra* note 1.

14. They also contended that the right to privacy and to live with dignity did not and could not allow a person to commit any offence even in private sphere.

The respondents contended that the Section was discriminating to homosexual men at a deeper level as male sexual activities involve penile activities which are non-vaginal in nature. This according to the respondents discriminated against homosexual men in a higher level. Moreover the respondents appealed to the changing values of society and asked the court to acknowledge the fact that the constitution is a changing and evolving document requiring amends to its structure. Furthermore the vagueness of the Section so as to the delegation of the policy making powers to the police was questioned to the extent that it caused harassment to the people belonging to the LGBT community. The respondents also appealed to the Apex Court that the criminalization of such activity increases stigma in the society causing rise in cases of HIV/AIDS as the people of the LGBT community tend to remain hidden from the public view so as to protect themselves from social criticism, legislative actions and protect their dignity as well as privacy. The Supreme Court in its decision allowed the appeal and held that even though it is a power of the Supreme Court and the High Court to revisit pre-constitutional laws to the extent that they violate the Constitution, yet the presumption the courts must adhere to is the constitutionality of the said laws. The Court held that Section 377 was not unconstitutional as it did not violate the rights of people of the LGBT community.

THE WRONG

According to the Court, the Section did not discriminate against any community. It merely criminalized certain acts which if performed by anyone shall be liable for punishment. The Court went on to make a distinction between the people and the LGBT community. The Court mentioned that the legislature had the powers to make a reasonable classification among a group of persons if such a classification is not

arbitrary. The Court mentioned that as a distinct class can be culled out by the reading of Section 377, Article 14 cannot be attracted by the same. In any case, *Kaushal's* decision has taken the recourse of Article 14 out of the reach of those who indulge in acts of carnal intercourse against the order of nature. According to the Supreme Court, "*What Section 377 does is merely define the particular offence and prescribe punishment for the same.*"[5] In other words, the case of *Kaushal v. Naz* states that equality principles do not apply to Section 377 because it does not target LGBT persons and only refers to sexual acts indulged in by two classes of persons. What the Court failed to observe was, that this particular provision in turn was harassing a particular group of people more. Moreover, it was encroaching upon their personal liberty, natural choice of partners and thus upon the right to live with human dignity. Moreover, the Supreme Court in a very haphazard manner mentioned that it was erroneous of the Delhi High Court not to acknowledge the fact that the people of LGBT community are minuscule in India. The Court even went on to support its claim by mentioning that as less as only 200 cases have been reported in the history of Article 377 and thus connects this to be a reason that the statute is a sound one and not unconstitutional. Again the Apex Court failed in appreciating the fact that even if a community is a minority, it does not render their rights nonexistent. Even if a single individual's rights, bestowed to him/her by the very constitution are encroached upon, the legislation encroaching upon such rights is void and is a bad law.

Furthermore, the Supreme Court in its decision in *S.K.Kaushal v. NAZ Foundation*[6] also held that the right to privacy and right to dignity which are enshrined in the Article 21 of the Constitution of India were also not violated by the legislation in question. The judges in the case held that the right to privacy and that of dignity did not in any way allow any person to commit any crime. As the act of carnal intercourse between adults of the same sex is a crime as has been provided for in the statute, therefore no one can actually

[5] *Supra* note 1.
[6] *Id.*

claim to the rights as provided in Article 21 of the Constitution. Therefore, according to the court, the judgment passed by the High Court was erroneous. Here, the Court fallaciously reached to the conclusion. The Court failed to give regard to the fact that a statute draws its powers from the Constitution; thus if the Constitution bestows the right of privacy and to live with human dignity upon individuals, the statute cannot take such a right away. The statute would always be second to the Constitution; its criminalizing of certain acts would be negated if such criminalization is against the constitution. Yes, the right under Article 21 does not give the right to commit a crime, but in this case, such an act cannot be criminalized at all because of Article 21. Sexual orientation and choices are one of the innermost aspects of one's conscience. To control the same through legislation will not only hamper one's privacy but also encroach upon his or her dignity. As the section 377 still stands due to the court's decision the rights of the people of the LGBT community gets hampered grossly on a daily basis. One must understand that there exists a realm of inner morality which shall not be the concern of anyone else. Thus, controlling the sexual activities of an individual in his/ her private realm shall not be correct in any manner whatsoever.

THE RIGHT

It can be argued that the rights provided in Article 21, Article 14 and Article 19 can be subdued by a fair procedure, an unbiased law and undiscriminating classifications. But clearly, in the case of *S.K.Kaushal*, the judges have drawn distinction between pro-creational sexual activity and non pro-creational sexual activities; branding the latter as re-creational sexual acts. Drawing these distinctions cannot be the concern of the state and the state should not be involved in such matters. One should pay heed to the *Hart- Devlin* debate which established that there must exist a realm of inner morality which should be beyond the control of any legislation. What happens behind closed doors, between two consenting adults should not be the concern of any legislation. Thus, the Court in its judgment must have

overlooked this concept of inner morality. Moreover, it must also be observed that the constitution vested some fundamental rights to all its citizens which were inalienable. No statute which violated them can stand the test of constitutionality. Thus any statute, which does the same, must be *ultra vire*s from the very inception of the constitution. In the present case, as can be clearly culled out, the judges had a very positivist approach and exhibited judicial formalism to the most. The judges refused to pay heed to the moral appeal made by the counsel for the respondent and from the very beginning stated that a law must be assumed to be constitutional until proven otherwise. Moreover the judges quoted highly irrelevant facts undermining the LGBT community; stating that only a minuscule population was affected by the legislation in question. The Court must realize that the right of even a single person when hampered is against the real intention of the constitution. Furthermore, the Court failed to look into the real intention of the constitution in recognizing the fundamental rights for its citizens.

Ronald Dworkin in his seminal work '*Taking Rights Seriously*'[7] has extensively talked about Rules and Principles and Principles and Policies. Dworkin in his essay 'Model Rule I'[8] and 'Model Rule II'[9] describes that rules are of two types namely primary and secondary. While the primary rules are those which govern the activities of its subjects, secondary rules can be termed as those which actually bind the subjects to the primary rules. Dworkin advocates against the positivist model of rules and states that rules exist in combination with principles. Where rules are the right answer to a question, the principles lead to the correct rule. Dworkin gives the example of a rule stating that use of motorized vehicles in a park is prohibited and another stating that the park is open to handicapped people. A handicapped man tries to enter the park on his motorized wheel chair. If the first rule is correct then the person should not be allowed to go in the park but if the second rule is correct then his entry cannot be restricted. Principles help to

[7] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978).
[8] *Id.*
[9] *Id.*

ascertain that which rule in fact is correct in a given situation. Dworkin, time and again has mentioned the case of *Riggs v. Palmer*[10] as an argument against legal positivism, focusing on a version of positivism by H.L.A. Hart. As a leader of the philosophy of Legal Positivism, Hart argues that the decisions in this case should be based on existing law, which was silent on the issue at the time. Positivism holds that all legal decisions by courts are classified into one of two categories. Some are central to the legal rules at issue. In these cases, judges merely mechanically apply the rules which fall within their jurisdiction. The other category of decisions, occupy the penumbra of legal rules, where the direction of the legal rule is unclear. In these cases, judges must decide which of the possible applications of the legal rules are best social policy and then apply the rule which is best.

Dworkin has argued that *Riggs* has two features which contradict Hart's interpretation of the legal process. First, this case does not appear to present itself at the edge of legal rules, instead it is very clearly central. Despite this, the majority did not apply the legal rule as required. Second, there appears to be a legitimate debate about what the law is, and not what the law should be, in this case. According to Dworkin, under most versions of legal positivism, Hart's included, there should rarely be debate about what counts as law. In his essay, '*Taking Rights Seriously*'[11], Dworkin uses this case to establish the realm of principles which also govern the aspects of laws in addition to established statutes. Moreover, Dworkin states that these principles have a separate dimension to themselves which he calls as weight. According to Dworkin, the weight of a principle decides which rule should be applied. Like in the case of *Riggs v. Palmer*, the majority used the principle that 'no one should gain by their own wrongs'[12] and the minority used the principle that 'no one should be punished beyond the ways specified by statutes'. The former being the heavier principle, prevailed. In the instant case, it seems the Court failed at the application of the proper principle, or in Dworkin's

[10] Riggs v. Palmer, 115 N.Y. 506 (1889).
[11] *Id.*
[12] *Id.*

words measure the correct weight. The Court chose to apply the principle of assumption of 'constitutionality of a statute until proven otherwise' rather than 'all statutes violating fundamental rights to be *ultra vires*'.

To the question of unlimited judicial discretion to judges, Dworkin suggests that such a level of discretion would be unjust, irrational and arbitrary and would also be against the rule of law. As there would not be any concrete result of similar cases, the rule of legitimate expectation would be severed. Moreover, the rule of discretion would be more of a rule of man and not rule of law. However, Dworkin does acknowledge that use of discretion would be required in some cases. He distinguished these cases to be of two types: weak discretion cases and strong discretion cases. While cases in which the rules or orders are open ended or vague the discretion to be exercised must be weak. Like at the time of sentencing or choosing a team for a voyage. Another occasion of such weak use of discretion would be when the authority judging the case is, the final authority, having no one else above them to review their decisions. Moreover, Dworkin also denies the existence of a strong discretion in cases where no legal rules actually govern the case. These types of cases, he describes as Hard cases in his book[13]. Cases which are not governed or covered by any law, and cannot also be brought under laws existing even after their widest interpretation are called hard cases. Dworkin states that even though the hard cases must be decided by the judges, and they are not accountable to any existing rule, they are expected to make a correct choice nevertheless. This undermines their level of discretion even in the hard cases. Thus, Dworkin through his work in his book[14] has inherently attacked the models of rules of positivism. In the instant case, the Court has displayed a positivist approach and failed to apply the discretion, though weak at all.

Dworkin professed the element of Constitutional Morality. Constitutional morality means adherence to the core principles of the constitutional democracy.[15] Therefore, according to Dworkin, the judge should pay heed to

[13] *Id.*
[14] *Id.*

the intention of the constitution in enacting a particular statute or providing for a particular right. The real intention of the constitution according to Dworkin, preserving, perfecting and professing the morality of the constitution should be the primary motive of all legislations.

As the Constitution of India in all its virtue provides for the fundamental rights of the people as one of its most important and valued facets, the legislation as well as the judiciary ought to protect such intention of the Constitution. The fundamental rights are part of the constitutional morality of the constitution of India. Article 21 not only provides the right to life but also sets the right to privacy and dignity. Moreover, Article 14 calls for equality among all without any discrimination[16]. As these rights are the intrinsic part of the constitution of India, thus it is incumbent on the judges to uphold these rights no matter what. Constitutional rights are above any other statute by the sheer reason that they are recognized & bestowed by the constitution, the all binding law itself. Thus, no statute can in reality take away from the fundamental rights.

CONCLUSION

A member of the LGBT community is as much a citizen of the country as any person with straight orientation. There is in fact no distinction between the two groups barring their sexual preferences. It must now be noted that a law must not encroach upon the inner morality of a person. It would be similar to encroachment upon the personal liberty of a person. In the case of *Maneka Gandhi*[17], it was held that Article 21 does not simply cover the realm of personal liberty, but also everything which in a manner builds up the realm of personal liberty. Sexual orientation and sexual activity is a matter of one's privacy. These are matters which may affect the mental condition of a person and also his or her social development. Therefore, this surely does

[15] Minu Elizabeth Scaria, *Constitutional Morality And Judicial Values*, LEGAL SERVICE INDIA (April. 16, 2016, 00:32 AM), www.legalserviceindia.com/article/l186-Constitutional-Morality-And-Judicial-Values.html.

[16] INDIA CONST. ART. 15.

[17] Maneka Gandhi v. Union of India, (1978) 1 S.C.C. 248.

make the realm of personal liberty. Thus this must be protected under Article 21 of the Constitution of India. Moreover, in a country like India, where social acceptance is an important aspect of life and sexual activities are looked down upon, criminalizing one's sexual choice has the capability of making him or her, a social outcast, outraging their dignity in the society. Furthermore, merely making legislation without paying heed to the rights of a minority community just because it is a minority is no classification at all. A classification needs to be done on a reasonable nexus without which it would be arbitrary and contrary to the fundamental right of equality. It would also be discriminatory to such a minority and against the Constitutional Morality of the Constitution.

In the current case the rights of gay men alongside with those of the LGBT community was in question. This case though cannot be termed as a hard case as was mentioned by Dworkin in his essay, and thus calls for application of weak discretion by the Judges. The constitutionality of the Section 377 has hampered the right of equality as well as dignity and privacy of the people of the community. Yet, the court did not choose to exercise its discretion; and adhering to the principles of judicial positivism determined that no such rights were violated by the impugned statute as no such right actually existed. According to the court's verdict, the right to dignity and privacy does not give the permission to commit any offence behind closed doors. But, the question the court did not answer was if, the fundamental rights were above the general statutes, and the constitutional morality provided for such rights, how can such acts of privacy be termed as offences. The Judges may exercise discretion in cases, however, in this case no discretion was utilized at all, which according to Dworkin's writings is not correct. One's sexual orientation or choice cannot be subject to public morality. It is a distinct choice, generally natural to people. One cannot force his choices on others. Moreover, one must also realize that homosexuality is no disease that one forces them towards cure. One must also understand the intention of the statute and compare it to the constitution before interpreting it. This would help the interpreter not to undermine the principles of the Constitution.

Lastly, Constitutional morality is the supreme law and shall be preserved no matter what.

The judgment in the *S.K. Kaushal v. Naz Foundation*[18] case is one of the sad examples of legal formalism. According to me, the respondents had a fundamental right to privacy, dignity, equality as well as non-discrimination. Instead, the court exercising its discretion overturned the decision of the High Court and thus interfered not only with the fundamental rights of the people of the LGBT community, but also did not adhere to the constitutional morality of the constitution of India. Thus, the decision in *S.K.Kaushal v. Naz Foundation*[19] according to the author was absolutely unjustified and unreasonable and hence infringed the rights of people belonging to the LGBT community to the extent of their right to equality, right against non-discrimination, right to dignity and right to privacy.

[18] *Supra* note 1.
[19] *Id.*

MINIMIZING VULNERABILITY OF PERSONS WITH DISABILITIES THROUGH LEGISLATIVE RESPONSES IN CRIMINAL PROCEDURE IN INDIA

Megha Nagpal*

Abstract

Access to justice is a core element of the Criminal Justice System. The system in India, however, is ill-equipped to facilitate Persons with Disabilities in accessing its agencies. PwDs, like able-bodied persons, can be victims of crime. It is seen that institutional, attitudinal and environmental barriers coupled with lack of affirmative provisions impair their prospects in bringing criminal law into motion. Foremost difficulty that this system poses to PwDs is communication of the occurrence of a crime. The Code of Criminal Procedure, 1973 prescribes no specific procedure for recording of statements and information of crime as provided by PwDs to the police and Magistrates. The system also leads to victimisation of a PwD upon incarceration being forced to live with a compromised right to live with human dignity. Using doctrinal research, specifically case-studies through judgements, few on-going public interest litigations, and an analysis of the provisions of the Code of Criminal Procedure and their interpretation in judgements of the Supreme Court of India, the present paper highlights issues and challenges that legislative lacunae pose for PwDs in India. It concludes that to tackle the problems relating to access to justice, need-based legislative responses in criminal procedure are required.

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Keywords: *Access to Justice, Criminal Law and Disability, Criminal Procedure and Vulnerability, Disability and Criminal Justice System, Incarceration and Disability, Persons with Disabilities.*

INTRODUCTION

About 15% of the world population is living with some form of disability or the other.[1] Barriers for disabled people range from being environmental, attitudinal, social, barriers in environment etc. The definition of disability also differs from perspective to perspective. In fact, different perspectives on disability lead to varied definitions of disability; example, medical, social or human rights definition of disability.[2] The formal notion of disability has undergone revision to accommodate changes in social norms and attitudes.[3] Indian criminal justice system is set into motion when a victim or informant registers a First Information Report,[4] or the information relating to a crime reaches the concerned Magistrate. The victim can play an important role in the investigation process since it is he/she who narrates the events leading to commission of an offence and provides necessary direction to the investigation through his statement.

As the burden to prove a crime rests on the side of the prosecution, the victim's testimony becomes really important. Even the contents of FIR can be used to corroborate and contradict this statement.[5] The present paper is an attempt to highlight the gap between needs of the disabled persons and legislative provisions relating to the Indian Criminal Justice System especially in providing access to justice. The author has argued that by

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[1] WHO FACT-SHEET ON 'DISABILITY AND HEALTH' (Dec. 17, 2015), www.who.int/mediacentre /factsheets/fs352/en/.

[2] According to the United Nations Convention on Rights of Persons with Disabilities, Article 1, 'persons with disabilities' include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

[3] DISABILITY MANUAL, NATIONAL HUMAN RIGHTS COMMISSION 9 (2005).

[4] § 154(1) of the Code of Criminal Procedure, 1973 (hereinafter referred to as CrPC), commonly called 'FIR'.

[5] Per Sections 157 and 145, the Indian Evidence Act, 1872. *See also* Sheikh Hasib alias Tabarak v. State of Bihar, A.I.R. 1972 S.C. 283.

incorporating rights-based approach in criminal procedure, the persons with disabilities can be given appropriate support facilitating them to significantly play their role in the justice delivery system. The focus of this paper is to recognise these lacunae and emphasise on solutions within the current law to reduce vulnerability of persons with disability.

Fairness in a criminal trial is of utmost importance. Article 21 of the Constitution of India mandates it since procedural fairness has been read by the Supreme Court in the words "procedure established by law".[6] Discussing the importance of fair trial, the Supreme Court in the case law of *Zahira Habibullah Shiekh (5)* v. *State of Gujarat & Ors.*[7] has remarked that "*fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated.*" The Code of Criminal Procedure, 1973 incorporates attributes of fairness in various provisions. Charge is to be framed formally and is required to be read over and explained to the accused whereupon his plea is recorded.[8] Further, evidence is required to be taken in presence of the accused;[9] and trial needs to be expeditious.[10] The enabling provisions need to specifically provide for a system to minimise the vulnerabilities of disabled, like it does for any accused. To discuss the need, scope and possibility of such provisions is the prime aim of this paper.

CONSTITUTIONAL PERSPECTIVE ON DISABILITY

The Constitution of India in its making had bundled the civil and political rights under Part III, wherein these inalienable rights were bestowed on its citizenry as fundamental rights binding on the State and all its agencies to

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[6] (1978) 1 S.C.C. 248.

[7] (2006) 3 S.C.C. 374.

[8] § 228, 240, 246, 251, the Code of Criminal Procedure, 1973.

[9] § 273, the Code of Criminal Procedure, 1973.

[10] *See* Hussainara Khatoon (I) v. Home Secretary, State of Bihar, (1980) 1 S.C.C. 81; wherein it was held that speedy trial is an essential ingredient of 'reasonable, just and fair procedure' as guaranteed under Article 21 of the Constitution of India. *See also* Abdul Rehman Antulay v. R.S. Nayak, (1992) 1 S.C.C. 225; Motilal Saraf v. State of J&K, (2006) 10 S.C.C. 560.

refrain from violating them. On the other hand the economic, social and cultural rights were grouped under Part IV, the 'Directive Principles of State Policy' (DPSP), less in the character of rights and more in the tone of guiding principles, as the heading suggests, for the State to strive towards in its own good time. On a plain reading of the part on fundamental rights it is evident that there is no specific reference to disability in any of the provisions. Legislation for protection of persons with disabilities can be said to be constitutional since it is based on a classification upon a reasonable ground of distinction, that is, persons with disability being a separate class in itself.[11] Therefore, Part III provisions can be deemed to include disability within the component of the civil and political rights. Even otherwise, fundamental freedoms[12] and right to life[13] are available to all citizens of India including the person with disability. Under the Indian legal system, every Act has to be in conformity with the Constitution of India. The Indian Parliament and also the State Legislatures derive their powers to legislate from the Constitution per Articles 245, 246 and 248.[14] Article 51 of the Constitution obligates the State to endeavour to foster respect for international law and treaty obligations in the dealings of organized peoples with one another. India has ratified UNCRPD.[15] In effect, a legislation relating to disability in India has to be in conformity to UNCRPD as well to Part III of the Indian Constitution.

Foremost, when addressing the issue of access of PwDs[16] to justice, the right resorted to is the right to life and personal liberty, which in the Indian Constitution is provided for as a fundamental right under Article 21.[17] While literally the provision only provides that no one may be deprived of life or

[11] For a discussion on Article 14 see Indian Supreme Court's decision in Chiranjit Lal Chowdhuri v. Union of India, A.I.R. 1951 S.C. 41.

[12] INDIA CONST. art. 19.

[13] INDIA CONST. art. 21.

[14] The State and its instrumentalities, as understood per Article 13, cannot make laws in contravention or violation of Part III of the Constitution.

[15] United Nations Convention on the Rights of Persons with Disabilities. It was adopted by the UN General Assembly on December 13, 2006.

[16] Persons with disabilities.

[17] Article 21, Constitution of India: "No person shall be deprived of his or her life or personal liberty except according to procedure established by law."

personal liberty in a manner contrary to law, the courts in India have interpreted it liberally to read into it a substantive right to life and liberty, and the right to dignity. Article 21 has been interpreted as being the repository of many rights, including, the right to a clean environment. Further, the Indian Constitution vide Articles 14, 15 and 16 prohibits discrimination on grounds of religion, race, caste, sex, place of birth etc., however, disability in itself is not a ground provided therein. In effect, the Constitution expressly does not prohibit discrimination on ground of disability.[18]

The Indian Judiciary has played a very important role in shaping jurisprudence in respect of subjects where it was nascent and required upholding and expanding application of old principles; environmental jurisprudence is an example to that effect. Since India has ratified the UNCRPD, laws in respect of persons with disabilities have been framed and they are required to be in consistent with the Convention. With respect to bringing PwDs at a non-discrimination platform, the Supreme Court of India and various High Courts have made considerable progress. Most importantly, the binding application of UNCRPD was observed in the case law of *Suchita Srivastava* v. *Chandigarh Administration*,[19] which was a case with respect to the right of a mentally retarded woman to give consent for termination of her pregnancy, the Supreme Court observed that India has ratified the Convention on the Rights of Persons with Disabilities (CRPD) on October 1, 2007 and thus, the contents of the same are binding on our legal system.[20] Thus, all laws made for the disabled have to pass the test of this interpretation; in other words, they need to be in conformity with the

[18] However, under Article 15(4) the State is empowered to make laws (special provisions) for the advancement of socially and educationally backward classes of citizens and / or for the Scheduled Castes and the Scheduled Tribes. Thus, we have the Prevention of Women from Domestic Violence Act, 2005 exclusively for women, the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 for the Scheduled Castes and the Scheduled Tribes, etc.

[19] A.I.R. 2010 S.C. 235.

[20] The Supreme Court held that woman's consent is mandatory under the Medical Termination of Pregnancy Act and without her consent, her child cannot be aborted.

UNCRPD.[21] Therefore, it can be argued that India is obligated under national as well as international human rights law to respect, protect, and fulfill human rights in relation to persons with disabilities. In the case law of *Javed Abidi* v. *Union of India*,[22] the Indian Supreme Court specifically recognized the principles of equality and non-discrimination applied to disabled persons based on binding international law obligations, identifying the responsibility of the State to provide medical care, education, training, employment and rehabilitation of disabled persons and ensuring that cases of abuse and exploitation are counteracted.[23]

Indeed judicial intervention is necessary to ensure the protection of vulnerable individuals and the redress of abominable wrongs and to ensure transparency in the system and accountability of the State. However, instead of relying on writ jurisdiction in all cases and overburdening the High Courts, the law itself must ensure prevention of or at least minimisation of vulnerability of persons with disabilities. The legal obligation for lower judiciary and the police, which are the first agencies every victim and accused comes into contact with upon commission of a crime, need to flow from legislation rather than from orders and directions of High Courts on a case-to-case basis.

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[21] The UNCRPD articulates a clear obligation to ensure the humane treatment of disabled persons through Articles 5 (equality and non-discrimination), Article 10 (right to life), Article 14 (liberty and security of persons) Article 15 (freedom from cruel and inhuman and degrading treatment), Article 16 (freedom from violence and abuse).

[22] (1991) 1 S.C.C. 467 (India).

[23] This case related to the implementation of certain provisions of the Persons with Disabilities Act, 1995, that is, constitution of the Central Co-ordination Committee under Section 3, and the States Co-ordination Committees under Section 13 of the Act. The petition also asked for concessions in airfares for people with locomotor disability in addition to the concessions already being given to visually challenged people. The petitioner also argued that orthopaedically challenged persons face significant difficulties with respect to the use of air transport facilities and thus, there must be a provision of "ambulifts" to take such passengers form the ground level to the aircraft. The Supreme Court directed that those suffering from the locomotor disability to the extent of 80% and above would be entitled to the concession in airfares from the Indian Airlines for travelling by Air within the country at the same rate as has been given to those suffering from blindness on their furnishing the necessary certificate from the Chief District Medical Officer. Further, with respect to 'ambulifts' the court observed that since the major airports were being provided with 'ambulifts' and aisle chairs as was stated on oath by the Indian Airlines, no specific direction in this regard was required.

PRESENT LAW AND VICTIMISATION OF PWDS

The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995[24] was enacted in India to give effect to the 'Proclamation on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region'.[25] Apart from providing reservation for PwDs in government employment, the Act casts obligation on State Governments to provide for non-discrimination in the built environment.[26] The Act perhaps endeavours gradual inclusion of PwDs in mainstream through these measures such as mandatory 3% reservation in government employment and equipping the transport facilities and public buildings to make them disabled friendly. The Act also provides for prevention of disability.[27] However, the wholesome inclusion of PwDs is forgotten in the cursory provisions of the legislation. The most glaring lacuna in the PwD Act, therefore, is its limited approach towards disability, rather than a more inclusive rights-based approach. While the 1995 PwD Act is silent on the issue of response of State agencies upon victimization of PwDs, and though the 2014 RPD Bill speaks of measures to be taken by appropriate Government to protect PwDs from violence, abuse and exploitation, yet law has not laid down in concrete terms the provisions as to their access to, support and relief from the criminal justice system. The newly enacted legislation on disability, the Rights of Persons with Disabilities, 2016, specifically in its Preamble recognises the need for implementation of UNCRPD upon its ratification by India in 2007. It requires the appropriate government to ensure reasonable accommodation for PwDs.[28] The 2016 Act further requires the appropriate government[29] to ensure access of PwDs to

[24] Hereinafter referred to as the 'PwD Act'.

[25] This Proclamation was adopted by the Economic and Social Commission for Asia and the Pacific (ESCAP), at Beijing in December 1992 and endorsed by it at its forty-ninth session in April 1993, the beginning of the Asian and Pacific Decade of the Disabled Persons.

[26] Chapter VIII, PwD Act.

[27] Chapter IV: Prevention and Early Detection of Disabilities, PwD Act.

[28] *See* § 3(5) of 2016 Act.

[29] For the definition of 'appropriate government' per 2016 Act, *see* § 2(b).

courts, tribunals, etc., including taking steps to facilitate 'recording of testimonies in their preferred language and means of communication.'[30]

The UNCRPD defines 'discrimination on the basis of disability' in wide terms as 'any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation'.[31] In 2009 in Rajasthan, a rape victim was unable to identify the accused persons during test identification parade as she had hearing and speech impairment. She was declared of unsound mind by the concerned Magistrate without an assessment of her disability, and her statement was found by the court to be inconclusive.[32] The effect such an uninformed conclusion of unsoundness has on the trial is saddening and not in accordance with constitutional guarantees. For a disabled person to get a fair trial, both as an accused and as a victim, enabling provisions in criminal procedure are therefore, required.

EVIDENCE IN INQUIRIES & TRIALS

The Code of Criminal Procedure, 1973 provides for mode of taking and recording evidence.[33] All evidence taken in the course of trial or other proceeding has to be mandatorily taken in the presence of the accused.[34] It is only when the personal attendance of the accused has been dispensed with by the court, evidence is permitted to be taken in presence of the accused's

[30] *See* § 12(4)(c) of 2016 Act.

[31] UNCRPD art 2.

[32] Kavitha Shanmugam, *Lending a Helping Hand*, THE TELEGRAPH, Mar. 13, 2013, http://www.telegraphindia.com/1130313/jsp/opinion/story_16666158.jsp.

[33] In Chapter XXIII: Evidence in Inquiries and Trials, the Code of Criminal Procedure, 1973.

[34] This is the mandate of Section 273. This provision incorporates the principle of fairness in trial, that is, a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated, see decision of the Supreme Court of India in Zahira Habibullah Sheikh v. State of Gujarat, (2006) 3 S.C.C. 374.

pleader.[35] Further, Section 279 of the Code mandates interpretation to the accused, in open court, of the evidence if it is given in a language not understood by the accused, in a language he understands. Naturally, this interpretation has to be under Court's supervision. However, the Code does not specify whether the expression 'language' includes sign language and braille. 'Language' can be understood in terms only of those recognised under the Constitution of India under Article 348, that is, English and 18 other languages included in the Eighth Schedule to the Constitution. Each State Government under Section 272 of the Code is required to determine the language of courts subordinate to that State's High Court.[36] However, our Constitutional framework does not permit this language to be any language other than English or those recognised under the Eighth Schedule. Section 277(b) of the CrPC empowers the courts to take evidence in a language other than the language of the court, provided true translation of such evidence is carried out. However, the Code is silent with respect to providing such assistance while recording FIR of a crime other than offences of rape, outraging a woman's modesty, sexual harassment etc. Absence of systemic support thus, doubly victimises the disabled; once by the perpetrator and next by the very system that should protect his/her rights.

The first and foremost step, therefore, is to facilitate the disabled in registering First Information Report in the event of a crime, that is, any and every crime. Every police station or the major police station of each district can be associated with a sign language expert and a person learned in Braille who can be of assistance when the police requires to take statement of a disabled victim to register his/her FIR. FIR must be a true and accurate account of the first information relating to commission of a crime. Considering that an informant can, during trial, be cross-examined with

[35] The power to dispense with the personal attendance of the accused is with the Judicial Magistrate and is exercised under Sections 205 and 317; in former case when summons have been issued to secure accused's presence, and in latter case when the Magistrate or Judge is satisfied that the accused's presence is not required in the interest of justice.

[36] This language is to be determined only for the purposes of the Code of Criminal Procedure, 1973.

respect to contents of his statement forming the FIR, proper communication of such information and the accurate recording of it by the police assumes significance. Inclusion of disabled persons consequently demands from the criminal justice system provisions for a mechanism facilitating their access to the system and its agencies; the foremost agency being the police.

Section 119 of the Indian Evidence Act, 1872 was amended in 2013 upon the recommendation of the Justice J.S. Verma Committee making it mandatory to videograph the testimony of any witness who is unable to give a verbal statement.[37] Further, taking the assistance of an interpreter or a special educator while recording a statement of a person who is unable to communicate verbally, has also been made mandatory vide the same proviso. However, assistance of such interpreter and special educator would make him an expert and his testimony to that effect will have to be recorded on oath. Only then can the evidence of the person giving statement by means of signs be admissible. In fact, in the case law of *State of Rajasthan* v. *Darshan Singh*[38] the Supreme Court has, while discussing the evidentiary value of the statement of a deaf and dumb person, held that if a deaf and dumb person is ascertained by the court to be of requisite intelligence to understand the nature of an oath, he can be a competent witness. Further, if such a witness is able to read and write, his statement should be recorded by asking him questions in writing and seeking his answers similarly. Otherwise, statement can be recorded in sign language with the help of an interpreter, who should not have any interest in the case and he has to be administered oath.[39]

On one side, it can be said that the will to recognise the law as it stands today, to determine the gaps therein and to provide for the mechanism to bring PwDs at par with other citizens in terms of access to justice, is lacking. However, on the other side, it can also be said that presently, the Code of

[37] Proviso to § 119, inserted vide the Criminal Law (Amendment) Act, 2013.
[38] (2012) 5 S.C.C. 789. *See also* Meesala Ramakrishnan v. State of Andhra Pradesh (1994) 4 S.C.C. 182.
[39] *Id.,* para 29. Interpreter is by law bound to state the true interpretation of any evidence or statement before the Criminal Court. *See* § 282, the Code of Criminal Procedure, 1973.

Criminal Procedure, 1973 does not empower the Magistrates and the police to take regular assistance in cases of PwDs at the ground level.[40]

Availability of interpreters and special educators is also required in the courts; apart from police stations to record FIR and statements during investigation, as well as when a disabled person's statement is being recorded before court during the course of trial. In this regard, the Criminal Law (Amendment) Act, 2013 has brought in a positive step though it is operational in a limited manner. It mandates video-graphing of a woman PwD victim's statement by police for registration of FIR in presence of an interpreter or special educator.[41] Further, statement of the disabled victim recorded by the Magistrate under Section 164 is also to be videographed necessarily with similar assistance. These provisions are however, only applicable in case of offences of rape, outraging a woman's modesty, stalking, voyeurism, sexual harassment and gang rape.[42] This understanding, although recognises that WwDs can be victims of sexual crimes, yet is a fundamentally narrow understanding of issues relating to disability. PwDs can be victims of crimes other than sexual offences, and may require similar assistance in accessing justice system through its agencies. UNCRPD defines 'reasonable accommodation' as "*necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms*."[43] This reasonable accommodation is required to be provided to PwDs through enabling provisions in existing law. Having a provision in the legislation that empowers a court to call for an interpreter or

[40] § 12(1) of the Rights of Persons with Disabilities Act, 2016 casts an obligation on the appropriate Government to ensure that persons with disabilities are able to exercise the right to access any court, tribunal, etc. having judicial or quasi-judicial or investigative powers without discrimination on the basis of disability. Right to access court includes right to register an FIR with assistance of an interpreter.

[41] Proviso (a) and (b) of § 154(1), and § 164(5A)(a) and (b), the Code of Criminal Procedure, 1973.

[42] § 354, 354A, 354B, 354C, 354D, 376, 376A, 376B, 376C, 376D, 376E and 509 of the Indian Penal Code, 1860.

[43] UNCRPD art 2.

a special educator is only a procedural convenience. This should be provided for as a matter of right. Right to legal aid is a fundamental as well as legal right.[44] Similarly, right of an accused to understand evidence in open Court is also recognized.[45] Fairness requires that the victim must also be able to relate to the proceedings of his case. Therefore, specific provisions in respect of special educators and interpreters must be made within the Code of Criminal Procedure, 1973.

INCARCERATION AND VULNERABILITY

Fundamental rights are not suspended upon incarceration. Prisoners have title to rights under Articles 14, 19 and 21 subject to the limitation of correlation between deprivation of freedom and legitimate functions of a correctional system.[46] The realisation of these rights is, however, faced with numerous barriers. *Jose Abraham* v. *Govt. of NCT of Delhi and Ors.*[47] and *Multiple Action Research Group* v. *Govt. of NCT of Delhi and Ors.*[48] are petitions seeking court intervention to address the gross medical negligence meted out to the inmates of *Tihar Jail*[49] and ensuring them minimum human rights, especially the poor, who are being denied any medical assistance even in cases of extreme emergency, and in many instances resulting in deaths of these inmates. The petition presents worrying facts including the death of an inmate V.R. Santosh Kumar while he was in custody in Tihar Jail, Delhi. Santosh Kumar was permanently disabled since 2005 when he had sustained permanent acid burns of his oesophagus. He had to be fed through a jejunosnomy feeding tube and could consume only liquid diet. He required food that could be easily crushed and consumed. Prison authorities failed to provide him with a grinder or with food that was already ground.[50] In

[44] India Const. art. 22(1), and § 304 of the Code of Criminal Procedure, 1973.
[45] § 279, Code of Criminal Procedure, 1973.
[46] Charles Sobraj v. Suptd., Central Jail, Tihar, New Delhi (1978) 4 S.C.C. 104.
[47] W.P. (C) 3146 of 2012 before the High Court of Delhi at New Delhi.
[48] W.P. (C) 4425 of 2012 before the High Court of Delhi at New Delhi.
[49] Tihar Jail is a Central Prison situated in Delhi.
[50] The inmate made an application to the Court for a grinder, and was provided with one vide a court order in April, 2011. In addition to the device, he was also provided with a special diet. His health was fine for approximately nine months as result of this grinder and special diet.

December, 2011, Santosh Kumar began to experience serious difficulties with his health.[51] Only upon a specific application made before court praying for an order to send him to AIIMS Hospital, this inmate was shifted to AIIMS Hospital,[52] where he was further diagnosed with tuberculosis acquired, being susceptible to infection, due to the negligence of the prison authorities who placed him in a cell with an infected prisoner. The tuberculosis remained undiagnosed despite his excessive weight loss during incarceration. Upon discharge, the inmate was continuously denied appropriate nourishment and his health kept declining. He died at a hospital few days later.[53]

Incidents like these present a deplorable scenario of denial of even basic human rights. They have become an everyday occurrence in Indian Prisons. Even when legal aid is a fundamental right, the same is denied behind closed bars in the absence of a mechanism to meet a lawyer.[54] The inmates are not given proper medical assistance, even in critical circumstances, and are left to die.[55] There is no doubt that a proper system needs to be established for putting in place a panel of doctors and lawyers who would come for regular visits of all the jails and wards. Also, the architectural barriers in each prison must be removed for a disabled-friendly environment. However, to assure this system's proper functioning, right to such a system needs to be recognised, and provided for in law in concrete terms.

In *Jose Abraham's* case, it was specifically argued that the non-initiation of an investigation into the death of a prison inmate and a report to the police to that effect is in violation of Delhi Prisons (Custody of Prisoners) Rules,

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[51] This was allegedly due to cancellation of his special diet by the Medical Officer associated with that prison. *See* Jiby Kattakayam*, Court Report Blames Poor Medical Care for Tihar Inmate's Death*, THE HINDU, Mar. 2, 2013, 00:01 AM, http://www.thehindu.com/todays-paper/tp-national/tp-newdelhi/court-report-blames-poor-medical-care-for-tihar-inmates-death/article4468064.ece.

[52] Surprisingly, he was shifted after eight days from date of court order.

[53] Kattakayam, *supra* note 51.

[54] Smita Chakraburtty, *Horror Behind Bars*, FRONTLINE 9 (Jan. 8, 2016).

[55] *Id.*

1988.[56] Further, according to Rule 77 the Delhi Prison (Transfer of Prisoners, Labour and Jail, Industry, Food, Clothings and Sanitation) Rules, 1988, which provide for the care and treatment of inmates it is "*the duty of the Inspector General from time to time to take all such measures as may be necessary to ensure that every prisoner is at all times so supplied with food and drink as to maintain him in good physical health and vigour*." It was further highlighted that Rule 26 of the Delhi Prisons (Medical Administration) Rules, 1988 requires,

> "*As a rule, sick prisoners should receive four meals a day. There shall be a separate cooking-shed in the hospital enclosure, a special cook appointed and suitable vessels provided for the preparation of food for the sick. Arrangements should be made for the frequent feeding of sick prisoners and for having sage and other invalid constantly ready. The special diets shall be served after being properly cooked.*"

Next, the Delhi Prisons (Medical Administration) Rules, 1988, Rule 11(3), mandates separate parading of the inmates who have lost substantial weight below standard weight before the Medical Officer posted for that prison. Further, every sick inmate is to be issued a coloured card describing the special diet permitted to him. For its compliance, the Assistant Superintendent is duty bound to ensure that the special diet is cooked separately.[57] Despite these rules in place, the inmate Kumar lost his life.

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[56] Delhi Prisons (Custody of Prisoners) Rules, 1988 – Rule 55: In every case of sudden death or supposed suicide, or whenever there is any doubt or complaint or question concerning the cause of death of any prisoner, or whenever any prisoner dies from the effect or punishment or injury or within 60 days of receiving such punishment or injury, a report shall forthwith be made to the Police who are empowered to take action under the Criminal Procedure Code, 1973.
Rule 56: The Superintendent shall, in every instance in which an inquest may be held on the body of any prisoner confined in the jail, submit a full report of the circumstances of each case to the Inspector General together with a copy of the finding of the Magistrate who conducted the enquiry.
Rule 57: A Magistrate who is also the Superintendent of the jail of acting under a temporary arrangement for the Superintendent shall not hold an inquest into the cause of death of any prisoner dying in the jail of which he has charge at the time, unless there be no other duly authorised Magistrate available for the duty.

[57] *See* Rule 12(3), the Delhi Prisons (Medical Administration) Rules, 1988.

These public interest litigations are pending hearing in the Delhi High Court.[58] The petition has prayed for an independent committee to conduct an inquiry into the custodial death of Santosh Kumar and to take administrative and penal action against all those involved in abetting the death of Santosh Kumar including the hospital authorities like DDU and AIIMS, and also an order for conducting investigation in all incidents of custodial deaths, especially those due to illness in the prison premises and provide adequate compensation to the next kin of the deceased. Further, it was prayed that adequate medical facilities be ensured in the prison premises, and at least two doctors in each jail in two shifts, so as to ensure that at least one doctor is present at any time of the day and night within each of the jails, are put in place for all the prison inmates at Tihar Jail. It was specifically prayed that an order for ensuring that the prisoners with disabilities and persons suffering with contagious diseases are provided with special wards equipped with their specific requirements and that they are provided with the special aids and appliances or other special facilities needed for leading a life of dignity equal to other inmates. Further, an order for ensuring that adequate food is provided to all the prison inmates and that the sick inmates are provided food appropriate to their medical requirements was also prayed to be passed. Also, an independent monitoring authority be set up to oversee the functioning of the Medical Officers and the Senior Medical Officers in the jail and to monitor the conditions of the sick inmates, and a panel of doctors who would visit the jail premises regularly and not less than twice a month be constituted.[59]

The Supreme Court has recognized that the right to life includes the right to be free from inhuman and degrading treatment; In the case law of *Francis*

[58] *Supra* note 47.

[59] The author has read the petition at *Human Rights Law Network*. *See* http://www.hrln.org/hrln/prisoners-rights/pils-a-cases/1333-jose-abraham-vs-govt-of-nct-of-delhi-a-ors-wp-c-no-3146-of-2012.html. The High Court of Delhi after going through the complete reports in respect of treatment given to Santosh Kumar, directed that the matter be examined by the District Judge, Patiala House Courts, New Delhi to inquire into the circumstances under which the inmate died. The District Judge has been entitled to take the assistance of Medical Superintendent as well as the petitioner. The orders in this writ petition can be followed per W.P. (C) 3146 of 2012 on the official website of the High Court of Delhi.

Coralie Mullin v. *Administrator, Union Territory of Delhi*,[60] it was held that Article 21 guarantees to all persons a right to be protected against torture or cruel, inhuman or degrading treatment. The right to protection against torture or cruelity, inhuman or degrading treatment is enunciated in Article 5 of the UDHR and guaranteed by Article 7 of the ICCPR, and thus, prisoners have the right to equality and non-discrimination. Right to life as encompassed in Article 21 is a range of rights, including, inter alia, the right to health, and the right to be free from inhumane and degrading treatment, which right does not get suspended upon incarceration.

Prisoners are entitled to the same level of health care as the general population which should be reflected in the existing law. Persons with disabilities have the same right against torture and unlawful detention under Articles 21 and 22 of the Constitution as other persons. In the case law of *Veena Sethi* v. *State Of Bihar*[61] the Supreme Court looked into the illegal detention of persons in jail, some of whom were mentally ill in order to safeguard their right under Article 21. In the case law of *Rakesh Chandra Narayan* v. *State of Bihar*,[62] the Supreme Court intervened and held that the conditions of a mental hospital, which included lack of clothes, medicines, water and electricity, neglect of the patients, detention of patients who no longer required treatment, resembled a "medieval torture-house" and gave specific directions to the State as to the running of the mental hospital. It also appointed a committee to oversee the implementation of improvements. The Court further observed that it is the obligation of the State to provide

[60] 1981 S.C.R. (2) 516. It should be noted that rape, which constitutes ill-treatment, has also been recognized as a violation of Article 21. *See* Bodhisattwa Gautum v. Subhra Chakraborty, (1996) 1 S.C.C. 490 and Chairman, Rly. Board v. Chandrima Das, (2000) 2 S.C.C. 465. Further, the Supreme Court has recognized that there is a right to human dignity and given directions and orders to make sure this is not violated in state run 'protective homes' in cases such as Upendra Baxi v. State of UP, A.I.R. 1987 S.C. 191.

[61] A.I.R. 1983 S.C. 339. In this case, the Supreme Court did order further detention of certain mentally ill persons in jail as there were no adequate hospital facilities. The Court reviewed the situation of each person who had been illegally detained separately and gave appropriate orders as to each of them.

[62] 1989 Supp. (1) S.C.C. 644. *See also* Vikram Deo Singh Tomar v. State of Bihar, 1988 Supp. S.C.C. 734.

medical attention to every citizen. In *In Re Death of 25 Chained Inmates in Asylum Fire in Tamil Nadu* v. *Union of India*,[63] the Supreme Court took *suo motu* action after twenty-five mentally challenged persons died in a fire when they were chained to their beds in a mental asylum. The Court gave elaborate directions to ensure effective compliance from both Central and State Governments under the Mental Health Act, 1987 (MHA), the PwD Act and the National Trust Act[64].

COMPENSATION FOR VIOLATION OF FUNDAMENTAL RIGHTS

The Indian Constitution provides for a redress mechanism in case any fundamental right as guaranteed under Part III, is violated by the State.[65] The writ jurisdiction of the Supreme Court is essentially and exclusively to protect the fundamental rights as guaranteed under the Constitution. The writ jurisdiction of High Courts is broader in comparison.[66] In several cases, the Supreme Court has awarded compensation under writ jurisdiction to be paid by the State when it has found violation of Article 21 to the person whose right was violated. Further, even where there is no express finding of a violation of fundamental rights, the Supreme Court has awarded reasonable compensation "to express court's condemnation of the tortious act

[63] (2002) 3 S.C.C. 31.

[64] The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999.

[65] Broadly speaking major civil and political rights are recognized as fundamental rights in India. This includes right to life, right to personal liberty, right to equality including affirmative action for protective discrimination (eg., for women, children etc.), right to freedom of movement and occupation, right to practise religion and also the right to constitutional remedies under Articles 32 and 226. In the effect of any right guaranteed by Part III being violated by any action of the State or any of its agencies and instrumentalities, the same being defined under Article 12 of the Constitution, the victim can approach either the appropriate High Court (based on territorial jurisdiction) or the Supreme Court of India for issuance of writs in order to secure, protect and enforce the guaranteed fundamental rights. However, the practice currently is to first approach the concerned High Court and thereafter, approach the Supreme Court in an appeal if the grievance is not redressed by the High Court. *See* contrasting decisions on this point: Kharak Singh v. State of U.P., AIR 1963 SC 1295 (concurrent jurisdiction), and P.N. Kumar v. Municipal Corporation of Delhi, (1987) 4 SCC 609 (exhaust 226 remedy first).

[66] *See* INDIA CONST. art. 226. Under writ jurisdiction, a court can direct any authority (not necessarily a Government Department), whether statutory or non-statutory, to conform its disputed action being performed as part of its public functions to the provisions of Part III. The writs that can be issued are: *mandamus*, *certiorari, habeas corpus, quo warranto* and prohibition.

committed by the State" in *RD Upadhyay* v. *State of Andhra Pradesh*.[67] Here, the person concerned was mentally disabled and had been deprived of his liberty being incarcerated in prison for years. The Court directed the State to pay an amount to the private care home where he was being taken care of with the help of donation. The Supreme Court has even provided for exemplary costs to be paid by a private entity in a case involving environmental pollution.[68] In *Kamal Nath*, the Indian Supreme Court relied on the International Law principle of 'polluter pays' and Article 21 to direct the non-state entity to pay damages and exemplary costs. Awarding of compensation upon violation of rights is a remedy which follows the aggrieved act. However, the need of the hour is ensuring non-discrimination of PwDs through a rights-based procedure in criminal law.

POSITIVE OBLIGATIONS OF THE STATE

In many cases concerning the right to life under Article 21, the Supreme Court has placed a degree of positive obligation on the state, such as issuing directions to the State to ensure that no one dies of starvation.[69] Since disability as such is not a constitutionally recognized ground for prohibition of discrimination or for affirmative action, fundamental rights as contained in Articles 14, 19 and 21 can afford protection to the disabled from discrimination. In many cases, the Directive Principles of State Policy as enunciated under Part IV of the Constitution[70] have been used by the courts to expand the scope of fundamental rights. Article 39(a) directs the State to ensure that all citizens have "the right to an adequate means of livelihood." According to Article 47, "*the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of*

[67] 2001 (8) SCALE 1.

[68] *See* MC Mehta v. Kamal Nath, A.I.R. 2000 S.C. 1997.

[69] *See* Kishan Pattnayak v. State of Orissa, 1989 Supp. (1) S.C.C. 258 (India).; PUCL v. Union of India, (2001) 7 SCALE 484 (India).; PUCL v. Union of India, (2003) 9 SCALE 835. *See also* Kewal Pati v. State of UP, (1995) 3 S.C.C. 600 regarding the duty to protect a prisoner from other prisoners.

[70] The Directive Principles of State Policy (DPSPs) are, however, non-justiciable in nature or unenforceable in the court of law but are fundamental in the governance of the country. The State is under a constitutional obligation to apply these principles in making laws (Article 37).

public health as among its primary duties." Article 41 obligates the State to secure public assistance in cases of disablement within the limits of its economic capacity and development. These provisions have been of assistance in expanding the scope of Article 21 of the Constitution and thus, the courts have in effect endeavoured their compliance. The justification for the same is that since these principles are fundamental in the governance of the country, they need to be given effect to secure the guaranteed fundamental rights.[71] Moreover, having ratified UNCRPD, India is to give effect to its obligations under the Convention per Article 51(c) of the Constitution.[72]

CONCLUSION

The Supreme Court in *State of Uttar Pradesh* v. *Chhoteylal*[73] observed: "We are constrained to observe that criminal justice system is not working in our country as it should. The police reforms have not taken place despite directions of this Court in the case law of *Prakash Singh & Ors vs Union of India & Ors*. The investigators hardly have professional orientation; they do not have modern tools. On many occasions impartial investigation suffers because of political interference. The criminal trials are protracted because of non-appearance of official witnesses on time and the non-availability of the facilities for recording evidence by video conferencing. The public prosecutors have their limitations". To adopt and modify all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the UNCRPD and to prevent discrimination against persons with disabilities is India's obligation under Article 4 of the

[71] Another positive obligation of the State can be found in Section 3(1) of the Rights of Persons with Disabilities Act, 2016 which mandates the appropriate Government to ensure that the persons with disabilities enjoy the right to equality, life with dignity and respect for his or her integrity equally with others.

[72] INDIA CONST. art. 51: The State shall endeavour to: ... (c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another.

[73] (2011) 2 S.C.C. 550.

UNCRPD.[74] One such important right is, "*every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.*"[75]

The executive and judiciary will always have their limitations. However, the legislature can play a dynamic role in minimising the vulnerability of PwDs by adding rights based provisions in the Code of Criminal Procedure, 1973, especially after coming into force of the Rights of Persons with Disabilities Act, 2016. Therefore, unless the law in unequivocal terms makes the assistance of interpreters and special educators a matter of right in the criminal justice system, and further lays down in appropriate terms the obligations of prison authorities with respect to disabled prisoners, the chances of any reform leading to minimisation of vulnerability of persons with disabilities are bleak, almost approaching nil.

[74] UNCRPD art. 14, then places an obligation on states parties to ensure that persons with disabilities enjoy the right to liberty and security of person on an equal basis with others and that they are not deprived of these rights unlawfully or arbitrarily. It specified that the existence of a disability shall in no case justify a deprivation of liberty.

[75] UNCRPD art. 17.

COMPARING THE INCOMPARABLE: A CRITICAL ANALYSIS OF THE CLASSIFICATION OF PROPERTY IN 'MOVABLE' OR 'IMMOVABLE' WITH RESPECT TO THE INDIAN CONTEXT AND RESOLVING THE CONUNDRUM

Manvendra Singh Jadon*

Abstract

The paper titled "Comparing The Incomparable: A Critical Analysis Of The Classification Of Property In 'Movable' Or 'Immovable' With Respect To The Indian Context And Resolving The Conundrum.", primarily discusses about the differing elements accorded to the concept of property in Indian legal system. The first chapter gives a brief overview of the concept of property and its relevance in light of The Transfer of Property Act. The second chapter provides for a discussion on the specific legal provisions given in the act to churn out differences between movable and immovable property. It is further discussed that how dubious terminology and definitions have caused confusion in laying down clear demarcations between the two structures of property in the Indian legal regime. The third chapter deals with the discussion held in the reports of Law Commission as to what constitutes movable and immovable property. The fourth and the final chapter discusses the judicial pronouncements that have paved the way for the evolution and development of the comparative discussion on movable and immovable property. It also looks at how, English Law differs to that of Indian law. Furthermore, Indian cases have been thoroughly provided at the end, wherein the Courts have formulated certain principles to clear out the air over this classification of property.

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INTRODUCTION TO THE CONCEPT OF PROPERTY AND OVERVIEW OF THE TRANSFER OF PROPERTY ACT

Before going into the realms of The Transfer of Property Act 1882, it is relevant to know what property is. According to the Black's Law dictionary[1] property is something *"Which is peculiar or proper to any person; that which belongs exclusively to one; in the strict legal sense, an aggregate of rights which are guaranteed and protected by the government.*[2]*The term is said to extend to every species of valuable right and interest.* [3]*More specifically, ownership; the unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude everyone else from interfering with it".*

Property is a part and parcel of common English terminology and must not be considered a term of art. It must be understood in its ordinary sense without any complications.[4] Property can be classified as 'Incorporeal' or 'Corporeal', 'Tangible' or 'Intangible', 'Personal' or 'Private' and 'Movable' or 'Immovable' Property. Broader classifications can be construed but as the scope of this research work is limited to movable and immovable property, the focus would be on these two types of property only. The Indian property law is nowadays governed by a wide array of legislations ranging from The Real Estate Act, The Sales of Goods Act, Intellectual Property Law (Patents, Trademarks and Copyrights) and Personal Law of Succession but the type of property every legislation governs is different in its nature. On a similar front the transfer of property in India is basically governed by The Transfer of Property Act, 1882 if the property in question is immovable property. This act came into existence during the British colonial era when the first Indian

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[1] BLACK'S LAW DICTIONARY 1382 (4th ed. 1968).
[2] Fulton Light, Heat & Power Co. v. State, 138 App. Div. 931 (N.Y. App. Div. 1910).
[3] McAlister v. Pritchard, 230 S.W. 66, 67, 287 Mo. 494 (1921).
[4] Queensbury Industrial Society v. Pickles, L.R.I Exch. 1 (1865).

Law Commission prepared a series of draft bills in 1870 (seven to be precise) after which the final bill was passed in 1882 to give rise to the law as we see it today. This act mainly concerns itself with the substantive law as most of the procedural law is governed by The Code of Civil Procedure[5]. The Transfer of Property Act mostly comprises of the principle of justice, equity and good conscience and the act has been extended to the whole of India except the states of Bombay, Punjab and Delhi[6]. In these three states, the immovable property is governed by various state laws though principles governing The Transfer of Property Act can be found in the laws of the above mentioned states albeit with certain amendments. It must be remembered that the transfer of property is primarily concerned with transfers inter vivos only[7]. Where a case is to be decided even though the provisions of the Act cannot be expressly applied, Courts of Equity are entitled to utilize the general principle of equity enshrined in the judicial precedents of Indian and English origin but such principles should not be in defiance of the statute.[8]

With a basic understanding of the term property under the Indian property law, let us now deal with the demarcations laid between the movable and immovable property under various legislations.

DIFFERING APPROACH: FACETS OF MOVABLE AND IMMOVABLE PROPERTY UNDER INDIAN PROPERTY REGIME

"*Legislation is the principal characteristic and means of growth in mature legal systems*"[9]

The term property in Indian context is of great incertitude and this is principally because of the lack of a clear outlook of the term property in one single legislation especially when it pertains to transfer of such property. On a Jurisprudential analysis, property turns out to be based traditionally on the

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[5] VEPA P. SARATHI, G.C.V. SUBBA RAO'S LAW OF TRANSFER OF PROPERTY (2008).
[6] § 1, The Transfer of Property Act, 1882.
[7] SARATHI, *supra* note 6.
[8] Raj Narain v. Sukha Nand Ram Narain, (1980) A.I.R. 78 (All.) 82.
[9] Roscoe Pound, *Sources and Forms of Law*, 21 NOTRE DAME L. REV. 247 (1946).

theory of rights and duties[10]. Furthermore, property has trans versed its way from its initial philosophical beginnings to the legal ends of today's world[11]. Moreover the property till today under any given system and framework is all about incidents such as ownership, control, benefits, exclusion, usage and more importantly transfer.[12] Among the most basic distinctions in property is that of movable and immovable property. In common parlance, these terms hold no more than a material significance but on a theoretical note, there are a lot of elemental differences which are governed by different acts. In justification of this proposition, The Transfer of Property Act in Chapter 1 Section 3 defines immovable property in a very straitened and uncertain manner as to something which *does not include standing timber, growing crops or grass*. A mere look at this provision is enough to ponder over the fact that The Transfer of Property Act doesn't classify immovable or movable property, it just lays down that what does not constitutes immovable property and thus cannot be considered as the sole piece of legislation to get a better understanding of the term immovable property.[13] On a different note, movable property is something which is specifically governed by The Sales of Goods Act[14] which defines movable property as any sort of property other than that of the actionable claims and general property and never a mere special property.[15] Now both these acts are incapable to offer a clear definition to classify movable or immovable property and thus we need to have a bird eye view of the other property related laws.

In respect to this conundrum The General Clauses Act[16] can be of some rescue. In Section 3[17] of the act, Immovable property is defined as "*to include*

[10] Patrick Riordan, *Property Rights and Property Duties, Studies*, 77, AN IRISH Q REV. 84-98 (1988).
[11] Jeremy Waldron, *Property and Ownership* (Oct. 21, 2016, 20:08 PM), http://plato.stanford.edu/entries/property/.
[12] Michael Weir, *Concepts of property*, 7(1) NAT'L LEGAL EAGLE Art. 6.
[13] Balvantrav v. Purshotam, (1872) 9 (Bom.) 99; *See also* Shiv Dayal v. Puthe Lal, (1932) 54 (All.) 437
[14] Act No. 3 of 1930.
[15] J. Sai Deepak, *What constitutes "Property" according to the Supreme Court*, Oct. 21, 2016, 20:08 PM, http://thedemandingmistress.blogspot.in/.
[16] Act No. 10 of 1897.
[17] § 3 (26), The General Clauses Act.

land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth. In respect to this definition, movable property is defined as *'movable property shall mean property of every description, except immovable property*. In comparison to the Transfer of Property Act, this act is more elaborate but still certain terminology like 'attachment' and 'permanently fastened' can be a tad confusing[18]. Contrarily the term 'attached to earth' which is prolifically mentioned in this act has been clearly defined in The Transfer of Property Act[19] and hence The General Clauses Act and below mentioned The Registration Act can be used to interpret the meaning of 'immovable property' in The Transfer of Property Act. The concept of property also finds an honourable mention in The Registration Act[20] which defines 'immovable property' as something which *"includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass."*[21] Counter respectively 'movable property' is defined as "*standing timber, growing crops and grass, fruit upon and juice in trees, and property of every other description, except immovable property"*. [22]

Of the three above mentioned Acts, The Transfer of Property Act has been amended thrice[23]. The Registration Act has been amended in 2001 and

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[18] All the terms and concepts are comprehensively discussed in the next chapter with help of precedents and existing research work.

[19] § 3, The Transfer of Property Act; *"attached to the earth" means—*
(a) rooted in the earth, as in the case of trees and shrubs;
(b) imbedded in the earth, as in the case of walls or buildings; or
(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached.

[20] Act 16 of 1908.

[21] § 2 (6), The Registration Act.

[22] § 2 (9), The Registration Act.

[23] The Act has been amended in 1929, 2001 and 2002. Names of the amended acts are in the ascending order; The Transfer of Property (Amendment) Supplementary Act, 1929; The Registration and Other Related Laws (Amendment) Act, 2001; The Transfer of Property (Amendment) Act, 2002.

another Amendment Bill[24] is still pending before the Parliament but there are no developments. It must be noted that these amendments are infructuous[25] as the definition of the immovable and movable property remains stagnant in its original form. Furthermore, specific mentions for definitions of immovable and movable property have been found in Income Tax Act[26], The Representation of the People Act[27], The Indian Penal Code[28]. Immovable property has been also defined previously in the Indian Trustees Act, where it was confined *to include messuages, tenements and hereditaments, corporeal and incorporeal of every tenure or description whatever may be the estate or interest therein*. Overall, it can be easily determined that the legislative framework falls short of substantially defining the broken system of classification. In order to overcome this deficiency, the Law Commission proposed certain amendments to the statutes with a slew of reports which must be studied as they are fundamentally essential to this cause.

ANALYZING LAW COMMISSION REPORTS

India is a land of law reforms. This is principally because the country has seen a drastic amount of modifications in the statutes from the time it was under the British rule to the present era. To expedite the process of codification, clarification and consolidation of legal reforms, Law Commissions were instituted in India throughout its history with the first such commission of independent India being set up in the years 1955-1958 with M.C. Setalvad as its first chairman.[29]

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[24] The Registration (Amendment) Bill, 2013, Bill No. XLVII of 2013.

[25] The Repealing and Amending Act, 2015, No. 17 OF 2015 has repealed The Transfer of Property Amendment Act, 2002 and other allied laws.

[26] § 269UA (d) (i) and (ii), The Income Tax Act [Defines Immovable Property]; No mention of Movable Property.

[27] Act 67 of 1951, § 75A (5) (i), [Defines Immovable Property] and § 75A (5) (ii) of the Act [Defines Movable Property].

[28] § 22 , The Indian Penal Code [Defines Movable Property].

[29] EARLY BEGINNINGS, LAW COMMISSION OF INDIA (Nov. 18, 2016, 18:04), http://www.lawcommissionofindia.nic.in/main.htm#a1.

(a) Law Commission on The Registration Act, 1908: -

It was suggested that the definition of 'immovable property' must be redrafted so as to make the meaning clear as to what constitute immovable and movable property because the definition of movable property is a counter-part to that of immovable property.[30] Furthermore, it was suggested that 'Standing Timber' should be considered as movable property far from the conflicting judicial opinion[31] whether it is to be severed or not.[32] 'Machinery' embedded into earth or attached to it, when dealt apart from the land should be regarded as immovable property[33] even though the intention of the parties does play a major role.[34] Moreover, the fruits and juice upon the trees is strictly to be considered movable property whether their existence is in place at the time of the contract or are future bound.[35]

To clear the doubts the Thirty Fourth Report on The Indian Registration Act, 1908[36] suggested that the previous amendment[37] opined by the sixth report of the Law Commission is not any more necessary as 'Standing Timber' should be considered movable property for most purposes in the light of the judgment in *Shantabai v. State of Bombay*[38]. The said report also affirmed the stand taken by the sixth report for considering fruits and juice as movable property and concluded that 'Machinery' must be considered as

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[30] SIXTH REPORT ON THE REGISTRATION ACT, 1908, LAW COMMISSION OF INDIA 9 (1957).

[31] Seem Chettiar v. Santhanathan Chettiar, (1895) 5 MADRAS L. J. 253.

[32] English Law does consider Standing Timber as part of Real Property; *See* ASHIQ HUSSAIN, AID TO PASSING C.P.A.

[33] S*upra* note 29, at 9.

[34] Duncans Industries Limited v. State of U.P., A.I.R. 2000 S.C. 355.

[35] Raja Devi v. Yaqub, (1925) 47 (All.) 738; *See* Marshall v. Green, (1875) 1 C.P.D. 35; *See* R. Saravanan v. Sri Vedaranyaswaraswami Devastanam, (1984) 1 MADRAS L. J. 419, wherein the court stated that, "No doubt, in the present case, in which plaintiff's right was to draw Palmyra juice, cut such leaves as his doing so involved and take the fruits of the trees...by the nutriment afforded by the land'. The decision in that case eventually turned on the definition of movable property in the Registration Act which includes 'standing timber, growing crops and grass, fruit upon and juice in trees'."

[36] THIRTY-FOURTH REPORT, INDIAN REGISTRATION ACT, 1908, LAW COMMISSION OF INDIA 7-8 (1967)

[37] SIXTH REPORT, *supra* note 30, at 9, paragraph 21(b).

[38] A.I.R. 1958 S.C. 532; The Hon'ble Supreme Court differentiated 'Standing Timber' with trees by drawing corollary with the concept of "Sustenance by the Soil"; *See* MULLA, TRANSFER OF PROPERTY ACT 16, 21 (1950).

movable property apart from the land[39]. Further, the machinery fastened to the earth must go through the test of "degree and object of annexation.[40]

(b) Law Commission on The General Clauses Act, 1897: -

The Law Commission observed that there is no need to extend an additional meaning or interpretation to the definition of movable and immovable property under The General Clauses Act, 1897 thereby putting to rest any amendment to clarify the position of property in the Act.[41]

(c) Law Commission on The Transfer of Property Act, 1882: -

It was pointed out that English Law differs[42] with that of Indian Law as the demarcation in English Law is based on real and personal property which draws corollary from that an early form of action known as 'actio realis'[43]. In the report, it was further stated that property under law needs to be classified on terms of rights unlike that of engineering where strict connotation is given to things involved.[44] Furthermore, standing crops were not to be considered movable property under The Limitation Act[45] and growing crops and trees are strictly to be considered immovable property within The Code of Civil Procedure and The Provincial Small Causes Courts Act[46]. Moreover, immovable property is not confined only to tangible property and thus would contain every possible real property under English law and might be more.[47]

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[39] Khan Chand v. Nur Muhammad, (1966) A.I.R. (Lah.) 242.
[40] MULLA, TRANSFER OF PROPERTY ACT 6 (1950).
[41] SIXTIETH REPORT ON THE GENERAL CLAUSES ACT, 1897, THE LAW COMMISSION OF INDIA 24, 27 (1974).
[42] Reversionar who has a lease in a property is has an interest which arises out from the land and hence an immovable property under Indian Law but English Law regard it as a 'chattel real'; *See* Matilal Raga v. Ishwar Radha Damodar, A.I.R. 1936 (Cal.) 727.
[43] Meaning, 'if the action is real'; *See* ALEXANDER MANSFIELD BURRILL, A NEW LAW DICTIONARY AND GLOSSARY 27 (1998).
[44] Seventieth Report on The Transfer of Property Act, 1882, Law Commission of India 34 (1977).
[45] Pandah Gazi v. Jenuddi, I.L.R. 4 (Cal.) 665*; See* Nattu Miah v. Nandrani, B.L.R. 8 509.
[46] Madaya v. Venkata, I.L.R. 11 (Mad.) 193; *See* Cheda Lal v. Mulchand, I.L.R. 14 (All.) 30.
[47] Futtehsangji v. Desai, B.L.R. 13 254 (P.C.).

There was discussion made on Rights under Hindu Law[48], Share in registered company[49], Standing Timber[50], Growing Crops[51] and Fixtures[52] as to what constitutes immovable or movable property. Finally the law of fixtures[53] was talked upon in great length drawing parallels with English Law[54] and the *Calcutta Letters Patent*[55] case. Though the reports have played a pivotal role in understanding the dubious nature of the system of classification, they have failed in answering the underlying conflict of laws.

AID OF JUDICIAL INTERPRETATION FOR COMPARISON BETWEEN MOVABLE AND IMMOVABLE PROPERTY: -

The discussion herein is related to the principles and the mode of interpretation established by the courts during the long history of the country. Classification relating to standing timber, grass, fishery, intangible property, fixtures, trees, shrubs etc. has been thoroughly discussed below.

I. Pre-Independence Decisions:

(a) The Foundation Stones (1800-1899)

In a case of *Re: Hormasji Irani v. Unknown*[56], there were two major issues involved, firstly of the classification of growing grass as movable or immovable property and secondly of the agreement in the instant case as to whether it is for the sale of goods or for lease respectively.

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[48] Angurbala Mullick v. Debabrata Mullick, AIR 1951 SC 293; *See* Raghoo Pandey v. Kassy Parey, I.L.R. (1884) 10 (Cal.) 73; *See also* Ram Rattan v. Bajrang Lal, A.I.R. 1978 S.C. 1393, wherein it was stated "That whatever is classified as immovable property in ordinary sense does not matter when the position concerns rights of Hindus till it is clearly defined in Hindu Law".

[49] Doorga v. Poreen, 5 W.R. 141.

[50] Ram Ghulam v. Manohar Das, AWN (1887) 50.

[51] Washbourne v. Burrows, L.J. Ex. (1847) 10 226 .

[52] Perumal v. Ramaswami, 1969 A.I.R. (Mad.) 346.

[53] § 3, The Transfer of Property Act, 1882 has defined the terms 'rooted in earth', 'imbedded in earth' and 'attached to the earth'.

[54] The English Law of Fixtures is based on the maxim '*quicquid plantatur solo, solo credit*' and '*quicquid inaedificatur solo, solo credit*' meaning whatever is planted into soil falls into or becomes part of the soil.

[55] Jnan Chand v. Jugal Kishore, 1960 A.I.R. (Cal.) 331; *See* Washbourne v. Burrows at 52.

[56] I.L.R. (1889) 13 (Bom.) 87.

Justice Nanabhai delivering the opinion of the court held that, "I do not think that the instrument in question is a lease. The person in whose favor it was executed took the farm of certain pasture land at Poona. When he gave contracts for grazing cattle for certain periods on this land to different persons, he did not part with the possession of the land; nor did those persons undertake to cultivate, occupy or pay or deliver rent for the land or the grass. These contracts do not in my opinion, come within the definition of a lease contained in Section 3, Clause (12) of Act I of 1879." Hence in an indirect affirmation "*grass was considered to be a movable property.*"[57]

It was held in the case of *Kalka Prasad v. Chandan Singh and Ors*.[58] by Justice Mahmood delivering the judgment of the Hon'ble Allahabad High Court that, "*Upon the first of these questions, I am of opinion, having read the original deed, that what was intended to be hypothecated was not the field itself, but only the crops of that field.....This being so, the hypothecation was of moveable property and not of immoveable property*." The court in the instant matter pondered over the question as to whether the hypothecation was related to the land or the crop of sugarcane and it decided for the latter.[59]

Before the passing of The Transfer of Property Act it was held in the case of *Nathu Miah v. Nand Rani*[60], that "a hut would comprise a fixture" *even though "the huts were expressly covered under the ambit of movable property or chattels both under the Provincial and Presidential Small Courts Acts of Bengal of 1865 and 1850*". This stance was first dictated by the Court in *Kali Prasad Singh v. Hulash Chand*[61].

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[57] The courts have further successfully held grass to be movable property; *See* Jagdish v. Mangal Pandey, A.I.R. 1986 (All.) 182.

[58] I.L.R. (1888) 10 (All.) 20.

[59] Indian courts though haven't expressly overruled the judgment in this case but alternatively bamboo clumps were held to be immovable property in the case of Jagmohan Singh v. Emperor, 1932 A.I.R. (Pat.) 344.

[60] (1872) 8 Beng. LR 508.

[61] 20 W.R. 8.

Moreover, it was held in the case of *Thakur Chander Pormanick*[62] that "*we have not been able to find in the law or custom of this country any traces of the existence of an absolute rule of law that whatever is affixed or built on the soil becomes a part of it, and is subjected to the same rights of property as the soil itself.*"

(b) Subtle Change in the Outlook (1900-1947)

During the case of *S.P.K.N. Subramanian Firm v. M. Chidambaram Servai*[63], the question arose on an appeal as to whether a security bond pledging an oil engine installed as part of a cinema can be deemed to be a transaction relating to immovable property so as to attract the provisions of Expl. 1 to Section 3, T.P. Act. It was held by Justice Wadsworth voicing the opinion of the Hon'ble court that "*it seems to me to be clear that this security bond (Ex. A) was, as it purports to be, a transaction relating to moveable property and the mere fact that the property in question was firmly but not permanently attached to the premises and also the fact that the registration department for its own purposes requires such a transaction to be treated as a transaction relating to immovable property, will not to my mind affect the true nature of the transaction which was one regarding a chattel.*" The court in giving the decision relied on § 3 of The Transfer of Property Act, 1882, § 3 of The General Clauses Act and the English case laws of *Hobson v. Corringe*[64], *Reynolds v. Ashby*[65], *Leigh v. Taylor*[66] and *Spyer v. Phillipson*[67].[68]

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[62] (1866) 6 W.R. 228.
[63] 1940 A.I.R. (Mad.) 527.
[64] (1897) 1 Ch. 182.
[65] (1904) A.C. 466.
[66] (1902) A.C. 157.
[67] (1931) 2 Ch. 183.
[68] It must be noted though that English Law differs from that of Indian Law and decisions should be rendered in light keeping up the spirit of Indian statute. For reference, *See* Mahadeo v. The State of Bombay, 1959 A.I.R. 735 ; *See also* Sirkar v. Mahadeva Iyer, 1953 A.I.R. T.C. 349 .

In an earlier case of *Nanhe Lal and Anr. v. Ram Bharosey*[69] it was held that "*a grove consisting of shisham and neem trees does not constitute immovable property under § 3 of The Act*". The court didn't discussed as to what constitutes standing timber and merely distinguished timber trees with that of fruit trees on the premise of factual matrix involved in the case. The case was related to a suit for sale on the basis of a mortgage deed dated 20th January 1922, executed by one Mulla in favor of the plaintiffs hypothecating a house and a property called "Nibhera" which was a collection of two shisham and 13 neem trees standing on land not belonging to the mortgagor. Though it must be noted that courts have further go on to state that intention constitute a major ingredient for differentiating trees with that of standing timber and a mere difference on basis of common parlance cannot be a valid ground for justification to the proposition that standing timber is movable property.[70]

Another case involving the parties *State of Indore v. Visheshwar Bhattacharya and Anr.*[71] concluded with the decision by the Hon'ble Court wherein it was laid down that, "*the owner of the soil is the owner of the space above it, and as there can be no ownership without property, it follows that the space above the land is property, whether movable or immovable, and it need scarcely be pointed out that it is not moveable property. So it would seem to follow as a necessary inference that it is immovable property.*" The court in the immediate matter concerned itself with the veranda created by the defendants which projected over the plaintiff premises and thus was alleged to invade the privacy of the plaintiff. In the instant matter the court rejected the eulogy of a plethora of cases of The Bombay Court which held such projection to be trespassing and thus gave a decision in favor

[69] 1938 A.I.R. (All.) 115.
[70] District Board, Banaras v. Ghuihu Rai, (All.) L. J. 1956 872; The real test is not the nature of the tree but the intention of the contracting parties.
[71] 1934 A.I.R. (All.) 1054.

of the defendants relying on the case of *Rathinavely Mudaliar v. Kolandavelu Pillai*[72].

II. Decisions Post Independence: -

(a) The Times of Change (1950-1999)

In the case of *J. Kuppanna Chetty, Ambati v. Collector of Anantapur and Ors.*,[73] the question arose against the act of realization of the arrears of plaintiff by the Tahasildar, Collector and the State of Andhra Pradesh under § 46(2) of The Income Tax Act, 1922 as to whether it constituted mala fide intention. Further the attachment of boiler engine and decorticator of the plaintiff's groundnut decorticator factory was alleged to be unlawful conduct by the defendants. Another question of importance in the instant case was whether the attached property is immovable or movable which would have made the effecting legal. The Hon'ble court relying on § 3 of The Transfer of Property Act, § 2(6) of The Registration Act, § 3 of The Madras General Clauses Act and the precedent of *Mahomed Ibrahim v. Northern Circars Fibre Trading Co., Coconada*[74] opined that the, *"boiler engine and decorticator were fixed or embedded in the factory building for the beneficial enjoyment of the building and thus would be immovable property alongwith the land on which the building was existing."* The court rejected the arguments of the government pleader who was trying to prove the property in question as movable property.

Further in the case of *State of Orissa v. Titaghur Paper Mills Co. Ltd.*[75], the issue involved was related to the bamboo and timber contracts

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[72] 1906 A.I.R. (Mad.) 29 511.
[73] 1965 A.I.R. (A.P.) 457.
[74] 1944 A.I.R. (Mad.) 492.
[75] 1985 A.I.R. 1293; *See* Baijnath v Ramadhar, 1963 A.I.R. (All.) 214; *see also*, that on the other hand electricity was held to be movable property in the case of The Commissioner of Sales Tax, Madhya Pradesh. Indore v. Madhya Pradesh Electricity Board, 1970 A.I.R. 732. Contract for Cable Signals was held to be an interest in movable property and not immovable property as held in the case of Jabalpur Cable Network Pvt. Ltd. v. E.S.P.N. Software India Pvt. Ltd. , 1999 A.I.R. (M.P.) 271.

between the respondents firm who was engaged in manufacturing of paper and that of the State of Orissa. The High Court of Orissa previously upheld the contentions of the petitioners and quashed the notifications issued by the State under The Orissa Sales Tax Act. Major concern in the case was related to the taxation on royalty paid by the respondent firm which according to them was unconstitutional as the said bamboo contract was not a sale of goods but a lease of immovable property. The Hon'ble Court relying on § 2 of The Sales of Goods Act, § 2 of The Registration Act, § 3 of The Orissa General Clauses Act, Section 3 of The Transfer of Property Act and the case of *Shrimati Shantabai v. State of Bombay and Ors.*[76] sided with the appellants and held that, "*trees which are ready to be felled would be standing timber and, therefore, movable property. What is, however, material for our purpose is that while trees (including bamboos) rooted in the earth being things attached to the earth are immovable property and if they are standing timber are movable property trees (including bamboos) rooted in the earth which are agreed to be severed before sale or under the contract of sale are not only a movable property but also goods."*(Bamboo and Timber are movable properties).[77]

It was previously held in the case of *Ananda Behera and Anr. v. The State of Orissa and Anr.*[78] that the right to catch fish is a benefit arising out of land and thus "*As fish do not come under that category.....the definition in the General Clauses Act applies and as a 'profit a pendre' is regarded as a benefit arising out of land it follows that it is immoveable property within the meaning of The Transfer of Property Act*. This case involved an oral license to obtain and catch fish on the Chilka Lake which was licensed to the appellants on payment of hefty sums to the proprietor Raja Parikud but after the passing of The Orissa

[76] 1958 A.I.R 532 (India).
[77] SUDHIR NANDRAJOG, HARI SINGH GOUR COMMENTARY ON THE TRANSFER OF PROPERTY ACT 58-69 (2014).
[78] AIR 1956 17; Bihar E.G.F Co.-op. Society v. Singh, A.I.R. 1973 S.C. 964; Chetlal Sao v. State of Bihar, 1986 A.I.R. (Pat.) 267.

Estate Abolition Act, the government refused to recognize them and thus the property came into question.

(b) The Modern Interpretation (2000-2016)

In the case of *Sunrise Associates v. Govt. of NCT of Delhi and Ors.*[79] involving the issue of sale of lottery tickets, the Hon'ble court rejected the view taken by the court itself in the case of *H. Anraj v. Government of Tamil Nadu*[80] and *Vikas Sales Tax Corporation and Anr. v. Commissioner of Commercial Taxes and Anr.*[81] and held that "*lottery tickets would not be considered movable property for the purpose of tax consideration*". The court relied on the definition of movable property § 2 of The Bengal Act and § 3 of The Transfer of Property Act.

Further it was held in the case of *Velayudhan Padmanabhan v. K. Thyagarajan*[82] that "*the yields from mango and jack trees do not constitute growing crops"*. The issue in hand related to a suit for redemption of mortgage where 'Sammathapratham' was held not to be evidence. This proved that the plaintiff has been rightly sued for the mortgage within the meaning of § 61 of The Transfer of Property Act as the Sammathapratham must be compulsorily registered under § 17 of the Registration Act.

Moreover in the case of *Telefonaktiebolaget LM Ericsson (PUBL) v. Competition Commission of India and Ors.*[83] The Hon'ble Delhi High Court ruled that *"……Exclude without right to use - did not in any manner exclude patent rights from scope of 'goods' as defined under*

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[79] A.I.R. 2006 S.C. 1908; *See* Commissioner v. Triveni N.L. Ltd.., (2014) 72 V.S.T. 448 (All) (India) for comparative discussion on movable and immovable property regarding plant and machinery; *See also* Sirpur Paper Mills Ltd. v. Collector of Central Excise, Hyderabad, A.L.D. 2002 (4) 344 (India).

[80] A.I.R. 1986 S.C. 63.

[81] A.I.R. 1996 S.C. 2082.

[82] K.L.J. 2011(3) 146.

[83] 2016 (66) P.T.C. 58 (Del.); Copyright is also a beneficial interest in movable property and thus itself a movable property; *See* Tata Consultancy Services v. State of Andhra Pradesh, A.P.S.T.J. (1997) 25 53.

Sale of Goods Act, 1930. All kinds of property (other than actionable claims, money and immovable property) would fall within definition of 'goods' and this would also include intangible and incorporeal property such as patents." Hence the court asserted that patent rights are essentially movable property by placing reliance on § 3 of The General Clauses Act, Definition in the Black's Law Dictionary and the case of *Vikas Sales Corporation v. Commissioner of Commercial Taxes*[84] thereby dismissing the petition of patent violation and giving relief to the defendants on the issue of violation of competition norms committed by the petitioner.

Throughout the last hundred odd years of blossoming litigation, the role of the Courts must be appreciated as they have been clinical in establishing the rules governing the classification of property. Although the Courts have by far been successful in dealing with the lacunas in the law, the current circumstances warrants for a systematic overhaul of the statutory provisions.

CONCLUSION

The Indian legal system for decades has remained stagnant, archaic and repressive. In the case of property laws, the situation is nothing different. As we have seen from this study, the terminology used in the context of property law, specifically in India till today remains ambiguous and bewildering, thereby making a need for change expediently necessary. One of the biggest hindrance in classification of movable and immovable property remains in the fact that Indian property law unlike the property laws of other common law countries like England, Australia and Canada does not work on any hard and fast principle and thus no single doctrine can be applied to different factual circumstances. This is the principal reason as to why Courts at times have stranded themselves in shallow waters. In spite of the splendid reasoning of the Courts in majority of the decisions, there is still a need for a

[84] S.C.C. (1996) 4 433.

sustainable approach towards this flawed system of classification. On a similar note, it would be a better state of affair for the legal system, if the provisions enshrined in the plethora of statutes discussed in the study above are brought in coherence with each other. This in turn will mitigate the need to refer to multiple statutes in finding answers to factual issues involved in a case to case basis. Conclusively, it can be deduced that the best possible solution to this erroneous dogmatic classification is a descriptive legislation which is transparent and technically sound. Hence, there is a quintessential need for the legislature to positively legislate, in order to remove the aberrations of the law. This would not only ensure an admirable system of governance but would be a much needed relief for the overladen judicial system.

The Study hereby put forth some Amendments which should made in the Legislative Framework:

1. Inclusion of the term 'Intention of the contracting parties' to ascertain whether the said property is movable and immovable.
2. Inclusion of the definition of 'movable property' in The Transfer of Property Act in order minimizes the uncertainty catered by a dubious counterpart definition and judicial precedents. This would smoothen the process of understanding the scope of application.
3. Inclusion of the term 'incorporeal property' in The Transfer of Property Act in order to expressly govern transfer of such property by the common law principles of Restraint on Alienation (§ 10) and Condition Repugnant to Interest created (§ 11).
4. The Legislative Framework should be reoriented to include the English Doctrine of 'Mode and Object of Annexation' as a relevant criteria to distinguish between chattels and immovable property when the issue at hand relates to 'fixtures'.

RE-THINKING THE SCHEDULAR CONSTITUTION: LESSONS FROM THE INDIAN SC/ST EXPERIENCE

Devarshi Mukhopadhyay* & Priyam Tiwari**

Abstract

While addressing the larger constitutional questions of caste, tribes, law and governance in India, the foremost challenge that one faces is the task of locating the structural barriers in each specific context, and then addressing them accordingly. While Indian governance has often drafted social welfare legislation that deals with the scheduled community, both castes and tribes as a blanket category, it is submitted that such insensitive and misplaced welfare hardly improves the dismal state of backwardness that these communities continue to face even today. Through this paper, the authors seek to debunk the relation between the Indian state and its scheduled members, in a bid to re-affirm our position on certain constitutional principles.

Keywords*: Schedule, Constitution, Governance, Constitutional, India.*

INTRODUCTION: CASTES, TRIBES AND THE INDIAN POLITY

One of the foremost challenges which the constituent assembly, being chaired by a member of the Dalit community, faced at the time of drafting

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the Indian constitution was the question of tackling caste. The cross-cutting dimensions of the formal premise of equality enshrined in Article 14, 15 and 16 of the Indian Constitution, have hence led to a set of difficult questions viz. the larger goal of substantive equality, expressed through an increased capability. If one were to evaluate the affirmative action model which our constituent assembly envisaged, in order to ultimately provide for equality amongst equals, there seems to be growing consensus regarding its systemic failure. Assuming therefore, that the principle basis for such model is sound in our constitutional scheme of equality, this paper seeks to examine how 'special' the guaranteed special status to the scheduled community really is, through the study of various sectors of public life.

The authors, through reflecting upon the current condition of reservation, seek to make a sound theoretical base for our affirmative model, and will then additionally address the question of enforcement. In the second segment of this paper, the authors examines the 'distance' theory of Spivak as well as Nesfield's systemic hegemony thesis in order to make a theoretical base possible for this debate. In this section, the authors additionally posit that it is precisely the above theoretical underpinning or the lack of it, which has resulted in the self-determination objective of the Fifth and Sixth Schedules, read with the Panchayats (Extension to Scheduled Areas) Act, 1996[1] (hereinafter: PESA) being completely defeated, as a direct consequence of our formal equality model. In the third section of this paper, the author will look into the current Indian judicial discussion surrounding 'caste' as classes, additionally addressing the methodologies adopted by the first and second backward classes commission in 1955[2] and 1979[3] respectively.

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[1] Panchayats (Extension To Scheduled Areas) Act 1996, *available at* http://tribal.nic.in/WriteReadData/CMS/Documents/201211290242170976562pesa6636533023.pdf (last visited October 25, 2016).

[2] Under Article 340 of the Constitution of India, the First Backward Classes Commission was set up by a presidential order on in 1953 under the chairmanship of Kaka Kalelkar. It is also known as the First Backward Classes Commission, 1955 or the Kaka Kalelkar Commission.

[3] The Second Backward Classes Commission was set up under the chairmanship of B.P. Mandal in 1979, and is commonly known as the Mandal Commission.

In the fourth section, the authors posit that in light of the current failures of our affirmative action mode, we must shift to a capabilities approach, than a guarantee approach, in order to bid for better substantive results. In the fifth section, the authors shall look at the general figures surrounding reservation in education and in the public services, with the larger objective of demonstrating possible areas of reform, being distinctly showcased as a capability issue rather than a representation issue. In the concluding segment of this paper, the authors will look at Yogendra Yadav's alternate reservation model in order to show that a 'one-size fits all' model, that our current central scheme follows, is detrimental to the very idea of a casteless democracy.

EVALUATING THE DISTANCE PROBLEM THROUGH SPIVAK AND NESFIELD: RE-THINKING THE SCHEDULER CONSTITUTION

As a part of social theory, *Gayatri Chakravorty Spivak* posits that the syntax of an object of literary or any other kind of representation changes when the narrator speaks from a position of privilege in relation to whom he speaks for.[4] Unfortunately for the dream welfare state of India, it is precisely this impediment which prevents us from addressing correctly, the dynamics of formal and substantive equality. In a law-making process, formal representation in the current guarantee model, may well be effectuated, but not to a larger avail. While the subaltern in the Indian scheduler context can speak, but does not speak, it is submitted that the law-maker's position of privilege makes it impossible to determine the real nuances of caste governance in this country. Rid with its multiple and local complexities, the current central model of reservation, or a one size fits all models as one could alternatively view it, has disappointed and continues to disappoint the average scheduled member even today. With the advent of the Narasimha Rao led 73rd and 74th amendments to the Indian constitution,[5] we had made a

[4] Cary Nelson And Lawrence Grossberg, Marxism And The Interpretation Of Culture (1988).

[5] Panchayati Raj System In Independent India, *available at* http://www.pbrdp.gov.in/documents/6205745/98348119/Panchayati%20Raj%20System%20in%20Independent%20India.pdf (last accessed October 26, 2016).

constitutional premise of self-determination to the Scheduled Tribes of this country, although not in terms of political sovereignty, but strictly in terms of self-governance. Although the *Thakkar*[6] and *Deoghar*[7] committee reforms suggested a complete overall change in the process of assimilation, our current situation in the fifth and sixth schedules, present a dismal picture of self-determination, thereby creating the cultural antipathy which we strove so hard to delete from the Indian polity. Further, at a time when we consider either shifting the fifth schedule areas to the sixth schedule, or doing away with the fifth schedule completely and making applicable only the PESA, it would be useful to look at how our current ST reservation model has failed miserably in the scheduled areas, an event that the following sub-section analyses.

First of all, and as *Apoorv Kurup* pertinently notes,[8] decentralization has not aided the self-determination objective of the scheduled tribes in India. While greater autonomy could have, and which was sought to be provided through reservation, the current numbers at our disposal, present a completely different image from what we sought to achieve in the first place. The first question is that of a substantive identity, free from the vestiges of cultural antipathy and stereotypes which are very typical to the indigenous community in this country. The fifth schedule's failure is no misnomer. With special and all-encompassing powers being granted to the governor in these plain areas, we have observed nothing but administrative high-handedness and nepotism, with the government acting in tandem with the governor, especially at the backdrop the Supreme Court's ruling in *Shamsher Singh*.[9] Further, given the fact that the Thakkar committee recommended Tribes Advisory Council (TAC) has over the years assumed the role of a merely advisory and consultative body rather than one whose recommendations are

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[6] REPORT OF THE THAKKAR COMMITTEE.

[7] REPORT OF THE DEOGHAR COMMITTEE.

[8] Apoorv Kurup, *Tribal Laws in India: How Decentralized Administration is Extinguishing Tribal Rights and Why Autonomous Tribal Governments are better*, 7(1) INDIGENOUS L. J. 87-126 (2008).

[9] Shamsher Singh v. State of Punjab, 1975 S.C.R. (1) 814.

to be incorporated on a mandatory basis,[10] the whole purpose of reservation on the TAC has become practically pointless. In the governance of the fifth schedule of the constitution, coupled with the over-arching objective of self-determination and creation of identity, it is only the TAC which provides for a reservation policy for the ST's. In fact, that is for all practical purposes, the only representation which exists, in order to promote the indigenous movement in this country. If that too is rendered a toothless tiger, then serious re-consideration must be made of the fifth schedule governance. It is in order to tackle precisely this problem that the PESA oriented Panchayati Raj governance, comprising of district and regional committees was brought into force in fifth schedule areas in the year 1996. It is submitted however, that the PESA governance too, has hardly matured the way for substantive equality through self-determination, which is the beginning premise of the ST equality movement in India.

First, the PESA mandates the respective State governments to extend the Panchayati Raj to fifth schedule areas, and to ensure substantive equality with other citizens in India, by ensuring that these Panchayati rules are in alignment with the cultural practices and traditional decision making arrangements of the scheduled areas. In practice however, the de-centralization process has either taken far too long to be brought in force, or have been brought into force but without regard to such distinct cultural identities. It is here that the question of reservation in the TAC assumes prime importance. If the consultation process can be converted into a concurrent process, the author believes that the reservation on the TAC will have real meaning, without which it merely acts as a discursive space. Clearly therefore, this is just one instance where the institutional machinery itself is wrought with fallacies, thereby never bridging the gap between formal and substantive equality, expressed in the ST question as a matter of self-determination and localized self-governance.

[10] REPORT, *supra* note 6.

Second, it is pivotal to examine our current 'development' agenda, in terms of the relation between the Land Acquisition Act[11] and the Scheduler Constitution. Given that the right to property, contained in Article 300A of the Indian Constitution is merely a legal and not a constitutional right, the Land Acquisition Act has paved way for the gradual erosion of tribal land rights, which are considered paramount in preserving the community sentiment of the STs. Now, it is here that the development agenda takes over the self-determination objective and which therefore warrants a greater degree of representation on the TAC. It is submitted in this regard, that in addition to the consultative process being re-framed into a concurrent process, there must be sufficient safeguards to ensure that land acquisition in scheduled areas is limited to only state corporations, an agenda that has majorly suffered a setback post the Supreme Court's decision in the *Samatha* judgment.[12]

Third, it is submitted that our current forest regime also disallows the self-determination objective, which in turn prevents our larger goal of substantive equality through assimilation. First of all, protection under the Forest Rights Act of 2006[13] for the Scheduled Tribes, may be afforded either in the form of Village Forests or Reserved Forests, both of which a particular ST populace needs to qualify for. Now, given the general lack of information symmetry and lack of access to such rights, a strict set of qualification criteria leads to a regime where protection is hardly afforded. Naturally therefore, the integral cultural element of community based ownership in scheduled areas becomes degraded significantly. Further, as a result of the failure of the Joint Forest Management system in these areas, and Van Panchayats in particular, assimilation continues to be a distant dream.

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[11] The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, *available at* http://lawmin.nic.in/ld/P-ACT/2013/The%20Right%20to%20Fair%20Compensation%20and%20Transparency%20in%20Land%20Acquisition,%20Rehabilitation%20and%20Resettlement%20Act,%202013.pdf (last accessed October 23, 2016).

[12] Samatha v. State of Andhra Pradesh, (1997) Supp (2) S.C.R. 305.

[13] The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006, *available at* http://tribal.nic.in/WriteReadData/CMS/Documents/201306070147440275455NotificationMargewith1Link.pdf (last visited October 24, 2016).

Fourth and finally, the staggered applicability of laws in the scheduled areas has also led to widespread disrespect for the self-determination objective. The result of this is the staggered application of criminal laws in particular, which leads to the inability of the ST community to keep up with legal processes, thereby keeping them away from assimilating into the social mainstream. For instance, although the Code of Criminal Procedure, 1973 doesn't apply to scheduled areas, certain provisions of the IPC do.This then leads to a complete misunderstanding of criminal process, in turn leading to the enforcement of stereotypes of the indigenous population, thereby distancing them even further from the assimilation agenda. As a result of the above four factors primarily, it is finally submitted that although a formal machinery does exist for the attainment of the self-determination objective and therefore substantive assimilation into the socio-political mainstream, our current decentralized mechanism of governance has not led to its fulfilment.

CASTE AS CLASS POST-INDRA SAWHNEY: MISPLACED PRIORITIES?

Indian judicial discussion, suffering through its many manifestations of distance, has largely failed to address Dalit inequality as a problem of structure. For instance, if one looks at the general trend emanating from the apex court's jurisprudence in *M. Nagaraj*,[14] *Pramati Educational Trust*,[15] and *Indra Sawhney*,[16] it becomes fairly clear that courts have failed to address caste as a class in itself. The 50% ceiling set in the *Indra Sawhney* case is reflective of the court's misunderstanding of castes constituting a class in itself, as a result of which greater percentage of reservation was provided to the OBC class, which again is based on economic criteria, and not social poverty. This once against asserted the lack of understanding of caste as a social reality, not an economic one. Naturally therefore, the movement

[14] A.I.R. 2007 S.C. 71.
[15] (2014) 8 S.C.C. 1.
[16] A.I.R. 1993 S.C. 477.

eventually lost track, given that Jains and other minority communities have politically been given the status of OBC's in several institutions including the IIMs and the IITs (and various other institutions of national importance). The judiciary failed to delve into the question of determinative criterion followed by various committees and commissions. In all the aforementioned decisions, it merely went into the question of formal equality, without resolving the fundamental issue of centralized assessment of backwardness. Terming it to be a purely administrative/political enquiry, the Court conveniently absolved itself from the responsibility of taking the tough decision of overhauling the mistakes committed by the political class.

However widely criticized at a political level, it is submitted that correct weightage was afforded to the element of social poverty in the 1979 Mandal Commission's recommendations.[17] In its 22 point system, one clearly sees that the most important factor in determining the potential beneficiaries of reservation in the public sector is not economic backwardness, but social backwardness, which includes cultural antipathy in the public sphere and levels of pathetic intolerance by the upper castes.

AMARTYA SEN AND THE CONVERSION HANDICAP: LESSONS FROM DALIT RIGHTS IN INDIA

Prof. Amartya Sen, theorizes the inability of a structurally backward individual to convert formal goods into personal welfare, in terms of what he terms the 'conversion handicap'.[18] Put simply, an example of this would include paying fifty rupees to a blind man and a man with perfect vision, to board a local bus. If the law, in its apparently welfare nature, were to guarantee the same set of goods to the blind man and the non-blind man, but were not to take account of the blind man's inability to put the fifty rupees to any use because of his different ability, then such a formal law cannot guarantee any composite rights. The story of caste welfare law in India is

[17] MANDAL COMMISSION REPORT, NATIONAL COMMISSION FOR BACKWARD CLASSES, *available at* http://www.ncbc.nic.in/User_Panel/UserView.aspx?TypeID=1161 (last visited Oct. 29, 2016).
[18] AMARTYA SEN, THE IDEA OF JUSTICE (2010).

very similar. Sen posits that the conversion handicap can be overcome if policy focuses on building capacities, rather than guaranteeing benefits which one can make no use of.[19] The capabilities approach, as it is popularly called is particularly relevant in the Indian context of caste. In addition to the fact that the Backward Affairs Ministry receives the lowest budgetary allocation, book and maintenance grants to SC/ST students in most parts of this country, continue to be abysmal.[20] Now, the capabilities approach would require a greater focus on primary education, rather than an undergraduate admission reservation. Clearly therefore, by creating the space for reserving seats in primary institutions and by increasing the book and maintenance cap for such students, we may potentially move a step closer to our desired levels of substantive equality. If this isn't done, there is stays the distant dream that it is even today, 70 years after independence.

In fact, Part XVI of the Indian Constitution, which makes certain 'special provisions' for SC/ST individuals, continues to record very low representation, especially in the public services where reservation has clearly not worked to its optimum levels.[21] As a result of this, there is sufficient debate on the question of whether it makes legal sense to extend the usually 10-year tenure under Part XVI. One of the chief reasons for this is Article 335 of the Indian constitution and the judicial discussion surrounding it, which refuses to compromise the so called 'efficiency' of the services by providing for reservation in promotions, as promised by the 117th Constitutional amendment[22] and the addition of Article 16(4) to the Constitution of India. It is submitted that the failure to view caste as a class in itself, has resulted in such non-appreciation for the structural question. Equality of what kind?

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[19] *Id.*

[20] Subodh Varma, *States show High Budget Allocation but spend less on SC/ST*, THE ECONOMIC TIMES, http://economictimes.indiatimes.com/industry/services/education/ states-show-high-budget-allocation-but-spend-less-on-sc/st/articleshow/18625076.cms (last visited Oct. 28, 2016).

[21] Mahim Pratap Singh, *Census counts just 4% SC, ST families with a member in a Govt. job*, THE INDIAN EXPRESS, http://indianexpress.com/article/india/india-others/census-counts-just-4-sc-st-families-with-a-member-in-a-govt-job/ (last visited Oct, 30, 2016).

[22] The Constitution (117th Amendment) Bill 2012, *available at* http://www.prsindia.org/billtrack/constitution-one-hundred-seventeenth-amendment-bill-2012—2462/ (last visited October 12, 2016).

Equality among equals? For a level playing field to be provided, one must understand that 'efficiency' is a restrictive term applicable only to a privileged few and not to communities faced with decades of oppression and marginalization.

Why does this need to be done at all? Is assimilation really necessary? Yes, because the constitution states so in categorical terms. In a country comprising 54% OBC and close to 25% SC population, their representative numbers are abysmal and must therefore be changed. Internationally, although we are a ratifying party to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 1965, very little has been done in domestic legislation to give effect to the larger equality goal. The Prevention of Atrocities Act 1989 too, is evidence to the fact that the 'equal protection of laws' in Article 14, has scarcely applied to the scheduled community of this country.[23] Whether this in terms of the absolute non-adherence to the Atrocities Rules, 1995[24] or the Manual Scavenging Act 2013, the protective arm of the law is just another formal promise, without much being achieved in substance. It is submitted that the ICERD has now attained the status of customary international law, and India, by not being a persistent objector, is under an internationally promise duty to being its laws in line with the global anti-discrimination regime.

Further, added elements of cultural antipathy also pave way for scattered discrimination. For instance, an NCERT directive, asking CBSE teachers to take note of the 'limited cognitive faculty' of Dalit students is just one example of such discrimination.[25] The recent Rohit Vermula suicide[26] incident at HCU, showcased how institutional discrimination is always

[23] Human Rights Watch, *Failure to meet Domestic and International Legal Obligations to Protect Dalits*, *available at* https://www.hrw.org/reports/1999/india/India994-13.htm (last visited October 20, 2016).

[24] SC/ST Prevention of Atrocities Rules 1995, *available at* http://tribal.nic.in/WriteReadData/CMS/Documents/201211290244463935546poarule1995E2005492342.pdf (last visited Oct. 29, 2016).

[25] National Curriculum Framework 2005, *available at* http://www.ncert.nic.in/rightside/links/pdf/framework/english/nf2005.pdf (last visited Oct. 28, 2016).

[26] Nikhila Henry, *Rohith's fellowship arrears released posthumously*, THE HINDU, http://www.thehindu.com/news/national/andhra-pradesh/rohiths-fellowship-arrears-released-posthumously/article8383366.ece (last visited Oct. 25, 2016).

rampant in institutes of national importance and excellence, for something as minute as the release of funds-in-aid for PhD students. It is shameful, and a matter of great disappointment that despite an elaborate protective machinery, very little real progress has been achieved in ensuring substantive equality to the average member of the Dalit community even today. The author has tried to showcase only certain specific instances where such institutional discrimination has taken an unbearable form, driving bright students to commit suicide and bringing an unfortunate end to their dreams just for their birth into a family they had no control over whatsoever.

PROPOSING YOGENDRA YADAV: RE-THINK THE ONE-SIZE-FITS-ALL MODEL?

Of the widely prevalent Indian literature on the issue of caste and policy, several critics posit that while the larger idea of affirmative action is certainly in line with our constitutional obligations as well as human rights, the current model we follow is wrought with fallacies. Unfortunately, this is entirely true. And the reason for this is a centralized and uniform reservation policy, also called a one-size-fits-all model. It is submitted that a more local mode of evaluation would better the assessment of beneficiaries, the need for which was highlighted at the backdrop of the Gujjar-Meena clashes in retaliation to the 2008 Chopra Committee recommendations,[27] which allotted reservation benefits to certain other communities. The Mandal commission, whose model we follow till date, made a nationwide census on the basis of which the guarantee model was devised. Even the Patidar agitation could be attributed to centralized/scheduler determination of backwardness, as the demand for affirmative action today has merely been restricted to a constitutional status.

It is submitted that Yogendra Yadav, who proposed a local-proportional assessment,[28] would better suit the purpose of our reservation regime.

[27] T.K. Rajalakshmi, *Gujjars are unhappy with the Chopra Committee's report, and the State government passes their demand for S.T. status to the Centre*, 29 FRONTLINE (2008).
[28] Satish Deshpande and Yogendra Yadav, *Redesigning Affirmative Action*, 41 (24) ECON. & POL. WEEKLY (2006).

Yogendra Yadav and Satish Deshpande in their article, Redesigning Affirmative Action, advocate for the implementation of a 'group-membership-plus model'.[29] The fundamental underpinning of the proposed model was that group identity is merely one of the criteria to determine backwardness; rather factors such as family income, occupational background, educational status etc. must also be taken into consideration. The modus operandi required in order to access the required data must also be done at the Panchayat or Gram Sabha level, making the determination localized and precise, and not solely based on the caste of an individual.[30] By adopting a more local and therefore sensitive analysis, our reservation system can be developed at a more nuanced level, thereby paving the way for real equality to be achieved. Often accused to spreading communal disharmony, it is essential that our social fabric is not negatively disturbed as a result of the central government's failures to address the reservation problem as a structural impediment.

REACHING SETTLED SHORES: THE BUCK STOPS WHERE?

Through this paper, the author has sought to formulate possible areas of reform to our current centralized model of reservation, both for the SC and the ST community in India. It is submitted that the very identification of the backwardness locus is misplaced, and has therefore been responded to with hasty and expedient legislation. While the quest for substantive equality in the case of the average Scheduled Caste in India is in terms of structure, the ST/indigenous movement look at the substantive equality question through the eyes of self-determination, although not in terms of political sovereignty. If one conducts even a preliminary literature review of the scholarship existent in the field, it becomes clear that our current machinery is ill suited, in terms of reservations, to address the larger substantive equality question. This is because of a number of factors. First of all, the legislature, being focused only on electoral questions, has largely remained either silent or

[29] *Id.*
[30] *Id.*

completely ineffective on improving the efficacy of Part XVI of the Indian Constitution. The executive, while forming rules of implementation, has suffered from a formulation of a one size fits all model that completely overlooks localized caste problems and enforcement impediments. The judiciary, being the isolated intelligentsia of this country, has suffered from the distance problem as a result of which the 'caste as class' doctrine has been formulated but without any legal boundaries, thereby creating scope for convenient application by the legislature. The amicus curie to the law making process, the external expert committees such as Thakkar and Bhuria, suffer from an assimilation bias which leads them to address the ST quality question as that of backwardness, not distinctness. Clearly therefore, we see how the machinery has not only misunderstood the problem, but has tried to make a hasty counter, through reservation.

While an affirmative action model is generally in line with our constitutional goals as well as our international obligations, the same should be modified for better efficacy. By following a more local assessment with social poverty being the only indicatory in the case of Dalits, will certainly pave way for the ultimate rights guarantee system. Focus must therefore be placed on improving the capabilities of these communities, rather than a guaranteed set of benefits which the scheduled community can make no use of, given that they suffer from the conversion handicap. Naturally therefore, we must adopt a dignitarian human rights perspective of caste in this country and address the same through a more sustained engagement with our current figures of representation of the scheduled community. In conclusion, it is finally submitted that the caste-tribe question in Indian politics must be made a constitutional question, but on a segregated basis for better redressal. By clubbing both categories into one, we fail to address that both categories are sourced from completely different motivations and objectives. If we fail to appreciate this, there can be no substantive identity creation for the scheduled community in India.

ROLE OF INDIAN TRADE UNIONS IN TRANSITION OF CHANGES: A CONTEMPORARY STUDY

Kaushik Banerjee*

Abstract

The responsibilities of trade unions in transition of change and development are the major concern of many analysts on trade union movement. There is a need for creation of a protective umbrella where all labour laws can be operative to protect the workers' rights at the time of imposing reform measures. The present research is the combination of Doctrinal and non-Doctrinal study. There are seventeen variables identified from earlier literature review and existing legal provisions and they are tested against Alternative Hypotheses through Chi Square Test. Different cases are analysed to validate the test result. It is found that militancy in the acts of trade unions occur if the workers are proactive and have a tendency for protectionism towards their members. In majority cases no significant difference arises among trade union members irrespective of their political affiliation. In some areas INTUC and non INTUC members vary in opinion. The trade union members, irrespective of their affiliation strongly oppose any attempt in changing the existing legal provisions. It can be concluded that the government machineries and employers should take more responsibility to maintain congenial association as they are also important parties to industrial disputes.

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Keywords: *Trade Union, Industrial Relations, change, disputes.*

INTRODUCTION

The Trade Union Act was passed by colonial government on June 1, 1926. A registered union acquires the status of a body corporate.[1] It is deemed to be in 'perpetual succession'.[2] Under the Act, if a union is registered, it will have certain rights and immunities.[3] For instance a decision by union members to act jointly or go on strike cannot be construed as a 'criminal conspiracy'[4] unless they plan to commit an offence. The responsibilities of trade unions in transition of change are the major concern of many analysts on trade union movement. "Trade union development is necessarily related to and conditioned by the changes in the whole socio-economic set-up.".[5] Government of India announced new industrial policy in July 1991 with different structural adjustments.[6] The adjustments include different separation schemes. The New industrial policy gave importance to 'privatization', 'globalization'[7] and 'competition'.[8]

The Second National Commission on Labour[9] recommended formation of a unique law applicable in similar ways to different sectors. The crucial recommendation of the commission is change in provisions of Chapter VB of Industrial Disputes Act, 1947. Permission from appropriate government in early is only needed for declaring lay-off[10] and retrenchment[11] in any

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[1] P. RAMNATHA AIYAR, THE LAW LEXICON 353 (2012).
[2] *Id.* at 1339.
[3] § 120A, The Indian Penal Code, 1860.
[4] AIYAR, *supra* note 1 at 785.
[5] GHOSH SUBRATESH, TRADE UNIONS IN UNDERDEVELOPED COUNTRIES 59 (1960).
[6] AIYAR, *supra* note 1 at 1656.
[7] *Id.* at 699.
[8] § 15, Indian Trust Act, 1882.
[9] SUMMARY OF RECOMMENDATIONS OF NATIONAL COMMISSION ON Labour (Jul. 11, 2015, 10:17 AM), *available at* labour.gov.in/upload/uploadfiles/files/ Divisions/.../ 39ilcagenda_1_.pdf (last visited, Jan. 22, 2016, 10:22 AM).
[10] § 2(kkk), Industrial Disputes Act, 1947.
[11] § 2(ooo), Industrial Disputes Act, 1947.

establishment where 300 or more workmen are employed and if the lay-off continues for more than 30 days.

Conciliation proceeding[12] should be made compulsory for interest disputes and disputes[13] related to strikes[14] and lock-outs[15]. Any union not securing 10% of membership in any establishment can only represent cases of individual workman. But that union should not have any other '*locus standi*'[16] there. Notice of change under Section 9A[17] of Industrial Disputes Act, 1947 should not operate as a stay[18] against Section 33[1] of the said Act. If proper and fair enquiry is conducted on charges of violence, sabotage, theft[19] or assault[20] and any workman is dismissed or removed from service and if the court is satisfied on the charges framed and enquiry proceedings, the order of reinstatement cannot be given. Proper protection against whimsical dismissals[21], denial of minimum wages[22] should be given to the workers engaged in unorganized sectors[23]. The provisions under different labour laws should be re-examined so that the workers as a class can enjoy freedom of dignity, economic security and equal opportunity.

REVIEW OF EARLIER LITERATURE

A brief review of the available literature on various aspects of trade unionism is done here. Debashish Bhattacherjee (1999)[24] in one discussion paper

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[12] § 2(d), Industrial Disputes Act , 1947.
[13] § 2(k) Industrial Disputes Act, 1947.
[14] § 2(q), Industrial Disputes Act, 1947.
[15] § 2(l), Industrial Disputes Act, 1947.
[16] AIYAR, *supra* note 1 at 1044.
[17] § 9A, Industrial Disputes Act, 1947.
[18] § 33, Industrial Disputes Act, 1947.
[19] § 378, Indian Penal Code, 1860.
[20] § 351, Indian Penal Code, 1860.
[21] AIYAR, *supra* note 1 at 488.
[22] § 3(1), Minimum Wages Act, 1948.
[23] Unorganized sectors exclude industrial establishments wherein ten or more employees are employed, or were employed, on any day of the preceding twelve months.
[24] DEBASISH BHATTACHERJEE, ORGANIZED LABOUR AND ECONOMIC LIBERALIZATION IN INDIA: PAST, PRESENT AND FUTURE, LABOUR AND SOCIETY PROGRAM 5-27 (1999).

analyses four phases of unionism in the light of above two views. According to Debasish Bhattacherjee the first phase of Indian trade union movement (1950 to mid-1960s) is dominated by AITUC[25]. Go slow[26] as new form of protest emerged during the second phase. In the third phase we find emergence of independent unions. They started competing with party affiliated unions. The fourth phase of trade unionism (1991- 2013) is characterized by effects of economic liberalization and structural adjustment programmes. Mamkoottam (2012)[27] analysed the efforts of trade unions coping with technological changes. Ranabir Samaddar (1995)[28], analysing a case study on newspaper industry, suggests that new technology is a weapon in the hands of management to eliminate trade unions. Unlikely, Roy (1995)[29] concludes from study of banking industry that the workers may become an eager supporter of technological change. Studies conducted by Akhilesh et al. (1989)[30] shows that management mostly takes the workers for granted while introducing technological change.

Rao EM (2008)[31] in "Industrial Jurisprudence – A Critical Review" explains matters of immunity in criminal[32] and civil[33] suits in certain cases. Kharbanda V.K. and Vipul Kharbanda(2013)[34] in "Commentaries on Trade Union Act,1926" gave detailed analysis on chapters and sections of Trade Union Act,1926.

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[25] RATNA SEN, INDUSTRIAL RELATIONS: TEXT AND CASES 62-65 (2011).

[26] Bharat Sugar Mills Ltd. v. Jai Singh, 1961 2 L.L.J 644 (S.C). Go-slow is likely to be much harmful than total cessation of work by strike.

[27] KURAIKOSE MAMKOOTTAM, ESSAYS ON GLOBALIZATION, TECHNOLOGICAL CHANGE AND LABOUR IN INDIA 69-76 (2012).

[28] RANABIR SAMADDAR, NEW TECHNOLOGY AT THE SHOP FLOOR LEVEL: THE STORY OF DE UNIONIZATION IN SOME INDIAN NEWSPAPERS 121 (1995).

[29] MAMTA ROY, INDIAN BANKS, INFORMATION TECHNOLOGY AND THE WORKERS' RESPONSE 137-151 (1995)

[30] K. B. AKHILESH ET AL., TECHNOLOGICAL CHANGE: MANAGEMENT INITIATIVES AND TRADE UNIONRESPONSE 124-152 (1989).

[31] BHATTACHERJEE, *supra* note 24 at 5-27.

[32] RATNA SEN, INDUSTRIAL RELATIONS: TEXT AND CASES 62-65 (2011).

[33] *Supra* note 26.

[34] MAMKOOTTAM, *supra* note 28.

METHODOLOGY

Since, the present research is quantitative in nature, it is very much important to determine the variables which may influence the decision factors. An exploratory research had been conducted with the help of small representation of union members. After consultation with 16 office bearers representing different union groups 17 variables had been incorporated in the final study.

Sample Size

For a primary study, sufficiently high representations of sample respondents are required. For this purpose it had been decided to go for 200 data collection but due to non-availability of respondents 156 responses were received in corrected form and the same had been included in the study with a response rate of 78%.

Sample Design Process

Since, the target respondents are office bearers, random sampling methods can't be applied as they might not be available at a particular point of time at a particular place. For this reason, it had been decided to go for snowball sampling.

Instrumentation and Test Administration:

The present research is the combination of Doctrinal and non-Doctrinal study. There are seventeen variables already identified and they are tested against Alternative Hypotheses. Hypothesis Testing (Chi Square Test) is done to accept or reject the hypotheses already formulated. Different cases are analyzed to test Hypothesis 2.

DATA COLLECTION, ANALYSIS AND RESULTS

Hypothesis 1: *H_o: Irrespective of union affiliation no significant difference exists between INTUC and non INTUC members in terms of utilization of general funds, imposition of restraint on conducting demonstration, legitimacy of exemption to the members of trade union U/S 17 of the Trade Union Act, 1926, legitimacy of immunity from civil suit in certain cases to the members of trade union U/S 18 of The Trade Union Act, 1926, workmen's right to demonstrate peacefully, non-existence of guaranteed fundamental right causing intervention of the peaceful working of the establishment because of demonstration, liability of registered trade union related to any suit or legal proceeding in the civil court in respect of any tortuous act done, opinion of referring dispute to voluntary arbitration for determination and declaration of award, conditions precedent to lay off and retrenchment as per law, opinion about punishment given in proportioned to the offence.*

H_1: Irrespective of union affiliation significant difference exists between INTUC and non INTUC members in terms of utilization of general funds, imposition of restraint on conducting demonstration, legitimacy of exemption to the members of trade union U/S 17 of the Trade Union Act, 1926, legitimacy of immunity from civil suit in certain cases to the members of trade union U/S 18 of The Trade Union Act, 1926, workmen's right to demonstrate peacefully, non-existence of guaranteed fundamental right causing intervention of the peaceful working of the establishment because of demonstration, liability of registered trade union related to any suit or legal proceeding in the civil court in respect of any tortuous act done, opinion of referring dispute to voluntary arbitration for determination and declaration of award, conditions precedent to lay off and retrenchment as per law, opinion about punishment given in proportioned to the offence.

Hypothesis 2: *The more proactive and protectionist nature of Trade Union activities, the more militancy prevails.*

INTERPRETATION OF HYPOTHESES:

There are seventeen variables already identified and they are tested against Alternative Hypotheses. Hypothesis Testing (Chi Square Test) is done to accept or reject the hypotheses already formulated. In some areas INTUC and non INTUC members vary in opinion. In the question of workmen's right to demonstrate peacefully, the response of non INTUC members has distributed among various categories but in case of INTUC members, most of the members believed that the same should be allowed with reasonable restrictions. In terms of non-existence of guaranteed fundamental right causing intervention of the peaceful working of the establishment because of demonstration, the INTUC and non INTUC members vary in opinion. Non INTUC members were strictly in favour of considering demonstration as guaranteed fundamental right but INTUC members opined that demonstration causing intervention to peaceful working of environment cannot be considered as guaranteed right. In terms of liability of registered trade union related to any suit or legal proceeding in the civil court in respect of any tortuous act done, INTUC and non INTUC members vary in opinion. Non INTUC members in large number opined that registered trade union or its members are not liable in any suit or legal proceeding in the civil court in respect of any tortuous act done. In terms of opinion of referring dispute to voluntary arbitration for determination and declaration of award INTUC and non INTUC members vary in opinion. In case of non INTUC members, respondents gave answer in a negative way whereas in case of INTUC members, a mixed response is coming out. Non INTUC members in large number clearly stated that voluntary arbitration is a failure and they are not in favour of referring dispute to voluntary arbitration for determination and declaration of award. INTUC members did not support this view.

Hypothesis 2 is accepted as the descriptions of the cases and incidents in different industrial establishments show that militancy in the acts of trade unions occurs if the workers are proactive and too much protectionist to their members. In the decades of 70's, 80's and in early years of reform measures unions showed huge pro activeness in activities and they were too much protectionist in safeguarding their members' interest. They showed

huge militancy in protecting workers' rights. The positive correlation between protectionism and militancy in behavior of workmen can be found in several cases, henceforth Hypothesis 2 is accepted.

SECONDARY DATA ANALYSIS

Table 1 : Statistics of Strikes and Lockouts during the years 2013 (P) 2014 (P) and 2015 (P)- (January & April) in Central and State Sphere

Item	2013 (January to April) (P)			2014 (January to April) (P)			2015 (January to April) (P)		
	Central Sphere	State Sphere	Total	Central Sphere	State Sphere	Total	Central Sphere	State Sphere	Total
1	2	3	4	5	6	7	8	9	10
A: Number of Industrial units affected:									
Strikes	69	39	108	22	40	62	7	19	26
Lockouts	-	13	13	-	13	13	-	14	14
Mandays Lost	1,035,632	869,869	1,905,501	648,493	480,932	1,129,425	174,069	271,917	445,986
B: Number of Workers Affected :									
Strikes	543,462	123,112	666,574	337,069	10,141	347,210	85,421	9,876	95,297
Lockouts	-	3,777	3,777	-	3,465	3,465	-	3,265	3,265

Table 2: Statistics of Retrenchments and Closures during the years 2013 (P) 2014 (P) and 2015 (P)- (January & April) in Central and State Sphere

Number of Industrial units affected :	2013 (P) January to April			2014 (P) January to April			2015 (P) January to April		
	Central Sphere	State Sphere	Total	Central Sphere	State Sphere	Total	Central Sphere	State Sphere	Total
Retrenchments	14	2	16	1	7	8	1	1	2
Closures	-	8	8	-	11	11	-	1	1

(P) = Provisional

Source: Labour Bureau, Government of India; http://labourbureau.nic.in

Interpretation: The industries under Central Sphere include Mines, Railways Banks,, Major Ports, Insurance Cantonment Boards, ONGC, Oil Sector Companies and FCI. It is seen that number of units affected by strikes and lockouts in both spheres is decreasing. Again number of retrenchments and closures is also decreasing. This figure shows growing positive attitude of employers and unions towards each other. They now try to understand the value of collaboration in maintaining industrial peace, harmony as well as protecting their own rights.

CASE ANALYSIS AND DISCUSSIONS

The judgments of different cases differ from case to case. Each case judgment depends on merit of each case. But the learned judges in different cases make it clear that militancy in any form cannot be encouraged as this is against the ideals of our Constitution and the true nature of trade union activities. In *Lakshmi Devi Sugar Mills case*[35] the learned judges observed that as the workmen had resorted to illegal strike, the order of suspension pending further orders by the General Manager was justified. Analyzing *O.k. Ghosh and others vs. E.X.Joseph*[36] and *Kameshwar Prasad and others vs. The State of Bihar*[37]it can be stated that right to association is a guaranteed fundamental right. But right to strike is only statutory and it only saves the working class from the arbitrary attitude of the management resorting to initiate any penal action against the union. In *Motipur Sugar Factory case*[38] the factory workmen went for go slow tactics. The Industrial Tribunal came to the conclusion that there was go slow during this period and this activity could not be allowed to continue. The Supreme Court also upheld the view. In *Amco Batteries Ltd. case*[39], the learned judge opined that when workers combined together preventing employers, customers and others to employ their duties by means of threats, intimidation or violence, such acts should

[35] Lakshmi Devi Sugar Mills Ltd. v. Pt. Ram Sarup A.I.R. 1957 S.C. 82.
[36] O. K. Ghosh v. E. X. Joseph, A.I.R. 1963 S.C. 812.
[37] Kameshwar Prasad v. State of Bihar, A.I.R. 1962 S.C. 1166.
[38] Workmen of Motipur Sugar Factory v. Motipur Sugar Factory, A.I.R. 1965 S.C. 1803.
[39] Simpson & Group Companies Workers v. Amco Batteries Ltd., I.L.R. 1990 (Kar.) 3568.

not be protected. The scope and extent of immunity to trade union members as described in Section 17 of Trade Unions Act, 1926 was clearly examined in *Ruikar vs. Emperor*[40]. The applicant in this case was convicted for the offence of abetment of molestation. The court, while recognizing the rights of a Trade Union to call a strike and their immunity if they commit acts in the furtherance of trade disputes, held that the immunity does not extend to an agreement to commit an offence under the Indian Penal Code.

In *Central Bank of India vs. Central Bank Officers Association*[41], slogans were shouted and dharnas were held inside the premises of the bank. The court opined that even though the demonstrations, dharnas, etc. are the rights of the Trade Union, an uncontrolled irresponsible agitation of the Trade Union cannot be allowed to continue. In *Shahdol Pipe Works and another vs. Zila Kamgar Sangh*[42], the Trade Union members of the partnership firm collected at the main gate and obstructed the ingress and egress of the workers who were willing to work. The court held that under Section 18, the civil court did not have jurisdiction normally, but if the Trade Union engaged in acts of violence and intimidation and coercion, a suit would lie in the civil court. The learned judges in different cases also did not support the unjustified and vindictive attitude of the management as well. In *The Statesman Ltd. vs. Their workmen*[43] the judges opined that though the management claimed that the lockout declared was legal as it was called as a result of an illegal strike, the management cannot behave unreasonably merely because the lock out is born lawfully.

In *Gujarat Tubes Ltd. case*[44] Justice V.R. Krishna Iyer opined that mere absence from duty cannot prove involvement of worker in a strike and dismissal of one worker in an economy facing massive unemployment can be considered as measure of last resort.

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[40] Ruikar v. Emperor A.I.R. 1935 (Nag.) 149.
[41] Central Bank of India v. Central Bank Officers Association, 1998 1 L.L.N. (S.C.) 941.
[42] Shahdol Pipe Works v. Zila Kamgar Sangh, 2004 IV-L.L.J. (M.P.) 474.
[43] The Statesman Ltd. v. Their workmen, 1976 A.I.R. 758, 1976 3 S.C.R. 228.
[44] Gujarat Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha, 1980 I-L.L.J. (S.C.) 137.

In *Jaslok Hospital and Research Centre vs. Industrial Tribunal and others*[45] the learned judge opined that order of the termination was punitive in nature. It was not termination simpliciter as per conditions of service and standing orders. In *P. Ramanaiah and others vs. Tirumala Tirupati Devasthanam, Tirupati, Chittoor District*[46] the petitioners were appointed as volunteers in the Anndanam Canteen of the respondent Devasthanams on different dates. The petitioners were retrenched from employment. The petitioners filed writ petition W.P. No. 26481 of 2011. The apex court critically analyzed different Articles of Constitution of India in this regard and directed the respondents to give an opportunity to the petitioners to work in the respondent Devasthanam as per terms of the said interim order. The apex court took the interpretation of Article 21 in *Bandhua Mukti Morcha case* [47]where the Supreme Court held that inaction of state in securing Articles 39, 41 and 42 would amount to denial of right to life.

In *Jay Engineering Works Limited vs. State of West Bengal*[48] there was the incident of retrenchment of workmen. On 2nd March, 1967 the retrenched workers together with other employees initiated gherao of the manager and other officers of the company. The workmen showed extreme violent attitude. The learned judges of Calcutta High Court opined that incidents of gherao together with confinement, restraint or other offences are cognizable offences and the offenders were found guilty under Section 340 of Indian Penal Code. The correlation between protectionism and militancy in behavior of workmen can be found in *Simpson & Group Companies Workers vs. Amco Batteries Ltd.* (*supra*)[49], *Central Bank of India vs. Central Bank Officers Association* (*supra*)[50], *Shahdol Pipe Works and another v. Zila Kamgar Sangh* (*supra*)[51]. Hypothesis 18 is accepted as the descriptions

[45] Jaslok Hospital and Research Centre v. Industrial Tribunal, 1984 I-L.L.J. (Bom.) 76.
[46] P. Ramanaiah v. Tirumala Tirupati Devasthanam, 2013 I-L.L.J. (AP) 230.
[47] Bandhua Mukti Morcha v. Union of India, 17 A.I.R. 1984 S.C. 802.
[48] Jay Engineering Works Limited v. State of West Bengal, 1968 A.I.R. (Cal.) 407.
[49] *Supra* note 39 at 12.
[50] *Supra* note 41 at 13.
[51] *Supra* note 42 at 13.

of the cases and incidents in different industrial establishments show that militancy in the acts of trade unions occurs if the workers are proactive in presenting their demands and too much protectionist to their members.

CONCLUSION

The judgments of different cases differ from case to case.

Each case judgment depends on merit of each case. But the learned judges in different cases make it clear that militancy in any form cannot be encouraged as this is against the ideals of trade union activities. Analyzing *Jay Engineering Works Limited vs. State of West Bengal* (*supra*)[52] it can be found that workers showed extreme militancy and violent behavior. So there exists a positive correlation between protectionism and militancy. This case also helps to accept Hypothesis 2. But true protectionism cannot imply unjustified, disorderly and unruly behavior towards others. The bona fide of action should be the most important factor for deciding the issue.

The Management of organizations also should behave in reasonable and justified way to recognize workers' rights. Unjustified attitude of Management also disrupts the true value of industrial relations. The general conclusion that can be derived from primary data is that the trade union leaders and members are sympathetic and collaborative in solving disputes. They strongly support bi-partite settlement and solving disputes through joint consultative machineries. Regarding Chapter V-B on Industrial Disputes Act, they strongly support existing legal provisions. It can be concluded that the Government machineries, employers should take more responsibility to maintain congenial association as they are also important parties to industrial disputes in transition of changes. There is the need for enactment of omnibus labour law covering different activities. But it should be kept in mind that separation provisions are very sensitive and any reform in these provisions should be directed to protect workers' interest.

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[52] *Supra* note 48 at14.

SCOPE OF STUDY

The relationship between workers and employers is based on novel understanding of trust and belongingness towards each other. It should be based on the deep understanding and ideals of enlightenment and empowerment. To uphold the above said ideals this study keeps a wide area for future research. Workers' rights can be revisited again. Future researches can be conducted on emerging IR issues and law reforms in recessionary period. This research keeps open scope for research on law reforms in Indian industries.

FORMAT OF QUESTIONNAIRE:

Question 1: Utilization of general funds in maximum for the following purposes (Association Representation)

Responses	No. of Respondents	Percentage
Payment of salaries and expenses to the office bearers		
Payment of expenses for the administration		
Defence of any legal proceeding		
Compensation of members for loss arising out of trade dispute		
Allowances to members or their dependents on account of death, old age, sickness, accidents or unemployment		

Question 2: Any restraint in conducting demonstration – violation of freedom of expression (individual representation of union members)

Responses	No. of Respondents	Percentage
Perfectly necessary		
Necessary		
Inadequate measure		
Not necessary		
Restraint should be abolished		

Question 3: Legitimacy of exemption to the members of trade union U/S 17 of The Trade Union Act, 1926 (individual representation of union members)

Responses	No. of Respondents	Percentage
Perfectly necessary		
Necessary		
Inadequate measure		
Not necessary		
Exemption should be abolished		

Question 4: Legitimacy of immunity from civil suit in certain cases to the members of trade union U/S 18 of The Trade Union Act, 1926 (individual representation of union members)

Responses	No. of Respondents	Percentage
Perfectly necessary		
Necessary		
Inadequate measure		
Not necessary		
Immunity should be abolished		

Question 5: Physical interference or duress or physically obstructing free movement of vehicles – whether Justifiable Trade Union Right (individual representation of union members).

Responses	No. of Respondents	Percentage
Perfectly justified		
Justified		
Justified with reasonable restrictions		
Not justified		
Liable for punitive action		

Question 6: Workmen's right to demonstrate peacefully – restriction, if imposed, should be reasonable (individual representation of union members).

Responses	No. of Respondents	Percentage
Should be allowed		
Allowed with reasonable restrictions		
Not a justified right		
Should be handled with diligence and care		
Should not be allowed and liable for punitive action		

Question 7: Violence in the premises – whether Section 18 is a bar for granting injunction against union? (Association Representation)

Responses	No. of Respondents	Percentage
Acceptable		
Moderately acceptable		
Less acceptable		
Defects inherent in the system		
Not acceptable as it is considered as justifiable right		

Question 8: Under the Constitution no fundamental right is guaranteed to anyone to hold demonstration in the premises of an establishment causing intervention of the peaceful working of the establishment (Individual representation of union members).

Responses	No. of Respondents	Percentage
Acceptable		
Moderately acceptable		
Less acceptable		
Defects inherent in the system		
Not acceptable as it is considered as justifiable right		

Question 9: System adopted for prohibition of unfair labour practices in organization (Individual representation of union members).

Responses	No. of Respondents	Percentage
Excellent		
Good		
Average		
Below average		
Poor		

Question 10: There is no fundamental right to go on strike or there is no statutory provision empowering the employees to go on strike (Association Representation).

Responses	No. of Respondents	Percentage
Accepted to great extent		
Accepted		
Strike should be prohibited in workplace		
Denied		
Strike should be not prohibited in workplace		

Question 11: Acceptability of Check off system in determining majority (Association Representation)

Responses	No. of Respondents	Percentage
Acceptable		
Moderately acceptable		
Less acceptable		
Defects inherent in the system		
Not acceptable		

Question 12 : Whether a registered trade union is liable in any suit or legal proceeding in the civil court in respect of any tortuous act done?(Individual representation of union members).

Responses	No. of Respondents	Percentage
Perfectly liable		
Liable		
Not at all liable		
It is an immunity U/S 18		
Question of liability varies from case to case		

Question 13: Constitution of Works Committee and its effective functioning (Individual representation of union members).

Responses	No. of Respondents	Percentage
Acceptable to great extent		
Acceptable		
Concept of participation is unknown		
Not acceptable		
Works committee is a statutory concept and loses its applicability and significance.		

Question 14: Opinion of referring dispute to voluntary arbitration for determination and declaration of award (Association Representation).

Responses	No. of Respondents	Percentage
Acceptable to great extent		
Acceptable		
The system has its own weaknesses		
Not acceptable		
Voluntary arbitration is a failure in settlement		

Question 15: Prohibition of Lay-off where application for permission of appropriate Government in prescribed manner is mandatory and the appropriate Government, having regard to the genuineness and adequacy of the reasons for such lay-off, by order and for reasons to be recorded in writing, grant or refuse to grant such permission. (Association Representation) [Section 25M of Industrial Disputes Act, 1947].

Responses	No. of Respondents	Percentage
Acceptable to great extent		
Acceptable		
The system has its own weaknesses		
Not acceptable		
The applicable Section should be changed		

Question 16: Conditions precedent to retrenchment where application for permission of appropriate Government in prescribed manner is mandatory and the appropriate Government, having regard to the genuineness and adequacy of the reasons for such retrenchment, by order and for reasons to be recorded in writing, grant or refuse to grant such permission. (Association Representation) [Section 25N of Industrial Disputes Act, 1947]

Responses	No. of Respondents	Percentage
Acceptable to great extent		
Acceptable		
The system has its own weaknesses		
Not acceptable		
The applicable Section should be changed		

Question 17: Opinion about punishment given be proportioned to the offence (Culpa poena par esto (Association Representation)

Responses	No. of Respondents	Percentage
Perfectly applied		
Applied		
Applied to some extent		
Applied to less extent		
Not applied		

Participant Information

Name:

Organization:

Phone Number:

Email:

CARVING THE MAP FOR A PROTECTED CONSUMER: ESTABLISHING THE NEED OF A SEPARATE LEGISLATION FOR E-COMMERCE

Chandni Ghatak*

Abstract

E-commerce today is one of the most lucrative and fastest growing means for conducting transactions over the internet between businesses, businesses and consumers etc. Naturally, in the increasingly globalised world, India is not untouched by this phenomenon. India happens to feature among the top 10 developing economies in Asia in terms of being an emerging e-commerce market.[1] E-commerce in India is expanding also thanks to the increase in the number of people choosing to go online, i.e. close to 402 million Internet users second to China.[2] With the fast pace of its growth and a clear future for this sector in the Indian economy, law makers today are required to attend to regulate the affairs of this sector in order to better its overall functioning. The rosy picture depicted through the aforesaid statistics is just a trailer to the larger picture that follows, one which is impeded by several logistical draw backs and inefficiencies not only affecting those making a livelihood by engaging in such trade but also adding to the vulnerability of those seeking to indulge in buying products

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[1] World Economic Forum, The Global Information Technology Report 2016, 14 (2016).

[2] Fareeha Ali, *India begins to realize its e-commerce potential,* Internet Retailer, Jul. 19, 2016, https://www.internetretailer.com/2016/03/01/india-begins-realize-its-e-commerce-potential.

and services off of such portals. This paper specifically deals with the relationship and impact felt on consumers in the Indian e-commerce sector, ultimately seeking to convince the reader to support the proposition that a separate legislation is needed to be formulated in light of the different dimensions inherent in the e-commerce sector, thereby requiring special attention to deal efficaciously with consumer grievances. Part I of the paper provides a brief description of what constitutes the e-commerce sector, its presence in India. Part II deals with issues arising in online consumer transactions and the lacunas in the present Act. Part III shall focus on International guidelines, relevant Indian statutes along with a comparison with few foreign jurisdictions and possible insertions that may find place in the separate legislation followed by Part IV providing a conclusion to the paper.

Keywords *– E-commerce, India, separate legislation, online consumer transactions.*

UNDERSTANDING E-COMMERCE THROUGH THE INDIAN LENS

E-commerce as pointed out essentially involves transactions that occur through mediums primarily placed over the internet. This would include online shopping portals, travel booking websites or in India even government operated websites such as IRCTC which deal with booking of railway tickets. However, a more formal understanding of the concept could be obtained by relying on the definition which defines e-commerce as the practice of buying and selling goods and services through online consumer services and of conducting other business using electronic devices and the internet.[3] This definition highlights that e-commerce as the name suggests, largely deals with transactions occurring over internet portals in a seller-consumer capacity. This form of business interaction is formally identified as'*Business-to-consumer*' transactions. This refers to a financial transaction or online sale between a business and a consumer.[4] In India, the model of e-

[3] BRYAN GARNER, BLACK'S LAW DICTIONARY (12014).

[4] *Business-to-Consumer,* TECHOPEDIA, July 19, 2016, https://www.techopedia.com/definition/1424/business-to-consumer-b2c.

commerce that is largely prevalent is the Business-to-consumer ["B2C"] model.

From clothing, lifestyle, furniture, electronics to even groceries, close to 42 companies are found to be contributing to the sector's growth trajectory[5] , making the Indian e-commerce sector widespread across various segments. This indicates that the e-commerce sector in India largely deals with the selling of products which a consumer would physically buy in a real marketplace which he now is resorting to do in a virtual market place. The B2C model, allows for such transaction to directly take place between the seller and consumer without any intermediaries.[6] This set up calls for attention to be directed toward specific consumer protection for the consumer is a direct party in such transactions. The current Consumer Protection Act of 1986 ["CPA"] deals majorly with day to day physical transactions, not particularly designed to address transactions ocurring in the virtual market place.

Online shoppers in India were expected to increase to 40 million in 2016 from 20 million in 2013.[7] This denotes the unprecedented and constant rise in internet penetration among the large populace of an emerging economy such as India. According to the Network Readiness Index-2016, India ranks at 91 among 143 nations.[8] This index largely revolves around measuring the efficacy of online policy measures along with internet penetration levels and the general level of skill and knowledge with respect to internet usage present amongst the population of the country.[9] In terms of individual usage India ranks 121st while level of skill is at an upsetting low of 101st. [10]

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[5] ASSOCHAM, GRANT THORTON, LAW & TECHNOLOGY: EVOLVING CHALLENGES AS A RESULT OF FRAUD IN E-COMMERCE SECTOR 3 (2015).

[6] Hina Kausar, *E-Commerce and the Rights of E-Consumers,* MANUPATRA 6 (Jul. 22, 2016), http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=f57d4b30-f306-4840-9c3b-bc5b64df9b64&txtsearch=Subject:%20Information%20Technology/Cyber%20Law.

[7] ASSOCHAM, *supra* note 5 at 5.

[8] W.E.F., *supra* note 1 at 15.

[9] Keith Breene, *What is 'Networked Readiness' and Why Does it Matter,* WORLD ECONOMIC FORUM (2016).

[10] *Supra* note 8 at 29.

These statistics are important in the discourse concerning the need for a separate legislative framework for regulation of e-commerce because it indicates the urgent need for improving as well as protecting consumer status in online transactions. Considering that the rank obtained by India in the aforementioned categories is low, it is all the more necessary to ensure that consumers are protected in the transactions they may undertake through online e-commerce portals. Further, since B2C model prevails largely, it is necessary to have specific regulations protecting consumer interests in such virtual space. The next part of this paper shall shed light on the issues arising in online consumer transactions and the current fallacies and shortcomings existant in present Indian legislations relevant to the current context.

IDENTIFYING CHALLENGES OCCURRING IN E-COMMERCE TRANSACTIONS

In the UNCTAD's 2015 assessment of nations judging e-commerce readiness, India was ranked a low position of 83rd amongst the 130 countries surveyed. It was also reported that India happened to be the nation with the fourth largest number of complaints being made against companies selling online.[11] This establishes that while India may witness an evident rise through its own domestic pioneers of e-commerce such as Flipkart producing huge aggregate sales, it still stands at a low level in this realm from a global stand point. As substantiated earlier, with general low level of skills present in the population with regard to internet usage, e-commerce sales are not every consumer's dream. Most of these buyers are first-timers, having limited knowledge regarding online purchases causing them to return most of the products so ordered.[12] Not only is this expensive and undesirable for the retail companies it also is detrimental to this first time consumer who is typically unaware of the workings of online shopping portals, making exchanges/refunds especially difficult.

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[11] *India ranks 83rd on UN Index assessing e-commerce readiness,* ECON. TIMES, Mar. 29, 2015.

[12] Bhavya Malhotra, *E-Business: Issues & Challenges in Indian Perspective*, 4 GLOBAL J. BUS. MGMT. & INFO. TECH. 11 -15 (2014).

Some of the persisting challenges arising in online transactions & the inadequacies of the CPA are highlighted below:

a. Lack of Consumer laws regulating Terms of Usage & related policies

Most of these online shopping portals available in India clearly indicate as general clauses and conditions their exchange policies or terms of use generally in adherence to the provisions and rules of the Information Technology Act, 2000 ["IT Act"] and not in accordance to provisions of CPA. This indicates a gap in the legislations since the IT Act has been applied in a generic sense. Going by the maxim *lex specialis derogat legi generalia* which is a recognised principle signifying the prevalence of specific law over generalised law,[13] this being a consumer matter would be better addressed if there would be a separate and specific legislation regulating e-commerce transactions.

b. Ambiguity in determining jurisdiction of Courts for redressal of grievances

It is necessary to bear in mind, the international nature of e-commerce. As it operates over the internet which is a borderless medium of exchange of information, it is not uncommon for domestic users to enter into contracts with foreign parties. This brings forth another challenge in consumer protection i.e. of jurisdictional issues.[14] Additionally, due to this accessible nature of the internet, it is a common phenomenon today for consumers to be susceptible even to online fraud and other damaging crimes.[15]

c. Usage of Standard Form of Contracts

Another aspect common to online transactions over e-commerce portals is the usage of standard form of contracts. Most online sales occur in a

[13] Commissioner of Income Tax v. Shehzada & Sons, 1966 A.I.R. 1342.
[14] Justice S. Muralidhar, *Jurisdictional Issues In Cyber Space*, 6 INDIAN J. L. & TECH. (2010).
[15] J. Rothchild, *Protecting the Digital Consumer: The Limits of Cyberspace Utopianism*, 74 IND. L. J. 925 (1999).

pre-mediated manner thereby adding to the convenience of issuing standard form contracts on behalf of the seller. This tends to be unfair especially in the Indian context as most consumers' being first time users lack understanding of the nuances of such agreement. While the appropriateness of the same is a subject of much academic debate, there is no denying that it is used to a very large extent with the burden of the risk being undertaken by the consumer in any case regardless of how unfair the terms may even seem.[16]

d. Absence of credibility in Online Payment Transactions

Due to low levels of awareness in relation to internet usage, online payment is particularly difficult, thereby making consumers vulnerable to the dangers of cyber-crime. Regulations against identity theft, promotion of safety while using credit cards online are largely generated by banks themselves or the Reserve Bank of India, at regular intervals. [17] There is however, an urgent need for consumer laws to also be drafted in a manner to incorporate measures that shall allow for redressal of such problem in any situation, even wherein the bank has not issued a regulation so as to guarantee protection of the consumer at every point of his transaction.

From the general problems, let us now explore the protection of consumers in online platforms guaranteed under CPA and gauge as to how far the same is effective.

e. The confined definition of 'goods' under CPA

In the beginning of the CPA itself, one can notice how the Act is said to be applicable to goods and services.[18] While this appears straightfoward, it is complex since goods as such have not been defined in this Act

[16] Hossein Kaviar, *Consumer Protection in Electronic Contracts*, 2 INT'L ARAB J. E-J. 96, 98 (2011).
[17] *See* DPSS (CO) PD No.1462/02.14.003/2012-13 (Feb. 28, 2013).
[18] § 1(4), Consumer Protection Act, 1986.

calling for reliance to be placed on alternate statutes such as the Sale of Goods Act-1930 ["SOGA"] etc.

For instance, the Apex Court has provided wide interpretation to products such as software etc for incorporation under the purview of goods under SOGA.[19] Considering the large range of products sold at e-commerce portals, there are inevtiably occasions when the consumer may encounter problems with regard to purchase of a product not as such recognised under CPA. Therefore, it highlights the need for widening the scope and definition of the Act to include wide range of products sold through such virtual market to ensure that at no point the consumer is left without a remedy under consumer law.

CPA PROVIDES REMEDIES IN ONLY THOSE ONLINE TRANSACTIONS THAT MAY INDIRECTLY SEEM AS DIRECT, PHYSICAL TRANSACTIONS

CPA specifically provides that it is applicable in case of deficiency of services or defect in goods[20], so if, in case of an online transaction such instance arises the consumer may find appropriate remedies under the Act. However, quite often it may be that there emerges a deficiency in the manner of delivery of the goods in online transactions. The Act lays down no specific provision dealing with such grievance thereby causing further inconvenience and lack of any protection to the consumer.[21]

With the above highlighted issues, we can infer that there is a diverse range of dangers existing, when consumers are seeking to enter into online transactions. The same corroborates the view that they ought to be guaranteed protection under consumer laws specifically not only for the sake of uniformity and subject matter relevance but also for public convenience. A

[19] Tata Consultancy Services v. State of Andhra Pradesh, (2005) 1 S.C.C. 308.
[20] *Supra* note 17 at § 2(c)(ii) & (iii).
[21] Kanika Satyan, *E-Commerce and Consumer rights: Applicability of Consumer Protection Laws in Online Transactions in India*, (Aug. 1, 2016, 10:30 PM), http://ssrn.com/abstract=2626027.

single piece of legislation, while open to amendments in future would serve as the one final stop for consumers and adjudicators alike to address and prevent emergence of grievances, also enhancing general growth and credibility of the e-commerce sector as a whole. The next part of the paper shall deal with international guidelines, relevant in the present context and their possible incorporation in the Indian model law, which the author proposes.

DRAWING INSPIRATION FROM THE WORLD – A STEP TOWARD A COMPREHENSIVE LEGISLATION

The CPA is a comprehensive take on the consumer protection objective, so far as physical transactions are concerned. In terms of affording protection to online consumer transactions, the Act despite its implied application, does not fully address all kinds of grievances the consumer may encounter while engaging in contracts over such virtual space. The Consumer Protection Bill, 2015 ["Bill"] has been formulated with the aim of widening the scope of such laws in India. The first positive step toward the direction of ensuring consumer protection over online domains can be observed in the widening of the definition of consumer which includes those engaging in online transactions as well.[22] While the effort is laudable, much more needs to be done. Going by international standards, e-commerce is an upcoming industry requiring to be afforded with the same level of concern from governments in terms of consumer protection just as any other sector. This principle has been consistently mentioned, by reputed organisations in their reports, for instance the Organisation for Economic Co-operation and Development ["OECD"] Recommendations of 1999 & 2016[23] and the UN's guidelines for Consumer Protection ["UNGCP"].[24]

The UNGCP provides for a set of general principles created with the aim of catering to the diverse situations consumers may be involved in, including

[22] *The Consumer Protection Bill-2015*, PRS LEGISLATIVE RESEARCH (Aug. 1, 2016, 10:12 PM), http://www.prsindia.org/billtrack/the-consumer-protection-bill-2015-3965/.
[23] OECD, CONSUMER PROTECTION IN E-COMMERCE (2016).
[24] UNCTAD, UNITED NATIONS GUIDELINES FOR CONSUMER PROTECTION (2016).

B2C transactions. Part V(A) of this document is particularly significant, in terms of providing a concrete direction to national governments while legislating e-commerce specific laws. Some of the pointers these guidelines lay down are as follows:

- Maintaining clarity in contract terms thereby preventing unfairness
- Transparency in confirmation, cancellation, return and refund transactions
- Securing payment mechanisms and consumer privacy.[25]

These pointers relate directly to the recurring issues in online transactions previously mentioned in this paper thereby substantiating the fact that a separate legislation so formulated requires to contain specific provisions dealing with each issue in a different and distinct manner. Generic provisions present in the CPA or the Bill cannot cater to the same effectively. The author shall now put forth positions on this subject matter by illustrating two specific examples of regional measures taken to ensure consumer protection & other consumer redressal mechanisms in this regard, which can prove to be a source of inspiration to the Indian predicament.

1. European Union Directives on 'Distance Selling'

The European Union Directives on Distance Selling apply on B2C transactions via means of distance communication, thereby making it relevant to our discussion.[26] It also covers other wide range of transactions that not only occur through interactive shopping websites but also those which partake in conducting transactions in response to letters, fax, emails, phone calls etc.[27] The same has however been replaced by the Directive on

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[25] *Id.* at 11.

[26] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (Jul. 29, 2016 5:32 PM) *available at,* http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Al32014.

[27] DISTANCE SELLING REGULATIONS (Jul. 29, 2016 5:47 PM) *available at,* http://www.consumer.gov.uk/ccp/topics1/guide/distsell.htm.

Consumer rights in 2011[28], however for the purpose of our discussion, the erstwhile directive shall be referred to.

Following are certain relevant articles in the directive, which may be incorporated in the separate legislation concerning e-commerce:

i. Article 4 – Prior information:

This article calls for certain information to be disclosed to the consumer, prior to the completion of the contract. This would include supplier's details, description of goods, price, taxes levied, delivery charge details etc. Additionally it shall mandate for an important declaration to be made under this, informing the consumer how long an offer lasts for and how long shall the discounted price remain valid for.[29] This is an important aspect in e-commerce transactions, especially in the Indian situation considering how there is a large market of first time buyers who are usually lured into engaging in online shopping on the pretext of huge discounts. While certain websites do so as a matter of company policy, it is appalling that their abstention may be condoned as this exercise is not required by law. [30] Considering that events such as the disastrous Flipkart sale has occurred in the past wherein consumers were charged incorrectly despite applying for discount as promised by the retailer[31], such disclosure of information becomes all the more necessary.

ii. Article 6 – Right to Withdrawal:

This is another vital component for guaranteeing consumer protection, especially in light of online transactions. This is necessary because the

[28] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights (Jul. 29, 2016 11:22 PM*) available at,* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0083&rid=1.

[29] Directive, *supra* note 25.

[30] *See* DIVISION TWO COMMENTARY ON CONSUMER PROTECTION ACT, *available at* http://ncdrc.nic.in/bare_acts%5C1_1_2.html.

[31] Sahil Mohan Gupta, *Flipkart Apologises to its Users for Big Billion Day Fiasco*, INDIA TODAY (Oct. 8, 2014).

consumer is unable to see the product/ ascertain the nature of the service provided before concluding the contract. Further, it is not always that every online shopping portal allows for the inspection of goods before final acceptance is made. Since the same right is incorporated in other legislations such as SOGA[32], it is pertinent that such provision be incorporated even in e-commerce legislations.

iii. Incorporating a wider definition of Services

Another significant directive generated from the EU was in 2000, which specifically dealt with e-commerce.[33] While it focused on measures specially suited for its own economies, it sought to include various kinds of services in its definition of 'services' in the directive. Some services include online information services (online newspapers etc), online selling of products & services (books, financial services and travel services), online advertising, professional services (lawyers, doctors, estate agents), entertainment services and basic intermediary services (access to the Internet and transmission and hosting of information). Intrestingly, it includes even those free of charge services which may be funded through advertising and sponsorship. [34] This is relevant because currently CPA does not cover free services of any kind, with such inclusion in a new legislation it will be suitable to the e-commerce situation since advertising on many portals is the key factor toward making people choose certain products etc; which are stated to be free of charge.

iv. Combatting the Unfair Terms Demon

A helpful tool in addressing the challenges posed by imposition of unfair term contracts, is the Directive on Unfair Contract Terms[35]. As

[32] § 41, The Sale of Goods Act, 1930.
[33] *See* Directive 2000/31/EC on electronic commerce, *available at* http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32000L0031.
[34] *E-Commerce Directive,* EUROPEAN COMMISSION (Jul. 24, 2016 3:48 PM), *available at* http://ec.europa.eu/internal_market/e-commerce/directive/index_en.htm#maincontentSec1.
[35] Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31993L0013.

mentioned earlier, e-commerce contracts often come in standard contract forms which is detrimental to consumers. While this directive covers this subject matter, an amendment is sought with respect to digital content contracts. Most online portals sell digital softwares, e-books; with a common restriction levied on the consumer's right to private use i.e. making personal copies etc. This is a common grievance, demanding coverage in the legislation for e-commerce, while dealing with unfair contract terms in general since the sale of e-books, mp3 files all commonly occur through such forums.[36]

2. South African E-commerce Laws.

South Africa's approach toward e-commerce deserves mention and can be an inspiration for the Indian predicament as well. *The Electronics Communications and Transactions Act, 2002* ["ECT"][37], which is their main legislation directed toward covering electronic transactions defines consumers in a way which includes covering of B2C transactions[38], which commonly occur in e-commerce portals. Appearing to have incorporated every aspect of online transactions, not strictly confining it to consumer laws, sections 42 to 49 clearly provide for provisions as mentioned under EU directives etc; to cater to online consumers making it a specific and comprehensive legislative set of action for the said purpose.

EMPOWERING CONSUMERS – MECHANISMS FOR CONSUMER GRIEVANCE REDRESSAL

Besides the aforementioned examples, there have been several other countries which have formulated e-commerce regulations and have provided form to novel and feasible measures for smooth consumer grivance redressal which deserve due attention. They include countries such as the UK, USA,

[36] Ursula Pachl & Agustin Reyna, *Unfair Contract Terms in Business-to-Consumer Contracts in the Proposed Common European Sales Law*, 1 EUROPEAN CONSUMER ORG. 1 (2012), http://www.beuc.eu/publications/2012-00480-01-e.pdf.
[37] The Electronic Communications and Transactions Act, 2002.
[38] § 1, The Electronic Communications and Transactions Act, 2002.

Malaysia etc. Special mention should be made with respect to the National Consumer Policy in Malaysia[39], which highly recommends the realisation of the idea of consumer 'self-help.' This approach focuses on consumer literacy programmes which seek to educate consumers on online contracts, their workings, unfair terms etc; so as to produce an alert and diligent consumer who rationally evaluates the risks involved in e-commerce transactions.

With respect to consumer grievance redressal mechanisms, several nations are focusing on the alternate dispute resolution ["ADR"] mechanism approach. While consumer forums have been the norm, as even in India, ADR is the future [40]. Not only does this save time and costs, it does not seem as a convenient option even to sellers for it saves them the detrimental publicity which suits at court would normally cause to their brand image. Advantageously, such a mechanism would allow for cross-border disputes which largely occur over internet transactions to be addressed in a more hassle-free manner than if the same would have to be dealt with through separate domestic courts which may not only be impeded by jurisdictional issues but also add to the docket explosion already happening in Indian courts.

Another interesting approach is adopted by the USA's Federal Trade Commission ["FTC"], which focuses on consumer redressal either through resorting to means of ADR[41] or self-help measures[42]. This would too serve as a good approach that may be incorporated in the Indian e-commerce consumer protection scheme.

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[39] National Consumer Policy, Official Portal Of Ministry Of Domestic Trade, Co-operatives And Consumerism (2016).

[40] Fahimeh Abedi & Sakina S. Yusoff, *Consumer Dispute Resolution: The way Forward* 1, *available at* https://www.academia.edu/994591/CONSUMER_DISPUTE_RESOLUTION_THE_WAY_FORWARD.

[41] Federal Trade Commission, Alternative Dispute Resolution On Consumer Information (2016).

[42] Federal Trade Commission, Solving Consumer Problems On Consumer Information (2016).

CONCLUSION – FINDING A LEGISLATIVE SOLUTION

'Consumers need the machinery of nation states in order to influence the behaviour of suppliers; they lack the power to do so on their own.'[43]

Legislative action in any federal structure plays a role essential to the proper functioning of its citizenry. Consumer protection is an integral subject to be covered by regulations for in a free market arena, such as the Indian economic landscape, it would be impossible to ensure that consumers from all strata's of society are in an equal and capable position for protecting themselves when up against corporate giants present in the e-commerce sector. India, as has been constantly reiterated in the paper, is set to witness large-scale growth in the e-commerce market with an increase not only in buyers but also suppliers. With the age of online shopping taking over, it is necessary for there to be a legislation that seeks to cater to the dynamic needs of this unique predicament. The present legislations be it CPA, IT Act etc; while all being laudable efforts in their own footing, fail to address the diverse and distinct nature of consumer needs which arise in the lives of e-consumers. A separate legislation becomes necessary because ultimately the diverse areas the aforesaid Acts cover happen to constitute the subject matter of e-commerce contracts in a rather fragmented manner not conducive for ensuring proper redressal. Not only will a separate and single legislation for e-commerce guarantee that each diverse issue is specifically dealt with at length, it shall also provide uniformity and be easier to access by consumers, sellers, lawyers and judges alike. The proposition of a separate legislation is not alien, considering that most modern economies witnessing the growth of e-commerce have governments enacting specific laws catering to this new-age phenomena. The urgency of such enactment is high, since today India is a hub for e-commerce giants, who often restrict their actions solely in adherence to their internal policy, granting them a dangerous amount of discretion. With a specific law in place, this discretion is checked and consumer rights remain better protected. While it may be argued that

[43] J. Goldring, Consumer Protection, The Nation State, Law, Globalization & Democracy 15 (2003).

with the CPA Bill of 2015, the simple option to pursue would be incorporating these provisions into the bill which deals with physical seller-buyer transactions. The fallacy in such rebuttal is that the object of CPA has always been restrictive and consequent redressal mechanisms set forth in this legislation is one designed for physical transactions. E-commerce deserves a separate approach because it contains several layers even when analysis is made solely on the dispute redressal mechanism. The internet has made e-commerce a borderless phenomenon, which CPA as legislation was never envisaged to deal with. As suggested by the author while illustrating foreign examples, 'self-help' measures for the consumer form a key feature. CPA as such does not focus on these mechanisms and simply mentions the need for consumer education without much elaboration. As emphasised in previous parts of the paper, CPA until now has been dealing with e-commerce matters in a restricted fashion, in an extremely implied sense. This would indicate that several situations unique to e-commerce transactions go uncovered leaving the consumer in a vacuum deficient of any protection whatsoever.

E-commerce requires attention with respect to wide reaching subjects such as data protection, secure payment avenues, prevention of fraud, relaxation of contract terms, widened scope of definition clauses etc. Incorporating all of this in CPA, is a cumbersome task for bridging the gap between physical transactions' related provisions along with online transactions related provisions. Taking note of the increasing internet penetration happening daily in India, it is therefore, imperative to produce a fool proof legislation that shall effectively protect all these diverse needs of the new age Indian e-consumer.

PLEA BARGAINING IN INDIA: STRIKING A NEW 'DEAL' WITH CRIMINAL JURISPRUDENCE

Rupesh Aggarwal* & Arnav Behera**

Abstract

With speedy justice being the most talked after term in the Indian judicial system, attention is brought towards the concept of plea bargaining. Plea bargaining has been the cynosure of attention ever since its introduction in the U.S.A. While there exists a plethora of scholarly literature on the subject, the gap between multifarious criticisms and constructive solutions has not been coherently bridged till now. Although the legislature has made an effort to give the concept a legal recognition, the crux of the mechanism remains restricted. This paper endeavours to reformulate the debate surrounding the current scheme of things, analyse the prevalent criticisms and further evaluate the viability of widening the scope of plea bargaining with regards to the speeding up of the criminal justice delivery system in our country by having all kind of offences covered within its conceptual framework.

Keywords *– Plea bargaining, India, Criminal jurisprudence, USA.*

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INTRODUCTION

In 2014, Information Commissioner Shailesh Gandhi declared that with 2.5 lakh under trials serving in prisons, India became the 10th "worst" country in terms of proportion of under trials serving in prisons.[1] With a backlog of over 3 crore criminal cases pending before Indian courts, the need for an introspection is more than ever.[2] A true appreciation of these shocking statistics requires the analysis of concepts, ideals, principles and frameworks which try and reduce such backlog of cases and lessen the ignominy to the accused person. One such system as ingrained in the Indian legal system is the idea of "plea bargaining". The conceptualization of plea bargaining can be compared to a scale which tries to balance out the interest of all the parties involved in the system. On the one hand it seeks to present the state with a brilliant opportunity to get the case disposed off in a quick and transparent manner, and on the other it gives the option to the accused to save himself from the rigours of a long trial which has become a routine in Indian judicial practise. In 2014, 35,000 IPC cases were disposed by plea bargains[3]. It has becomes pivotal for us to understand the entire mechanism of plea bargaining in the Indian criminal justice system. The process is criticised for a myriad of reasons. The safeguards incorporated in Part XXI-A of the Code of Criminal Procedure, 1973 (hereinafter referred to as CrPC) is testimony to the fact that the idea is still viewed from a hypercritical point of view. While these safeguards do help in mitigating the ills attached with the system, they do not provide a comprehensive solution to the general conceptual framework of the idea. This essay is geared towards finding solutions to the traditional criticisms the concept has attracted and to examine the viability of extending the concept to all criminal offences irrespective of heinousness. In the initial part, focus will be geared towards

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[1] Divya Gandhi, *65% of prisoners are undertrial*, THE HINDU, (May 12, 2016).

[2] *More Than 3 Crore Court Cases Pending Across Country,* PRESS TRUST OF INDIA, http://www.ndtv.com/india-news/more-than-3-crore-court-cases-pending-across-country-709595 (last visited Dec. 7, 2014).

[3] *Five states start culling stale criminal cases, cut pendency*, TIMES OF INDIA, http://timesofindia.indiatimes.com/india/Five-states-start-culling-stale-criminal-cases-cut-pendency/articleshow/48877363.cms (last visited Sept. 9, 2015).

the general jurisprudence of plea bargaining. In the latter half, solutions to the old shibboleths will be brought in, along with a comparative analysis of the American and the Indian ideas. The winds of change sweeping through the birthplace of the concept - the U.S.A, the socio-economic realities and emerging debates concerning the aspect of penology can hardly be ignored.

JURISPRUDENCE OF PLEA BARGAINING: AN INDIAN OVERVIEW

A plea bargain refers to an agreement between the defence and the prosecution in which a defendant may waive his rightand plead guilty to all or some of the charges in exchange for either a lighter sentence or the dropping of some charges by the prosecution.[4] Simply put, it involves Pre-trial negotiations which lead to a waiver of rights on the part of the defendant in consideration of leniency from the prosecution.[5] Black law dictionary defines plea bargaining as, *"the process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to the Court's approval. It usually involves the accused pleading guilty to a lesser offence or to only one or some of the counts of a multi-count indictment in return for a lighter than that possible for the graver charge."* [6]

There are several forms of bargains that may be struck namely, charge bargains, sentence bargains, evidentiary bargains and compensatory bargains. Definitions may be moulded to suit each form and the jurisdiction in which it is negotiated, due to which a strict, all-encompassing definition has been difficult to formulate. The problem however is more of an academic consideration rather than practical application. In this regard, there arises an urgent need to evaluate the current position of plea bargaining in India, with

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[4] Dawn Reddy, *Guilty Pleas and Practice,* 30 AM. CRIM. L. REV. 1117, (1993).

[5] Sugandha Nayak, *Plea Bargaining: An Overview*, MONDAQ, http://www.mondaq.com/india/x/273094/trials+appeals+compensation/Plea+Bargaining+An+Overview (last visited Nov. 5, 2013).

[6] BRYAN GARNER, BLACK'S LAW DICTIONARY (2014).

reference to judicial precedents, statutory developments and provisions under the CrPC.

A. Judicial precedents: A shift in stance

Initially, Indian courts were adverse of incorporating the idea within the framework of the criminal justice system. In the case of *Murlidhar Meghraj Loya v. State of Maharashtra*[7], the Supreme Court labelled plea-bargaining as a 'mere trading activity' in the process of dispensation of justice. Again in *Kasambhai vs. State of Gujarat*[8], Justice P.N. Bhagwati vociferously asserted that the concept of plea-bargaining will be violative of constitutional principles, since it dispenses with a magistrate's responsibility to scrutinise evidence which is the foremost requirement in the formation of an independent opinion after applying one's mind to it. In this regard, the Supreme court in the cases of *Kachhia Patel Shantilal Koderlal v. State of Gujarat and Anr*[9] and *Thappaswamy vs. State of Karnataka*[10] also disapproved the practise and termed it unconstitutional. In *Kripal Singh v. State of Haryana*[11], the Apex Court observed that minimum sentence prescribed by law cannot be bypassed just because a plea bargain had been arrived at. Further in *State of Uttar Pradesh v. Chandrika*[12], the court held,*"It is settled law that on the basis of plea bargaining Court cannot dispose of the criminal cases. The Court has to decide it on merits. If accused confesses his guilt, appropriate sentence is required to be imposed."*

These precedents confirm that the Apex Court had always viewed the idea from a critical perspective. This position changed after the amendment to the CrPC in 2005. Indicative of this fact is the stance taken by the Supreme court on the idea of moving the amendment in the case of S*tate of Gujarat vs. Natwar Harchandji Thakor*[13], wherein it held that plea bargaining as a

[7] A.I.R. 1976 S.C. 1929.
[8] A.I.R. 1980 S.C. 854.
[9] 1980 Cri.L.J. 553.
[10] (1983) 1 S.C.C. 184.
[11] (1995) 5 S.C.C. 649.
[12] 2000 Cr.L.J. 384 (386).
[13] 2005 Cri.L.J. 2957.

concept, though filled with conceptual fallacies, has become a necessity keeping in mind the changed landscape of criminal justice in our country.

B. Plea Bargaining as esconsed under The Code of Criminal Procedure

Plea bargaining became entrenched under Part XXI-A (Section 265A - section 265L) of the CrPC by way of the Criminal Law (Amendment) Act, 2005 following a series of recommendations from the 142nd and 154th Law Commission Reports and the Justice Malimath Committee. Section 265A states that the scheme will apply[14] only when the offence in question does not attract either a death sentence or a maximum punishment of imprisonment for more than seven years. Further, socio-economic offences, offences against a woman or a child below the age of fourteen years are excluded from the purview of this chapter. The process begins after the accused submits an application to the court.[15] Care has been taken to ensure that the accused files the application voluntarily by making it mandatory to submit a sworn affidavit to that effect.[16] The accused would be precluded from plea bargaining if he has been formerly convicted of the same offence.[17] As an added safeguard, the code mandates the court to examine the accused *in camera* where the other party in the case is absent.[18] Only after the Court is satisfied of the voluntariness of the application will it allow the parties to negotiate and arrive at a mutually satisfactory disposition.[19]

Section 265C provides guidelines for reaching a mutually satisfactory disposition which chalks out the contours of the agreement to be reached between the accused, the prosecution, the police officer who investigated the case and the victim.[20] After this, a report[21] must be prepared which is signed

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[14] § 265A, Code of Criminal Procedure, 1973.
[15] § 265B (1), Code of Criminal Procedure, 1973.
[16] *Id.* § 265B (2). In the affidavit the accused has to state that he has voluntarily preferred plea bargaining after understanding the nature and extent of punishment provided in the law.
[17] *Id.*
[18] *Id.* § 265B (4).
[19] *Id.* § 265B (4) (a).
[20] *Id.* § 265C. Herein the court sees to any possibility of accused getting coerced while the process of mutually satisfactory disposition between various parties are going on.

by the presiding officer of the court and all other participants in the negotiations[22]. The court is then bestowed with the responsibility to award necessary compensation to the victim and decide on the quantum of punishment for the accused.[23] The right to appeal is not provided for except under Articles 136, 226 and 227 of the Constitution.[24] Statements given by the accused during the process cannot be used for any other purpose.[25]

EVALUATING THE AGE OLD CRITICISMS

John Langbein had said, *"A legal system will do almost anything, tolerate almost anything, before it will admit the need for reforms in its system of proof and trial."*[26] Justifying the statement, scholars from all over the globe have raised apprehensions over the concept where an accused can bargain with the state for mitigating certain aspects of his punishment. From questioning the voluntariness of the accused to being empathetic to the rights of the victim, plea bargaining has met with skepticism even after its adoption by various judicial systems.[27] The result of this has been a restricted application of this unique concept which can solve many ills persisting in legal systems around the world. The subsequent sections are an effort to evaluate these criticisms in the Indian context and provide coherent answers to them, by establishing linkages with the American experience, which still remains the primary model of the plea bargaining system.

A. The rationale behind pleading guilty: busting the myths

In recent times, a great debate has emerged in the USA, where 90-95% of cases at the federal and state levels are resolved through Plea Bargaining,[28]

[21] *Id.* § 265D.
[22] *Id.*
[23] *Id.* § 265E.
[24] *Id.* § 265G.
[25] *Id.* § 265K.
[26] John H. Langbein, *Torture and Plea Bargaining,* CHI. L. REV.19 (1978).
[27] *Department of Justice*, GOV'T CAN., http://www.justice.gc.ca/eng/abt-apd/icg-gci/pb-rpc/pb1-rpc1.html; Martin Kerscher (last visited Mar. 3, 2016), *Plea Bargaining in South Africa and Germany,* SUN SCHOLAR RES. REPOSITORY, http://scholar.sun.ac.za/handle/ 10019.1/80257 (last visited Apr.13, 2016).
[28] LINDSAY DEVERS, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY, BUREAU JUST., U.S. DEP'T JUST. (2016).

apropos of its fairness. A rough estimate suggests that out of 2.2 million Americans in prison, more than 2 million went in for a plea bargain and of them, about 20,000 innocents pleaded guilty.[29] Plea bargaining for some leads to a position where the accused is stuck in 'the place between the rock and the whirlpool'.[30] In 1975, Alaska banned plea bargains due to this controversy.[31] Opponents to Plea Bargaining have often cited this American Controversy in their arguments. The following analysis of the problem will show that the problem in the U.S lies not in the concept but in its application and the approach of its judicial system.

i. Dissimilar trends and legal practices

The theory of punishment followed in the USA is more retributive than reformative. In the Alabama criminal code, theft of the first degree[32] is treated as a class B offence which envisages a punishment of imprisonment for a term which may not be more than 20 years but not less than 3 years. In contrast to this, Section 379 of the IPC provides for a punishment of imprisonment for a term which may extend to 3 years.[33] Since 1991, India has conducted 26 executions[34] whereas the USA conducted 35 just in 2014[35]. In the US, the stakes involved in going for a trial are visibly higher than in India. A plea bargain in a theft case has the potential for a difference of 17 years in the US but just 3 years in India. The quantum of punishment itself becomes the first factor coercing

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[29] Jed S. Rakoff, *Why innocent people plead guilty*, N.Y. REV. BOOKS, http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilty (last visited Nov. 20, 2014).

[30] Frost & Frost Trucking Co. v. Railroad Commission, 271 U.S. 583, 593 (1926).

[31] Michael L. Rubinstein & Teresa J. White, *Alaska's Ban on Plea Bargaining*, L. & SOC'Y REV. 367, (1979).

[32] Code of Alabama, § 13A-8-3, U.S.C. (2013).

[33] § 372, Indian Penal Code, 1860.

[34] Himanshi Dhawan, *Just 4 of 26 hanged since '91 Muslims'*, TIMES OF INDIA, http://timesofindia.indiatimes.com/india/Just-4-of-26-hangedsince91Muslims/articleshow/48430762.cms?utm. (last visited Aug. 11, 2015).

[35] Death Sentences and Executions 2014, *Amnesty International USA*, (last visited Mar. 31, 2016), http://www.amnestyusa.org/research/reports/death-sentences-and-executions-2014.

innocents to enter into plea bargains. This has been termed as equivalent to 'soft coercion'.[36] Innocent, risk-averse defendants may not be willing to take the gamble of going to trial so as to receive an exceedingly severe sentence, and instead, will choose to plead guilty to ensure a more lenient sentence.[37] Evidently, the quantum of punishment awarded by Indian courts is much more realistic. The burden on the accused in making a decision will not be as towering as in the US. The stakes will not become a coercive factor in the Indian context.

The practice of electing judges in the US also becomes a factor in this regard. The general trend has been that "tough on crime" judges get more votes than "soft" judges. There is an incentive for judges to pronounce harsh sentences in the US.[38] On the other hand, the independence and autonomy of the judiciary in India allows judges who are students of law to impose sentences as the law deems fit and not what the mob deems fit. An accused in India will not risk as much by going to trial. If the accused genuinely believes that he is innocent, taking the risk of going through the rigours of trial is more viable in India.

ii. Evaluating the legal aid scheme

The US Congress created the Legal Services Corporation in 1974 to provide for legal aid to persons who could not afford it. This was in furtherance of the VI[th] Amendment which provided for the right to be represented by a counsel.[39] Implementation of legal aid has suffered from chronic underfunding. A report titled *Documenting the Justice Gap in America* states, "For every client served by a

[36] Arthad Kurlekar & Sanika Gokhale, *The Unconstitutionality of Plea Bargaining in the Indian Framework: The Vitiation of the Voluntariness Assumption*, INDIAN L. J., (2016).
[37] Douglas D. Guidorizzi, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L. J., 771-772 (1998).
[38] Rakoff, *supra* note 29.
[39] U.S. CONST. amend. VI.

LSC-funded program, at least one person who sought help was turned down because of insufficient resources. Only a very small percentage of the legal problems experienced by low-income people (one in five or less) are addressed with the assistance of either a private attorney (pro bono or paid) or a legal aid lawyer."[40] A survey in *Consumer Reports* found that the median legal fee charged by lawyers defending criminal cases was $1,500. A defendant in the US charged with misdemeanour could be expected to shell out $2,000-$3,000.[41] Poverty often acts as a prominent factor forcing even innocent defendants to opt for a plea bargain. Serving time in prison without going in for a long drawn trial is a lot less expensive and affordable affair since under the conventional trial system, an accused might secure an acquittal but he may sink into debt and bankruptcy by that route.

In India this position requires deep circumspect. The Rangarajan Committee estimated 29.5% of Indians to be below the poverty line.[42] Going by this statistic it may be inferred that poverty in India will also make plea bargain a very attractive option even for innocents. In this scenario, implementation of the Legal Services Authorities Act, 1987 is of utmost importance. The National, State and District level Legal Services Authorities have been providing for legal aid in India. Until its implementation is complete and every needy person is assured of free legal aid by the state, introducing plea bargaining will be a risky proposition. Legal aid and Plea bargaining will go hand in hand. An accused person must be guaranteed of a fair trial complete with representation by

[40] DOCUMENTING THE JUSTICE GAP IN AMERICA, A REPORT OF THE LEGAL SERVICES CORPORATION 5 (2012).
[41] Sara J. Berman, *Paying for a private criminal deffense attorney,* NOLO L. FOR ALL (Apr. 15, 2016), http://www.nolo.com/legal-encyclopedia/paying-private-criminal-defense-attorney.html.
[42] GOV'T OF INDIA PLANNING COMMISSION, REPORT OF THE EXPERT GROUP TO REVIEW THE METHODOLOGY FOR MEASUREMENT OF POVERTY (2014).

counsel and provided with legal aid when he cannot afford it. This vindicates the position that an innocent person should not plea bargain just because of the fear that the system shall fail him. Fortunately, legal aid in India is on track.[43]

iii. Role of the prosecution, the defence and, the judge

In American practice, it is the prosecution which generally dominates the motion for a plea bargain.[44] Armed with police investigation reports, forensic reports and all the evidence, the prosecution who has multifarious roles is at a position to make an informed deal[45] and to force the defence into accepting it.[46] On the other hand, most defence counsels get to meet their clients just about once before the prosecution initiates the deal. One meeting may not be enough to even get the facts straight, let alone evaluate the viability of a defence strategy for a trial. The defence and the prosecution are certainly not at a level playing field. The accused is very often asked to accept the plea bargain within a short deadline. It is not uncommon for the defence counsels to force their clients into the bargain[47], especially if the counsel has been provided through a legal aid scheme who has no personal interest in serving their clients. All this under the incommensurable strain of arrest and detention. Under such circumstances, it is not difficult for an accused, even an innocent one, to crack under the pressure and enter the bargain.

The American Bar Association's Standards for Criminal Justice states, "The trial judge should not participate in plea discussions,"

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[43] HISTORY OF LEGAL MOVEMENT IN INDIA, NALSA NATIONAL LEGAL SERVICES AUTHORITY (2016).
[44] Rakoff, *supra* note 30.
[45] Tina Wan, *The Unnecessary Evil Of Plea Bargaining: An Unconstitutional Conditions Problem And A Not So Least Restrictive Alternative*, 17 S. CAL. REV. L. & SOC. JUST., 38 (2007).
[46] Alabama v. Smith, 490 U.S. 794 (1989).
[47] Thomas R. McCoy & Michael J. Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 STAN. L. REV. 887 (1980).

> and the ABA's Professional Ethics Committee has ruled, "A judge should not be a party to advance arrangements for the determination of sentence whether as a result of a guilty plea or a finding of guilty based on proof."[48] Barring a few jurisdictions, judges do not intervene in plea bargains. If wronged, the defence has no neutral third party to appeal to. This puts the prosecution in the "driver's seat". These factors should not affect the accused in the Indian system for the simple reason that the CrPC allows for the active participation of the Judge during the entire process, even at the time of sentencing. The Judge is a neutral facilitator and a final authority.[49]

Furthermore, it is the accused who must initiate the motion of plea bargaining by filing an application.[50] Additionally, Section 265B of the CrPC guarantees voluntariness on the part of the accused.[51] This allows the defence leeway to weigh its options and test the strength of their case. The court has been granted all the powers vested in respect of bail, trial of offences and other matters relating to the disposal of a case under a plea bargain.[52] The safeguards provided in the Indian system mitigate all concerns regarding the monopoly of the prosecution in the process.

B. Societal interest and deterrence

The primary objective of Criminal Law is to provide for deterrence to people from committing acts of depredation. Criminal Law is the instrument with which the state guarantees that the rights of persons shall not be infringed by the private acts of other persons. The state essentially maintains law and order, peace and tranquillity in society through the administration of criminal law. By punishing a criminal, the state sets an example to society.

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[48] Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining,* 76 COLUM. L. R. (1976).
[49] § 265B (1), Code of Criminal Procedure, 1973.
[50] *Id.* § 265B (1).
[51] *Id.* § 265B (4).
[52] *Id.* § 265H.
[53] (1968) 3 S.C.R. 34.

Opponents to Plea Bargaining claim that when a state makes an agreement with a criminal, the entire objective behind criminal law is compromised. In *Madanlal Ram Chandra Daga v. State of Maharashtra*[53], the Supreme Court observed: *"In our opinion, it is very wrong for a court to enter into a bargain of this character. Offences should be tried and punished according to the guilt of the accused."*

A deeper examination of this apprehension has been undertaken below to counter this claim.

i. Balancing speedy justice with fair justice

Does plea bargaining sacrifice justice in the name of faster disposal of cases? Answering in the negative, Justice Malimath states, " Plea bargaining presents an option for an accused to negotiate the sentence, wherein final result is only a lesser sentence, not acquittal."[54] In addition to this, it cannot be held that the deterrence effect of law is done away with. The punishment meted out to an accused who pleads guilty to the charges will still be harsh, though less than what would have been the if he had been convicted after a trial. In the case of *Brady v. United States*[55], due to a guilty plea taken by the accused, the trial court imposed a sentence of 50 years imprisonment (later reduced to 30 years) even though the maximum punishment under that offence was the death penalty. The case testifies to the preservation of the deterrence effect.

ii. Focus on reformative justice

In penological parlance, the reformative theory of punishment is always preferred over the deterrence and retributive theories.[56] The

[54] Shankar Gopalakrishnan, *Recommendations of the Malimath Committee on reforms of Criminal Justice System,* P.U.C.L. (Apr. 5, 2015), http://www.pucl.org/Topics/Law/2003/malimathrecommendations.htm.

[55] 397 U.S. 742 (1970).

[56] Narotam Singh v. State of Punjab, A.I.R. 1978 S.C. 1542.

prime object of punishment should be to reform the offender. Critics of this theory however claim that criminals under this theory will not be sent to prisons but to "dwelling houses" by making it easy-going for them.[57] An ideal punishment takes into account all the theories of punishment. Plea bargaining will help the Justice system devise such an ideal form of punishment which would benefit both the individual and the society at large, thereby presenting a balanced picture in the field of penology for criminal jurisprudence. A person who pleads guilty will always be more akin towards reforming himself. A criminal who regrets his acts should not be punished in the same manner as one who remains unapologetic. Concessions to accused persons pleading guilty will encourage the person to reform himself into a responsible citizen. A maximum punishment removes all hope and motivation for reform from a criminal's mind. As an illustration, an analysis of Section 302 of the IPC 1860 may be made. It prescribes for either the death penalty or life imprisonment for the offence of murder.[58] A criminal convicted of murder has nothing to encourage him to reform when all hopes of a normal life have been removed. In a way, he is condemned to lead a life in prison. On the other hand, if concessions may be granted to an accused entering a guilty plea even to the offence of murder, he is given a motivation to rehabilitate himself. Via plea bargaining, the state gets an opportunity to impose a sentence on the convict which not only acts as a credible deterrence to society but also ensures that the convict will try and reform himself in hope of future reintegration with society.

C. Safeguards of a trial procedure remains intact

Does plea bargaining lead to the degradation of safeguards as ensured in the conventional trial system?[59] Presumption of innocence, onus of proof

[57] K.D. GAUR, TEXTBOOK ON INDIAN PENAL CODE 72 (2014).
[58] § 302., Indian Penal Code, 1860.
[59] Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial,* 117 HARV. L. REV., 2469 (2004).

burdened on the prosecution, etc. are some of the legal protections that the trial offers to the accused.[60] While some experts criticize plea bargaining for its inability to maintain the standards of the trial system[61], at the other end of the scale, some scholars enunciating their view of 'shadow trials' are of the opinion that plea bargaining produces more or less the same results as produced by trial.[62] The latter is based on the presumption that bargains largely reflect the substantive outcomes that would have materialized at trial anyway, minus some fixed discount.[63] It must be kept in mind that a plea bargain is a choice availed. The protection of trial is not removed willy-nilly. The criticisms tend to ignore the fact that a prohibition on plea bargaining will not stop the accused from pleading guilty on their own accord in the conventional trial procedure due to reasons such as expenses involved in trial, penance, etc.[64] This choice is always present and is just treated more conspicuously in plea bargaining.

Additionally, according to some, plea bargaining can lead to categorization of offenders between accused persons some of whom decide to avail their constitutional right to trial and others who decide to waive the same. This may tantamount to carte blanche discrimination against the person exercising his right to trial. However, this apprehension is misplaced as the concept is based on the principle that the accused is given complete discretion to move forward on a path of his choice.[65] In India, this stance gets substantiated further since it is the accused who initiates the procedure. Going by these arguments, it can be settled that all the safeguards attached to the trial procedure remain intact.[66] They are simply translated into rights of the accused under the plea bargaining regime.

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[60] Garrity v. New Jersey 385 U.S. 493 (1967).
[61] Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 1024–48 (1983).
[62] Frank H. Easterbrook, *Plea Bargaining as Compromise*, YALE L. J. 1011, 1969-1975 (1992).
[63] Thomas W. Church, Jr., *In Defense of "Bargain Justice*, 13 L.& SOC'Y REV. 509, 512–14 (1979).
[64] Jeff Palmer, *Abolishing Plea Bargaining: An End to the Same Old Song and Dance*, 26 AM. J. CRIM. L. 505, 513–14 (1999).
[65] Borderkircher v. Hayes, 434 U.S. 357 (1978).
[66] Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?,* 97 HARV. L. REV. 1040 (1984).

D. Extraneous factors not involved

The economic status of the accused may play an extraneous role. A rich accused can easily sway the parties in the process using his monetary potential, especially the victim or his family.[67] Since a mutually satisfactory disposition often involves a compensation component, a poor accused may find himself at a disadvantage vis a vis a rich accused. Such a situation is clearly violative of Article 14 of the Constitution. This apprehension though sounds reasonable does not survive scrutiny if implemented with the proper safeguards.

Plea bargaining in the case law of *Bordenkircher v. Hayes*[68] was defined as negotiations between parties with "relatively equal bargaining power". This equal bargaining power comes from the fact that the victim who is an interested party in the case has a choice to agree to a compromise with the accused or not. Arguments like these also fail to take note of a poignant reality that extraneous factors do affect normal trial procedures too. Although courts have become sensitive to the issue after the Jessica Lall Murder Case and the Aarushi Talwar Murder Case, witnesses turning hostile, shoddy police investigation, victims being threatened are still a major blot on criminal procedures. Contentions connected with the proposition that crimes are offences against the society and not just against persons are of relevance, but the flip side to this is that with more cases being disposed of faster, it is society which benefits at the end of the day.

In addition, statutory provisions in the CrPC ensure that the Judge remains an active, neutral participant in the whole process. Taking into account the question of inability of poor accused to strike a bargain, there is a need to reformulate the dynamics of legal aid as embedded in Article 39A[69] of the Constitution and section 304 of CrPC[70] so as to extend its application beyond

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[67] Linus Y. Akor, *Plea Bargaining and The Anti Corruption Campaign In Nigeria*, 3 GLOBAL J. INTERDISC. SCI. 116-121 (2014).
[68] 434 U.S. 357, 362 (1978).
[69] INDIA CONST. art. 39A.

the conventional trial system and to establish a cogent connection with the processes involved in plea bargaining.

NATURE AND SCOPE OF PLEA BARGAINING: THE PATH AHEAD

The basic principle behind plea bargaining is to show leniency to persons who repent committing the crime and are willing to reform themselves. Keeping this in mind, there remains no reason why crimes with sanctioned maximum punishment of more than seven years should not be included under Chapter XXI-A of the CrPC. There has to be a distinction made between two persons accused of a crime, even a heinous one, one of whom regrets committing the offence and the other does not. For example, in crimes like rape, merely enhanced punishment will not prevent future offences. It is this patriarchal frame of mind of the Indian society which needs to be addressed. For this, the reformative approach which cures the root cause - the mind-set of the rapist will be more effective. This leads us to an inference that implementation of the plea bargaining system for crimes against women will be more beneficial than not in the long run. This argument may be extended to include all other heinous crimes that are currently exempted from plea bargaining. Besides, as discussed above, the option to plead guilty also exists for offences with a punishment of seven years or more accorded to them. The existing rationale behind allowing plea bargaining only for minor crimes falters.

NCRB data for 2013 states that 11.3% of all IPC crimes in 2013 were violent crimes, 48.5% of violent crimes were crimes against the body which includes murder, rape, attempt to murder, culpable homicide not amounting to murder, dowry deaths and kidnapping and abduction.[71] An analysis of the data suggests that not more than 15% of all cases are exempted from plea bargaining. But the proportion of these 15% of criminal cases which go in for

[70] § 304, Code of Criminal Procedure (1973).
[71] Ministry Of Home Affairs, Crime In India 2013 Compendium, National Crimes Records Bureau (2014).

appeal to higher courts is much higher than that of other criminal cases. Allowing for plea bargains in such offences will have a significant impact in reducing the backlog of cases in the higher courts.

As of 2014, 67.6% of jail inmates housed in Indian prisons were under-trials. Under Section 436A CrPC, under-trials should not be detained beyond half of the maximum sentence for the offence they are charged with.[72] We can safely assume that under-trials who have served beyond 3.5 years must be charged with offences exempted from plea bargaining. At the end of 2014, 12,052 under-trial prisoners had been lodged in prison for more than 3 years but less than 5 years. 3,540 under-trials had been detained for 5 years or more.[73] These 3,540 under-trials have been failed by the judicial system. Had they been allowed to plea bargain, at least their future could have had some sense of certainty. If charged under heinous offences like Section 302 IPC, these under-trials may be expected to stay in prison indefinitely. A plea bargain may allow those who consider themselves to be guilty to settle their position once and for all.

Changing the nature and scope of plea bargaining will have no meaning if an accused does not have a knowledge of his rights.[74] This becomes paramount when there emerges a proposal to include all kinds of offences within the purview of a pre-trial process. In this connection, it is pivotal for the court to be given the duty of making the accused aware of his right to plea bargain; an essential ingredient currently missing from chapter XXI-A of CrPC. Au contraire, in Sections 164[75] and 304[76] the court is specifically mandated to inform the accused of his needful rights. In doing this it will be ensured that the right to exercise one's discretion does not remain chained by

[72] § 436A, Code of Criminal Procedure, 1973.
[73] *Id.*
[74] Gopalakrishnan, *supra* note 54.
[75] § 164, Code of Criminal Procedure, 1973. Under this provision it the Judge's obligation to explicitly declare to the accused or the witness that he is not duty bound to confess or make a statement and if he does then it may be used against him.
[76] *Id.* § 304. This provision makes it compulsory for the court to inform the accused of his right to legal aid in case he does not have the means to avail a pleader for himself.

supervenient factors such as the counsel's role in the process[77]. Legal aid must be treated as the lynch pin of the concept of plea bargains. The courts need to take on the added responsibility of fusing legal aid with plea bargaining. This will ensure that justice is not commodified. It will remove differences accruing to offenders from varying social classes. Until the Legal Services Authorities Act, 1987 is implemented universally; the very edifice of the concept shall remain weak.

The current realities of the Indian criminal justice system have necessitated a shift from the conventional adversarial trial system to newer forms of alternate dispute redressal mechanisms in order to realize the fundamental right to speedy justice. Though statutory recognition given to plea bargaining has improved the scenario, its parochial scope has proved to be a roadblock to the effective reformation of the judicial system. The conceptual framework of the idea requires a revisit to increase its scope and improve its functionality. Incorporating offences from the entire spectrum of criminal law may prove to be beneficial for the entire society in the long run. It is not the heinousness of the crime but the heinousness of the mind committing it that must be appreciated. Approached rightly, plea bargaining may prove to be the panacea the Indian judiciary has been looking for. The idea must be connected with a cogent legal aid scheme and a fair pre-trial process. The American experience is a sacred pool of knowledge that needs recognition. The design of the scheme in the Indian context may be juxtaposed with the American model so that the lessons are learnt but not the mistakes. The criticisms are still out there. So are the solutions.

[77] Missouri v. Frye, 132 S. Ct. 1399, 1404 (2012).