

THE

BANARAS LAW JOURNAL

**Cite This Issue**

**as**

**Vol. 42 No.2 *Ban.L.J.* (2013)**

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(25.12.1861 - 12.11.1946)

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

- Madan Mohan Malaviya

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**THE  
BANARAS LAW JOURNAL**

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**Vol. 42**                      No. 2                      ISSN 0522-0815                      July 2013 - Dec. 2013

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## ADMISSIBILITY OF SCIENTIFIC EVIDENCE: THE LEGAL TESTS

R.P. Rai\*

**Abstract :** Science and law are coinciding to the admissibility in the civil and criminal process. Present era has witnessed a spate in the use of modern scientific techniques in criminal investigation. Although the legal and ethical propriety of its use has been in doubt, they may in fact be a solution to many a complicated investigation. This article describes how the techniques may be used against an accused scientists has increased since the 1980s, reflecting growing recognition that scientists ‘have a unique contribution to justice system. Scientists, of course, are called as expert witnesses in both civil and criminal cases. A witness qualified as an expert by knowledge, skill, experience, training, or education may testify and offer opinions in court if “scientific, technical, or other specialized knowledge” will assist the Trier of fact to understand the evidence or to determine a fact in issue.

Science advances incrementally by establishing facts and is able to do so “because scientists operate within a framework of incremental adjustments and carefully bounded negotiations among communities who share a commitment to closure. Legal fact finding in the adversary system, however, treats every fact as equally contingent, and each party has every incentive to overstate the weakness in the other’s case. The difference between these two approaches can make it difficult to evaluate scientific opinion in the courtroom.

**Key Words:** *Science, Evidence, Substantial factor, Certainty rule, Proximate Cause Test.*

### I. INTRODUCTION

Science can play a valuable role in the civil and criminal process. The role of scientists has increased since the 1980s, reflecting growing recognition that scientists ‘have a unique contribution to justice system. Scientists, of course, are called as expert witnesses in both civil and criminal cases. Moreover, the range of cases has been broader in some countries than in others. A witness qualified as an expert by knowledge, skill, experience, training, or education may testify and offer opinions in court if “scientific, technical, or other specialized knowledge” will assist the trier of fact to understand the evidence or to determine a fact in issue.

It is rule of evidence that the proponent of the evidence must establish its reliability. This concept is the basis for all rules for admissibility of scientific evidence. The proponent must demonstrate both that the theory upon which the scientific evidence is based and the technique applying the theory are valid and that the theory and the technique

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<sup>1</sup> Thornburgh, *Junk Science—The Lawyer’s Ethical Responsibilities*, 25 *Fordham Urban Law Journal*, 449 (1998).

were properly applied in the particular case. Too often, expert witnesses are hired not for their scientific expertise, but for their willingness to testify, for a price, to say whatever is needed to make the client's case. As the litigation explosion expands ... "junk science is producing junk law."<sup>2</sup> To what extent should the trial court examine the methodological basis of expert scientific testimony is a question for debate?

It is a truism that "error is inherent in research, and [scientific] validity is always conditional."<sup>3</sup> Science advances incrementally by establishing "facts" and is able to do so "because scientists operate within a framework of incremental adjustments and carefully bounded negotiations among communities who share a commitment to closure".<sup>4</sup> Legal fact finding in the adversary system, however, treats every fact as "equally contingent," and each party has "every incentive to overstate the weakness in the other's case".<sup>5</sup> The difference between these two approaches can make it difficult to evaluate scientific opinion in the courtroom.

## II. THE ELEMENTS OF EXPERT EVIDENCE

Expert evidence is a species of the genus evidence. Like all other evidence, expert evidence is only admissible if it is relevant. Even if admissible, it may be rejected other than on grounds specifically relating to its status as expert evidence. The overriding duty of an expert witness is to assist the court impartially on matters relevant to his or her area of expertise. The paramount duty of an expert witness is to the Court, not to the party by whom he or she is retained. An expert witness is not an advocate for a party. In *Makita (Australia) Pty Ltd v. Sprowles*,<sup>6</sup> Heydon JA summarised the applicable law in relation to the admissibility of expert evidence as an exception to the opinion rule. In summary, if evidence tendered as expert opinion evidence is to be admissible:

- (1) it must be agreed or demonstrated that there is a field of "specialised knowledge";
- (2) there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert;
- (3) the opinion proffered must be "wholly or substantially based on the witness's expert knowledge";
- (4) so far as the opinion is based on facts "observed" by the expert, they must be identified and admissibly proved by the expert;
- (5) so far as the opinion is based on "assumed" or "accepted" facts, they must be identified and proved in some other way;
- (6) it must be established that the facts on which the opinion is based form a proper foundation for it; and the expert's evidence must explain how the field of "specialised knowledge" in which the witness is expert, and on which the opinion is "wholly or substantially based" applies to the facts assumed or observed so as to produce the opinion propounded.

The current legal position, with respect to expert testimony, is that, for expert evidence to be admissible in India, it must be "sufficiently well-established to pass the

<sup>2</sup> Thornburgh, *Junk Science—The Lawyer's Ethical Responsibilities*, 25 *Fordham Urban Law Journal*, 449 (1998).

<sup>3</sup> Relman, A S, Angell M. How Good is Peer Review? *New England Journal of Medicine*, (1989) 321:827-829.

<sup>4</sup> Jasanoff, S, What Judges Should Know about the Sociology of Science, *Jurimetrics*, (1992) 32: 345-59.

<sup>5</sup> *Ibid.*

<sup>6</sup> (2001) 52 NSWLR 705 at 743-744.

ordinary tests of relevance and reliability.” That is to say, the expert witness’s evidence must be sufficiently reliable to be fit for a judge/magistrate to consider.

### III. RULES AND STANDARDS FOR ADMITTING EXPERT EVIDENCE

It has long been accepted that specialised areas of knowledge, where relevant to the determination of a disputed factual issue, should be explained to the judge by experts in the field because the judge can be presumed to be unfamiliar with such areas. This does something to ensure that the judge does not draw erroneous inferences from the evidence before it and that it is properly equipped to determine how much weight, if any, to give to the evidence to which the expertise relates. It is therefore trite law that witnesses having a relevant degree of expertise are competent to testify on the factual matters which lie within their specialisation, to guide or assist the court in its resolution of the disputed factual issues.

Expert witnesses are a necessary component of the legal system because many claims involve technical facts that would be beyond the understanding of judges and juries without expert testimony.<sup>1</sup> Expert witnesses are also pervasive throughout the legal system. Most US state courts now use either the *Daubert* test, the older test from *Frye v. United States*<sup>7</sup> requiring general acceptance by the relevant scientific community, or a mixture of the two standards.<sup>8</sup> However, both tests mistakenly import scientific standards into the fundamentally legal decision of admissibility. This paper critically examines the legal tests of scientific evidence in criminal justice and civil litigation. This paper critically examines the legal tests of scientific evidence in criminal justice and civil litigation.

In 1993, the U.S. Supreme Court, in *Daubert v. Merrell-Dow Pharmaceuticals*,<sup>9</sup> changed the standard governing the admissibility of expert testimony in presenting scientific evidence. The opinion begins by construing Rule 702. The Court stated that the words “scientific” and “knowledge” “connote[s] more than subjective belief or unsupported speculation pursuant to Rule 702.”<sup>10</sup> Reading those terms together, the Court found that the Rule limits scientific expert testimony to opinions that are the product of scientific thinking. The Court reasoned: “In order to qualify as “scientific knowledge,” an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation-i.e., “good grounds,” based on what is known. In short, the requirement that an expert’s testimony pertain to “scientific knowledge” establishes a standard of evidentiary reliability.”<sup>11</sup>

In *Daubert*, the Supreme Court held that the general acceptance doctrine was superseded by *Rule 702 of the Federal Rules of Evidence*: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”<sup>12</sup> The Court also noted that Rule 702 applied to all scientific evidence rather than only to

<sup>7</sup> 293 F. 1013 (D.C. Cir. 1923).

<sup>8</sup> See Alice B. Lustre, Annotation, *Post-Daubert Standards for Admissibility of Scientific and Other Expert Evidence in State Courts*, 90 A.L.R.5th 453, § 2, at 481 (2001).

<sup>9</sup> 509 U.S. 579 (1993).

<sup>10</sup> *Id.* at 590.

<sup>11</sup> *Ibid.*

<sup>12</sup> Federal Rule of Evidence 702 (1999) (amended 2000). Rule 702 was amended to add reliability requirements based in part on *Daubert*. See Federal Rule of Evidence 702.

the novel evidence specified by the *Frye* opinion.<sup>13</sup> Other Federal Rules of Evidence are also relevant to quote here in the context of current discussion.

Although the *Frye* test was displaced by the far more liberal Federal Rules of Evidence, Justice Harry Blackmun said in a part of his judgment that was accepted by a 7-2 majority of the bench that “under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable”. According to Rule 702, quoted above, the expert testimony must relate to scientific knowledge, and according to the court the adjective “scientific” implies “a grounding in the methods and procedures of science. Similarly, the word ‘knowledge’ connotes more than subjective belief or unsupported speculation. In short, the requirement that an expert’s testimony pertain to ‘scientific knowledge’ establishes a standard of evidentiary reliability”. In the United States it is now up to the courts to decide not only whether proposed expert testimony is relevant, which has always been necessary, but also whether it is reliable in the scientific sense.

Much of the discussion about admissibility in post-*Daubert* cases centers upon philosophy of science<sup>14</sup> because distinctive treatment of scientific evidence hinges upon a belief that science differs significantly from other sources of evidence. The acceptance of the scientific community’s word under *Frye* suggests a view of scientists as objective and science as universal truth. The expectation that judges assess science under *Daubert* suggests that scientists may not be trustworthy but that science, or at least the processes that satisfy the *Daubert* factors, is.

In 1997, the U.S. Supreme Court decided *General Electric Co. v. Joiner*,<sup>15</sup> a toxic tort case where the petitioner was a long-time smoker with a family history of lung cancer and claimed his exposures to polychlorinated biphenyls (PCBs) had promoted his development of lung cancer. Even though there were four epidemiological studies presented, the trial court found these studies insufficient, and applied the *Daubert* criteria, excluded the plaintiff’s expert’s opinions, and granted the defendant’s motion for summary judgment. The court of appeals reversed the decision because “the Federal Rules of Evidence governing expert testimony display a preference for admissibility”.

The Supreme Court examined the record, determined that the plaintiff’s experts had been properly excluded because the studies relied upon were not sufficient to support the conclusion that *Joiner*’s PCB exposure contributed to his cancer, then reversed the decision without remanding the case. The Court concluded that the plaintiff’s expert’s causation opinions were merely speculation, and that it was never explained how the experts extrapolated their opinions from animal studies to the plaintiff’s (human) exposure. The *Joiner* decision noted that a court may conclude that there is simply too great an analytical gap between the data and the opinion proffered. The *Joiner* decision reinforced *Daubert* by again noting that the trial court should act as the “gatekeeper” in determining admissibility of scientific evidence.

In March 1999, the Supreme Court held in *Kumho Tire Co. v. Carmichael*<sup>16</sup> that *Daubert*’s general qualification and reliability apply to “nonscientific” expert testimony,

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<sup>13</sup> See *Daubert*, 509 U.S. (1993) at 592 (“Although the *Frye* decision itself focused exclusively on ‘novel’ scientific techniques, we do not read the requirements of Rule 702 to apply specially or exclusively to unconventional evidence.”).

<sup>14</sup> See Robert Robinson, *Daubert v. Merrell Dow Pharmaceuticals and the Local Construction of Reliability*, 19 *ALB. L.J. SCI. & TECH.* 39, 44 (2009).

<sup>15</sup> 522 US 136, 118 S.Ct. 512 (1997).

<sup>16</sup> 119 S. Ct. 1167 (1999).

not just scientific testimony. In *Kumho Tire*, the plaintiffs claimed that a manufacturing defect caused a tire to blow out, which, in turn, resulted in numerous injuries and one death.<sup>17</sup> Plaintiffs' expert, who had a master's degree in mechanical engineering and 10 years work experience at Michelin America, Inc., as well as prior consulting experience in other tire blowout cases, gave his opinion that a manufacturing defect or design defect caused the plaintiffs' injuries.<sup>18</sup> He based his opinion upon the combination of his knowledge of tire failures, a personal four factor theory of the cause of tire failures, and his inspection of the tire at issue.<sup>19</sup>

In *Kumho Tire*, the Court extended the *Daubert* analysis beyond scientific evidence to the "technical" and "other specialized" knowledge also referenced in Rule 702.20 The Court supported this conclusion by noting the lack of distinctions made in the statutory language, the equal grant of latitude in testimony to nonscientific experts, and the difficulty of distinguishing between "scientific" and "technical" or "other specialized" knowledge.<sup>20</sup> The Court specified that trial courts may consider the four factors suggested by *Daubert* in these nonscientific contexts.<sup>21</sup>

Before *Kumho Tire* was decided, proponents of forensic evidence in criminal cases, and the plaintiffs' lawyers in civil cases, were arguing that the *Daubert* criteria are actually more liberal than *Frye* (a plausible argument), and that in any event their application should be limited to cases involving pure science, or at least some kind of science, as opposed to practical or technical skill (a less plausible argument). The Supreme Court's decision in *Kumho Tire* surprised the commentators by rejecting any "scientific versus technical" dichotomy.<sup>22</sup> After *Daubert*, judges may have to make their own judgment about the reliability of the expert's science. By a preponderance of the evidence, the proponent of the expert evidence has to demonstrate to the judge that it is good evidence, perhaps in spite of what other experts think about it.

#### IV. REASONABLE DEGREE OF CERTAINTY RULE

Many criminal court cases involve analysis of physical evidence and ultimately expert testimony that may associate a defendant with a crime. Human physical evidence frequently introduced in criminal court cases includes fingerprints, serology (blood, semen, etc.), and hair. These forms of evidence are considered circumstantial and are based upon probability theory.<sup>23</sup> Probability standards for fingerprints and serology have been established and are recognized by the courts.<sup>24</sup> Such standards account for the presence or absence of particular characteristics or "points" of comparison between known and questioned articles of evidence. The more points of comparison present,

<sup>17</sup> *Id.* at 1171.

<sup>18</sup> *Id.* at 1172.

<sup>19</sup> *Id.* at 1172-1173.

<sup>20</sup> *See id.* at 147-48.

<sup>21</sup> *See id.* at 149-50 ("Petitioners ask more specifically whether a trial judge determining the 'admissibility of an engineering expert's testimony' may consider several more specific factors that *Daubert* said might 'bear on' a judge's gatekeeping determination. . . . Emphasizing the word 'may' in the question, we answer that question yes").

<sup>22</sup> *Kumho Tire*, 526 U.S. 13 (1999) at 137 (applying *Daubert* factors to technical and scientific testimony).

<sup>23</sup> Moenssens, A. A., Inbau, F. E., & Stars, J. E., *Scientific Evidence in Criminal Cases* (3rd ed.) (Mineola, New York: The Foundation Press, 1986).

<sup>24</sup> Curran, W. J., & Shapiro, E. D., *Law, Medicine, and, Forensic Science* (2nd ed.). (Boston: Little, Brown and Co., 1982).

the higher the probability that the questioned evidence originated from the suspect. The frequency that these points of comparison occur within populations has been well established for fingerprints and serology.<sup>25</sup> However, no such standards exist for human hair identification.

The facts or scientific principles on which experts base their opinions must be sufficient to support reasonably accurate conclusions. Expert witnesses will not be barred from expressing opinions merely because they are not willing to state their conclusions with absolute certainty. However, expert opinions, if not stated in terms of certainty, must at least be stated in terms of the probability and not merely of the possibility. The test of whether an expert witness testimony expresses a reasonable probability is not based upon the use of “magic words” but is determined by looking at the entire substance of the expert’s testimony.

The expert’s opinion must satisfy the “preponderance of the evidence” burden of proof. This means that the expert must opine that it is more probable than not (there is more than a 50% probability) that his opinion is correct. Thus, an expert witness may give testimony in terms of an opinion that something could, or would, produce a certain result. The theory for admitting opinion testimony of this nature into evidence is that an expert witness’s view regarding probabilities is often helpful in the determination of questions involving matters of science or technical or skilled knowledge.

It is generally thought of as a “more likely than not” standard.<sup>26</sup> The universal use of the phrase “reasonable medical certainty,” and the importance that some courts attach to this phrase, cannot be explained by its intrinsic meaning, for the phrase has no readily apparent meaning. The very notion of “reasonable certainty” is almost an oxymoron, because the adjective “reasonable” qualifies and essentially negates the absolute implications of the noun “certainty.” Insertion of the adjective “medical” does not reduce the tension between “reasonable” and “certainty,” for the concept of certainty is just as elusive in medicine as in other scientific disciplines and perhaps more so.

When an expert does not express the concept that he/she is at least 51% sure of his/her opinion, the opinion might be excluded by the judge. Thus, it is important to state an opinion in a way that clearly communicates that it is based upon a reasonable degree of probability and not just a mere possibility or speculation. Experts need to be prepared to express and deliver their opinions in a legally sufficient way. Speculation and guessing are not permitted. Expert opinions need to be based upon reliable facts and methodology or they may be excluded from evidence.

*In Bara v. Clarksville Memorial Health Systems, Inc.*,<sup>27</sup> the Court of Appeals in Tennessee found that jury instructions using the phrase “reasonable degree of medical certainty” were incorrect statements of the law and were confusing to the jury. The Appeals Court in Tennessee held that the phrase “to a reasonable degree of medical certainty” is not synonymous with the correct legal standard of “more probable than not.” The court held that the use of the “magic words” in the jury charge was erroneous and reversible error. Other jurisdictions, such as Colorado, addressing the “certainty” problem, have allowed the hybrid phrase “to a reasonable degree of medical probability.”<sup>28</sup>

<sup>25</sup> Sensabaugh, G. E., Biochemical Markers of Individuality, in R. Saferstein (Ed.), *Forensic Science Handbook*. (Englewood Cliffs, New Jersey: Prentice-Hall, 1982).

<sup>26</sup> See generally, Lewin, *The Genesis and Evolution of Legal Uncertainty About Reasonable Medical Certainty*, 57 *Meryland Law Review*, 380, 400-401 (1998).

<sup>27</sup> 104 S.W. 3d 1 (Tenn. Ct. App.2002).

<sup>28</sup> *Jacobs v. Commonwealth Highland Theater Inc.*, 738 P.2d 6 ( Colo. App. 1986).

The habit of using the phrase “to a reasonable degree of medical certainty” should be discouraged in civil litigation as this phraseology creates confusion and imposes a higher burden on the plaintiff and should not be used at any civil trial by anyone. In most civil cases, the legal requirement for stating an expert opinion is related directly to the burden of proof that exists. That burden of proof is a “preponderance of the evidence,” “more likely than not,” or “more than 50% likely.” This is a much lesser burden of proof than the “beyond a reasonable doubt” standard with criminal cases.

There is a difference between ‘admissibility’ and ‘certainty’. The ‘certainty’ standard applies only to expert medical testimony that a litigant offers as proof of a necessary fact in support of recovery.<sup>29</sup> So to that extent, there is a difference between admissibility and sufficiency. Defense evidence can be admissible without being sufficient to prove anything, precisely because defendants are not required to prove anything. The risk defendants run is that jurors won’t believe a less certain expert, so defendants typically have their experts conform to the professional certainty standard even if that’s not legally required.

#### a) Proximate Cause Test

The proximate cause test can be applied both in civil and criminal cases to establish the fact. It is axiomatic that “proximate cause” consists of two elements: (1) cause-in-fact and (2) legally cognizable cause.<sup>30</sup> “Causation in fact” is concerned with whether the defendant’s conduct produced the plaintiff’s injury?<sup>31</sup> Maryland courts have employed two tests to determine whether cause-in-fact exists: the “but for” test, which is the general rule, and the “substantial factor test.”<sup>32</sup> Prosser and Keeton define the “but for” test as: “The Defendant’s conduct is a cause of an event if the event would not have occurred but for that conduct; conversely, the Defendant’s conduct is not a cause of the event if the event would have occurred without it.”<sup>33</sup> The “substantial factor” test is defined as: The Defendant’s conduct is a cause of the event if it was a material element and a substantial factor in bringing it about.”<sup>34</sup>

Generally speaking, a finding of proximate cause cannot be predicated on surmise or conjecture. Rather, proximate cause must be established with reasonable certainty.<sup>35</sup> A mere possibility is not sufficient to sustain the burden of proof of proximate cause.<sup>36</sup> It has long been the rule that at trial, a defendant has the right to attempt to establish

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<sup>29</sup> E.g., *Neal v. Lu*, 530 A.2d 103, 110 (Pa. Super. 1987).

<sup>30</sup> See, e.g., *May v. Giant Food, Inc.*, 122 Md. App. 364, 383, 712 A.2d 166, (1998) *cert. denied*, 351 Md. 286, 718 A.2d 234 (1998).

<sup>31</sup> *Peterson v. Underwood*, 258 Md. 9, 16-17, 264 A.2d 851, 855 (1970).

<sup>32</sup> *Yonce v. Smith Kline Beecham Clinical Laboratories, Inc.*, 111 Md. App. 124, 138, 680 A.2d 569, 575 (1996), *cert. denied*, 344 Md. 118, 685 A.2d 452 (1996).

<sup>33</sup> W. Page Keeton, et al., Prosser and Keeton on the *Law of Torts*; 41 at 266 (5th ed. & Supp. 1998).

<sup>34</sup> *Id.* at 267.

<sup>35</sup> *Wojtowicz v. Cervantes*, 284 Ill.App.3d 524, 532, 672 N.E.2d 357, 362, 219 Ill. Dec. 849, 854 (1st Dist. 1996).

<sup>36</sup> *Saxton v. Toole*, 240 Ill.App.3d 204, 210-11, 608 N.E.2d 233, 238, 181 Ill. Dec 160, 165 (1st Dist. 1992); accord *McCullough v. Gallaher & Speak*, 254, Ill.App.3d 941, 949, 627 N.E.2d 202, 208, 194 Ill. Dec. 86, 92 (1st Dist. 1993).

competent evidence that the conduct of a third person, or some other causative factor, is the sole proximate cause of the plaintiff's injuries.<sup>37</sup>

Naturally, a sole proximate cause instruction "requires that there be some evidence to justify the theory of the instruction."<sup>38</sup> Circumstantial evidence is sufficient to establish proximate cause if there is a reasonable inference that can be drawn from it.<sup>39</sup> Circumstantial evidence establishing proximate cause by reasonable inference need not exclude all possible inferences or support only one logical conclusion, so long as the evidence justifies an inference of probability, not mere possibility.<sup>40</sup> Conversely, where the circumstantial evidence supports different reasonable inferences of possible causes, the question of proximate cause is one for the jury.<sup>41</sup>

The plaintiff bears the burden of proof on the issue of proximate cause. Even where a defendant comes forward with evidence supporting a sole proximate cause defense, the burden of proof on proximate cause remains with the plaintiff.<sup>42</sup> Obviously, if there is evidence that negates causation, a defendant should show it. However, in granting the defendant the privilege of going forward, also called the burden of production, the law in no way shifts to the defendant the burden of proof.

#### **b) The Substantial Factor Test**

The substantial factor test should only be applied in limited situations. In *Yonce*, the court explained: By its very nature, the "but for" test applies when the injury would not have occurred in the absence of the defendant's negligent act. The "but for" test does not resolve situations in which two independent causes concur to bring about an injury, and either cause, standing alone, would have wrought the identical harm.

The "substantial factor" test was created to meet this need but has been used frequently in other situations.<sup>43</sup> In *Yonce*,<sup>44</sup> the court considered three factors in applying the "substantial factor" test:

(a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;

(b) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm or has created a situation harmless unless acted upon by other forces for which the actor is not responsible;

(c) lapse of time.<sup>45</sup> The substantial factor test is frequently applied in toxic tort cases.<sup>46</sup> The test is fact specific to each plaintiff's case and requires an understanding of the use of the product in the workplace and the plaintiff's activities in the workplace.<sup>47</sup>

<sup>37</sup> See, *Leonardi v. Loyola Univ. of Chicago*, 168 Ill.2d 83, 101, 658 N.E.2d 450, 459, 212 Ill. Dec. 968, 977 (1995); see also IPI Civil 3d No. 12.04 (conduct of third party as sole proximate cause of plaintiff's injuries) and IPI Civil 3d No. 12.05 (intervention of "outside agency"—something other than the conduct of defendant—as sole proximate cause).

<sup>38</sup> *McDonnell*, 192 Ill.2d at 523, 736 N.E.2d at 1085, 249 Ill. Dec. at 647 (citing *Leonardi*).

<sup>39</sup> *McGraw v. Cegielski*, 287 Ill.App.3d 871, 872, 680 N.E.2d 394, 396-97, 233 Ill. Dec. 661, 663-64 (1st Dist. 1996).

<sup>40</sup> *Wojtowicz*, 284 Ill.App.3d at 532, 672 N.E.2d at 362, 219 Ill. Dec. at 854 (1996).

<sup>41</sup> *Id.*, 284 Ill.App.3d at 533, 672 N.E.2d at 362-63, 219 Ill. Dec. at 854-55.

<sup>42</sup> *Leonardi*, 168 Ill.2d at 93-94, 658 N.E.2d at 455, 212 Ill. Dec. at 973.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Yonce*, 111 Md. App. at 138 (1996).

<sup>45</sup> *Id.* at 138-39.

<sup>46</sup> See, e.g., *Eagle-Picher Indust. v. Balbos*, 326 Md 179, 208-217, 604 A. 2d 445 (1992); *Owens-Illinois, Inc. v. Armstrong*, 326 Md. 107, 119, 604 A.2d 47 (1992); see, generally, Bell, *Maryland Civil Jury Instructions and Commentary* §39.04 and Restatement (Second) of Torts, §431.

<sup>47</sup> *Eagle-Picher Indust.* 604 A. 2d at 460 (Md. 1992).

The “substantial factor” test differs from the “but-for” test, which tests whether the plaintiff would not have been injured but-for the exposure.<sup>48</sup> Under the “substantial factor” rule the issue is whether the exposure was a substantial or insignificant factor in plaintiff’s injury.<sup>49</sup> The substantial factor test is frequently applied in toxic tort cases.<sup>50</sup> The test is fact specific to each plaintiff’s case and requires an understanding of the use of the product in the workplace and the plaintiff’s activities in the workplace.<sup>51</sup>

In *Rutherford*, the California Supreme Court considered application of the substantial factor standard in the context of proof of causation in an occupational cancer case. Recognizing that “[p]laintiffs cannot be expected to prove the scientifically unknown details of carcinogenesis . . . ,” the Court held that a plaintiff in such a case may prove cause in fact by showing that the “plaintiff’s exposure to a particular product was a substantial factor in causing or bringing about the disease if in reasonable medical probability it was a substantial factor contributing to the plaintiff’s “risk of developing cancer.”<sup>52</sup> In *Bockrath v. Aldrich Chemical Co.*<sup>53</sup> the Court clarified that this rule applies in “the context of products liability actions” generally.

## V. THE INDIAN SCENARIO

In India, opinions of skilled witnesses are admissible whenever the subject is one upon which competency to form an opinion can only be acquired by a course of special study or experience. The areas on which the expert evidence is admissible is governed by section 45 of the Indian Evidence Act, 1872. Section 45 reads as under:

When the Court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions are relevant facts.

The expert evidence is a weak type of evidence and the courts do not consider it conclusive. It is, therefore, not safe to rely upon it without seeking independent and reliable corroboration.<sup>54</sup> In India, the evidence of an expert is really of an adversary character. The duty of an expert witness is to furnish the judge the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the judge to form his independent judgment. The scientific evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with other evidence of the case. The credibility of such an expert depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of

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<sup>48</sup> See, generally, *Conde v. Velsicol Chem. Corp.*, 804 F. Supp. 972 (S.D. Ohio 1992), *aff’d* 24 F. 3d 809 (6th Cir. 1994); *Vuocolo v. Diamond Shamrock Chem. Co.*, 573 A. 2d 196 (N.J. Super. Ct App. Div. 1990); *In re Agent Orange Prod Liab. Litig.*, 611 F. Supp. 1223 (E.D.N.Y. 1985), *aff’d on other grounds*, 818 F. 2d 187 (2d Cir. 1987).

<sup>49</sup> Restatement (Second) of Torts §431.

<sup>50</sup> See, e.g., *Eagle-Picher Indust. v. Balbos*, 326 Md 179, 208-217, 604 A. 2d 445 (1992); *Owens-Illinois, Inc. v. Armstrong*, 326 Md. 107, 119, 604 A.2d 47 (1992); see, generally, Bell, *Maryland Civil Jury Instructions and Commentary* §39.04 and Restatement (Second) of Torts, §431.

<sup>51</sup> *Eagle-Picher Indust.* 604 A. 2d at 460.

<sup>52</sup> *Id.* at 977.

<sup>53</sup> (1999) 21 Cal.4th 71, 79.

<sup>54</sup> *S. Gopal Reddy v. State of A.P.*, A.I.R. 1996 SC 2184.

<sup>55</sup> *State of H.P. v. Jai Lal*, A.I.R. 1999 SC 3318.

his conclusions.<sup>55</sup> In *Muralilal v. State of M.P.*<sup>56</sup> the Supreme Court has laid down that, although the approach has to be one of caution, there is no rule of law that the evidence of an expert cannot be acted upon unless substantially corroborated. The court can refuse to place any reliance on the opinion of an expert which is unsupported by any reasons.<sup>57</sup>

The tests which may be applied in determining whether a particular question is one of scientific nature and, consequently, whether skilled witnesses may pass their opinions upon it are:

Is the subject-matter of inquiry such that inexperienced men are unlikely to prove capable of forming a correct judgment upon it without the assistance of experts; that is, does it so far partake of the character of a science or art as to require a course of previous habit or study in order to obtain a competent knowledge of its nature...<sup>58</sup>

## VI. CONCLUSION

Scientific evidence is an inescapable facet of modern legislation. It is fundamental to criminal justice and to civil litigation. However, the issue of scientific reliability is a hot topic in India and other commonwealth jurisdictions, as well as in continental European system. Limiting testimony to what is relevant is a basic notion of procedural fairness. Even expert testimony must abide by this structure, which means that it must have a sound scientific basis. There is a unanimity that medical and forensic evidence plays a crucial role in helping the courts of law to arrive at logical conclusions. Therefore, the expert medical professionals should be encouraged to undertake medico-legal work and simultaneously the atmosphere in courts should be congenial to the medical witness.

One of the most important issues that arise in expert testimony is which scientific procedures a court should accept as evidence. Many scientific procedures are not seriously in dispute and are accepted by courts with little or no inquisition into their validity. Examples include fingerprint tests for purposes of identification, blood tests, breathalyzer tests for alcohol consumption, and ballistics tests of bullets and their impact areas. These scientific procedures are so widely accepted that a court may take judicial notice of the procedure's validity. In some instances legislatures have specifically authorized the use of scientific tests, such as breathalyzer tests for suspected drunk drivers.

An expert appearing in court with scientific evidence carries a heavy burden. In the face of cross-examination and direct testimony by opposing parties, the expert must choose valid scientific data on which to rely, and form his principal inductive and deductive opinions thereon in a lucid and credible manner so as to be understood and believed by the lay trier of fact. It is unlikely that the trier of fact will be swayed by an expert who testifies in a manner that is inconsistent with the scientific facts when the adverse party is represented by able counsel.

It is fair to say, however, that the problems associated with expert evidence can never be entirely resolved. Scientific knowledge is continuously advancing as more empirical research is undertaken, so it is inevitable that some hypotheses will come to be modified or discarded, that expert testimony based on any such hypothesis will subsequently come to be regarded as unreliable and that this will have a bearing on the legitimacy of convictions (and, to a lesser extent, acquittals) founded on such testimony.

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<sup>56</sup> A.I.R. 1980 SC 531.

<sup>57</sup> *Haji Md. Ekramulhaq v. State of West Bengal*, A.I.R. 1959 SC 488.

<sup>58</sup> *Mahadeo v. Vyankammabai*, A.I.R. 1948 Nag 287.

## LIABILITY OF ARTIFICIAL INTELLIGENCE ENTITIES IN CRIMINAL CASES

Ajay Kumar\*

**Abstract :** The present era is of technology. There is rapid change in technology. An acrimonious debate is going on artificial intelligence entities and its use in criminal cases. Significant use of AI in computers has become an important part of human life, and it has brought a major change in human life, but people's fear of AI entities in most of the criminal cases requires a great deal. The present will focus on liability of artificial intelligence entities in criminal cases.

**Key Words:** *Artificial Intelligence Entities, Computer, Robot, Criminal Cases, Technology.*

### I. INTRODUCTRION

Increasing importance and use of Artificial Intelligence have been recognized throughout world. Starting with all sort of electronic equipment to robots, it is playing significant role. The optimum use of it, may be seen in computer. The technological world is graving rapidly the area of normal human activities either in form of artificial intelligence loaded machine or robots. The problem began when computers evolved from "thinking" machine ( machine that were programmed to perform defined thought process/ computing) into thinking machines (without quotation marks) or artificial intelligence.<sup>1</sup> Since then artificial intelligence (herein after called as AI) entities have become an integral part of modern human life, functioning much more sophisticatedly than other daily tools. Could they become dangerous? In fact they already have become. In 1950, Issac Asimov<sup>2</sup> set down three fundamental laws of robotics in his science fiction master piece: 1. A robot shall not injure human being or, through inaction, allow a human being to be harmed; 2. A robot must obey the orders given to it by human being, except where such orders would conflict with the First law; 3. A robot may protect its own existence, as long as such protection does not conflict with the First and Second laws.

It is submitted that these three laws are contradictory. These laws are unable to explain cases – where a man orders a robot to hurt another person for his own goods? Where the robot is in public service and commander of the mission orders it to arrest a suspect and the suspect resists arrest? Or where the robot is in medical service and is ordered to perform a surgical procedure on a patient and the patient objects, but the medical doctor insists that the procedure is for the patient's benefits, and repeats the order to robot? The laws of Asimov of robotics only relate to robots. AI software

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<sup>1</sup> Padhy, N.P., *Artificial Intelligence and Intelligence System*,(2005), 3-29.

<sup>2</sup> Asimov ,Issac, *I. Robot* (1950).

installed in a robot would not be subject to Asimov's laws, even if these laws had any legal significance. The fundamental question in this context is which kind of laws or ethics are correct and who is to decide such cases. In order to cope with these problems as they relate to humans, society devised criminal law. Criminal law embodies the most powerful legal social control in modern civilization. People's fears of AI entities, in most cases, is based on the fact that AI entities are not considered to be subject to the law, specially to criminal law.<sup>3</sup> In past, people were similarly fearful with corporations and their power to commit a spectrum of crimes, but since corporations are legal entities subject to criminal and corporate law, that kind of fear has been reduced significantly.<sup>4</sup> The main questions related to AI entities are- Does the growing intelligence of AI entities subject them to legal, social control, as any other legal entities?<sup>5</sup> The present article attempts to work out a legal solution to the problem of criminal liability of AI entities. At the beginning, definition of AI entity is suggested and based on the definition, this article will then propose and introduce three models for determining criminal liability – 1) Perpetration – by – another liability model, 2) Natural – probable-consequence liability model and 3) Direct liability model.

These three models might be applied separately, but in many situations, a coordinated combination of them is required in order to complete the legal structure of criminal liability. It also invites discussion on the question of the punishment to them i.e. how can an AI entity serve a sentence of imprisonment? How can a death penalty be imposed on AI entity? How can probation, a pecuniary fine etc. be imposed on them?

#### **Definition of AI entity**

There has been a significant debate on essence of AI entity.<sup>6</sup> Futurologists have proclaimed the birth of a new species or machine sapiens, which will share the human place as intelligent creatures on earth. Critics have argues that a 'thinking machine' is an oxymoron. Machines, including computers, with their foundations of cold logic, can never be insightful or creative as humans are. This controversy raises the basic questions of essence of humanity ( Do human being function as thinking machine?)<sup>7</sup> . The following five attributes for Artificial Intelligence have been suggested by Roger C. Schank.<sup>8</sup>

- 1) The first is communication. One can communicate with an intelligent entity. The easier to communicate with an entity, the more intelligent the entity seems.
- 2) The second is internal knowledge. An intelligence entity is expected to have knowledge about itself.

<sup>3</sup> The apprehension that AI entities evoke may have arisen due to Hollywood's depiction of AI entities in numerous films.

<sup>4</sup> Coffee, Jr., John C., "No Soul to Damn: No Body to Kick : An Unscandalised Inquiry Into the Problem of Corporate Punishment, 79 Mic. L. Rev. 386 (1981), Steven Box, Power.

<sup>5</sup> See, Carty, Throne L. Mc, *Reflections on Taxman: An Experiment in Artificial Intelligence and Legal Reasoning*, 90 Harv. L. Rev. 837 (1977).

<sup>6</sup> Winograd, Terry, *Thinking Machine : Can There Be? Are We?*, The Foundations of Artificial Intelligence 167 (Derek Partridge and Yorick Wilks eds., 2006).

<sup>7</sup> See, Przymusinski, Teoder C., *Non - Monotonic Reasoning Versus Logic Programming : A new Perspective*, The Foundations of Artificial Intelligence 49(Derek Partridge and Yorick Wilks eds., 2006); Weyhrauch, Richard W., *Prolegomena to a theory of Mechanized Formal Reasoning*, The Foundations of Artificial Intelligence 72 (Derek Partridge and Yorick Wilks eds., 2006).

<sup>8</sup> Schank, Roger C., *What is AI, Anyway?* The Foundations of Artificial Intelligence 3 (Derek Partridge and Yorick Wilks eds., 2006).

- 3) The third is external knowledge. An intelligent entity is expected to know about the outside world, to learn about it, and utilize that information.
- 4) The fourth is goal-driven behaviour. An AI is expected to take action in order to achieve its goals.
- 5) An AI entity is expected to have some degree of creativity. Creativity means the ability to take alternative action when the initial action fails.

Some 21<sup>st</sup> century type of AI entities possess even more attributes that enable them to act in form of more sophisticated ways.<sup>9</sup>

A robot can be designed to imitate the physical capabilities of a human being and these capabilities can be improved. A robot is capable of being physically faster and stronger than a human being. The AI software installed in it also enables the robot to calculate many complicated calculations faster and simultaneously, or to “think” faster. An AI entity is capable of learning and gaining experiences, and experience is a useful way of learning. All these attributes create the essence of an AI entity.<sup>10</sup> AI robots and AI software are used in a wide range of applications in industry, military services, medical services, science and even games.

## II. CRIMINAL LIABILITY OF ARTIFICIAL INTELLIGENCE ENTITIES

To determine the criminal liability of AI entity for a specific offence committed for specific point of time and space is a challenging task in legal field. Two elements are essential for imposing criminal liability of any person- first, external or factual element i.e. criminal conduct (*actus reus*), while the other element is internal or mental element, i.e. knowledge or general intent vis-à-vis the conduct element (*mens rea*). If any one of them is absent, no criminal liability can be imposed. The *actus reus* requirement is expressed mainly by the acts or omissions.<sup>11</sup>

Sometimes, other external elements are required in addition to conduct, such as the specific result of that conduct and the specific circumstances underlying the conduct.<sup>12</sup>

The *mens rea* requirement has various level of mental elements. The highest level is expressed by knowledge, while some times it is accompanied by a requirement of intention or specific intent.<sup>13</sup> Lower level are expressed by negligence<sup>14</sup> or by strict liability.<sup>15</sup> Presence of both the elements are required for imposing the criminal liability;

<sup>9</sup> In November, 2009, during the supercomputing conference in Portland Oregon, IBM Scientists and other announced that they succeeded in creating new algorithm named “Blue Matter”, which possesses the thinking capabilities of a cat. Chris Capps, “Thinking” Supercomputer Now Conscious as a Cat, 19.11.2009.

<sup>10</sup> See, Wilks, Yorick, *One Small Head: Models and Theories*, The Foundations of Artificial Intelligence 121 (Derek Partridge and Yorick Wilks eds., 2006); Bundy, Alan, and Ohsson, Stellan, *The Nature of AI Principles*, The Foundations of Artificial Intelligence 135 (Derek Partridge and Yorick Wilks eds., 2006).

<sup>11</sup> Hitchler, Walter Harrison, *The Physical Element of Crime*, 39 Dick. L. Rev. 95 (1934).

<sup>12</sup> Salmond, John William, (1957) *On Jurisprudence*, Glanville Williams, 11<sup>th</sup> ed. 505; Walter Wheeler Cook, *Act, Intention and Motive in Criminal Law*, 26 Yale L.J. 645 (1917).

<sup>13</sup> Edward, J. L. I. J., *The Criminal Degree of knowledge*, 17 Mod. L. Rev. 294 (1954); Perkins, Rollin M., “Knowledge” as a *Mens Rea* Requirement, 29 Hastings L.J. 953 (1978).

<sup>14</sup> Hall, Jerome, *Negligent Behaviour Should Be Excluded from Penal Liability*, 63 Colum. L. Rev. 632 (1963); Fine, Robert P., and Cohen, Gray M., *Is Criminal Negligence a Defensible Basis for Criminal Liability?* 16 Buff. L. R. 749 (1966).

<sup>15</sup> Horder, Jeremy, *Strict Liability, Statutory Construction and the Spirit of Liberty*, 118 Law Q. Rev. 458 (2002).

not only for humans but also for other kinds entities including corporation and AI entities e.g. a spider is capable of biting but incapable of formulating the *mens rea* requirement, therefore, a spider bite bears no criminal liability. Similarly, a parrot is capable of repeating words it hears, but incapable of formulating the *mens rea* requirement for libel.

The relevant question concerning the criminal liability of AI entities is: How can these entities fulfill the two requirements of criminal liability? This article proposes the imposition of criminal liability on AI entities using three possible model of liability – 1) Perpetration – by - Another Liability Model; 2) Natural – Probable – Consequence Liability Model; and 3) Direct Liability Model.

#### **A. Perpetration – by - Another Liability Model**

This model does not consider the AI entity as possessing any human attributes. AI entity is considered as an innocent agent. However one cannot ignore an AI entity's capabilities to commit an act. Pursuant to this model, these capabilities are insufficient to deem the AI entity a perpetrator of an offence. These capabilities resemble the parallel capabilities of a mentally limited person, such as the child, or of a person who is mentally incompetent or lacks a criminal state of mind. When an offence is committed by these innocent agent, they are criminally liable as perpetrator- via- another.<sup>16</sup> In such a cases, the intermediary is regarded as mere instrument, albeit a sophisticated instrument, while the party or orchestrating the offence (the perpetrator – via – another) is the real perpetrator as a principal in the first degree and is held accountable for the conduct of innocent agent. The perpetrator's liability is determined on the basis of that conduct<sup>17</sup> and his own mental state.<sup>18</sup>

The derivative question relating to AI entities is: who is the perpetrator-via- another ? There are two – the first is the programmer of the AI software and the second is the user, or the end user. A programmer of AI may designs software for operating robot. For example, a programmer designs software for operating robot. The robot is intended to be placed in a factory, and its software is designed to torch the factory at night when no one is there. The robot committed the arson, but the programmer is deemed the perpetrator.

The second person who may be considered the perpetrator –via – another is the user of the AI entity. The user did not program the software but he uses the AI entity, including its software, for his own benefit. For example, a user purchases a servant robot, which is designed to execute any order given by its master. The specific user is identified by robot as master, and the master orders the robot to assault any invader of the house. The robot executes the order exactly as given.

In both examples, the actual offence was committed by the AI entity. The programmer or the user did not perform any action conforming to the definition of a specific offence , therefore, they do not meet the *actus reus* requirement of the specific offence.

The perpetrator – by - Another Liability model considers the action committed by the AI entity as if it had been the programmer's or the user's action. The legal basis for

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<sup>16</sup> *Morrisey v. State*, 620 A.2d207 (Del. 1993); *Conyers v. State*, 367 Md. 571,790 A.2d 15 (2002); *State v. Fuller*, 346 S.C. 477,552 S.E. 2d 262 (2001).

<sup>17</sup> *Dusenbery v. Commonwealth* 220 va. 770, 263 S.E. 2d 392 (1980).

<sup>18</sup> *United State v. Tobon- Builes* 706 F.2d 1092 (11<sup>th</sup> Cir. 1983).

that is the instrumental usage of the AI entity as an innocent agent. No mental attribute required for the imposition of criminal liability is attributed to the AI entity.<sup>19</sup>

When programmers were use an AI entity instrumentally, the commission of an offence by the AI is attributed them. The internal element required in the specific offence already exists in their minds. The programmer had criminal intent when he ordered the commission of the arson, and the user had criminal intent when he ordered the commission of the assault, even though these offences were actually committed through a robot, an AI entity. When does an end – user make instrumental usage of an innocent agent to commit a crime, the end – user is deemed the perpetrator. This liability model does not attribute any mental capability, or any human mental capability, to the AI entity. According to this model, there is no legal difference between an AI entity and a screwdriver in order to open up a window, he uses the screwdriver instrumentally, and the screwdriver is not criminally liable. The screwdriver’s “action” is treated as action of burglar.

#### **Limitation of the model**

This kind of legal model may be suitable in following two types of situations:

i) The first situation is using an AI entity to commit an offence without advanced capabilities.

ii) The second situation is using an AI entity of a old version which lacks the modern advanced capabilities of the modern AI entities.

This model is not suitable when an AI entity decides to commit an offence based on its own accumulated experience or knowledge. This model is also not suitable when software of the AI entity was not designed to commit the specific offence, but commit offences of general nature. Equally, model is also not suitable when the specific AI entity functions not as innocent agent, but as semi – innocent agent.<sup>20</sup>

The legal result of applying this model is that the programmer and the user are fully criminally liable for the specific offence committed, while AI entity has no criminal liability.

#### **B. Natural – Probable – Consequence Liability model**

This second model of criminal liability assumes involvement of programmers or users in the AI entity’s daily activity even though they have neither the knowledge of the committed offence nor had any planned for the same nor had participated in any way in the Commission of that offence until it had already been committed.

The examples of such situation are – an AI in robot or software designed to function as an automatic piloting the plane. During the flight, the human pilot activates the automatic piloting system (which is the AI entity) and the programme has been initialized. At some time after activation of the automatic piloting system, human pilot sees an approaching storm and tries to abort (switch off) the activation of automatic piloting and return back to normal piloting. The artificial intelligence entity may understand

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<sup>19</sup> The AI entity is used as an instrument and not as a participant, although it uses its features of processing information. See, Cross, George R., & Debessonnet, Cary G., *An Artificial Intelligence Application in the Law: CCLIPS, A Computer Program that Processes Legal Information*, 1 High Tech. L.J. 329 (1986).

<sup>20</sup> Lacey Nicola, and Wells, Celia, *Reconstructing Criminal Law – Critical Perspectives on Crime And the Criminal Process* 53 (2<sup>nd</sup> ed., 1998).

the human pilot's action as a threat to the mission and take action to eliminate the threat. It may cut off the air supply to the pilot or activate the ejection seats etc.. As a result, the plane may crash and killed the passengers and pilot. But the factual result is that human pilot and passengers were killed by action of Artificial Intelligence entities action. These actions were done according to the programme. Similarly, a second example is artificial intelligence software designed to detect threats from the internet and protect a computer system from these threats. After few days software has activated and figured out that the best way to detect such threats is by entering in to web sites and defines as dangerous and destroying any software does that, it is committing a computer offence, although the programmer did not intended for the artificial intelligence to do so.

The problems discussed in the above examples may not be dealt by first model legally suitable. The first model assumes *mens rea*, the criminal intent of the programmers or users to commit an offence through instrumental use of artificial intelligence entity's capabilities. In the above examples, the programmers and users had no knowledge of the offence committed. They had also neither planned nor intention to commit nor participated in the commission of offence. Such problems (discussed in the above example) may suitably be dealt by the second model. Because this model is based upon the ability of the programmers or users to foresee the potential commission of offences.

According to this second model, a person might be held accountable for an offence, if the offence (committed) is a natural and probable consequences of that person's conduct. In criminal law, the natural – probable consequence liability was used to impose criminal liability upon accomplices. The establish rule prescribed by U.S. courts is that accomplice liability extends to act as a perpetrator that was a natural and probable consequence<sup>21</sup> of a criminal scheme which accomplice encourage or aided.<sup>22</sup> Latter on, it has been widely accepted in U.S. statute. This liability model requires the programmer or user to be in a mental state of negligence. Programmer or user are not required to know about any forthcoming commission of an offence as a result of their activity, but are required to know that such an offence is a natural, probable consequence of their action.

A negligent person, in criminal law, is a person who has no knowledge of the offence, but a reasonable person should have known about it, since specific offence is a natural probable consequence of that person's conduct.<sup>23</sup>The programmers or users of an entity are coming under this category. They should have known about the probability of the forthcoming commission of the specific offence even though they did not actually knowing about it. Negligence is, in fact, an omission of awareness or knowledge. The negligent person omitted knowledge and the act.

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<sup>21</sup> *United State v. Powell*, 929 F. 2d 724 (D. C. Cir. 1991).

<sup>22</sup> Sayre, Francis Bowes, *Criminal Responsibility for the Acts of Another*, 43 Har. L. Rev. 689(1930); *Pople v. Prettyman*, 14 Cal. 4<sup>th</sup> 248, 58 Cal. Rptr. 2d 827, 926 P.2d 1013(1996); *Chance v. State*, 685 A.2d 351 (Del. 1996); *State v. Jackson*, 137 Wash. 2d 712 976 P.2d 1229 (1999).

<sup>23</sup> Fine, Robert P., and Cohen, Gray M., *Is criminal Negligence a Defensible Basis for Criminal Liability?* 16 Buff. L. Rev. 749 (1966); Hart, Herbert L. A., *Negligence Mens Rea and Criminal Responsibility*, Oxford Essays In Jurisprudence 29 (1961); Sturat, Donald, , *Mens Rea, Negligence and Attempt*, Crim. L. R. 647 (1968).

This liability model would permit liability to be predicated upon negligence, even when the specific offence requires a different state of mind.<sup>24</sup> This is not valid in relation to the person who personally committed the offence, but rather, is considered valid in relation to the person who was not the actual perpetrator of the offence, but was one of its intellectual perpetrators. Reasonable programmers or users should have foreseen the offence, and prevented it from being committed by AI entity.

However, the legal results of applying the Natural – Probable – Consequence Liability model to programmer or user is differ in two different types of factual cases. The first type of case is when the programmers or users were negligent while programming or using the AI entity but had no criminal intent to commit any offence. The second type of case is when programmers or users programmed or used the AI entity knowingly and wilfully to commit one offence through AI entity, but the AI entity deviated from the plan and committed some other offence, in addition or instead of the planned offence. The first type of the case is purely covered in negligence. The programmers or users acted or omitted negligently, there is no reason why they should not be held liable for offence of negligence.

The second type of case resembles with the basic idea of Natural Probable Consequence - Liability model. For example, a programmer programmes an AI entity to commit a violent robbery in a bank but the programmer did not programme the AI entity to kill any one. During the execution of the robbery, the AI entity kills one of the person present in bank whom resisted the robbery. In such cases, criminal negligence liability alone is insufficient for programmer or user. They should be made accountable as if they had committed knowingly and wilfully. In this case , they should be held liable for robbery as well as manslaughter or murder, which requires knowingly or intent. <sup>25</sup>

The question still remain: What is criminal liability of AI entity itself when the Natural – Probable – Consequence model is applied? There may be two possible outcome–

i) When AI entity acted as an innocent agent, without knowledge , it is not accountable for committed offence.

ii) When AI entity did not act merely as innocent agent, then in addition to criminal liability of programmer or user (as to the natural – probable- consequence model), the AI entity itself shall be held criminally liable for specific offence directly. The direct liability model of AI entities is the third model, as discussed below.

### **C. Direct Liability Model :**

The third liability model does not assume any dependency of AI entity on programmer and user. This model only focuses on the AI entity itself. In order to impose criminal liability on any kind of entity two elements must be proved – first, *actus reus* (external element) and second *mens rea* (mental element). The mental element includes knowledge or intent of that entity. The relevant questions related with criminal liability of AI entity is :

How it may be proved that these entities fulfill the requirements of the criminal liability? Do they differ from humans in this context? An AI algorithm might have

<sup>24</sup> *State v. Linscott*, 520 A.2d 1067. (Me. 1987).

<sup>25</sup> *People v. Cooper*, 194 Ill. 2d 419 (2000), *People v. Weiss* 256 App. Div. 162, 9N.Y. S. 2d 1 (1939).

different feature and qualifications from an average human, but such features are not required to impose criminal liability. In order to impose criminal liability, internal and external elements are required to be proved. Similarly, to impose criminal liability on AI, it is essential to examine that whether they are capable of fulfilling both elements and if they fulfill them, then nothing prevents to impose criminal liability on them.

Normally, the fulfilment of external element requirement of an offence is easily attributed to AI entities. So long as AI entity controls a mechanical or other mechanism to move its moving parts, any act might be considered as performed by the AI entity. Thus when an AI robot's electric and hydraulic arms move, it might be considered an act, if specific offence involves such an act.

When any offence might be committed due to omission, it is simpler for AI entity also. Its action is the legal basis for criminal liability, so long as there had been a duty to act. If a duty to act is imposed upon the AI entity, and it fails to act, *actus reus* requirement of specific offence is fulfilled by way of an omission. The attribution of the internal (mental) element of offence to AI entities is the real legal challenge in most cases. The attribution of mental requirement differs from an AI technology to other. Most cognitive capabilities developed in modern AI technology are immaterial to the question of the imposition of criminal liability. Creativity is a human feature that some animals also have, but creativity is not a requirement for imposing criminal liability. The sole mental requirements needed in order to impose criminal liability are - knowledge, intent, negligence etc.. Knowledge has been defined as sensory reception of factual data and the understanding of that data.<sup>26</sup> Most of the AI entities are well equipped for such reception. Sensory receptors of sights, voices, physical contact, touch etc. are not rare in most AI systems. These receptors transfer the factual data received to central processing units that analysed the data. The process of analysis in AI systems parallels human understanding.<sup>27</sup> The human brain understands the data received by eyes, ears, hands etc. by analysing that data. Advanced AI algorithms are trying to initiate human cognitive processes. This process is not different.<sup>28</sup>

Specific intent required to establish liability for specific offence. The perpetrator of the offence performs external act as a result of existence of such intent. This situation is not unique to humans. An AI entity might be programmed to have a purpose or an aim and to take action in order to achieve that purpose. This is specific intent of AI. One might argue that humans have feelings that cannot be initiated by AI software, even most advanced software - such as feeling of love, affection, hatred, jealousy etc. However, such feelings are rarely required to prove specific offences. Specific offence may be proved by knowledge of the existence of external element. But few offences require specific intent in addition to knowledge. Almost all other offences are satisfied by much less than this requirement like - negligence, recklessness, strict liability etc.

For imposing the criminal liability, both external and internal elements of specific offence are required to be proved. Why should an AI entity that fulfils all elements of

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<sup>26</sup> In this context knowledge and awareness are identical. See, *United State v. Youts* 229 F.3d 1312 (10<sup>th</sup> cir. 2000); *State v. Sargent*, 156 Vt. 163, 594 A.2d 401 (1991).

<sup>27</sup> Boden, Margaret A., , *Has AI Helped Psychology?* The Foundations of Artificial Intelligence 108 (Derek Partridge and Yorick Wilks, eds, 2006).

<sup>28</sup> Dannett, Daniel C., *Evolution, Error, and Intentionally* , The Foundations of Artificial Intelligence 190 (Derek Partridge and Yorick Wilks eds., 2006) ; Chandraswkar, B., , *What Kind of Information Processing is Intelligence?* The Foundations of Artificial Intelligence 14 (Derek Partridge and Yorick Wilks eds., 2006) .

offence be exempted from criminal liability even if both elements (external and internal) have been established – like infants and mentally ill persons? Social rational behind it is to protect infants from harmful consequences of criminal process.<sup>29</sup> Do such frame works exist for AI entities? The original legal rational behind the infancy defence was that the infants are yet incapable of comprehending what was wrong in their conduct. Could the same applied to AI entities? Most AI algorithms are capable of analysing - permitted or forbidden.

The mentally ill are presumed to lack the intentional element of specific offence. The mentally ill are unable to distinguish between right and wrong (cognitive capabilities)<sup>30</sup> and to control impulsive behaviour.<sup>31</sup> When an AI algorithm functions properly, there is no reason for it not to use all its capabilities to analyze the factual data received through its receptors.

However, an interesting legal question would be whether a defence of insanity might be raised in relation to a malfunctioning of AI algorithm, when its analytical capabilities became corrupted as a result of that malfunctioning.

When all elements of specific offences have been proved in an AI entity, there is no reason to prevent imposing of criminal liability upon it for that offence. This criminal liability of AI entity does not replace the criminal liability of the programmers or users. It is in addition with criminal liability of programmer or user. It is also not dependent on criminal liability of programmers or users. The programmed and used AI entity shall be held criminally liable for specific offence pursuant to the direct liability model unless it has been proved as innocent agent.

An AI entity and a human might co – operate as joint perpetrators, as accessories and abettors etc. and relevant criminal liability might be imposed on them accordingly. If the capabilities satisfy the legal requirements of joint perpetrators, accessories and abettors etc., then the relevant criminal joint liability as joint perpetrators, accessories and abettors etc. should be imposed regardless whether the offender is an AI entity or a human.

Not only positive factual and mental elements might be attributed to AI entity, but all relevant negative fault elements are attributable to AI entities. Most of these elements are expressed by general defences in criminal law e.g. self defence, necessity, duress, intoxication etc.. For these defences,<sup>32</sup> there is no material difference between humans and AI entities, since they relate to a specific situation, regardless of the identity of the offender. For other defences (excuses and exemptions),<sup>33</sup> some adjustment are required.

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<sup>29</sup> Ludwig, Frederick J., *Rational of Responsibility for Young Offenders*, 29 Neb. L. Rev. 521 (1950); Hirsch, Andrew Von, *Reduced Penalties for Juveniles : Normative Dimension, Principled Sentencing : Readings on Theory and Policy* 323, 3<sup>rd</sup> ed., 2009).

<sup>30</sup> See. Grazia, Edward de, *The Distinction of Being Mad*, 22 U. Chi. L. Rev. 339 (1955), Hall, Jerome, *Psychiatry and Criminal Responsibility*, 65 Yale L. J. 761 (1956).

<sup>31</sup> See, Waite, John Barker, *Irresistible Impulse and Criminal Liability*, 23 Mich. L. Rev. 443, 454 (1925); Hoedemaker, Edward D. , “*Irresistible Impulse*” as a Defence in Criminal Law, 23 Wash. L. Rev. 1,7 (1948).

<sup>32</sup> Dillof, Anthony M., *Unravelling Unknowing Justification*, 77 Notre Dame L. Rev. 1547 (1002) ; Greenawalt, Kent, *The Perplexing Borders of Justification and Excuse*, 84 Colum. L. Rev. 949 (1964).

<sup>33</sup> Lelling, Andrew E., *A Psychological Critique of Character – Based Theories of Criminal Excuses*, 49 Syrac. L. Rev. 35 (1998); Sanford Kadish, H., *Excusing Crime*, 75 Cal. L. Rev. 257 (1987).

For example, the intoxication defences applied in respect to human being. The influence of alcohol on AI entity has no affect (mental element), but influence of electronic viruses which is affecting the operating system of AI entity might be considered parallel to the influence of intoxicating substances on humans.

It might be summed up that the criminal liability of an AI entity according to direct liability model is not different from the relevant criminal liability of a human. In some cases, some adjustments are necessary, but substantively, it is same.

#### **DETERMINATION OF CRIMINAL LIABILITY: BY COMBINING ALL ABOVE MODEL**

The above three model will not work as island for determining criminal liability of AI entity and others. These models may be applied in combination to determine the criminal liability of AI entity and to give a complete image of it. None of these models is mutually exclusive. When AI entity plays an innocent role in perpetrating specific offence and the programmer is only person who directed that perpetration, the application of the Perpetration – by – Another - model (first model ) is the most appropriate model in this situation. If in the same situation, if the programmer is itself an AI entity (when AI entity programs another AI entity to commit a specific offence), the direct liability model (third model) is most appropriate to determine criminal liability of the programmer of AI entity. The third liability model is applied in addition to the first liability model, and not in lieu thereof. Thus in such situation, the AI entity programmer shall be criminally liable, pursuant to a combination of the Perpetrator by Another model and the Direct Liability model. If AI entity plays the role of physical perpetrator of the specific offence, but that very offence was not planned to be perpetrated, then application of the Natural – Probable – Consequence liability (second) model may be appropriate. The programmer may be deemed negligent if no offence had been deliberately planned to be perpetrated, or the programmer might be held fully accountable for that specific offence, if another offence had indeed been deliberately planned. Nevertheless when the programmer is not human, the direct liability model must applied in addition to the Natural – Probable-model.

The combination of all three liability model creates an opaque net of criminal liability. The combined and coordinated application of these three models reveal a new legal situation in the specific context of AI entities and criminal law. All entities – human, legal or AI – become subject to criminal law.

#### **PUNISHMENT ASPECTS**

Let us assume that AI entity has been tried and convicted, then the court is supposed to sentence that entity. If appropriate punishment has been awarded in form of sentence, then how can it be practically served on AI entity? Suppose the punishment awarded is death sentence , probation or fine, how can it be affected against AI entity? How arrest (specially in cases of AI software which was installed in the physical body) can be made? What is the practical meaning of imprisonment? These questions are relevant in case of criminal liability of AI entity.

Similar questions were raised when criminal liability of corporation was recognized. When the court adjudicates a fine, the corporation pays the fine in the same way as human pays. However, when punishment imposed on corporation cannot be carried out in same way as to humans, the adjustment is required. Such is the legal situation vis – a – vis AI entities. The adjustment in punishment requires to examine the theoretical foundations of that particular punishment like –

- a) Fundamental significance of specific punishment to a human.
- b) How may that punishment be affected to AI entity?
- c) Practical significance of punishment when imposed on AI entity?

In modern society, normally following punishment are imposed as a corrective measures: death penalty, imprisonment, suspended sentencing, community service and fines. Death penalty has been considered as most severe punishment for humans. There is a debate regarding its constitutionality amongst the nations.<sup>34</sup> It has been considered as most effective method of incapacitating offenders. The life of the AI entity is an independent existence as an entity. Some time, it has a physical appearance (like robot); some time it has only abstract existence (like – software installed in a computer system or on a net work server). Considering death penalty as incapacitating offenders, this may be achieved by deletion of software from AI entity. Once deletion is carried out, the offender (AI entity) becomes incapable of committing offences further. The deletion eradicates the independent existence of the AI entity and is tantamount to the death penalty.

Another significant punishment is imprisonment. Imprisonment in case of human being means deprivation of human liberty and imposition of severe limitation on human free behaviour, freedom of movement and freedom to manage one's personal life.<sup>35</sup> The 'liberty' or 'freedom' of an AI entity includes the freedom to act as an AI entity in relevant area like – an AI entity in medical service has freedom to participate in surgeries, an AI entity in factory has freedom to manufacture. Considering the nature of a sentence of imprisonment, the practical action that may achieve the same effect as imprisonment, when AI entity is to put out of use for a determined period. During that period, no action relating to the AI entity's freedom is allowed, and thus its freedom and liberty is restricted. The other way of imprisonment is suspended sentencing. It has deterrent effect on offenders in lieu of actual imprisonment. The significance of a suspending sentence for human is the threat of imprisonment if the human commits a specific offence or a type of specific offence.<sup>36</sup> If the human commits such an offence, a sentence of imprisonment will be imposed for the first offence in addition to sentencing for the second offence. As a result, humans are deterred from committing another offence and from becoming a recidivist offender. Practically, a suspended sentence is imposed only in the legal records. No physical action is taken. In case of suspended sentence, there is no difference in effect between human and AI entities. The statutory criminal records do not differentiate between suspended sentenced on human, and those imposed on corporation or AI entities, so long as relevant entity may be identified specifically and accurately.

Community service is a popular intermediate sanction in western legal system in lieu of actual imprisonment. In most legal system, community service is a substitute for a short sentence of actual imprisonment. In the same legal system, community service is imposed couple with probation so that the offender pays a price for damage, he has caused by committing specific offence.<sup>37</sup> The significance of the community

<sup>34</sup> Whether the death penalty should be retained or not?

<sup>35</sup> Rothman, David J., *For the Goods of All: The Progressive Tradition in Prison Reform, History And Crime* 271 (James A. Inciardi and Charles E. Faupel eds., 1980).

<sup>36</sup> Ancel, Marc, *The System of Conditional Sentence or Sursis*, 80 L. Q. Rev. 334(1964).

<sup>37</sup> Austin, James, and Krisberg, Barry, *The Unmet Promise of Alternatives*, 28 Journal of Research in Crime and Delinquency 374 (1982); Umbriet, Mark S., *Community Service Sentencing : Jail Alternatives or Added Sanction?* 45 Federal Probation 3 (1981).

service for human is compulsory contribution of labour to the community. An AI entity can be engaged as worker in many area. When an AI entity works in factory, its work is done for benefit of factory or worker in order to ease and facilitate their professional tasks. In the same way, AI entity works for benefit of private individual and community also. The same may be imposed by sentence.

The imposition of fine is another way of imposing punishment. The significance of paying fine by human or corporation is deprivation of their property either in form of money or by way of forfeiture.<sup>38</sup> If a person fails to pay a fine or has insufficient property to pay the fine, substitute penalties may be imposed on offender in form of imprisonment. Since people or corporation have property or bank account, so payment of amount (fine) may be realized. However, AI entities have no money or property of their own or bank account. But, since paying a fine or property is result of labour and transfer to State, so the fine imposed on an AI entity might be collected in form of labour in benefit of State or community. This labour may be transferred to the State in form of labour or property. Thus most common punishment are applicable to AI entities.

## CONCLUSION

On compliance of the requirements laid down for specific offence, the criminal liability may be imposed on any entity – human, corporation or AI entity. The rapid development of AI technology requires current legal solutions in order to protect society from possible damages inherent in technologies not subject to the laws especially criminal law. Criminal law has important social functions – i.e. to preserve social order for the benefit and welfare of society. The threat on social order may be posed by humans, corporations or AI entities. Traditionally only human have subjected to criminal law. Thus minors and mentally ill persons are not subjected under criminal law in most legal system. Although corporation in their modern form have existence from 24<sup>th</sup> century, it took hundreds of years to subject corporations to the law (criminal law). It was only in 17<sup>th</sup> century that an English court dared to impose criminal liability on corporations.<sup>39</sup> Legal solutions were developed and corporation were held to be capable of fulfilling all elements of criminal liability.<sup>40</sup> Now, it is working successfully. Why should AI entities be treated different from corporation? AI entities are taking large parts in human activities, as do corporations. The offences have already been committed by AI entities or through them. They may be subjected to the same laws of corporations.

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<sup>38</sup> Greene, Judith A., *Structuring Criminal Fines: Making an 'Intermediate Penalty' More Useful and Equitable*, 13 Justice System Journal 37 (1988).

<sup>39</sup> Startford – Upon – Avon Corporation, (1811) 14 East 348, 104 E. R. 636.

<sup>40</sup> Pollock, Frederick, *Has the Common Law Received the Fiction Theory of Corporation?* 27 L. Q. Rev. 219 (1911).

## JUDICIAL REVIEW OF THE SECURITY COUNCIL ACTIONS IN THE CONTEXT OF HIERARCHY OF NORMS: JURISPRUDENCE OF THE ICJ EXAMINED

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**Abstract :** The question of judicial review of the determinations of other organs of the United Nations, in particular, the Security Council by the International Court of Justice (ICJ) remains contentious since the inception of the World Organization. The United Nations Charter does not expressly provide for judicial review of the acts of its other organs by the ICJ. The *travaux préparatoires* of the Charter shows that the framers of the Charter did not intend to confer upon the ICJ power to review the acts and decisions of other organs of the United Nations. In the *Certain Expenses Opinion*, the ICJ itself suggested that each organ must “determine its own jurisdiction” and rejected the very idea of judicial review. The view was reiterated in the *Namibia Opinion* and some other decisions of the ICJ. However, an analysis of the case law of the ICJ on the issue of judicial review of the Security Council’s actions under Chapter VII reveals that the issue has been approached by the Court from the perspective of hierarchy of norms. When faced with a situation of making a choice between the Member States’ obligations under the Charter and their obligations under a treaty law, the Court preferred the former as it found that a State’s obligations under the Charter are hierarchically superior to the obligations under a treaty. Similarly when faced with the situation to make a choice between a Member State’s obligations under a Security Council resolution and its obligations with respect to the prohibition of genocide, the Court acknowledged the obligations in respect of the prohibition of genocide are even superior to a Member State’s obligations under a Security Council resolution. This leaves no doubt that the ICJ is empowered to judicially review, albeit indirectly, the lawfulness of the Security Council’s actions under Chapter VII.

**Key Words:** *International Court of Justice, Security Council, Judicial Review of the Security Council Actions, Jus Cogens.*

### I. INTRODUCTION

The question of judicial review of the determinations of other organs of the United Nations, in particular, the Security Council by the International Court of Justice (ICJ) remains contentious since the inception of the World Organization. The United Nations Charter does not expressly provide for judicial review of the acts of its other organs by the ICJ. The *travaux préparatoires* (preparatory work consisting of the records of the San Francisco Conference convened to draft the Charter) of the Charter shows that the framers of the Charter did not intend to allow the ICJ to review the actions of

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other organs of the United Nations.<sup>1</sup> In *Certain Expenses of the United Nations Case*,<sup>2</sup> the ICJ itself suggested that each organ must “determine its own jurisdiction” and rejected the very idea of judicial review. The view was reiterated in the *Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*.<sup>3</sup> In that *Opinion*, the ICJ clearly stated that the Court did not possess powers of judicial review or appeal in respect of decisions taken by other organs. However, both the *Certain Expenses* and the *Namibia Opinions* have shown that the Court can examine the legality of the acts of the other organs of the UN when confronted with such an issue. Since in these opinions, the requests were not directed to the question of the validity of the decisions of the Security Council or the acts of other organs, it is important to note that the two opinions are not determinative on the issue of judicial review.<sup>4</sup>

While advisory opinions are not determinative on the issue of judicial review, some contentious cases which are more relevant on the issue have demonstrated that when faced with the question as to the legality of the acts of other organs, the Court will decide the question on the basis of the hierarchy of the norms of international law. An analysis of the case law of the ICJ on the issue of judicial review of the Security Council’s actions<sup>5</sup> under Chapter VII reveals that the issue has been approached by the Court from the perspective of hierarchy of norms. When faced with a situation of making a choice between the Member States’ obligations under the Charter and their obligations under a treaty law, the Court preferred the former as it found that a State’s obligations under the Charter are hierarchically superior to the obligations under a treaty. Similarly, when faced with the situation to make a choice between a Member State’s obligations under a Security Council resolution and its obligations with respect to the prohibition of genocide, the Court acknowledged that the obligations in respect of the prohibition of genocide are even superior to a Member State’s obligations under a Security Council resolution.

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<sup>1</sup> See Kathleen Renee Cronin Furman, “The International Court of Justice and the United Nations Security Council: Rethinking a Complicated Relationship” 106 *Columbia Law Review* 435-463, 436 (2006); and Watson, “Constitutionalism, Judicial Review, and the World Court”, 34 *Harv. ILJ* 1, 8-14 (1993).

<sup>2</sup> *Certain Expenses Opinion, Advisory Opinion*, ICJ Reports 1962, p. 151, at 168. [Hereinafter *Certain Expenses Opinion*]

<sup>3</sup> *Advisory Opinion*, ICJ Reports 1971, p. 16, at 45. [Hereinafter the *Namibia Opinion*].

<sup>4</sup> In the *Certain Expenses Opinion*, the Court presumed the validity of the relevant Security Council resolution, *supra* note 2, at 168; and in the *Namibia Opinion*, the Court, without going into the issue of the competence, found the UN, as a supervisory institution, competent to pronounce on the conduct of the mandatory, *id.*, at 39 (“To deny to a political organ of the United Nations which is a successor of the League in this respect the right to act, on the argument that it lacks competence to render what is described as a judicial decision, would not only be inconsistent but would amount to a complete denial of the remedies available against fundamental breaches of an international undertaking.”).

<sup>5</sup> The term ‘action’ is used in the UN Charter to denote enforcement action to be taken by the Security Council under Chapter VII. See Hans Kelsen, “The Settlement of Disputes by the Security Council”, 2 *International Law Quarterly* 173-213, 180 (1948).

The scholarly opinion is divided over the issue.<sup>6</sup> Some suggests that Article 92's reference to the ICJ as "principal judicial organ" of the United Nations might imply a power of judicial review. Others refute the argument stating that such a power cannot be taken as implied and it must result from the Charter in view of Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties (VCLT).<sup>7</sup> Those who oppose judicial review argue that the Charter is not a Constitution with checks and balances, but a hierarchical collective security system with the Council at its apex and the Court's role is limited to affirming the Council's program. Supporters of the judicial review argue that international legal system, like domestic legal systems, is based on hierarchy of norms. Security Council determinations need to be tested on the touchstone of the UN Charter principles and peremptory norms of international law (*jus cogens*). It has been suggested that the absence of the provision granting express power of review to the ICJ in the Charter is not crucial. What is crucial is that the Charter does not expressly prohibit the Court from reviewing the Council's actions.<sup>8</sup>

The present paper is aimed to examining the case law of the ICJ involving the issue of reviewing the decisions of the Security Council under Chapter VII. An attempt has been made to show that the Court while maintaining that it does not possess the power of judicial review has in fact examined the validity of the actions of the Security Council. In certain cases, the Court even went further and indirectly reviewed the actions of the Council *vis a vis* a law which is hierarchically superior to the law created by the Council. Obviously, a power of judicial review as is exercised by the courts of many municipal legal systems is not possible in international legal system as international law is quite different from municipal law and a comparison to *Marbury v Madison*<sup>9</sup> or

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<sup>6</sup> For a partial literature on the issue, see Furman, *supra* note 1; Ioana Peteulescu, "The Review of the United Nations Security Council Decisions by the International Court of Justice", *Netherlands International Law Review*, 2005, pp. 167-195; Dapo Akande, "The International Court of Justice and the Security Council: is there Room for Judicial Control of Decisions of the Political Organs of the United Nations?" 46 *ICLQ* 309-43, 326 (1997); Vera Gowlland-Debbas, "The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case" 88 *AJIL* 643-77 (1994); Jose E. Alvarez, "Judging the Security Council", 90 *AJIL* 1-39 (1996); and Thomas M Franck, "The Powers of Appreciation: Who is the Ultimate Guardian of UN Legality", 86 *AJIL* 519 (1992).

<sup>7</sup> Ioana Peteulescu, *id.*, at 179. For the text of the VCLT, see 8 ILM 679 (1969). (Article 31(1): "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Article 32: "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstance of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.").

<sup>8</sup> See Dapo Akande, *supra* note 6, at 326.

<sup>9</sup> 5 U.S. (1 Cranch) 137 (1803). In *Marbury*, the US Supreme Court gave itself the power to decide the legality of the acts of the political organ of the state on the touchstone of the Constitutional values.

to those Constitutions of the countries like India where judicial review is expressly provided may be misleading. However, as international law, like municipal law establishes a hierarchy of norms<sup>10</sup>, it has been suggested that the Security Council resolutions may be indirectly reviewed to avoid the two competing norms from conflicting with each other. This paper finds sufficient support in the separate and dissenting opinions of the Judges of the ICJ that a Security Council resolution may be treated as void if it cannot be reconciled with *jus cogens* or the peremptory norms of international law.

After a brief introduction of the subject matter under discussion, the paper in part two presents a brief overview of the functions and powers of the ICJ and the Security Council regarding the maintenance of international peace and security. In particular, this part focuses on the relationship between the ICJ and the Security Council since difficulty mainly arises in the case of these two principal organs. It is these organs- ICJ and the Security Council- which have the ability to make binding decisions. Part three examines the case law of the ICJ on the issue of judicial review of the Security Council decisions under Chapter VII of the Charter. It focuses in particular the cases which relate to the debate over the issue of judicial review. Finally, part four concludes that the power of judicial review naturally flows from the Court's power of interpretation and its ability to decide legal matters relating to the Council's Chapter VII powers. Such a power may be taken as implied and may be used in practice without amending the Charter or the Statute.

## II. RELATIONSHIP BETWEEN THE ICJ AND THE SECURITY COUNCIL

Discussion in this part shows that a considerable overlap exists between the powers and functions of the two organs. It also shows that the Charter does not exclude the Court from adjudicating disputes falling within the scope of powers of the Security Council. As *Nicaragua*<sup>11</sup> and *Lockerbie*<sup>12</sup> cases demonstrate, it is likely that the ICJ is called upon to decide the legality of the Council's Chapter VII determinations.

### International Court of Justice

The ICJ was established in 1946 replacing its predecessor, the Permanent Court of International Justice (PCIJ). The PCIJ was established in 1922. The Covenant of the League of Nations had called for the establishment of the Permanent Court.<sup>13</sup> According to the Covenant, the PCIJ would issue advisory opinions to other organs and would function as an arbitrator when two Member states submitted their dispute to it for settlement.<sup>14</sup> In fact, the devastation caused by the World War I was so overwhelmingly present in the minds of the framers of the Court that they gave it 'a second, unprecedented role –the role of an adjudicator that would issue "binding" orders to nations employing force against other nations.'<sup>15</sup> The ICJ has its roots in Article 14

<sup>10</sup> See Dinah Shelton, "Normative Hierarchy in International Law", 11 *AJIL* 291-323 (2006).

<sup>11</sup> *Nicaragua v United States, (Military and Paramilitary Activities in and against Nicaragua), Merits*, 1986 ICJ Rep. p. 14).

<sup>12</sup> *Question of Interpretation and Application of 1971 Montreal Convention Arising from Aerial Incident at Lockerbie, Provisional Measures, Libya v UK; Libya v US*, 1992 ICJ Reports 1992, p.3, p.114

<sup>13</sup> Heidi K Hubbard, "Separation of Powers within the United Nations: A Revised Role for the International Court of Justice", 38 *Stanford Law Review* 165-94,165 (1985).

<sup>14</sup> Articles 12, 13 and 14 of the League of Nations Covenant.

<sup>15</sup> Hubbard, *supra* note 12, at 166.

of the League of Nations Covenant which established the PCIJ and inherited the same dual role from it.

While PCIJ was not an organ of the League of Nations,<sup>16</sup> the ICJ is the principal organ of the United Nations and at the same time its principal judicial organ.<sup>17</sup> ICJ's functions are to deal with disputes between States in accordance with international law, and to render advisory opinions to the specified international organizations on certain legal questions.<sup>18</sup> Under the Charter, Members have undertaken to comply with the decisions of the ICJ.<sup>19</sup> The Charter also declares that if any party to a case fails to perform its obligations incumbent upon it under the judgment of the Court, the Security Council may, "if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."<sup>20</sup> As has been pointed out by Leo Gross, the Court was created with the expectation that "[t]he judicial process will have a central place in the plans of the United Nations for the settlement of international disputes by peaceful means."<sup>21</sup> The centrality of the ICJ in the settlement of disputes is also borne by the fact that the Security Council is mandated to take into consideration, while making recommendations under Article 36 (2) that "legal disputes should as a general rule be preferred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court."<sup>22</sup>

### **Security Council**

But settlement of disputes between states does not exclusively fall within the jurisdiction of the ICJ. The Charter entrusts this function to the Security Council also and to a certain extent settlement of disputes is also the concern of the General Assembly. In addition, adjustment of other situations which might lead to a breach of peace may also be dealt with by the Security Council.<sup>23</sup> Not only formal disputes fall within the jurisdiction of the Council, its functions also include dealing with the situations which might give rise to friction or disputes.

The United Nations Charter confers upon the Security Council, "primary responsibility for the maintenance of international peace and security." But 'primary

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<sup>16</sup> Shabtal Rossenne, *The World Court: What It Is and How It Works* (Leyden, AW Sythoff & New York, Oceana Publications: 1962) p. 22.

<sup>17</sup> UN Charter, Article 92.

<sup>18</sup> *Id.*, Article 96: (1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question. 2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.).

<sup>19</sup> *Id.*, Article 94 (1).

<sup>20</sup> *Id.*, Article 94 (2).

<sup>21</sup> See Leo Gross, "The International Court of Justice: Consideration of Requirements for Enhancing Its Role in the International Legal Order", 65 *AJIL* 253-56, 256 (1971) citing the Rapporteur of the First Committee of the United Nations Conference on International Organization.

<sup>22</sup> This provision has been invoked by the Security Council only rarely. There was only one case which the Security Council recommended for submission to the ICJ. See Furman, *supra* note 1, at 440.

<sup>23</sup> On the respective powers and functions of the Security Council and the General Assembly regarding the pacific settlement of disputes, see Hans Kelsen, *supra* note 5.

responsibility' does not mean exclusive responsibility for the maintenance of international peace and security. This was made clear by the ICJ in the *Certain Expenses Opinion*. The Court citing the provisions of Article 24 opined that the responsibility conferred is "primary", not exclusive. "Primary responsibility is conferred upon the Security Council, as stated in Article 24, "in order to ensure prompt and effective action". To this end, it is the Security Council which is given a power to impose an explicit obligation of compliance if for example it issues an order or command to an aggressor under Chapter VII. It is only the Security Council which can require enforcement by coercive action against an aggressor."<sup>24</sup>

Although, the Council is not a judicial organ it is widely viewed as having been invested with the quasi-judicial powers in respect of its powers under Chapters VI and VII of the United Nations Charter. Widely perceived as a political organ, Security Council was conceived to mainly act as a security system. Some have expressed the view that the Security Council is not restricted to act on the basis of legal principles. "Security was set above justice and the establishment of order was to proceed the reign of law."<sup>25</sup>

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<sup>24</sup> *Certain Expenses Opinion*, *supra* note 2, at 163. The Court went on to state: The Charter makes it abundantly clear, however, that the General Assembly is also to be concerned with international peace and security. Article 14 authorizes the General Assembly to "recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the purposes and principles of the United Nations". The word "measures" implies some kind of action, and the only limitation which Article 14 imposes on the General Assembly is the restriction found in Article 12, namely, that the Assembly should not recommend measures while the Security Council is dealing with the same matter unless the Council requests it to do so. Thus while it is the Security Council which, exclusively, may order coercive action, the functions and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies and the making of recommendations; they are not merely hortatory. *Ibid*.

<sup>25</sup> Clyde Eagleton, "The Jurisdiction of the Security Council Over Disputes", 40 *AJIL* 513-33, 513 (1946). Hans Kelsen also supports the view that the Security Council is not required to act in accordance with international law when it is acting to maintain or restore international peace and security. He says, "The purpose of the enforcement action under Article 39 is not to maintain or restore the law but to maintain or restore the peace, which is not necessarily identical with the law." Hans Kelsen, *The Law of the United Nations: A Critical Analysis of the Fundamental Problems* (1951), p. 294 (cited in Dapo Akande, *supra* note 6, at 318. For the view that the Security Council's powers are not unlimited by virtue of Article 24 (2) of the Charter, see the dissenting opinion of Judge Weeramantry in the *Lockerbie* case. Judge Weeramantry raised the question, "Does this mean that the Security Council discharges its variegated functions free of all limitations, or is there a circumscribing boundary of norms or principles within which its responsibilities are to be discharged? He then expressed the view that "Article 24 itself offers us an immediate signpost to such a circumscribing boundary when it provides in Article 24(2) that the Security Council in discharging its duties under article 24 (1)... The duty is imperative and the limits are categorically stated." *Lockerbie* case, *supra* note 11, at 61. For the similar view, see the discussion in Akande, *supra* note 6, at 318-22.

The primary function of the security council, that is, maintenance of international peace and security is to be exercised by two means- the pacific settlement of disputes as are likely to endanger international peace and security (chapter VI powers) , and second, enforcement of action (chapter VII powers). Chapter VI sets out the various methods for peaceful settlement of disputes. These methods are supplementary to those traditionally established in international law and which ‘first of all’ be used, as appropriate.<sup>26</sup>

### **Distinctions and Overlaps Between the Functions of the Court and The Security Council**

The ICJ is not excluded from adjudicating disputes falling within the scope of Chapter VII of the UN Charter. And a possible solution to avoid this tension lies in conceding the power of judicial review to the ICJ. The issue that arises prominently in this context is: Is there any limit on the powers of the Security Council in respect of its Chapter VII determinations? As has been shown above, powers of the Security Council are not unlimited even in respect of its chapter VII powers. Under Chapter VII, the Council has the power to make binding decisions. Its powers include adjudicatory powers. Even assuming that in respect of political questions or disputes, the authority of the Council cannot be challenged, decisions which are of judicial nature are amenable to judicial interpretation. In *Nicaragua*, the ICJ rejected the argument of the US that its actions in Nicaragua constituted the exercise of a right of collective self-defence and as such fell within the scope of powers of the Security Council and thus was not amenable to evaluation by law. Moreover, as has already been shown Articles 1(1) and 24(2) expressly limit the powers of Security Council. Article 24 (2) provides that in discharging its primary responsibility for the maintenance of international peace and security “the Security Council shall act in accordance with the Purposes and Principles of the United Nations.”

It is not unusual for the Security Council handling legal questions in relation to its work. In fact, under the circumstances of the Chapter VII, it has authority to make binding decisions. In the absence a hierarchy between the different principal organs of the UN, there is every likelihood that both the ICJ and the Security Council are seized with the same dispute. The ICJ has tried to resolve this issue by adopting the view:

The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can perform their separate but complementary functions with respect to the same dispute.<sup>27</sup>

Further, in the *Iranian Hostages* case<sup>28</sup>, the ICJ has clearly ruled that it is not excluded from adjudicating disputes falling within the scope of Chapter VII of the UN Charter.

This apparent overlap between the functions of the ICJ, on the one hand and the Security Council, on the other, shows that a potential conflict exists between the General Assembly, the Security Council and the ICJ since all of them play a role in

<sup>26</sup> Philippe Sands Q.C. and Pierre Klein (ed.), *Bowett’s Law of International Institutions*, (Sweet& Maxwel, Thomson Reuters, South Asian Edition, 2011) p. 41

<sup>27</sup> *Nicaragua case*, *supra* note 10 at 435.

<sup>28</sup> *United States Diplomatic and Consular Staff in Tehran (US v. Iran)*, ICJ Reports 1990, p. 3.

maintaining international peace. But difficulty arises mainly in the case of the ICJ and the Security Council which are the only UN organs capable to make binding decisions. Owing to their “parallel function” the relationship between the ICJ and the Security Council becomes more complex.

Since both the principal organs- the ICJ and the Security Council, one political and the other judicial, may be concurrently exercising their respective powers in respect of same dispute, it is likely that the ICJ is called upon to review the decisions of the Council. This possibility of review of Council’s actions may arise in the course of the Court’s consideration of contentious cases as well as when it is exercising its power to give advisory opinion.

The ICJ is the “principal judicial organ of the United Nations” which is to function strictly on the basis of legal principles. To quote Judge Lachs in the *Lockerbie case*, the Court is to act as “the guardian of legality”.<sup>29</sup> Through a process of interpretation and some form of review of the Security Council actions, the Court can restrain the Council from exceeding its limits.<sup>30</sup>

The Security Council, on the other hand, a political organ, albeit vested with quasi-judicial powers, which has considerable flexibilities in discharging its primary responsibility. The Council need not apply international law in recommending the appropriate terms of settlement. Both organs also differ in their methods of operation. The Court is concerned with third-party adjudication of disputes. The Council on the other hand, on its own initiative, may investigate any dispute or situation that might lead to friction or give rise to dispute, to determine whether its continuance is likely to endanger the maintenance of international peace and security. The Council may recommend ‘appropriate procedures and methods of adjustment’ and alternatively it may recommend terms of settlement for such disputes that the parties to the dispute concerned. It may also be noted that the Council’s pacific settlement of disputes related functions are limited to making non-binding recommendations. The Council has no right to enforce its recommendations unless indirectly under Chapter VII.<sup>31</sup> In fact, five of six Articles in chapter VI relate to settlement of disputes by the states themselves, through means of their own choice. Eagleton writes: [T]he fact that all of chapter VI, with the exception of four words (“such terms of settlement”) is devoted to procedures through which the parties may choose their own means and their own terms of settlement manifests the emphasis of the charter upon the right of sovereign states to settle their disputes in their own fashion. This emphasis must dominate in any interpretation of the charter provisions for pacific settlement.<sup>32</sup> The dominating theory in the chapter VI provisions is that settlement must be by the parties themselves. This is also borne out by the fact that “the Security Council, even if it intervened with such a decision, could only recommend a procedure to the parties, to which they would not be bound; and by paragraph 2 of Article 36, under which the Council should take into consideration any procedures already adopted by the parties.”<sup>33</sup>

As already stated the Security council is involved not only in the type of disputes the continuance of which is likely to endanger the maintenance of international peace

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<sup>29</sup> *Lockerbie case*, *supra* note 12, p 26.

<sup>30</sup> Gowlland-Debbas, *supra* note 6, at 662.

<sup>31</sup> Eagleton, *supra* note 25, at p. 514

<sup>32</sup> *Ibid.*

<sup>33</sup> *Id.*, at 516. For functional distribution between the Court and the Council in the Peaceful settlement of disputes, see Gowlland-Debbas, *supra* note 6, at pp. 653-55.

and security, it may also deal with 'any situation which might lead to international friction or give rise to a dispute. In either case, decision as to whether the dispute or the situation of the type mentioned above is to be made by the Security Council.<sup>34</sup>

One more question that arises in the context is whether the ICJ's powers include the power of interpretation of the Charter. On the basis of textual analysis and certain observations by the ICJ, it is suggested that the Court possesses an interpretative function as part of its normal judicial powers. The ICJ has clearly indicated that in absence of a provision forbidding the Court to exercise power of interpretation may be taken as presumed.<sup>35</sup>

The objection is often raised that the question of judicial review is of little avail in view of the fact that the Court's pronouncements are not binding on other organs. But it misses the point that the ICJ's pronouncements on a question of law are highly authoritative and carry strong moral force to deter an organ from exceeding its powers.

### III. JUDICIAL REVIEW IN THE CASE LAW OF THE ICJ

In a number of cases which include both contentious cases and advisory opinions, the ICJ has considered the issues pertaining to the validity of the acts of the other organs of the UN. Cases in which the ICJ has discussed the issue of judicial review are of three types. In the first type of cases which comprise some advisory opinions, the Court's opinions are not determinative as the matter of judicial review did not arise directly in those cases. In the second category are included those cases in which the Court was asked to decide the validity of the Council's resolutions which were in conflict with the obligations of a State under a treaty. In the third category, those cases may be placed in which the ICJ was asked to decide the legality of the Security Council's Chapter VII determinations on the touchstone of peremptory norms of international law.

#### **Certain Expenses, Namibia and Wall Opinions**

In the exercise of its advisory opinion jurisdiction, the ICJ has in fact examined the legality of the acts of the organs of the UN albeit it expressly denied that it had a power of review over the acts of other organs. In *Certain Expenses Opinion*, it stated:

In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in course of rendering is an *advisory* opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction. If the Security Council, for example, adopts a resolution purportedly for the maintenance of international peace and security and if, in accordance with a mandate or authorization in such resolution, the Secretary-General incurs financial obligations, these amounts must be presumed to constitute "expenses of the Organization".<sup>36</sup>

<sup>34</sup> UN Charter, Article 34.

<sup>35</sup> *Conditions of Admissions of a State to Membership in the United Nations, Advisory Opinion*, ICJ Reports 1947-48, p.61.

<sup>36</sup> *Certain Expenses Opinion*, *supra* note 2, p. 168.

In that opinion, a question arose whether the expenditures authorized in relevant General Assembly resolutions of 1961 relating to the United Nations operations in the Congo (ONUC) and of the operations of the U.N. Emergency Force in the Middle East (UNEF) undertaken in pursuance of the Security Council resolutions constitute 'expenses of the organization' within the meaning of Article 17, paragraph 2 of the UN Charter. It is clear that in deciding whether certain expenditures constitute the expenditures of the organization, the Court had to consider the respective functions of the General Assembly and the Security Council in regard to maintenance of international peace and security. In the course of rendering advisory opinion, the Court as a matter of fact examined the respective functions of the General Assembly and the Security Council under the Charter, in particular, with respect to the maintenance of international peace and security in order to know whether the acts of the organs were *ultra vires*. In this way, it has incidentally exercised the power of judicial review over the actions of the Security Council.

It may be pointed out that at the 1086th Plenary Meeting of the General Assembly on 20 December 1961, in the course of the debate leading to the making of request for advisory opinion on the 'expenses of the organization', the French representative to the General Assembly proposed an amendment to the draft resolution requesting the advisory opinion, which was rejected. If the amendment had been adopted, it would have asked the Court to give an opinion on the question whether the expenditures relating to the UN operations in question were "decided on in conformity with the provisions of the Charter". In other words, if the amendment had been adopted, the Court would have been asked to consider whether the resolutions *authorizing the expenditures* were decided on in conformity with the Charter. According to the Court, "the French amendment did not propose to ask the Court whether the resolutions *in pursuance of which the operations in the Middle East and in the Congo were undertaken*, were adopted in conformity with the Charter".<sup>37</sup> The Court made the following observations on the argument based upon the rejection of the French proposal:

The rejection of the French amendment does not constitute a directive to the Court to exclude from its consideration the question whether certain expenditures were "decided on in conformity with the Charter", if the Court finds such consideration appropriate. It is not to be assumed that the General Assembly would thus seek to fetter or hamper the Court in the discharge of its judicial functions; the Court must have full liberty to consider all relevant data available to it in forming an opinion on a question posed to it for an advisory opinion. Nor can the Court agree that the rejection of the French amendment has any bearing upon the question whether the General Assembly sought to preclude the Court from interpreting Article in the light of other articles of the Charter, that is, in the whole context of the treaty. If any deduction is to be made from the debates on this point, the opposite conclusion would be drawn from the clear statements of sponsoring delegations that they took it for granted the Court would consider the Charter as a whole.<sup>38</sup>

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<sup>37</sup> The French proposal was rejected not because it was something that could not be done but because it was found unnecessary. See Dapo Akande, *supra* note 6, at 328.

<sup>38</sup> *Certain Expenses Opinion*, *supra* note 2, at 157.

In *Namibia Opinion*, in response to the objection that the Court should not assume powers of judicial review of the action taken by the other principal organs of the United Nations without specific request to that effect, nor act as a court of appeal from their decisions, the Court replied:

Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned. The question of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for advisory opinion. However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions.<sup>39</sup>

In that Opinion, the ICJ was requested by the General Assembly for an advisory opinion on the question ‘What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?’ Resolution 276 reaffirmed the General Assembly Resolution 2145 (XXI) by referring to the decisions of the United Nations “that the Mandate of South-West Africa was terminated” declared that “the continued presence of the South African authorities in Namibia was illegal” and in consequence all acts taken by the Government of South Africa “on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid”.

Objection was raised on behalf of the Government of South Africa that the General Assembly, in adopting resolution 2145 (XXI) acted *ultra vires*. Although the Court expressly ruled out the possibility of the exercise of judicial review by it over the decisions of the other organs, the Court, “in the exercise of its judicial functions” in fact delved into the issue whether the General Assembly in adopting the said resolution acted *ultra vires*. It is clear, for example, from the following comment of the Court:

In a further objection to General Assembly resolution 2145 (XXI) it is contended that it made pronouncements which the Assembly, not being a judicial organ, and not having previously referred the matter to any such organ, was not competent to make...To deny to a political organ of the United Nations which is a successor of the League in this respect the right to act, on the argument that it lacks competence to render what is described as a judicial decision, would not only be inconsistent but would amount to a complete denial of the remedies available against fundamental breaches of an international undertaking.<sup>40</sup>

Looking into the issue of the legal basis of the Security Council’s relevant resolutions, the Court went on to state, “Article 24 of the Charter vests in the Security Council the necessary authority to take action such as that taken in the present case. The reference in paragraph 2 of this Article to specific powers of the Security Council under certain chapters of the Charter does not exclude the existence of general powers to discharge the responsibilities conferred in paragraph 1. Reference may be made in this respect to the Secretary-General’s Statement, presented to the Security Council on 10 January 1947, to the effect that “the powers of the Council under Article 24 are not

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<sup>39</sup> *Namibia Opinion*, *supra* note 3, at 45.

<sup>40</sup> *Id.*, at p. 49.

restricted to the specific grants of authority contained in Chapters VI, VET, VII1 and XII . . . the Members of the United Nations have conferred upon the Security Council powers commensurate with its responsibility for the maintenance of peace and security. The only limitations are the fundamental principles and purposes found in Chapter 1 of the Charter.”

The Court further opined:

[T]he Court recalls that in the preamble of resolution 269 (1969), the Security Council was “*Mindful* of its responsibility to take necessary action to secure strict compliance with the obligations entered into by States Members of the United Nations under the provisions of Article 25 of the Charter of the United Nations”. *The Court has therefore reached the conclusion that the decisions made by the Security Council in paragraphs 2 and 5 of resolutions 276 (1970), as related to paragraph 3 of resolution 264 (1969) and paragraph 5 of resolution 269 (1969), were adopted in conformity with the purposes and principles of the Charter and in accordance with its Articles 24 and 25.* The decisions are consequently binding on all States Members of the United Nations, which are thus under obligation to accept and carry them out.<sup>41</sup>

In the *Wall Opinion*<sup>42</sup>, an advisory opinion on the legality of the construction of the wall in the occupied Palestinian territory, the ICJ was confronted with the issue related to the Security Council’s interpretations of the United Nations Charter law.<sup>43</sup> In opining that the construction of the wall (security fence separating much of the occupied west Bank of the Jordan River from Israel proper) was contrary to the principles of international law, the Court adopted an interpretation of self defence provided under Article 51 of the Charter which runs contrary to that of the Security Council. In the *Wall Opinion*, the Court noted that the right of self defence could not be applied to a case of terrorist attacks as the right is limited to a case of armed attack by one State against another State. However, in the wake of September 11, 2001 attacks on the U.S. the relevant security council resolutions widening the scope of Article 51 invoked the right of self defence in the case of terrorist attacks.

The *Wall Opinion* raises a host of important issues including the issues relating to the relationship between the organs of the UN, Palestinians’ right to self determination and the right of self defence against the terrorist attacks. However, only the issue of the relationship between the ICJ and other organs will be considered here. Israel argued before the Court that it lacked jurisdiction as the General Assembly had acted *ultra vires* in requesting the advisory opinion. Israel, in particular, argued that the General Assembly did not possess authority to request the advisory opinion when the Security Council was already seized of the matter. Israel based its argument on the provisions of Article 12 (1) of the UN Charter. Article 12 (1) provides, “While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the

<sup>41</sup> *Id.*, at p. 53. [Emphasis supplied].

<sup>42</sup> *Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports 2004, 136. [Hereinafter the *Wall Opinion*]. For a discussion on the Wall opinion, see Furman, *supra* note 1; Watson, “The Wall Decision in Legal and Political Contexts”, 99 *AJIL* 6-26 (2005); and Richard A Falk, “Toward Authoritativeness: The ICJ Ruling on Israel’s Security Wall”, 99 *AJIL* 42-52 (2005).

<sup>43</sup> Furman, *id.*, at 435.

present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.”

The Court refuted the argument advanced by Israel on two grounds. First it opined that a request for advisory opinion is not a recommendation within the meaning of Article 12(1) and thus not prohibited. Second, the Council was not, in any case, exercising its functions on the matter.<sup>44</sup>

### **Lockerbie and Basnia Genocide Cases**

The *Lockerbie*<sup>45</sup> and the *Bosnia Genocide*<sup>46</sup> cases have raised the issue of “possible inconsistency between the decisions of the two organs.”<sup>47</sup> As Judge Weeramantry in his dissenting opinion expressed the view that the *Lockerbie* case was unique in the sense that “it is first time the international court and the Security Council have been approached by opposite parties to the same dispute.” In *Lockerbie*, while ruling that the Security Council’s determinations trumped other treaty obligations, the ICJ dwelt upon the issue of judicial review by the ICJ over the Security Council actions.

The case relates to the destruction on 21 December 1988, over Lockerbie of the aircraft on Pan Am flight 103, and to charges brought by a Grand jury of the US in November 1991 against two Libyan nationals suspected of having caused a bomb explosion to be placed aboard the aircraft which bomb had exploded causing the aero plane to crash. The US and the UK demanded the surrender of the two Libyan nations for their trial accused of carrying out the bombing of Pan Am flight 103. In January 1992 the Security Council adopted Resolution 731 urging Libya “to provide a full and effective response” to the requests of the UK and Us. On 3 March 1992, the Government of Libya instituted a proceedings against the US and the UK in respect of a dispute between Libya and the US over the interpretation or application of the Montreal Convention for the Suppression of Unlawful Act against the Safety of Civil Aviation, 1971 (“the Montreal Convention”). Libya asked the ICJ to declare that the UK and the US were in breach of their obligations under the Montreal Convention and that it was complying with its obligations under that convention. Libya also filed an application, under Article 41 of the Statute of the ICJ requesting the indication of provisional measures which would prevent the US and UK from taking any measures that would coerce Libya surrender the Libyan nationals to any jurisdiction outside Libya or that would otherwise prejudice the right claimed by Libya or that would otherwise prejudice the rights claimed by Libya. But before the judgment was delivered, The Security Council adopted under Chapter VII of the Charter, resolution 748 (1992) which imposed mandatory sanctions on Libya in the event that Libya failed to comply, by a certain date, with the demand to surrender the two men.

*Lockerbie* presented before the Court a situation where it was to decide the parties’ respective obligations under the Montreal Convention *vis a vis* their obligations under the above named Security Council resolution. In its orders of 14 April 1992, the Court found that “the circumstances of the case were not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures.” It further

<sup>44</sup> *Wall Opinion*, *supra* note 42, paras 25 and 27.

<sup>45</sup> *Supra* note 12.

<sup>46</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v Yugoslavia (Serbia & Montenegro)*, Request for the Provisional Measures, ICJ Reports 1993, p. 3 and 325.

<sup>47</sup> See the judgment of Judge Bedjaoui, *supra* note 12, at 33.

held that by virtue of Articles 25<sup>48</sup> and 103<sup>49</sup> of the UN Charter, the obligations under The Security Council resolution 748 prevailed over those under the Montreal Convention.

In its Judgment of 27 February 1998 on the preliminary objections in the Lockerbie case, the Court by 13:2 found that it had jurisdiction to deal with the merits of the case brought by Libya claims were admissible.<sup>50</sup>

In his dissenting opinion, Judge Schwebel dealt at length with the question of judicial review. His judgment expressly rules out the prospect of judicial review by the ICJ of the Security Council actions. He categorically states, “it [ICJ] is particularly without power to overrule or undercut decisions of the Security Council made by it in pursuance of its authority under Articles 39, 41 and 42 of the Charter to determine the existence of any threat to the peace, breach of the peace, or act of aggression and to decide upon responsive measures to be taken to maintain or restore international peace and security.” Taking the position that extraordinary powers of the Security Council are antithetical to the exercise of powers of judicial review by the ICJ, Judge Schwebel went on to state:

The texts of the Charter of the United Nations and of the Statute of the Court furnish no shred of support for a conclusion that the Court possesses a power of judicial review in general, or a power to supervene the decisions of the Security Council in particular. On the contrary, by the absence of any such provision, and by according the Security Council “primary responsibility for the maintenance of international peace and security”, the Charter and the Statute import the contrary. So extraordinary a power as that of judicial review is not ordinarily to be implied and never has been on the international plane. If the Court were to generate such a power, the Security Council would no longer be primary in its assigned responsibilities, because if the Court could overrule, negate, modify - or, as in this case, hold as proposed that decisions of the Security Council are not “opposable” to the principal object State of those decisions and to the object of its sanctions - it would be the Court and not the Council that would exercise, or purport to exercise, the dispositive and hence primary authority.<sup>51</sup>

Judge Schwebel argued that by virtue of Article 103 of the Charter, the Security Council “may lawfully decide upon measures which may in the interests of the maintenance or restoration of international peace and security derogate from the rights of a State under international law.”<sup>52</sup> To him, simply because the Security Council actions must be in accordance with the Charter and that the ICJ is made the principle judicial organ, it does not follow that the Court can judicially review the Council’s actions. To hold that it does so “...overlooks the truth that, in many legal systems, national and international, the subjection of the acts of an organ to law by no means

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<sup>48</sup> UN Charter, Article 25: “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”

<sup>49</sup> *Id.*, Article 103: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

<sup>50</sup> *Question of Interpretation and Application of 1971 Montreal Convention Arising from Aerial Incident at Lockerbie*, Provisional Measures, *Libya v UK; Libya v US*, Preliminary Objection, Judgment, 1992 ICJ Reports 1998, p.9.

<sup>51</sup> *Id.*, at p. 75.

<sup>52</sup> *Id.*, at 76.

entails subjection of the legality of its actions to judicial review. In many cases, the system relies not upon judicial review but on self-censorship by the organ concerned or by its members or on review by another political organ”.<sup>53</sup> He then concludes, “[A] judgment of the Court which held resolutions of the Security Council adopted under Chapter VII of the Charter not to bind or to be “opposable” to a State, despite the terms of Article 25 of the Charter, would seriously prejudice the effectiveness of the Council’s resolutions and subvert the integrity of the Charter. Such a holding would be tantamount to a judgment that the resolutions of the Security Council were *ultra vires*, at any rate in relation to that State. That could set the stage for an extraordinary confrontation between the Court and the Security Council. It could give rise to the question, is a holding by the Court that the Council has acted *ultra vires* a holding which of itself is *ultra vires*?”<sup>54</sup>

However, adopting a different line of approach, Judge Rezek expressed the view that the Court can examine the validity of a political organ’s interpretation of the Charter. In his separate opinion, Judge Rezek observed:

The Court has full jurisdiction to interpret and apply the law in a contentious case even when the exercise of such jurisdiction might entail the critical scrutiny of a decision of another organ of the United Nations. It does not directly represent the State Members of the Organization (this fact has been stated before the Court and attempts have been made to infer from it the consequence that the Court is not competent to undertake a review of resolutions of the Council), but precisely because it is impermeable to political injunctions the Court is the interpreter par excellence of the law and the natural forum for reviewing the acts of political organs in the name of the law, as is the rule in democratic regimes. It would be surprising indeed if the Security Council of the United Nations were to enjoy absolute and unchallengeable power in the respect of the rule of law, a privilege not enjoyed, in domestic law, by the political organs of most of the founding Members and other Members of the Organization, starting with the respondent state.”<sup>55</sup>

*Bosnia Genocide Convention and Congo v Rwanda Cases*

In the *Bosnia Genocide Convention* case (Provisional Measures)<sup>56</sup> and the *Case Concerning Armed Activities on the Territory of the Congo*<sup>57</sup> the ICJ has considered the validity of the Security Council resolutions in the context of *jus cogens*. As has already been shown, the Council’s Chapter VII powers are not unlimited. They are subject to the purposes and principles of the United Nations. One of the purposes of the UN is to achieve international cooperation in “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion...”<sup>58</sup> It is accepted position that certain human rights which

<sup>53</sup> *Ibid.*

<sup>54</sup> *Id.*, at 81.

<sup>55</sup> *Id.*, pp.153-54.

<sup>56</sup> Order of 8 April 1993, ICJ Reports 1993, p. 3.

<sup>57</sup> *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v Rwanda)*, *Jurisdiction and Admissibility, Judgment*, ICJ Reports 2006, p.6.

<sup>58</sup> UN Charter, Article 1.

are fundamental in character have acquired the status of *jus cogens*. Although there is no universally accepted list of peremptory norms it is generally agreed that norms against genocide, slave trade, and use of force are part of *jus cogens*.<sup>59</sup> Besides these, humanitarian law norms, freedom from torture and right to self determination are also considered peremptory norms of international law. *Jus cogens* are overriding norms which are higher than any other norms of international law.<sup>60</sup> They operate to invalidate any treaty concluded contrary to them.<sup>61</sup> Hence, a Security Council action that purports to violate the peremptory norms of international law is subject to judicial scrutiny.<sup>62</sup>

In *Bosnia Genocide Convention* case, like *Lockerbie*, the ICJ and the Security Council have been approached by opposite parties to the same dispute. On 20 March 1993, Bosnia instituted proceedings against Yugoslavia in respect of a dispute concerning alleged violations by Yugoslavia of the Convention on the Prevention and Punishment of the Crime of Genocide. In particular, it requested the Court to declare that the Security Council resolution 713 imposing arms embargo upon the whole of the territory of the former Yugoslavia must not be construed as imposing an arms embargo on the Bosnia as this would be contrary to the right of self defence to be found in Article 51 of the Charter and would also stop the Bosnian Government from preventing the commissioning of genocide. The Court called upon Yugoslavia to “immediately”...take all measures within its power to prevent commission of the crime of genocide.” Further, the Court’s order of provisional measures asked Yugoslavia that it should in particular ensure that its military, paramilitary or irregular armed units “do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement, to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group”.

In the Order of 13 September 1993<sup>63</sup> in the same case, the Court while reaffirming the measures it ordered at the previous occasion issued an interim order of provisional measures. It held that “the present perilous situation demands, not an indication of provisional measures additional to those indicated by the Court’s Order of 8 April 1993, but immediate and effective implementation of those measures.”

Judge *ad hoc* Lauterpacht held that the effect of the Security Council’s arms embargo was to create a marked imbalance between the weaponry in the hands of the Serbian and Muslim population of Bosnia and Herzegovina. He cited the United Nations Special Rapporteur (whose view has been adopted by the General Assembly) as saying that the imbalance as having contributed to the intensity of ethnic cleansing in the area. He expressed the view that the prohibition of genocide has long been accepted as a matter of *jus cogens*, a legal order superior to treaties. In so far, therefore, as the

<sup>59</sup> Dinah Shelton, *supra* note 10, at 302.

<sup>60</sup> See The Vienna Convention on the Law of Treaties, Articles 53 and 64. For a thorough discussion on the origin and development of the principle of *jus cogens*, see Jerzy Sztucki, *Jus Cogens and the Law of the Vienna Convention on the Law of Treaties: A Critical Appraisal* (Wien New York, Springer-Verlag: 1974), pp.6-96.

<sup>61</sup> For different perspectives on hierarchical superiority of *jus cogens*, and especially for the argument that *jus cogens* or peremptory norms of international law have a status higher than the Security Council resolutions, see *id.*

<sup>62</sup> The position is supported by the concurring and separate opinion of Judge *ad hoc* Lauterpacht in the *Bosnia Genocide Convention* case, *supra* note 51. See *infra* texts accompanying notes 64-67.

<sup>63</sup> *Id.*, Order of 13 September 1993, ICJ Reports, p. 325.

embargo can be seen as contributing to ethnic cleansing and thus to genocide, its continuing validity has become doubtful and the Security Council should know this when reconsidering the embargo.

Maintaining that there are many substantive limits on the Chapter VII powers of the Security Council as expressly stated in Article 24 (2) of the Charter, he observed that “Nor should one overlook the significance of the provision in Article 24 (2) of the Charter that, in discharging its duties to maintain international peace and security, the Security Council shall act in accordance with the Purposes and Principles of the United Nations. Amongst the Purposes set out in Article 1 (3) of the Charter is that of achieving international co-operation “in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.”<sup>64</sup>

On the issue of judicial review, he stated:

This is not to say that the Security Council can act free of all legal controls but only that the Court’s power of judicial review is limited. *That the Court has some power of this kind can hardly be doubted*, though there can be no less doubt that it does not embrace any right of the Court to substitute its discretion for that of the Security Council in determining the existence of a threat to the peace, a breach of the peace or an act of aggression, or the political steps to be taken following such a determination. But the Court, as the principal judicial organ of the United Nations, is entitled, indeed bound, to ensure the rule of law within the United Nations system and, in cases properly brought before it, to insist on adherence by all United Nations organs to the rules governing their operation.<sup>65</sup>

Judge *ad hoc* Lauterpacht maintained that *Bosnia Genocide Convention* case is clearly distinguishable from *Lockerbie* in that the former involves the prohibition of genocide which has generally been accepted as having the status of jus cogens. *Lockerbie*, on the other hand, related to the conflict between the obligations under the Security Council resolutions and the Montreal Convention which is an ordinary rule of international law.<sup>66</sup> He further said that “the prohibition of genocide has long been regarded as one of the few undoubted examples of jus cogens”.<sup>67</sup> Citing the Court’s Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*<sup>68</sup>, he said that in that Opinion, it had affirmed that genocide was “contrary to moral law and to the spirit and aims of the United Nations.”<sup>69</sup> The following remarks of Judge *ad hoc* Lauterpacht are also instructive:

The concept of jus cogens operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot - as a matter of simple hierarchy of norms - extend to a conflict between a Security Council resolution and jus cogens. Indeed, one only has to

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<sup>64</sup> *Id.*, at p. 440.

<sup>65</sup> *Id.*, at 439.

<sup>66</sup> *Id.*, at 440.

<sup>67</sup> *Ibid.*

<sup>68</sup> Advisory Opinion, ICJ Reports 1951, p. 22.

<sup>69</sup> *Bosnia Genocide* case, *supra* note 43, at p. 440.

state the opposite proposition thus - that a Security Council resolution may even require participation in genocide - for its unacceptability to be apparent.<sup>70</sup>

In *Congo v Rwanda* while examining the validity of Rwanda's reservations to the Genocide and Racial Discrimination Conventions, the Court explicitly recognized the existence of the notion. In that case, the Court found norms against genocide as part of *jus cogens*. The following remarks of Judge Dugard are instructive:

Norms of *jus cogens* are a blend of principle and policy. On the one hand, they affirm the high principles of international law, which recognize the most important rights of international order- such as the right to be free from aggression, genocide, torture and slavery and the right to self-determination; while, on the other hand, they give legal form to the most fundamental policies or goals of the international community-the prohibition on aggression, genocide, torture and slavery and the advancement of self determination. This explains why they enjoy a hierarchical superiority to other norms in international legal order.... [T]hey must inevitably play a dominant role in the process of judicial choice.<sup>71</sup>

However, in *Congo v Rwanda*, the Court was not asked to exercise the judicial choice between the competing norms of international law. Instead it was asked to invoke the notion of *jus cogens* to trump a norm of general international law that the basis of the Court's Jurisdiction is consent of the parties.

#### IV. CONCLUSION

The jurisprudence of the ICJ supports the view that the Court has the potential for judicial review. Some power of judicial review naturally flows from the ability of the ICJ to decide the matters falling within the competence of the Security Council. Further, as has been aptly remarked by Judge *ad hoc* Lauterpacht in *Bosnia Genocide* case, being 'the principal judicial organ', the ICJ is bound to ensure rule of law within the United Nations. As has been shown, the Security Council's powers in respect of maintenance international peace and security are not exclusive and unlimited. The Court is empowered to indirectly reviewing in the legality of the actions of the Security Council in regard to *jus cogens*.

Although the ICJ has consistently taken the position that it does not possess powers of judicial review, an examination of the ICJ's jurisprudence reveals that at many occasions when the Court was confronted with the issue of deciding the validity of the Security Council's actions under Chapter VII, the Court while giving wide interpretation of the powers of the Security Council, has gone to examine the issue of validity. Relying on the notion that international law is a system of hierarchy of norms, the ICJ at many occasions has exercised limited powers of judicial review to avoid a situation of conflict between two competing norms. In *Lockerbie*, it adopted an interpretation of right to self defence under the Charter which is substantially different from that of the Security Council and in *Bosnia Genocide* case it recognized that obligations under a *jus cogens* norm cannot simply be trumped by a Security Council resolution. The Court's recognition that *jus cogens* as part of general international law and is hierarchically superior to customary or treaty law tends to suggest that the ICJ is empowered to judicially review, albeit indirectly, the lawfulness of the Security Council's actions under Chapter VII.

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<sup>70</sup> *Ibid.*

<sup>71</sup> Separate Opinion of Judge Dugard, *supra* note 52, p. 87.

## FREE SPEECH *VIS-À-VIS* COMMERCIAL SPEECH: AN INDO-US PERSPECTIVE

Manoj Kumar Padhy<sup>1</sup>

**Abstract :** Free speech is a natural right which the human being acquires on birth. Commercial speech is the genus to which the free speech is a species. Free speech in the United States is protected by the First Amendment to the United States Constitution. American courts while expanding the protection given to commercial speech recognized that the government has sufficient latitude to regulate it. Recently, the *Sorrell's* ruling of US has extended the protection of first amendment to commercial speech, even at the cost of personal privacy of individuals of the society. In India though a commercial speech is recognized as a part of freedom of speech and expression guaranteed under Art.19 (1) (a) of the Indian Constitution, the decision in the line of *Sorrell* is lacking. This article examines the constitutionality of commercial speech in India and United States with special reference to a face to face scrutiny of free speech and commercial speech.

**Key Words:** *Speech, Freedom, Commercial and Constitution.*

### I. INTRODUCTION

Speech is almighty's blessing to mankind, through which human beings express their ideas, opinions and sentiments to others. Free speech<sup>2</sup> means the liberty to communicate ideas etc. without government restraint or interference or punitive action. It includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers<sup>3</sup>. The freedom of thought and expression and the freedom of the press are not only valuable freedom in themselves, but are basics to a democratic form of the government, which proceeds on the theory that problems of the Govt. can be solved by the free exchange of thought and by public discussion.<sup>4</sup> Any encroachment on such freedom should be resisted by every legal means made available to citizens by our Constitution. For an injury to one

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<sup>2</sup> For free speech see generally C Edwin Barker, *Human Liberty and Freedom of Speech* (Oxford University press, 1989); Martin H Redish, "The First Amendment in the Market Place: Commercial Speech and the Values of Free Expression", 39 *Geo. Wash. L. Review*. 429 (1971); David F. McGowan, "A Critical Analysis of Commercial Speech", 70 *Calif. Law Rev.* 359 (1990).

<sup>3</sup> Article 19 of the Universal Declaration of Human Rights.

<sup>4</sup> H.M. Seervai, *Constitutional Law of India* (Universal Law Publishing Co. Pvt. Ltd. ND, 4<sup>th</sup> ed., Vol. 1, 2011).

citizen, or to one newspaper, is an injury to all citizens and to all newspapers<sup>5</sup>. The people of India have affirmed in their constitution which they gave unto themselves their resolve to secure to all the citizens liberty to thought and expression. This resolution is enshrined in Article 19(1) (a) of the Indian Constitution<sup>6</sup>. This Article guarantees the individual's ability to think and to express his thought in material form, whether spoken, written, symbol, visual representation, acting or otherwise. It is interesting to note that this right does not guarantee him the material means to execute his rights. Free of speech in the United States is protected by the First Amendment to the United States Constitution which was adopted in 15<sup>th</sup> December 1791<sup>7</sup>. The freedom of speech so guaranteed is not absolute. The American Supreme Court from time to time has added several restrictions on this freedom by giving the government an authority to restrict this freedom on certain grounds.

Commercial speech is the genus to which the free speech is a species. The phrase "Commercial Speech" came from U.S. Supreme Court's judgment in 1942 in the case of *Valentine v. Chrestensen*<sup>8</sup>, where the court unanimously ruled that the term commercial speech aims to make profit does not enjoy protection under the First Amendment of US Constitution. Since then, the courts treatment of commercial speech has followed a remarkable trajectory over the past years. The American courts have expanded the protection given to commercial speech, while recognizing the government has sufficient latitude to regulate commercial advertising. In *Sorrel v. IMS Health, Inc.*<sup>9</sup>, the court substantially expanded the protection due to commercial speech by broadening the scope of "speech" in the commercial area and held that forms of marketing research such as data mining are speech protected by First Amendment. The *Sorrel's* ruling imposes a heavy burden on the government to justify protections for personal privacy in an internet age when companies such as Google possess enormously valuable and sensitive individual information.

In India the journey of commercial speech (commercial advertisement)<sup>10</sup> has

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<sup>5</sup> Per Jackson J. dissenting in *Terminiello v. Chicago* 334 US 1 (1949).

<sup>6</sup> Article 19(1)(a) of the Indian Constitution: 'All citizens shall have the right to freedom of speech and expression'.

<sup>7</sup> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievance.

<sup>8</sup> 316 US 52 (1942).

<sup>9</sup> 131 S.Ct. 2653 (2011).

<sup>10</sup> For details on commercial advertisements see generally, D.A. Aaker and J. G. Myers, *Advertising Management*, (Prentice - Hall of India (P) Ltd., New Delhi 1982); N.H. Borden and M.V. Marshall, *Advertising Management, Text of Cases* (D.B. Taraporevala Sons and Co. (P) Ltd., Bombay, 1971); S.A. Chunawalla, K.C. Sethia, et.al., *Advertising (Principles and Practice)* (Himalaya Publishing House, Bombay, 1986); R.H. Cooley, *Defining Advertising Goals for Measured Advertising Results* (Association of National Advertisers, New York, 1962); C.J. Dirksen and, A. Kroeger, et.al., *Advertising: Principles and Management Cases* [Homewood (Illionis) : R.D. Irwin, Inc., 1983];, C.J. Dirksen, Arthur Kroeger, et.al., *Advertising Principles, Problems and Cases* [Homewood (Illinois) Richard D. Irwin Inc., 1977]; Watson Dun, *Social and Ethical Problems of Advertising: Its role in Modern Marketing* (Rhyhart Holt and Wintson, London, 1969); Joseph

started with the decision of Supreme Court in *Hamdard Dwakhana v. Union of India*<sup>11</sup>, where it was held that though advertisement is undoubtedly a form of speech. But every form of advertisement is not a form of speech or expression of ideas. Advertisement when it takes the form of commercial advertisement no longer falls within the concept of freedom of speech for the object of such advertisement is not the propagation of ideas-social, political or economic or furtherance of literature or human thought. *In Balsara Hygiene Products Ltd. and Others v. D.S.Saxena and Another*<sup>12</sup>, the Bombay High Court held that it is not possible to equate the right to publish advertisement with the freedom of speech guaranteed to Newspaper. Subsequently the same court in the *Tata Press Ltd. V. Mahanagar Telephone Nigam Limited*<sup>13</sup> held that a commercial speech is a part of freedom of speech and expression guaranteed under Art.19 (1) (a) of the Indian Constitution. It can only be restricted on the grounds specified in Art.19 (2). The said ruling not only recognized the commercial speech as a part of free speech guaranteed under the Indian constitution, but also marked a balance between free speech and commercial speech. On one hand it extended the protection of Art. 19(1) (a) to commercial speech, on the other it conferred sufficient latitude to the government to regulate and control commercial speech.

The major purpose of commercial speech (advertising) is to attract a prospective consumer towards buying a particular, product or to avail a service. However, A trend is now going on to lure the prospective consumers by making false or misleading advertisements<sup>14</sup>,

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Minattur, *Advertising Men and their Wares: Caveat Emptor* appeared in Leelakrishnan(ed.), *Consumer Protection and Legal Control* (Eastern Book Co, Lucknow); Mahendra Mohan *Advertising Management Concept and Cases*(Tata McGraw-Hill Publishing Company Ltd., New Delhi 1998); C.H. Sandage, V. Fryburer, et.al., *Advertising Theory and Practice*[Richard D. Irwin, Inc, Home Word (Illinois),1983]; Justice PB Sawant and Bandyopadhyay *Advertising Law and Ethics* (Universal Law Publishing Co. Pvt. Ltd., New Delhi ,2002); J.L. Simon, *Issues in the Economics of Advertising* ( University of Illinois Press, Illinois, 1970); Stanton and Buskirk *Advertising Theory and Practice*[Richard D. Irwin Inc., Homewood (Illinois),1983]; Farooq Ahmad "False and Misleading Advertisements – Legal Perspectives", *JILI* 168-182 (1996).

<sup>11</sup> AIR 1960 SC 554.

<sup>12</sup> (1994) 2 Bom CR 164.

<sup>13</sup> (1995) 5 SCC 139.

<sup>14</sup> In a general parlance 'false' means something more than a mere untruth. It may include all types of falsehoods, intentional or innocent. A false statement may thus be either intentionally, knowingly or negligently untrue or by mistake or honestly untrue. The statements must be false at the time when they were made. Similarly, the representation may be misleading because facts that should be said are omitted or because advertisements are composed or purposefully printed in such a way as to mislead. The 'Explanation' to clause (1) of section 2(1) (r) of the Consumer Protection Act, 1986 clarifies as to when a statement is said to be made to the public and by whom it is said to be made. A statement would be 'misleading', when it is susceptible to two interpretations, one of which is false. In other words it means 'leading people into error'. It is wider in scope than the word 'false' which suggests that 'which is not true'. For the purpose of Section 2(1) (r) (1) of the Consumer Protection Act, 1986, it is not material that the person making the statement knows that the statement is false. Even where a person bonafide makes a statement which later turns out to be false, it would also fall under this section. Such an interpretation would be in consonance with the intention of the legislature that a seller shall not make any statement about the truth of which he is uncertain.

bargain sale<sup>15</sup>, 'bait and switch' selling<sup>16</sup>, prizes or promotional contests<sup>17</sup> etc., which lead the consumer to purchase goods they have no wish to purchase. Advertising is being made attractive at the cost of vulgarity, obscenity and at times immorality to attract consumers. In order to get attention women are being shown in scanty clothes in the advertisements of those products or services which are not even remotely connected with them. For example the advertisement for a motorcycle in which each part of the vehicle is equated to some part of woman's body to be ridden by the conquering male. While some advertisements promote the sale of harmful substances like cigarette and liquor in an attractive way, others mislead the consumers in the name of traditional herbal drugs or self medication. Even children are not being spared from the clutches of such advertisements. To regulate certain aspects of commercial

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<sup>15</sup> Fictitious bargain is another form of deception which is used to lure buyers into believing that they are getting something for nothing or at a nominal value for their money. Prices may be advertised as greatly reduced and cut when in reality the goods may be sold at seller's regular prices. The test is always whether the consumer would, as an average purchaser, be misled. Clause (2) of section 2(1) (r) of the Consumer Protection Act, 1986 deals with bargain sales. Any practice relating to the publication of any advertisement whether in any newspaper or otherwise, for the sale or supply at a bargain price, of goods or services that are not intended to be offered for sale, or supply at a bargain price, or for a period that is, and in quantities that are, reasonable having regard to the nature of the market in which the business is carried on, the nature and size of business, and the nature and size of the advertisement, is prohibited as unfair trade practice. It may be submitted that the regulations of this kind of practice will prevent the consumer from being influenced by fraud in 'Sales Pitch' and will in turn eliminate deceitful form of advertising. The 'intention not to supply' the advertised goods would be difficult to prove in many cases. Similarly, whether the period for such sale is reasonable as well as the reasonableness of 'quantity' of goods offered would depend upon fact and circumstances of each case.

<sup>16</sup> The purpose of these kind of practice is mainly to attract the consumer to the business premises only to be told that the goods advertised have been 'sold out' or they are not fit for use etc, and in this manner 'switch' him on to the other goods, which are costlier. Deliberate disparagement of the advertised goods so as to steer the consumer to shift his choice to other goods which are costly is an inherent vice in this type of advertisement. May be the consumer who is switched on to the new product gets value for his money, but the objection is to misleading representation made as to the availability of goods advertised.

<sup>17</sup> In most of the cases the cost of the gifts offered is recovered with price of the item, but the consumer is tempted to believe that it is being offered free. The offer of "free" merchandise is a promotional device and used as an effective and popular marketing tool as consumers regard them a good buy. The word "free" indicates to the customer that he is not paying for the item so offered. When anything is being offered free of charge, the purchaser would be right to presume that the cost of the offered item is not charged to him. But often, it has been seen that the cost of the offered item is included in the main item.

advertising not only a wide range of statutory regulations<sup>18</sup> have been put in this country but there is also a demand for enactment of a comprehensive legislation on those aspect of commercial advertising which are hitherto unregulated especially advertising in the electronic media. It is worthy to note that commercial speech is intimately linked to the freedom of speech and expression and freedom of trade, profession and business on the one hand and the right of consumers to receive commercial information on the other. So, any attempt in enacting such legislation is bound to raise a number of constitutional issues of far reaching significance. Against this background an attempt is made hereunder to discuss the constitutional aspects of commercial speech in India and United States with special reference to a face to face scrutiny of free speech and commercial speech.

## II. FREE SPEECH VIS-À-VIS COMMERCIAL SPEECH: AN US PERSPECTIVE

The framers of the American Constitution introduced a broad protection to speech in the form of First Amendment, providing that “Congress shall make no law abridging the freedom of speech”. The question as to whether the protection of First Amendment can be extended to commercial speech come up in 1942 in *Valentine v. Chrestensen*<sup>19</sup>, where the Supreme Court of United States ruled that commercial speech is not protected under the First Amendment. The court while upholding a New York law prohibiting the distribution of commercial or business related handbills held – “The constitution imposes no such restriction on the government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the

<sup>18</sup> Most of these legislations prohibit obscene or indecent advertising and aim to protect the young minds from the harmful effects of unfair and unethical commercial advertising. To mention a few of them are: Indian Penal Code, 1860, The Indecent Representation of Women (Prohibition) Act, 1986 and The Young Persons (Harmful Publication) Act, 1956 etc. Some legislations regulate advertisements of prohibited drugs and magic remedies, cigarettes and other tobacco products and liquor etc. These legislations are: the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954, the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 and the Cable Television Networks (Regulation) Act, 1995, the Drugs and Cosmetics Act, 1940, and the Food safety and Standards Act, 2006 etc. The advertisements promoting prize competitions and prize chits and money circulation schemes are prohibited under the Prize Competition Act, 1955 and Prize Chits and Money Circulation Schemes (Banning) Act, 1978 respectively. The Emblems and Names (Prevention of Improper Use) Act, 1950, prohibits the use of emblems and names specified in the schedule under this Act, for the purpose of trade, business etc. The Transplantation of Human Organs Act, 1994 prohibits advertisements relating to commercial dealings in human organs. The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, prohibits the advertisements of pre-natal diagnostic techniques for detection or determination of sex. Some legislations relate to intellectual property rights laws such as, the Trade Marks Act, 1999 and the Copyright Act, 1957 etc. Provisions of Indian Penal Code and the Immoral Traffic (Prevention) Act, 1956 are relevant legislation in this regard, while the former punishes homosexuality, the latter punishes the act of seducing or soliciting for the purpose of prostitution. Turning to internet advertising, the Information Technology Act, 2000, prohibits only the publishing of information which is obscene in electronic form and leaves other aspects uncovered and unregulated.

<sup>19</sup> 316 US 52 (1942).

streets, to what extent such activity shall be adjudged or derogation of the public right of user, are matters of legislative judgment.”<sup>20</sup> In *New York Times Co. v. Sullivan*<sup>21</sup>, the court held that an advertisement published in the newspaper was not commercial speech because it communicated information, expressed opinion, recited grievances, protested claimed abuses and sought financial support on behalf of a movement whose existence and objectives are matters of highest public interest and concern, despite the fact that the advertisement sought monetary contribution. Eleven years after the *Sullivan’s case*, the Supreme Court of USA in *Bigelow v. Virginia*<sup>22</sup> disregarded the distinction between commercial and non-commercial speech. In this case a small advertisement was published in the Virginia Weekly, a small newspaper for the Women’s Pavilion of New York city. The advertisement announced that the Pavilion would help women with unwanted pregnancies to obtain “immediate placement in accredited hospitals and clinics at low cost” and would make all arrangements on a strictly confidential basis. The paid announcement stated that abortions are legal in New York and there are no residency requirements. The Pavilion offered interested women information and counseling.

On May 13, 1971 Jeffrcy C. Bigelow, the director and managing editor of the newspaper was charged with violating a Virginia Code which read : If any person, by publication, lecturer, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompts the procuring of abortion or miscarriage, he shall be guilty of misdemeanor. They argued that the advertisement was protected by the First Amendment, that a State could not prescribe certain speech merely because it found to be offensive. The Court held- “Speech is not stripped of First Amendment protection merely because it appears in advertising form”<sup>23</sup>. The court ruled that at least some speech in particular advertising for abortion procedures by non-profit organizations, although substantially motivated by a desire to make a profit, nonetheless deserve protection equal to non-commercial speech<sup>24</sup>.

In 1976 the American Supreme Court finally overruled the *Valentine* decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*<sup>25</sup> and set at rest all confusions and dilemmas. While Striking down a Virginia law prohibiting pharmacists from advertising the price of prescription drugs the court held - “Commercial speech like other verities is protected by First Amendment.”<sup>26</sup> The court further added - “A different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired.”<sup>27</sup> The court concluded-”In concluding that the commercial speech enjoys first Amendment protection, we have not held that it is un-differentially from other forms. There are commonsense differences between speech that does no more propose a commercial transaction, and other varieties.”<sup>28</sup> For many years after this case it was simply accepted that commercial speech deserved less protection because for the distinction between commercial and non commercial

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<sup>20</sup> *Id.* at p. 54.

<sup>21</sup> 376 U.S. 254 (1964)..

<sup>22</sup> 421 US 818 (1975)

<sup>23</sup> *Ibid.*

<sup>24</sup> *Id.* at p. 825 .

<sup>25</sup> 425 US 748 (1976).

<sup>26</sup> *Id.* at p. 770.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Id.* at p. 772.

speech as one of ‘common sense’. In *44 Liquormart Inc. v. Rhode Island*<sup>29</sup>, the court raised a question on the justification for the distinction between commercial and non commercial speech in the following words: “Regulations that suppresses the truth are no less troubling because they target objectively verifiable information, nor are they less effective because they aim at durable messages.” The court further held- “Nether the ‘greater objectivity’ neither the ‘greater hardiness’ of truthful non-misleading commercial speech justifies reviewing its complete suppression with added difference.” The court was of the opinion that there was no philosophical or historical basis for asserting that commercial speech was of lower value than non-commercial speech. Justice Thomas in the same case went further to hold that any regulation that merely protects consumers by keeping them ignorant of commercial speech is *per se* illegitimate<sup>30</sup>.

In 1980, in *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York*<sup>31</sup>, the Supreme Court of USA developed a four part Central Hudson Test to scrutinize regulations that control commercial speech. *Firstly*, the communication must be neither misleading nor related to an unlawful activity<sup>32</sup>; *secondly*, the state must assert a substantial interest to be achieved by restriction<sup>33</sup>; *thirdly*, the restriction must directly advance the state interest involved<sup>34</sup>; and *fourthly*, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive<sup>35</sup>. The above study reveals that the court’s concentration was to confer much freedom to commercial speech rather than to curtail freedom on reasonable grounds.

The court interpreted the Central Hudson Test in the cases of *Posadas de Puerto Rico Associates. v. Tourism Co. of Puerto Rico*<sup>36</sup> and *Board of Trustees of State Universities of New York v. Fox*<sup>37</sup>. In *Posodas case* the court while applying part three of the Central Hudson Test upheld a Puerto Rico statute providing that the casinos could not advertise or otherwise offer their facilities to the public of Puerto Rico<sup>38</sup>. In *Fox case* the court interpreted part four of the Central Hudson Test holding that commercial speech regulations may extend beyond the least restrictive means necessary to advance the government’s interest. In subsequent cases after the *Fox* the Supreme Court gradually strengthened the Central Hudson Test and more explicitly in *Rubin v. Coors Brewing Co.*<sup>39</sup>, where the court went up to the extent in saying that if the government wanted to restrict commercial speech, it had to demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to material degree<sup>40</sup>.

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<sup>29</sup> 517 US 484 (1996).

<sup>30</sup> *Id* at p. 502.

<sup>31</sup> 447 U.S. 557(1980).

<sup>32</sup> *Id.* at p. 563-64.

<sup>33</sup> *Id.* at p. 64.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> 478 US 328 (1986).

<sup>37</sup> 492 Us 469(1989).

<sup>38</sup> Puerto Rico’s Games of Chance Act, 1948 legalizes certain forms of casino gambling in licensed places in order to promote the development of tourism, but also provides that “no gambling room shall be permitted to advertise or otherwise offer their facilities to the public of Puerto Rico”.

<sup>39</sup> 514 US 476 (1995).

<sup>40</sup> *Id.* at p. 487.

The Central Hudson principle ruled for many years in America in regulating the commercial speech till the decision in *Sorrell v. IMS Health Inc.*<sup>41</sup>, where the court struck down a Vermont's Prescription confidentiality Law which provides that, absent the prescriber's consent, prescriber-identifying information may not be sold by pharmacies and similar entities, disclosed by those entities for marketing purposes, or used for marketing by pharmaceutical manufacturers<sup>42</sup>, as a violation of first amendment and called for a new standard of review. The opinion in *Sorrell* suggests that there may possibly be sweeping changes in the supreme courts commercial speech doctrine particularly Central Hudson. *Sorrell's* decision has a long way effect and it changed the settled principle of *Central Hudson* in two ways- *Firstly*, the court expanded the protection guaranteed under the First Amendment to the use of data collected under a Government mandate and did not impose any limits on the speech of pharmaceutical companies; and *secondly*, in the opinion of the court Vermont law was subject to high scrutiny because it was a content based and speaker based regulation of commercial speech. The decision in *Sorrell* suggests that a majority of courts may well be ready to displace *Central Hudson's* intermediate scrutiny standard and invoke rigorous standard the court has applied, outside of the context of commercial speech, in striking down content and speaker based regulations of speech. In *Discount Tobacco City and Lottery Inc. v. United States*<sup>43</sup>, the court upheld the vast majority of the Family Smoking Prevention and Tobacco Control Act, 2009 provisions under the Central Hudson including the requirement of large graphics warning on the cigarette packages and other tobacco products and rejected plaintiff's argument that strict scrutiny should apply. In *R.J Reynolds v. United States Food and Drug Administration*<sup>44</sup>, a District Court of Washington DC invalidated the new graphics warning agreeing with the decent in *Discount Tobacco*.

### III. FREE SPEECH VIS-À-VIS COMMERCIAL SPEECH: AN INDIAN PERSPECTIVE

The Indian Constitution guarantees a number of Fundamental Rights to citizens as well as non-citizens. For the purpose of the present discussion the relevant Fundamental Rights are "Freedom of Speech and Expression"<sup>45</sup>, which also includes the freedom of the press and "Freedom of Profession, Occupation, Trade or Business"<sup>46</sup>. Like United States, in India also there was confusion as to availability of the "freedom of speech and expression" guaranteed by the Article 19(1) (a)<sup>47</sup> to commercial speech. The Court's particularly that of Supreme Court's attitude towards commercial advertising

<sup>41</sup> 131 S.Ct. 2653 (2011)

<sup>42</sup> For more detail see Vt. Stat. Ann., Tit., 18, §4631 (d), available on <http://www.leg.state.vt.us/statutes/fullsection.cfm?Title=18&Chapter=091&Section=04631>, visited on 09/30/2013.

<sup>43</sup> 674 F3d 509 ( 6<sup>th</sup> Circuit 2012)

<sup>44</sup> 2012 WL 653828, No. 11-1482 (DDC Feb 29, 2012); also see *Commonwealth Brands Inc. v. United States*, 678 F. Supp. 2d 512(W.D. Ken, 2010).

<sup>45</sup> For details on freedom of speech and expression see generally, Durga Das Basu, *Constitution of India* (Wadhwa and Company, Nagpur, 2002); M. Seervai, *Constitutional Law of India*, (Universal law Publishing Co. Pvt. Ltd. ND, 4<sup>th</sup> edn., Vol. 1, 2011; M. Hidayatullah, *Constitutional Law of India* (Gulab Vazirani for Arnold - Heinemann Publishers (India) Pvt. Ltd., New Delhi, 1984); V.N. Shukla, *Constitution of India* (Eastern Book Company, Lucknow, 2004).

<sup>46</sup> Article 19(1) (g) of the Indian Constitution: "All citizens shall have the right to practice any profession, or to carry on any occupation, trade or business.

has followed a remarkable trajectory over the past few years. In *Hamdard Dawakhana v. Union of India*<sup>48</sup>, the constitutionality of Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 was challenged. The Apex Court speaking through Justice Kapur though recognized advertising as a mode of expression falls within the ambit of Article 19(1) (a), denied the protection to commercial advertisements on the ground that such advertisements do not pertain to freedom of speech and expression but to trade and business and further they do not propagate any ideas - social, political or economic. His Lordship observed:

“An advertisement is no doubt a form of speech but its true character is reflected by the object for the promotion of which it is employed. It assumes the attributes and elements of the activity under Article 19(1) which it seeks to aid by bringing it to notice of the public. When it takes the form of a commercial advertisement which has an element of trade or commerce is no longer falls within the concept of freedom of speech for the object is not propagation of ideas social, political or economic or furtherance of literature or human thought; but as in the present case the commendation of the efficacy, value and importance in treatment of particular diseases by certain drugs and medicines. In such a case, advertisement is a part of business even though as described by Mr. Munshi its creative part and it was being used for the purpose of furthering the business of the petitioners and had no relationship with what may be called the essential concept of the freedom of speech. It cannot be said that the right to publish and distribute commercial advertisements advertising an individual’s personal business is a part of freedom of speech guaranteed by the Constitution.”<sup>49</sup>

Relying on the American Supreme Court’s decision in *Valentine v. Chrestensen*<sup>50</sup>, Kapur J. held: “It cannot be said therefore that every advertisement is a matter dealing with freedom of speech nor can it be said that it is an expression of ideas. In every case one has to see what the nature of the advertisement is and what activity falling under Art. (19)(1), it seeks to further. The advertisement in the instant case relate to commerce or trade and not to propagating of ideas; and advertising of prohibited drugs or commodities of which the sale is not in the interest of the general public cannot be speech within the meaning of freedom of speech and would not fall within Art. 19(1) (a)”<sup>51</sup>.

It is humbly submitted that the aforesaid decision of the Hon’ble Supreme Court went beyond the needs of the case and tended to affect the right to publish all commercial advertisements. The main issues in the instant case were related to the right to advertise prohibited drugs and validity of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954, which aims at prevention of self-medication and self treatment. But the Court made some of the observation which was not called for to decide the case. What is more puzzling is the fact that the Supreme Court relied on the American Supreme Court’s decision in *Valentine v. Chrestensen*<sup>52</sup>, which has not been

<sup>47</sup> Article 19(1) (a) runs: “All citizens shall have the right to freedom of speech and expression”.

<sup>48</sup> AIR 1960 SC 554.

<sup>49</sup> *Id.* at p. 563.

<sup>50</sup> 316 US 52 (1942).

<sup>51</sup> *Id.* at p. 563.

<sup>52</sup> 316 US 52 (1942).

fully approved by the American Supreme Court itself in its subsequent decision. It is surprising that his Lordship relied on a decision, which had already been overruled by the American Supreme Court in the previous year i.e. in 1959 in the case of *Cammarano v. United States*<sup>53</sup>, where in his concurring judgment Justice Douglas said:

“*Valentine v. Chrestensen*, held that business of advertisements and commercial matters did not enjoy protection of First Amendment, made applicable to the states by the Fourteenth. The ruling was causal, almost off hand, and it has not survived reflection.”

In *Bigelow v. Virginia*<sup>54</sup>, the Court narrowed the *Valentine* holding further refusing to recognize any “sweeping” *per se* exception from First Amendment protections for so called “commercial speech”. The case has shown that “commercial speech” does have at least some constitutional protection. Justice Blackmun noted: “The existence of commercial activity itself is no justification for narrowing the protection of expression secured by the First Amendment”. He went on to argue that the advertisement in this case did more than simply propose a commercial transaction. He added: “It contained factual material of clear public interest”.

Now coming to *Hamdard Dawakhana Case*, the Apex Court seems to have acted on an assumption that information with a motive to promote commercial interest serves no interest of general public whereas the true facts are something else. It is pertinent to note that advertising is the cornerstone of our economic system. Apart from being the lifeline of free economy in a democratic society, advertising is the life blood of free media, pays most of the cost and thus makes the media widely available. It pays a large portion of the cost of newspapers supplied to the public. Therefore, to hold that the impugned advertisement not being in the general public interest is not entitled to commercial speech protection has a valid justification on which there is no controversy but to hold that commercial speech *per se* is not entitled to such protection overlooks the actual and potential advantages of commercial advertising in a democratic country like India where press is revered as the fourth pillar of democracy.

In *Sakal Papers (P) Ltd. v. Union of India*<sup>55</sup>, a Constitution Bench of the Supreme Court extended the protection of “freedom of speech and expression” clause to the publication of advertisement and declared Section 3(1) of Newspapers (Price and Page) Act, 1956 as unconstitutional on the ground that the curtailment of the advertisements would bring down the circulation of newspapers and as such would be hit by Article 19(1) (a) of Constitution of India. The Court rejected the contentions- *firstly*, that the publication of advertisement was a trading activity; *secondly*, that the diminution of advertisement revenue would not be regarded as an infringement of right under Article 19(1)(a); *thirdly*, that devoting large volume of space to advertisement could not be lawful exercise of the right of “freedom of speech and expression” or right of dissemination of news and views; and *finally*, that instead of raising the price of the newspaper the object could be achieved by reducing the advertisements. The Supreme Court reasoned:

“...Section 3(1) of the Act in so far as it permits the allocation of space to advertisements also directly affects freedom of circulation. If the area for advertisements is curtailed the price of the newspaper will be forced up. If that happens, the circulation

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<sup>53</sup> 358 US 498 (1959).

<sup>54</sup> 421 US 809 (1975).

<sup>55</sup> AIR 1962 SC 305.

will inevitable go down. This would be no remote, but a direct consequence of curtailment of advertisements”.<sup>56</sup> The Court further held:

“If, on the other hand, the space for advertisement is reduced the earnings of a newspaper would go down and it would either have to run at a loss or close down or raise its price. The object of the Act in regulating the space for advertisements is stated to be to prevent ‘unfair’ competition. It is thus directed against circulation of a newspaper. When a law is intended to bring about this result there would be a direct interference with the right of “freedom of speech and expression” guaranteed under Article 19(1) (a)”.<sup>57</sup>

The Apex Court also made similar observations in *Bennett Coleman and Co. v. Union of India*<sup>58</sup>. In this case the constitutionality of Newsprint Policy for 1972-73 was being challenged on the ground that some provisions of the policy were violative of Articles 14 and 19(1)(a) of Constitution. The Court held:

“The law which lays excessive and prohibitive burden which would restrict the circulation of a newspaper will not be saved by Article 19(2). If the area of the advertisement is restricted, price of paper goes up. If the price goes up circulation will go down. This was held in *Sakal Papers Case* to be the direct consequence of curtailment of advertisement. The freedom of a newspaper to publish any number of pages or to circulate it to any number of persons has been held by this court to be an integral part of the freedom of speech and expression. This freedom is violated by placing restraints upon it or by placing restraints upon something which is an essential part of that freedom”. The Court further held:

“A restraint on the number of pages, a restraint on circulation and a restraint on advertisements would affect the fundamental rights under Article 19(1) (a) on the aspects of propagation, publication and circulation”.

Finally, the Supreme Court in *Tata Press Ltd. v. Maha Nagar Telephone Nigam Limited and others*<sup>59</sup> set at rest the lingering controversy regarding the protection of commercial advertisement under Article 19(1) (a) of Constitution of India by holding that the commercial speech cannot be denied such protection merely because the same is issued by businessman. The facts of this case were as follows: The Mahanagar Telephone Nigam is a Government company controlled by the Government of India. Initially, the Nigam used to publish and distribute on its own, the telephone directory consisting of white pages only. However, from 1987 the Nigam started entrusting the publication of its telephone directory to outside contractors and permitted such contractors to raise revenue for themselves by procuring advertisements and publishing the same as “Yellow Pages” appended to the telephone directory. The telephone directory published and distributed by the Nigam now consist of white pages which contain alphabetical list of telephone subscribers and also “Yellow Pages” consisting of advertisements procured by the contractor to meet the expenses incurred by the contractor in printing, publishing and distributing the directory. Tata Press Ltd., were engaged in publication of Tata Press Yellow pages. The Nigam and the Union of India filed a civil suit before a Civil Court at Bombay for a declaration that they alone have the right to print, publish the list of telephone subscribers and Tata Press Ltd. have no right to print or publish without its permission as it was violation of the Indian Telegraph Act

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<sup>56</sup> *Id.* at. p. 313.

<sup>57</sup> *Ibid.*

<sup>58</sup> (1972) 2 SCC 788.

<sup>59</sup> (1995) 5 SCC 139.

and they should therefore, be restrained by permanent injunction from publishing the 'Yellow pages'. The City Civil Court dismissed the suit but a single judge of the Bombay High Court allowed the appeal. Tata Press's letter patent appeal was dismissed by the Division Bench of the High Court. Tatas filed an appeal in the Supreme Court.

The learned single judge of the Bombay High Court as the Supreme Court observed rested his judgment on the ground that the publication of advertisements in the form of yellow pages appended to the white pages was within the bar contained in Rule 458 of the Indian Telegraph Rules, 1951. The learned judge accordingly allowed the appeal and restrained the appellant from publishing the Tata pages. Highlighting the importance of commercial advertisement Kuldip Singh, J. held:

"Advertising is considered to be the cornerstone of our economic system. Low prices for consumers are dependent upon mass production, mass production is dependent upon volume sales, and volume sales are dependent upon advertising".<sup>60</sup>

While holding that the Mahanagar Telephone Nigam Limited cannot restrain the appellant from publishing "Tata Press Yellow Pages" comprising paid advertisements from businessmen, traders and professionals, his Lordship added:

"Advertising as a 'commercial speech' has two facets. Advertising which is no more than a commercial transaction is nonetheless dissemination of information regarding the product advertised. Public at large is benefited by the information made available through the advertisement. In a democratic economy free flow of commercial information is indispensable. There cannot be honest and economical marketing by the public at large without being educated by the information disseminated through advertisements. The economic system in a democracy would be handicapped without there being freedom of commercial speech".<sup>61</sup>

The learned judge examined the issue from the angle of the right of the public at large to receive the commercial information and recognized the consumer's right to information.

#### **A. Right to Receive Commercial Speech**

The constitutional issue of extension of "freedom speech of expression" to commercial advertisement needs to be examined from the prospective of the consumer's right to product and service information. As we know that the concept of consumer's right is recognized at both international and national level. These rights include right to safety, right to be informed, right to choose, right to be heard, right to redress, right to consumer education, right to a healthy environment and right to basic needs<sup>62</sup>. The first

<sup>60</sup> *Id.* at p. 154.

<sup>61</sup> *Ibid.* at p. 156.

<sup>62</sup> For details on the rights of the consumers see generally, Harvey and Parry, *The Law of Consumer Protection and Fair Trading*, 1992; Dr. Rakesh Khanna, *Consumer Protection Laws*. (Central Law Agency, Allahabad, 2002); P Leelakrishnan (ed.), *Consumer Protection and Legal Control* (Eastern Book Co. Lucknow); Robert Lowe and, Geoffrey Woodrffe, *Consumer Law and Practice* (Sweet and Maxwell, London, 1995); Rajendra Kumar Nayak, *Consumer Protection Law In India* (N.M. Tripathi Pvt. Ltd., Bombay 1991); D.N. Saraf, *Law of Consumer Protection in India* (N.M. Tripathi Private Limited, Bombay, 1995); Avtar Singh, *Law of Consumer Protection Principles and Practice* (Eastern Book Company, Lucknow, 2000)

six rights are also recognized under Consumer Protection Act, 1986<sup>63</sup>. The right to information about the quantity, quality, potency, standard, purity and price of product are crucial to the exercise of other consumer rights. As commercial advertising helps consumers to get information about products and services which they need, they have legitimate interest in the free flow of information within permissible limits. In India the “right to know” and the “right to receive and impart information” have been recognized as a part of the right to “freedom of speech and expression”. Time and again the Supreme Court has held that a citizen has a fundamental right to use the best means of imparting and receiving information and as such to have an access to telecasting for the purpose. The freedom to telecast on the Doordarshan has been recognized by the Apex Court in the Doordarshan cases<sup>64</sup>. The right to receive information regarding products and services from advertisements in the print media has been expressly recognized by the Supreme Court in the *Tata Yellow Pages case*<sup>65</sup>. The Supreme Court speaking through Justice Kuldeep Singh in this case observed:

“The public at large has a right to receive the commercial speech. Article 19(1) (a) not only guarantees freedom of speech and expression, it also protects the rights of an individual to listen read and receive the said speech. So far as the economic needs of a citizen are concerned, their fulfillment has to be guided by the information disseminated through the advertisements. The protection of Article 19(1) (a) is available to the speaker as well as to the recipient of the speech. The recipient of commercial speech may be having much deeper interest in the advertisement than the businessman who is behind the publication. An advertisement giving information regarding a life-saving drug may be of much more importance to general public than to the advertiser who may be having purely a trade consideration”.<sup>66</sup>

### **B. Free Speech vis-à-vis Compelled Speech**

It is interesting to note that sometimes a statute instead of imposing a restraint compels the publication of a particular matter through “must carry” provision. To give

<sup>63</sup> Section 6 of the consumer Protection Act: The object of the Central Council shall be to promote and protect the right of the consumer such as-(a) the right to be protected against the marketing goods and services which are hazardous to life and property; (b)the right to be informed about the quality, quantity, potency, purity, standard and price of goods or services as the case may be so as to protect the consumer against unfair trade practices; (c)the right to be assured, wherever possible, access to variety of goods and services at competitive prices; (d)the right to be heard and to be assured that the consumers’ interests will receive due consideration at appropriate forums; (e) the right to seek redressal against unfair trade practices or restrictive trade practices or unscrupulous exploitations of the consumers; and(f) the right to consumer education.

<sup>64</sup> In *Odyssey Communication (P.) Ltd. v. Lokvidayanm Sangathan*, (1988) 3 SCC 410, the right of a citizen to exhibit films on the Doordarshan subject to the terms and conditions to be imposed by the latter has been recognized; In *Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal*, (1995) 2 SCC 161. The apex Court made it clear that an individual has a right under Article 19(1)(a) to have an access to telecasting, which is subject to the limitation on account of use of public property, i.e. the air waves involved in the exercise of the right can be controlled and regulated by the public authority even on grounds not strictly covered under Article 19(2) of the Constitution.

<sup>65</sup> (1995) 5 SCC 139.

<sup>66</sup> *Id.* at p. 156.

illustrations, at times a statute imposes an obligation to print certain information such as a food product must carry on its package the list of ingredients used in its preparation or must print its weight and cigarettes cartons are required to carry statutory warning that cigarette smoking is injurious to health etc. Does “must carry” provision or compelled speech restrict or further freedom of speech and expression? The issue came before in the case of *Union of India v. Motion Picture Association*<sup>67</sup> the Supreme Court held:

“Whether compelled speech will or will not amount to a violation of the freedom of speech and expression, will depend on the nature of a “must carry” provision. If a “must carry” provision furthers informed decision-making which is the essence of the right to free speech and expression, it will not amount to any violation of the fundamental freedom of speech and expression. If, however, such a provision compels a person to carry out propaganda or project a partisan or distorted point of view, contrary to his wish, it may amount to a restraint on his freedom of speech and expression”.

Explaining its position the Apex Court opined that advertisement showing the list of ingredients on food package enables the public to decide on a correct basis whether a particular product should or should not be used. Statutory warning on cigarettes cartons enables a user to make a correct decision as to whether he should smoke a cigarette or not. Such mandatory provisions although they compel speech cannot be viewed as a restraint on the freedom of speech and expression.

### **C. Availability of Freedom of Commercial Speech to Manufacturing Companies**

Article 19(1) (a) of the Constitution declares: “All citizens shall have the right to freedom of speech and expression”. Accordingly, the freedom guaranteed under Article 19(1) (a) can be availed of only by the citizens<sup>68</sup>. The use of the word citizen in Article 19(1) (a) has had the effect of leaving the companies out of the scope of this Article. The result is that one of the important segments of the nation does not have any constitutional protection against commercial speech. Manufacturing companies, institutions and organizations being impersonal in character cannot qualify for citizenship. Hence the commercial speech of these organizations will remain unprotected. This no doubt creates a serious anomaly. The Apex Court of the country had several opportunities to examine this issue in several cases. In *R.M.D. Chamarbaugwalla v. The Union of India*<sup>69</sup>, the Supreme Court held that the corporations are not citizens. Again in *M.M.M Sharma v. Sri Krishna Sinha*<sup>70</sup>, the same court observed that a non-citizen running a newspaper is not entitled to right of freedom of speech and expression, and therefore cannot claim the benefit of liberty of press. The supreme court there after decided two case in the year 1964, in the first case<sup>71</sup> the Apex court held that the provisions of Citizenship Act were conclusive on the question that a corporation or a company could not be a citizen of India; in the second case<sup>72</sup> the Supreme Court held that an Association (such as Company) could not lay a claim to fundamental rights guaranteed by Article 19(1) (g), solely basing on the fact that it was an aggregation of citizens. It was also held that ‘Citizens’ under this Article mean only natural persons who have the status of

<sup>67</sup> AIR 1999 (SC) 2334.

<sup>68</sup> *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27.

<sup>69</sup> (1957) SCR 930.

<sup>70</sup> (1959) Supp. ISCR 806.

<sup>71</sup> *STC v. Commercial Tax Officer*, (1964) 4 SCR 99.

<sup>72</sup> *Tata Engineering and locomotive Company Ltd. V. State of Bihar*, AIR 1965 40, 48 SC.

citizenship under the law. The decision of the Apex Court in *R.C. Cooper v. Union of India*<sup>73</sup> (Bank Nationalization case) has established beyond doubt that the fundamental rights of shareholders as citizens are not lost when they associate to form a company. When the fundamental rights of shareholders are impaired by State action their rights as shareholders are protected. The reason is that the shareholders' rights are equally and necessarily affected if the rights of the company are affected. This view of the apex Court was also reiterated approved in *Bennett Coleman and Co. v. Union of India*<sup>74</sup>. The court observed:

“This can otherwise be said that through a company is a juristic person, and has no right to freedom of speech and expression but after ‘lifting of the corporation veil’, the members (share holders), who constitute it can't be denied of their right to “freedom of speech and expression”.

Thus it can be said that though a manufacturing company has no right to freedom of commercial advertisement, still, it can exercise this right through its shareholders.

#### IV. REASONABLE RESTRICTIONS ON COMMERCIAL SPEECH

It is now well established that the freedom of commercial speech is a part of “freedom of speech and expression”. However, this freedom is not absolute. The Government is free to impose reasonable restrictions on commercial speech on the grounds set forth in Article 19(2) of the Constitution. The Supreme Court of India in *Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd.*<sup>75</sup> stressed this fact when it observed: “Unlike the First Amendment under the United States Constitution, our constitution itself lays down in Article 19(2) the restrictions which can be imposed on the fundamental right guaranteed under Article 19(1) (a) of the Constitution. The ‘Commercial Speech’ which is deceptive, unfair, misleading and untruthful would be hit by Article 19(2) of the Constitution and can be regulated/prohibited by the State”.

The Apex Court however, did not clarify as to which restriction/restrictions under Article 19(2) would be attracted by a deceptive, unfair<sup>76</sup>, misleading and untruthful commercial speech (advertisement). It may be noted here that Clause (2) of Article 19 contains the grounds on which restrictions on the freedom of speech and expression can be imposed to mention them: (a) Security of the State; (b) Friendly relations with foreign states; (c) Public Order; (d) Decency or Morality; (e) Contempt of Court; (f) Defamation; (g) Incitement of an offence; and (h) Sovereignty and integrity of India. Thus the state can prohibit or regulate such advertisements which may affect the security of the state or jeopardize its friendly relations with foreign states. The preservation of public order is another ground for imposing restrictions on freedom of commercial speech.

The term public order is of broad import and synonymous with public peace, safety and tranquility<sup>77</sup>. The State may in the interest of public order, prohibit and punish (i) utterances tending to incite a breach of peace or riots; (ii) use of threatening,

<sup>73</sup> (1970) 1 SCC 248.

<sup>74</sup> (1972) 2 SCC 788.

<sup>75</sup> (1995) 5 SCC 139.

<sup>76</sup> For details on unfair trade practice see generally, S.M. Dugar, *Unfair Trade Practice under the MRTP: Injunction and Compensation* (Taxation Publishers Pvt. Ltd., New Delhi, 1985); K. Puri, “Protection Against Monopolistic and Unfair Trade Practices”, *JILI* 443-455 (1992).

<sup>77</sup> *Supt. Central Prison v. Ram Manohar Lohia*, AIR 1960 SC 633.

abusive, insulting words, behaviours in any public place or meeting with intent to cause a breach of the peace; (iii) causing of loud and raucous noise in streets and public places by means of sound amplifying instruments<sup>78</sup> etc.

Decency or morality is another permissible ground of restraint on commercial advertisements. This exception has been engrafted for the purpose of restricting speeches and publications which tend to undermine public morals<sup>79</sup>. The Indecent Representation of Women (Prohibition) Act, 1986, the Dramatic Performances Act, 1876, The Cinematograph Act, 1952 and The Press Act, 1951, etc. restrict the freedom guaranteed under Article 19(1)(a) on the basis of 'decency or morality' clause of Article 19(2). Apart from these the 'Press Council of India's norms of Journalistic Conduct' also contains following norms in this regard. Rule 29 provides Newspapers/Journalists shall not publish anything which is obscene, vulgar or offensive to public good taste. Rule 30 says- newspapers shall not display advertisement which are vulgar or which, through depiction of a women in nude or lewd posture, provoke lecherous attention of males as if she herself was a commercial commodity for sale.

The maintenance of the dignity of court is the cardinal principle of the rule of law. The criticism which undermines the dignity of the court cannot be permitted under cloak of freedom of speech and expression<sup>80</sup>. In the exercise of the right of freedom of speech and expression a person cannot be allowed to lower the prestige of the court in the eyes of the people by inserting an advertisement in a newspaper. Commercial advertising is also subject to the laws of obscenity and defamation. The laws penalizing the defamation are reasonable restriction on the freedom of speech and expression and hence protected under Article 19(2).

It must be recognized that the freedom of speech and expression cannot confer a license to incite people to commit offence. The laws penalizing or preventing incitement to commit offences are therefore, protected under Article 19(2). The word 'offence' used here is not defined in the Constitution. It is however, defined in the General Clauses Act, which means 'any act or omission made punishable by any law for the time being in force'. In *State of Bihar v. Shailabala Devi*<sup>81</sup>, the Supreme Court held

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<sup>78</sup> In *Rajni Kant v. State*, (1958) A.L.J. 56, it was held that the use of mechanical instruments like loudspeakers and amplifiers was not covered by the guarantee of freedom of speech and expression, and consequently a Municipal Bye-Law which required a permit of an executive officer for using loudspeaker did not infringe Art. 19(1) (a). Seervai in his book suggested that the correct position is that since there is a fundamental right to freedom of speech and expression, that right extends to mechanical devices which amplify speech, but so far as the devices are likely to cause noise, or disturbance or nuisance, reasonable restriction could be placed on the use of such devices regard to time, place and manner using them, and a municipal bye-law providing for such reasonable restrictions is valid. This view has been taken in *Indulal v. State*, (1963) A. Guj. 259. For detail see H.M. Seervai, *Constitutional Law of India* ( Universal Law Publishing Co. Pvt. Ltd. ND, 4<sup>th</sup> edn., Vol. 1, 2011)

<sup>79</sup> See *Ranjit D. Udeshi v. State of Maharashtra*, AIR 1965 SC 881; see also *Chandrakant v. State of Maharashtra*, AIR 1970 SC 1390; *P.K. Somanath v. State of Kerala and others*, 1990 -(096)-CrLJ-0542-KER; *Chairman and Managing Director, Hindustan Latex Ltd., Thiruvananthpuram and Anothers v. State of Kerala and Another*, 1999 (105) CrLJ 808 Ker.

<sup>80</sup> *Arundhati Roy, In re.*, AIR 2002 SC 1375.

<sup>81</sup> AIR 1952 SC 329.

that incitement to murder or other violent crimes would generally endanger the security of the State and hence a restriction against such incitement would be a valid law under Article 19(2) of the Indian Constitution. This ruling is also applicable to the commercial speech.

The freedom under Article 19(1) (a) can be restricted on the ground of integrity and sovereignty of India. This restriction enables the Parliament to make law so as to prevent any person from propagating cession of a state or any part of India from union or to prevent all activities aimed at disintegration of the country. Though sedition is not mentioned as one of the restrictions on the freedom of speech and expression, publication of a seditious advertisement is punishable under Section 124A of Indian Penal Code.

## V. CONCLUSION

The decision in *Sorrell* marked a possibly sweeping change in the commercial speech doctrine in America. This decision opened an era of applying heightened scrutiny of the statutes restricting free speech on one or the other ground, by invoking a rigorous standard which may be a step towards displacing Central Hudson Test. *Sorrell's decision* created a hardship before protection of the personal privacy of various individuals in the society whose data are being stored in the hands of various entities either government or private. To mention few of them- personal medical information in the possession of health care providers , financial information in the possession of financial institutions , purchasing history in the possession of retailers including online retailers, matrimonial information in the possession of matrimonial sites and centres and search information in the possession of search engines such as Goggle etc.

Though the Supreme Court of India refused to extend the protection under Article 19(1) (a) of the Constitution to commercial speech in *Hamdard Dawakhana case* on the basis of wrong presumption of facts and law, but finally in *Tata Yellow Pages Case* extended this protection to commercial speech. The foregoing discussion also makes it clear that the “compelled speech” or “must carry” provisions in different statute could not be viewed as a restraint on the freedom of speech and expression rather furthers it. Moreover, the freedom of commercial advertisement is also available to manufacturing companies. Though the Apex Court held that the deceptive, unfair, misleading and untruthful commercial advertisements would be hit by Article 19(2) of the Constitution for the purpose of being regulated/ prohibited by the state, it has not clarified as to which restriction/restrictions under Article 19(2) would be attracted by such advertisements. To the best of our knowledge, in India we don't have any ruling in the line of *Sorrell* of United States, which failed to make a balance between commercial speech and personal privacy of individuals. However, it may be submitted that the freedom of commercial should be protected but not at the cost of personal privacy of individuals of the society.

## THE *RIGHT TO INFORMATION ACT*, 2005: RETROSPECT AND PROSPECTS

J.P. Rai\*

**Abstract-**Citizen's Access to Information is an essential step in ensuring transparency and accountability in government systems and processes. It includes the right to know and to be known and the right to impart and receive information regarding the functioning of the government and the state machineries. In modern constitutional democracy, it is axiomatic that the citizens have a right to know about the affairs of, government which having being elected by them, seek to formulate sound policies of Governance aimed at their welfare. The Right to Information generally understood as the right to access information held by public authorities is not just a necessity of the citizens but it is a precondition to good governance. During the last decade, it empowered public to get information from the State. As emphasized by the National Commission to Review the Working of Constitution under the chairmanship of Justice M.N. Venkatachaliah the much of the common man's distress and helplessness is because of his ignorance of decision making process. The report has exhorted government to assume a major responsibility and mobilize skills to ensure flow of information to citizens. In this background, this paper makes an attempt to trace the historical background and evolution of right to information in India and other countries. It examines efficacy of regulatory framework related to right to information in India. It also highlights the contribution and role of the Supreme Court of India to felicitate the proper and effective implementation of the Right to Information Act, 2005 in India.

**Key Words:** *Right to Information; Constitution of India; Democracy; Informed Citizenry*

Information is currency that every citizen requires to participate in the life and governance of the society. In any democratic polity, greater the access, greater will be the responsiveness, and greater the restrictions, greater the feeling of powerlessness and alienation. Information is basis for knowledge, which provokes thought, and without thinking process, there is no expression.<sup>1</sup> Citizen's Access to Information is an essential step in ensuring transparency and accountability in government systems and processes. It includes the right to know and to be known and the right to impart and receive

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<sup>1</sup> *Secretary General, Supreme Court of India Vs. Subhash Chandra Agarwal*, AIR2010Delhi159, 166(2010)DLT305.

information regarding the functioning of the government and the state machineries. The right to inform and the right to be informed are co-extensive<sup>2</sup>. In modern constitutional democracy, it is axiomatic that the citizens have a right to know about the affairs of, government which having being elected by them, seek to formulate sound policies of Governance aimed at their welfare.<sup>3</sup> The Right to Information generally understood as the right to access information held by public authorities is not just a necessity of the citizens but it is a precondition to good governance. To be specific, access to Information makes democracy more vibrant and meaningful and allows citizens to participate in the governance process of the country. During the last decade, it empowered public to get information from the State. The importance of RTI can be judged from the report of National Commission to Review the Working of Constitution under the chairmanship of Justice M.N.Venkatachaliah. The report has emphasized the fact that much of the common man's distress and helplessness is because of his ignorance of decision making process. He remains ignorant and unaware of the process which vitally affects his interest. Government procedures and regulations shrouded in veil of secrecy do not allow the clients to know how their cases are being handled. They shy from questioning officers handling their cases because of the latter's snobbish attitude and bow-wow style. RTI should be guaranteed and needs to be given real substance. The report has exhorted government to assume a major responsibility and mobilize skills to ensure flow of information to citizens. Further, right to information ensures minimizing manipulative and dilatory tactics of babudom, putting a considerable check on graft and corruption.<sup>4</sup> The state-level RTI Acts have been enacted by the state governments of Karnataka (2000), Goa (1997), Rajasthan (2000), TamilNadu (1997), Delhi (2001), Maharashtra (2002), Assam (2002), Madhya Pradesh (2003), and Jammu and Kashmir (2004), Harayana (2005).<sup>5</sup>

This paper makes an attempt to trace the historical background and evolution of right to information in India and other countries. It examines efficacy of regulatory framework related to right to information in India. It also highlights the contribution and role of the Supreme Court of India to felicitate the proper and effective implementation of the Right to Information Act, 2005 in India.

## **HISTORICAL BACKGROUND**

Declaration of The Rights of Man, 1789<sup>6</sup> provides that all the citizens have a right to decide, either personally or by their representatives, as to the necessity of the public contribution, to grant this freely, to know to what use it is put; and to fix the proportion, the mode of assessment and of collection and the duration of the taxes.<sup>7</sup>

United Nations Charter, 1945 through the General Assembly, in 1946 resolved that "freedom of information is a fundamental human right and the touchstone for all

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<sup>2</sup> *Secy. Ministry of Information and Broadcasting v. Cricket Association, Bengal*, 1995 SC 1236, at 1262.

<sup>3</sup> *D.K. Trivedi v. Union of India*, (1997) 4 SCC 306.

<sup>4</sup> Available at <http://lawmin.nic.in/ncrwc/finalreport/v1ch3.htm>, visited on 22-05-2013.

<sup>5</sup> Available at [http://en.wikipedia.org/wiki/Right\\_to\\_Information\\_Act#State-level\\_RTI\\_Acts](http://en.wikipedia.org/wiki/Right_to_Information_Act#State-level_RTI_Acts), visited on 03-06-2013.

<sup>6</sup> Article 14 of the 1789 Declaration of the Rights of Man made after the French Revolution.

<sup>7</sup> Available at <http://www.yale.edu/lawweb/Avalon/rightof.htm>(The Avalon Project at Yale Law School).

freedoms to which the United Nations is consecrated.”<sup>8</sup> The United Nations Special Rapporteur, an office of United Nations Commission on Human Rights on freedom of opinion and expression, noted in 1995 that ‘the right to seek or have access to information is one of the most essential elements of freedom of speech and expression.’<sup>9</sup> Similarly, in the annual report of the year 2000, it was pointed out that the right to information was not only important for democracy and freedom, but also for facilitating public participation and realisation of the right to development.<sup>10</sup>

Universal Declaration of Human Rights, 1948 in Art 19 provides that “everyone has the right to freedom of opinion and expression. This Right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

The International Covenant on Civil and Political Rights, 1968 through Article 19 provides that everyone shall have the right to hold opinions without interference. Everyone shall have the right to freedom of expression. This right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice. India has ratified the ICCPR. Section 2(d) read with 2(f) of the Protection of Human Rights Act, 1993 clarifies “human rights? to include the rights guaranteed by the ICCPR.

The Commonwealth Association recognizes human rights and democracy as part of its fundamental political values. These include fundamental human rights, and the individual’s inalienable right to participate in the democratic process. In the year 1980, the law ministers of the Commonwealth countries at their meeting held at Barbados stated that ‘public participation in the democratic and government process would be most meaningful when citizens had adequate access to official information.’<sup>11</sup>

European Convention on Human Rights, 1950 in Article 10 prescribes (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions, and to receive and impart information and ideas without interference by public authority and irrespective of frontiers; (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or such penalties as are prescribed by law, and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Rio Declaration on Environment and Development, 1992 in Principle 10 first recognized the fact that access to information on the environment, including information held by public authorities, is the key to sustainable development and effective public participation in environmental governance. Agenda 21, the ‘*Blueprint for Sustainable Development*’, the companion implementation document to the Rio Declaration, states: “Individuals, groups and organizations should have access to information relevant to environment and development held by national authorities, including information on

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<sup>8</sup> United Nations General Assembly, Resolution 59(1), 65<sup>th</sup> Plenary Meeting, 14 December 1946.

<sup>9</sup> Report of the Special Rapporteur, Promotion of the Right to Freedom of Opinion and Expression, United Nations Document E/CN.4/1995/31, 14 December 1995, para 35.

<sup>10</sup> *Ibid*, United Nations Document E/CN.4/2000/63, 18 January 2000, para 42.

<sup>11</sup> Available at <http://www.article19.org/odfs/publications/foisrvey.pdf>.

products and activities that have or are likely to have a significant impact on the environment, and information protection measures..”

### **EVOLUTION OF RIGHT TO INFORMATION AND STATUTORY FRAMEWORK IN OTHER COUNTRIES**

Sweden was the first country in the world which guaranteed the Right to Information as early as 18<sup>th</sup> Century (in the year 1766). By 2013, more than 93 countries have national-level Right to Information laws or regulations in force including the major developing countries like China and India<sup>12</sup> and Russia, most countries in Europe and Central Asia, more than half of the countries in Latin America, more than a dozen in Asia and the Pacific, eleven countries in Africa, and three in the Middle East<sup>13</sup>. Of all these, Mexico has taken the lead in 2002 with one of the best examples of a well-functioning Freedom of Information Act in the world, which represents a vital element of Mexico’s democratic transition, and became a model worldwide. A well competent governmental body (Instituto Federal de Acceso a la Información) is entrusted with the responsibility of implementation and overseeing the law. Handling over 200,000 requests in its first five years have resulted in Mexico setting a new international standard for transparency legislation.<sup>14</sup>

The momentum for adoption of Right To Information laws is building in Africa, with passage of a law in Nigeria in 2011 after a decade-long civil society campaign and work led by the African Commission on Human and Peoples Rights to develop a Model Access to Information Law for AU member states. Momentum is also developing in Asia, boosted by China’s adoption of nationwide regulations (applicable to all levels of government) in 2007 and Indonesia’s adoption of a nationwide law in 2008. The region least touched by the right to information movement is the Middle East. Only Jordan, Yemen and Israel have laws; moreover Jordan’s law is weak and adoption was driven by the government rather than civil society.

In Asia so far almost 20 nations have adopted Freedom of Information laws including Kazakhstan (Freedom of Information Act, 1993), South Korea (Act on Disclosure of Information by Public Agencies, 1996 adopted in 1998 and amended in 2004), Japan (Law concerning Access to information, 1999 came into power in 2001 and amended in 2003), China (Open Government Information Regulation, 2008 which came into effect in 2009) and Indonesia (Freedom of Information Law, 2008 which came into force in 2010). In South Asia, countries such as Afghanistan, Bhutan, Maldives and Sri Lanka, have not adopted any related legislations. Only Nepal (2007), Bangladesh (2009), Pakistan (2002) and India (2005) have such laws. In Pakistan, the Freedom of Information Ordinance passed in 2002 has provision for fine up to Rs. 10,000 when complaints are deemed to be frivolous, vexatious or malicious by the Ombudsmen. In Nepal, the law requires public agencies to update and publish 12 different kinds of information by themselves on a periodic basis. Likewise, in Bangladesh, request for information cannot be rejected on the ground of national security. In this connection, it is necessary to highlight the legislative attempts related to right to information in United Kingdom and United States of America.

<sup>12</sup> Available at <http://right2info.org/>

<sup>13</sup> See Roger Vleugels’ list compiled in consultation with FOI Advocates, a network of more than 400 FOINGOs and individuals in more than 90 countries.

<sup>14</sup> Available at [http://www.cuts-international.org/cart/pdf/Analysing\\_the\\_Right\\_to\\_Information\\_Act\\_in\\_India.pdf](http://www.cuts-international.org/cart/pdf/Analysing_the_Right_to_Information_Act_in_India.pdf).

Though the democratic traditions are deep-rooted in England, yet the thrust of legislation in this direction has been not on information but 'Secrecy. The law is contained basically in the Official Secrets Acts of 1911, 1920, 1939. Broadly speaking, it is the Official Secrets Act, 1911, which governs the subject matter substantially. Judiciary, in England, has approved openness in Government and it is achieved by refusing the government's claim of secrecy.<sup>15</sup> It may be noted that the Officials Secrets Act, 1923 makes almost all kinds of documents secrets and punishes anyone who leaks them out. A consolation against the rigorous provision is Section 10<sup>16</sup> of the Contempt of Court Act, 1981. This section reflects the importance which parliament attaches to the free flow of information to the public.<sup>17</sup>

Freedom of speech and expression is guaranteed by the first Amendment of the Constitution of the United States, which says that 'Congress shall not make any law..... abridging the freedom of speech or of the press. The Constitution of America does not contain any specific provision of access to administrative documents, but such a right has been conferred by statutes like the Administrative Procedure Act, 1946 and the Freedom of Information Act, 1966. In U.S.A., the affirmative rights to acquire information are considered as a corollary of the First Amendment freedoms.<sup>18</sup> However, the protection of the Bill of Rights goes beyond the specific guarantee to protect from congressional abridgement of those equally fundamental personal rights, necessary to make the express guarantees fully meaningful.<sup>19</sup> The First Amendment was held to involve not only the right to speak and publish but also the right to hear, learn and to know.<sup>20</sup> Thus, the freedom of speech necessarily protects the right to receive information.<sup>21</sup> Thus, the trend in United States is in favour of allowing an affirmative First Amendment right.

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<sup>15</sup> *Conway v. Rimmer*, (1968) A.C. 910 decision enlarged the public access to administrative information.

<sup>16</sup> Section 10 of the Act provides a protection to the press and media from the disclosure of source of their information. A disclosure can only be desired by a judicial finding that it is necessary in the interest of any of the exceptional circumstances specified under the section.

<sup>17</sup> *Secy. Of State v. Guardian Newspaper Ltd*, (1984) 3 All E.R. 60 at p. 603. It recognizes the existence of a *prima-facie* right to ordinary members of the public to be informed of any matter that one thinks it appropriate to communicate to them. Such a right encourages purveyors of information to the public. However a member of the public as such has no right conferred on him by this section to compel purveyance to him of any information. The choice lies with publisher alone.

<sup>18</sup> Thomas Emerson, *Legal Foundation of Right to Know*, Washington University Law Quarterly, 1976, p. 2. In *Lamont v. Post Master General*, 14 Lawyer Edition, 2d. 398 (1965), it was held that the First Amendment contains no specific guarantee of access of publications.

<sup>19</sup> *Stanley v. Georgia*, 22 Lawyer Edition, 2d. 542 (1969) while upholding the right of an individual to read pornography in the privacy of his home, the Supreme Court held that it was already established that the Constitution protected the right to receive information and ideas.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

### **RIGHT TO INFORMATION IN INDIA: RETROSPECT**

There is no specific Constitutional right to Freedom of Information. The chapters on Fundamental Rights and Directive Principles of State Policy are totally silent on the subject. However, through Judicial Activism, the courts have started carving out this right in Article 19 (1)(a) which confers the right of freedom of speech and expression.<sup>22</sup> Though a directive in this regard seems to have begun as early as in 1960<sup>23</sup>, however, it was K.K. Mathew J., who expounded with force that in “Government of responsibility’ like ours where all the agents of the public must be responsible for their conduct, there can be but few secrets the people of this country have a right to know every public act, everything is done in a public way by their functionaries”.<sup>24</sup> It was only in 1981 that “right to know” matured to the status of Constitutional right in the celebrated case.<sup>25</sup> In the words of Justice Bhagwati, “the concept of open Government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(a) of the Constitution.”<sup>26</sup> The rationale of

<sup>22</sup> In *Romesh Thappar V. State of Madras*, AIR 1950 SC 124 & *Brij Bhushan V State of Delhi*, AIR 1950 SC 129 cases the Supreme Court held that freedom of press is included in freedom of speech. In *Sakal Newspapers (Pvt.) Ltd. V. U.O.I*, AIR 1962 SC 305 the Supreme Court held that, the impugned Act and, the Order imposed unconstitutional restriction on freedom of the press. Again in *Bennett Coleman v. UOI*, AIR 1973 SC 106, similar curbs of Sakal case, were imposed but majority held that the impugned Order not only violated the freedom of the press but also violated the right of the readers the information which was included within their right to freedom of speech and expression. In *Indian Express Newspapers Bombay Pvt. Ltd. V. UOI*, AIR 1986 SC 515, p 527, Venkataramiah J. (as he then was) said that In today’s free world freedom of the press is the heart of social and political intercourse. The press has now assumed the role of the public educator making formal and non formal education possible in a large scale particularly in the developing world, where television and other kinds of modern communication are not still available for all sections of society. The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments. In *Prabha Dutt V. UOI*, (1982) 1 SCC 1, AIR 1982 SC 6, the Supreme Court held that, the Right to Information of a journalist did not give her an unrestricted access to information. The right to information being integral part of the right to freedom of speech is subject to restrictions that can be imposed upon that right under art 19(2). In *Dinesh Trivedi V. UOI*, (1997) 4 SCC 306, the court came to the conclusion that the details of the Vora Committee report and the materials on which it was based might be kept confidential until the nodal agency prepared cases against the guilty persons. The Court therefore directed the government to appoint a nodal agency but not give directions for disclosing the supporting materials. This decision should guide future determination of when and which information would be required to be given and which kind of information may be covered by the exemptions provided by the Right to Information Act 2005.

<sup>23</sup> *Hamdard Davakhana v. Union of India*, AIR 1960 SC 554.

<sup>24</sup> *State of U.P. v. Raj Narain*, AIR 1975 SC 885.

<sup>25</sup> *S.P. Gupta v. Union of India*, AIR 1982 SC 149 at p. 158-160. In this case the question arose with regard to the claim for privilege laid by the government of India in respect of disclosure of certain documents including correspondence between Chief Justice of India and the Chief Justice of Delhi High Court in connection with the confirmation of Justice Kumar who was an additional Judge of the Delhi High Court.

<sup>26</sup> *Ibid.*

this view in the words of the same learned Judge is that “the right to information or access to information is basic to the democratic way of life.”<sup>27</sup>

However, it is submitted that both Mathew and Bhagwati, JJ. had not given an account on how the “right to know” could be founded under the freedom of speech and expression. They were further silent on the relationship between the restriction which should be placed on the right to know and the restriction existing under Article 19(2).

Right to Information cannot be located exclusively in Article 19(1)(a) of the Constitution. Indeed, it is to be found in several other provisions also.<sup>28</sup> Further, inclusion of the right to information only in Article 19(1) (a) of the Constitution will indirectly restrict that right only to citizens. Rather, such right must vest in every human being irrespective of his/her citizenship. If the right to information is to be treated as a human right, it need not be restricted to citizens. For example, if a person is legally detained or die in police custody, can his/her near relative not seek information about him even if they are not citizens? Keeping in view the liberal interpretation of the rule of *locus standi*<sup>29</sup>, any person can raise question of legality of State’s action which infringes the fundamental rights of persons who are poor and devoid of resources to come to court, the information must now be available to non- citizens also. This argument also draws support from Article 19 of the Universal Declaration of Human Rights, 1948<sup>30</sup> and Article 19 of the International Covenant on Civil and Political Rights of 1966<sup>31</sup> and India is a party to both the Covenants. While widening the scope of right to information further, the Supreme Court has held that the right to information emanated from the right to personal liberty and procedure established by law, guaranteed by Article 21 of the Constitution<sup>32</sup>.

Directive Principles of State Policy, providing for social and economic transformation, direct the State to strive to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities, not only amongst

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<sup>27</sup> *Ibid.* The right to know was further considered by the Supreme Court in the *Sheela Barse v. Union of India*, AIR 1986 SC 1773, wherein the appellant, a social worker, approached the court for appropriate remedy while highlighting the sad condition of the children detained in jails pending trials. The Supreme Court issued direction for release of information to her regarding such under trials kept in different parts of the country. It is pertinent here to note that the court did not attract the right to freedom of speech and expression to confer the right to know. Thus once a need has been shown by a person having proper standing, he would be able to seek the information from the government. Again, in *Pune Environmental Case, (Bombay Environmental Action Group v. Pune Cantt. Board, SLP (Civil) 11291/198)* the Court spoke of the importance of people’s participation and upheld their right to know.

<sup>28</sup> Article 22(1) of the Constitution of India empowers every person who is detained is entitled to know the grounds of his/her detention. Article 311(2) of the Constitution of India empowers a government servant is entitled to know why he/she is being dismissed or removed in rank and to be given an opportunity to make representation against the proposed action. *E.P. Royappa v. State of Tamil Nadu*, AIR 1974 SC 555. Not giving the information may violate the principle of natural justice and could lead to arbitrary action, which violates the right to equality and accordingly hit by Article 14 of the Constitution.

<sup>29</sup> *Peoples’ Union for Democratic Reforms v. Union of India*, AIR 1982 SC 1473

<sup>30</sup> Article 19 of UDHR, 1948

<sup>31</sup> Article 19 of ICCPR, 1966

<sup>32</sup> *Essar Oil Ltd. V. Halar Utkarsh Samiti*, AIR 2004 SC 1834.

groups of people, residing in different areas or engaged in different vocations.<sup>33</sup> Dr. BR Ambedkar<sup>34</sup> presupposed a vigilant citizenry for Directive Principles.

The inclusion of the Fundamental Duties<sup>35</sup> in the Constitution shows the importance of the civil society and its duty to promote rationality scientific outlook, humanism and spirit of inquiry. Such a civil society must comprise a well-informed citizenry.<sup>36</sup>

### **RIGHT TO INFORMATION ACT, 2005: PROSPECTS**

India's RTI Act is said as one of the most empowering and most progressive legislations passed in the post Independent India and world's best law.<sup>37</sup> Most radical provision of the Act is that the information seeker need not to give any reason for it or prove his *locus standi*.<sup>38</sup> Right to Information Act provides a broad framework for Government and Citizens' interface contain corruption, ensure accountability and to mutually share the responsibility for development. Under the Act, the public authorities are required to adopt open and transparent procedures and methods of delivery of services. They ought to reveal what they do, how they do and what are the outcomes of the policies, programmes and public expenditures.<sup>39</sup> In a democratic society, the citizen have the right to know as to how they are governed and they also have right to exercise their options to indicate how they ought to be governed and served by the Government.

The major objectives<sup>40</sup> of the Right to Information Act, with which the legislation was passed by the Indian Parliament in the year 2005 are critical elements of good governance, which entails full accountability to stakeholders, who are partners in development process. And, have the powers to enforce accepted policies, common norms and recognized bench marks. It is expected, therefore, that the citizens, armed with information obtained through their exercise of right to know, would be able to

<sup>33</sup> *Ibid*, Art. 38(2).

<sup>34</sup> Constituent Assembly Debates, 4 November 1948, vol. 7, p 41.

<sup>35</sup> Inserted by the Constitution (42nd Amendment) Act, 1976.

<sup>36</sup> Constitution of India, Art. 51A(e) provides to promote harmony and the spirit of common brotherhood amongst all the people of India transgressing religious, linguistic and regional or sectional diversities, to renounce practices derogatory to the dignity of women. Art.51A(g) provides to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures. Art. 51A(h) provides to develop the scientific temper, humanism and the spirit of inquiry and reform. Art. 51A(k) provides that if she is a parent or a guardian, to provide opportunities for education to her child, or, as the case may be, ward, between the age of six and fourteen years.

<sup>37</sup> Prime Minister of India Dr. Manmohan Singh delivering Valedictory Address at the National Convention on RTI, October 15, 2006 said that *we live in an age of information, in which the free flow of information and ideas determines the pace of development and well being of the people. The implementation of RTI Act is, therefore, an important milestone in our quest for building an enlightened and at the same time, a prosperous society. Therefore, the exercise of the Right to Information cannot be the privilege of only a few.*

<sup>38</sup> Section 6(2) of the Right to Information Act, 2005 provides that, "an applicant making request for information shall not be required to give any reasons for requesting the information or any other personal details except those that may be necessary for contacting him." (emphasis supplied)

<sup>39</sup> Section 4 of the RTI Act, 2005 provides for "Obligation of Public Authorities".

<sup>40</sup> Aim & Object Clause of the RTI Act, 2005.

protect life and liberty as well as secure equity and justice before the law. An attempt is therefore made below to examine the extent to which the Right to Information has been successful in influencing the above factors in the desirable direction.

With a view to ensuring maximum disclosure of information regarding government rules, regulations and reports including decision making processes, every public authority is required to 'maintain all its records duly catalogued and indexed in a manner and the form which facilitates the right to information under the Act'<sup>41</sup>. The public authorities are therefore, expected to make pro-active disclosures through publication of relevant documents, including web-based dissemination of information. Besides, the public authorities are also required to 'provide as much information *suo motu* to the public at regular intervals through various means of communication, including internet, so that the public have minimum resort to the use of this Act to obtain information'.<sup>42</sup> In addition, a public authority is required to "provide reasons for its administrative or quasi-judicial decisions to the affected persons".<sup>43</sup> Public authorities have to facilitate the access to information to a citizen, the right to<sup>44</sup> (i) inspection of work, documents, records (ii) taking notes, extracts or certified copies of the documents or records (iii) taking certified sample of material and iv) obtaining information in electronic form, if available. In the cases where the information sought for are not provided within the stipulated period of 30 days or the information furnished are incomplete, misleading or incorrect, a requester is free to file a complaint or appeal before the Information Commission, for necessary directions to the parties as per the provisions of the Act.<sup>45</sup> The Commission has the mandate to impose penalty and/or to recommend disciplinary action against the information providers, if held responsible for obstructing the free flow of information.<sup>46</sup> The Commission may also award compensation for any detriment suffered by a requester for seeking information.<sup>47</sup>

Thus, the Act ensures greater transparency than ever before in the working of the public bodies. The disclosure of vital information thus results in checking corrupt practices in delivery of services and ensuring the reach of entitlements to the poor.

The Right to Information Act provides a framework for promotion of citizen-government partnership in designing and implementation of development programmes for improving quality of life, which calls for increasing people's options for higher earnings, better education and health care, a cleaner environment and a richer cultural life. The principle of partnership is derived from the fact that people are not only the ultimate beneficiaries of development, but also the agents of change. The stakeholders' participation leads to better projects and more dynamic development. Under the Right to Information regime, citizens' participation has been promoted through (a) access to information and involvement of affected groups/communities in design and implementation of projects and (b) empowerment of local government bodies at village level through the involvement and cooperation of citizens. The pro-active disclosure of information has enabled the beneficiaries to assume a central role in design and execution

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<sup>41</sup> Section 4(1)(a) of the RTI Act, 2005.

<sup>42</sup> Section 4(2), *Ibid.*

<sup>43</sup> Section 4(1)(d), *Ibid.*

<sup>44</sup> Section 2 (j), *Ibid.*

<sup>45</sup> Section 18(1) of the RTI Act, 2005 provides about power of the Information Commission to receive & inquire Complaint" & Section 19 provides for "Appeal".

<sup>46</sup> Section 20(1), *Ibid.*

<sup>47</sup> Section 19(8)(b), *ibid.*

of policies. Right to Information has instilled a wider sense of ownership in economic and political processes.

The Right to Information provides people with the mechanism to access information, which they can use to hold the government to account or to seek explanation as to why decisions have been taken, by whom and with what consequences or outcomes. In addition, every public authority is required 'to provide reasons for its administrative or quasi-judicial decisions to the affected persons'.<sup>48</sup> There is therefore no scope for any arbitrary decision. Until the implementation of the Right to Information Act, it was not possible for an ordinary persons to seek the details of a decision making process, which was found most often, as ineffective in terms of its outcome. It was, therefore, not possible to hold a free and frank discussion on issues of common concern of people or to fix the responsibility for any action. Such an era of darkness in policy planning, including monitoring and evaluation of schemes by affected persons, is over. The information regime has, in effect, created conducive conditions for everyone to have a better understanding of how the government works or how a particular decision was reached.

The culture of secrecy, as known, encourages the government officials to indulge in corrupt practices, misuse of power and diversion of funds for private purposes. As a result, the government's social spending yields no worthwhile benefits. It creates an environment of distrust between the people and the government, which impinge upon the development and jeopardize democratic governance. Under the Right to Information regime, there is unprecedented transparency in the working of public departments. There is thus better understanding of the decision making process and greater accountability of government. This has led to reduction in corruption in the country as evident from the report of the Transparency International (TI) which perceives that corruption in India has declined, due mainly to the implementation of the Right to Information Act. This is evident from corruption reduction score of 3.6 (out of 10) in 2013, after an initial rise of 3.5 in 2010, compared to 2.99 in 2009, which indicate a decline in corruption to the extent of 15%.<sup>49</sup>

Right to information (RTI) is harnessed as a tool for promoting participatory development, strengthening democratic governance and facilitating effective delivery of socio-economic services. People who have access to information and who understand how to make use of the acquired information in the processes of exercising their political, economic and legal rights become empowered, which, in turn, enable them to build their strengths and assets, so as to improve the quality of life. In view of this, almost every society has made endeavours for democratizing knowledge resources by way of putting in place the mechanisms for free flow of information and ideas so that people can access them without asking for it. People are thus empowered to make proper choices for participation in development process.

Until 2005, an ordinary citizen had no access to information held by a public authority. Even in matters affecting legal entitlements for such subsidized services as food for work, wage employment, basic education and health care, old age pension and food security for destitute, it was not easy to seek the details of decision making process that affected or harmed him. Under the Official Secret Act, 1923, the entire development process has thus been shrouded in secrecy. The people who voted for the formation of democratically elected governments and contributed to the huge costs of

<sup>48</sup> Section 4(1)(d) of the RTI Act, 2005.

<sup>49</sup> Available at [www.transparency.org/country#IND](http://www.transparency.org/country#IND).

financing public activities, had no legal rights to know as to what process has been followed in designing the policies affecting them, how the programmes have been implemented, who are the concerned officials associated with the decision making process and execution of the schemes and why the promises made for delivery of essential services to the poor have not been fulfilled? The major concern of the RTI Act, 2005 is to allow for greater probity in the functioning of the government departments so as to promote transparency and accountability in the working of the public bodies and contain the scourge of corruption, which are critical for ensuring good governance and development. In the Right to Information regime, the poor persons<sup>50</sup> armed with information through the exercise of right to know, are getting increasingly involved in designing and implementation of poverty alleviation programmes such as Guarantee of Income and Food Security through NREGA, Jawaharlal Nehru Urban Renewal Mission (JNNURM), Mid-Day Meals to School Children, Integrated Child Development Scheme (ICDS), Grant of Food Security and Pension for the Poor Senior Citizens etc.; Delivery of Services under Subsidized Schemes like Public Distribution System (PDS) and Shelter for the Poor etc.; Education and Health Care Schemes like Sarva Shiksha Abhiyan, National Rural Health Mission and Aam Admi Insurance Schemes etc.; Basic Infrastructure Development Programmes like rural roads, electricity, water and sanitation etc.; Empowerment of Vulnerable Sections mainly women, SC/ST, minorities and disabled persons etc.; Environmental Protection.

#### **SUPREME COURT OF INDIA AND RIGHT TO INFORMATION**

Can an applicant seek information as to why and for what reasons the judge had come to a particular decision or conclusion? In *Khanpuram Gandaiah v. Administrative Officer & Ors.*<sup>51</sup>, the Supreme Court held that definition of “information”<sup>52</sup> shows that an applicant under Section 6 of the Right to Information Act can get any information which is already in existence and accessible to the public authority under law. Of course, under the Right to Information Act an applicant is entitled to get copy of the opinions, advices, circulars, orders, etc., but he cannot ask for any information as to why such opinions, advices, circulars, orders, etc. have been passed, especially in matters pertaining to judicial decisions. A judge speaks through his judgments or orders passed by him. If any party feels aggrieved by the order/judgment passed by a judge, the remedy available to such a party is either to challenge the same by way of appeal or by revision or any other legally permissible mode. No litigant can be allowed to seek information as to why and for what reasons the judge had come to a particular decision or conclusion. A judge is not bound to explain later on for what reasons he had come to such a conclusion.

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<sup>50</sup> Proviso to Section 7(5) of the RTI Act, 2005 recognizes the significance of right to know for ensuring free flow of information and good governance and therefore exempts the poor from payment of fees for seeking information.

<sup>51</sup> AIR 2010 SC 615

<sup>52</sup> Section 2(f) of the Right to Information Act, 2005 provides that “*information*” means any material in any form, including records, documents, memos, emails, opinions, advices, press releases, circulars, orders, logbooks, contracts, report, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force.

*Preamble of 'Right-To-Information (RTI) Act' suggests it an Act for being a tool to effectively check corruption in our democratic system which comprises of three wings namely judiciary (being public authority)<sup>53</sup>, legislature and bureaucracy. Legislature and bureaucracy are subjected to RTI provisions, but unnecessary controversy was created in CPIO, *SCI v. Subhash Chandra Agrawal*<sup>54</sup> on including non-judicial aspects of judicial administration under RTI Act? After all judges also come from the same human society which consists of both honest and dishonest persons. How Chief Justice of India, mentioned as Competent Authority<sup>55</sup>, escape from being in purview of RTI Act when other concerned public-authorities respond to communications addressed to competent authorities like President of India and Chief Information Commissioner?*

*Five-member bench of the same Supreme Court headed by the then Chief Justice of India Mr. Justice PN Bhagwati in the matter *S P Gupta v. Union of India*,<sup>56</sup> had evolved concept of open government even much before RTI Act came into existence. Even though this particular aspect has never been over-ruled by later judgments on appointments of judges, opinions of members of Supreme Court collegium are not being made public despite esteemed verdict by Central Information Commission (CIC). Interestingly, file-notings on the RTI petition filed in Supreme Court regarding resolution by all Supreme Court judges on wealth-declaration by judges reveals that reply of Central Public Information Officer (CPIO) was approved by Chief Justice of India and the Appellate Authority also. On the other side, CPIO at Supreme Court says information relating to Chief Justice of India is not available with him. Does Appellate Authority's endorsement on CPIO's reply not make decisive authority and appellate authority colliding thereby nullifying any role of being the first Appellate Authority?*

*In *Ram Jethmalani v. UOI*<sup>57</sup> (popularly known as the Black Money Case), the Court held that, the right to privacy is an integral part of right to life, a cherished constitutional value. Revelation of bank account details of individuals, without establishment of prima facie grounds to accuse them of wrong doing, would be a violation of their rights to privacy. State cannot compel citizens to reveal, or itself reveal details of their bank accounts to the public at large, either to receive benefits from the State or to facilitate investigations, and prosecutions of such individuals, unless the State itself has, through properly conducted investigations, within the four corners of constitutional permissibility, been able to establish prima facie grounds to accuse the individuals of wrong doing.*

<sup>53</sup> Section 2 (h) of the RTI Act, 2005 defines "Public Authority" means any authority or body or institution of self government established or constituted-(a) by or under the Constitution (emphasis supplied); (b) by any other law made by Parliament; (c) by any other law made by State Legislature; (d) by notification issued or order made by the appropriate Government, and includes any- (i) body owned, controlled or substantially financed; (ii) non-Government organization substantially financed, directly or indirectly by funds provided by the appropriate government.

<sup>54</sup> 2010(12)SCALE496 , where Hon'ble Judges B. Sudershan Reddy and S. S. Nijjar, JJ. referred the matter to the constitutional bench.

<sup>55</sup> Section 2(e) of the RTI Act, 2005 defines "Competent Authorities" means (i).....(ii) the Chief justice of India in case of the Supreme Court; (iii) the Chief Justice of the High Court in case of a High Court ;(iv).....

<sup>56</sup> (1981) SCC 87.

<sup>57</sup> Available at <http://supremecourtsofindia.nic.in/outtoday/wc17609.pdf><http://supremecourtsofindia.nic.in/outtoday/wc17609.pdf>, at para 73.

Whether, instructions and solutions to questions were information made available to examiners and moderators in their fiduciary capacity and therefore exempted under Section 8(1)(e) of the Right to Information Act. Giving answer to this question in *The Institute of Chartered Accountants of India v. Shaunak H. Satya*<sup>58</sup>, the Court held that, anything given and taken in confidence expecting confidentiality to be maintained would be information available to person in fiduciary relationship. Therefore, instructions and solutions to questions communicated by examining body to examiners, head-examiners and moderators were information available to such persons in their fiduciary relationship and therefore, exempted from disclosure under Section 8(1)(d) of Right to Information Act. "Authorities shall maintain proper balance so that while achieving transparency, demand for information does not reach unmanageable proportions affecting other public interests."

A decision, classic example of judicial over-reach, killing right to information was made in *Namit Sharma v. UOI*<sup>59</sup>. The Supreme Court, chaired by Justice AK Patnaik and Justice Swatanter Kumar, passed an order which would fundamentally change the constitution and working of Information Commissions. Apart from the operational problems, the suggested changes would require an amendment to the RTI Act by the government. The Supreme Court has given directions that, all Information Commissions shall work in Benches of two members, and one member should be a 'judicial member'. Thus 50% of the Commissioners will now be retired judges. Effectively the disposal of pending cases will drop to about 50% of the current disposals. This will lead to Commissions deciding cases after five years or more in the next few years. Certain other elements in the order are confusing. For instance, it is unlikely that a sitting judge will ever leave the Supreme Court to join the CIC. Yet ironically, a retired judge of the SC would also not be able to join since both the Supreme Court and CIC have the same retirement age of 65 years. It is not clear why the head of Information Commissions must necessarily be a judicial member. If anything, he or she needs to have some administrative acumen over and above a regular member.

In *Shri Subhash Chandra Aggarwal v. Indian National Congress & Ors.*, the Central Information Commission has held, on 3rd June 2013 that INC, BJP, CPI(M), CPIO, NCP and BSP (6 Recognised National Political Parties) have been substantially financed by the Central Government under section 2(h)(ii) of the RTI Act. The criticality of the role being played by these Political Parties in Indian democratic set up and the nature of duties performed by them also point towards their public character, bringing them in the ambit of section 2(h). The constitutional and legal provisions also point towards their character as public authorities and it was held that AICC/INC, BJP, CPI(M), CPI, NCP and BSP are public authorities under section 2(h) of the RTI Act. Reacting to this decision, all political parties unanimously decided to make an amendment to the RTI Act & the Bill for the purpose is pending in the Parliament. This bill should be immediately withdrawn to enable citizens of this country to know the functioning of the political parties.

### CONCLUDING OBSERVATIONS

The Right to Know is not meant for gratifying idle curiosity or mere inquisitiveness but is essential for the effective functioning of democracy. Transparency and

<sup>58</sup> Available at [http://www.supremecourtcases.com/index2.php?option=com\\_content&itemid=99999999&do\\_pdf=1&id=22187](http://www.supremecourtcases.com/index2.php?option=com_content&itemid=99999999&do_pdf=1&id=22187) (2011)8SCC781 A.

<sup>59</sup> WP(C) 210 of 2012. The judgment has been stayed.

accountability are sine quo non in a genuine democracy. India, being largest democracy has to strive hard to serve the citizens of country. The Right to Information Act, 2005, in its childhood, during these eight years has shown its charisma in Delhi Legislative Assembly elections and citizens, full of information have reacted greatly to the performance of the government. Hence, attempt should be to give more and more scope, ambit, use of it rather to attenuate it.

Right to know, as a tool to access public held information, has significant bearing on good governance, development and the implementation of flagship programmes. A common man is empowered to seek accountability of the Government. Yet the task of implementing the law is not without major challenges. Lack of adequate public awareness, lack of proper system to store and disseminate information, lack of capacity of the public information officers (PIOs) to deal with the requests, bureaucratic mindset and attitude etc. are still considered as major obstacles in implementation of the law. With a view to realizing the development goals, the followings are tasks ahead:

All the 'Public Authorities' are required to make proactive disclosure of information. Almost entire gamut of their activities and the manner in which they are executed are to be disclosed. The issue is how to present and capture the relevant information that can be of use to the stakeholders for realizing their rights. The computerization of records and use of IT resources to ensure transparency in functioning of different departments should be accorded high priority. The information should be disclosed on *suo motu*<sup>60</sup> basis so that a citizen does not have to resort to the provisions of the Right to Information Act.

The Act empowers every citizen to seek information and to gain ideas and acquire new knowledge to improve quality of life and to participate in the effective governance of public authorities. The issue is to promote information literacy among people to enable them to decide what to ask for, how to ask and how to make good use of information, so that they can effectively participate in the process of development, including control of corruption. The issue of promotion of information literacy among both educated and not so well educated citizens is very critical and challenging to enable them to claim for their entitlements.<sup>61</sup>

A comprehensive Information Management System should be developed by each public authority for storage and retrieval of data and information that may be shared with anyone who seeks to inspect the records and use the information. Use of information technologies would not only facilitate faster dissemination of information but would also reduce the costs of servicing and sharing information.

In view of high illiteracy among the poor, a multimedia approach should be adopted to educate and train people of diverse linguistic backgrounds. They should be enabled to decide and select as to what information should be sought for and that from where and how? Besides, they should also know as to how to make best use of information

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<sup>60</sup> Section 4(2) of the Right to Information Act, 2005 provides that "It shall be a constant endeavour of every public authority to take steps .....to provide as much information *suo motu* to the public at regular intervals through various means of communications, including internet, so that the public have minimum resort to the use of this Act to obtain information."

<sup>61</sup> Under Section 26(1)(a) of the Act, the appropriate Government has to develop and organize educational programmes to advance the understanding of the public, in particular of disadvantaged communities as to how to exercise the rights contemplated under this Act.

for effective participation in economic and political processes. This alone can ensure cost-effective use of the provisions of the Right to Information Act and promote efficient use of limited resources.

In this connection, recommendation of the National Commission to Review the working of the Constitution is worth considering. It has recommended that Article 19(1)(a) of the Indian Constitution should be amended as “All citizens shall have the right to freedom of speech and expression which shall include the freedom of press and other media, the freedom to hold opinion and to seek, receive and impart information and idea.” Additional ground in Article 19(2) should be added as “Preventing disclosure of information received in confidence except when in public interest.”<sup>62</sup>

Democratization of information and knowledge resources is critical for people’s empowerment to realize the entitlements as well as to augment opportunities for enhancing the options for improving quality of life. The strengthening of information regime is therefore sine quo non for promoting democratic governance and right to development.

The Public Interest Disclosure and Protection to Persons Making the Disclosure Bill, 2010, provides the Central Vigilance Commission powers of a civil court to hand down harsh penalty to people revealing the identity of whistleblowers. According to the bill, the onus will be on the CVC to protect the identity of the citizens who provide information about the misuse of government authority and funds. Hence, the Bill should be immediately passed.

There are Backlog of appeals & complaints in Commissions. Around, 18872 Appeals & 5669 Complaints are pending in CIC.<sup>63</sup> The RTI Act provides for maximum period within which disposal of application either for information or for first appeal has to be disposed off<sup>64</sup> but it nowhere provides for maximum period for disposal of complaints or appeals by Information Commissions. It has resulted in backlog of cases in the ICs thereby frustrating the very purpose of the Act. Therefore, a time limit should be prescribed for ICs within which they have to dispose of complaints and appeals.

Last, but not the least, it is submitted that the Right to Information Act, 2005 will have no fruitful result unless the society will not be awarded. Thus, being a law scholar it is our responsibility to educate the people about the law and their own rights. The government, both, Central and State, should also make an endeavour in this regard.

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<sup>62</sup> Available at <http://lawmin.nic.in/ncrwc/finalreport/v1ch3.htm>, para3.8

<sup>63</sup> Available at <http://cic.gov.in/> (Visited on 31 Aug.2013)

<sup>64</sup> Sections 7(1) & 19(6) of the RTI Act, 2005.

## VIABILITY AND FEASIBILITY OF RIGHT TO RECALL IN INDIA: EMERGING POLITICO- LEGAL ISSUES

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**Abstract :** The issue of right to recall has recently gained the attention of political scientists, philosophers, politicians and jurists. The arguments are a mixture of principles and political calculations. The right to recall is a right of electorate and it may be proved beneficial for effective and vibrant democracy. India has adopted parliamentary system of democracy based on Westminster model of Great Britain. Free and fair election is inevitable for good governance in democracy. To have a moral control over elected representatives during their tenure, recall may be proved a better instrument. This may realise the novel thought- '*Prajaa adheen Raaja*'. This article casts a sceptic eye on the claims, by emphasizing how complex political issue may be sort out within the existing legal system. Hence, while there are good reasons to worry about voter turnout in established democracies worldwide, the idea for right to recall is persuasive in India. After judicial pronouncement to introduce a new idea of 'none of the above' (i.e. NOTA) in the electoral process, the Indian politico-legal system is emerging into a new arena. Therefore, before turning to the arguments in its favour or to disfavour this matter, it requires threadbare discussion. The present paper will embark upon this contemporary issue to analyse its utility in present Indian perspective.

**Key Words :** *Democracy; Good Governance; Election; Right to Recall; Right to Reject (NOTA).*

“If the people who are elected are capable and men of character and integrity, then they would be able to make the best even of a defective Constitution. If they are lacking in these, the Constitution cannot help the country. After all, a Constitution like a machine is a lifeless thing. It acquires life because of the men who control it and operate it, and India needs today nothing more than a set of honest men who will have the interest of the country before them.....It requires men of strong character, men of vision, men

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who will not sacrifice the interests of the country at large for the sake of smaller groups and areas.....We can only hope that the country will throw up such men in abundance.<sup>1</sup>

## I. INTRODUCTION

History believes in its hopes. Time went marching on. There were progress, development, movement and revolutionary change not only in the realm of ideas, but in every single domain of social and political life. What seemed immutable and universally valid was rejected and replaced by new ideas, institutions and societies. However, in spite of the lessons taught by history, democracy has been established as the best form of governance in the contemporary political arena across the globe and universally recognized ideal as well as best goal, which is based on common values shared by people throughout the world community irrespective of cultural, political, social, economic and trans-boundaries differences. It is a system in which basic rights of citizenship may be exercised under condition of freedom, equality, and transparency with due respect for the plurality of views and also in the interest of polity. Democracy is the system of governance which brought people from private to public domain, legitimated and institutionalized the rights of mankind and recognized man as Human and therefore identified a system of governance having potential to make all governmental decision making transparent, rational, just, fair and responsive. It promotes public participation, self - administration and self- management and decentralises power from gross rout level and realises self-rule i.e. *Swaraj*. Good governance is crucial for economic development, equity and social participation of common people. Independent India has been a large-scale experiment in democracy. Though, Indian representative democracy faces several problems and challenges. Limited participation of people has significantly reduced responsiveness of the elected representatives. Moreover, policies made by these representatives are not aligned with the wishes of the people. The problem is not more unique to India. Representative democracies around the world have searched for solutions to structural flaw in it. The right to recall is one of them. Originally, this system was evolved and existed in the Greek City states for the first time and adopted in the rest of the world gradually in a form of direct democracy in different ways.<sup>2</sup>

In India, the existing legal framework is not sufficient and effective to address the real problem of good governance. The parliamentary institutions have been showcased as the pillars of a functional democracy even though they have not been working for the people and therefore, the idea of Right to Recall has become an interesting and pertinent subject matter of discourse and discussion to eliminate the corrupt and unworthy representatives. Our founding fathers made India a republic in which various institutions were set up for the welfare of the people. Good - governance could be seen as an integral component of the democracy, and the common people in India assume that there is government without governance. Though, there are certain other control devices which aim to have good governance, however, due to failure in achieving the intended purpose, there is a vehement demand for having recall provisions at the

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<sup>1</sup> Dr. Rajendra Prasad, President, Constituent Assembly of India, 26th November, 1949 before putting the motion for passing of the Constitution on the floor of Assembly.

<sup>2</sup> Aristotle, *Constitution of Athens*, p 5.

Union and State level both. In this backdrop, the present paper analyses and judges the justification of right to recall in India from various angles.

## II. RIGHT TO RECALL : CONCEPT AND MEANING

The term 'Recall' is used to describe a process whereby the electorate can petition to trigger a vote on the suitability of an existing elected representative to continue in office. Basically, it gives an opportunity to the voters to remove elected representatives whom they feel not doing good job<sup>3</sup>. 'Recall procedure'<sup>4</sup> is adopted in direct democracy system that allows the appropriate authority and/or a specified number of citizens to demand a vote for the electorate on the issue whether an elected holder of public office should be removed from that office before the end of his or her fixed term. To be considered as an instrument of direct democracy, the process of legally interrupting the period in office of an elected official must involve the initiative and/or the vote of the electorate.<sup>5</sup> The electorate's right to recall Legislators is a means to ensure their accountability towards the people. It is prerogative of citizen to determine whether an errant or non-performing representative should continue in office for a full term or not. In direct democracy, right to recall is a method for calling back to elected representatives from their office due to non- optimum performance or sometimes misuse of their position<sup>6</sup>. Contrary to this, when an initiative and decision in this regard comes exclusively from legally established authorities, such as the legislative or the judicial branch, that does not require the voters' involvement at any phase of the process, the procedure is more properly called impeachment<sup>7</sup>. Its definition implies that the recall should fulfill a set of requirements, which distinguish this procedure from others aimed at terminating an elected official's period in office, such as impeachment. Among the procedures adopted by the countries in direct democracy, the recall process is the least widespread, and consequently the least applied<sup>8</sup>.

In a democratic set up, if citizens (electorates) are morally bound and legally entitled to elect the representative to run the Government, they should have a right to de-elect their representatives before the completion of their fix tenure if they fail to ensure good governance. Democracy requires public participation and transparency in decision-making and accountability. A recall procedure is more familiar where there is Presidential form of government with a directly elected executive.

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<sup>3</sup> Sanjeev Kumar Chaswal, *A Paradox of Right to Recall and Reject- A boon or bane*, p-8;

<sup>4</sup> "This is a right or procedure by which a public officials, commonly a legislative officials, may be removed from office, before the end of his term of office, by a vote of people to be taken on the filling of a petition signed by a required number or percentage of qualified voters," available at [www.brainyquote.com](http://www.brainyquote.com) visited on 30-12-2013; Recall may be called an instrument of direct democracy, which may reflect the theory that representatives are merely the representative of electors.

<sup>5</sup> *Direct Democracy Handbook*, International IDEA, Stromsburg, 103 34 Stockholm, Sweden, p 109.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Id.* at 110.

<sup>8</sup> *Ibid.*

### III. RIGHT TO VOTE AND FAIR ELECTION

Election is *sine qua non* for a vibrant, dynamic and participatory democracy. The Election of India- the largest democracy of the world is not effective unlike other Nations. The Constitution of India does not provide any mandate for the constitution and working of the political parties, nevertheless, they are at the heart of a parliamentary democracy. A parliamentary democracy without political parties is inconceivable<sup>9</sup>. The Law Commission of India has rightly noted that:

“It is essential to make our electoral system more representatives, fair and transparent, to strengthen our democracy, to arrest and reverse the process of proliferation and splitting of political parties and to introduce stability in our governance.<sup>10</sup>”

The Commission, further, quoted from a judgement of Supreme Court to say that:

“The political parties are integral to the governance of a democratic society. They perform the critical function of mobilising and organising public opinion and will, and function as a link between the public at large and the government, particularly its political wing. While they are a necessary mechanism for the functioning of a democracy, it is paradoxical that a number of them are highly undemocratic in their own internal functioning. We all know of political parties and leading ones at that— nationally and regionally—in which internal elections are hardly ever held. It is these internally undemocratic parties which often claim to be the upholders of the democratic tradition in the country or in their respective states”<sup>11</sup>.

The Indian electoral process has not been able to keep out criminals, undesirable and anti-social elements from participating in and even dominating the political scene and polluting the electoral and parliamentary process. To strengthen Indian democracy and to bring major structural reforms in electoral system, there has been growing concern over the years in India about different aspects of electoral system, and issues were discussed by a number of committees.<sup>12</sup> But, in absence of an effective ‘post-election control mechanism’ over the elected members, particularly in system of indirect democracy, elected representatives are not accountable to the ‘People’ during their tenure in performing their job honestly. In India, where a caste oriented societal structure prevails over the general elections, regionalism, backing of money and muscle power is common practices, it results into corrupt practices and misuse of power across the Nation. It is praiseworthy to note the observation of the ape Court:

“[T]hat corruption in a civilised society is like cancer, which if not detected in time is sure to malignise the polity of the country leading to disastrous consequences. It is termed as a plague which is not only contagious but if not controlled spread like a fire in a jungle.

<sup>9</sup> Law Commission of India 170<sup>th</sup> Report on Reform of the Electoral Laws (1999) as per B.P. Jeevan Reddy, *J.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> Goswami Committee on Electoral Reform(1990); Vohra Committee Report(1993); Indrajit Gupta Committee on the State Funding of Elections(1998); Law Commission Report on Reform of the Electoral Laws(1999); National Commission to Review the Working of the Constitution(2001);Election Commission of India-Proposed Electoral Reforms(2004) and The Second Administrative Reforms Commission(2008).

Its..... It has also been termed as royal thievery. The socio-political system exposed to such a dreaded communicable disease like to crumble under its own weight. Corruption is opposed to democracy and social order, being not only anti-people, but also aimed and targeted at them. It affects the economy and destroys the cultural heritage, unless nipped in the bud at the earliest; it is likely.....healthy, wealthy, effective and vibrating society.<sup>13</sup>

Since, right to vote and the exercise of this franchise by eligible citizens is the pulse of every democracy and citizenship has traditionally provided the basis for voter eligibility in national elections throughout the world, so the right to vote has emerged as fundamental human rights of eligible citizens. It is a well recognized right *at par* not only under domestic law but also in international instruments and covenants<sup>14</sup>. Unlike the other rights articulated in the fundamental human rights treaty (i.e. ICCPR), the right to vote has been presumed a privilege of citizens. There is proximity in right to vote and right to recall. Triumph of democracy depends on the portrayal of public will. The European Convention on Human Rights stating simply that the High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.<sup>15</sup>

In India, democracy being the basic feature of the constitutional set-up, there can be only one opinion that free and fair elections would alone guarantees the growth of healthy democracy in the country. The fair denotes equal opportunity to all people. Universal adult suffrage, conferred on the citizens of India by the Constitution, has made it possible for these millions of individual voter to go to the polls and thus participate to form government of the country.<sup>16</sup> Adult Suffrage gives Right to Vote to every citizen of India, who is above the age of eighteen years, with a vision of maximum participation and provides an opportunity to the youth to select their leaders with inherent strategies of electoral process that every citizen of the country would have right to know, enquire

<sup>13</sup> *State of Madhya Pradesh & Ors v Shree Ram Singh* AIR 2000 SC 870.

<sup>14</sup> Article 25 of the *International Covenant on Civil and Political Rights* reads, “every citizens have the right? and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions; —(b) to vote and to be elected at genuine periodical elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;” See *International Covenant on Civil and Political Rights* 1976 (ICCPR), G.A. Res. 2200A (XXI) A, U.N. Doc. A/RES/2200A (XXI), Art. 2 (Dec.16,1966) (establishing that all rights discussed in the covenant are available to all people involved. It also describes the duties taken on by States that adhere to the Covenant). Article 41 of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* also specifically grants to migrant workers and their families the right to vote in their country of origin.

<sup>15</sup> Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 3, Mar. 20, 1952, Council of Europe, available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/009.htm> visited on 29-12-2013.

<sup>16</sup> The Constitution of India itself provides under Article 325 that “No person to be ineligible for inclusion in, or to claim to be included in a special, electoral roll on grounds of religion, race , caste, or sex”; and 326 that the General Elections of the House of the People and State Assemblies on the basis of Adult Suffrage.

and ensure the particulars of the candidate who is going to represent them in the Legislatures. It is also essential that the best available men should be chosen as people's active representation for proper governance. As the Supreme Court of India opined that:

“Free and Fair election is a basic structure of the Constitution and necessarily includes within its ambit the right of an elector to cast his vote without fear of reprisal, duress or coercion.<sup>17</sup>”

#### IV. RIGHT TO RECALL: GLOBAL LEGAL PERSPECTIVE

Right to Recall is integrated with direct democracy system; it is enshrined in the constitutions and electoral laws of that country where it exists. The subjects of recall are elected officials working at national, regional and local levels. However, some countries provide for the possibility of removing appointed officials from office through procedures that involve citizens' participation.<sup>18</sup> In Europe, Karl Marx had demanded right to recall in 1871. In the modern world, many countries like Venezuela<sup>19</sup>, some states of the United States (US)<sup>20</sup>, Switzerland<sup>21</sup>, Uganda<sup>22</sup>, Canada<sup>23</sup> and Philippines

<sup>17</sup> *Indira Nehru Gandhi (Smt) v Raj Narayana* AIR 1975 SC 2299 para 45; *Kihoto Hollohan v Zachilhu* [1992] Supp (2) SCC 651

<sup>18</sup> Many US States have already incorporated the provisions under the existing statutes, supra note 6, p 180; The Peruvian Constitution calls right to revoke and remove officials a fundamental right of the person.

<sup>19</sup> The 1999 Constitution of Venezuela enables a recall of any elected representative including the President. Article 72 of the Constitution declares that all offices filled by popular vote are subject to revocation. Venezuela is an example of the broadest application of full recall.

<sup>20</sup> In US, the recall referendum exists for local jurisdictions. In 18-19 states, it is applicable to recall State officials. It is not incorporated in the Constitution yet especially in municipality of Los Angeles (1903); Michigan; Oregon (1908); California (1911) and Arizona, Colorado, Nevada and Washington (1912) introduced recall. The requirements vary depending on the states, but the common factor for its application is non-compliance of duties of representatives, like- incompetency, felony, involvement in corrupt act, and misconduct, etc. The Wisconsin Constitution reflects specifically the principle of an active popular sovereignty by creating the unlimited right to recall elected officials. This is demonstrated by the facts that under Article XIII, Section XII, the power is placed solely in hands of public, in the form of a recall election available at : <http://law.marquette.edu/facultyblog/2011/08/22/the-constitutional-right-of-recall/> visited on 29-12-2013 ; the recall gained a firm footing in US's politics with democratic ideals that burst forth from the American revolution( *A Paradox of Right to Recall or Reject: Boon or Bane*, p94);

<sup>21</sup> Switzerland is often cited as the strongest example of modern direct democracy. Switzerland introduced this system in 1848. It has put to use the initiative and the referendum at both local and federal levels in six Cantons-Bern; Schaffhausen; Solothurn; Ticino; Thurgau; and Uri .

<sup>22</sup> Article 84 (1) says that subject to the provisions of this Article, the electorate of any constituency and of any interest group referred to in Article 78 of this Constitution have the right to recall their Member of Parliament before the expiry of the term of Parliament.

<sup>23</sup> The Canadian province of British Columbia enacted *the Representative Recall* in 1995. The Voter in that province can petition the Government to have a sitting representative removed from office.

etc. have already made provision in varying forms in their respective constitutions and legislations. The late twentieth century earmarked in South America as the most identified region of the world where the recall increased its presence, in the new constitutions enacted, following a growing trend to combine representative democracy with participatory democracy.<sup>24</sup> However, they significantly differ to others in design, legal rules, level and opportunity to the citizen in its exercise. The countries like United Kingdom (UK)<sup>25</sup>, Germany, New Zealand, Sweden and India, are indulged in the debate on recall process in their Legislatures.

The Right to recall is not new to India. The system of recall has its origin with human civilization and evolution of institutions like state and sovereign. It is worthwhile to note here that India has the oldest system of governance based on principles of democracy in the world. No other country has a more ancient or exalted pedigree where people (*Praja*) had right to remove King (*Raja*)<sup>26</sup>. Kautilya says that:

“In the happiness of his subjects lies the king’s happiness, in their welfare his welfare. He shall not consider as good only that which pleases him but treat as beneficial to him whatever pleases his subjects. Therefore let the King be active in working for the prosperity and welfare of his people.”<sup>27</sup>

*Sri Ramcharitmanasa* describes the suggestion of Lord Ram to Lakshman that a King whose reign brings suffering to his beloved people surely deserves an abode in hell<sup>28</sup>. Such ruler is not entitled to remain on the throne as King; he should be called back.

The Constitution of India and Union Legislation both do not contain any provision relating to right to recall. It is needless to say that our Constitution- makers had deliberated and acknowledged the absence of right to recall<sup>29</sup>. The members were of opinion that:

<sup>24</sup> See generally the Constitutions of Ecuador, Ethiopia, Peru and Taiwan etc. that contain generic statements about the possibility of mandate of elected officials as a right of the people in those countries; the Constitution of Ecuador establishes that the people will enjoy among the other political rights, ‘the right to revoke the mandate conferred to elected officials;’ the Ethiopian Constitution states that the people may recall any one of their representatives whenever they lose confidence in him.

<sup>25</sup> The Recall of Elected Representatives Bill, 2012-13

<sup>26</sup> The term ‘*Rajdharma*’ in various form can be found in various Indian Oriental texts i.e. *Dharmashastra*; *Niti-shastras*; *Mimamsa*; and *Smritis*.

<sup>27</sup> Kautilya, *Arth-shastra*, quoted by President Sri Pranab Mukherjee in speech on the occasion of Fourth UPSC Foundation Day Lecture on “*Governance and Public Service*” at Vighyan Bhavan, New Delhi, on 29-11-2013; See also, The people should execute a King who does not protect them but deprives them of their property and assets and who takes no advice or guidance from any one, such a King is not a King but a misfortune; A King, who after having sworn that he shall protect his subjects fails to protect them, should be executed,- Mahabharat.

<sup>28</sup> ~~THE GIK FI Z I Z K R H I A I K U I Q O F I U J D V F I D I J H A T~~ ulasidas krit *Sri Ramcharitmanasa*, *Ayodhya Kand*-70.6; Kashiraj Sanskarana, Pratham Sanskaran, edited by Viswanath Prasad Mishra, p 170.

<sup>29</sup> Sri K M Munshi, while speaking in the Constituent Assembly rebuffing the inception of a particular piece of legislation as unconstitutional, drew a pleading that almost to suggest that the absence of a right to recall is a compromise to ensure that the people are not over-empowered—*CAD, Vol. VII, p 1167*.

“We do not think by votes a government becomes the people’s government, and it may be right to prove by logic that since the people had voted for the government, the government shall have to be the people’s government, and it may claim that the people themselves carry on the government. It is not so in fact. They had exercised their votes once. But as the elections were over, they got out of politics, now they have no control. Till the next elections or till such time as they have another chance to exercise their choice, they must remain like sleeping partners of democracy. We have not got the right to recall the Government. People once cost the vote to form the Government, have no right of recall or to censure its officials unless there is a fresh election. So whatever rights we give to the State or the Government those rights are not necessarily to be used in the interest of the people. For the present type of democracy in India, people do not count at all”<sup>30</sup>.

However in India, the move for right to recall started in pre-independence era when Sri Manabendra Nath Roy, a *radical humanist* and *political theorist*, proposed an alternative system of political economy in the year 1944 by emphasising decentralisation and devolution of power, which was be in tune with his humanistic approach of restoring sovereignty to the individual in society with a right to recalling their representatives.<sup>31</sup> Sri Jayprakash Narayan, alias *Loknayak*, initiated a demand in the year 1950 for the same and reiterated again in his movement ‘*Total Revolution*’ (*Sampoorn Kranti*) in 1974. Since corruption and democracy go parallel, and with due regards it may be submitted that unfortunately India is witnessing a constant rise in unethical and irresponsible behavior on the part of elected legislators except some. Thus the issue being a matter of great deal, was discussed in 1998 by the Indrajit Gupta Committee on electoral reform. Subsequently, to accept the repeated public demand, the matter brought into the floor of the House of the People (Lok Sabha) for consideration and deliberation at several occasions, but could not reach to any conclusion.<sup>32</sup> Though in the States’ Legislations, statutory provisions are made particularly to deal with local

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<sup>30</sup> *Ibid.*

<sup>31</sup> M N Roy, *New Humanism*, p 13 & 62.

<sup>32</sup> In 2003, during the discussion on the Constitution Ninety Seventh Amendment Bill; in 2005 on 23<sup>rd</sup> December, during the short term discussion in the Lok sabha Mr. Basu Deb Acharia spoke strongly in favour of the right to recall; in 2007 Mr. Som Nath Charterjee , the then Speaker, supported the right to recall during plenary session of the Commonwealth Parliamentary Conference held in India, and emphasized on this issue again while delivering ‘EMS Namboodari pad Memorial Lecture’ on ‘*Democratic Consideration: The Indian Experienced*’ and said that it is time to us to look for device such as ‘recall’ to ensure accountability of the members of democratic institutions at all levels before the common man gets totally disillusioned with the prevailing system. The performance and the functioning of the Parliament as well as its members would improve if people who elected their representatives to voice their grievances watched the parliamentary proceedings regularly. But, it is not such an easy thing to be resolved in our parliamentary democracy as all the political parties have to arrive at a consensus which may be difficult task.”

bodies like Maharashtra; Madhya Pradesh; Chhattisgarh; Jharkhand and Bihar for experiment basis<sup>33</sup>.

## V. RIGHT TO RECALL: DIAGNOSIS AND PROGNOSIS

In a parliamentary system of democracy, the proponents of this right suggest that right to recall strengthens the very root of the system; promotes accountability, fairness and transparency in governance and imposes an obligation upon the Legislators to be just, fair, reasonable and responsive to the common-cause. On the other hand, the opponents argue that right to recall is a double edged weapon if available in the hand of people certainly would promote instability in governance, hardship in decision making and proper functioning of the public offices. Thus, to analyse these issues thoroughly, it is necessary to examine the plausible implications of introduction of the 'Right to Recall', its viability and feasibility in a country like India, where a larger section of local populace reside in multi-cultural, multifarious and multi-lingual diversity.<sup>34</sup> In the light of the aforesaid facts, an acrimonious debate continuously goes on since pre-independence era to till date to improve our democratic set up<sup>35</sup>.

The fundamental characteristics of right to recall has been aptly explained centuries back by George Washington (the first US President) in a letter written to his nephew. He wrote that:

“the power under the federal constitution will always be in the People. It is entrusted for the certain defined purposes, and for a certain limited period, to the representatives of their own choosing; and whenever it is executed contrary to their interest, or not agreeable to their wishes, their servants can, and undoubtedly will be recalled”.<sup>36</sup>

The Common Wealth Parliament Association<sup>37</sup> debated on the matter and considered the right to recall as a strategy to enforce greater accountability of Parliament to the people. People are disillusioned with the conduct of Parliamentary business.<sup>38</sup> The very process of legislative functioning is subverted, leading to incalculable harm to the representation of democratic institution.<sup>39</sup> The National Commission to Review the Working of the Constitution has rightly pointed out in its report how a Parliamentary

<sup>33</sup> State of Chhattisgarh witnessed its first recall election in the year 2008 wherein three local body chiefs were de-elected by the people in accordance with Section 47, *the Chhattisgarh Nagar Palika Act, 1961*.

<sup>34</sup> A country of different religion, race, caste, sex, and region, where there is liberty of thought, expression, belief, faith and worship (Preamble of the Constitution of India).

<sup>35</sup> The Independent India has a large-scale experiment in its democracy and remained a democracy, despite its size and diversity while many other colonial countries descended into dictatorship and military rule.

<sup>36</sup> On November 9th, 1787 a letter was written by George Washington in favour of federal constitution. Of course the Constitution *was* adopted, and two years after this letter was written, George Washington became the first President of the United States, available at : [www.lettersofnote.com/2010/04/is-it-best-for-states-to-unite-or-not.html](http://www.lettersofnote.com/2010/04/is-it-best-for-states-to-unite-or-not.html) visited on 29-12-2013.

<sup>37</sup> Academic Journal, *Parliamentarian*; 2007, Vol. 88 Issue 4, p329; See 53<sup>rd</sup> Report of CPA.

<sup>38</sup> *Right to Recall: Solidarity of Democracy* available at: [upscportal.com](http://upscportal.com), visited on 29-12-2013.

<sup>39</sup> *Ibid.*

system, unlike Presidential system, lays emphasis on accountability? Commission reviewed that:

'Parliament is the pivotal institution of our representative parliamentary democratic polity. Its role in navigating India's voyage in the post-independence period of momentous developments stands in comparison with the best of legislatures anywhere in the world. We can take legitimate pride and comfort from the impressive record of the uninterrupted continuity of our parliamentary institutions for over half a century. However, like all living institutions, Parliament needs to keep under constant review its structural-functional requirements as also the entire gamut of its operational procedures. Also, it has to be remembered that in parliamentary democracy just as Government is responsible to Parliament, Parliament is also responsible to the people who are the supreme sovereign'.<sup>40</sup>

The National Commission also referred in particular to the emergence of the unhealthy role of money and mafia power and to criminalisation, corruption, communalism and casteism. The electorate has no role in the selection of candidates for election and the majority of the candidates are elected by minority of votes under the first-past-the-post system.

If right to recall would be introduced in Indian political system, it will enlighten the dark ages of democracy. Political rivals would make issue out of the smallest one. People may scrutinise the activities of their elected officials and they serve the Nation under deterrent power of the common people.

## **VI. RIGHT TO REJECT OR NOTA AND INDIAN JUDICIARY**

Political parties in India have few rules to regulate themselves. They have no agenda in their political manifesto neither to improve the process of general elections nor to strengthen the democratic system of governance for the long run. Subsequently, a gradual deterioration came in electoral process. The Election Commission, therefore, changed its traditional procedure of superintendence, direction and control of election and made efforts in several areas to respond to some of the concerns. The Central Information Commission (CIC) took a landmark step in an order on a complaint application filed by the Association of Democratic Reforms and Mr. Subhash Agrawal (an RTI activist), under a Right to Information (RTI) and decided that the six respondent political parties are public authorities as they are substantially financed by the Government. It was, further, determined by the CIC that the political parties would be answerable to the citizens of the country for the issues like their sources of Funds; details of expenditures; and also criteria of distribution of party tickets in general elections to the candidates<sup>41</sup>. Thus, the political system has gained considerable ground by the efforts of the Central Information Commission.

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<sup>40</sup> NCRCW Final Report, Chapter V, 5.1.

<sup>41</sup> A Full bench consisting of Shri Satyananda Mishra and Information Commissioners Shri M.L. Sharma and Smt. Annapurna Dixit in a landmark decision delivered on 3<sup>rd</sup> June, 2013 brought the political parties under the ambit of RTI Act.

The Supreme Court has led to a great furore in the political circle of the country while delivering path-breaking verdicts<sup>42</sup>. The apex court judgment is latent with the possibility of revolutionizing the way Indian democracy functions by excluding convicted persons from the electoral process and giving the electorate an option for negative voting. The court has directed to the Election Commission of India to include the option “none of the above” with the view to cleansing politics and it to foster greater participation among voters. The Court rightly underlined the importance of providing this right of not to vote and kept it *at par* with the right to vote in a pluralistic democracy. The court opined that:

“the strength of any democracy ultimately hangs on its ability to ensure voter participation and commitment to democracy. The right to negative voting will not only attract that vast majority to polling booths who avoid exercising their franchise due to absence of worthy candidates but also check the rampant malpractice of proxy-voting encouraged by political parties.”<sup>43</sup>

The Supreme Court, further, held that the provisions of Rules 41 (2) & (3) and 49-O, the Election Rules, 1961 are impugned and stand *ultra- vires* to the extent they violate secrecy of voting provided by Sections 128 of the R P Act and Article 19(1)(a) of the Constitution of India. Indeed, NOTA option gives the voter the right to express his disapproval with the kind of candidates that are bring put up by the political parties.

## VII. CONCLUSION

Indian politics is gripped by a steadily declining standard and the citizens were longing for a mechanism that allows them to register their disapproval of the choices offered to them by the political out fits. Indian election process requires to be reformed to the extent that it should express the real will of the people of the country but, recall process may ensure vertical responsibility as opposed to horizontal accountability. The entire public debate and discourse relating to the introduction of right to recall in India, goes beyond the fact that this right is a means to achieve certain end-objectives but not an end itself. It is a post-election measure having an idea to ensure accountability and responsiveness, and to achieve this goal, focus should be given to enhance the political sensitisation and awareness among masses. Therefore, unless the existing system is reformed and implemented with the beginning of the pre-process, such move may create several problems. This is an attractive idea in theory but certainly, it would entail practical difficulties and bring unwilling repercussions. Of course, there are other useful measures to improve pre-election process, which may be applied. Needless to say that recall is novel idea that minimises entry of corrupt, criminal, dishonest, greedy and non-responsible representation in the legislature. The right to recall is being proposed having two basic intentions- one, to correct the limitations and flaws of existing electoral/ representative democratic practice; two, hanker after some form of democracy and to replace the representative democracy by direct democracy as all time favourite of Utopian democrats who have little patience for matters of scale and level. In Indian perspective, this idea enjoys an evocative space irrespective of its feasibility or practical

<sup>42</sup> *People’s Union for Civil Liberties & Anr. v. Union of India & Anr.*( 2013 STPL (Web) 796 SC 2); *Union of India v Association for Democratic Reforms and Another* (2002 (3) SCC 294), where Supreme Court has held that citizens have a right to know about public functionaries and candidates for office.

<sup>43</sup> *Ibid.*

implications. Today's supporters of this right are tomorrow's radical democrats who always wish to rewrite the idea of democracy. But they are not in position to clarify that whether they are fundamentally disagree with the current idea of democracy rather than disagree only with the current practice of democracy.

India is a country of paradoxical position. In current version of Indian representative democracy, people's power to govern themselves, is operationalised within a framework that secures justice- social, economic and political; equality of status and opportunity and - one person- one vote, and free access to electoral participation which ensures a minimum threshold of inclusiveness, but the measures of direct democracy can easily be the less inclusive ones on the other. Keeping in view the above discussion based on different committee's report<sup>44</sup>, its anti- social implication, judicial pronouncements and several moves, it may be sum up that the right to recall is worth noticed in recent years to keep representatives on a leash.

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<sup>44</sup> See chapter 4 of the report of National Commission to Review the Working of the Constitution cited in Vohara report- *'the nexus between the criminal gangs, police, bureaucracy and politicians has come out clearly in various parts of the country and that some political leaders become the leaders of these gangs/armed Senas and over the years get themselves elected to local bodies, State Assemblies and Parliament'*.

## PROTECTING WOMANHOOD : NOT BY LAW ALONE

A.P. Singh\*

**Abstract:** Woman is subjected to a variety of discriminations and actions derogatory to her status and has not obtained adequate and proportionate representation in the services, legislatures and other decision-making bodies. It raises questions such as: What has gone wrong? Why the constitutional guarantees and voluminous laws passed for her protection and ensuring her proper growth and representation in all walks of life have not been able to secure a proper place for womanhood under Indian sun? This paper seeks to discuss an alternative strategy to ensure better implementation of existing laws and ensuring better representation of women in all walks of life, securing to her a better place in the socio-economic and politico-cultural life of the country. Law has two aspects of its application process. There can be what we call hard law approaches and there also can be what we call soft law approaches. What we have done so far is exclusively to come up with hard law approaches in terms of providing reservations or providing solutions in the form of do's and don't's etc. What is sought to be argued here is that a mixed approach is needed.

**Key words:** *Womanhood, Soft vs Hard Law approaches, Use of Legal Instrumentality.*

### I. INTRODUCTION

Latest census figures of 2011 records the child sex ratio between 0 to 06 years of age at the lowest since independence, i.e. at 914. This goes on to prove that despite best of efforts at preventing abortion of female foetus, diagnostic techniques are being rampantly used to eliminate female foetus in almost every parts of the country, resulting in a very adverse kind of sex ratio that might result in variety of distortions in the socio-economic and politico-cultural set up of the country in the days to come. We know that the women who conceives, nurtures the foetus, gives birth, nurses the infant and makes him worthy for human civilization, fosters and chistles its future by her own blood, is discriminated against, treated as an economic drain, exploited or dispensed with as a non-person because she crushes her family with marriage and dowry expenses. Her birth is greeted with silence, nay with sorrow whereas a boy arrives to the sound of conch shells. This is only the beginning of the host of crimes and injustices perpetrated against the womenfolk. The process starts even before she takes birth and continues till she is buried in the grave. The list of crimes varies from simple harassment, physical

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and mental to eve-teasing and sexual harassment at work place, to rape and bride burning, cruelty and wife beating and so on. The worst aspect is that these crimes are committed within the four walls of the house where she is supposed to have her emotional roots. This and many other crimes are committed despite the existence of hosts of constitutional guarantees of equality and dignity, an assurance that the state shall not discriminate against any citizen on the grounds of religion and race, caste, sex, place of birth etc.<sup>1</sup>

Article 14 guarantees all kinds of equality including equal voting rights and political participation to both men and women. As reflected in the preamble, the Indian Constitution is firmly grounded in the principles of liberty, fraternity, equality and justice and contains a number of provisions for the empowerment of women. Women's right to equality and non-discrimination are defined as justiciable fundamental rights and there is enough room for affirmative action programmes for women. Equality of opportunity in matters relating to employment or appointment to any office under the State is also a fundamental right.<sup>2</sup> The Directive Principles of State Policy stress on the right to an adequate means of livelihood for both men and women equally,<sup>3</sup> equal pay for equal work for both men and women,<sup>4</sup> provision for just and humane conditions of work and for maternity relief<sup>5</sup>. Directives for promoting harmony and renouncing practices derogatory to the dignity of women are also provided for in the Indian Constitution.<sup>6</sup> The political rights of women are recognized without any discrimination, or distinction and they have the right to participate in decision making at all levels equally with men. The right to constitutional equality has been supplemented by legal equality by the passage of a number of Acts through which the traditional inequalities in respect of marriage, divorce and property rights are sought to be eliminated.

However, in spite of these constitutional and legal provisions, the ground reality is that womanhood is still subjected to a variety of discriminations and actions derogatory to her status and has not obtained adequate and proportionate representation in the services, legislatures and other decision-making bodies. What has gone wrong? Why the constitutional guarantees and voluminous laws passed for her protection and ensuring her proper growth and representation in all walks of life have not been able to secure a proper place for womanhood under Indian sun? This paper seeks to discuss an alternative strategy to ensure better implementation of existing laws and ensuring better representation of women in all walks of life, securing to her a better place in the socio-economic and politico-cultural life of the country.

There are basically three separate questions and strategies that I seek to argue in this paper, one that the use of legal instrumentality in improving the women's lot has so far proved to be a failure and continuing use of this strategy is not likely to bring about a significant change in the life of the nation, as regards the status of women and their role in the socio-economic and politico-cultural life of the country. Secondly the use of legal instrumentality in transforming the social organism, at theoretical level has its

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1 Articles 14 and 15 of Indian Constitution.

2 *Id.* Article 16 .

3 *Id.* Article 39(a).

4 *Id.* Article 39(d).

5 *Id.* Article 39(e).

6 *Id.* Article 51A (e).

own limitations. That has got to be appreciated and proper strategies worked out to affect some kind of an effective strategy to manage the social transformation process in a better way. The third argument is just a sequel of the first two arguments. Law has two aspects of its application process. There can be what we call hard law approaches and there also can be what we call soft law approaches. What we have done so far is exclusively to come up with hard law approaches in terms of providing reservations or providing solutions in the form of do's and don'ts etc. What is sought to be argued here is that a mixed approach is needed. Unfortunately, because hard law approaches are politically convenient, we continue to resort to such approaches, soft law approaches which require lot of ground work at the grass root level are generally avoided being politically inconvenient.

## **II.USE OF LEGAL INSTRUMENTALITY : IS THAT THE ONLY WAY OUT?**

There is no gainsaying of the fact that there is certainly a need for women's more effective role in decision-making processes for the democratic and constitutional assurances of equal citizenship and rights in the Indian Constitution to become a reality at the operational level. Citizenship is linked to political participation and representation. Lack of ability and opportunity to participate in the political system implies a lack of full membership in the system. For true equality to become a reality for women, the sharing of power on equal terms with men is essential. But the reality is that women continue to be marginally represented even in areas where variety of policies has a direct impact on them. There is still a great gap between constitutional guarantees and the actual representation of women in the political system in India.

However the million dollar question is as to how do we ensure that women play effective role in the decision making process at the political level? It has been proposed and argued more than once that providing quota for women probably would do the trick. And therefore the Women's Quota Bill is still hanging fire in the Parliament. 73rd and 74th Constitutional Amendments have already been implemented and commenced the experimentation on women's role in political decision making process at the lowest level of Indian Democracy i.e. Panchayati Raj and Municipality levels. One has to concede that at least in absolute terms if nothing else, the political representation of women has substantially increased in the wake of implementation of 73rd and 74th Constitutional Amendments. However that has not led to an overall improvement in the political decision making process in terms of role of women. Therefore there are certain vital questions that I intend to raise here, Does a quota for women bring about social change? What is the relation between caste and class? Do quotas bring to prominence people who otherwise would never have attained governance positions? Would men/political system have fared differently in the absence of quota system? Shall the reservations for women lead to eradication of social evils against women which we had referred earlier? are the political institution in the country in quandary as they are at the moment, in a position to transform the social standard in favour of women? Shall it have any short term or long term impact on the functionality of the system as a whole? These and many such questions are required to be answered for balanced analysis of the implications of women's reservations in proper perspective.

The argument that I propose to make here is that mere political representation may not serve the ultimate goal of women's empowerment, if that is the goal of the system. The line of argument adopted here is to highlight the limitations and drawback of the state intervention to affect social change and ensure that women's participation

in socio-economic and politico-legal life of the country is ensured. This goes without saying that the purpose of reservations for women is not to increase employment opportunities for the women nor even to improve their economic conditions, but the basic purpose of reservations in general, and of women's in particular is to give them a chance to participate in the affairs of the community and in decision making process and thereby enhancing the sense of participation so that others may emulate them and move ahead in the ladder of socio-political power game. Apart from this it also entwines a notion of historical restitution or reparation to offset the systemic and cumulative deprivations suffered in the past.<sup>7</sup>

It may not be out of place in this context to mention that right since the beginning of 19th century when we launched our struggle for national rejuvenation, the issue of social reform in general and emancipation of women in particular has been the prominent issue in every agenda that we have formulated for guiding our struggle. And an important and worth noting point in this context is that the fight for social reform and emancipation of women was fought at two levels, i.e. social and political.

On the social front the struggle was against the social evils such as sati, polygamy and emphasis on widow remarriages and women's education.<sup>8</sup> These efforts for removal of social evils were sought to be re-enforced by the instrumentalities of law such as sati prohibition Act, Widow Remarriages Act etc. The stalwarts of early reform movement emphasized on the social reform as a pre-condition for political reforms.<sup>9</sup> The later reformers, however, relied more on affecting social reforms by using the instrumentality of the state rather than work upward from the grassroot level transforming the social scenario as a ground for initiating reform at the political level.

This tradition of using the instrumentality of the state for social reform continued in the post-independence period and host of social reform laws, like sati abolition, child marriage prohibition Act etc. joined the statute books. Now women's upliftment is being sought to be affected once again by way of legislation. What has been forgotten in the process is that legal remedies for social ills can work upto a point.<sup>10</sup> Beyond that it depends on the extent of acceptability of value system in the society at large. Human history is witness to a process of social development preceding the development of political institutions and the development of rules of governance. Unless the acceptability of the political institutions and rules of governance is "deep and comprehensive" no force can really implement it.

In fact this concept is also the basis of modern democratic governance. Mahatma Gandhi conclusively proved that the ruled can not be governed without its consent. This is not an argument for status quo or an apology against social transformation. The point is that for affecting social change one has to see that first the favourable conditions are created and institutions developed for that purpose. Political institutions are essentially the tools of governance.<sup>11</sup> What we have been trying is to use political institutions and

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7 See generally Jayanti Alam, *Ideology of Oppression under Secular Constitution*, 1998 XXXVI (40) *Mainstream* New Delhi .

8 See generally Prem Arora, *Comparative Politics and Indian Political System*, (New Delhi : Cosmos Bookhive Pub,1998)

9 *Ibid.*

10 See generally Arvind N Das, *Times of India*, New Delhi.

11 See generally Swaminathan S Ankaleshwar Ayer, *Institutional Barriers of Reforms*, 20th Sep 1998, *Sunday Times of India*, New Delhi.,

instrumentalities of the state for social transformation and the history of last years is a proof enough that we have squarely failed in that. My submission is that the causes for the present ills of political governance are the in-appropriate usage of the institutions, i.e. using certain institutions for the purpose for which they are not meant for. This in a word is systemic aberration. Unless we correct it there is no hope of overcoming the present ills of our polity.

What is even more disconcerting is the fact that the institutions we have emulated are essentially western in origin whose acceptability in our system is neither "deep and comprehensive" nor it is spread evenly in all the sections of our population. It may be noted in this respect that the socio-political institutions do not develop in vacuum. Their structural combinations are highly complex and determined by history, culture and tradition. Their roots lie deep in the ethos and social behavior of a particular system.<sup>12</sup> If one wants to emulate the institutions of the system alien to one's ethos and culture, tradition and convention there has got to be a long indigenization process and some kind of an acceptability developing on a large scale. This is not the case with India.

On the contrary the people have developed abhorrence or a grudge against the state and its institutional structure as a result of long drawn struggle for political independence. And by emulating the institutions of the same system we have brought in an inherent contradiction in the sense that now we are called upon to respect and abide the dictates of the same system against which they were called upon to wage a struggle earlier. This led to the development of a paradigm wherein the individuals' relation with the state is of an adversarial character and not that of willing cooperator.

The new welfare state, dispenser of goods and services and provider of employment etc has used the master-key of political/state intervention for all socio-economic issues though the particular problem may not concern the political domain. Burdening the state system with the things it cannot solve, to my opinion, leads to some sort of dis-functionalism of various structures of the state system on the one hand and on the other various kinds of frustrations develop. In contrast to this we have had various social institutions which did not allow the politics to dabble in its affairs and concentrated on issues of social development and social evils. Such institutions did not only flourish quickly but also developed strong grip over public mind. Brahma Samaj, Prarthan Samaj and Arya Samaj etc can be cited as some of the examples. Within the life time of an individual these institutions developed a strong grip over public mind and contributed towards the social development and eradication of social evils.

The state system no doubt brought in many a social reform, but they are at the most facial and superficial and their acceptance level in the social arena is neither deep and comprehensive nor distributed evenly in all the sections of society. Political reforms on the other hand whenever brought about at the instance of social reform movement or social institutions have been both deep and comprehensive.

Women's reservation is a way of seeking women's emancipation by way of state intervention i.e. affecting social reform by the instrumentality of the political system. On the basis of the above analysis it may be argued that this measure for women's upliftment is neither sufficient nor purposive but is merely a political facewash. There is nothing to suggest that bringing 180 women in the parliament might benefit the

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12 *Ibid.*

women in general. Studies have compelling evidence to suggest that ascendancy of women to political eminence does not necessarily lead to the beneficial deal in favour of women. Rajasthan and U.P. where women chief ministers have ruled for substantial period of time have not changed power equations in favour of women. Mrs. Indira Gandhi was at the apex of Indian political scene for almost two decades. Smt Bhandarnaike and then her daughter Mrs Chandrika Kumartunge has dominated the political scene of Shrilanka and the political scene of both Pakistan and Bangladesh has been dominated by women politicians, Benazir Bhutto, Begum Zia and Shiekh Hasina Wajed. One may meaningfully raise a question whether this has brought in any significant change in the lot of south asian women. The answer is evidently and categorically a big NO.

Added to it is the fact that women political leaders even if at the apex of political/state organization would not necessarily favour women centric policies for the dynamic of power structures is different. The reason for the low influence of women-centric policies in the formal political structures and decision making levels, seems to lie in the compulsions of competitive elections and the quest for power by the political parties in a multiparty democracy. Increasingly the compulsions of the political parties due to narrow majorities, precarious coalitions and hung parliaments have made the question of power rather than that of representation the determining factor. Women's issues and women's participation and representation are encouraged only within the parameters of power and are constrained by the basic objectives and interest of the parties either to capture power or survival, if in power.

Further it must be understood very clearly that women's reservation may bring about a swift quantitative jump in legislatures, it is unlikely to improve the overall quality of the governance in the country and benefit the women in any significant manner. The argument that the participation of a few in the decision making process might give a sense of participation to a large section of women presumes that the public institutions are the resources at the disposal of their members for altering the distribution of power in the directions that they consider desirable.<sup>13</sup> While this does not serve the purpose of empowerment to any significant manner, this leads to the displacement of objects of the institutions and wastage of public resources. This also entails the question of efficiency of the system as a whole.

These points have never been discussed in the debate over reservations in general and women's quota in particular. When we talk of one third of the public offices to be filled on the basis of the reservations, this point needs a thorough debate. Article 335 of Indian Constitution speaks of maintaining efficiency of administration consistently with a demand of underprivileged sections of society, but in the debate over the reservations this article never figures in the agenda anywhere. The reason appears to be simple. Here we take care of particular community and its share in the cake of national resources, not as individuals and members of a whole political system whose efficiency is our concern.

It may be interesting to know that the special subcommittee of Sardar Patel, Dr. Ambedkar, Pandit Nehru, Dr. Rajendra Prasad and Sh. K.M. Munshi formed on minority problems had rejected both seprate electorate and reservation, saying that these might disrupt the whole conception of democratic process.<sup>14</sup> Patel wrote " Although the

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13 See generally Andre Betielle, Power and Authority, 19th April 1994, *Times of India*, New Delhi,

14 B. Shiva Rao, *The Framing of India's Constitution : Select Document* (Govt of India Press 1967).

abolition of separate electorate had removed much of the poison from the body politic, the reservation of seats for religious communities, it is felt, leads to a certain degree of separatism and was to that extent contrary and exception to a secular and democratic state"<sup>15</sup>

Pandit Jawahar Lal Nehru, while responding to a speech by Begum Rasool, against reservation in the Constituent Assembly had observed " I think that doing away with this reservation business is not only good thing in itself, good for all concerned more specifically for the minorities, but psychologically too, it is very good move for the nation and the world. It shows that we are really sincere about this business of having secular democracy".<sup>16</sup> Contrary to the sentiments of founding fathers of Indian Constitution we have kept the juggernaut of reservation moving and process of divisions in the society at large.

### III. LIMITATIONS OF LAW : A THEORETICAL UNDERSTANDING

Turning to the theoretical understanding of instrumentality of law, an important point one needs to understand is the role of politico-legal structures in the life of a nation. I would figuratively put it in a different format. Law, broadly understood can be talked of in two ways, 'lead law' and 'lag law'. Lead law is one where law determines the nature and direction of the goal towards which the system is to move. Lag law on the other hand would follow the social mechanism and would develop a rule to handle the emerging problem. We at the time of independence proceeded with an understanding that the indigenous model due to variety of reasons has become in-appropriate and is ridden with so much of social rot and therefore has to be given a new direction, the direction determined by the project of modernity. The project of modernity, the product of the western thinking has already maligned the indigenous thinking so much that the generation of political leaders proceeded on the assumptions of ushering into an era of modernity determined by western paradigm. A typical western thinking was typified by Henry Maine's dismissive remark that much of Ancient India's wisdom consisted of 'dotages of Brahmanical superstitions'.<sup>17</sup> This kind of an attitude towards ancient Indian traditions in law and justice represents the attempts made by the colonial administration to discredit the ideological foundations of Hindu hegemony of ideas. It would be interesting to learn how the so called disadvantaged groups in Indian society willingly accepted their position as part of the Dharmic order of things. India's genius for accommodation can only be understood against the backdrop of this Dharmic order which holistically encompassed all of the society. This social system was not certainly the rigidified hierarchical structure as it has been presented to be, on the contrary, it was comparatively a dynamic order unparalleled in the contemporary societies and I proceed with an assumption that it still retains a lot of socio-political validity.

Turning to the 'lead law' 'lag law' debate for the purpose of understanding the impact of law on the social dynamic, instrumentalist vision of law treats Law as an agency of power, an instrument of government, in so far as government is centralised in the state. It is seen as an independent agency of social control and social direction, autonomous and separate from the society it regulates. In this sense law acts upon

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15 *Ibid.*

16 *Ibid.*

17 See generally S.S.Dhavan, *Indian Jurisprudence and the Theory of State in Ancient India*, Mussorie:National academy of Administration, Printed Lectures, 1962.

society rather than is an aspect of society. It is considered to derive its effectiveness from its congruence with popular moves but from the concentration of political power, which the state represents. "Major ages of social change and mobility almost always involve great use of law and litigation",<sup>18</sup> writes Nisbet, but in modern societies law's capabilities have been seen as vastly greater than appeared to be in earlier eras. Putting of law into written form might be considered historically one of the first steps towards developing its potential as a precise instrument of government. Apart from this, accumulation of state power available for enforcement, professionalization of interpretation and application of legal doctrine, instrumentalisation of elaborate adjudicative processes, have helped in consolidating the instrumentalist role of law.

This instrumentalist vision, considers that sovereign power, the ultimate authority in a polity can legislate on any matter and can exercise control over behaviour within the state. Indeed in a highly centralised political system with advanced technology and communication apparatus, it is taken for granted that legal innovation can effect social change.<sup>19</sup> Roscoe Pound, perceived law as an instrument of social engineering. Underlying this vision is the assumption that social processes are susceptible to conscious human control and the instrument by which this control is to be achieved is law. In such a formulation law is a short-term form of a very complex aggregation of principles, norms, ideals, rules practices and agencies of legislation, administration, adjudication and enforcement backed up by political power and legitimacy.<sup>20</sup>

'Lag law' on the other hand relies on sociological vision of law, and looks at the capacity of law as an instrument of social control, as severely limited by emphasizing upon the fact that if the legal rules are not in congruence with social mores they are not only in-effective, but are doomed to stultification almost at birth, doomed by the over ambitions of the legislator. "Law is vital", writes Nisbet, "but when every relationship in society becomes potentially legal relationship expressed in adversarial fashion the very juice of social bond dries up, and the social impulse atrophies."<sup>21</sup> For Habermass law is a support, protection and stabilizing structure of life world, within which values motivations and initiatives of individuals are born and nurtured. But as a directing instrument or medium it threatens to crush through violent abstraction the moral subtleties, local meanings and diversity of individual life.<sup>22</sup>

Legal consciousness studies with the declared opposition to the predominant position of prevalence of institutional viewpoint and public policy bias in law, emphasizes at the constitutive theory of social action, pointing its attack on the instrumentalist vision of law, what Mc Cann says countering the lead law approach with a bottom up jurisprudence<sup>23</sup>. According to Evick and Silby, the ways in which the law is experienced and understood by ordinary citizens as they choose to invoke law, to avoid it, or to resist it, is an essential part of Law. The attention of the investigator is directed towards these every day concrete social practices in which legal rules are perceived as constitutive elements of the reality. This emphasis on the routine instead of exceptional, on the

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18 As quoted in Roger Cotterrel's, *Sociology of Law : An Introduction*, (Butterworths: 1992)

19 See generally Sally Falk Moore, *Law as a Process*, (London: Routededge and Kegan Paul, 1993)

20 *Ibid.*

21 Roger Cotterrel, *Supra* note 22.

22 See generally Legitimation Crisis, Heinmann, London, 1976.

23 As quoted in Maurice Garcia, Villegas, "*Symbolic Power without Symbolic Violence? Critical Comments on Legal consciousness Studies in USA*, *Droit a Societe*, no-53/2003.

social in place of institutional, on mental representations in place of coercive legal system is the common elements in this change of optic<sup>24</sup> from 'lead law' to 'lag law'.

Social phenomenon has its own dynamic and any law that seeks to affect certain changes into it without taking into consideration the fundamental realities around is bound to result in failure. Sumner,<sup>25</sup> talks about the folkways and mores of life, which change gradually as the conditions of life change. There is little scope for changing them fundamentally through any conscious act of legislation. Legislation has to seek standing ground on the existing mores and legislation to be strong must be consistent with the mores. Any law that deliberately separates itself from the mores and values weakens its social base and authority to the similar extent. Law, philosophy, religions and morality have no independent existence, but are various reflections of social dynamic. They are deeply rooted in the process of social development, yet virtually powerless to alter them. Philosophy and ethics too are products of mores and philosophy attempts the impossible when it tries to construe absolutes from the accidents of experience, which shape the mores<sup>26</sup>.

#### IV. SOFT LAW VERSUS HARD LAW APPROACHES

The third limb of the argument as to the protection of women hood not by law alone consists of soft vs hard law approaches. Prof David Benjamin Oppenhiemer is one who talks about such a vision of law. This approach he adopts for the purpose of classifying various measures of affirmative action programme available in the US system. According to Prof. Oppenhiemer the practice of affirmative action is comprised of five methods: quotas, preferences, self-studies, outreach and counseling, and anti-discrimination<sup>27</sup>. Hard law method would cover the first two i.e. quotas and preferences and the soft law would encompass various outreach, self-evaluations, marketing, and labor market development programmes etc.<sup>28</sup> Hard law approach basically comprises of a strict legal categories where norms are provided for strict implementation by way of legal sanctions. Soft law on the other hand would rely on the welfarist state opting for policies to ameliorate the conditions of the deprived sections of the society. Under Indian Constitution, the whole array of affirmative action programmes are divisible into hard and soft law categories. Article 15 & 16 and 330 to 334, 340-342 can be categorized as 'hard' law approaches as they prescribe certain legal norms whereby the historical injustices have sought to be done away with or provided with some kind of reparation element by way of protective action or affirmative action. Article 15 partly, and preferences in resources distribution and amelioration programmes that can be designed in pursuance of Directive Principles of State Policy, are divisible into 'soft' law category affirmative action programmes for the reason that they are not implemented through strict sanctional methods, rather they require a policy evolution by state system and implementation of the measures through methods involving persuasion and efforts at change of habits of mind.

An example for the purpose of clarity could be the provisions of Article 15 (3) "nothing in this article shall prevent the State from making any special provision for the

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24 *Ibid.*

25 As quoted in Roger Cotterrel, *Supra* note 22.

26 *Ibid.*

27 Jed Rubenfeld, *Affirmative Action* (1997) 107 *Yale Law Journal* at 427.

28 *Ibid.*

protection of women and children or the expression of Article 15 (4).....special provisions for the advancement of socially and educationally backward classes ...." These are open ended and very wide provisions and can be used both as soft or hard law way. It is unfortunate that it has not been utilised for other purposes. The underlying assumption of the interpretation of Article 15 (3) and (4) and by implication of Article 16 (4) so far appears to be that unless seats and posts, including promotional posts are reserved for women and backward classes in public employment, their status can never be improved. It cannot be said that there are no other methods to consider by which status can be improved because to say this is to overlook the wide scope of these provisions. The language of Article 15 (4) for example shows first, that reservations as such are not expressly mentioned there, but fall within the wide expression "special provisions for the advancement of..." It is overlooked that special provisions include every kind of assistance which can be given to backward classes and scheduled castes and scheduled tribes to make them stand on their feet or as is commonly said to bring them into the mainstream of Indian life. Illustratively those measures would include grant of land either free or on nominal rent the supply of seeds and agricultural implements, the supply of expert advice as to how to improve the yield of land, provisions for marketing the produce and the like<sup>29</sup>. Those measures would also include schemes for training the backward classes to pursue trades or small business which would fetch a reasonable income. In relation to education itself, under Article 15 (4) the state can give free education, free text books free uniforms and subsistence allowance, merit scholarships and the like, starting from the stage of primary education and going right up to University and post graduate education. Once this is realised, how vast and varied are the powers at the disposal of the state if it really takes care to improve the lot of women, children, scheduled castes and scheduled tribes, and backward classes. The controversies of reservations, of preferring less meritorious to the more meritorious one, or of impairing the efficiency of administration for the purpose of providing protective discrimination, which more often than not are accused to be governed by political considerations shall lose much of their shine.

The second group of articles which can be said to be the storehouse of soft law approaches and thereby a catena of affirmative action programmes can be constructed out of Directive Principles of State Policies. It may be noted that the Preamble to the Indian Constitution of India, has enjoined the "sovereign, socialist, secular<sup>30</sup>, democratic Republic of India, to secure to all its citizens, social economic and political justice". Reserving seats and ensuring a minimum representation to deprived and exploited sections of society in the legislatures and other political bodies ensure political justice.<sup>31</sup> Social and economic justice is intended to be achieved by the state in pursuance of the Directive Principles of state policy contained in chapter IV of the Constitution, which command the state to remove existing socio-economic inequalities by special measures. All these provisions are intended to promote the constitutional scheme to secure equality. These provisions set forth a programme for the reconstruction and transformation of Indian Society by a firm commitment to raise the sunken status of the pathetically neglected and disadvantaged sections of our society. Before we note how the reconstruction and

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29 See Dr. Parmanand Singh, *Equality, Reservations and Discrimination in India*, (New Delhi : Deep & Deep Publications 1985).

30 The word Secular was added into the Preamble by 42<sup>nd</sup> Constitutional Amendment, 1975.

31 See Articles 330 to 334 of Indian Constitution.

transformation of Indian society is intended to be realised, it must be noted that the provisions included in Directive Principles of State policy are not enforceable in the courts, however the principles laid down in this part of the Constitution are fundamental in the governance of the country.

These provisions may better be described as the active obligations of the state<sup>33</sup>. The State shall secure a social order in which social, economic and political justice shall inform all the institutions of national life.<sup>33</sup> Wealth and its source of production shall not be concentrated in the hands of the few but shall be distributed so as to subserve the common good. And there shall be adequate means of livelihood for all and equal pay for equal work.<sup>34</sup> The state shall endeavour to secure the health and strength of workers, the right to work, to education and to assistance in cases of want, just and humane conditions of work and living wage for workers<sup>35</sup> a uniform civil code<sup>36</sup>, and free and compulsory education for children.<sup>37</sup> The state shall take steps to organise village panchayats,<sup>38</sup> promote the educational and economic interests of the weaker sections of the people, raise the level of nutrition and standards of living, improve public health, organise agricultural and animal husbandry,<sup>39</sup> separate the judiciary from executive<sup>40</sup> and promote international peace and security.<sup>41</sup> Article 46 which specifically refers to the obligation of the state towards the weaker sections and scheduled castes and scheduled tribes etc provides that "The state shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular of the scheduled castes and scheduled tribes and shall protect them from social injustices and all forms of exploitation".

In pursuance of these directives, various land re-distribution and allotment programmes have been initiated. In fact so great was the enthusiasm of the government in this particular respect that hundreds of land reform laws were passed in the first five years of Indian Republic. This ensued a spate of litigation in the courts, as the land reforms laws infringed the right to property of the land owners.<sup>42</sup> However the government was so determined to effect land reforms that the right to property which was provided under article 31 of the constitution was modified six times and finally was done away with for the purpose of avoiding litigation in land reform measures of the government<sup>43</sup>.

For the purpose of providing legal aid to the poor and indigent a vast network of legal aid programmes involving judicial officers, Bar Councils and law Schools, have

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32 See generally V.N. Shukla, *Constitutional Law of India* (Lucknow: Eastern Book Company 1990).

33 Article 38 of Indian Constitution.

34 *Id.* Article 39.

35 *Id.* Articles 41, 42 and 43.

36 *Id.* Article 44.

37 *Id.* Article 45.

38 *Id.* Article 40.

39 *Id.* Articles 47 and 48.

40 *Id.* Article 50.

41 *Id.* Article 51.

42 See *Kameshwar Singh v. State of Bihar*, AIR 1962 SC 1116.

43 44<sup>th</sup> Constitutional Amendment Act of 1978 abolished the Right to Property from Part III Of Indian Constitution.

been established all over the country. Legal Services Authority Act, 1987 which was meant to provide legal aid to all those who cannot afford access to legal services either due to poverty indigence or illiteracy or backwardness, has been a big success and apart from legal services authorities at the central and state level various legal aid committees have been successfully and effectively working at the district and taluka level.

Apart from this various health care programmes such as primary health centres all over the country have been established and various scholarships grants, loans etc for the deprived sections of the population have been contributing their bit towards the socio-economic transformation of the country. These distributive schemes are accompanied by efforts to protect the backward classes from exploitation and victimisation.

#### IV. CONCLUDING OBSERVATIONS

This does not amount to saying that the law with an instrumentalist vision does have no utility. There have been substantial number of studies about the main factors that make social control through law effective. For example Yehzkel Dror distinguishes between direct and indirect uses of law in promoting change, Dror accepts that seeking social change through lead law approach is fraught with danger, but he emphasizes that law can and does play an important, albeit indirect role in fostering social change in many ways. First it can shape various social institutions, which in turn have a direct influence on the rate or character of social change. For example law structuring a national education system and providing for a national curriculum for schools influence the scope and character of educational institutions, which may help in affecting social change. Secondly law provides institutional framework for agencies specifically set up to exert influence change. Thus for example setting up boards, agencies of various kinds may be resorted to charged with promoting particular policy goals and finally creation of legal duties to establish situations in which change is fostered.

American sociologist, William M Evans,<sup>44</sup> writing in the light of American experiences, shortlists some basic conditions, which may provide a framework of such a system of rules that may lead to social change. First source of new law must be authoritative and prestigious. Secondly the rationale of the new law must be expressed in terms of compatible and continuity with established cultural and legal principles. Law in fact can be powerful force for change, when the change derives from a principle deeply embedded in our heritage. Thirdly pragmatic models of compliance must be identified. The underlying idea of this condition is that law must not appear utopian but practical in its aims. Another important condition that Evans talks of is the element of time in legislative action. But this condition appears to be rather unenlightening answer to a complex question. The appropriate timing and strategy depends on the extent and complexity of change that law seeks to bring about.

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44 As quoted by G.S.Sharma, in *Law and Social Change*, 1971, Indian Social Science Research, New Delhi.

## NOTES & COMMENTS

Vol. 42, No. 2, *Ban.L.J.* (2013) 105-110

# EXHAUSTION OF RIGHTS AND PARALLEL IMPORTS: A TRADE MARK ANALYSIS VIS-A-VIS THE JUDGEMENT OF *KAPIL WADHWA V. SAMSUNG ELECTRONICS CO. LTD.*

Jupi Gogoi\*

## I. INTRODUCTION

Consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer (Adam Smith). Intellectual Property Rights is a stream of law which recognizes and protects the output of human intellect. Saying that, it is also important to ascertain that the main reason for the protection of IPR is social welfare, that is, encouraging innovation which furthers social good. One of the most important intellectual property rights is Trade Mark (TM). TM is basically a sign that is used to distinguish the goods or services offered by one undertaking from those offered by others. So it is quintessential that the trade mark must be distinctive and it should not be deceptive.<sup>1</sup> Under the Trade Mark Act, 1999, a trade mark is defined as a 'mark' which is capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours.<sup>2</sup>

TM law is largely territorial in nature. The trade mark rights are promulgated by the national legislation and judiciary and are enforced on a national basis. This means that, irrespective of the trademark owner holding rights in different countries, an action for infringement will lie in a country only so far as it involves the vindication of the rights available in such country.<sup>3</sup> Moreover, TM is one of those IPR which is given perpetual protection. To counter this restriction on trade imposed by territoriality of trademark and to put a restriction on the perpetuity of the unlimited protection granted to TM, the principle of exhaustion was applied.<sup>4</sup>

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1 The courts in India has time and again in various cases reiterated that distinctiveness is the essential feature of trade mark law. *Hindusthan Development Corporation v. the Deputy Registrar of Trade Mark*, AIR 1955 Cal 319; *Imperial Tobacco Co. Of India v. The Registrar of Trade Mark*, AIR 1977 Cal 413; *Geep Flashlight Industries v. Registrar of Trade Mark*, AIR 1972 Del 179.

2 Section 2(1) (zb) of the Trade Mark Act, 1999.

3 Sneha Jain, Parallel Imports and Trademark Law (2009)14 *JIPR* at 14 .

4 *Id.* at 15.

## II. EXHAUSTION PRINCIPLE

Once a marked good is put on the market by the owner or with his consent and purchased legitimately by another, the Intellectual Property (IP) owner or anyone deriving title under him cannot prevent further sale of such goods, as the exclusive right to sell goods bearing the mark is 'exhausted' by the first sale and cannot be exercised twice.<sup>5</sup> It is also referred to as the 'first sale doctrine'.

Exhaustion of rights may be domestic, regional as well as international. Domestic exhaustion entails the exhaustion in which the owner of IP loses his right by the first sale in the domestic market, whereas international exhaustion embodies the exhaustion in which IP owners loses his rights by the first sale in any market in the world. Regional exhaustion means the exhaustion in which IP owner exhausts his rights by selling his products in any market of a particular regional free trade area, for e.g., the European Union/ European Economic Area.<sup>6</sup> In this, the trade mark owner can still oppose import of genuine goods that have been put on the market outside the regional free trade area.

## III. PARALLEL IMPORT

The principle of exhaustion can be better understood with the help of parallel imports. Parallel imports are often referred to as grey products. It is a practise by which an importer takes advantage of the exhaustion principle and import goods cheaper in price to be sold parallel with the more expensive goods which is either non imported or imported from a source controlled by the trademark owner.<sup>7</sup> Parallel import refers to a situation where a third party, without authorisation of the TM holder, imports a foreign manufactured product put on the market abroad by the trademark holder, his licensee or in another legitimate manner in competition with imports or locally manufactured products by trademark holder or his licensee.

Undoubtedly parallel imports are advantageous as they put a check on the monopoly practises, in addition to providing a wide range of prices of genuine products to the consumer, but the demerits of parallel imports cannot be overlooked. Parallel imports may lead to swaying the consumers to its side encashing on the goodwill of the trademark owner. Many a times it may bring down the reputation of the owner as the product varies from market to market. Parallel imports though genuine products bearing trade mark still may be different for a different market, comprising different tastes, and demands. In case of parallel imported products bearing the same trade mark but for different market, it becomes impossible to distinguish these from those which are produced by right holders in the importing country. The consumers may be deceived into purchasing products with features different from those expected or desired. Consumers may even feel cheated at times when grey products may not be given

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5 Holyoak and Torremans, *Intellectual Property Law* (London : Oxford University Press, 2005, 4th ednition) at 430, wherein mentioned the owner of trademark can exercise right by putting products (or services) labelled with trademark on the market for the first time, but afterwards his rights are exhausted.

6 *Id.* at 440. (The agreement on the European Economic Area expanded the area in which exhaustion applies to the whole of European Economic Area, which means apart from EU, it applies to Iceland, Liechtenstein and Norway).

7 Philips Jeremy, *Trademark Law : A Practical Anatomy* 273-275 (London:Oxford University Press, 2003) as quoted in Sneha Jain, *Supra* note 3 at 15.

guarantee/warranty ignorant of the fact that the owner of trademark is not bound to provide them the same for grey products.<sup>8</sup>

Parallel imports has a simple corollary with exhaustion of rights, that is,

- a. If international exhaustion is followed, it allows parallel import, but,
- b. If national exhaustion principle is followed, parallel import is prohibited.

### **India's stand on Exhaustion of Rights and Parallel Imports**

Since a consensus could not be reached on exhaustion of intellectual property rights or parallel imports of genuine products, TRIPS left it to be dealt with domestic laws of each member country.<sup>9</sup>

In India, parallel imports were allowed for patent with effect from 2002 which was further amplified by the 2005 amendment.<sup>10</sup> For copyright, parallel imports are not allowed. In case of trade mark, Section 30(3) (b) of the Trademark Act, 1999 deals with exhaustion of rights. The said provision supports the 'first sale doctrine' mentioning that if a marked good is legitimately bought by a person it will not be held as an infringement if that person or any person through him puts it in the market for further sale.<sup>11</sup> The only exception to this rule is provided in Section 30(4) of the Act which provides that Section 30(3) will not be applicable if legitimate reasons for proprietor to oppose, conditions of goods changed or impaired after they have been put on the market.<sup>12</sup>

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8 *Id.* pp. 15-16.

9 Article 6 of the TRIPS Agreement deals with Exhaustion. The said article mentions that for the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.

10 Section 107 A was inserted by Patents (Amendment) Act, 2002 and substituted by Patents (Amendment) Act, 2005 which provides that: For the purposes of this Act, (a) any act of making, constructing, [using, selling or importing] a patented invention solely for uses reasonably relating to the development and submission of information required under any law for the time being in force, in India, or in a country other than India that regulates the manufacture, construction, [use, sale or import] of any product; (b) importation of patented products by any person from a person [who is duly authorised under the law to produce and sell or distribute the product], shall not be considered as an infringement of patent rights." *See also*, Ashwani Kumar Bansal, *Law of Trade Mark in India* (New Delhi: Institute of Constitutional and Parliamentary Studies, 2009 2nd edition) at 427.

11 Section 30(3) provides Where the goods bearing a registered trade mark are lawfully acquired by a person, the sale of the goods in the market or otherwise dealing in those goods by that person or by a person claiming under or through him is not infringement of a trade by reason only of- (a) the registered trade mark having been assigned by the registered proprietor to some other person, after the acquisition of those goods; or (b) the goods having been put on the market under the registered trade mark by the proprietor or with his consent.

12 Section 30(4) provides Sub- section (3) shall not apply where there exists legitimate reasons for the proprietor to oppose further dealings in the goods in particular, where the condition of the goods, has been changed or impaired after they have been put on the market.

Although these are the provisions in the Indian Trade Mark Act, 1999 with respect to exhaustion of Rights, but the problem still persists. The provisions are unclear as Section 30 does not mention whether it is 'domestic' market or the 'international' market.

Since the provisions related to parallel imports of trade mark has not been specifically provided, it has to be understood with the help of the Customs Act, and, the judicial decisions.

### **Types of Parallel Imports in India**

Parallel imports can be classified in India under Permitted and Prohibited Parallel Import. The Government of India allowed importation of goods bearing a trademark if the goods having been made or produced in a place beyond the limits of India, and, the country in which that place is situated is indicated in letters as large and conspicuous as any letter in the name or trademark, and, in the English language.<sup>13</sup> A recent notification by the Government of India, Ministry of Finance, mentions that cases of import of 'parallel imports' are to be decided in accordance with the provisions of the parent Acts, that is S.30 (3)(b) of the Trade Mark Act, 1999 provides that where the goods bearing a registered Trade Mark are lawfully acquired, further sale or other dealing in such goods, having been put on the market under the registered Trade Mark by the proprietor or with his consent. However, such goods should not have been materially altered or impaired after they were put in the market.<sup>14</sup>

The provision of prohibited parallel imports is further provided in the Customs Act and Section 140 of the Trade Mark Act, 1999. The Intellectual Property rights (Imported Goods) Enforcement Rules, 2007 under Section 6 provides that the import of alleged infringing goods in India shall be deemed as prohibited within Section 11 of the Customs Act, 1962. Section 11(2) of the Customs Act, 1962, gives a list of instances which prohibits import or export of goods. It provides that export and import will be prohibited if it hampers the protection of patents, trademarks and copyrights.<sup>15</sup> It also provides that export/import will be prohibited if it leads to deceptive practices<sup>16</sup> and if it contravenes any law for the time being in force.<sup>17</sup>

The Government of India clarifies the Intellectual Property rights (Imported Goods) Enforcement Rules, 2007 by specifying that goods having applied thereto a false trade mark as specified under Section 102 of the Trade Mark Act, 1999, and, goods having applied there to a false trade description within the meaning of section 2(1)(i) of the Trade Marks Act, 1999, otherwise than in relation to any of the matters specified in section 2(1)(za)(ii) and section 2(1)(za)(iii) will be prohibited for import for the purpose of sale or use in India.<sup>18</sup> The Trade Mark Act, 1999 also provides a mechanism for proprietor or registered licensee to obtain information of imported goods from entering

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13 MF (D.R.). Notification no.1 (Customs) dt. 18.1.64 as cited by P.Narayan, *Law of Trade Mark and Passing Off* (Nagpur : Eastern Book House, 2007 6th edition) at 664.

14 Circular No.13/2012-Customs, F. No. 528/21039/08-Cus/ICD, Government of India, Ministry of Finance, Department of Revenue, Central Board of Excise and Customs, New Delhi, dated the 8th May, 2012.

15 The Customs Act, 1962, Section 11(2)(n).

16 *Id.* Section 11(2) (o).

17 *Id.* Section 11(2) (u).

18 Government of India, Ministry of Finance (Department of Revenue, Notification No. 51/2010 - Customs (N.T.), New Delhi, dated the 30th June, 2010.

into India.<sup>19</sup>

Under the Trade Mark Act, the proprietor or registered licensee may give notice in writing to the Collector of Customs to prohibit the importation of any goods if the import of the said goods constitutes infringement under clause (c) of sub-section (6) of section 29.<sup>20</sup> If any goods are imported into India which is prohibited by notification<sup>21</sup> of the Central Govt. under Section 11(2) (n)<sup>22</sup> of the Customs Act, 1962 the Commissioner of Customs if, upon representation made to him, has reason to believe that the trade mark complained of is used as a false trade mark, may require the importer of the goods, or his agent, to produce any documents in his possession relating to the goods and to furnish information as to the name and address of the person by whom the goods were consigned to India and the name and address of the person to whom the goods were sent in India. The importer or his agent shall, within fourteen days, comply with the requirement as aforesaid, and if he fails to do so, he shall be punishable with fine which may extend to five hundred rupees. Any information obtained from the importer of the goods or his agent under this section may be communicated by the commissioner of Customs to the registered proprietor or registered user of the trade mark which is alleged to have been used as a false trade.

#### **Judicial Approach in India**

The legal provision relating to parallel import of trade mark for a better understanding has to be looked into from the angle provided by the judiciary also. One important decision given by the court in this matter is *Samsung Electronics Company Ltd. & Anr. V. G. Choudhary & Anr.*<sup>23</sup> In this case, Samsung Electronics filed a suit praying injunction which sought to eradicate parallel importation by third parties into India manufactured by the plaintiff itself. Their claim was that the products were manufactured in China and were not meant for Indian markets as it did not conform to the Indian laws.

The court in this case deciding the matter in favour of the plaintiff held that there is a prima facie case. The balance of convenience is in favour of the plaintiff who is likely to suffer irreparable loss and injury. The court held that the new TMA, 1999 under Section 30 of the Act recognises the 'first sale' doctrine. However, the provision under Section 30 (4) provides that 'first sale doctrine' will be applicable only when goods have not been materially altered or impaired.

Another important decision in this regard is the *Kapil Wadhwa v. Samsung Electronics Co. Ltd.*<sup>24</sup> decided in 2012. In this case, the High Court of Delhi considered whether the parallel importation of goods bearing a registered trademark and the sale of those goods without permission of the proprietor of the mark amounted to infringement of the trademark. The brief fact of the case is that Kapil Wadhwa was the director of an authorised dealer of Samsung products. The other parties are companies constituted as

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19 The trade mark Act, 1999 Section 140.

20 To decide whether it is infringement or not, Section 29(6)(c) provides that it will constitute infringement if a person uses a registered mark, if in particular he imports or exports goods under the mark.

21 The trade mark Act, 1999 Section 140

22 Circular No. 13/2012, *Supra* note 14.

23 2006 (33) PTC 425 Del.

24 FAO(OS) 92/2012.

per laws of Korea and India respectively. The Samsung Electronics discovered that the retailer was also selling genuine Samsung printers imported from and intended for another market. The Respondent alleged that the act of importing Samsung products into India by the Appellant amounts to infringement. In this case, a single judge bench of the Delhi High Court gave injunction favouring Samsung holding that the Trade Mark Act favours domestic exhaustion.

On appeal, the Division Bench of the Delhi High Court held that absence of any obvious specification and the presence of the term 'the market' in Section 30(3) of the Act cannot be deduced to restrict the legislative intent to confine the market to the domestic market. Had it been the intention of the legislators, they would have specified the same. The court mentioned that in Section 30(2) (b) of the Act, the words "any market" are included in the phrase "in relation to goods to be exported to any market". Thus, in the Section 30(2)(b) context, "exported to any market" implies a global market. The Court here took the help of external aid of interpretation of statutes, that is the Statement of Object and Reasons attached to the Trade Mark Bill, 1999 which mentions 'in any geographical area'. The court said that it clearly envisages that the legislative intent was to recognise the principle of international exhaustion of rights to control further sale of goods once they are put on the market by the registered proprietor of the Trade Mark. Further, during the Uruguay discussions that preceded the TRIPS Agreement, the Indian position was that parallel import should be permitted. Thus, the court held that the parallel importation of goods without prior permission of the registered proprietor does not amount to infringement of trademark rights.

The case has now been appealed to the Supreme Court by Samsung Electronics and it will be interesting to observe the verdict of the Supreme Court as that shall finally decide the status of parallel import of trade mark goods in India.

#### **IV. CONCLUSION**

One of main motive of trade mark law is to prevent public from being deceived. If parallel import without any rules and regulations is allowed, it might actually lead to public getting deceived. Ordinary public/consumer may be completely unaware about the parallel imports/ grey products and end up buying them as the product of the exclusive licensee in India.

On the other hand, many scholars have actually raised concern about the rights of exclusive licensee of the trade mark in India. But it has to be remembered that the majority of the population in India are not rich and even if we take one area, such as, electronic goods, we can see that technology is now no more a luxury, but it has become a vital necessity of life. But for the ordinary people, it may not be affordable. By parallel imports, if such people get access to technology, there can be no harm in it. It is also to be observed as mentioned earlier that India always had a pro-consumer approach. Even during the pre-TRIPS negotiations, India favoured international exhaustion of rights.

So the call of the hour is parallel imports should be allowed, but the people dealing with grey products has to be instructed by a government regulation to clearly mention that although they are dealing with genuine products, they are not products of the exclusive licensee and the place of manufacture, terms and conditions (most grey products does not offer warranty/ guarantee) has to be clearly mentioned. If these are followed, there can be no harm in following a policy of international exhaustion of rights for trade mark goods in India.

## **HAZARDOUS WASTE MANAGEMENT, SHIP-BREAKING AND ENVIRONMENTAL ISSUES : A CASE OF ALANG**

**Nitesh Saraswat\***  
**Nibras Salim Khudhair\*\***

### **1. INTRODUCTION**

The ocean is vital to the survival of all life on this planet: it is the source of our rainfall, it regulates climate, it provides us with food, and it serves as the home of countless marine animals.. Unfortunately, industrialization has produced massive amounts of garbage, and countries have been struggling for decades to properly manage the waste. People's backyards and the ocean itself have become waste dumps. In 1989, countries signed the Basel Convention and agreed to protect human health and the environment against the adverse effects of generating and managing hazardous wastes. The Convention was in response to the outflow of hazardous wastes from developed countries to developing countries, caused by polluters seeking to lessen the costs of proper waste management. State Parties to the Basel Convention and the Basel Convention Secretariat have been improving waste management practices around the world, particularly in developing countries, but new waste streams have created new challenges. A better control of end-of-life ships in OECD countries and a new international convention on ship dismantling would be necessary in order to prevent environmental and social disasters.

India is the first country that has made constitutional provisions for protection and improvement of the environment<sup>1</sup>. In order to manage hazardous waste (HW), mainly solids, semi-solids and other Industrial wastes which are not covered by the Water & Air Acts, and also to enable the authorities to control handling, treatment, transport and disposal of waste in an environmentally sound manner, Ministry of Environment & Forests (MoEF), Government of India notified the Hazardous Waste (Management & Handling) Rules (HWM Rules) on July 28, 1989 under the provisions of the Environment (Protection) Act, 1986 and was further amended in the year 2000 & 2003. These amendments enable to identify hazardous wastes by means of industrial processes and waste streams in Schedule I and also by way of concentrations of specified constituents of the hazardous waste in Schedule II. Categories of wastes banned for export and import have also been defined (Schedule-8). The procedure for

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<sup>1</sup> Article 48-A of Constitution enjoins the state to make endeavor for protection and improvement of the environment and for safeguarding the forest and wild life of the Country. In Article 51 A (g) of the Constitution, one of the fundamental duties of every citizen of India is to protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures.

registration of the recyclers /reprocessors with environmentally sound facilities for processing waste categories such as used lead acid batteries, non-ferrous metal and used oil as contained in schedule-4 and schedule-5 respectively has also been laid down.

## **II. HAZARDOUS WASTE GENERATION SCENARIO**

The hazardous waste generated in the country per annum is estimated to be around 4.4 million tones while as per the estimates of Organization for Economic Cooperation and Development(OECD) derived from correlating hazardous waste generation and economic activities, nearly five million tones of hazardous waste are being produced in the country annually. Given the wide variations in quantity and nature of waste generated across states and union territories (UTs) and also considering the wide variations in climatic as well as hydro-geological conditions in different regions of the country, the approach to waste management has to be essentially state-specific.

Consequent upon amendments made in the year 2000 and subsequently in 2003, the State Pollution Control Boards (SPCBs) and Pollution Control Committees (PCCs) are in the process of re-inventorying hazardous waste generated. The current exercise has brought to light the serious short-comings in the earlier inventorisation.

### **a) THE BASEL CONVENTION & SHIP BREAKING**

India is a party to the Basel Convention on the Control of Trans Boundary Movements of Hazardous Wastes and their disposal is the most comprehensive global environmental treaty on hazardous and other wastes<sup>2</sup>. The basic objectives of the Basel Convention are for the control and reduction of trans-boundary movements of hazardous and other wastes subject to the Convention, prevention and minimization of their generation, environmentally sound management of such wastes and for active promotion of the transfer and use of cleaner technologies.

The Convention sets an exhaustive list of products and materials that it considers to be hazardous wastes. The Basel Convention is based on the prior informed consent of the country of export and the country of import of hazardous wastes<sup>3</sup>. However the Convention does not give a detailed definition of 'environmentally sound management of hazardous waste' that has to be followed by State Parties. It only refers to non obligatory technical guidelines<sup>4</sup>.

### **b) THE 1995 BASEL AMENDMENT**

In March 1994, advised by developing countries, Parties agreed to an immediate ban on the export from OECD to non-OECD countries of hazardous wastes intended

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<sup>2</sup> Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 22 March 1989, 28 *Int'l Leg. Mat.* 657(1989).

<sup>3</sup> Article 6 states that 'the State of export shall notify, or shall require the generator or exporter to notify, in writing, through the channel of the competent authority of the State of export, the competent authority of the States concerned of any proposed trans boundary movement of hazardous wastes or other wastes' 52 and then the State of import shall 'respond to the notifier in writing, consenting to the movement with or without conditions, denying permission for the movement, or requesting additional information' .53.

<sup>4</sup> Article 4(8), Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.

for final disposal. They also agreed to ban the export of wastes intended for recovery and recycling<sup>5</sup>. However, this decision was not incorporated in the text of the Convention itself, the question as to whether it was legally binding or not arose.

### **C) THE APPLICATION OF THE BASEL CONVENTION TO SHIP BREAKING**

The Convention mentions the issue of ships in its Article 1.4 which states that 'wastes which derive from the normal operations of a ship, the discharge of which is covered by another international instrument, are excluded from the scope of this Convention<sup>6</sup>. Due to the difficulties to control end-of-life ships under the Basel Convention, the international community is currently drafting a future Convention for the safe and environmentally sound recycling of ships with binding international standards that would create a level playing field worldwide.

### **III. THE FUTURE INTERNATIONAL CONVENTION ON SHIPDISMANTLING**

The future international Convention is trying to address the most important issue in ship dismantling that is to ensure that ships are recycled in an environmentally sound and safe way worldwide<sup>7</sup>. The future Convention obliges ships to have onboard an Inventory of Hazardous Materials<sup>8</sup>. Also the draft Convention states that ship recycling facilities shall prepare a recycling facility management plan. In addition, pursuant to the Convention, ship recycling facilities shall prevent accidents such as explosions by ensuring 'gas-free for- hot work'.

#### **a) ALANG CASE**

Ship breaking activity grew into a full-fledged industry by 1979, when Govt. of India recognized it as a manufacturing industry. Now it has been recognized as a manufacturing process as per Central Excise and Sales Act, also. The ship braking activities are carried out at various coasts of the county; however, the main center lies on the West Coast at Alang, Gujarat. The geography of Alang makes it ideal for ship breaking<sup>9</sup>. The profit margins in the ship breaking industry are huge and big-time

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<sup>5</sup> Decision II/12 of the Second CoP Meeting, *in* the Report of the Second Meeting of the Conference of Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Geneva, 21-25 March 1994, Doc. No. UNEP/CHW. 2/30 (1994).

<sup>6</sup> The Decision VII/26 adopted by consensus of all 160 Parties states that 'Recognizing that many ships and other floating structures are known to contain hazardous materials and that such hazardous materials may become hazardous wastes as listed in the annexes to the Basel Convention'.<sup>64</sup>

<sup>7</sup> Preview: Marine Environment Protection Committee (MEPC)-54th Session: 20-24 March 2006 available at [http://www.imo.org/Safety/mainframe.asp?topic\\_id=1320&doc\\_id=6198](http://www.imo.org/Safety/mainframe.asp?topic_id=1320&doc_id=6198)

<sup>8</sup> It provides for example that 'ship recycling facilities shall establish management systems, procedures and techniques which do not pose health risks to the workers or the population in the vicinity of the facility and which will reduce, minimise and eliminate to the extent practicable adverse effect on the environment'.<sup>87</sup>

<sup>9</sup> The beach is low and tides are as high as 10 meters. During low tide, the sea recedes by three km. The industry was set up in Alang in 1982, By 1990, over 100 ships started landing in Alang each year. In 1996-97, the industry scrapped a record 348 ships. The annual turnover of the industry stands at Rs 6,000 crore.

contractors make unbelievable profits. On an average 200 ships per year are being cut at the Alang Ship Breaking Yard.. During the process of ship breaking, pollutants like oil, paint-chips, debris, rubber & plastics insulating materials, thermocole, glass wool, asbestos, etc. find their way to marine / terrestrial eco-system. Also some times the ships contain unidentified matters and toxic chemicals like paints / components, lead, heavy metals, poly-chlorinated byphenyls (PCB), asbestos, tin etc. Water pollutants, generated during ship breaking, result in change in water quality and marine eco-system especially in inter-tidal zone. The open burning of solid wastes including hazardous waste, becomes a potential source of air pollution.

Alang, situated in Gujarat, on the West coast of India is the biggest ship-recycling site in the world. Two hundred end-of-life ships from all over the world are scrapped there every year<sup>10</sup>. This industry is a great source of revenue for the State of Gujarat. However, the dismantling industry in Alang has been strongly criticised since it is polluting the environment and it is highly hazardous to the health of the workers and the communities living around it<sup>11</sup>. Indeed, most of the ships that are dismantled on the beach of Alang still contain hazardous wastes such as PCB's and asbestos and safety and environmental standards are very poor in the ship dismantling plots. The ship dismantling industry in Alang is in fierce competition with the ship-scraping sites in Bangladesh and Pakistan. The economic activity in Alang is dramatically decreasing as India imposes certifications which ensure that the oil tankers are free of gas residues before they are scrapped, while Bangladesh does not enforce such obligations<sup>12</sup>. It is submitted that the Supreme Court of India's decision that prioritises the commercial interest of the dismantling companies over the environmental concerns of the workers and the communities living in Alang can be said to be a decision in right direction.

#### IV. REPORT OF HIGH POWER COMMITTEE

The HPC appointed by the Supreme Court of India in its report stated that the Alang ship-breaking industry generated around two million tones of rerollable steel per annum and it provided employment to around 40,000 people in direct and indirect ways. The report also underlined that around 200 ships were broken up every year. However, the High Powered Committee also pointed out that, throughout its investigation, the site was highly polluted and observed that during the breaking process various solid wastes some of which were hazardous and highly toxic such as asbestos sheets, ropes and insulation were generated. Some ships might have been contaminated with radioactive materials. The gases such as ammonia, chlorofluorocarbons from the air conditioning system and inflammable gases may be present in the dismantled pipelines of oil tankers. The Committee further observed that there was considerable and

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<sup>10</sup> Government of India, Report of the High Powered Committee on Management of Hazardous Waste, available at [http://envfor.nic.in/cpcb/hpcreport/chapter\\_3.htm#3.3.4%20Shipbreaking%20activities%20and%20hazardous%20wastes.](http://envfor.nic.in/cpcb/hpcreport/chapter_3.htm#3.3.4%20Shipbreaking%20activities%20and%20hazardous%20wastes.), last visited on 24<sup>th</sup> July 2011

<sup>11</sup> Judith Kanthak and Nityanand Jayaraman, Steel and Toxic Wastes for Asia: Finding of a Greenpeace Study on Workplace and Environmental Contamination in Alang-Sosiya Ship-breaking Yards, Gujarat, India (Hamburg: Greenpeace, 2001), available at <http://www.ban.org/Library/ALANG%202000%20final.pdf>.

<sup>12</sup> Anonymous, Shipbreaking, available at <http://www.greenpeace.org/india/campaigns/toxics-freefuture/ship-breaking>.

environmentally unsound disposal of solid waste all over the beach and the hazardous wastes generated by the ship-breaking industry 'are not handled as per the laws and guidelines on ship-breaking in force'.

Finally, the report underlined that this activity was highly hazardous to the health of the workers. Indeed it mentioned that approximately five tones of asbestos are generated from the dismantling of every vessel and workmen are hardly equipped to handle such toxic material. It also pointed out that the rate of industrial accidents in Alang was dramatically high since an average of up to 40 deaths has been reported every year.

A study conducted by Greenpeace on workplace and environmental contamination in Alang showed that the ship-breaking industry was highly polluted and hazardous for the workers and the communities living around Alang. Greenpeace study confirmed the presence of asbestos dust in the workplace and public areas, including the hinterland around Alang. They also underlined the presence of heavy metals, dangerous levels of organotins (pollutant used in anti-fouling ship paints), and cancer causing poly aromatic hydrocarbons. Moreover, the Greenpeace report pointed out that the level of pollutants in the soils and sediments in and around Alang was high enough to classify those soils and sediments as hazardous wastes.

#### ***a) BLUE LADY CASE***

The decision on the Blue Lady underlines the neglect of the social and environmental concerns of the workers and the communities living in Alang by Supreme Court. The Apex Court is taking a strong economic approach in favour of the ship dismantling industry. It goes, on many points, against a 2003 Supreme Court decision on ship dismantling, and finally distorts the concept of sustainable development in order to justify its decision. The Blue Lady (ex-France) which has been sold to an Indian dismantling company was seen as a great opportunity to revive the economic activity of Alang. However, ship dismantling companies in India do not have the capacities to remove the hazardous wastes it contains in a safe and environmentally friendly manner. Several NGOs pointed out that issue, and filed a petition in the Supreme Court of India under the Public Interest Litigation procedure in order to prevent the dismantling of the Blue Lady in Alang. In a highly controversial decision, the Supreme Court decided to allow the dismantling of the Blue Lady. The Blue Lady case also has an international perspective as most of the ships - such as the Blue Lady - that are dismantled in Alang come from developed countries. The Basel Convention applies to end-of-life ships as it has been demonstrated in the case of the Clemenceau.

However, in the case of private ships, it is very easy to escape the disposition of the Basel Convention, due to the mobility of the ships, and the difficulty to know when a ship will be illegally sent for scrapping. However, some fear that the future convention, which will probably enter into force later than 2010, will not ensure an equivalent level of control and enforcement as under the Basel Convention.<sup>89</sup> The coming years are crucial since, in 2010, around 800 single-hull tankers will have to be phased out. Therefore measures must urgently be taken at the domestic level and at the international level in order to avoid further environmental and social disasters.

#### **V. HAZARDOUS WASTE FROM SHIP BREAKING**

The Court while allowing ship breaking activity to continue noted that it deserves to be strictly and properly regulated. When the ship arrives at a port for breaking, the concerned authorities have to be vigilant about the hazardous waste which may be

generated. The Maritime Board and the SPCB have to be alive to the consequences of the appropriate steps to be taken before the breaking activities start.

The Court While Accepting the Recommendations of HPC Laid Down That :

1. Before a ship arrives at port, it should have proper consent from the concerned authority or the State Maritime Board, stating that it does not contain any hazardous waste or radioactive substances.
2. The ship should be properly decontaminated by the ship owner prior to the breaking. This should be ensured by the SPCBs.
3. Disposal of waste material, viz. oil, cotton, dead cargo of inorganic material like hydrated/solidified elements, thermocole pieces, glass, wool, rubber, broken tiles, etc. should be done in a proper manner, utilizing technologies that meet the criteria of an effective destruction efficiently of 99.9 per cent, with no generation of persistent organic pollutants, and complete containment of all gaseous, liquid and solid residues for analysis and, if needed, reprocessing. Such disposed of material should be kept at a specified place earmarked for this purpose. Special care must be taken in the handling of asbestos wastes, and total quantities of such waste should be made known to the concerned authorities.
4. The ship breaking industries should be given authorization under Rule 5 of the H.W. Rules, 2003, only if they have provisions for disposal of the waste in environmentally sound manner. All authorization should be renewed only if an industry has facilities for disposal of waste in environmentally sound manner.
5. The State Maritime Board should insist that all quantities of waste oil, sludge and other similar mineral oils and paints chips are carefully removed from the ship and taken immediately to areas outside the beach, for safe disposal.
6. There should be immediate ban of burning of any material whether hazardous or non-hazardous on the beach.
7. The concerned State Pollution Control Board(s) be directed to close all units which are not authorized under the HW Rules.
8. The Gujarat PCBs should ensure continuous monitoring of ambient air and noise level as per the standards fixed. The Gujarat PCBs be further directed to install proper equipment and infrastructure for analysis to enable it to conduct first level inspection of hazardous material, radio-active substances etc.
9. The Gujarat SPCB will ensure compliance of the new Gujarat Maritime Board (Prevention of Fire & Accidents for Safety & Welfare of Workers and Protection of the Environment during Ship breaking Activities) Regulations, 2000, and should submit a compliance report to the Court.
10. Gujarat Maritime Board and Gujarat SPCB officers should visit sites at regular intervals so that the plot owners knows that these institutions are an Inter-Ministerial Committee comprising Ministry of Surface Transport, Ministry of Steel, Ministry of Labour and Ministry of Environment should be constituted with the involvement of labour and environment organizations and representatives of the ship breaking industry.
11. The SPCBs along with the State Maritime Board should prepare land fill sites and incinerators as per the CPCB guidelines and only after prior approval of the CPCB. This action should be taken in a time bound manner.
12. That the above conditions also apply to other ship breaking activities in other Coastal States also.

The Supreme Court of India constituted Monitoring Committee to ensure that the generation of hazardous waste is minimum and it is properly handled in every State and to oversee the compliance of law, directions of this Court and Rules and Regulations.

1) Impact on environment, health, pollution and safety for the workers through informal recycling activities is required to be assessed though the impact may not be severe, some measurement is necessary for preventive reason.

2) While some regulating law and rules are established for hazardous wastes from the industrial sources, there is no regulating legal framework for such wastes as e-waste and plastics is established.

3) Lack of awareness among some waste generators and waste treaters: Among the some waste generators as well as waste treating facility, level of the awareness for paying proper cost for the waste management in environmentally sound manners is not high enough. Awareness raising activities are necessary to improve the situation so that the waste treating industries are more economically viable and trigger further investment of the state of the art waste recovering technology.

4) Management, monitoring and implementing capacity: It can be enhanced among the regulators. Regulating body has the important role to make sure the proper waste treatment activities being conducted in environmentally sound manner.

## VI. CONCLUSION

With increasing costs of ship breaking in developed countries, ship owners are now disposing of their ships in China, Turkey and South Asia (primarily Bangladesh, India, and Pakistan) to take advantage of low labor costs and lax environmental regulations. The industry driven economy of India's has resulted in hazardous waste problems, which are difficult to manage in an environmentally friendly manner. The non-enforcement of 'Polluter Pays' principle, continuation of import of hazardous wastes despite the ban, absence of proper infrastructure viz. centralized disposal facilities and lack of technical and financial resources have led to the unscientific disposal of hazardous wastes posing serious threat to human, animal and plant life. A High Power Committee (HPC) on hazardous waste management, constituted by the Hon'ble Supreme Court of India in 1997, made similar observation and conclude that the hazardous wastes situation in India is fairly grim. Thus, there is an urgent need for formulating proper hazardous waste management strategies, implementation of hazardous wastes management regulations and establishment of proper hazardous waste treatment and disposal facilities (HWTDF) for controlling the unscientific disposal of hazardous wastes.

It cannot be disputed that no development is possible without some adverse effect on the ecology and environment, and the projects of public utility cannot be abandoned and it is necessary to adjust the interest of the people as well as the necessity to maintain the environment. A balance has to be struck between the two interests. Where the commercial venture or enterprise would bring in results which are far more useful for the people, difficulty of a small number of people has to be bypassed. The comparative hardships have to be balanced and the convenience and benefit to a larger section of the people has to get primacy over comparatively lesser hardship

With minimal or nonexistent protections for human health or the environment, ship breaking has resulted in substantial releases of toxic chemicals (i.e. asbestos, PCBs) into the environment and significant damage to the human health of the workers and their families. Regrettably, ship breaking is also a big business.

The value-added industrial waste management and recycling system is required to be developed with the legal framework for industrial waste management and recycle activities. The legal framework of the waste management and recycling system operation is a crucial element for realizing sound social and industrial development among the society. At the international level, India should participate in meetings on ship breaking at the level of the International Maritime Organisation and the Basel Convention's Technical Working Group with a clear mandate for the decontamination of ships of their hazardous substances such as asbestos, waste oil, gas and PCBs prior to exports to India for breaking.

The industrial hazardous waste of 1.7 million tons is generated in a year in Gujarat and the current treatment capacity is not sufficient enough to manage such volume of waste -

- (1) The industrial waste recycle system can be attained with technical co-operation from the foreign companies. Training and capacity development program for the collection of recyclable waste is also necessary.
- (2) Legal framework for supporting environmental friendly social and industrial development is required.

For this the help of private environment-related project developers and technology providers can be sought so that the chance of developing a more environmentally sound operations and new arena of environmental business development can take place. Our livelihood depends on a healthy ocean. We cannot afford to use it as a waste dump. Polluters must take responsibility to manage their own waste and ensure that their waste is not someone-else's problem. Profit and convenience must not be gained at the cost of the environment and people's wellbeing.

## BOOK REVIEW

Vol. 42, No. 2, *Ban.L.J.* (2013) 119-120

*Commentary on The Indian Penal Code* (2<sup>nd</sup> ed., 2013) By K. D. Gaur, Universal Law Publishing Co. Pvt. Ltd., Delhi. Pp. clix + 1540, Price Rs. 1795/=

Statute is formal expression of will of the Legislature. A law, passed by the Legislature, known as an Act or Statute expressed in writing, and declares, proscribes, or commands something, i.e. basically human behaviour. Since the dawn of human civilization wrongful act if caused by an individual against another one, it was either retaliated or avenged by the victim himself or by his kin some. With a gradual transition to a situation that had taken place in due course of development, organized institutions evolved and certain commission or omission of an act identified to be forbidden on pain of punishment by the State. It was recognized on all hands that apart from liability for reparation or compensation, which everyone who wrongs another must incur and pay the wronged individual, State also handled to impose certain penalties with the object of preserving peace and tranquility in the society and promoting good behavior towards each other and community as a whole. Now, what acts or omissions should be singled out for punishment, be branded as crime, has always depended on the force, vigour and movement of public opinion from time to time and country to country and even in the same country from decade to decade. In fact, this position suggests that crime is something that is product of culturally-bounded social interaction. It is label applied, under circumstances, to certain acts (or omissions). Within a broad spectrum of cultural and historical variations, crime constitutes the intentional commission of an act prohibited by law or omission of duty recommended by law as described in codifications or legislations in the contemporary world.

The Indian Penal Code 1860, an exhaustive Criminal Code of the world, saw its advent long before Indian gave themselves this freedom, yet this cast-iron British frame still survives to cater our pure native system. The Code, undoubtedly, is a master piece in the history of legislation. Its utility and efficacy in the modern India shows its maker's foresightedness towards progressive Indian societal structure. Our Criminal Laws take care of probabilities, proofs, circumstantial evidences, and concrete evidence-contemporary, historical and even mythological. The foundation of the Indian Penal Code laid down more than 150 years ago and different authors commented from various angles on its provisions since then. Sir James Stephen, Mayne, Dr. H. S. Gaur, S. S. Huda, Rahi and R. C. Nigam scholarly enriched the *corpus juris* of India and explained the Penal Law to coordinate the intrinsic and complex problems faced by not only Bar, but Bench and Scholars also.

The book in hand '*Commentary on the Indian Penal Code*' written by K. D. Gaur is widely known and a welcomed edition to the students of Law. The entire arrangement of the book is highly appreciable. The book focuses mainly on the commentary of the Sections, explains the provisions along with analysis of decided cases and classifies every offence narrating its ingredients in detail. Though, writing a commentary on the Code is uphill task to any commentator, nevertheless, Dr. Gaur's *Commentary on the Code* provides a detail analysis of different provisions in reference to the Commonwealth and US cases also. Author has taken into consideration all the pertinent issues while commenting on the different provisions of the Code relating to

certain socio-cultural developments having impacts on the working of law in India. This book is intended for the new, or relatively new, student of Criminal Law. As such the aim is to be accessible and engaging and to this end the book contains a number of features which would help the readers get the most from the text.

The General Introduction part especially mentioned in the book is more informative with regard to the substantive part- origin, concept, theories and other discussions about Indian Criminal Justice system. After the opening chapter, the whole book is divided into twenty three chapters as enacted in the Code (containing 511 Sections) and elaborately discussed commenting upon with the view that readers can understand the law when they meet them. The chapters carefully arranged resonate in a familiar to legal experts and some use it becomes contagious. Apart from a traditional emphasis on adherence to law, the book also comes out with suggestions which generate a novel idea which really helps in growth of law. The author has touched the emerging trends and new challenges in the area of Criminal Law to the place wherever needed. Violation of Human Rights, State sponsored crimes; criminal acts against religion, environment, consumers, and women even against information technology (cyber crime) have also been elaborated in the book in very lucid manner and the aim of author is to cover full range of all offences described in the Code in a single volume. New development, either by legislation or by judicial interpretations is given in the book in proper way at proper place.

The language of the commentary in the book is digestible and readers friendly. The readable style of language makes it popular. The book is useful for LLB and LLM students sitting examination on Indian Criminal Law in their even or odd semesters. Author hopes that persons with little or no access to law libraries will find the text helpful and for those studying for other qualifications pursuing private study as well. The book, which is analytical in nature, covers also those areas of substantive Criminal Law which are traditionally covered in a Criminal Law course, and those topics are presented in the way in which it normally taught. It seems that author has focused on what is sometimes called the 'internal critique of the law', in order to bring out any conceptual inconsistencies and to trace the areas those present difficulties. Annexure I & II given at the end in the book discuss the new horizons of criminal jurisprudence.

The author deserves appreciation in his attempt by giving a critical commentary on the Code because of his long experience of teaching and visiting across the world, there are little topographical errors in the book. The book in hand is not available at an affordable price to the students particularly of rural areas.

**Dharmendra Kumar Mishra\***

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## LL.M. DISSERTATIONS SUBMITTED DURING THE SESSION 2012-2013

Mohammad Nazim<sup>1</sup>

### LL.M. (GENERAL)

<b>Sr. No.</b>	<b>Student's Name</b>	<b>Supervisor's Name</b>	<b>Topic</b>
1.	Abhishek Pandey	Dr. S.K Gupta	Post Modernism and Critical Legal Studies: A Study in Indian Context
2.	Amit Kumar	Dr. Sibaram Tripathy	Victim of State Crime with Special to Police Atrocities in India
3.	Amit Kumar	Prof. R.P. Rai	Liabilities of Internet Service Providers for Infringement of Copyright Over Internet
4.	Amit Kumar	Prof. R.P. Rai	Contract of Virtual World: An Analysis
5.	Km. Amrita Singh	Dr. D.K. Srivastava	Human Rights and Status of Women in India in View of Present Legislation
6.	Anil	Dr. K.M. Tripathy	The Changing Dimension of Judicial Accountability in India: Recent Trends
7.	Anoop Srivastava	Dr. R.K. Murali	A Critical Analysis of the Provisions Related to Well Known Trade Mark in the Indian Law
8.	Arvind Kumar	Dr. D.K. Srivastava	Right to Education Act,2009: An Analysis
9.	Ashutosh Pandey	Dr. P.K. Singh	Black Money Problem and Legal Regime in India
10.	Asitabh Kumar	Dr. V.S. Mishra	Right to Education and Autonomy of Minority Institution in India
11.	Diwan Fawad Khan	Prof. Ali Mehdi	Environment Impact Assessment: Merits of Environmental Audit

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| 12. | Dharmendra Gupta       | Dr. S.K. Gupta         | Rawl's Theory of Justice and its Legal Dimensions: An Environmental Audit   |
| 13. | Km. Ganga Sharma       | Prof. Ali Mehdi        | Basel Convention and Indian Response: An Analysis   |
| 14. | Gautam Kumar           | Dr. D.K. Mishra        | DNA Finger Printing and Criminal Justice Delivery System in India   |
| 15. | Krishna Kumar Singh    | Dr. A.K. Pandey        | Public Interest Litigation in India: Emerging Trends  |
| 16. | Likha Ram              | Dr. Sibaram Tripathy   | The Doctrine of Consideration-A Critical Appraisal  |
| 17. | Mahendra Kumar Baishya | Smt. Babita Baereiya   | Sentencing Policy of the Supreme Court of India Dowry Death : A Study from Women Rights Perspective                       |
| 18. | Mayank Pratap          | Prof. D.K. Sharma      | Challenges before Indian Judiciary: Executive and Judicial Response   |
| 19. | Mihir Kumar Kundu      | Dr. V.S. Mishra        | Right of Linguistic Minorities in India: Emerging Legal Issues  |
| 20. | Waheed Alam            | Dr. M.N. Haque         | Divorce: A Comparative Study with Special References to Muslim Law  |
| 21. | Md. Abu Shahid         | Dr. R.K. Singh         | Protection of Folklore: National and International Perspective  |
| 22. | Md. Zeeshan Chand      | Dr. R.K. Singh         | Administration of Copy-Right and Neighboring Rights with Special Focus on Collective Administration                       |
| 23. | Moji Ete               | Dr. Raju Majhi         | The Right to Accused Person with Special Reference to Bail  |
| 24. | Navin Kumar            | Dr. R.K. Murali        | Critical Appraisal of Doctrine of Dilution in Trademark Jurisprudence with Particular Reference to India                  |
| 25. | Km. Neha Srivastava    | Dr. J.P. Rai           | Efficacy of R.T.I. Act, 2005: Aims, Aspiration and Realities  |
| 26. | Priyanka Asthana       | Dr. N.K. Mishra        | DNA Profiling: As an Investigative Tool   |
| 27. | Rajesh Kumar Gautam    | Dr. Ajendra Srivastava | Insurable Interest: Position in India   |
| 28. | Ram Kinker Pandey      | Dr. P.K. Singh         | Capital Punishment-Rarest of Rare Principle: A Critical Appraisal   |
| 29. | Ranjit Kumar Tripathy  | Prof. B. N. Pandey     | Traditional Knowledge and Intellectual property Rights with Special Reference to Traditional Medicinal Knowledge in India |

30. Ravi kumar Gutam Dr. Ajendra Srivastava Terrorism Laws in India: Human Rights Approach
31. Ravi Shanker Pandey Dr. C.P. Upadhyay Legal Position and Role of Director in Current Scenario
32. Ravi Shankar Singh Dr. V.K. Pathak Independence of Judiciary: Emerging Problems and Challenges under the Indian Constitution
33. Km. Richa Sharma Dr. M.K. Padhy Legal Control of e-Contract in India
34. Sailendra Kumar Dr. G.P. Sahoo Cyber Contraventions in India: Problems and Prospects
35. Sandeep Kumar Sri Surendra Mehra Medical Negligence and Consumer Protection Laws: An Analytical Study with Special Reference to India
36. Sanjay Kumar Dr. M.K. Padhy Multinational Corporation in India: Legal Issues and Challenges
37. Santosh Kumar Tripathy Dr. C.P. Upadhyay Corporation Criminal Liabilities under Company Law
38. Shashi Kumar Rai Dr. D.K. Mishra Right to Information in Public Institution: An Appraisal
39. Saurabh Chaudhari Prof. B.N. Pandey Compulsory Licensing of Pharmaceuticals Patents and Access to Medicines in India: An Issue relating to Intellectual Property Right
40. Shree Prakash Yadav Dr. Adesh Kumar Protection of Child from Sexual Offences and Law in India
41. Sumit Kumar Dr. Adesh Kumar Regulation of Health Sector in India: Prospect and Retrospect
42. Tej Kumar Prasad Prof. D.P. Verma Human Rights and Corporate Governance
43. Km Sandhya Singh Dr. G.P. Sahoo Cyber Crime in India: Issue and Challenges
44. Sanjay Kumar Singh Dr. R.K. Patel Conduct of Judges and Judicial Accountability
45. Vinit Kumar Sah Sri M.K. Malviya Secularism in Constitution of India and Role of Indian Judiciary
46. Vinod Sharma Dr. R.K. Patel Media Trial: Social Accountability and its Need for Regulation
47. Dhananjai Deo Pandey Dr. A.K. Pandey Witness Protection in Indian Criminal Justice System

**LL.M. (HRDE)**

<b>Sr. No.</b>	<b>Student's Name</b>	<b>Supervisor's Name</b>	<b>Topic</b>
1.	Abhishek Singh	Dr. N.K. Mishra	Emerging Issues and Liabilities for Crime Victim in India
2.	Aftab Alam Ansari	Prof. B.C. Nirmal	Implementation and Enforcement of the Chemical Weapons Convention : Problem and Challenges
3.	Akhilesh Kumar	Smt. Babita Baiereya	Rights of Aged Person: A critical Appraisal
4.	Binod Kumar Choudhary	Dr. V.K. Saroj	Child Soldier and International Humanitarian Law
5.	Dhiraj Kumar Dixit	Dr. V.P. Singh	Human Rights and Right to Health in India
6.	Km. Ekta Dubey	Dr. J.P. Rai	Legal Control of Female Foeticide: The Indian Experience
7.	Mukesh Kumar	Dr. V.K. Saroj	Role of UNHCR in Protection of Internally Displaced Persons
8.	Naveen Kumar Verma	Dr. A.K. Singh	Surrogate Motherhood in India: Legal Ethical and Human Rights Issues
9.	Pankaj Kumar	Dr. A.K. Singh	Role of Indian Judiciary in Protection of Human Rights of Prisoners
10.	Pappu Kumar Singh	Km. Abha Trivedi	Sexual Harassment of Working Women in India: Human Rights Perspective