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(The Founder of Banaras Hindu University)

(25.12.1861 - 12.11.1946)

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ARTICLES

NOTES & COMMENTS

BOOK-REVIEW

COMPLEMENTARITY AND COMPLETED TRIALS: REFORMING THE *NE BIS IN IDEM* CLAUSE OF ARTICLE 20(3) OF THE ROME STATUTE

EVODE KAYITANA*

ABSTRACT : Article 20(3) of the Rome Statute provides that a person who has been tried by a national court for a crime over which the ICC has jurisdiction may be retried before the ICC for the same conduct, if it is established that the proceedings at the national level "[W]ere for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court"; or "were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice". This paper is concerned with the question whether article 20(3) of the Rome Statute is broad enough to allow the ICC to retry all persons who have already been tried in domestic courts of States Parties where such retrial is commanded by the interests of justice..

KEY WORDS : Rome Statute, *Ne bis in idem*, Double Jeopardy, International Criminal Court.

I. INTRODUCTION

On 17 July 1998 representatives of 148 States convened in Rome, Italy, and voted to adopt the Rome Statute of the International Criminal Court (hereafter referred to as the Rome Statute).[1] Because of its mandate and its enforcement powers, the International Criminal Court (ICC) has been hailed as a major advance on the road towards individual accountability for the perpetration of the most heinous violations of human rights (hereafter referred to as international crimes) and thus as a major contribution to the prevention of such horrible crimes.[2] However, with its limited resources in terms of human and financial means, the ICC will not be able to deal with all perpetrators of the crimes that come under its jurisdiction wherever such crimes are committed throughout the world.[3] For this reason, in order to end

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1 S.H. Farbstein, 'The Effectiveness of the Exercise of Jurisdiction by the International Criminal Court: the Issue of Complementarity' (2001), available at http://www.ecmi.de/publications/detail/12-the-effectiveness-of-the-exercise-of-jurisdiction-by-the-international-criminal-court-the-issue-of-complementarity-184/ (last visited 17 January 2014), 7.

2 A. Cassese, 'From Nuremberg to Rome: International Military Tribunals to the International Criminal Court' in A. Cassese, P. Gaeta and J.R. Jones, *The Rome Statute of the International Criminal Court: A Commentary,* Vol. I (2002), 18.

3 *Democratic Republic of The Congo v Belgium Case Concerning The Arrest Warrant of 11 April 2000* Dissenting opinion of Judge ad hoc Van den Wyngaert 2002 ICJ 3 (14 February 2002) para 37.

impunity in the commission of international crimes, there will always be a need for combined efforts by the ICC and national courts.[4] This reality is recognised by the Rome Statute which, in the preamble and article 1, provides that the jurisdiction of the ICC is "complementary" to national courts and that, therefore, States Parties retain the primary responsibility for the repression of international crimes. In legal literature, this is generally referred to as the "principle of complementarity" or the "complementarity regime of the Rome Statute".[5]

Complementarity, however, is subject to a serious problem. Since international crimes are often committed by State agents as part of State policy, governments often try to ensure that their own officials engaged in such actions are not held accountable.[6] Even where trials are conducted, the accused persons are often acquitted through what is generally referred to as "sham" trials.[7] In order to counteract this problem, the Rome Statute provides that a person who has been tried by a national court for a crime over which the ICC has jurisdiction may be retried before the ICC for the same conduct, if it is established that the proceedings at the national level:[8]

> [W]ere for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
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> […] were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Both two above situations relate to instances where, at the time of trial, "proceedings" are not conducted with a genuine intent of punishing the person accused of an international crime. Article 20(3) of the Rome Statute provides that in these situations, in order to put an end to the culture of impunity for gross violations of human rights, the ICC may disregard the

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4 *Democratic Republic of The Congo v Belgium Case Concerning The Arrest Warrant of 11 April 2000* Dissenting opinion of Judge ad hoc Van den Wyngaert 2002 ICJ 3 (14 February 2002) para 37.

5 The complementarity regime of the Rome Statute means that the ICC was not intended to replace national courts; it will rather act alongside national courts which are primarily entrusted with the task of prosecuting international crimes (E. Kourula, 'Universal Jurisdiction for Core International Crimes' in M. Bergsmo and L. Yan, (eds), *State Sovereignty and International Criminal Law* (2012), 132). It is a "reserve court" which acts only when States are "unable or unwilling" to prosecute (J. Wouters, 'The Obligation to Prosecute International Law Crimes' (date uknown), available at http://www.law.kuleuven.be/iir/nl/onderzoek/opinies/obligationtoprosecute.pdf (last visited 2 May 2013), 3.

6 D. Akande and S. Shah, 'Immunities of State Officials, International Crimes and Foreign Domestic Courts', 21 *European Journal of International Law* (2011), 815, 816. See also A. Cassese, *International Criminal Law,* 2nd ed. (2008), 307: "[T]oday, more so than in the past, it is state officials, and in particular senior officials, that commit international crimes. Most of the time, they do not perpetrate crimes directly. They order, plan, instigate, organize, aid and abet, or culpably tolerate or acquiesce or willingly or negligently fail to prevent or punish international crimes". See also W. Schabas, *An Introduction to the International Criminal Court* 4th ed. (2011), 1: "Prosecution for war crimes, however, was only conducted by national courts, and these were and remain ineffective when those responsible for the crimes are still in power and their victims remain subjugated. Historically, the prosecution of war crimes was generally restricted to the vanquished or to isolated cases of rogue combatants in the victor's army. National justice systems have often proven themselves to be incapable of being balanced and impartial in such cases".

7 L.E. Carter, 'The Principle of Complementarity and the International Criminal Court: The Role of Ne Bis in Idem', 8 *Santa Clara Journal of International Law* (2010), 165, 194 and L. Finlay, 'Does the International Criminal Court protect against double jeopardy: An analysis of article 20 of the Rome Statute', 15 *U.C. Davis Journal of International Law & Policy* (2009), 221, 235.

8 Art 20(3) Rome Statute.

sham proceedings conducted at the national level and retry the persons concerned. This clearly is an important provision in the Rome Statute.

The present article argues, however, that the situations in which the ICC is allowed to intervene and correct sham trials in terms of article 20(3) are too limited. The argument is that there are more situations in which the ICC should be allowed to intervene and retry a person who has already been tried at the national level because, like in the two situations currently provided for in article 20(3), the interests of justice also require a retrial. These situations are the situation where the "proceedings" in the national courts were genuinely conducted and an appropriate sentence was imposed but the person concerned was later released from prison after serving only an insignificant part of his sentence, and the situation where, subsequent to the acquittal of the accused, new and compelling evidence is brought to light which clearly points to his guilt.

The first section of this paper discuss the provision of article 20(3) of the Rome Statute which sets out the situations in which the ICC may retry a case that has already been tried in a national court. The article will then go on to suggest other situations in which a retrial by the ICC is needed and conclude that article 20(3) should be broadened to cover those situations too.

II. COMPLEMENTARITY AND *NE BIS IN IDEM*: ARTICLE 20(3) OF THE ROME STATUTE

The complementarity regime of the Rome Statute is also intertwined with the *ne bis in idem* rule which is found in many domestic laws.[9] The Rome Statute recognises that when a person has already been tried by a national court he may not be tried for a second time for the same crime before the ICC.[10]

However, in order to ensure that national trials are not be used as a means to shield perpetrators of international crimes from being tried by the ICC,[11] the Rome Statute provides that a person who has been tried by a national court for a crime under the jurisdiction of the ICC may be retried by the Court with respect to the same conduct, if it is established that the proceedings at the national level:[12]

> [W]ere for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
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> […] were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

As stated above,[13] these two situations relate to "sham"[14] proceedings. Here, the

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9 H. Khen, 'Internationalizing Non Bis in Idem: Towards a unified concept of double jeopardy in the application of universal jurisdiction over international core crimes' (date Unknown), available at http://www.alma-ihl.org/opeds/hillyme-nonbisinidem (last visited 25 September 2013).

10 M Zeidy 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' 23 *Michigan Journal of International Law* (2002), 869, 930-931.

11 X. Philippe, 'The Principles of Universal Jurisdiction and Complementarity: How do the Two Principles Intermesh?', 88 *International Review of the Red Cross* (2006), 375, 384.

12 Art 20(3) Rome Statute.

13 See 1 (Introduction) above.

14 Zeidy, *supra* note 10, 931.

domestic courts deliberately conducted fake trials to circumvent the ends of justice.[15] These two situations are examined in more details hereunder.

(a) THE PROCEEDINGS WERE UNDERTAKEN FOR THE PURPOSE OF SHIELDING THE PERSON CONCERNED FROM CRIMINAL RESPONSIBILITY

Situations where a foreign trial can be characterised as having been conducted with a purpose of "shielding" the accused from criminal responsibility are many and various. They include fraudulent acquittals[16] or, in case of conviction, situations where the accused was convicted but no sentence was imposed,[17] where the sentence was imposed but not served[18] and where a derisory sentence was imposed.[19]

(i) THE ACCUSED WAS FRAUDULENTLY ACQUITTED

When State officials or their allies are implicated in the commission of international crimes, fraudulent proceedings may be conducted for the purpose of clearing the persons involved of the accusations against them in order to allow them to continue a normal civil or political life free from blames and complaints. Article 20(3)(a) plays an important role here by preventing a State from using a sham trial to prevent the concerned persons from being held accountable before the ICC.[20] It ensures that State does not collude with an individual accused of international crimes to shield that person from criminal responsibility.

It is impossible to draw up an exhaustive list of all situations that may reflect a State's intention to shield a person from criminal responsibility in this way.[21] This is a question which must be answered in view of the prevailing facts of each case.[22] An example of these situations would be when the State conducts ineffective and "non-genuine" investigations in order for the accused to be acquitted in court.[23] Other cases would include instances where evidence emerges that the acquittals were secured as a result of intimidation or influence on the judges. Such acquittals may lead the ICC to consider the proceedings as having been conducted with the purpose of shielding the accused from criminal responsibility and make an order for a retrial.

(ii) THE ACCUSED WAS CONVICTED BUT NO SENTENCE WAS IMPOSED

Another situation where a domestic trial would be seen as having been conducted for the purpose of shielding the person from criminal responsibility is where the accused was tried and convicted but no sentence was imposed. On this issue, Bernard[24] points out that in order for a judgment of a national court to block the case from being admissible before the ICC, the accused must have been "sufficiently punished". In other words, he says, for the *ne bis in idem* principle to apply:

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15 M.A. Newton, 'Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court', 167 *Military Law Review* (2001), 20, 59 and Zeidy, *supra* note 10, 931.

16 See 1 hereunder.

17 See 2 hereunder.

18 See 3 hereunder.

19 See 4 hereunder.

20 Finlay, *supra* note 7, 235.

21 M. Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (2008), 175. See also Finlay, *supra* note 7, 236: "It is difficult to precisely ascertain the types of cases that will, in practice, fall within this exception and where exactly the line will be drawn".

22 Finlay, *supra* note 7, 236.

23 Zeidy, *supra* note 21, 175.

24 D. Bernard, 'Ne bis in idem-protector of defendants' rights or jurisdictional pointsman?', 9 *Journal of International Criminal Justice* (2011), 1, 16.

> it is necessary not only that an initial judgment is handed down but that a sentence is also imposed.[25]

This interpretation of the *ne bis in idem* clause of the Rome Statute is the most consistent with the underlying purpose of the Rome Statute, i.e., to end impunity for international crimes.[26] Without the possibility for the ICC to intervene where a person has been convicted but no sentence was imposed, purposes of deterrence and prevention of future international crimes cannot be achieved.

(iii) THE SENTENCE WAS IMPOSED BUT NOT SERVED

Another situation where a domestic trial should be seen as having been conducted with the intention of shielding the accused person from criminal accountability is where that person was sentenced but, owing to a State's policy, the sentence was not executed. Although no specific mention is made in the Rome Statute to the effect that the ICC would retry such cases, it appears that a situation of this kind would clearly fall under article 20(3)(a) of the Rome Statute. If States were allowed to try and convict but fail to execute the sentences imposed by their courts, it can never be said that the purpose of the trial was to bring the perpetrator to justice. Such a situation would also undermine the very purpose of the Rome Statute: ending impunity for the perpetrators of international crimes.[27]

(iv) ONLY A DERISORY SENTENCE WAS IMPOSED

The last situation where a trial can be characterised as having been conducted for the purpose of shielding the person concerned from criminal responsibility is where, under external pressure, a State conducts a trial in order to prevent the extradition of the said person to a foreign or international tribunal, but the court sentences that person to a derisory sentence.[28]

A typical example of such cases is the so-called "*Leipzig* trials". These were a series of war crimes trials held by the German Supreme Court (*Reichsgericht*) in Leipzig following the end of WWI as part of the penalties imposed on the German government under the Treaty of Versailles.[29] Initially the Allies wanted to prosecute German war criminals before their military tribunals,[30] but the Germans refused to extradite any German citizens to Allied governments, suggesting instead that they would try them before a German court.[31]

This proposal was accepted by the Allied leaders, and in May 1920 they handed the German government a list of 45 persons to be tried.[32] As not all these people could be traced,

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25 *Ibid*, 16.

26 Para 5 Preamble to the Rome Statute.

27 Bernard, *supra* note 24, 16: "Non-enforcement of a judgment does not explicitly constitute an exception to the principle of *ne bis in idem* but could be considered as a deficiency of the first trial. This tallies with the objective of 'fighting against impunity' pursued by the Rome Statute".

28 See also Bernard, *supra* note 24, 16 where the author discuses this issue in the context of the Rome Statute: "New procedures *in idem* will indeed be allowed, in spite of the principle, if the first initial procedure was deficient in a number of respects - amongst which is the situation where a too lenient sentence has been imposed. In other words, the imposition of mild sentences seems to be conceived as a sign of too much clemency being afforded to the accused".

29 Zeidy, *supra* note 10, 872.

30 A. Kramer, 'The First Wave of International War Crimes Trials: Istanbul and Leipzig', 14 *European Rev* (2006), 441, 442; Zeidy, *supra* note 10, 872; C. Mullins, *The Leipzig Trials: an Account of the War Criminals' Trials and a Study of German Mentality* (1921), 8.

31 Zeidy, *supra* note 10, 872; Schabas, *supra* note 6, 4 and Mullins, *supra* note 30, 8-9.

32 Mullins, *supra* note 30, 9. The initial list contained 895 suspected war criminals to be tried by the Allied governments. This proposal was rejected by the German government, arguing that it (the German government) was not very stable and that honouring this demand would lead to its overthrow. Zeidy, *supra* note 10, 872.

however, only twelve individuals were brought to trial.[33] The trials were held before the *Reichsgericht* in Leipzig from 23 May to 16 July 1921.[34] Six persons were acquitted while six others were convicted of war crimes.[35]

The sentences that were imposed were as follows:

i. Sergeant Karl Heynen, convicted of mistreating British prisoners of war. He was sentenced to a prison term of ten months.[36]
ii. Captain Emil Müller, convicted of mistreating prisoners of war. He was sentenced to six months in prison.[37]
iii. Private Robert Neumann, convicted of mistreating prisoners of war. He was sentenced to six months in prison.[38]
iv. First Lieutenants Ludwig Dithmar and John Boldt, convicted of war crimes on the high seas. The accused were two officers of the submarine SM U-86 that had sunk the hospital ship *Llandovery Castle* and then attacked and killed survivors in lifeboats.[39] They were sentenced each to four years in prison.[40]
v. Major Benno Crusius, convicted of ordering the execution of prisoners of war. He was sentenced to two years confinement.[41]

Outside Germany, the *Leipzig* trials were perceived, and rightly so, as a mockery of justice because of the too lenient sentences that the court imposed *vis-à-vis* the gravity of the crimes involved.[42] In particular, if one considers the sentences imposed on those who were found guilty of murder (First Lieutenants Ludwig Dithmar and John Boldt and Major Benno Crusius), one must arrive at the conclusion that the trials were conducted for the sole purpose of preventing the accused persons from being extradited to the Allied governments as envisioned earlier in the Treaty of Versailles, where, they could have been sentenced to long terms of imprisonment. Germany's intention of shielding the war criminals from accountability becomes even clearer if one takes note of the fact that First Lieutenants Ludwig Dithmar and John Boldt spent only four months in prison (out of four years) as

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33 Mullins, *supra* note 30, 191.
34 *Ibid*, 23.
35 W.H. Parks, 'Command Responsibility for War Crimes', 62 *Military Law Review* (1973), 1, 13
36 Anonymous 'German War Trials: Judgment in the Case of Karl Heynen', 16 *American Journal of International Law* (1922), 674, 674.
37 Anonymous 'German War Trials: Judgment in the Case of Emil Muller', 16 *American Journal of International Law* (1922), 684, 685.
38 Anonymous 'German War Trials: Judgment in the Case of Robert Neumann', 16 *American Journal of International Law* (1922), 696, 696.
39 Llandovery Castle was a Canadian hospital ship. It was sunk by a German submarine, U-86, on 27 June, 1918. A total of two hundred and fifty-eight persons were on board the ship. Three life boats survived the sinking of the vessel, however, and proceeded to rescue survivors from the water. The U-boat (U-86) then started firing at and sinking the life boats to kill all witnesses and cover up what had happened. Ultimately, only twenty four people survived the attack on the lifeboats. For a full account of this incident see M. Leroux, 'The sinking of the Canadian Hospital Ship' (2010), available at http://www.canadiangreatwarproject.com/writing/llandoveryCastle.asp (last visited 15 September 2013).
40 Anonymous, 'German War Trials: Judgment in Case of Lieutenants Dithmar and Boldt', 16 *American Journal of International Law* (1922), 708, 709.
41 Parks, *supra* note 35, 13.
42 *Ibid*, 14 and Mullins, *supra* note 30, 17 and 208. See also Schabas, *supra* note 6, 4: "those found guilty were sentenced to modest terms of imprisonment, often nothing more than time already served in custody prior to conviction. The trials looked rather more like disciplinary proceedings of the German army than any international reckoning".

German authorities later announced that they had "escaped" from prison.[43] In cases similar to the *Leipzig* trials, there clearly is an interest for the ICC to step in and retry the perpetrators.

(b) THE PROCEEDINGS WERE CONDUCTED IN A MANNER WHICH, IN THE CIRCUMSTANCES, WAS INCONSISTENT WITH AN INTENT TO BRING THE PERSON CONCERNED TO JUSTICE

Same proceedings that fall under this category are those which relate to the situation where the domestic proceedings were conducted, not necessarily with a purpose of "shielding" the person concerned from criminal liability, but in another manner which is inconsistent with an intent to punish. The difference between the two situations consists in that in the first situation there is "a plan conceived in order to shield the accused", while in the other situation are included other possible circumstances where a proceeding was not conducted with an intent to "punish" but without necessarily there being a "subjective" purpose to shield.[44] In practical terms, however, the two situations do not differ much because they both result in the impunity of the perpetrator.[45]

A situation of this kind can best be illustrated by reference to the post-genocide *Gacaca* trials in Rwanda. After the 1994 genocide in Rwanda, the new Rwandan government struggled to bring the perpetrators of the genocide to justice but failed. By 30 November 1999, five years after the genocide, only 2,406 persons had been tried for genocide, out of the 121,500 in detention.[46] Among those awaiting trial, an estimated 40,000 prisoners were still without files, let alone having appeared before a judge.[47] It quickly became very clear that, considering also the fact that thousands of other suspects were still at large, it could take more than 100 years to complete the trials.[48] The country thus needed a more expeditious means of delivering justice.

In response, Rwanda implemented the *Gacaca* system, a Rwandan traditional form of dispute resolution.[49] The pillars of this system were confessions accompanied by a request for pardon in exchange for lenient sentences. It was hoped that this system would help to speed up the trials.[50] The *Gacaca* courts were launched on 18 June 2002 and closed *on 18 June 2012 after* trying more than 1.2 million cases,[51] among which 25-30% resulted in acquittals.[52]

43 Leroux, *supra* note 39.

44 D. Spinellis, 'Global report the *ne bis in idem* principle in "global" instruments', 73 *Revue Internationale de Droit Pénale* 1149, 1160.

45 *Ibid*, 1160.

46 UN 'Report of the Special Representative of the Commission on Human Rights on the situation of human rights in Rwanda' UN Doc A/55/269 (4 August 2000) para 144.

47 *Ibid*, para 146.

48 S. Rupucci, and C. Walker, (eds), *Countries at the Crossroads: A Survey of Democratic Governance* (2005), 500.

49 Named for the *Kinyarwanda* word for "grass", gacaca was a traditional form of communal justice, whereby community elders would resolve disputes by devising compensatory solutions aimed at restoring harmony between the parties. S.E. Powers, 'Rwanda's Gacaca Courts: Implications for International Criminal Law and Transitional Justice' (2011), available at http://www.asil.org/insights110623.cfm (last visited 19 March 2013).

50 *Ibid*.

51 Human Rights Watch, 'Country Summary: Rwanda' (World Report January 2012), available at http://www.hrw.org/sites/default/files/related_material/rwanda_2012.pdf (last visited 12 January 2013), 2.

52 Government of Rwanda, 'Fact File-Gacaca–The People's Court' (date unknown), available at http://www.gov.rw/FACT-FILE-Gacaca-the-people-s-court (last visited 19 March 2013).

The law establishing the *Gacaca* courts[53] divided the perpetrators of the genocide according to their responsibility into three categories:[54]

1st Category:

1° The person whose criminal acts or criminal participation place among planners, organisers, incitators, supervisors and ringleaders of the genocide or crimes against humanity, together with his or her accomplices;

2° The person who, at that time, was in the organs of leadership, at the national level, at the level of Prefecture, Sub-prefecture, Commune, in political parties, army, gendarmerie, communal police, religious denominations or in militia, has committed these offences or encouraged other people to commit them, together with his or her accomplices;

2nd Category:

1° The person whose criminal acts or criminal participation place among killers or who committed acts of serious attacks against others, causing death, together with his or her accomplices;

2° The person who injured or committed other acts of serious attacks with the intention to kill them, but who did not attain his or her objective, together with his or her accomplices;

3° The person who committed or aided to commit offences against persons, without the intention to kill them, together with his or her accomplices.

3rd Category:

The person who only committed offences against property.

The criminals who fell in the first category were excluded from the jurisdiction of the *Gacaca* courts and could be prosecuted only before the ordinary courts.[55] *Gacaca* courts were thus able to try cases of category 2 (which also included acts of murder) and category 3 crimes (crimes against property). In case of category 2 crimes Gacaca courts could issue sentences ranging from 6 months imprisonment and "community work"[56] to 30 years' imprisonment.[57] Those falling under the 3rd category could only be ordered to pay civil damages for what they have damaged.[58]

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53 This law was amended several times. The latest version of it was the Organic Law n° 16/2004 of 19/6/2004 Establishing the Organisation, Competence and Functioning of Gacaca Courts Charged With Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes Against Humanity, Committed Between 1 October 1990 and 31 December 1994 (Official Gazette n° special of 19/06/2004)

54 Art 51 Organic Law n° 16/2004.

55 Art 2(2) Organic Law n° 16/2004.

56 Art 73(2) Organic Law n° 16/2004: "Defendants falling within the second category referred to in part 3° of article 51 of this organic law, who :

3° confess, plead guilty, repent and apologise before the Gacaca Court of the Cell, draws up a list of perpetrators, incur a prison sentence ranging from one (1) to three (3) years, but out of the pronounced prison sentence, they serve half of the sentence in custody and the rest is commuted into community services on probation".

57 The long sentence of imprisonment (up to 30 years' imprisonment) was applicable where the accused refused to plead guilty and apply for pardon and for those accused whose confessions were rejected and were subsequently convicted of a crime of genocide. Art 73(1): "Defendants falling within the second category referred to in points 1° and 2° of article 51 of this organic law, who:

1° refused to confess, plead guilty, repent and apologise, or whose confessions, guilty plea, repentance and apologies have been rejected, incur a prison sentence ranging from twenty five (25) to thirty (30) years of imprisonment".

58 Art 75 Organic Law n° 16/2004.

Gacaca has been credited with the swift delivery of results that could not possibly have been achieved by the ordinary courts.[59] On the other hand, however, *Gacaca* has been criticised for lacking a deterrent effect for future would-be perpetrators of international crimes. This stemmed from the inherent contradiction of using a "conciliatory process for a retributive purpose".[60] In the context of international criminal law, deterrence emphasizes the need to demonstrate to would-be perpetrators that genocide and other serious violations of human rights will always be "punished". This is the deterrent effect of punishment. People have complained, however, that *Gacaca* lacked such deterrent effect because the sentences handed to the perpetrators did not reflect the gravity of the crimes they had committed and confessed to.[61] In particular, some people perceived the "community service" as insufficient punishment, given the gravity of the crimes committed during the genocide, such as murder.[62]

Of course, it cannot be said that the trials were conducted with the "purpose of shielding the person" from responsibility because the Government that put in place the *Gacaca* courts in Rwanda is the same government which stopped the genocide after defeating the *génocidaires*' regime in 1994.[63] This is the reason why the *Gacaca* cases cannot be put in the same category as the *Leipzig* trials. While the former were conducted with an intent to shield the accused persons from criminal accountability (i.e., to avoid the extradition of the accused persons to an international criminal tribunal as envisaged earlier in the Treaty of Versailles), the *Gacaca* trials were not.

But, can it also be said that a person who committed murder during the 1994 genocide and was subsequently sentenced to 3.5 years' imprisonment (plus 3.5 years of community service) was tried with an "intent to bring the person to justice"?[64] The answer falls to be "no"! The answer must be sought in the social-political and economic situation that was prevailing in Rwanda when the Government of the country decided to launch these courts. After the genocide, Rwanda did not have enough judges and prosecutors to conduct and

59 Powers, *supra* note 49 and P. Clark, 'The Limits and Pitfalls of the International Criminal Court in Africa' (2011), available at http://www.e-ir.info/2011/04/28/the-limits-and-pitfalls-of-the-international-criminal-court-in-africa/ (last visited 12 September 2013): "[t]he experience of Rwanda's gacaca community courts highlights the importance of delivering justice at the local level. Since their creation in 2001, the gacaca jurisdictions – despite sustained criticism by international human rights groups – have prosecuted 400,000 suspected perpetrators of the 1994 genocide and contributed substantially to community truth-telling and social cohesion. Nearly every Rwandan adult has been involved in the trials, including providing eyewitness accounts of genocide crimes. Village-level processes like gacaca attempt what the ICC and national courts can never do, namely delivering accountability for everyday citizens who participate in violence. For many Rwandan genocide survivors, the most important perpetrators are not the government officials who planned and incited mass murder, but rather the neighbour or family member who wielded the machete in 1994. Violence committed by community-level actors – which is increasingly common in diffuse forms of modern conflict – requires these new forms of community-level accountability".

60 Powers, *supra* note 49.

61 A.M. De Brouwer and S. Ka Hon Chu, 'As end of gacaca nears, looking to more attention to post-genocide trauma from sexual violence' (2012), available at http://www.intlawgrrls.com/2012/04/as-end-of-gacaca-nears-looking-toward.html (last visited 19 March 2013).

62 Clark, *supra* note 59.

63 T. Hauschildt, 'Gacaca Courts and Restorative Justice in Rwanda' (2012), available at http://www.e-ir.info/2012/07/15/gacaca-courts-and-restorative-justice-in-rwanda/ (last visited 16 September 2013): "The Rwandan Patriotic Army (RPA), the military arm of the Rwanda Patriotic Front (RPF) which consisted of Tutsis living in Ugandan exile, defeated the Rwandan Government Forces and ended the genocide".

64 In terms of art 73(1)(3o) of Organic Law n° 16/2004, *Gacaca* courts were allowed to impose a sentence of 3.5 years imprisonment and 3.5 years of community service in murder cases.

finish the trials of the *génocidaires* within a reasonable time.[65] As stated above, before the *Gacaca* courts were introduced, it had been anticipated that the genocide trials would take around 150 years to complete.[66] The primary purpose of the *Gacaca* process was thus the expedition of the trials by conducting them at grass-roots level (involving around 160,000 "lay judges")[67] and by offering incentives to the accused persons to confess and plead guilty in order to facilitate the collection of evidence.[68] This has helped the country to conduct complete genocide trials in ten years instead of 150 years as initially anticipated.

Another consideration behind the *Gacaca* policy is that the administration and maintenance of the prisons placed enormous financial constraints on the government. By 30 November 1999, around 121,500 persons were in detention.[69] The costs for maintaining these prisoners were unbearable for a country like Rwanda.[70] The *Gacaca* rate of convictions was around 70%[71] of the 1.200.000 persons brought to trial.[72] This means that around 800.000 persons were convicted of genocide. The Rwandan government could simply not keep all these persons in prison. Although the Government never publicly mentioned this argument, it is obvious that *Gacaca*, with its sentences of community work (outside prison) and its reduced imprisonment sentences (up to only 3 months in prison) was meant to be a solution to this problem.

Given the above considerations, it seems clear that the purpose of *Gacaca* justice was not to punish the perpetrators of the genocide. Arguably, the *Gacaca* trials can be tolerated because the "first category" perpetrators of the genocide were prosecuted by ordinary courts and were sentenced to heavy sentences, including the death penalty,[73] before it was abolished in 2007.[74] It may happen, however, that in future another country ravaged by an internal conflict, such as Sudan,[75] will attempt to resort to a process similar to *Gacaca*. It is also possible that sentences imposed in that process would be much more lenient than those imposed by the *Gacaca* courts. For instance, the sentence of 3.5 years imprisonment may be reduced to 3 months imprisonment, and 3.5 years of community service may be reduced to 3 months of community service. Such proceedings would not be regarded as having been conducted with an intent to bring the person concerned to justice and, in particular if they

65 Out of the 785 judges that Rwanda had before the genocide, only 20 were still active after the genocide. Some had been killed during the genocide but the majority were in exile or were in prison on charges of genocide. Hauschildt *supra* note 63.

66 Hauschildt, *supra* note 63. Some say the trials could even take more than 200 years. Powers, *supra* note 50.

67 AllAfrica, 'Rwandan Gacaca Genocide Courts Considered a Success' (2012), available at http://allafrica.com/stories/201206190550.html (last visited 25 Sept 2013).

68 Under article 54(3)(20) of Organic Law n° 16/2004, for a guilty plea to be accepted that accused had also to "reveal the co-authors, accomplices and any other information useful to the exercise of the public action".

69 UN, *supra* note 46, para 144.

70 Hauschildt, *supra* note 63.

71 Government of Rwanda *supra* note 52.

72 Human Rights Watch, *supra* note 51, 2.

73 In 1998, 22 people found guilty of genocide were sentenced to death and executed. See W.D. Rubinstein, *Genocide* (2004), 292.

74 Amnesty International, 'Rwanda abolishes death penalty' (2007), available at http://www.amnesty.org/en/news-and-updates/good-news/rwanda-abolishes-death-penalty-20070802 (last visited 20 March 2013).

75 It is now alleged that war crimes and crimes against humanity have been committed in Darfur, Sudan, and it is on the basis of these allegations that in 2009 the ICC issued an international arrest warrant against President Omar Bashir. *The Prosecutor v Omar Hassan Ahmad Al Bashir Second Decision on the Prosecution's Application for a Warrant of Arrest* ICC-02/05-01/09-94 (12 July 2010).

were to be applied to the "first category"[76] offenders (which was not the case in Rwanda), the ICC would legitimately step in and order that some of the cases (the most responsible) be retried before it.[77]

The other exceptions to the *ne bis in idem* rule which should be introduced into the Rome Statute will now be discussed next.

III. PROPOSED REFORMS TO THE *NE BIS IN IDEM* PROVISION OF ARTICLE 20(3): SITUATIONS NOT CURRENTLY CONTEMPLATED IN THE ROME STATUTE

Situations that are discussed under this heading relate to two circumstances which do not fall under any of the two situations currently contemplated in the Rome Statute. First there may be a situation where the "proceedings" were genuinely conducted with an intent of bringing the person concerned to justice and an appropriate sentence was imposed but the person was later released from prison after serving only an insignificant part of his sentence. Secondly, there may be a case where subsequent to the acquittal of the accused new and compelling evidence is brought to light which clearly points to his guilt. In these two cases, given the nature and gravity of the crimes defined in the Rome Statute, and given the need of ending impunity and ensuring deterrence for those crimes, interests of justice demand that a second trial be opened before the ICC if such trial is not possible under the laws of the territorial State or if such State is unwilling or otherwise unable to conduct it. These two situations are discussed hereunder.

a. THE SENTENCE WAS IMPOSED BUT ONLY AN INSIGNIFICANT PART OF IT WAS SERVED

A situation where the accused was properly tried and sentenced to an appropriate punishment but then shortly released may materialise where, for example, the accused has been convicted and sentenced but then released from prison through executive measures such as presidential pardon,[78] or parole.[79]

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76 It is meant here the "most responsible" such as high-ranking government officials who plan and execute genocides, crimes against humanity and war crimes.

77 See also Carter, *supra* note 7, 195) where he says that "an extreme disparity between the sentence and the gravity of the […] crime of which the accused is convicted" may cause the proceedings to be viewed as "a sham trial".

78 Under section 84(2)(j) of the South African Constitution (1996), for example, the President of the Republic has the power to pardon offenders and remit any sentence imposed by a court. In Rwanda, the President has similar powers by virtue of article 236 of the *Code of Criminal Procedure* (*Law N° 30/2013 of 24/5/2013 Relating to the Code of Criminal Procedure*, Official Gazette n° 27 of 08 July 2013) which provides that: "The power to grant collective or individual pardon shall be exercised by the President of the Republic at his/her sole discretion and in public interests. Presidential pardon shall remit in whole or in part penalties imposed or commute them to less severe form of penalties".

79 Parole is a mechanism that allows for the conditional release of offenders from a prison into the community prior to the expiration of their entire sentences of imprisonment, as imposed by a court of law. In South Africa, parole is allowed by section 73(4) of the Correctional Services Act 111 of 1998 which provides that: "In accordance with the provisions of this Chapter a prisoner maybe placed under correctional supervision or on day parole or on parole before the expiration of his or her term of imprisonment". In Rwanda, the power to grant parole is entrusted to the Minister of Justice by article 245(1) of the *Code of Criminal Procedure* (*Law N° 30/2013 of 24/5/2013 Relating to the Code of Criminal Procedure*, Official Gazette no 27 of 08 July 2013) which reads as follows: "A person who is sentenced to one or several imprisonment penalties or placed under the Government's custody may be granted release on parole on the following conditions: 1° if he/she sufficiently demonstrates good behaviour and gives serious pledges of social rehabilitation; 2° if he/she suffers from serious and incurable disease approved by a medical committee composed of at least three (3) recognized doctors; 3° if he/she has already served his/her penalty for a period of time provided for under Article 246 of this Law depending on the offences of which he/she was convicted".

Presidential pardon and parole may be abused and used to "shield" convicted criminals from accountability.[80] This problem is far from being hypothetical. Schabas[81] gives the example of the case of an American soldier, Lt William Calley who, in the early 1970s, was convicted of war crimes for an atrocious massacre in My Lai village, Vietnam, in which around 500 civilians were savagely massacred by American soldiers under his command, and was duly sentenced to a term of life imprisonment but was then granted a pardon by President Richard Nixon after only a brief term of detention had been served.[82]

Another example may be the one of Schabir Shaik, a former business advisor to South African President Jacob Zuma, who had been sentenced to an effective 15 years' imprisonment for corruption and fraud on 8 June 2005 but was released on medical parole after serving two years and four months, allegedly suffering from life-threatening ("final phase") severe hypertension.[83] Some believe that the medical reasons advanced to release Mr Schabir Shaik from prison were mere pretence.[84] They argue that Shaik was never "terminally ill" and that he was released only because of his personal and business ties with President Zuma.[85]

The lesson that must be learnt from Lt William Calley and Schabir Shaik's cases is that trials are not enough to ensure that criminals are held accountable and that potential offenders are deterred from engaging in similar conducts in future. There must also be a legal framework that ensures that sentences are effectively executed.[86]

With respect to international crimes, the potential for abusing executive powers by releasing criminals from prison is even higher because international crimes are often committed by political leaders or on their behalf in pursuance of State policy.[87] A State that is under pressure from the international community[88] or from the ICC may institute a proceeding

80 G.S. Sisk, 'Suspending the Pardon Power during the Twilight of a Presidential Term', 67 *Missouri. Law Review* (2002), 1, 19 and D.F. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', 100 *Yale Law Journal* (1991), 2539, 2606.

81 Schabas, *supra* note 6, 204.

82 On 16 March 1968, US soldiers led by Lt William Calley entered the Vietnamese village of My Lai on a search and destroy mission during the Vietnam War. Under Lt Calley's orders, the soldiers massacred around 500 civilians, including women and children. Many of the victims were raped, tortured, and/or mutilated. Lt Calley himself shot down and killed large groups of civilians with a machine gun. J. Rosenberg, 'My Lai Massacre The Massacre Conducted by U.S. Soldiers in My Lai During the Vietnam War' (2013), available at http://history1900s.about.com/od/1960s/qt/mylaimassacre.htm (last visited 20 September 2013).

83 C. Bateman, 'Tighter medical parole - no more 'Shaik, rattle and roll", *South African Medical Journal* (2012), 210, 212.

84 See for example, S. Hlongwane, 'New medical parole board, new rules â?? Correctional Services moves to avoid another Shaik 'brouhaha''(2012), available at http://www.dailymaverick.co.za/article/2012-02-24-new-medical-parole-board-new-rules-correctional-services-moves-to-avoid-another-shaik-brouhaha/ (last visited 13 September 2013), and Bateman, *supra* note 83, 212.

85 Hlongwane *supra* note 84.

86 See also Finlay, *supra* note 7, 240: "A strict application of the *ne bis in idem* prohibition would not allow consideration of subsequent issues of enforcement, with 'jeopardy' attaching to the conviction itself. This may, however, conflict with broader notions of justice, since the subsequent failure to enforce a sentence - whether through granting a pardon, commutating a sentence, or granting parole would be clearly relevant when considering the overall punishment to which an individual has been subjected, and to the broader functioning of the criminal justice system".

87 J. Foakes, 'Immunity for International Crimes? Developments in the Law on Prosecuting Heads of State in Foreign Courts' (2011), available at http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/bp1111_foakes.pdf (last visited 13 September 2013), 2.

88 Such as Senegal in regard to the trial of former Chadian dictator Hissène Habré. See *Belgium v Senegal Questions Relating to the Obligation to Prosecute or Extradite* Judgement 2012 ICJ 422 (20 July 2012).

against the persons suspected of international crimes, convict them and send them to prison. However, as long as the government on behalf of which the crimes were committed is still in power, the convicted persons will stand a great chance to be released from prison very soon earlier than the interests of justice would otherwise require. In cases such as this there is need for an international forum where these criminals should be retried and appropriately punished.

The Rome Statute does not address this important question. The two admissibility thresholds in regard to the retrial of a case before the ICC concern only "proceedings"[89] which were conducted for "the purpose of shielding the person concerned from criminal responsibility"[90] or were otherwise "conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice".[91] These two provisions do not thus address the issue of a person who has been tried by an independent court and sentenced to an appropriately long term sentence but is later released from prison when, for example, a new government comes to power. If such a situation were to happen, it appears that the ICC would be barred from hearing such case for the purposes of ensuring that the person concerned is appropriately punished.[92] In the light of this fact, the admissibility threshold under article 20(3) of the Rome Statute should be extended to cover cases where the "proceedings" were conducted genuinely and a person was convicted and sentenced to a fitting sentence but only an infirm portion of the sentence was served.

It is not possible to provide precise criteria to determine when the period a person has passed in prison should be seen as an "insignificant part" of his sentence. But, it is submitted, a period that is less than the half of the sentence imposed by the court ought to be regarded as insignificant. Although international law does not prescribe to States the minimum length

89 Art 20(3) Rome Statute.

90 Art 20(3)(a) Rome Statute.

91 Art 20(3)(b) Rome Statute.

92 Schabas *supra* note 6, 204: "In a case where an individual is properly tried and convicted, but is subsequently pardoned, the Court would seem to be permanently barred from intervening". See also RD Evans 'Amnesties, Pardons and Complementarity: Does the International Criminal Court Have the Tools to End Impunity?' http://www.nottingham.ac.uk/hrlc/documents/publications/hrlcommentary2005/amnestiespardonscomplementarity.pdf (last accessed 12 October 2013): "it would appear that the ICC would be prevented from retrying a person if they were pardoned after a genuine trial and conviction" (at 6). For a contrary view see Finlay, *supra* note 7, 240-241: "It is, however, incorrect to conclude that the failure to adopt these exceptions means that the ICC will be inevitably barred from intervening in a case where an individual is convicted but then immediately pardoned. If a state fails entirely to enforce a criminal sentence that has been duly imposed by a national court, this may be evidence that the proceedings were not actually genuine and that they were, in fact, designed to shield the individual from criminal responsibility. The ICC would then be able to prosecute that individual on the basis of the exception provided for under Article 20(3)(a). In such a case, "criminal proceedings that have commenced in a wholly appropriate manner may turn into a *de facto* sham trial at the stage of enforcement. In this way, while not expressly apparent from the text of the Rome Statute, a member state's manifest failure to enforce a criminal sentence imposed by a national court may expose the individual concerned to subsequent prosecution by the ICC. This is a further example of the broad nature of the exceptions to the *ne bis in idem* prohibition within the Rome Statute and a further illustration of the considerable discretion that the ICC has in reviewing domestic proceedings".

of imprisonment that States must impose to persons guilt of international crimes,[93] it would be a mistake to say that international law is indifferent to the degree of severity of the penalties imposed and, as a matter of logic, served.

The obligation to impose appropriate sentences is specifically reflected, for example, in article V of the Genocide Convention which requires member States to enact legislation providing "effective penalties for persons guilty of genocide", and article 4 of the Torture Convention which requires States parties to make acts of torture "punishable by appropriate penalties which take into account their grave nature". Although these conventions do not prescribe specific terms of imprisonment, their intent is obviously that persons convicted of genocide and torture get sentences that reflect the gravity of the offences.[94] By analogy, the granting of pardon and the subsequent release of a person from prison before he has served a substantial part of the sentence (supposing that the sentence was itself appropriately long) would clearly deviate from a State's obligation under international law, and a second trial before the ICC would be a proper remedy. In the view of the present author, half of the sentence imposed should be an appropriate threshold.

Before passing to the next point, it is worth noting that in case of a second trial and conviction by the ICC, fairness would require that the sentence served at the domestic level be reduced from the sentence imposed by the ICC. This requirement of fairness is often expressed in the maxim *ne bis poena in idem*,[95] which provides that sentences already served by an accused for the same offence should be discounted in the imposition of any subsequent sentence relating to the that offence.[96]

b. NEW AND COMPELLING EVIDENCE IS BROUGHT TO LIGHT AFTER THE COMPLETION OF THE ORIGINAL PROCEEDINGS WHICH POINTS TO THE GUILT OF AN ACQUITTED DEFENDANT

The second situation where a retrial by the ICC of a person already tried for an international crime at a domestic level is needed and justified is where subsequent to that person's acquittal, new and compelling evidence is brought to light which undoubtedly points to his guilt.

The instances in which a situation of this kind may arise are many and various. Firstly, with the advances in recent years in scientific evidence, particularly DNA testing, it is now possible to obtain new and persuasive evidence which was not available at the time a person was tried and acquitted. Secondly, the person concerned may himself, subsequent to his

93 Orentlicher, *supra* note 80, 2604: "Even when international law establishes a duty to prosecute particular offenses, it generally leaves the determination of penalties to the discretion of national governments". See also D.F. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' in N. Kritz, *Transitional Justice*: *How Emerging Democracies Reckon with Former Regimes, Volume I: General Considerations* (1995), 411.

94 Orentlicher, *supra* note 80, 2605.

95 G. Conway, 'Ne Bis in Idem in International Law' 3 *International Criminal Law Review* (2003), 217, 226. In the legal literature, this principle is invariably referred to as the "accounting principle", the principle of "set-off", the principle of "deduction", or the principle of "taking into account". W.B. Bockel, *The Ne Bis in Idem Principle in EU Law: A Conceptual and Jurisprudential Analysis*, PHD-thesis, Leiden University (2009) 35. For a similar provision see art 9(3) of the Statute of the ICTR which provides that: "In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal for Rwanda shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served". The same article appears as art 9(3) in the Statute of the ICTY.

96 Conway, *supra* note 95, 241; Bockel, *supra* note 85, 35 and Finlay, *supra* note 7, 242.

acquittal, confess that he in fact committed the crime with which he was charged. Thirdly, any other type of evidence, a witness for example, may emerge after the person concerned has been acquitted and clearly point to the guilty of that person.

Despite the sound justifications for the rule against double jeopardy, a second trial would be justified.[97] From the accused person's rights perspective, the *ne bis in idem* fulfils three functions. First, the principle protects the accused against "abusive" and "ill-intentioned" prosecutions.[98] Secondly, the rule protects the accused against the anxiety and stress arising from multiple prosecutions.[99] Finally, recognising that the accused cannot have enough resources to fight an endless legal battle (the trial), the rule protects the accused against a potential wrongful conviction.[100]

It is submitted that a further exception to the *ne bis in idem* rule of the Rome Statute that allows a second prosecution before the ICC where new and compelling evidence is discovered may be accommodated in a way that does also care for the above functions of the rule. This can be achieved by limiting the exceptions only two situations where new evidence is most compelling and unequivocal. These are where the new evidence consists in scientific evidence, such as DNA testing, or confession from the accused person himself. In these two situations, the risks that ICC prosecutors could abuse their power by instituting malicious prosecutions against a specific person (or specific persons) as well as the risk of a wrong conviction are seriously minimised because of the quality of the evidence required. Scientific evidence is not easily manipulated and a confession cannot be easily fabricated. The anxiety and stress of a second trial are also minimised because of the accuracy of these types of evidence. In any event, it must also be kept in mind that the rights of the accused must be weighed against the rights of the victims to see justice being done and the international community's interest in deterrence of future crimes.[101]

97 Also see M. Kirby, 'Carroll, double jeopardy and international human rights law' (2003), available at http://www.michaelkirby.com.au/images/stories/speeches/2000s/vol52/2003/1880-DOUBLE_JEOPARDY_CLJ,_AUGUST_2003.doc (last visited 7 March 2015), 29: "An important reason, propounded for supporting a qualification or exception to the double jeopardy rule is the availability, in recent times, of DNA and other scientific evidence that may help to prove conclusively the guilt or innocence of an accused. […] This is a new ingredient. It was not available for the resolution of earlier disputes about guilt. A rational legal system, so it is said, will be adjusted to permit the new ingredient to be taken into account whether the jury verdict was guilty or not guilty".

98 D.S. Rudstein, 'Retrying the acquitted in England Part II: The exception to the rule against double jeopardy for 'tainted acquittals'', 9 *San Diego International Law Journal* (2008), 217, at 255 and Bernard, *supra* note 24, 3.

99 Rudstein, *supra* note 98, 246-249. See also Law Commision (New Zealand), 'Acquittal following perversion of the course of justice" (2001), available at http://www.lawcom.govt.nz/sites/default/files/publications/2001/03/Publication_77_166_R70.pdf (last visited 24 September 2013), 5.

100 *Green v United States* 355 US 188 (1957). See also D. Scheffer, 'Non bis in idem and the Rome Statute of the International Criminal Court' (2006), available at http://law.bepress.com/cgi/viewcontent.cgi?article=6282&context=expresso (last visited 12 September 2013), 3: "Its rationale lies principally in the need to protect individuals, with their limited access to resources, from being harassed through repeated prosecutions by the powerful state, with its access to extensive resources. It prevents the state from attempts to retry facts underlying an acquittal thereby limiting erroneous convictions which could flow from the fact that defendants do not have the resources and energy to fight against repeated and vexatious prosecutions".

101 Finlay, *supra* note 7, 224: "[w]hile it is important for a criminal justice system to include safeguards designed to protect innocent people from wrongful conviction, it is also important to ensure that guilty people are convicted and punished. A criminal justice system that manifestly fails in this regard will quickly lose public confidence and respect. To this end, both victims of crime and the wider community, in certain circumstances, may see the rule against double jeopardy as preventing justice from being done".

From the perspective of the sovereignty of the territorial State, the proposed exception would also take care of the primacy of such State in initiating and conducting trials of persons accused of international crimes (complementarity) by limiting itself to situations where a second trial is not possible under the laws of that State, or where the State is unable to conduct such a trial or is unwilling to conduct it. A situation where a second trial is not possible under the laws of the concerned state may be due to the fact that the protection against double jeopardy afforded to a person accused of a crime in that country is absolute to the extent that even if, after a final acquittal, the person in question confesses to the police that he committed the crime for which he was acquitted, a second trial is not possible.[102] The situation where the State is unable would include, for example, situations where owing to conflicts the judicial system is not able to properly investigate and try the person(s) accused concerned. Finally, the situation where the State is unwilling would cover situations where the State judicial machinery is perfectly functional but because of political influences the accused persons are not investigated and prosecuted. These three situations would fit into the logic of the complementarity regime of the Rome Statute: States Parties have primacy in conducting investigations and trials but, if they are unable or unwilling to conduct such investigations and trials, the ICC is allowed to step in to ensure that impunity for perpetrators of gross violations of human rights does not occur.

IV. CONCLUSION

This paper has been concerned with the question whether article 20(3) of the Rome Statute is sufficiently broad to allow the ICC, in accordance with its complementarity regime, to retrial persons who have already been tried in domestic courts of States Parties if a retrial of such persons is commanded by the interests of justice.

Under article 201(3) of the Rome Statute the ICC is allowed to conduct a second trial only when the "proceedings" at the national level were conducted for the purpose of "shielding the person concerned from criminal responsibility" or were otherwise conducted in a manner which, in the circumstances, was "inconsistent with an intent to bring the person concerned to justice". To sum up, both two above situations relate to instances where, at the time of trial, "proceedings" are not conducted with a genuine intent of punishing the person accused of an international crime. It was argued that this is a too restrictive approach to international crimes whose perpetrators are prosecuted at the national level. It was argued that article 20(3) of the Rome Statute should be amended to also empower the ICC to intervene and retry a person who has already been tried at the national level when, although the "proceedings" in the national courts were genuinely conducted and an appropriate sentence was imposed:

(1) the person concerned was later released from prison after serving only an insignificant part of his sentence; or,

(2) subsequent to the accused's acquittal, new and compelling evidence is brought to light which clearly points to his guilt. It was argued that a retrial in these two situations

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102 For example, it is said that the protection against double jeopardy enshrined in section 35(3)(m) of the South African Constitution (1996) is absolute. For instance, if A was previously acquitted on a charge of murder in respect of Y's death, he cannot be retried for the same offence if the prosecution finds fresh and compelling evidence that was not available or that was not known at the time of the first trial. A.M. Sorgdrager, *Law of Criminal Procedure and Evidence Casebook,* 2nd ed. (1997), 137.

is also needed in order to ensure that impunity for the most serious crimes is ended.

In order to ensure that the jurisdictional primacy of States Parties is not unduly violated, it was suggested that the proposed exceptions should be restricted to situations where:

(i) a second trial is not possible under the laws of the concerned State; or

(ii) the concerned State is not willing, or

(iii) unable to retry the concerned person.

Finally, it was suggested that in case of prior conviction and sentence, the sentence served at the country level, if any, should be deducted from the sentence to be imposed by the ICC. A deduction of the sentence already served at the domestic level would strike a fair balance between, on the one hand, the requirements of fairness to the accused and, on the other hand, the broader interests of the victims, the society and the international community at large.

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1996'S NON PARTY CARETAKER GOVERNMENT MOVEMENT AND THE ROLE OF OPPOSITION IN BANGLADESH: A POLITICO-LEGAL ANALYSIS

MOHD. MORSHEDUL ISLAM*

ABSTRACT : Role of opposition is very important in democracy. In parliamentary system opposition operates a parallel government for ensuring good governance in the country. In Bangladesh with the start of second inning of parliamentary system in 1991 people expected practice of peaceful democratic behaviour from the political parties. But opposition parties played reversed role in new system. Awami League, Jatiya Party and Jamaat-e-Islam seized the normal life of the people for executing their own political agenda. And in the name of ensuring voting right of the people they created unbearable atmosphere in the country and thereby forced the BNP government to adopt non-party caretaker government in the constitution. This paper is intended to show how opposition parties realized their illogical and irrational demand in the name of democratic movement in 1996.

KEY WORDS : Opposition Movement, Free and Fair Election, Caretaker government. Chief Adviser, Formula.

I. INTRODUCTION

With object of establishing good governance in the country, Bangladesh adopted parliamentary democracy in 1991. In democracy conflicting interest holders always employ all sorts of tricks and mechanisms to pursue their own values of life. As all the contending groups do not attain power simultaneously, at least some one has to play the role of opposition. In democracy opposition plays the role of a shadow government. In developing countries like ours, opposition political parties oppose all the actions-good or bad of the government. Not only that they create hindrance and bottlenecks to the way of economic growth and political stability of the country. In Bangladesh the moto of political parties is to give their party interest priority over national interest. After the unexpected loss in fifth parliamentary polls (the first free, fair and neutral election held under the auspices of Chief Justice Shahabuddin Ahmed) Awami League Chairperson Sheikh Hasina, the leader of the opposition, mentioning victorious party leader Khaleda Zia told the news media that her(Khaleda Zia) government should not be kept in peace for a single moment. With the aim of materializing this word AL leadership in cooperation with left political parties raised different issues and

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gave birth to some unnecessary movements in political arena making the economic and social life of the people as well as government pale. At the end in collaboration with autocratic ruler HM Ershad, President of Jatiya Party, and war criminal Golam Azam, Aamir of Jamaat-e-Islam, it forced the ruling BNP government to insert their agenda in the Constitution of Bangladesh in the name of ensuring the voting right of the people.. This dissertation is intended to synchronize different issues and movements of opposition which were launched to unsettle the democratically elected government and analyse the devastating role of opposition in materializing their irrational demand for caretaker government in 1996.

(a) TRIAL OF WAR CRIMINAL

All of a sudden immediately after handing over power by President Justice Shahabuddin Ahmed to President Abdur Rahman Biswas on October 10, 1991 AL leader Mr. Shamsul Huq Chowdhury former president of the Supreme Court Bar Association in a rally of Awami Jubo League held on November 11, 1991 at Bangabandhu Avenue urged the government to hold trial of the killers who had murdered the heroes of Bangladesh liberation war.[1]

AL MPs such as Abdus Samad Azad, deputy leader of the opposition, Salahuddin Yusuf, Azizur Rahman, Begum Matia Chowdhury, Sheikh Salim in the House on January 12, 1992 demanded the government to declare Jamaat-e-Islam Bangladesh illegal for having elected Prof. Golam Azam a non-national as it's Ameer. They suggested Golam Azam should be tried and hanged for crimes against humanity in Bangladesh during the liberation war.[2]

On March 24, 1992 Prof. Jahanara Imam, convener of Ghatak Dalal Nirmul Committee(Elimination Committee for Killers-Collaborators), meeting with AL Chairman sought her support for the trial of Golam Azam in the People's Court on March 26, 1992. AL President extended her whole hearted support to the Gono Adalat (People's court).[3] Accordingly they tried Golam Azam and gave him death penalty in people's court on March 26, 1992.[4]

On April 22, 1993 HC declared Prof. Golam Azam as the citizen of Bangladesh by birth.[5] Inspite of the verdict of the court AL sponsored Nirmul Committee on April 25, 1993 observed sit-in programme in front of the Ministry of Foreign Affairs in support of their demand for declaring Golam Azam non-citizen and execute the verdict of Gono-Adalat.[6] Although AL was dragging the government over Golam Azam issue but the court did not heed them. The HC on July 14, 1993 declared Azam's detention illegal and on July 15, 1993 the Appellate Division refused to give stay on the verdict of HC regarding the issue.[7] That means AL's movement against Golam Azam lost legal and moral basis.

(b) HONEYMOON PARTY

AL and Jamaat-e-Islam played a major role in toppling autocratic ruler Ershad through mass upsurge in 1990. AL organized and led a violent movement on war crime issue against Jamaat-e-Islam from October 11, 1991. JP stood by AL for this cause. As a result a bitter relation prevailed among these three political parties. Suddenly this enmity among AL. JP

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1 *The New Nation,* November 12, 1991
2 *Ibid*, January 13, 1992
3 *The Bangladesh Observer,* March 26, 1992
4 *Ibid*, March 28, 1992
5 *Ibid,* April 23, 1993
6 *Ibid,* April 26, 1993
7 *Ibid,* July 16, 1993

and Jamaat started melting and within a short period of time for political gain it turned into a honeymoon party.

(i) Corruption Allegation and Liaison between AL and JP

AL and its allies brought corruption charges against Agriculture, Water Resources and Irrigation Minister Mr. Major General (Retd) Majedul Huq in the parliamentary committee. But government cancelled the committee.[8] In response to that cancellation, AL and JP formed *entente* on July 12, 1993 with regard to their demand for revival of Joint Parliamentary Committee to investigate corruption charges against Mr. Majedul Huq.[9] In the face of AL, JP, and other left leaning opposition parties demand Speaker formed fifteen-member Parliamentary Probe Body to investigate the allegation of corruptions on July 13, 1993.[10] They (AL, JP, JSD, CPB, BSD, NAP, Ganatantrik Party, GanaAzadi League, Janata Dal, Democratic League, JAGPA, Ganatantrik Biplobi Jote) observed *hartal* on July 19, 1993 against government corruption.[11] Government denied allegation of corruption. But on November 14, 1993 PM Khaleda Zia sacked Mr. Akbar Hossain, Environment Minister for human trafficking.[12]

(ii) Demand for Caretaker Government

The 5-year term of office of BNP government was supposed to end in November 1995. Top level AL leaders for political gain decided to launch movement on the issue of polls under interim administration. Accordingly Sheikh Hasina in a public meeting held on November 20, 1993 said any future election under party in power would not be free and fair.[13]

On November 30, 1993 AL President Sheikh Hasina addressing a rally at Bangabandhu Avenue demanded next parliamentary polls under caretaker government. She said any *Jatiya Sangsad* polls under the ruling BNP government would not be free and fair.[14] On December 9, 1993 Prof. Golam Azam, Ameer of Jamaat, started singing with AL in matter of polls under caretaker government. He made it clear that there is no alternative to a caretaker government in order to hold a free, fair and impartial election. The Central Committee of Jamaat-e-Islami expressed their strong concern that next parliamentary election under BNP government would not be impartial.[15]

A question may arise here why all of a sudden AL and Jamaat-e-Islami, two bitter enemies, started talking in same language. Jamaat leadership might have agreed to assist AL and its allies in creating anti-government movement on the issue of polls under caretaker government and take part in that with AL perhaps to remove its pro-Pakistani role in the war of independence.

(iii) Formation of Combined Opposition

Opposition was boycotting the House from early March, 1994 for caretaker government issue. On May 4, 1994 all opposition political parties having seat in the House except Rashed Khan Menon from Bangladesh Workers Party and Maulana Obidul Huq from Islami Oikkya Jote formed combined opposition in a meeting arranged by AL. The meeting unanimously declared that henceforth they would be treated as combined opposition both in the House and outside the House under the leadership of Hasina.[16] After the meeting leader of the

8 *Ibid,* July 14, 1993
9 *Ibid,* July 13, 1993
10 *Ibid,* July 14, 1993
11 *Ibid,* July 20, 1993
12 *Ibid,* November 15, 1993
13 *The Bangladesh Observer*, November 21, 1993.
14 *Ibid*, December 1, 1993.
15 *Ibid*, December 10, 193
16 *Ibid*, May 5, 1994

Combined Opposition Sheikh Hasina told the reporters that PM Khaleda Zia had ignored the demand for holding general election under a neutral caretaker government.[17] Turning down opposition demand for election under caretaker government Finance Minister Mr. Saifur Rahman in a press conference held at Dhaka on May 7, 1994 said that caretaker government was not acceptable. Electoral process could be strengthened for making election free and fair.[18]

(iv) Three Party Liaison Committee

On January 24, 1996 three party liaison committee pledged to take all efforts and to apply all force to undo the February 15, 1996 *Jatiya Sangsad* polls. Accordingly they called 48-hour *hartal* on February 14 and 15, 1996.[19] Amid stiff violence by the opposition polls was held on February 15, 1996. Election officers were manhandled severely by the opposition workers. Voter lists, ballot papers and ballot boxes were snatched away and in some cases were burnt down by the anti-election forces before and during polling. Even a number of presiding officers were abducted. Opposition workers set fire in the house of BNP candidate and EC office in Chittagong.[20] Voter turnout was poor. CEC AKM Sadeque said 26.74 percent vote cast.[21] Polling was postponed in 84 constituencies and 213 MPs were elected. Of them 47 were elected unopposed. Final result depicted that BNP got 290 seats, Freedom Party and other Independent bagged the rest.[22] Due to violence and intimidation different election observer groups withdrew their manpower before election.[23]

(C) ALLEGATION OF MALPRACTICE IN VOTE

The opposition alleged that malpractice was used in November 15, 1991 UP polls, February 1, 1993 Pourashava election, January 30, 1994 City Corporation polls and by-elections of different constituencies in the year 1993 and 1994. It is interesting to note that Sheikh Hasina blamed of corruption for those results in which it lost but praised the one in which it won.

(i) By-election of Dhaka-11

Regarding Dhaka-11 by-polls suffocative atmosphere was seen between AL and ruling BNP. All the big-guns of both AL and BNP took part in the election campaign. Even PM Khaleda Zia cancelled her trip to France for this polls scheduled on February 2, 1993.[24] In the polls BNP candidate Syed Mohammad Mohsin won bagging 80127 votes.[25] On the other hand defeated AL candidate got 77535 votes. AL demanded recounting. On February 4, 1993 Mohammad Nasim, Chief Whip of the opposition, alleged that BNP had hijacked result sheets of by-polls in Dhaka-11 constituency. AL Chairperson said PM Khaleda Zia postponed her France visit to influence Mirpur by-polls held on February 2, 1993.[26] On February 5, 1993 Matia Chowdhury and K.M. Jahangir blamed government for tarnishing the independent character of the EC. On the plea of manipulating Mirpur by-polls AL observed countrywide *hartal* on February 6, 1993. Refuting AL claim LGRD Minister and BNP General Secretary

17 *Ibid.*
18 *The Daily Ittefaq*, May 8, 1994
19 *The Bangladesh Observer*, *the New Age* and *theDaily Star* January 25, 1996
20 *Ibid*, February 16, 1996.
21 *Ibid*, April 12, 1996.
22 See the Election Commission report of February 15, 1996 polls supplied by EC without date.
23 *The Bangladesh Observer*, January 15, 1996 See also *the Inqilab*of January15, 1996
24 *Ibid*, February 5, 1993, *the new Age* of February 5, 1993
25 *Ibid*, February 4, 1993, *the Daily Star* of February 4, 1993
26 *Ibid*, February 5, 1993, *the Janakantha* of February 5, 1993

Abdus Salam Talukder said there happened no such incident at all.[27] However in the face of stiff AL pressure EC on February 13, 1993 cancelled the Dhaka-11 by-polls result and ordered recounting of votes cast in 117 polling centres on February 15, 1993.[28] After recounting BNP candidate became victorious again. On the other hand AL reversing their demand asked for re-election. EC turned down this claim at once.[29]

(ii) Magura By-election

On February 12, 1994 Magura-2 parliamentary seat fall vacant due to the death of veteran AL leader Mr. Ashaduzzaman. EC announced March 20, 1994 for by-election of Magura-2 constituency. AL nominated Mr. Shafiquzzaman, the eldest son of the deceased MP Mr. Asaduzzaman to stand for by-election. BNP selected Kazi Saleemul Huq Kamal, a leading industrialist of the country as their candidate. EC initiated to form All Party Polls Observer Committee to monitor the election. But the effort failed due to disagreement between opposition and BNP. The CEC Justice Abdur Rouf had planned to stay at Magura to coordinate the pre-polls activities as well as to monitor the working of the EC officials on election-day. For that object he had a booking of guest-house at Magura from March 19 and 20, 1994. He landed in Magura on March 19, 1994 but in the evening he found that his booking was cancelled to the name of AL Chairman Sheikh Hasina. He could not manage any accommodation for him for the night. Finding no other alternative CEC had to leave for Dhaka on the night of March 19, 1994.[30]

Opposition leader Sheikh Hasina in a news conference held at Magura on March 19, 1994 told that minority people were being intimidated by BNP workers and they were out to snatch the Magura seat.[31] On the other hand Dr. Mosharraf Hossain, Abdul Mannan Bhuiyan, and Majedul Huq influential leaders of BNP in a press briefing held at party office, Dhaka refuting Hasina's claim said opposition workers were trying to intimidate the voters not to cast vote for BNP candidate.[32] On March 20, 1994 polls was held peacefully. No incident of confrontation or vote rigging was noticed. However the EC suspended polling in three polling stations in which AL musclemen tried to create problems.[33] The election result showed BNP candidate defeated AL candidate by 73248 to 39623 votes.[34]

AL and its political allies rejected outcome of the by-polls and accused the BNP government of committing vote dacoity in the by-election. Opposition leaders including Sheikh Hasina condemned the role of BNP government and said no election would be free and fair under this government. AL called *hartal* on March 23, 1994 in protest of vote hijacking.[35] On March 22, 1994 AL President demanded the cancellation of the result within seven days and announcement of new election date. On March 28, 1994 AL leader Shajeda Chowdhury said any polls under CEC Justice Abdur Rouf would not be fair.[36]

On January 22, 1995 Pourashava polls was held in Sylhet,Chandpur, Barisal and Shibganj. Deviating from their position AL candidate Badruddin Kamran won the Sylhet Pourashava,

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27 *Ibid*, February 9, 1993, *the Daily Star*, February 9, 1993
28 *Ibid*, February 14, 1993, *the Independent*, February 14, 1993
29 *Ibid*, February 16, 1993, *the New Age*, February 16, 1993
30 *Ibid*, March 20, 1994, *the Janakantha*, March 20, 1994
31 *Ibid*.
32 *Ibid*
33 *Ibid*, March 21, 1994, *the Inqilab*, March 21, 1994
34 *Ibid*, March 22, 1994, *the Ittefaq,* March 22, 1994
35 *Ibid*, March 21, 1994, *the Daily Star*, March 21, 1994
36 *Ibid*, March 29, 1994, *the New Age*, March 29, 1994

Mohammad Yusuf Gazi, District Jubo League leader, bagged the Chandpur Pourashavba.[37]

II. EFFORTS TO MEDIATE THE ISSUE OF CARETAKER GOVERNMENT

Opposition led by AL and BNP government both held two different views regarding caretaker government issue. Opposition demanded a solution over caretaker government beyond the constitution. Though government had not heed opposition demand yet it was looking for constitutional solution. These contradictory demands of both opposition and government had loomed a disastrous consequence in political and socio-economic stability of the country. Thus intellectuals, political leaders and international figures tried their best to bring opposition and government in one place for dialogue over caretaker government issue. Dialogues of different groups of people with the government and opposition were held simultaneously.

(i) First Initiative by Speaker

Speaker Sheikh Razzak Ali on June 4, 1994 took initiative to mitigate the difference between government and combined opposition over the issue of caretaker government and return to Parliament. As a part of that effort he met the leader of the combined opposition Sheikh Hasina and PM Khaleda Zia on June 6, 1994.[38] Referring the effort of the Speaker, Sheikh Hasina while addressing a public gathering held at Dhaka on June 7, 1994 said dialogue with PM Khaleda Zia would be held on the modalities of caretaker government.[39] On the other hand accepting the proposal PM on June 8, 1994 said discussion must be held in the House. Referring PM's call opposition leader said she would join the House if caretaker government bill was introduced in the House.[40]

(ii) Second Initiative by Speaker

On April 19, 1995 Speaker Sheikh Razzak Ali proposed summit between PM and opposition leader Sheikh Hasina to find out peaceful solution to the political crisis. But AL General Secretary Zillur Rahmman rejected that call.[41]

(iii) Mediation of Foreign Diplomats

Diplomats of USA, UK, India and other European countries brought leaders of opposition and government in one table for dialogue. They agreed to form twenty-member advisory council with ten from opposition and ten from government. But hectic discussion was going on the question of who would be the head of the interim government.[42] During dialogue Hasina offered live dialogue on TV with PM to resolve the crisis. Perceiving that offer a trick BNP rejected that. Consequently dialogue collapsed.[43]

(iv) Mediation by LDF

Watching the unmoved stand of both opposition and government Left Democratic Front leader Mr. Manjurul Ahsan Khan undertook steps to mitigate the political impasse.[44] Accordingly BNP General Secretary Abdus Salam Talukder held meeting with Chief Whip of the opposition Mohammad Nasim on August 27, 1994.[45] Deputy leader of the House Prof.

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37 *Ibid*, January 23, 1995, *the Independent*, January 23, 1995
38 *Ibid*, June 7, 1994, *the New Age*, June 7, 1994
39 *Ibid*, June 8, 1994, *the Daily Star*, June 8, 1994
40 *Ibid*, June 9, 1994, *the daily Star*, June 9, 1994
41 *Ibid*, April 20, 1994, *the Independent*, April 20, 1994
42 *Ibid*, December 22, 1995, *the Indepence*, December 22, 1995
43 *Ibid*, December 25, 1995, *the Inqilab*, December 25, 1995
44 *Ibid*, August 9, 1994, *the Janakantha*, August 9, 1994
45 *Ibid*, August 28, 1994, *the Ajker Kakoj*,August 28, 1994

A.Q.M, Badruddoza Chowdhury held discussion with Abdus Samad Azad, deputy leader of the opposition on August 31, 1994.[46] As a part of their initiative BNP General Secretary Abdus Salam Talukder and deputy leader of the House Prof. A.Q.M. Badruddoza called on Jamaat General Secretary Matiur Rahman Nizami on September 4, 1994. During the meeting Jamaat Secretary said his party would not move an inch from its stand on caretaker government.[47] They also held talks with JP Secretary Mizanur Rahman Chowdhury on September 5, 1994. JP emphasized on its demand for caretaker government along with the release of their president H.M. Ershad.[48]

While the parley was going on AL and its honeymoon partner Jamaat, JP observed Dhaka Seize on September 10, 1994 and 72-hour *hartal* from September 11 to 13, 1994 for their cause and their leader Hasina said her party would fight to establish voting rights of the people.[49] On the other hand A.Q.M. Badruddoza Chowdhury said that no power could dethrone elected government.[50] As a result mid level dialogue ended due to cool response of the opposition.

(v) Mediation by Commonwealth Secretary

In spite of opposition *hartal* and seize programmes Bangladesh was heading towards economic emancipation. The foreign powers became hopeful of potential economic outburst in Bangladesh. Perhaps for that reason for astonishing growth in the economic field Bangladesh was called as emerging tiger in South Asia. Whatever may be told the foreign powers were fearful of the confrontational politics of the opposition and government. They wanted peaceful solution to the crisis. Perhaps that's why Commonwealth Secretary General Emeka Anyaoku while visiting Dhaka took initiative to defuse this political deadlock. Before starting proceedings he on September 17, 1994 in an interview with press said, "I think free and fair election is possible under the present government if there is further strengthening of the EC, formulating of an election code of conduct for all political parties and allowing the Commonwealth observation team well ahead of polls."[51] He held discussion with both ruling BNP and major opposition political parties on September 19, 1994 and expressed possible solution to the difficulties with regard to holding free and fair election in democracy. However government and opposition stood on their respective position.[52]

On September 26, 1994 Commonwealth Secretary prepared an agenda for dialogue between government and opposition. The agenda included– strengthening of the EC, the question of caretaker government and proposals for an overall code of conduct to guide political activities. It also stipulated that both parties to the dialogue would make joint statement at the end of each setting regarding the progress of the dialogue and there would be no other comment on that.[53] Both BNP and opposition accepted the agenda. But senior *Nayeb-e-Ameer*[54] of Jamaat Mr. Abbas Ali Khan denounced this dialogue saying it as interference into country's internal affairs.[55]

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46 *Ibid*, September 1, 1994, *the Inqilab*, September 1, 1994
47 *Ibid*, September 5, 1994, *the Ajker Kakoj*, September 5, 1994
48 *Ibid*, September 6, 1994, and see chapter 4.7.1
49 *Ibid*, September 11, 1994, *the Daily Star*, September 11, 1994
50 *Ibid*,
51 *Ibid*, September 18, 1994, *the New Age*, September 18, 1994
52 *Ibid*, September 20, 1994, *the New Nation*, September 20, 1994
53 *Ibid*, September 27, 1994, *the Janakantha*, September 27, 1994
54 Vice-President
55 *The Daily Star*, September 29, 1994

In order to facilitate the dialogue Sir Ninian Stephen, a special envoy of Commonwealth General Secretary, arrived at Dhaka on October 5, 1994. He in an interview with journalists on October 14, 1994 said, "I am not a mediator but a facilitator. I came here to facilitate the dialogue between political parties. I am anxious to see the two leaders arrive at a consensus."[56] He called upon Sheikh Hasina and Khaleda Zia on October 14 and 15, 1994 respectively and expressed his positive outcome to the dialogue.[57] The Commonwealth sponsored dialogue between government and opposition began on October 20, 1994. Opposition was represented by Zillur Rahman, AL General Secretary, Mr. Abdus Samad Azad, deputy leader of the opposition, Mr. Tofael Ahmed, AL Standing Committee member, Mr. Matiur Rahman Nizami, Jamaat General Secretary, Barrister Moudud Ahmed, Acting President of JP.[58]

Barrister Abdus Salam Talukder, BNP General Secretary and LGRD Minister, Barrister Nazmul Huda, Information Minister, Prof. A.Q.M. Badruddoza Chowdhury, deputy leader of the House, Oli Ahmed, and Barrister Zamiruddin Sirkar participated in the talk on behalf of the government.[59] On October 25, 1994 on the fifth day of dialogue the dialogue broke down owing to the rigid stand of both parties. On October 27, 1994 PM Khaleda Zia while addressing Jubo Dal National Conference said that BNP was pledged bound to uphold Constitution.[60]

On October 28, 1994 Jamaat Ameer Golam Azam while addressing a rally in Sylhet said that caretaker government was a must to ensure voting right of the people. He urged the government to accept caretaker government with a view to holding a free and fair election.[61] On October 29, 1994 deviating from its earlier position BNP proposed interim government under PM Khaleda Zia for holding free and fair polls.[62] Combined opposition rejected that proposal on October 30, 1994.[63]

On November 1, 1994 AL president Sheikh Hasina addressing a huge public gathering held at Manik Mia Avenue, Dhaka threatened the government to accept caretaker government otherwise they would resign from JS. On the other hand BNP proposed a 10-member interim government headed by incumbent PM Khaleda Zia for holding free and fair election. Of the ten four were offered to Opposition.[64] This proposal was also rejected by opposition. On November 16, 1994 PM said political crisis might be solved within constitutional framework.[65]On November 17, 1994 opposition proposed interim government under technocrat PM.[66] On the other hand government proposed 10-member interim government under PM Khaleda Zia. However it agreed to give five members to the opposition. Opposition rejected the offer and called off its representatives from the dialogue. Consequently dialogue failed.

On November 20, 1994 Sir Ninian Stephen accused the opposition of failure of dialogue. He said though dialogue failed yet government was willing to accept Commonwealth proposal.[67] However on the eve of departure on November 21, 1994 he expressed positive hope that Bangladesh will overcome political crisis.[68]

56 *Ibid*, October 15, 1994
57 *The Bangladesh Observer*, October 15 and 16, 1994
58 *Ibid*, October 21, 1994
59 *Ibid*
60 *Ibid*, October 28, 1994
61 *Ibid*, October 29, 1994, *the Daily Star*, October 29, 1994
62 *Ibid*, October 30, 1994, *the New Age*, October 30, 1994
63 *Ibid*, October 31, 1994, *the Independent*, October 31, 1994
64 *Ibid*, November 10, 1994, *the Inqilab*, November 10, 1994
65 *Ibid*, November 17, 1994, *the New Age*, November 17, 1994
66 *Ibid*, November 18, 1994, *the Ajker Kakoj*, November 18, 1994
67 *Ibid*, November 21, 1994, *the Ajker Kakoj*, November 21, 1994
68 *Ibid*, November 22, 1994, *the Inqilab*, November 22, 1994

Immediately after his (Sir Ninian Stephen) take off US Ambassador David N. Merill and UK High Commissioner Peter J-Fowler called upon Sheikh Hasina on November 22, 1994 and asked her to carry forward the ongoing dialogue to solve the political *impasse* for Bangladesh's own democratic process and its economic march towards progress.[69]

Under the circumstances it was heard that Commonwealth Secretary took another step to mitigate the difference between government and opposition. But AL and JP on December 10, 1994 rejected his (Emeka Anayoku) overture initiative for dialogue.[70]

(vi) Mediation by Three Party

Rashed Khan Menon from BWP, Moulana Obaidul Huq from Islami Oikkya Jote and Shamsuddoha from Gono Forum took initiative for resolving the deepening political crisis through dialogue on December 13, 1994. Accordingly on December 21, 1994 Speaker Sheikh Razzak Ali undertook step to bring the opposition on table to pacify the crisis. But his effort was bogged down on question of acceptance or rejection of the concept of caretaker government. However PM accepted the offer but asked the Speaker to specify the concrete demand of the opposition before dialogue started.[71]

(vii) Effort to Solve Political Crisis by Civil Society

In the meantime in order to find out an acceptable solution to the political deadlock on the issue of caretaker government National Democratic Foundation arranged a round table conference with some renowned constitutional and political experts viz, Barrister Istiaque Ahmed, T.H. Khan, President of SC Bar Association, Barrister Amirul Islam, Barrister Asrarul Hossain, Barrister Moinul Hossain, Dr. Rafiqur Rahman on July 28, 1995. All the discussants opined for constitutional amendment to accommodate opposition demand. They said there was no alternative to dialogue for resolving the crisis. On July 28, 1995 Barrister Ishtiaq proposed 10-member council would be nominated by both the ruling and opposition parties for contesting the next by-election. These individuals could constitutionally form caretaker government. T.H. Khan said there was no guarantee that a free and fair election would be held under caretaker government. There was lack of tolerance and voters could be easily purchased.[72] Dr. Rafiqur Rahman said that constitution did not say anything about caretaker government. Denouncing opposition Barrister Moinul Hossain said that there was no alternative to holding the democratic constitution for making their political leaders conform to democratic values and ways.[73]

(viii) US Government Mediation

Perceiving uncertain and violent political future US President Bill Clinton on August 16, 1995 sent Mr. Robin Lynn Raphel, US Assistant Secretary for South Asian Affairs to Dhaka with a special mission to resolve the long-drawn political *impasse* and thereby help Bangladesh move onward smoothly on democratic path.[74] AL President Sheikh Hasina called on US special representative Mr. Robin Lynn Raphel over the issue of caretaker government and tried her best to convince him of their movement. On September 7, 1995 US special envoy called on PM Khaleda Zia and expressed her futility in removing the differences between government and opposition.[75]

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69 *Ibid*, November 23, 1994, *the Independent*, November 23, 1994
70 *Ibid*, December 11, 1994, *the Daily Star*, December 11, 1994
71 *Ibid*, December 24, 1994, *the New Age*, December 24, 1994
72 *Ibid*, July 29, 1995, *the Janakantha*, July 29, 1995
73 *Ibid*
74 *Ibid*, August 17, 1995, *the Inqilab*, August 17, 1995
75 *Ibid*, September 8, 1995, *the Ajker Kakoj*, September 8, 1995

In the meantime under relentless efforts of US Ambassador David N Merill the lost dialogue was revived again on December 31, 1995. In the dialogue Barrister Salam Talukder, BNP General Secretary, Mr Shamsul Islam, Commerce Minister and Abdul Mannan Bhuiyan represented BNP and Amir Hossain Amu, AL presidium member, Tofael Ahmed AL leader and Anwar Hossain Monju JP represented opposition. The two sides haggled over who would be the head of interim government after Khaleda's resignation. Opposition put two pre-conditions on January 3, 1996 one was Advisory Council headed by a chief advisor and another was deferring the election date.[76] On the other hand BNP delegates offered Advisory Council headed by president.[77]

In the meantime as a part of a dialogue initiated by US Ambassador BNP negotiators proposed ten-member (five from government. and five from opposition) Advisory Council headed by the president. The proposition also laid down that President shall enjoy the power of Prime Minister for the interim period after PM's resignation. This proposal was communicated to Hasina through US Ambassador Devid N Merill on January 14, 1996.[78] Opposition leader Sheikh Hasina rejected the proposal.

(ix) Mediation Offer by PM

On October 14, 1995 PM Khaleda Zia addressing a public gathering held at Nachol, Chapai Nawabganj offering dialogue to Hasina said that she would invite her (Hasina) on tea to discuss political deadlock.[79] Rejecting PM's call Hasisna threatened if government failed, opposition would form caretaker government. Prof Gholam Azam asked government to accept caretaker government to avert *hartal*.[80] In order to die down the political crisis PM Khaleda Zia sent two letters through Abdul Mannan Bhuiyan to AL chairperson Hasina inviting her for dialogue. But she refused that offer.[81]

On November 26, 1995 PM Khaleda Zia talked to Hasina over telephone to solve the crisis. PM said she was ready to talk on any issue within constitution. On the other hand Hasina asked her to resign and help form caretaker government. As a result, conversation ended in smoke.[82]

On March 3, 1996 PM Khaleda Zia took oath as PM for second term. She on the same day in a nationwide speech offered a 3-point package proposal to solve the political crisis quickly and effectively. The proposals were as follows- [83]

1) A non-party government will be formed to function during all national election in future;

2) A bill will be introduced in the first session of the sixth parliament to amend the constitution in this regard; and

3) The election to the seventh parliament will be held within shortest possible time. Thereafter a referendum will be held according to the constitution.

Sheikh Hasina rejected the proposal straightway.[84]

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76 *Ibid*, January 4, 1996, *the Daily Star*, January 4, 1996
77 *Ibid*
78 *Ibid*, January 15, 1996, *the Independent*, January 15, 1996
79 *Ibid*, October 15, 1995, *the Daily Star*, October 15, 1995
80 *Ibid*
81 *Ibid*, November 4, 1995, *the Ittefaq*, November 4, 1995
82 *Ibid*, November 27, 1995, *the Independent,* November 27, 1995
83 *Ibid*, March 4, 1996, *the New Age*, March 4, 1996
84 *Ibid*

(x) Mediation by Five-eminent Citizens

Five eminent intellectuals namely Barrister Istiaque Ahmed, Justice Kamal Uddin Hossain, Prof. Rehman Sobhan, Mr. Fakruddin Ahmed and Mr. Faez Ahmed met twice with PM to find out peaceful solution to the crisis. But their effort did not get air because of stubborn nature of the opposition.[85]

III. FORMULA OF CARETAKER GOVERNMENT

During three year long caretaker government movement opposition, government, political parties and intellectuals proposed several formulas to the caretaker government issue for holding free, fair and neutral election. These formulas were not unanimous. Each was different from other. But each formula was intended to protect the interest of their respective proposer.

(i) First Formula of Caretaker Government

Combined Opposition leader Sheikh Hasina in the presence of opposition MPs on June 27, 1994 unveiled their formula of caretaker government. It called for the appointment of a non-partisan acceptable person as PM on the basis of recommendation of parties in movement. It also laid down a caretaker government is to be appointed after dissolution of parliament by the President. The sitting PM Khaleda Zia would have to resign after such dissolution. The caretaker PM would appoint a cabinet from among persons who would not contest in *Jatiya Sangsad* polls and conduct the election.[86]

Referring that formula Information Minister Barrister Nazmul Huda on July 23, 1994 said that the concept of caretaker government was unconstitutional and confusing.[87] On August 8, 1994 AL president added some proposition to the formula. She proposed caretaker government provision for holding free and fair election should be inserted in constitution for 15-years and also proposed ordinary bill to further strengthen the EC.[88]

(ii) Huda-Jaman Formula

Sheikh Hasina on November 24, 1994 called for ousting government movement in order to materialize caretaker government. Consequently Barrister Nazmul Huda, Information Minister, without the knowledge of BNP leadership proposed an interim government manned by Appellate Division Judges for holding free and fair conduct of future elections. But he and Major (Retd) Akhtaruzzaman were suspended from party on the ground of violating party discipline.[89]

(iii) Proposal for Strong EC and Voter ID Card

While the opposition were demanding for caretaker government, government emphasized on strong EC and voter identification card in its place. On November 30, 1994 Parliament passed laws granting more power to EC and with regard to issuance of voter ID card to all voters. Referring the laws Sheikh Hasina on December 1, 1994 said empowered EC is not substitute to caretaker government.[90]

(iv) Fourth Formula of Caretaker Government

Immediately after the *enmasse* resignation of the opposition Sheikh Hasina outlined the new formula of caretaker government in the following language-

85 *Ibid*, November 2, 1995, *the Daily Star*, November 2, 1995
86 *Ibid*, June 28, 1994, *the Janakantha*, June 28, 1994
87 *Ibid*, July 24, 1994, *the Ajker Kakoj*, July 24, 1994
88 *Ibid*, August 9, 1994, *the Inqilab*, August 9, 1994
89 *Ibid*, November 25, 1994, *the Dailt Star*, November 25, 1994
90 *The Daily Star*, December 2, 1994

1) There shall be resignation of the PM and dissolution of Parliament to pave the way for holding next general election under a non-partisan caretaker government.

2) The President shall appoint an interim PM from among the sitting or retired judges of the Supreme Court. A small council of advisers shall also be appointed to run the emergency business of the state.

3) The interim government will hold power until a new PM is appointed by the President after the general election.

4) Neither the PM nor the advisers could seek election.

At the end she said the process through which interim government will be formed could be ratified by the next parliament.[91] Rejecting opposition proposal PM Khaleda Zia said, "We have to go by constitution." However she offered to step down from her post 30 days before the election.[92] Opposition leader Hasina rejected the offer.[93]

(v) Fifth Formula

On September 6, 1995 in a new development AL, JP, and Jamaat simultaneously asked the government to form caretaker government with Chief Justice as Head of that government[94]

(vi) Sixth Formula

On September 17, 1995 BNP General Secretary Abdus Salam Talukder made a new offer of dialogue and proposed that PM will resign before the formation of interim government.[95] On the other hand Sheikh Hasina said there required no constitutional amendment to accommodate caretaker government demand. Experts such as Barrister Ishtiaq Ahmed, Dr. Kamal Hossain, Barrister Mainul Hossain, etc termed her proposal a rubbish one.[96] On September 26, 1995 JP General Secretary Mizan proposed a new formula for caretaker government to the Home Minister Mr. Matin. The proposal was- the President first shall dissolve the Parliament and at his request the PM and his cabinet will resign. Thereafter he shall appoint a neutral person in consultation with the political parties as PM.[97]

(vii) Ishtiaq-Kamal Formula

On August 2, 1995 Barrister Istiaque Ahmed and Dr. Kamal Hossain met PM and proposed 10-member caretaker government with equal representation from both sides. These members could be elected uncontested in the by-election on the basis of agreement. This body could hold credible election without amending constitution.[98] On August 3, 1995 Jamaat Ameer Golam Azam proposed '90 model caretaker government. He in an interview with BBC on August 14, 1995 rejected Ishtiaq-Kamal formula, and termed it a drama and impracticable.[99]

IV. CARETAKER ISSUE AND MOTIVE OF AL

In the name of caretaker government AL president Sheikh Hasina demanded resignation of the BNP government and on July 27, 1994 in a huge public gathering held at Dhaka declared anti-government movement enchanting "Aeik dhafa aeik dabi Khaleda tui kobe jabi

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91 *Ibid*, December 29, 1994
92 *Ibid*, December 30, 1994
93 *Ibid*, January 11, 1995
94 *Ibid*, September 7, 1995
95 *Ibid*, September 18, 1995
96 *Ibid*, September 24, 1995, *the New Age,* September 24, 1995
97 *Ibid*, September 27, 1995, *the New Age*, September 27, 1995
98 *Ibid*, August 3, 1995, *the Inqilab*, August 3, 1995
99 *Ibid*, August 15, 1995, *the Daily Star*, August 15, 1995

(one point one demand Khaleda, when will you go)."[100] English version of the statement appears to be a simple and humble remark whereas in Bangla it is used in a derogatory sense.

(i) Caretaker Issue and Motive of JP

Though Jatiya Party had been giving full hearted support to AL led non-party caretaker government for holding free and fair election yet its intrinsic objective was to free their party chairman H.M.Ershad. On September 3, 1995 JP General Secretary Mizanur Rahman Chowdhury said that ceaseless movement against the BNP government would ensure the release of H.M. Ershad.[101]

V. PUBLIC OPINION AND OPPOSITION MOVEMENT

For the cause of caretaker government the combined opposition observed Dhaka Seize on September 10, 1994,[102] 72-hour *hartal* from September 11 to 13, 1994. Hasina said her party would fight to establish voting rights of the people.[103] Prof. Golam Azam on July 29, 1994 said election under party government would not be fair. He said government might have to face an ignominious exist if it did not concede to their demand.[104] On May 30, 1994 Dr. Kamal Hossain, president of Gono Forum, said that caretaker government was no guarantee for free polls.[105]

But people as a whole did not like opposition stand and programme. On November 14, 1994 Mr. Anthony Baldry, MP and British Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, expressed that destructive activities of the opposition would create political uncertainty and instability which would hamper foreign investment. Bangladesh had huge potential in foreign investment. She should not spoil that potentiality by creating uneasy political chaos in the country through *hartal*, blockade and seize.[106]

Condemning *enmasse* resignation by the opposition retired Chief Justice and ex-Acting President Shahabuddin Ahmed on January 31, 1995 said premature dissolution of Parliament will be tragic for the democratic and parliamentary system of government.[107]

On September 6, 1995 in a new development AL, JP, and Jamaat simultaneously called 72-hour *hartal* from September 16 to 18, 1995 in support of their proposition.[108] On September 14, 1995 the High Court in reply to the petition of Abu Bakar Siddiqui issued a rule upon the opposition political leaders to explain within two weeks why their 72-hour *hartal* call from September 16 to 18, 1995 should not be declared illegal.[109]

The business delegates urged Sheikh Hasina not to call *hartal* or blockade very often and requested her to solve the political crisis through dialogue.[110]

Condemning opposition *hartal* US State Department said, "Threat of violence without political will makes *hartal* a success."[111] Though common people as well as foreign

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100 *Ibid*, July 28, 1994, *the Janakantha,* July 28, 1994
101 *Ibid*, September 4, 1995, *the Independent*, September 4, 1995
102 *Ibid*, September 11, 1994, *the Ajker Kakoj*, September 11, 1994
103 *Ibid*, September 11, 1994.
104 *Ibid*, July 30, 1994,
105 *Ibid*, May 31, 1994, *the Ittefaq*, May 31, 1994
106 *Ibid*, November 15, 1994, *the New Age*, November 15, 1994
107 *Ibid*, February 1, 1995, *the Janakantha,* February 1, 1995
108 *Ibid*, September 7, 1995, *the Independent*, September 7, 1995
109 *Ibid*, September 15, 1995, *the Daily Star*, September 15, 1995
110 *Ibid*, April 7, 1995, *the New Age*, April 7, 1995
111 *Ibid*, September 10, 1995.

governments condemned destructive policy of the opposition yet in order to make *hartal* a success opposition activists-AL, JP and Jamaat started stripping off dresses of the office bound persons in broad daylight during 72-hour *hartal* started from September 16 to 18, 1995. Such type of acts of the picketers revealed the heinous and barbarous lust for power of the opposition.[112] She (Sheikh Hasina) called 96 hour *hartal* from October 16, 1995. [113] In protest of *hartal* and for peaceful solution to the explosive political crisis leaders of Bangladesh Garment Manufacturers and Exporters Association went on token hunger strike on November 9, 1995.[114] The chairman of editorial board of the Daily Ittefaq, Barrister Moinul Hossain criticizing opposition said what they earned through blood they did not maintain. He indicated democratically elected government. Dr. Kamal Hossain condemned AL for its alliance with anti-liberation force (Jamaat) and anti-democratic party (JP).[115] Former chief justice Habibur Rahman denouncing opposition demand said that constitution could not be changed by a group of people.[116]

(i) *Enmasse* Resignation and Order of High Court

Sheikh Hasina on December 6, 1994 put an ultimatum to the government to accept their demand by December 27, 1994 or they would resign *enmasse* on December 28, 1994.

While the opposition threatened to *enmasse* resignation the High Court on December 11, 1994 declared their ongoing JS boycott illegal and unconstitutional. The court also asked the boycotting MPs to attend parliamentary session. It is worthy to mention that some Anwar Hossain Khan filed a writ petition challenging JS boycott by combined opposition illegal on November 9, 1994. Justice Monwaruddin heard the case.[117] This judgment discredited opposition movement. Perhaps such verdict hurt the opposition. That's why bomb was exploded at the residence of Justice Monwaruddin on December 11, 1994.[118] According to earlier declaration 147 MPs of Combined Oppositions resigned from the Parliament on December 28, 1994 *enmasse*.[119]

(ii) Speakers Ruling on *Enmasse* Resignation

On February 23, 1995 Speaker Sheikh Razzak Ali rejected *enmasse* resignation of 147 opposition MPs fifty seven days after their resignation. However, he accepted resignation of JP President H.M. Ershad, Democratic League President Salauddin Quader Chowdhury and AL MP Mr. Dabirul Islam. In his 29-page judgment Speaker said that he was clearly of opinion that the resignation letters which contained reasons opposed to the very concept of democracy and contrary to the fundamental principles of state policy were not contemplated by article 67(2) of the Constitution. Quoting different provisions of constitutions of different countries particularly India and Pakistan he said there were various anomalies in the resignation letter of the opposition MPs in the light of article 67(2) of the constitution and section 177 of the Rules of Procedure of the *Jatiya Sangsad*. He said an MP could resign his

112 See *the Ittefaq*, *Inqilab* and *Bangladesh Observer* of September 17, 18, 19 of 1995
113 *The Inqilab*, September 29, 1995
114 *The Bangladesh Observer*, November 10, 1995
115 *Ibid*, December 16, 1995
116 *Ibid*, January 6, 1996
117 *The Bangladesh Observer*, December 12, 1994. See the case *Anwar Hossain Khan* vs. *Combined Opposition MPs (1994)*, date November 10, 1994.
118 *Ibid*
119 *Ibid*, December 29, 1994, *the Daily Star*, December 29, 1994

seat in writing under his hand addressed to the Speaker and should not give any reason for his resignation.[120]

(iii) Revolt of Government Officers

Dissatisfaction surfaced in secretariat over the transfer of Mr. Mahiuddin Khan Alamgir, a secretary, to a junior post and alleged manhandle of Deputy Commissioner of Sylhet by Deputy Minister of Health Sirajul Huq. The BCS Administration Association put several demands, viz. a) Immediate cancellation of current appointment of Dr. Mahiuddin Khan Alamgir and reappointing him to a post equivalent to the rank of secretary, b) Cancellation of the appointment of journalist Gias Kamal Chowdhury as Economic Minister of Bangladesh High Commission in London, c) Apology from the Deputy Minister of Health Sirajul Huq for his alleged misbehaviour with Deputy Commissioner of Sylhet, and d) Filling up of all vacant post in administration. On May 29, 1995 they threatened to resort to direct action against government if demands were not met by June 8, 1995.[121]

(iv) Parliament Boycott and Court Ruling

In spite of declaring *enmasse* resignation of the opposition void by the High Court and Speaker they did not join parliament. The Speaker became confused regarding the status of the boycotting MPs. That's why on July 4, 1995 Speaker referred the question of continuous boycott of parliament by opposition MPs through President to the Appellate Division under article 107 of the constitution and sought opinion on article 67(1) (b) of the constitution. The President asked four questions namely:-[122]

1) Can the walkout and consequent period of non-return by all the opposition parties taking exception to a remark of a ruling party minister be construed as absent from parliament without leave of parliament occurring in article 67(1) (b) of the constitution?

2) Does boycott of the parliament by all members of the opposition parties mean "absent" from the parliament without leave of parliament within the meaning of article 67(1)(b) of the constitution?

3) Whether ninety consecutive sitting days be computed excluding or including the period between two sessions intervened by prorogation of parliament within the meaning of article 67(1)(b) read with the definition of sessions and sittings defined under article 152(2) of the constitution.

4) Whether the Speaker or Parliament will compute and determine the period of absence.

In order to make opinion on those questions Chief Justice formed a larger Bench consisting of (1) Chief Justice A.T.M Afzal (2) Justice Mostofa Kamal (3) Justice Latifur Rahman (4) Justice Abdur Rouf and (5) Justice Ismailuddin. The court appointed S.R. Poul, Barrister Dr. Kamal Hossain, Barrister Istiaque Ahmed as *Amicus Curiae* on the questions.

After hearing experts' opinions the court drew the following conclusion:-[123]

1) walkout or boycott means absence;

2) speaker is to compute days of absence;

3) Reassembled House is to be informed of vacancy.

According to that verdict 87seats of the parliament fall vacant on July 30, 1995. The

120 *Ibid*, February 24, 1995, *the Daily Star*, February 24, 1995
121 *Ibid*, May 30, 1995, *the Janakantha*, May 30, 1995
122 *Ibid*, July 5, 1995
123 *The Bangladesh Observer*, July 28, 1995

CEC A.K.M. Sadeque said EC would hold by-election in these vacant seats.[124] On the other hand JP General Secretary Mizanur Rahman Chowdhury on August 3, 1995 vowed to thwart the by-election at any cost.[125]

(v) Non-cooperation and *Janatar Mancha*

In order to materialize their demand AL, JP and Jamaat called non-cooperation and *gherao* (Seize) programme simultaneously from February 24-28, 1996.[126] During non-cooperation opposition leaders and workers became mad in destruction of public and private buildings, motor vehicles-cars and properties to create anarchy and jungle rule in the country. On February 29, 1996 Hasina called for non-stop non-cooperation from March 9, 1996 until fall of government.[127]

During the non-cooperation movement dissatisfaction of secretariat turned into anti-government movement and it extended cooperation to opposition non-cooperation movement. President of Officers' Coordination Council of the Republic and Planning Commission Member Dr. Mohiuddin Khan Alamgir and General Secretary of Bangladesh Sangjukta Karmachari Parishad Syed Mohiuddin in a joint statement on March 29, 1996 called upon all government officers in the Secretariat to join the non-cooperation movement.[128] On March 28, 1996 some government officers observed sit-in programme inside the secretariat and enchanted anti-government slogans. Some of these officials not only actively joined the "Janatar Mancha(Public Stage)" an anti-government stage built up by and under direct auspices of Dhaka Mayor and veteran AL leader Mohammad Hanif on February 26, 1996 but also gave speeches against the government violating the Government Servants(Conduct) Rules, 1979.[129]

(vi) Election Commission and Sixth Parliamentary Polls

On November 5, 1995 EC announced its preparation for holding bye lection by December 16, 1995 to carry out constitutional responsibility. However, in order to create chaos and to make election questionable AL president demanded new voter list because current voter list was procured by BNP government.[130] After such call CEC on November 6, 1995 postponed EC's activities for holding by-election to avoid bloodshed.[131]

After the dissolution of fifth parliament on November 24, 1995 CEC A.K.M Sadeque on December 3, 1995 declared that sixth parliamentary election would be held on January 18, 1996. Opposition rejected the election schedule and in protest on December 9, 1995 opposition activists burnt down Chittagong EC office.[132] On the request of AL, JP and Jammat he shifted election date from January 18 to February 7, 1996.[133] Not only that EC also on December 17, 1995 extended voter enrolment time at the request of the opposition.[134] CEC AKM Sadeque on December 30, 1995 announced that armed forces would be deployed for forty days from

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124 *Ibid*, July 31, 1995, *the New Age*, July 31, 1995
125 *Ibid*, August 4, 1995, *the Ajker Kakoj*, August 4, 1995
126 *Ibid*, February 27, 1996, *the Daily Star*, February 27, 1996
127 *Ibid*, March 1, 1996, *the Inqilab,* March 1, 1996
128 *Ibid*, March 30, 1996, *the New Age,* March 30, 1996
129 *Ibid*, March 29, 1996, *the Janakantha,* March 29, 1996
130 *Ibid*, October 29, 1995, *the Ajker Kakoj*, October 29, 1995
131 *Ibid*, November 7, 1995*, the Independent*, November 7, 1995
132 *Ibid*, December 10, 1995, *the New Nation*, December 10, 1995
133 *Ibid*, December 16, 1995, *the New Nation,* December 16, 1995
134 *Ibid*, December 18, 1995, *the Daily Star*, December 18, 1995

January 1 to Feb 9, 1996 at every district and thana for maintaining law and order.[135]

But opposition called 48-hour *hartal* on January 7 and 8 to resist the submission of the nomination paper.[136] It is necessary to mention that according to Constitution EC was bound to hold general election by February 22, 1996. In case of failure BNP government would have faced legitimacy crisis. However, in the hope of accommodating all political parties in election CEC for the second time shifted election date from February 7 to February 15, 1996.[137] On January 14, 1996 he urged President to arrange a meeting between Khaleda Zia and Hasina.[138]

But Sheikh Hasina on January 15, 1996 called on the people to boycott February 15, 1996 polls.[139] The leaders of AL, JP and Jamaat on January 19, 1996 called *hartal* on February 15, 1996. Accordingly on January 21, 1996 opposition withdrew their nomination paper and vowed to resist polls.[140] However, election was held without the participation of major political parties amid *hartal* and opposition resistance on February 15, 1996.

VI. INSERTION OF NONPARTY CARETAKER GOVERNMENT IN THE CONSTITUTION

Being forced by the opposition movement sixth parliament materialized the opposition demand in the constitution by thirteenth amendment. The main provisions of the amendment were-

(i) Insertion of Article 58A

Thirteenth amendment included a new article 58A which asserted the legality and validity of the non-party caretaker government in defiance of all the provisions of the constitution. It said that the executive action of the non-party caretaker government should be taken in the name of President and its business should be operated according to the rules and regulations made by President. It also said no question should be raised in any court against any action of this government. President should have the right to call emergency meeting of Parliament if any emergency situation occurred.[141]

(ii) Inclusion of Chapter IIA

Thirteenth amendment inserted a new chapter titled IIA. Article 58B explored the general idea of non-party caretaker government and said "A nonparty caretaker government shall be formed with Chief Adviser (CA). It shall be formed only when Parliament is dissolved as a result of expiration of its term. It lasts until new Prime Minister enters upon his office. It shall be collectively responsible to the President. CA shall act in accordance with the advice of his Advisers."[142]

Article 58C described composition of non-party caretaker government and said "Nonparty caretaker government shall be constituted of eleven members including CA. It shall be appointed within the period of fifteen days from the date of dissolution of Parliament. CA shall be the last retired Chief Justice of Bangladesh. If he is not available the second last retired Chief Justice shall be appointed as CA. It he is not available then the last retired Justice of the Appellate Division shall be appointed as CA. It he too is not available then

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135 *Ibid*, December 31, 1995, *the Janakantha,* December 31, 1995
136 *Ibid*, January 5, 7, and 8 of 1996, *the Inqilab*, January 5, 7 and 8, 1996
137 *Ibid*, January 9, 1996, *the Daily Star*, January 9, 1996
138 *Ibid*, January 15, 1996, *the Daily Star*, January 15, 1996
139 *Ibid*, January 16, 1996, *the New Age*, January 16, 1996
140 *Ibid*, January 22, 1996, *the Inqilab*, January 22, 1996
141 See Act No. 1 of 1996 published in official Gazette on March 28, 1996
142 *Ibid*

second last retired Justice of the Appellate Division shall be appointed as Chief Adviser. If he is not available then the person selected by political parties on the basis of consensus shall be appointed as CA. If such consensus person is not found then president shall assume this post in addition to his normal function. It said that advisers should possess the qualification of an MP. They shall not have any political affiliation. They shall not stand in the ensuing election. They shall not be above seventy two years of age. Advisers shall be appointed by the President on the recommendation of CA. A member of nonparty caretaker government shall resign at any moment by writing under his hand addressed to the President. They shall cease office if they become disqualified. CA shall enjoy the status of Prime Minister and an Adviser shall have the status of a Minister. CA shall get remuneration of a Prime Minister. An Adviser shall receive the remuneration of a Minister. This provision gave emphasis heavily for neutral CA on highest judiciary. As a result it opened the door of politics in highest judiciary.

Article 58D said "nonparty caretaker government shall carry out day to day function and shall not take any policy decision. However it shall give all possible aid and assistance to the EC for arranging and holding free, fair parliamentary election peacefully, fairly and impartially." This provision gave caretaker government absolute power for holding general election peacefully, fairly and impartially.

Article 58E gave President enormous power which he could not exercise in the presence of Prime Minister. During the tenure of nonparty caretaker government President had no restriction to assert any power even the declaration of emergency. Though CA enjoyed the status of Prime Minister yet President was not bound to abide by his advice.

(iii) Amendment of Article 61

After twelfth amendment executive power was transferred to Prime Minister. Though President is the head of state and supreme command of defense lies with the President yet he is to act according to the advice of Prime Minister. Though CA enjoyed the status of Prime Minister yet he was not entrusted with this power of defense force. President was given the charge of defense force during nonparty caretaker government.[143] By this it revealed that elected government did not believe in the motive of the non-elected temporary government.

(iv) Amendment of Article 99

Judges were allowed to hold CA's or Adviser's office. Although constitutionally judges of the highest court were not to hold any office of profit after retirement but both civil and military governments put judges in the state power. AL appointed justice Abu Sayeed Chowdhury as President on January 23, 1972, Khaled Mosharraf brought Abu Sadat Mohammad Sayem in statepower on November 6, 1975, Abdus Sattar was made Vice-President by Zia in 1977, Ershad made Ahsanuddin Chowdhury President on March 26, 1982. Thirteenth amendment legitimized this unconstitutional practice by allowing judges of the highest court to hold CA's and Adviser's office.

(v) Amendment of Clause (3) of Article123

A new clause (3) was inserted in article after (2) in article 123 which said Parliamentary election should be held within ninety days from the date of its dissolution."[144] This provision gave emphasis on the non-party caretaker government for holding of Parliamentary polls within ninety days from its dissolution.

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143 See Act No.1 of 1996 published in official gazette on March 28, 1996

144 *Ibid*

VII. CARETAKER GOVERNMENT AND MEMBERS OF *JANATAR MANCHA*

On March 29, 1996 PM requested President to form caretaker government under the constitution.[145] Accordingly on March 30, 1996 PM Khaleda Zia resigned and former Chief Justice Habibur Rahman was sworn in as Chief Adviser.[146] On April 3, 1996 10-member Advisory Council was appointed with the following persons:- [147]

1) Barrister Istiaque Ahmed;
2) Prof. Mohammad Yunus;
3) Prof. Md. Shamsul Huq;
4) Mr. Shagufta Bakht Chowdhury,
5) Mr. A. Z. M Nasiruddin;
6) Major General(Retd) Abdur Rahman Khan;
7) Dr. Wahiduddin Mahmud;
8) Mr. Manjur Elahi;
9) Dr. Nazma Chowdhury; and
10) Mr. Zamilur Reza Chowdhury.

On April 1, 1996 BNP Chairperson Khaleda stressed the need for purging the administration to ensure a free and fair election.[148] BNP General Secretary Barrister Abdus Salam Talukder on April 3, 1996 said that for fair election neutral administration was a must. But Chief Adviser put the pro-AL government officials who had directly taken part in "*Janatar Mancha*" during non-cooperation movement of the opposition to responsible government post.[149] On April 17, 1996 Khaleda Zia uttered a strong warning against the inaction of the caretaker government to take punitive measures against bureaucrats who had joined the AL sponsored movement. She said that these officials should be punished for the sake of neutral approach of the caretaker government. If caretaker government failed to deal with these identified partisan officers her party would launch movement against the government.[150] In spite of BNP threat CA did not take any action against the law trespasser pro-AL government officials. Rather on April 25, 1996 he just asked the government officials to act neutrally.[151]

Watching the cool response of CA towards law defiant pro-AL government officials Mr.Asaduzzaman Ripon, Editor of weekly "the Janatar Dak" and president of National Democratic Foundation on May 7, 1996 filed a writ petition demanding punitive action against bureaucrats who took part in non-cooperation movement. He said Dr. Mohiuddin Khan Alamgir, Saifur Rahman, Faruq Sobhan, Syed Ahmed, Waliul Islam, Alamgir Faruq Chowdhury, Azizur Rahman, Sirajuddin Saiful Alam, Shahjahan Siddiqui (Bir-Bikram), Shah Alam, Abdul Mannan, Serajul Huq, Abdul Hye, Enamul Kabir, Khan Mohammad Nurul Huda, Abdus Sattar Khan, B. Karim and Abu Alam Shahid Khan violated the provisions of Rules 25 and 29 of the Government Servants (Conduct) Rules 1979 by attending meeting on March 25, 1996 in the Secretariat premises and by joining the political podium called "*Janatar Mancha*" created by Bangladesh AL in front of National Press Club from March 20 t0 30, 1996 and making speeches and expressing solidarity with the non-cooperation movement of the opposition political parties. The High Court issued rule restraining the Principal Secretary to

145 *Ibid*, March 30, 1996, *the Janakantha*, March 30, 1996
146 *Ibid*, March 31, 1996, *the Ajker Kakoj*, March 31, 1996
147 *Ibid*, April 4, 1996, *the Independent*, April 4, 1996
148 *Ibid*, April 2, 1996, *the Ittefaq,* April 2, 1996
149 *Ibid*, April 4, 1996, *the Daily Star*, April 4, 1996
150 *Ibid*, April 18, 1996, *the Inqilab*, April 18, 1996
151 *Ibid*, April 26, 1996, *the New Age*, April 26, 1996s

the CA and eight DCs from performing their functions for next ten days and called upon the government, 19 high government officials and EC to show cause within one week as to why a direction should not be issued upon the Secretary of Establishment Division to initiate disciplinary proceeding against them under Government Servant (Appeal and Discipline) Rules, 1985 on charge of misconduct.

The court also wanted to know why a direction should not be issued to cancel the posting of Syed Ahmed, Principal Secretary to the CA, Saiful Alam, DC and Returning officer of Faridpur, Shahjahan Siddiqui, DC and Returning Officer of Nilphamari, Shah Alam, DC and Returning Officer of Rangamati, Serajul Huq, DC and Returning Officer of Kushtia, Khan Mohammad Nurul Huda, DC and Returning Officer of Comilla, Abdus Sattar Khan, DC and Returning Officer of Tangail, Abdul Mannan, DC and Returning Officer of Bhola, and Enamul Kabir, DC and Returning Officer of Mymensingh for their involvement in anti-government movement.[152] Defying the court order Chief Adviser kept these known faced partisan government personnel in important government's posts and Election Commission, and on May 8, 1996 he asserted government firm commitment to hold fair polls.[153] Here one can easily construe the soft allegiance of CA Habibur Rahman to AL. However, on May 12, 1996 Appellate Division suspended the application of High Court Order.[154]

VIII. ATTEMPT OF MILITARY COUP AND AL

On May 18, 1996 President gave two high ranked army officers forced retirement and on May 20, 1996 Army Chief of Staff Lieutenant General Abu Saleh Mohammad Nasim was removed from the Army because of arranging coup against the government. It is alleged that Colonel (Retd) Tajul Islam, a diehard AL leader, was behind this plot. It was also claimed that AL wanted to form national government under the leadership of Sheikh Hasina if the coup would have been succeeded.[155] Since AL's plot to attain power by coup was foiled by President Abdur Rahman Biswas, Sheikh Hasina on May 23, 1996 demanded the transfer of Ministry of Defense from President to CA during caretaker government. Admiring the role of expelled coup leaders she said on May 25, 1996 the removed army officers were trying to protect democracy and fair election. She accused President of conspiring against democracy by removing Army Chief Mohammad Nasim and other high ranking army officers who marched from Bogra and Mynmensingh cantonment with their forces on May 20, 1996.[156] Such type of plan of AL top leadership diminished the object of their long cherished caretaker government movement. Critics upheld that AL was not for free and fair election rather it was interested in attaining power through creating chaos and anarchic situation in the country with the aid of JP and Jamaat which had their own goals in the movement. Jamaat achieved its goal in protecting it's Ameer Golam Azam from the clutches of and anguishes of AL. And JP demanded their leader's release at any cost. Perhaps for that reason BNP Chairperson Khaleda Zia on May 25, 1996 accused AL of attaining power through other means except polls.[157]

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152 See the writ petition filed by Mr. Asaduzzaman Ripon, Editor of the weekly "*Janatar Dak"* on May 7, 1996. See *the Bangladesh Observer* of May 8, 1996

153 *The Bangladesh Observer*, May 9, 1996

154 See the order of Appellate Division on Janatar Mancha case published in *the Bangladesh Observer* on May 13, 1996

155 Major General(Ret) M. A. Matin, Beer Pratik, PSC, *Amar Dekha Bartha Sena Avvurthan 96*, First edition, 2001, Dhaka, pp- 55, 69, 108,

156 *The New Nation*, May 26, 1996

157 *Ibid.*

(i) Seventh Parliamentary Polls June 12, 1996 and Chief Adviser

CEC Abu Hena in order to avoid controversy regarding the publication of election results declared that polls result would be announced from EC not from polling centres.[158] However, on June 8, 1996 a survey conducted by the New Nation published that BNP would get 113 seats, AL 80, JP 24 and Jamaat 22 in June 12, 1996 polls.[159] On June 9, 1996 CEC asserting his pride of power said, "None can even the President be able to hijack election result."[160] On June 12, 1996 seventh parliamentary polls was held amid rigging. Jamaat leaders accused AL and Khan Mohammad Nurul Huda, DC of Comilla of vote rigging in Comilla district.[161] BBC reported that vote rigging was rampant in 60 polling centres in Rangpur District. The leaders of National Democratic Institute, association of foreign observers said polls was free and fair.[162] BNP accused AL and the administration of vote rigging in 111 constituencies. BNP officially brought charges of voting irregularities on June 16, 1996.[163] It is necessary to mention that most complaints of voting irregularities were made against election officials who had taken part in "*Janatar Mancha*." Ignoring BNP allegation EC published results of 273 seats by gazette notification.[164] Not only that EC violating its own election code of conduct for unknown reason on June 17, 1996 abolished Election Enquiry Bodies without taking any step for pacifying the allegation of voting irregularities by government officials.[165] Re-polling was held in 27 seats on June 19, 1996 and after the result AL bagged 146 seats, BNP 116, JP 31, Jamaat 3, Islami Oikkyo Jote 1, JSD 1, and Independent 1. [166]

(ii) Election Victory and Release of Ershad

JP supported AL in forming government in return of the release of their president H.M. Ershad on June 23, 1996.[167] Thus AL attained state power in the name of non-party caretaker government movement.

IX. CONCLUSION

Desired goal of democracy depends on the practice of secularised political culture by the government and opposition. But opposition AL tainted the sacred role of democratic opposition in Bangladesh. In the name of movement it maligned Bangladesh judiciary by staging war crime trial in public against the chairman of Jamaat-e-Islam. It hampered normalcy in public life by orchestrating movement on government's corruption. At the end violating all norms and values of democratic movement, it in coordination with its arch enemy Jatia Party and Jamaat-e-Islam raised non-party caretaker government movement in the plea of guaranteeing voting right of the people. It suffocated the life of common masses and blocked the socio-economic and political development of the country for realizing this demand. In spite of accommodating opposition demand in the constitution opposition AL did not stop playing negative match in politics. In democracy such type of ugly role of opposition is not pleasant for a stable socio-economic and political development of the country. It is a bad sign for Bangladesh democracy no doubt.

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158 *Ibid* , June 3, 1996
159 *Ibid*, June 9, 1996
160 *Ibid*, June 10, 1996
161 *Ibid*, June 13, 1996
162 *Ibid*
163 *Ibid*, June 17, 1996
164 *Ibid*
165 *Ibid*, June 18, 1996
166 The result of seventh Parliamentary polls supplied by EC without date
167 *The Bangladesh Observer*, June 24, 1996

CHANGING CONTOURS OF MEDICAL NEGLIGENCE IN INDIA

HUMAYUN RASHEED KHAN*

ABSTRACT : Carelessness, callous approach, absent mindedness and lack of reasonable care and caution has always been looked down in human affairs as human beings are supposed to use human acumen and intelligence which is a unique gift of nature to Homo sapiens. In law, carelessness may prove costly if taking reasonable care is a duty. Carelessness on the part of a medical practitioner may be dangerous to human life and results in medical negligence. This paper highlights different nuances of medical negligence in India which developed fast over last few decades.

KEY WORDS : Ethics, Profession, Negligence, Hospitals, Vicarious Liability.

I. INTRODUCTION

A person struggling between life and death or his relatives look towards a doctor with divine expectation though the reality is that such a doctor himself is in search of divine grace as much as the patient or his relatives are at the time of treating critical cases or performing critical surgeries. It is this reason due to which we most often find in hospitals written words ''Doctor treats, God cures'' or ''Doctor operates, God saves''. A doctor, at times, may be confronted with making choice between the devil and the deep sea and he has to choose the lesser evil.[1] The profession of treating physical or mental injury or suffering has, therefore, gained respect from all corners of the society since time immemorial. A physician, apart from being a healer, has been looked upon by the masses as a role model of grace personified. Unfortunately this image has now been transformed to a mere service provider. This can partly be attributed to doctors themselves because of increasing number of cases involving doctors engaging in unethical practices for greed. Consequently medical professionals have over the period of time lost the confidence of their patients and the society.

There is no doubt that the doctor- patient relationship is a pious relationship and a doctor certainly performs a divine act, at times, in the same manner as a judge does. However, in this increasingly materialized and consumerist society, patients have been largely reduced to the position of mere consumers and most of the doctors have brought themselves down to the position of mere service providers. Undoubtedly the number of medical negligence cases against doctors, hospitals and nursing homes in the consumer forum are increasing day by day.[2]

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1. *Jacob Mathew* v. *State of Punjab & another* (2005) 6 SCC 1 : (2005 AIR SCW 3685).
2. *Balram Prasad* v. *KunalSaha* (2014)1 SCC 384.

The Supreme Court of India while discussing medical negligence in a recent judgment observed that doctors, hospitals, the nursing homes and other connected establishments are to be dealt with strictly if they are found to be negligent with the patients who come to them pawning all their money with the hope to live a better life with dignity. The patients irrespective of their social, cultural and economic background are entitled to be treated with dignity which not only forms their fundamental right but also their human right.[3]

The relationship between doctor and his patient falls within the zone of relations ubrema- fides and responsibility of a doctor for the safe custody of his patient's confidential records is the same whether they are kept in conventional manners or in a computer. A doctor who commits confidential medical information to a computer or some other form of data recording machine must bear in mind that he is responsible ultimately for the results of his decision. Before such information is recorded he must satisfy himself that disclosure will be possible only to the persons and to the extent that he has decided and those persons from whom he has the assurance of confidentiality are both competent and trustworthy.

When we look to find out as to what constitutes medical negligence, we well have to first look into the meaning of negligence in general. In fact, it is carelessness leading to harm to someone in legal parlance which is called negligence. It means carelessness in a matter in which the law mandates carefulness within reasonable limits. Negligence as a tort is a breach of a legal duty to take care which results in the damage to the claimant.[4] A breach of this duty gives a patient the right to initiate action against the physician.

In fact, the jurisprudential concept of negligence differs in civil and criminal law. For negligence to amount to an offence, the element of *mens rea* must be shown to exist. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.[5] Persons who offer medical advice and treatment implicitly state that they have the skill and knowledge to do so as they have the skill to decide whether to take a case, to decide upon the likely course of the treatment, and to administer that treatment.[6] This is known as an "implied undertaking" on the part of a medical professional.

It cannot be held that doctors can never be prosecuted for medical negligence. When they perform their duties with ordinary degree of professional skill and competence, they cannot be held guilty of medical negligence. It is imperative that the doctors must be able to perform their professional duties with free mind.[7]The civil society has to ensure that doctors are not unnecessarily harassed or humiliated so that they may perform their professional duties without fear or apprehension. The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill competence and in the interest of patients as the interest and welfare of patients has paramount importance.[8]

A doctor is said to be not negligent if he is acting in accordance with the practice accepted as proper by a reasonable body of medical men skilled in that particular art.[9] The law relating to medical negligence has travelled a long way in India and doctors may be held liable for their services individually or vicariously unless they come within the exceptions

3. Ibid.
4. Winfield & Jolowicz on Tort, 18th Edition (London : Sweet & Maxwell 2010), p.150.
5. Supra note. 1, para. 48.
6. *VenkateshIyer* v. *Bombay Hospital Trust*, 1978 (2) TAC 820 (Bom).
7. *Kusum Sharma* v. *Batra Hospital and Medical Research Centre*, AIR 2010 SC 1050.
8. Ibid.
9. *Bolam* v. *Friern Hospital Management Committee* (1957) I WLR 582 : (1957) 2 All ER 118 (Queen's Bench Division- Lord Justice McNair.

specified in the case of *Indian Medical Association v. V P Shantha*.[10] Doctors are not liable for their services individually or vicariously if they do not charge fees. Thus, free treatment at a non-government hospital, governmental hospital, health center, dispensary or nursing home would not be considered a "service" within the purview of Consumer Protection Act.[11]

II. ETHICAL DIMENSIONS OF DOCTOR- PATIENT RELATIONSHIP

Medical profession differentiates itself from other professions as in this profession apart from the knowledge and skills; touch of humanity is also required. In fact, medical professionals have always been given highest degree of respect by the common man for the service they render towards the mankind. Even though the patient knows that he is suffering from an incurable disease, he derives solace under the care of the treating physician, whom they see as their savoir.

A medical professional applies his or her knowledge and skill in diagnosing and treating an ailment. However the degree of skill and knowledge may vary from person to person depending upon their experience and other factors.[12]

The doctor-patient relationship has always been one of the trust and doctors have enjoyed that trust in the past. But with increasing awareness among the patients, their expectations have also risen. This is evident from the fact that after inclusion of medical profession under the ambit of Consumer Protection Act, we have seen the spurt in the number of cases against the doctors. The possible reasons which can be considered responsible are: (i) lack of human feeling towards the patients, (ii) high expectation of the people, (iii) commercialization of the medical services, (iv) doctors criticize their own colleagues and (v) difficult patients who conceal facts deliberately or by mistake.

The basis of the relationship between a doctor and his patient is that of absolute confidence, and the success of medical treatment depends to a large extent upon the confidence which the patient reposes in his medical attendant and this confidence in turn depends upon the doctor's discretion. Until recently it was generally believed that any information obtained by a doctor during the course of his professional relationship with his patient was sacrosanct and that, except under compulsion of law, such information could not be disclosed to the third party without the consent of the patient or, in case of child, without parental consent.[13] It is generally recognized that in the public interest there may be circumstances in which the doctor may feel that his duty to the community should override his ethical obligation to maintain professional secrecy. For instance, he may feel that he is under a moral and social obligation to disclose to the licensing authority the physical condition of a patient if his condition is such as to render him unsafe to drive a car. The nature of professional confidence varies according to the form of consultation or examination, but in each of three forms of relationship the doctor is responsible to the patient or the person with whom he is in a professional relationship for the security and confidentiality of information given to him.[14]

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10. AIR 1996 SC 550.
11. See Section 2(1)(o) of *the Consumer Protection Act*, 1986
12. Supra note. 4, pp. 1058-1060.
13. Ibid.
14. Taylor's *Principles and Practice of Medical Jurisprudence*, eds. by A. Keith Mant, 13th Edition (New Delhi : B.I. Churchill Livingston, 1984).

Disciplinary proceedings may be taken against a doctor where it is alleged that he has improperly disclosed information which was obtained in confidence from or about a patient. Furthermore, if a patient could show that his doctor had, by breach of professional secrecy, brought upon him a loss that could be assessed in money, he might be entitled to damages. His plea would be that the understanding between him and the doctor to observe the universally recognized custom of professional secrecy. When a doctor is in doubt about a matter that may have legal implication he should consult his medical defense organization.[15]

In fact two crucial facets central to the doctor-patient relationship are confidentiality and consent. The right to confidentiality stems from an individual's right of privacy which, in turn, is implicit in the right to life and liberty guaranteed by Article 21 of the Constitution. In medical terms, this can be described under two heads – autonomy privacy freedom to make certain decisions about what happens to one's own body and informational privacy to keep the personal information private. Such confidentiality may be breached in certain exceptional cases such as for the protection of patients against a communicable disease or specific risks, if the patient is suffering from certain sexually communicable diseases to inform others including the sexual partner who would then be bound under the same obligation of confidentiality.

III. CONSENT, CARE, CAUTION AND LIABILITY IN MEDICAL ACTS

Consent is material to all medical treatments, with the exception of emergent medical care, when consent can be waived. The basis for recognizing consent to medical treatment is the individual's right to autonomy or self-determination. Two or more persons are said to consent when they agree upon the same thing in the same sense[16]. Consent is fundamental and established principle in the Indian law which is of two types- implied or express and it has three basic aspects such as voluntariness, knowledge and competence of person giving it. Every person has the right to determine what shall be done to his body. It is not merely consent which is necessary but it must also be an informed consent. The patient must consent to the treatment after understanding the nature of the treatment. It is considered an informed consent if before giving it, the patient havs some information about the procedure itself. In the absence of adequate consent of the patient or his near one, a doctor might face the risk of proceedings for assault or causation of injury if any complication arises from such medical procedure. Self-defense of body[17] provides right to the protection of bodily integrity against invasion by other. All medical procedures, including examinations, diagnostic procedures and medical research on patients potentially acts of bodily trespass or assault in the absence of consent or statutory section[18]**.** Treatment and diagnosis cannot be forced upon anyone who does not wish to receive them except in statutory situation.

The Helsinki Declaration of 1964 also made it compulsory to take free consent for any medical research too. The legal implication of consent first came in vogue in United States in 1914 in *Schloendorffv. Society of New York Hospital Case*[19], when a patient was operated upon for tumor without his wish, Justice Benjamin Cardoza wrote in his opinion "every human being of adult years and sound mind has a right to determine what shall be done with his own body and the surgeon who performs operation without his (patient's) consent

15. Jhala& Raju's *Medical Jurisprudence* 6th Ed. Revised by R.M Jhala& K. Kumar (Lucknow : Eastern Book Company, 1997)
16. See Section 13 of *Indian Contract Act*, 1870
17. See Sections 96, 102, 104, 106 of *Indian Penal Code*, 1860
18. See Section 351 of *Indian Penal Code*, 1860
19. 211 N.Y. 125, 105 N.E. 92.*Schloendorff* v. *Society of New* York Hospital. 1914.

commits assault for which he is liable in damages." This landmark opinion established the concept of consent as an integral part of the most fundamental precept for respect of a person's bodily integrity. The actual phrase "informed consent" entered American jurisprudence in 1957 in a California medical malpractice case.

It would be pertinent to mention that in *Salgo v. Leland Stanfordetc .Bd. Trustee*[20], a patient's legs were paralyzed when his physician performed aortography to locate an obstruction in his abdominal aorta. Apparently, the physician giving treatment had not informed the patient about the risk in the procedure. The Court observed that "a physician violates his duty to his patient and subjects himself to liability if he holds any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment."

In English medical jurisprudence a doctor may only carry out a medical treatment or procedure which involves contact with a patient if there exists a valid consent by the patient or another person authorized by law to consent on his behalf or if the touching is permitted notwithstanding the absence of consent." [21]

The doctor has a duty to maintain secrecy regarding any information relating to his patient. In a case *Mr 'X' v. Hospital 'Z'*, a disclosure was made by the hospital in question as to patient's condition (happened to be HIV+ was challenged on the ground that such disclosure is against the code of medical ethics. The court observed that the patient's suffering from a dreadful disease AIDS deserve full sympathy. They are entitled to all respects as human beings. Their society cannot, and should not be avoided, which otherwise would have a bad psychological impact upon them. But 'sex' with them or the possibility thereof has to be avoided as otherwise they would infect and communicate the dreadful disease to others. The court cannot assist such a person to achieve the object.

There are cases where the express consent of the patient himself is required and none else. In *Samira Kohli v. Dr. PrabhaManchanda and Anther*[22], Hysterectomy of the patient was performed without her express consent and consent was obtained from her mother instead. The court held that only in cases of grave and imminent danger to life, can the doctor perform such a major surgery without express consent of the patient herself. In the present case, it was found that there was no need to remove the ovaries of the patient and cause her irreparable and permanent loss moreover when it was done without her express consent. Thus, performance of the surgery was an unauthorized invasion and interference with Appellant's body which amounted to a tortious act of assault and battery and therefore a deficiency in service.

A doctor must always bear in mind the obligation of preserving human life as a doctor owes to his or her patient complete loyalty and the resources of his or her science. Whenever an examination or treatment is beyond his or her capacity he or she should summon other doctor who has the necessary ability. A doctor shall preserve absolute secrecy on all he or she knows about his/her patient because of the confidence entrusted in him. A doctor must give emergency care as a humanitarian duty unless he or she is assured that others are willing and able to give such care.

It is important to note here that the Supreme Court in *Lakshaman v. Trimbak*[23] observed that a doctor who holds himself ready to give medical advice and treatment impliedly undertakes

20. *Salgo* v. *Leland Stanfordetc.Bd.Trustee*, 154, cal. App 2d560.
21. *Principles of Medical Law* (published by Oxford University Press Second Edition, edited by Andrew Grubb, Para 3.04, Page133).
22. *Samira Kohli* v. *Dr. PrabhaManchanda and Anr*., (2008) 2 SCC 1
23. *Lakshman* v. *Trimbak*, AIR 1969 SC 128

that he is possessed of skill and knowledge of the purpose. Such a person when consulted by a patient owes him certain duties, such as a duty of care in deciding whether to undertake the case, a duty of care in the administration of that treatment. A breach of any of these duties gives a right of action for negligence to the patient. A practitioner must bring to his reasonable degree of care and competence.

IV. WHAT CONSTITUTES MEDICAL NEGLIGENCE?

The cause of action for negligence arises only when damage occurs; for, damage is a necessary ingredient of the tort of negligence. The essential components of negligence are three: 'duty', 'breach' and 'resulting damage'. In most cases, the question whether a medical practitioner or hospital is negligent or not, is a mixed question of fact and law.[24] Ordinary and reasonable care and skill should be applied at all times with all the patients-a physician has full liberty to adopt any of the accepted theories of medicine and surgery in which he honestly believes. In addition there is a considerable scope for him in exercising his judgment and discretion as medical science is not an exact science.

Negligence is, indeed, breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property.[25]

The Supreme Court of India in *Syed Akbar v. State of Karnataka*[26], held that if negligence is an essential ingredient to the offence, negligence to be established by the prosecution must be culpable or gross and not negligence merely based on an error of judgment. A doctor should not guarantee cure to his patient. All that he can undertake is to make sincere efforts to discharge his duties as a medical man is using reasonable skill, care and judgment while treating his patient. He could always bear in mind the importance of preserving a human life from birth till death. The medical man shall use prudence in discontinuing his attendance on the patient. He is bound to provide medical aid as long as the patient needs that. In *Poonam Vermav. Ashwin Patel*[27] case, the Supreme Court of India has held that the homoeopathic practicing allopathy commits an act of negligence per se and is liable to pay compensation to the aggrieved party.

There had been an unfortunate practice followed by doctors and hospitals refusing to treat injured persons on the ground of case being a police case and demanding that they could start medical treatment only after a police case is registered. This practice of refusing immediate medical treatment even to serious patients resulted in death of a number of patients. The fear sycosis amongst doctors and hospitals in refusing medical treatment even to serious patients on the ground of case being a police case got removed when the Supreme Court of India reacted sharply to a defensive and non-committal attitude of doctors/ hospitals as it observed that every citizen brought for medical treatment should be given medical aid to preserve life and thereafter the procedural criminal law should be allowed to operate in order to avoid negligent death.[28]

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24. *V. Kishan Rao* v. *Nikhil Super Speciality Hospital* (2010) 5 SCC 513.
25. Ratanlal & Dhirajlal, *The Law of Torts* (24th ed. 2002), at pp. 441- 444.
26. *Syed Akbar* v. *State of Karnataka*, (1980) 1 SCC 30
27. (1996) CPJ 1 (SC)
28. *ParmanandKatara* v. *Union of India*, 1989 AIR SC 2039.

In a unique self-explaining case of medical negligence, a mop was left inside a woman's peritoneal cavity while she was operated for sterilization in the government hospital causing peritonitis which resulted in her death. The conclusion of negligence was drawn against the doctors by applying the principal of res ipsaloquitor and the government was vicariously held liable.[29]

The Supreme Court of India had a unique occasion to go into the details of what is the meaning of negligence by medical professionals.[30] Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed.

When it comes to the failure of taking precautions what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.[31]

It would not be out of place to mention here the position in England which emerged out of the decision in *Bolam v. Friern Hospital Management Committee*[32] where John Hector Bolam suffered from depression and was treated at the Friern Hospital in 1954 by E.C.T. (electro-convulsive therapy). He was not given any relaxant drug but nurses were present on either side of the couch to prevent him from falling off. When he consented for the treatment, the hospital did not warn him of the risks, particularly that he would be given the treatment without relaxant drugs. He sustained fractures during the treatment and sued the hospital and claimed damages for negligence. When the opinion of experts was taken they said that there were two practices accepted by them: treatment with relaxant drugs and treatment without relaxant drugs. Regarding the warning also, there were two practices prevalent: to give the warning to the patients and also to give the warning only when the patients ask about the risks.

The court concluded that the doctors and the hospital were not negligent. The court observed that in the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. That is a perfectly accurate statement, as long as it is remembered that there may be one or more perfectly proper standards; and if he conforms to one of those proper standards, then he is not negligent.

In fact, it is impliedly accepted that persons who offer medical advice and treatment undertake that they have the skill and knowledge to do so, that they have the skill to decide whether to take a case, to decide the treatment, and to administer that treatment. This is known as an "implied undertaking" on the part of a medical professional. In the case of the

29. *Achutro HaribhauKhodwa* v. *State of Maharashtra*,(1996) 2SCC 634.
30. Supra note.1.
31. *Jacob Mathew* v. *State of Punjab & another* (2005)6 SCC 1 : 2005 AIR SCW 3685.
32. *Bolam* v. *Friern Hospital Management Committee* [1957] 2 All E.R. 118

State of Haryana v. SmtSantra, the Supreme Court held that every doctor "has a duty to act with a reasonable degree of care and skill." [33]

However, it is true that human acumen has its own limitations and no human being is perfect and even the most renowned specialist could make a mistake in detecting or diagnosing the true nature of a disease. A doctor can be held liable for negligence only if one can prove that he is guilty of a failure that no doctor with ordinary skills would be guilty of medical negligence if he was acting with reasonable care. An error of judgment constitutes negligence only if a reasonably competent professional with the standard skills that the defendant professes to have, and acting with ordinary care, would not have made the same error.

The Supreme Court in an important decision on medical negligence delivered in *Dr. LaxmanBalkrishna Joshi v. DrTrimbakBapuGodbole*, observed that if a doctor has adopted a practice that is considered "proper" by a reasonable body of medical professionals who are skilled in that particular field, he or she will not be held negligent only because something went wrong. Doctors must exercise an ordinary degree of skill [34]. However, they cannot give a warranty of the perfection of their skill or a guarantee of cure. If the doctor has adopted the right course of treatment, if she/ he is skilled and has worked with a method and manner best suited to the patient, she/ he cannot be blamed for negligence if the patient is not totally cured[35].

In fact, certain conditions must necessarily be satisfied before liability for medical negligence can be considered. The medical professional who is accused must have committed an act of omission or commission; this act must have been in breach of the person's duty; and this must have caused harm to the injured person. The complainant must prove the allegation against the doctor by citing the best evidence available in medical science and by presenting expert opinion[36].

Moreover, there may be some situations where negligence on the part of medical professional may be so glaring that the complainant can invoke the principle of res ipsa loquitur meaning that the thing speaks for itself. In such circumstances no proof of negligence is required beyond the accident itself. The National Consumer Disputes Redressal Commission applied this principle in *DrJanakKantimathi Nathan v.MurlidharEknathMasane*[37]. The principle of res ipsa loquitur comes into operation only when there is proof that the occurrence was unexpected and the accident could not have happened without negligence and lapses on the part of the doctor, and that the circumstances conclusively show that the doctor was negligent.

V. DETERMINING THE DEGREE OF CRIMINAL NEGLIGENCE

It is established in criminal jurisprudence that whoever causes the death of any person by doing any rash or negligent act (not falling in the category of culpable homicide) shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both.[38] The Supreme Court while describing criminal negligence in relation to the acts of

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33. *State of Haryana* v. *Smt. Santra* (2000) 5 SCC 182:: AIR 2000 SC 3335
34. *Smt J S Paul* v. *Dr (Mrs) A Barkataki* (2004) 10 CLD 1 (SCDRC - MEGHALAYA).
35. *DrPremLuthra* v. *Iftekhar* (2004) 11 CLD 37 (SCDRC - UTTARANCHAL); MrsSavitri Devi v. *Union of India* IV (2003) CPJ 164; *Dr. Devendra Madan* v. *Shakuntala Devi* I (2003) CPJ 57 (NC).
36. AIR 1969 (SC)128
37. 2002 (2) CPR 138
38. See Section 304A of the Indian Penal Code, 1860.

medical professionals said in *Dr. Suresh Gupta v. Govt. of NCT Delhi*[39], that for fixing criminal liability on a doctor or surgeon, the standard of negligence required should be so high to describe it as "gross negligence" or recklessness. It is not merely lack of necessary care, attention and skill which could create criminal liability on doctors. Thus a doctor cannot be held criminally responsible for patient's death unless his negligence or incompetence showed such disregard for life and safety of his patient as to amount to a crime against the State.

It is, in fact, very clear that every careless act of medical man cannot be termed as 'Criminal'. Mere inadvertence or some degree of want of adequate care and caution might create civil liability but would not suffice to hold him criminally liable. Then there is another importantlandmark judgment regarding criminal liability on medical professionals*Jacob Mathew v. State of Punjab*. This case was referred to the three judge bench of Supreme Court and expressed reason for disagreement with the judgment in Dr. Suresh Gupta v. Govt. of NCT Delhi for the following two reasons:

1. First that Section 304-A, does not distinguish between negligent and grossly negligent act and the word 'gross' is not an essential for the applicationof requirement Section 304-A.

2. Different standards cannot be applied to doctors and others. In all cases, is all that seen that what is to be seen in thatthe act was rash or negligent.

The Supreme Court then underlined the important point which has got widespread implication that "in order to hold the criminal negligence, the element of mens rea (means criminal intention) must be shown to exist. To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances, no medical professional in his ordinary senses and prudence would have done or failed to do.

The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent. The word 'gross' has not been used in Section 304A of IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be 'gross'. The expression 'rash or negligent act' as occurring in Section 304A of the IPC has to be read as qualified by the word 'grossly'. Doctrine of Res IpsaLiquitor, if at all, has limited role in trial in case of criminal negligence. The Supreme Court issued the following guidelines in Jacob Mathew's case:

1. A private complaint may not be entertained unless the complainant has produced prima facie evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor.

2. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service qualified in that branch of medical practice.

3. A doctor accused of rashness or negligence, may not be arrested in a routine manner unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigation officer feels satisfied that the doctor proceeded against would not make him available to face the prosecution unless arrested, the arrest may be withheld.

It is imperative to move our emphasis on criminal negligence now. It would be futile to conduct a judicial interpretation of medical negligence cases without taking into account the

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39. *Dr. Suresh Gupta* v. *Government of N.C.T* of Delhi AIR 2004 SC 4091

criminal negligence part. We know that criminal negligence of a professional usually falls within Section 304A[40] of Indian Penal Code. There have been many landmark cases in this regard such as *Suresh Gupta v. Govt. of NCT of Delhi and Another*.[41] and *Jacob Mathew v. State of Punjab*[42]. The courts have held that an FIR cannot be lodged against a doctor under Section 304A unless there is a prima facie case of gross negligence and recklessness by the doctor.

On a bare reading of Section 304A, we will find that simply a rash and negligent act not amounting to culpable homicide would attract the penal liability under the aforesaid provision. But, according to the courts, a mere negligent act would not attract Section 304A. For Section 304A to apply to doctors, the degree of negligence has been set to be very high. This matter was subsequently resolved by a larger bench in the same case which said that the degree of negligence is not higher or unusual in case of professionals.

In the case of *Malay Kumar Ganguly v. Dr. Sukumar Mukherjee and Others.*[43], the court held that "for criminal prosecution of a medical professional for negligence, it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary sense and prudence would have done or failed to do."

In fact, *Malay Kumar Ganguly's* case is the law of the land as it basically said that the jurisprudential concept of negligence differs in civil and criminal law. It is established that the element of mens rea must exist before negligence could amount to an offence. To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something, and intended to do the same, which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do.

It is also important to observe that trial court judge has been bestowed with wide powers with respect to fixation of liability upon the doctor. In *B. Jagdish and another. v. State of A.P. and another*[44], the magistrate issued process against the appellant and took cognizance of the offence to be negligence in performing professional services despite the fact that civil liability of negligence had already been fixed upon the medical professional. The Supreme Court held that whether criminal liability could be fixed in this case or not is a question to be determined by the learned trial court judge alone.

In the case of *Mahadev Prasad Kaushik v. State of U.P. and another*[45], a complaint was registered against the doctor under Section 304 IPC. The court said in every mishap or death during medical treatment; a medical man cannot be proceeded against in a Criminal Court. Thus, the court held that a professional may be held liable for negligence on one of the two findings: (i)either he was not possessed of the requisite skill which he professed to have possessed, or, (ii)he did not exercise, with reasonable competence in the given case, the skill which he did possess.

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40. Section 304A of the Indian Penal Code, 1860- Causing death by negligence.— Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.
41. *Suresh Gupta* v. *Govt. of NCT of Delhi and Anr*. (2004) 6 SCC 422
42. *Jacob Mathew* v. *State of Punjab*, (2005) 6 SCC 1
43. *Malay Kumar Ganguly* v. *Dr. Sukumar Mukherjee and Ors*., (2009) 9 SCC 221
44. (2009) 1 SCC 681
45. AIR 2009 SC 125

VI. HOSPITAL'S LIABILITY

The liability of hospitals with respect to medical negligence may either be direct or vicarious liability. Direct liability in this context refers to the deficiency on the part of hospital itself in providing safe and suitable environment for treatment as promised. Vicarious liability means the liability of an employer for the negligent act of its employees[46]. In fact, vicarious liability operates at the touchstone of two important principles- : 'respondent superior' meaning 'let the master answer' and the common law principle *qui facit per aliumfacit per se* meaning one who acts through another, acts in his or own interests. An exception to the above principle is 'borrowed servant doctrine' according to which the employer is not responsible for negligent act of one of its employee when that employee is working under direct supervision of another superior employee [e.g. Where a surgeon employed in one hospital visits another hospital for the purpose of conducting a surgery, the second hospital where the surgery was performed would be held liable for the acts of the surgeon].[47]

A hospital can be held directly liable for negligence on many grounds. Failure to maintain equipment in proper working condition constitutes negligence. In case of damage occurring to a patient due to absence/non-working equipment e.g. oxygen cylinder, suction machine, insulator, ventilator etc. the hospital can be held liable[48]. Failure to hand over copies of medical records, X-rays, etc., constitutes negligence or deficiency in service[49]. In India, a provision in respect of medical records has been made in The Indian Medical Council (Professional conduct, Etiquette and Ethics) Regulations 2002,[50] which state that every registered medical practitioner has to maintain medical records pertaining to its indoor or outdoor patients for a period of at least three years from the date of commencement of treatment in the prescribed form given by MCI and if any request is made for medical records either by patient/ authorized attendant or legal authorities involved, the same may be duly acknowledged and documents be issued within the period of 72 hours[51]. Also it must not be forgotten that it is the right of every patient to obtain in writing about his/her medical illness, investigations and treatment given on a prescription/ discharge ticket.

There is no doubt that lack of cleanliness or unhygienic condition of hospital premises amounts to negligence. In *M Ramesh Reddy* v. *State of Andhra Pradesh*[52], the hospital authorities were held to be negligent for not keeping the bathroom clean as it was found covered with fungus and was slippery, which resulted in the fall of an obstetrics patient in the bathroom leading to her death. A compensation of Rs. 1,00,000 was awarded against the hospital.

Where the ambulance service provider, usually a hospital, professes that the ambulance is equipped with life-saving equipment and such equipment is either absent or non-functioning, it is liable for negligence in case of a mishap. In the United Kingdom, even delay in arrival of ambulance has been held negligent on the part of hospital as even a common man knows the importance of properly equipped ambulance arriving on time in saving a life[53] .

46. Karmakar R N. Mukherjee's *Forensic Medicine & Toxicology*. 3rd ed. Kolkata: Academic Publishers; 2008
47. Ibid.
48. Sharma J and Bhushan *Medical Negligence & Compensation*.2nd Edition. New Delhi: Bharat Publications; 2004.
49. Ibid.
50. See Regulations 1.3.1 & 1.3.2 of 2002
51. Agarwal S S, Kumar L and ChavaliK. *Legal Medicine Manual*. 1st ed. New Delhi: Jaypee Brothers Medical Pubishers; 2008.
52. 2003 (1) CLD 81 (AP SCDRC)
53. I (2002) 2 AII ER 474

Hospitals can be charged with negligence for transmission of dangerous infection including HIV. If any patient develops such infection during the course of treatment in the hospital and it is proved that the same has occurred on account of lapse on part of the hospital. The Centre for Disease Control (CDC) although does not advise that HIV positive individuals be routinely restricted from performing surgery, it does recommend that the restrictions be determined on a case by case basis. The employee could be given other duties in the hospital that involves lesser degree of direct patient care or could be required to use extra safety precautions while dealing with patients. There is no generally accepted medical evidence that HIV can be transmitted through normal day to day contact in typical private workplace setting. The CDC has issued guidelines that recognize that, with the exception of health care workers and personal service workers who use instruments that pierce skin, no testing or restriction is indicated for workers known to be infected with HIV but otherwise is able to perform their jobs. If any hospital does not follow the guidelines and there results an infection of the patient, it can be held directly liable for negligence[54].

Another important aspect which may create liability of this kind is misleading signboards, prescription slips and advertisements of hospitals and the same can be construed as deficiency in service or unfair trade practice under the Consumer Protection Act, 1986 and damages can be awarded for such practices. Wrong claims of availability of certain facilities like some hospitals claiming in their sign boards/ prescription slips that 24 hours emergency services are available in their setup but in fact they lack basic emergency facilities like services of a doctor round the clock, necessary equipment in working order, intensive care facilities etc. would construe negligence.

In the current flourishing consumerist culture, many medical professionals may be found using misleading signboards. Wrong depiction of qualifications of doctor, like MD (Gyn.) against a doctor's name, creating an impression and misleading the patients that the doctor possesses a PG degree in Gynecology whereas it was obtained from Germany and was equivalent to MBBS as per rules of MCI may also be construed as negligence. [55] Claiming guaranteed results for operative procedures that do not give desired outcome also amount to negligence.[56]

There are many instances where a senior or super-specialist performs surgery in a center where such expertise is not locally available. After the surgery, the post-operative care is left to the local competent doctor. Failure of the senior/ super specialist to personally supervise the post-operative care may not constitute negligence provided the doctor to whom responsibility of the post-operative care lies is competent; same applying to a visiting physician. It has been held by National Consumer Redressal Commission[57] that in case of the operation being performed in an institution, it is the duty of the institution to render post-operative treatment and care to the hospital's patients. Quite often foreign doctors undertake operations in India and it cannot be maintained that the post-operative care and treatment shall continue to be provided by the foreign doctor who may no longer be in the country.

The Supreme Court has observed that running a hospital is a welfare activity undertaken by the government but it is not an exclusive function or activity of the government so as to

54. Vij K. *Textbook of Forensic Medicine & Toxicology*. 4th ed. New Delhi: Elsevier; 2008.
55. 1993 (1) CPR 422 (NCDRC)
56. Sharma J and Bhushan, *Medical Negligence & Compensation*.2nd Edition. New Delhi: Bharat Publications; 2004.
57. 1993 (3) CPR 414 (NCDRC)

be regarded as being in exercise of its sovereign power.[58] Hence, the State would be vicariously liable for the damages which may become payable on account of negligence of its doctors or other employees. In another case of *Smt. Santa v. State of Haryana & Others*[59], the contention that the State is not vicariously liable for the negligence of its officers in performing the sterilization operation was not accepted in view of the above judgment of the Supreme Court of India. In another case of *Rajmal v State of Rajasthan*[60], where the patient died of neurogenic shock following laparoscopic tubal ligation done at a primary health centre, an Enquiry Committee constituted on the directions of the Rajasthan High Court found that the doctor was not negligent in conducting the operation, nor his competence, integrity or efforts were doubted. It was lack of adequate resuscitative facilities and trained staff that was held responsible for the death and the State Government was held vicariously liable and was directed to pay compensation to the husband of the deceased.

It is pertinent to note here that the Punjab and Haryana High Court in *Punjab State v. Surinder Kaur*[61], has held that the doctor working in a government hospital was performing the duty while he/ she was under the employment of the State and in these circumstances, the master is always responsible for the vicarious liability of the acts committed by the employee in the course of such employment. It is for the State to determine the liability of the erring doctors. It is their internal affair but so far as patient is concerned she can recover the amount from the State Government. It is the duty of the authorities under the State to see that its employees are available in time in the hospital. If for any reason, a doctor or expert is not available, the hospital authorities would have known before hand and some other person should be posted.

The primary responsibility of the hospital authorities is to see that there is no negligence on its part or on the part of its officers. The failure to provide a doctor or anesthetist or an assistant is essentially a lapse on the part of hospital authorities and are thus liable for negligence. In *R. P. Sharma v. State of Rajasthan*[62], where a woman died because of mismatched blood transfusion, the State was held vicariously responsible for the negligent act of its blood bank officer and the doctor who transfused the blood.

VII. IS A PATIENT CONSUMER?

There has been a lot of debate and discussion on the issue that whether medical profession should also be brought within the purview of Consumer Protection Act, 1986? After a long controversy and strong contentions, the Supreme Court held that the medical profession and all other similar professions come under the purview of the Consumer Protection Act.The latest case in this regard is *Minor Marghesh K. Parikh v. Dr. Mayur H. Mehta*[63]. In this case, the Supreme Court directed for a fresh hearing of the matter and observed that court must pass an order considering all material facts and circumstances of the case and should not leave material facts unenquired or unverified.

In *Medical Association v. V. P. Shanta*[64], it was held that medical practitioners, hospitals and nursing homes are also covered under the Consumer Protection Act, 1986. It was held that consultation, diagnosis and treatment rendered by the medical practitioners or at hospitals,

58. *Achutrao & others* v. *State of Maharashtra* & others.
59. (2005) 5 SCC 182
60. AIR 1996 Raj. HC 80
61. 2001 ACJ 1266 (P&H-HC)
62. AIR 2002 Raj. HC, 104
63. 2010 (10) UJ 4872 (SC)
64. *Indian Medical Association* v. *V.P. Shanta* (1995) 6 SCC 651

nursing homes, health centers, dispensaries were part of the definition of "service" under the Act except where the same is rendered free of charge or where the medical officer is employed for rendering services to the employer. Hence, all medical service suffering from deficiency and negligence is covered under the provisions of the Consumer Protection Act.

In another case *Kusum Sharma and Others v. Batra Hospital and Medical Research Centre and Others*[65], the basic question was whether the death of the deceased occurred due to 'deficiency in services' by the Respondent Hospital. The court said that the Services rendered by the medical practitioner by way of surgery would definitely fall within the ambit of 'Service', as defined under Section 2(1)(o) of the Consumer protection Act,1986[66]. Deficiency[67] in service has to be judged by applying the test of reasonable skill and care which is applicable in action of damages for negligence. Thus, a mere deviation from normal professional practice is not necessarily an evidence of negligence. Hence, the court held that "doctors performing their duties and exercising an ordinary degree of professional skill and competence cannot be held guilty of negligence.

It is interesting to observe that the court has taken a very wide connotation and understanding of the concept of medical negligence. The court says that these questions are to be judged on the facts of each case and there cannot be a mechanical or strait jacket approach that each and every case must be referred to experts for evidence[68]. The court also says that a professional may be held liable for negligence if he was not possessed of the requisite skill which he professed to have or, he did not exercise, with reasonable competence in the given case the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not; would be that of an ordinary person exercising skill in that profession. Thus, it is not necessary for every professional to possess the highest level of expertise in that branch which he practices[69].

It is pertinent here to note that the Supreme Court has time and again reiterated the fact that whenever a complaint is received against a doctor or hospital by the Consumer Fora, then it should first refer the matter to a competent doctor or committee of doctors, specialized in the field and only on their report a prima facie case of medical negligence can be made out and a notice can be issued to the concerned doctor/hospital[70].Thus, as far as remedy under Consumer Protection Act, 1986 is concerned, the situation is quite clear. The Court has itself said that there is no straight jacket approach and each case has to be decided on its own merits.

VIII. EXPANDING HORIZONS OF MEDICAL NEGLIGENCE

Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. A surgeon does not undertake that he will perform

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65. AIR 2010 SC 1052
66. "Services" means service of any description which is made available to potential [users and includes, but not limited to, the provision of] facilities in connection with banking, Financing insurance, transport, processing, supply of electrical or other energy, board or lodging or both, [housing construction] entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service
67. "Deficiency" means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service.
68. *V. Kishan Rao* v. *Nikhil Super Specialty Hospital*, (2010) 5 SCC 513
69. *PGIMER, Chandigarh* v. *Jaspal Singh & Others*., (2009) 7 SCC 330
70. *Martin F. D'Souza* v.*Mohd.Ishfaq* (AIR 2009 SC 2049)

a cure; nor does he undertake to use the highest possible degree of skill, as there may be persons of higher education and grater advantages than him; but he undertakes to bring a fair, reasonable and competent degree of skill.[71]

Under English law as laid down in *Bolam's case* a doctor, who acts in accordance with the practice accepted as proper by a responsible body of medical men, is not negligent merely because there is a body of opinion that takes a contrary view. The test laid down is the standard of ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. In the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical man at that time.

The Supreme Court of India approvingly referred to Bolan's Test in *Jacob Mathew v. State of* Punjab and said that the water of Bolam Test has ever since flown and passed under several bridges, having been cited and dealt with in several judicial pronouncements, one after the other and has continued to be well received by every shore, it has touched as neat, clean and well condensed one. The test holds well in its applicability in India. The principles stated in *Jacob Mathew* have been reiterated in *Martin F.D'Souza v. Mohd. Ishfaq and INS Malhotra V. Dr. A. Kriplani***.** The test, in fact, covers the entire field of liability of a doctor's duty to warn his patient of risks inherent in treatment; liability in respect of operating upon or giving treatment involving physical force to a patient who is unable to give his consent; and liability in respect of treatment. The question of consent in India is also governed by the Bolam test as elaborately laid down in the case of Samira *Kohli v. PrabhaManchanda*.

However in the case of *Martin F. Dsouza v. MohdIshfaq*[72] the Supreme Court analyzed the entire case law and reiterated the principles which were stated in Jacob Mathew's case. In this case the claimant complained of deafness because of negligence of the doctor in administration of overdose of amikacin injection. The Supreme Court directed that whenever a complaint is received against a doctor or hospital by the Consumer Forum (whether District, State or National) or by a criminal court then before issuing notice to the doctor or hospital against whom the complaint was made the Forum or the Court should first refer the matter to a competent doctor or committee of doctors, specialized in the field relating to which the medical negligence is attributed, and only after the report of the Committee to the effect that there is prima facie case of medical negligence, should notice be issued to the doctor/ hospital concerned. This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent. We further warn the police officer not to arrest or harass doctors unless the facts clearly come within the parameters laid down in Jacob Mathew case, otherwise the policemen will themselves have to face legal action."[73]

In deciding the cases of medical negligence the Supreme Court of India has followed liberal approach in some cases while it preferred to follow the strict liability rule in some other cases. The approach of Judiciary in deciding the cases of medical negligence and liability of the doctors has been described as "Two lines of judicial authorities on medical negligence liability in India" by Mr. B.B.Pande. He opined that "in India in respect of claims for medical negligence the judicial rulings of the Supreme Court of India and of the State High Courts can be put in two distinct lines. The first line, that favours a limited liability based on 'ordinary

71. Ratanlal & Dhirajlal, *The Law of Torts*, 26 ed. 2010, p-552.
72. AIR 2009 SC 2049
73. *Martin F. Dsouza* v. *MohdIshfaq* AIR 2009 SC 2049

professional standard' as laid down in Bolamcase. The second line, that favors expanding the sphere of medical profession's liability and demanding a higher duty of care towards the patient and his relatives, particularly where medical expertise is provided on a commercial basis".[74]

The Supreme Court while adopting a liberal approach, has approved the rule of "ordinary skilled professional standard of care" laid down in Bolamcase in*Dr. Suresh Gupta v. Govt. of N.C.T of Delhi,*[75]*State ofPunjab v. Shiv Ram*[76] and *Jacob Matthew v. Union of India*[77]cases. These cases are some of the instances where the court has preferred to follow liberal approach in the matters of medical negligence. In *Jacob Matthew v. Union of India*[78] the Supreme Court held that "no sensible professional would intentionally commit an act or omission which would result in harm or injury to the patient since the professional reputation of the professional would be at stake".

The Supreme Court has in*Martin F. D'Souza v. Mohd. Ishaq,*[79] once again approved the Bolam'srule and held that "judges are not experts in medical science, rather they are lay men. This often makes it somewhat difficult for them to decide cases relating to medical negligence. While doctors who cause death or agony due to medical negligence should certainly be penalized, it must also be remembered that like all professionals, doctors too can make errors of judgment but if they are punished for this no doctor can practice his vocation with equanimity. Indiscriminate proceedings and decisions against doctors are counterproductive and serve society no good.

On the other hand the Supreme Court has taken stringent action in some medical negligence cases following 'higher duty of care rule'. In cases of grave professional negligence like, failure on the part of the doctor to inform or warn the patient about the risks involved in the treatment the court has not followed the rule laid down in Bolamcase. The Supreme Court even applied the doctrine of res ipsa loquitur in some cases where the negligence is manifest.*Dr. KhusaldasPammandas*[80]*, AchutraoHaribhauKhodwa*[81], and *Spring Meadows Hospitals v. Harjot Ahluwalia*[82] are some illustrative cases where the Supreme Court hasapplied the 'higher duty of care rule' in deciding the negligence of thedoctors. Recently the Supreme Court refrained to take a liberal approachin establishing medical negligence and emphasized on accountability andhigher duty of care in medical profession in *B. Jagadishv. State of A.P.*[83]

In its landmark judgment in *V. Kishan Rao v. Nikhil Super Speciality Hospital*[84] the Supreme Court recently held that 'there cannot be a mechanical or straitjacket approach that each and every medical negligence case must be referred to experts for evidence' and declared that the judgment rendered in *Martin F.D'Souza v. Mohd. Ishfaq*[85] is per in-curiam. In this

74. B.B. Pande, '*Why Indian Patients do not deserve the Highest Expert Skills from Doctors*?'(2009) 4 SCC 21.
75. (2004) 6 SCC 422
76. (2005) 7 SCC 1.
77. (2005) 6 SCC 1.
78. Ibid.
79. (2009) 3 SCC 1.
80. *Dr. KhusaldasPammandas* v. *State of M.P.,* AIR 1960 50.
81. *Achutrao Haribhau Khodwa* v. *State of Maharashtra*, (1996) 2 SCC 63.
82. (1998) 4 SCC 39
83. (2009) 1 SCC 681
84. (2010) 5 SCC 513
85. (2009) 3 SCC 1

case the Supreme Court held that in the context of such jurisprudential thinking in England, time has come for this Court also to reconsider the parameters set down in Bolam test as a guide to decide cases in medical negligence and especially in view of Article 21 of the Constitution which encompasses within its guarantee, a right to medical treatment and medical care.

The impact of the judgment in Kishan Rao's case is that now the Consumer Forum in the country should not necessarily refer the cases of medical negligence to Expert Committee before issuing the notice to the doctor or hospital accused of medical negligence. This is a welcome change in the peculiar social milieu of our country as in our country many doctors or hospitals which are actually guilty of medical negligence would have got an easy escape route under Bolam's shadow.

IX. THE ISSUE OF COMPENSATION

The matter of compensating the victim of medical negligence or his near ones is a very important matter and as such it has been agitated over and again before the courts in India. Compensation can be awarded to an injured person for not being provided treatment in a government hospital or for death or injury caused therein because of negligence. Assessment of compensation though involving certain hypothetical considerations should nevertheless be objective. Justice and justness emanate from equality in treatment, consistency and thoroughness in adjudication, and fairness and uniformity in the decision-making process and the decisions. While it may not be possible to have mathematical precision or identical awards in assessing compensation, same or similar facts should lead to awards in the same range. When the factors/inputs are the same, and the formula is the same, consistency and uniformity, and not divergence and freakiness, should be the result of adjudication to arrive at just compensation. In fact, 'Just Compensation' is adequate compensation which is fair and equitable, on the facts and circumstances of the case, to make good the loss suffered as a result of the wrong, as far as money can do so, by applying the well-settled principles relating to award of compensation. It is not intended to be a bonanza, largesse or source of profit.[86]

In the case of *PaschimBangalKhetMazdoorSamity& Others v. State of West Bengal*[87], the Hon'ble Supreme Court held that providing adequate medical facilities for the people is an essential part of the obligations undertaken by the Government in a welfare state. Failure on the part of government hospital to provide timely medical treatment to a person in need of such treatment is violation of his right to life guaranteed under Article 21 of Indian Constitution (death of the patient occurring for not being admitted/ given proper treatment for want of bed in a government hospital).

It is remarkable to note that the Supreme Court in today's context made a very stimulating remark in relation to the quantum of damages. The court said that while computing compensation the Court has to strike a balance between the inflated and unreasonable demands of a victim and the equally untenable claims of the opposite party saying that nothing is payable. Thus, the Court must award adequate compensation[88].

The Supreme Court in *AchutraoHaribhauKhodwa v. State of Maharashtra*[89] laid down the law that the skill of medical practice differs from doctor to doctor. The very nature of the

86. *Sarla Verma* v. *DTC*, (2009)6 SCC 121: (2009)2 SCC (Civ) 770 : (2009)2 SCC (Cri) 1002.
87. 1996 (4) SC 260
88. *Nizam Institute of Medical Sciences* v. *Prasanth S. Dhananka and Ors.,* (2009) 6 SCC 1
89. AIR 1996 SC 2377

profession is such that there may be more than one course of treatment which may be advisable for treating a patient. Courts would indeed be slow in attributing medical negligence on the part of doctor if he has performed his duties to the best of his ability and with due care and caution. Medical opinion may differ with regard to the course of action to be taken by a doctor treating a patient, but as long as a doctor acts in a manner which is acceptable to the medical profession and the court finds that he has attended on the patient with due care skill and diligence and if patient still does not survive or suffers a permanent ailment, it would be difficult to hold the doctor guilty of negligence.

In *Nizam Institute of Medical Sciences v. Prasanth S. Dhanaka*[90], the complainant who was an engineering student and suffering from recurring fever. The X- ray examination revealed tumor in left hemi thorax with erosion of ribs and vertebra. Even then without having MRI or Mylography done, cardiothoracic surgeon exercised the tumor and found vertebral body eroded. Operation resulted in acute paraplegia of the complainant. MRI or Myelography at the pre-operation stage would have shown necessity of a neurosurgeon at the time of operation and the paraplegia perhaps avoided. Consent was not taken for removal of tumor but only for excision biopsy. The hospital and the surgeon were held liable for negligence. When the matter reached the Supreme Court the complainant who was then 40 years, was gainfully employed as an IT engineer. The nature of his work required him to travel to different locations but as he was confined to a wheel chair he was unable to do so, on his own and needed a driver cum attendant. The total amount of compensation allowed was Rs. 1,00,00,000 with interest at 6% till the date of payment giving due credit for any compensation already paid.

X. CONCLUSIONS

The concept of medical negligence as we have seen is simply one of the principles whichis deeply engrained in the law of tort. The test evolved over time which has come to be known as *Bolam's test* is widely applied across various jurisdictions. The rising graph of the cases representing medical negligence during last about two decades in our country has paved the way towards defining the actual boundaries of medical negligence in the present consumerist culture. The doctor-patient relationship is, indeed, a fiduciary relationship governed by high standards of morals and ethics. Though a breach of patient confidentiality is usually seen to be a case of professional misconduct on the part of the doctor, violating the patient's body without consent and it has in numerous cases been taken to be medical negligence and even as a crime of assault on the patient.

The present legal position with regard to criminal liability of a doctor is that it cannot be fixed upon the doctor unless there is a prima facie case of gross negligence and recklessness. We have seen in the preceding pages that Consumer Forums have included medical services under the ambit of Section 2(1) (o) of the Consumer protection Act,1986 which defines "service". Thus, any deficiency in these services is construed to be a part of medical negligence as has been explained earlier.

The idea of negligence can be understood only when there is clarity about the duty of the doctor, assisting staff and the hospital as a whole. In several cases, there is a problem of overlapping duties. It is, therefore, advisable to have clear-cut duties laid down for different persons in medical profession and hospitals under separate legislation to avoid confusion and bring accountability and transparency in near future.

90. (2009) 6 SCC 1.

Many doctors are found adopting experimentation mode of working which is dangerous for the patient. Risk taking just for adventure is not acceptable. Thus, if a doctor can perform a difficult surgery in candle light because there is no electricity connection, it does not make sense that he insists performing surgery in candle light when there is power available. There is an urgent need for proper guidelines, methods, procedures and protocol in this regard. To identify accountability, there should be a provision that assumptions taken while giving a treatment should also be documented.

Law requires evidence and documentary evidence in the form of case papers has to be meticulously prepared. The duty of the doctor is to treat the patient in the manner he deems fit yet it is also important to document the treatment given. Documentation of medical treatment given would be helpful for both the patient as well as the doctor as it provides the reason why such treatment has been given. It is also important to have transparency in the system and give a copy of all the papers, reports, films, etc. to the patient. An important improvement in the paper work has been in the shape of electronic records, which allow easy storage and retrieval. At the same time, several copies can easily be made. Greater and better use of advancement in science and technology by medical professionals, hospitals and patients might be fruitful not only for the purposes of accountability and transparency but also for avoiding unwanted litigation for medical negligence in near future.

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STANDARD FORM CONTRACTS IN THE AGE OF ELECTRONIC COMMERCE: SOME LEGAL ISSUES

R. P. RAI*

ABSTRACT : According to the basic paradigm of contract law, a contract is the result of a negotiation process among parties who exercise their freedom to contract. Standard form contracts, however, are offered on a take-it-or-leave-it basis, and are rarely the outcome of any bargaining. Standard form contracts include provisions determined in advance by one party, which is superior in terms of bargaining and market power. In contract law, terms become parts of contracts because parties assent to them. Typically, where standard terms are used, however, parties are asked to submit to them unread or, if read, not necessarily understood. Moreover, when parties do read and understand standard terms and object to them, the parties imposing them may refuse any alteration. Where standard terms are inalterable, parties asked to "agree" to the terms in some instances will have no easy alternatives other than to submit. That is most obviously the case where the supplier has a monopoly or where all other suppliers use the same terms. Standard form contracting is subject to constant criticism by courts, legislators, academics and society in general. The views mentioned here have led to an ongoing policy debate regarding the enforcement of standard form contracts. This debate has also resulted in a variety of policy recommendations, some of which argue for intervention both by court and legislatures. Legislatures are asked to regulate contract terms and set legal rules permitting courts to strike down undesired and inappropriate contract terms.

KEY WORDS : E-Commerce, Standard From Contract, Basic Paradigms of Contract, Common Law.

I. INTRODUCTION

The increasing use of standard form contracts is a subject which concerns everybody much more than is commonly realised and one to which lawyers have paid only casual attention. The words "standard form contract" will be used to include every contract, whether simple or under seal and whether contained in one or more documents, one of the parties to which habitually makes contracts of the same type in a particular form and will allow little, if any, variation from that form. In all these transactions the bargaining power of the parties is unequal: on the one side there is the ordinary individual and on the other a monopoly or powerful organisation with desirable goods or services to supply. The choice between not making a contract or making it on the only terms available is no choice at all and docile submission to the standard form, meek signature "on the dotted line," is the general rule. The potential customer has the choice either to

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adhere to the standard form or not and the printed document which sets out the standard conditions will never see the red, green and purple ink beloved of the conveyancer when negotiating his terms. Other transactions take place on standard forms of contract where the bargaining power of the parties is more equal. This is especially the case in what may be called commercial contracts, that is, contracts between parties both of whom are engaged in trade, business or commerce. The standard form contracts have a long history in various fields of commerce, particularly in that of shipping. Charter parties and bills of lading are still based on ancient forms and even the complicated marine insurance policy has changed little during the centuries.

In other fields of commerce, the use of standard form contracts is a new phenomenon and there is a general tendency for more and more contracts to be embodied in elaborate printed documents where previously they were made in a simple form, the parties relying on the common law and statutes, such as the sale of goods, to establish their rights and liabilities. The more that monopolies and combines extend their activities the less bargaining power remains and there may be just as much inequality between a small trader and a large combine as there is between a railway company and a passenger.[1]

The present paper discusses the legal problems the standard form contract creates in electronic age. The Indian legal framework in this regard is inadequate. This article evaluates the existing suggestions on standard-form contracts and argues that none of them safeguard consumer interests sufficiently.

II. POSITION OF STANDARD FORM CONTRACT UNDER COMMON LAW

The position of standard form contracts under the common law can be summarised in a series of divisions of possibilities. These all assume the absence of duress, fraud or misrepresentation. They are best expressed numerically:

1. A person who accepted an offer which is based on standard conditions, the terms of which were all specifically brought to his notice, is bound by these conditions, even if he expressed his objections to them.[2]

If a person accepted an offer made subject to standard conditions, but was unaware of their contents, the first question to ask is whether he signed the form containing the conditions or not: If he signed, the form he would be bound by the conditions,[3] even if he did not know the language in which they were printed.[4] If he did not sign the form the second question to ask is whether he knew of the existence of the conditions: (i) If he knew of the existence of the conditions he will be bound by them.[5] (ii) If he was ignorant of the existence of the conditions the third question to ask is whether some, though not necessarily adequate, notice of the existence of the conditions was given : (a) If no, notice of the existence of the conditions was given he will not be bound by them.[6] (b) If notice of the existence of the conditions was given, the fourth question to ask is whether or not the document in which they were contained or referred to was a "common form" document[7] : (A) If the document was a "common form" document he will be bound by the conditions set out or referred to in it. (B) If the document was not a "common form" document, the fifth question to ask is whether he knew there was writing on the document:

1. Cf. *Palmoliue Co (of England) Ltd*. v. *Freedman,* (1928)1 Ch. 264.
2. *Walker* v. *York and North Midland Railway Company,* (1853) 2 E. & B. 750; *Eric Gnapp, Ltd*. v. *Petroleum Board,* (1949) 11 All E.R. 980.

(a) If he did not know that there was writing on the document he will not be bound by the conditions.[8] If he did know that there was writing on the document, the sixth question to ask is whether the notice given to him of the existence of conditions was reasonable: (i) If it was, he will be bound, (ii) If it was not, he will not be bound.

The big organisations producing standard form contracts certainly take advantage of such aids. They can afford the best legal advice and most of them employ competent legal staffs. On the other hand, neither the persons with whom they make contracts nor any body representing their interests are consulted about the form the contract should take, unless statute law dictates that they should be so consulted. The increase in the use of standard form contracts in the present century has been phenomenal. This is not so much due to the sudden increase in the number of Government boards and commissions, which in the main have taken over businesses and industries in which common form contracts were already in vogue, as to the steady, but less advertised, tendencies of trades and industries of various types to pass from the hands of the small man to the multiple firm or combine, and of other businesses to be formed into trade associations.

Standard form contracts are nothing new. Notwithstanding the voluminous treatment of standard form contracts in the literature, there is no uniform line of thought regarding the appropriate treatment of such contracts. Professor Todd Rakoff thus correctly observed that "the subject (of adhesion contracts) is inherently intractable." Put another way, since the problem of form contracts was first addressed, "contract law has died, and been resurrected, reconstructed, and transformed. Doctrines of adhesion, reasonable expectations, and unconscionability have all been advanced."

Contract law has always assumed that consumers have a duty to read the contracts which they sign and are thus bound by all terms in such contracts, regardless of their actual failure to read or understand such terms.[9] The primary principle applied by courts to protect consumers from one-sided terms to which they did not subjectively agree is the unconscionability doctrine. However, this doctrine provides only a failsafe option for protecting consumers from undesirable terms, as courts tend to only invalidate the

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3. Lord Cairns in *Henderson* v. *Stevenson,* (1875) L.R. 2 H.L.(Sc) 470, 474; Mellish L.J. in *Parker* v. S.E. Ry., (1877) L.R. 2 C.P.D. 416, 421; Atkin J. in *Roe* v. *Naylor,* (1917) 1 K.B. 713, 716; and Lord Haldane in *Hood* v. *Anchor Line,* (1918) A.C. 837,845.
4. *Canadian Pacific Ry.* v. *Patent,* (1917) 116L.T. 165, and *The Luna and The Kingston,* (1919) 36 T.L.R. 112.
5. *Parker* v. *South Eastern Ry.,* (1877) L.R. 2 C.P.D. 416, per Mellish L.J., at p. 421. See particularly the judgment of Blackburn, J. at p. 538. See, similarly, Lord Haldane in *Hood* v. *Anchor Line,* (191A) A.C. 837, 845.
6. *Henderson* v. *Steoenson,* (1875) L.R. 2 H.L.(Sc) 470, per Lord Cairns L.C., p. 476; *Walls* v. *Centaur Co., Ltd.* (1922) 126 L.T. 242; *Fosbrooke-Hobbes* v. *Airworks, Ltd.,* (1936) 53 T.L.R. 254; *Chapelton* v. *Barry U.D.C.* (1940) 1 K.B. 532; *Olley* v. *Marlborough Court, Ltd.,* (1949) 1 All E.R. 127. 134.
7. *Watkins* v. *Rymill,* (1883) 10 Q.B.D. 178, in which Stephen J. first drew the distinction between common form documents and others.
8. *Parker* v. *South Eastern Ry.,* (1877) L.R. 2 C.P.D. 416.
9. See John D. Calamari, *Duty to Read—A Changing Concept*, *Fordham Law Review* 341 (1974).

most oppressive clauses through unconscionability."[10]

Today an agreement between two parties is often embodied in a standardised document, which has been specially drafted.[11] Such standard form contracts probably account for more than 99 % of all contracts made today.[12] For many decades, numerous consumer transactions between firms and individuals have been accommodated by, and executed through, standard form contracts (SFCs). Form contracting will presumably continue to predominate, as modern technology and recent developments bring new and improved standard contracting practices into the market. One prominent example is online contracting, which is constantly growing in breadth and scope. Almost all online interactions are governed by standard terms incorporated in SFCs. Within this broader feature, online standard contracting dominates retail transactions, sometimes referred to as B2C (Business-to-Consumer).

III. BASIC PARADIGMS OF CONTRACT AND THE STANDARD FORM CONTRACT

According to the basic paradigm of contract law, a contract is the result of a negotiation process among parties who exercise their freedom to contract. Standard Form Contracts (SFCs), however, are offered on a take-it-or-leave-it basis, and are rarely the outcome of any bargaining. Standard Form Contracts include provisions determined in advance by one party, which is superior in terms of bargaining and market power. Very commonly, merely the seller's agents negotiate and contract with individual consumers. These agents are not usually authorized to make changes or concessions in the standardized agreements they offer.[13] Seldom can an SFC be negotiated and altered.

Standard form contracting is subject to constant criticism by courts, legislators, academics and society in general. Yet, from a classic law and economics perspective, most of the traditional allegations against SFCs, namely the offer of form contracts by agents not empowered to make contextual changes, execution between unfamiliar parties, and inequality in economic strength, do not necessarily pose serious challenges to contract law. According to the most basic concepts of Law and Economics, both contracting parties are assumed to accept only efficient contracts that maximize their utility.[14]

Commentators go on to question courts competence in deciding *ex post* what would have constituted a fair contractual allocation of risks and obligations among the parties *ex ante*. In most cases, courts' lack the necessary expertise to analyse the specific transaction and market that any given SFC addresses. Courts might also have difficulty understanding the relation between concessions made in one contractual provision and

10. See Robert A. Hillman & Jeffrey J. Rachlinski, Standard Form Contracting in the Electronic Age, 77 *New York University Law Review* 429 (2002).
11. S. Van der Merwe, L Van Huysteen, M Reinecke and G Lubbe, *Contract, General Principles* (Lands down: Juta Law, 2003) at 285.
12. W.D. Slawson, 'Standard Form Contracts and Democratic Control of Law-making Power', (1971) 84 *Harvard Law Review* 529 at 529.
13. See Jason Scott Johnston, The Return of the Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers, 104 *Michigan Law Review* 857, 877 (2006) (arguing that employees have a great deal of discretion to satisfy consumers).
14. Therefore, some scholars question the widely accepted notion that SFCs provisions are "pro-seller". See, e.g., Clayton P. Gillette, Pre-Approved Contracts for Internet Commerce, 42 *Houston Law Review* 975,979 (2005).

benefits rendered in another. Legal intervention in the terms of SFCs also constitute acts of blunt state paternalism, which encroach on the contracting parties' autonomy. Some academics argue that the very fact that firms are repeat players places them in the best position to assess the appropriate content of form contracts.[15]

IV. STANDARD TERMS AS A LEGAL PROBLEM FOR PARTIES

In contract law, terms become parts of contracts because parties assent to them. Typically, where standard terms are used, however, parties are asked to submit to them unread or, if read, not necessarily understood. Moreover, when parties do read and understand standard terms and object to them, the parties imposing them may refuse any alteration. Where standard terms are inalterable, parties asked to "agree" to the terms in some instances will have no easy alternatives other than to submit. That is most obviously the case where the supplier has a monopoly or where all other suppliers use the same terms. But practically—at least in smaller matters—it may also be the case where the inconvenience of seeking out alternatives is disproportionate to the dangers involved in accepting the terms. Users of standard terms act in their own interests.[16] Ask in house counsels to speak candidly and they will acknowledge, as one general counsel advised senior management of a Fortune 500 company, that "[t]he purpose of form contracts is primarily to protect the needs of our (internal) clients, not to protect the interests of our customers." But when users provide terms in their own self-interest, and parties submitting to them do not read them or have no choice but to accept them, possibilities for abuse arise Some Legal Issues Posed by Standard Form Contract.

Lawmakers and theorists currently are debating the need for a new set of rules to support those innovative transactions.[17] Some assert that the general rules of contract law, which have adapted to numerous technological breakthroughs in the past, can also accommodate the new electronic modes of commerce (e-commerce). The development of information in electronic form and of software (collectively, "computer information") has given standard terms new and increased importance. Computer information contracts are hardly imaginable without standard terms.

With the progress in technology the standard form contract has become technically complex and consequently, difficult to comprehend by an average consumer thereby further limiting her/his choices. Often, especially in the cyberspace, such contracts contain terms that are drafted to reduce the liability of manufacturer or supplier if anything goes wrong. In light of the specific characteristics standard form contracts have acquired, the pressures such contracts have put on freedom of contract, and the viability and proliferation of standard form of contracts in the cyberspace.

In an ideal world, Internet standard-form contracts between vendors and consumers would be beneficial to both parties. E-commerce is expected to improve the productivity and competitiveness of participating businesses by providing unprecedented access to an on-line global market place with millions of consumers and thousands of products

15. See Robert A. Hillman, Rolling Contracts, 71 *Fordham Law Review* 743, 751 (2002).
16. While users are usually suppliers, sometimes they are customers, particularly large ones. They also may be trade associations or even government bodies. They frequently seek to transfer all risks to the other parties.
17. See Francescos G. Mazzotta, A Guide to E-Commerce: Some Legal Issues Posed by E Commerce for American Businesses Engaged in Domestic and International Transactions, 24 *Suffolk Transnational Law Review* 249, 249-51 (2001).

and services. However, in the real world, there are reasons to be wary of Internet standard terms (e-standard terms). The main problem is that few consumers read them before completing a transaction, which invites some vendors to draft one-sided terms—an issue also common in the world of paper contracts, but exacerbated in the digital world.

In the absence of any concern about adverse market forces, vendors can therefore take advantage of consumers in various ways. Vendors can write terms that are especially disadvantageous to consumers. For example, terms that create inconvenient venues for litigation, consent to arbitration in far-off places and before industry arbitrators, allow for unilateral modification, and permit automatic renewal of subscriptions and licenses. Although India is one of the most culturally diverse countries in the world, this will assume that on the issue of reading of e-standard forms India's shoppers as a whole are no more eager readers of e-standard forms than those in most of the world. On the other hand, India's businesses negotiate contracts cautiously and negotiations are often painstakingly deliberate.[18] Successful business negotiators must be patient and unhurried.[19] If Indian Internet consumers exhibit similar cautious and deliberative tendencies, they may pay more attention to their e-standard forms.

Contract law in Western countries is based on the principle of freedom of contract. Thus, to varying extents, but generally as much as is widely acceptable in any one system, contract law is default law. That is, it is law that applies unless the parties agree otherwise. The nineteenth century brought not only mass production, but also mass distribution, and with mass distribution, standard form contracts. In form contracts the party supplying a product or service spells out the terms on which the party does business and which it expects the other party to accept. Standard terms permit suppliers to rationalize their offerings, to control their agents, and to avoid wasting time negotiating terms that they are not prepared to vary. Standard terms can provide answers to questions on which the law is silent. Yet just as standard form contracts provide benefits, so too, they produce problems. Karl N. Llewellyn observed that users of standard terms may "turn out a form of contract which resolves all questions in advance in favour of the one party."[20] What controls, if any, should a legal system place on such terms?

V. THE ISSUE OF UNCONSCIONABILITY IN STANDARD FORM CONTRACTS

In its simplest terms, the doctrine of unconscionability permits a court to intervene into the contractual relations of parties and modify or reject an agreement because part of the contract is unfair. The role of unconscionability in helping parties achieve fair bargains dates back to Roman law, which allowed a contracting party to rescind a contract "if the disproportion between the values exchanged was greater than two to one." In the United States, prior to any uniform adoption of the official doctrine of unconscionability, the eighteenth century courts acknowledged unconscionable agreements. As early as 1816, American courts had the equitable power "to set aside a contract if 'in conscience' it should not be binding." Later in the 1800s, the courts elaborated on unconscionability and explained unconscionable contracts as ones "such as no man in his senses and not

18. Alliance Experts, Indian Business Culture, Contract Law and Negotiations, at http://www.allianceexperts.com/en/knowledge/countries/asia/indian-contract-law-and-how-it-affects-your-business/
19. *Ibid*.
20. Karl N. Llewellyn, Contract—Institutional Aspects, in 4 *Encyclopedia of the Social Sciences* 329, 335 (Edwin R.A. Seligmaned., 1931).

under delusion would make on the one hand, and as no honest and fair man would accept on the other."[21]

The U.S. law has a general clause, essentially authorizing courts to review contract terms. It provides little direction and is not backed up by any list of unconscionable terms. The question is a legal one for the court, but requires taking evidence on the terms commercial setting, purpose and effect. Unconscionability determinations are "fact-sensitive" and are made on a case-by-case basis.[22]

We live in a world where perfect contracts do not exist, and vulnerable contracting parties such as consumers, tenants, the poverty-stricken, and employees often suffer as a result.[23] Atiyah argues that since the 1980s the United States has witnessed a renaissance of classical principles of contract law.[24] The political emphasis on freedom of choice, the value of a free market economy, and a less paternalistic role for the state created an atmosphere of classical contract theory.[25] The political and economic climate since the 1980s has fostered a resurgence in the ideas of freedom of contract and emphasized less dependence on a benevolent state.[26]

The law of contract is engaged in trying to balance the upholding of traditional market liberalism with the need to protect those who may be vulnerable.[27] One way of protecting the vulnerable in contract law is through increasing the court's usage of the doctrine of unconscionability. Schwartz states: A contracting party's poverty is commonly thought to militate in four ways against enforcing an agreement. First, poverty may impede the buyer's efforts to purchase a "fair" contract. ... Second, poverty is thought to correlate strongly with a buyer's lack of commercial sophistication. Third, poverty may restrict the flow of commercial information to poor consumers .... Fourth, poverty may exacerbate the consequences of certain contract clauses. An acceleration clause, for example, may bear more harshly upon a poor consumer than upon an affluent consumer.[28]

Furthermore, classical contract theory assumes that parties will be able to bargain equally because they have similar resources and that all contracting parties are rational adults.[29] In a world of perfect contracts and rational parties, the state should regulate or intervene as little as possible. It is not the task of the law to ensure that a fair bargain is struck or to inquire whether the parties had in fact met as equals.[30] Rather, it is the task of the individual bargainers of the contract to ensure the terms of the contract are fair. As the Lewis points out, "The notion of contract as a bargaining process arose concomitantly with the doctrines of *laissez-faire* and of the free enterprise system .... In

21. See John Edward Murray, JR., Murray *On Contracts,* 96, at 486 (3d ed. 1990).
22. *Forsyth* v. *Bane Boston Mortgage Corp.,* 135 F.3d 1069, 1074 (6th Cir. 1997).
23. See P.S. Atiyah, *An Introduction to the Law of Contracts,* 27-34 (5th ed. 1995).
24. *Id. at27.*
25. *Ibid. 21*
26. *Ibid.*
27. Lawrence Koffman & Elizabeth Macdonald, *The Law of Contract,* 4 (6th ed. 2007), at 4.
28. Alan Schwartz, *A Re-examination of Non-substantive Unconscionability*, 63 *Virginia Law Review,* 1053, 1056-57(1977).
29. See Paula England, The Separative Self: Androcentric Bias in Neoclassical Assumptions, in *Beyond Economic Man: Feminist Theory and Economics,* 37, 37-38 (Marianne A. Ferber & Julie A. Nelson eds., 1993).
30. Lewis A. Kornhauser, *Comment, Unconscionability in Standard Forms*, 64 *California Law Review* 1151, 1152-53(1976).

the *laissez-faire* market place, economic agents, unfettered by government restrictions, interacted freely. Agents met, conferred, and, acting in their own self-interest, contracted."[31] The law of contract is engaged in trying to balance the upholding of traditional market liberalism with the need to protect those who may be vulnerable. One way of protecting the vulnerable in contract law is through increasing the court's usage of the doctrine of unconscionability.[32]

Unconscionability is not intended to erase freedom of contract, but to assure that the agreement has resulted from real bargaining between parties who had freedom of choice and understanding and the ability to negotiate in a meaningful fashion. In *Rowe* v. *Great Atlantic & Pacific Tea Co.,*[33] the New York Court of Appeals highlights the opposition between freedom of contract and protecting the vulnerable through encouraging fair bargaining. The court asserts the need for the doctrine of unconscionability and in doing so states: It is ... far too late in the day to seriously suggest that the law has not made substantial inroads into such freedom of private contracts. There exists an unavoidable tension between the concept of freedom to contract, which has long been basic to our socio-economic system, and the equally fundamental belief that an enlightened society must to some extent protect its members from the potentially harsh effects of an unchecked free market system....[34] Law has developed the concept of unconscionability so as to prevent the unjust enforcement of onerous contractual terms which one party is able to impose under the other because of a significant disparity in bargaining power.[35]

VI. CONCLUSION

Competition should be based solely upon the quality and price of the goods or services to be provided, not upon the financial gain to be obtained from imposing unjust or unreasonable conditions. If the conditions of contract are the same for all who take part in a particular trade or business, they are left free to compete amongst themselves within the proper sphere of competition. At present this desirable state of affairs may exist in three types of cases: first, the trade or business may be one to which the use of standard form contracts has not spread and therefore all engaged in it are dependent equally upon the common law and general legislation; secondly, legislation relating to the particular trade or business may have ensured uniformity of terms; and thirdly, there may be a trade association or other organisation so effective as to secure that only one set of conditions is used throughout the trade or business.

The trade association, when drawing forms of contract, will have only the interests of its members at heart, and if its membership is sufficiently strong and the goods or services which its members offer are sufficiently in demand, it will be able to impose unreasonable conditions on the customers of its members. This is an advantage which such associations share with monopolies and both are liable to seize the advantage."[36] Is there, then, any alternative to the present practice of dealing with each type of contract

31. *Ibid*.
32. *Ibid*.
33. 85N.E.2d566(N.Y. 1978).
34. *Ibid.*
35. *Ibid.*
36. See, for instance, *Henson* v. *L.N.E. Ry.* (1946) 1 All E.R. 63, per Scott L.J., at p. G57.

separately by special legislation when, but only when, it becomes obvious that nothing short of legislation will prevent harsh bargains being made? The simplest solution would be for an Act to be passed "setting up a tribunal or commission composed partly of lawyers, partly of business men and partly of representatives of people who, for want of a better word to describe those who suffer from the imposition of standard form contracts, can be called the customers. This commission could have the power and duty to prepare standard forms of contracts to be used in the trades or businesses specified in the Act. Lastly, in matters of contract the parties wish to know, so far as is possible, how they stand from the outset. It is better for the question of reasonableness of a particular condition to be judged before it is inserted in a contract than after there has been some dispute on a contract: otherwise the parties will never know until it is too late whether or not the condition forms part of the contract. Dependency on e-commerce is going on day-by-day. It is time to regulate by law strictly the terms and conditions used in standard form contracts, so that the interest of consumers can best be protected by law.

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DWORKIN'S THEORY OF ADJUDICATION: REVISITING THE LAW'S EMPIRE

RABINDRA KUMAR PATHAK*

ABSTRACT : Ronald Dworkin is an influential English-language legal theorist and one of a leading exponent of liberal jurisprudence in the Anglo-American world. He regarded Hart's version of positivism as the most powerful contemporary version of positivism. Dworkin offers a characterization of law as a social practice. His theory is preoccupied with the centrality of the judicial function. He is particularly concerned with the resources that judges are expected to use, the ways in which they use them, and the nature of their results. Dworkin makes a distinction between principles and policies; he puts forth his thesis of law as integrity; his idea of law being a seamless web; his denial of judicial law making; analysis of law as literature and so on. Thus, there is a great deal of controversy that surrounds these tools of adjudicatory framework devised by him. The present paper will focus on theory of adjudication of Ronald Dworkin.

KEY WORDS : Adjudication, Law's, Law's Empire, Interpretation, Pragmatism.

I. INTRODUCTION

Ronald Dworkin has dominated the field of jurisprudence and has been hailed as being "arguably the pivotal jurist of the last 40 years"[1] and as "the phenomenon of our age."[2] Brian Bix describes him as the "most influential English-language legal theorist of this generation".[3] The vast corpus of his works touches upon issues such as liberty, abortion, homosexuality, euthanasia, rights as trump and adjudication among others. And, equally staggering has been the criticism that his writing has generated. As being the leading exponent of liberal jurisprudence in the Anglo-American world[4], his work "explicitly picks up the questions and legacies of Fuller and Hart, and develops an interpretative methodology with a self-conscious political programme—to defend the ideas of fairness, due process and individual rights as

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1. MDA Freeman, *Lloyd's Introduction to Jurisprudence* 716 (2008).
2. George C. Christie, "Dworkin's "Empire"", 1987 *Duke L J* 157 (1987). Also See, Brian Leiter, "The End of Empire: Dworkin and Jurisprudence in the 21st Century", 36 *Rutgers L.J.* 165 (2004)
3. Brian Bix, *Jurisprudence: Theory and Text*, 87 (2006)
4. "Hart…and Dworkin work[ed] within the tradition of philosophy sometimes called Anglo-American analytic or analytical tradition in which great premium is placed upon clarity and straightforward elaboration of one's views." See, James Penner, *Introduction to Jurisprudence and Legal Theory: Commentary and Materials*, 335(2005).

fundamental to legality".[5] He came to fore in the arena of jurisprudence as a critic of positivism, especially of the model of positivism represented by Herbert Hart as he regarded Hart's version of positivism as the "most powerful contemporary version of positivism."[6] However, there are critics who argue that "he has based his criticism on a conception of the appropriate aims and methods of jurisprudence that is strikingly at variance with the positivist conception"[7] and therefore "the debates between Dworkin and his opponents create the impression of being missed connection more often than responsive encounters".[8] In the past several years, he has "tried to defend a theory about how judges should decide cases that some critics (though not all) say is a natural law theory…"[9] Dworkin offers a characterization of law as a social practice. His theory is preoccupied with the centrality of the judicial function. It stresses the dynamic, open-ended character of law by scrutinizing the role of judges as interpreters of law. Dworkin is particularly concerned with the resources that judges are expected to use, the ways in which they use them, and the nature of their results.[10] Dworkin has devised his own theory that tries to show how judges decide cases, especially hard cases which are legally unregulated or are indeterminate. And while developing his theory of adjudication, Dworkin introduces certain key concepts his theory centres around. He develops his own theory of "law as integrity", besides making certain innovation like the concept of chain novel and superhuman judge Hercules. The building blocks of Dworkin's theoretical edifice have faced critical onslaught given the fact that they bring to fore some of the glaring inconsistency and deficiency in Dworkin's arguments. The theory of adjudication as developed by Dworkin assumes due importance, especially given the parallels that are perceptible in the time that preceded Dworkin's theory.[11] The present paper endeavours to look at some of essential aspects of Dworkin's theory of adjudication and while doing so touches upon some of questions that are integral to a critical understanding and appreciation of the theory.

II. LAW AND ADJUDICATION

Dworkin used Hart's concept of law to attack the positivistic notion of what is law.[12] It is then but natural and logical to study Hart given the fact that "Hart's theory of law is part of

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5. Wayne Morrison, *Jurisprudence: From the Greeks to Post-Modernism*, 415 (1997).
6. Ronald Dworkin, *Taking Right Seriously,* 4(Bloomsbury, 2013)
7. Mathew Kramer, *In Defence of Legal Positivism*, 128 (2003) "In defiance of his own methodological precepts concerning interpretive generosity, he has frequently attributed certain theses to positivists which no members of their camp would accept. Because his accounts of the general ambiguity and specific claims of legal positivism are sometimes be musingly distortive, his genuinely important challenges can become obscured. Anyone who endeavors to parry or defuse those challenges must disentangle them from the caricatures that accompany them." *Ibid*.
8. *Ibid*.
9. Ronald Dworkin, "*Natural Law Revisited*", 34 *Univ. of Florida L R* 165. (1982).
10. Thomas Morawetz, "*Law as Experience: Theory and the Internal Aspect of Law*", 52 *SMU L. Rev*. 27 at 55 (1999).
11. One such parallel can be seen in Blackstone's declaratory theory that dealt with the famous account of judging which holds that judges find (or declare), rather than make, law. In the introduction to the *Commentaries*, Blackstone states that the judge's job is to determine the law not according to his own private judgment, but according to the known laws and customs of the land; the judge is not delegated to pronounce a new law, but to maintain and expound the old one. See, William Brewbaker, "*Found Law, Made Law and Creation*: Reconsidering Blackstone's Declaratory Theory" available at http://ssrn.com/abstract=899103

the conceptual domain of general jurisprudence inhabited by Dworkin and by other writers including Richard Posner, Bruce Ackerman, Roberto Unger, and Guido Calebresi, to name just a few."[13] Largely as a result of the challenges of Ronald Dworkin, much of Hart's work has been called upon to support one or the other side of debates about adjudication and about the explanatory virtues of different versions of legal positivism.[14] Hart's explication of law is marked with "elucidation of the concept of law through a descriptive-explanatory account of the relations between law and coercion, law and morality, and law and social rules."[15] This method approaches law from a sidelong view of the observer not only detached from legal practice but detached from investigations that place law as the central object of study.[16] In his lectures, which culminated in *The Concept of Law* in 1961, Hart focused mainly on those concepts which particularists like Pollack and Buckland treated as prolegomena to jurisprudence - law, legal system, command, rule, sovereignty, sanction and the like.[17] Most important theses of the late H.L.A. Hart's *The Concept of Law*, published originally in 1961 can be expressed thus:[18]

> 'Law is a social construction. It is a historically contingent feature of certain societies, one whose emergence is signalled by the rise of a systematic form of social control and elite domination. In one way it supersedes custom, in another it rests on it, for law is a system of primary social rules that direct and appraise behaviour, together with secondary social rules that identify, change, and enforce the primary rules. Law may be beneficial, but only in some contexts and always at a price, at the risk of grave injustice; our appropriate attitude to it is therefore one of caution rather than celebration. Law pretends, also, to an objectivity that it does not have, for whatever judges may say, they in fact wield serious political power to create law.'

The rules of adjudication described by Hart have a more distinct role to play. By determining who has the authority to decide the different legal decisions, it points out the relevant legal officials that recognize the rule of recognition. The rules of adjudication, receiving validity from the rule of recognition, in turn specify whose recognition is relevant for determining the rule of recognition.[19] In law's empire, adjudication enjoys a place of prominence. Primarily the task of the courts is to adjudicate upon the issues that arise in disputes between parties which may be an individual, at times, state, and on occasions both the state and individuals. In the modern era, the role of the judges has become more complex and it is now a far cry when compared with the role a judge had to play eons ago. The evolution of the society and the legal system has entrusted the judges with newer powers and functions. Now their area of operation is not confined to decide questions that arise between individuals as Geoffrey Rivlin reminds that "First, where there is any dispute about

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12. Dworkin says, "I want to make general attack on positivism, and I shall use H L A Hart's version as target…." See, Ronald Dworkin, *Taking Rights Seriously* 22(2007, Indian Reprint)
13. Keith Culver, "Leaving the Hart-Dworkin Debate" 51 *The University of Toronto Law Journal* 367(2001) at 371.
14. Frederick Schauer, "*Retaking Hart*", 119 *Harv. L. Rev*. 852(2006) at 853.
15. Raymond Wacks, *Understanding Jurisprudence* 39 (2005).
16. *Ibid*.
17. *Id*. at 369.
18. Leslie Green, "*The Concept of Law Revisited*", 94 *Mich. L. Rev.* 1687.
19. Reidar Edvinsson ,*The Quest for the Description of the Law* 17 (2009)

constitutional law, the judges must decide what the law is. Their most important role, however, is to act as an independent check on the power of the executive. Only the courts have the authority to stop any individual or body of persons from exceeding their powers, or making improper use of their powers. This is known as preventing an abuse of power."[20]

When we speak of judges, it means the entire hierarchy of judges who operate in different courts. The problems arising before the courts and decisions to be rendered are different in nature depending upon the courts. The factors that influence the outcome of an adjudicatory process vary greatly, and so do the decisions of the court. Cardozo said that law is a "strange compound which is brewed daily in the caldron of the Courts"[21] When courts decide cases, they perform two distinct, though interrelated, functions. First, they settle the controversy between the parties: they determine what the facts were and apply the appropriate rules to those facts. This is the function commonly known as *adjudication*.[22] While performing their second function, courts "decide what the appropriate rules are and how they fit in a particular case. Deciding what rules are applicable often requires the courts to reformulate and modify the scope of existing rules. The second function is sometimes referred to as *judicial lawmaking*.[23] There are two aspects of judicial function that come to fore: "The first—which can be traced back to at least Hale and Blackstone—is that judges merely find and declare the law rather than create it. Thus, judges are, allegedly, not a source of law".[24] The second aspect of judicial juristic techniques that receives much publicised attention is the doctrine of precedent.[25] The tool of interpretation plays an important role in adjudicatory process. It may be said that "Adjudication is interpretation" and a process by which "a judge comes to understand and express the meaning of an authoritative legal text and the values embodied in that text."[26] Interpretation, whether it be in the law or literary domains, is neither a wholly discretionary nor a wholly mechanical activity. It is a dynamic interaction between reader and text, and meaning the product of that interaction.[27] The words and phrases are symbols that stimulate a mental reference to referents.[28]

The problem of interpretation is a problem of words and their effectiveness as a medium of expression to communicate a particular thought. One of the important aspects on interpretation is to find the intention of the members of the legislature whose creation, that is the enactment, outlives them. Salmond says that the true duty of the judicature is to act upon the true intention of the Legislature—the *mens* or *sententia legis*. However, the way this duty is to be performed becomes tedious in that judges have only the barren words to confront with and to find the intention of the legislature. The question of interpretation also brings forth the question: do judges make law while interpreting the law? Does the finding of intention amount only to discovery of law or does it mean creation of law? Interpretation often is instrumental in the birth of new precedents, and there have been arguments put forth that say precedents are clearest examples of judicial law making. Dworkinian thesis of how judges decide cases avers that judges merely discover law; they do not make law. However, it has been argued that when judges discover legislative intent, they in fact invent it instead

20. Geoffrey Rivlin, *Understanding the Law* 40 (2006)
21. Benjamin Cardozo, *The Nature of the Judicial Process* 10(1921).
22. James L. Houghteling, *The Dynamics of Law* 13 (1963).
23. *Ibid*.
24. Rajeev Dhavan *et. al.* (ed), *Judges and the Judicial Power*12 (1985)
25. *Ibid*.
26. Owen M. Fiss, "*Objectivity and Interpretation*", 34 *Stan. L. Rev.* 739.
27. *Ibid*.
28. G Williams, "Language and the Law", 61 *LQR* 73.

of discovering it.[29] The growing complexities of modern day life throw new challenges and problems in myriad manifestation before the judges, who at times may be tempted to cross the restraints of written words of law, besides being confronted with question of morality and needs of justice. There may surface a problem which the law when enacted could not foresee. Or the law relating to a particular issue is shrouded in ambiguity. Many a time, a judge may have to trace that golden thread in the labyrinth of legalese and factual matrix that will help him reach the desired goal of rendering justice. Often, it is very difficult to do so. The process of adjudication requires a judge to be attentive and aware of the several factors which at times may have a telling impact upon the rights of people, besides jeopardising the cherished goal of doing justice.

III. DWORKIN'S THEORY OF ADJUDICATION: AN OVERVIEW

Dworkin's begins his *Law's Empire* with these words: "It matters how judges decide cases. It matters most to people unlucky or litigious or wicked or saintly enough to find themselves in court."[30] It should be noted, however, that while Dworkin's general theory of interpretation is designed to assist in guiding judges to the one right answer in a case which comes before them.[31]To him, law is an interpretive concept. By making this claim, he tries to distinguish his philosophy from what he calls "semantic theories of law", which refer to positivist theories, like that of John Austin and Herbert Hart.[32] Dworkin refines his thesis that law is an interpretive concept, "dividing it into a general part and a specific part. The general part describes what interpretation is and then what an interpretation of law is; the specific part offers an interpretation of American law."[33] Elsewhere also he puts forth a similar thesis.[34] He takes the reader on a detour to explicate what interpretation is.[35] To him, "a theory of interpretation is an interpretation of the higher-order practice of using interpretive concepts".[36] Dworkin does not think that the theory of interpretation should say a priori what makes an interpretation true or false, sound or unsound, objective or subjective. In fact, whether the theory can ever say this at all is problematic, and will depend on the answer to the prior question, namely, what an interpreter must believe about the interpretation (and

29. See, Upendra Baxi, "On How Not to Judge the Judges: Notes towards Evaluation of the Judicial Process", 25 *JILI* 210 (1983).
30. Ronald Dworkin, *Laws Empire* 1(2002, Indian Reprint)
31. He says, "I have not devised an algorithm for the courtroom. No electronic magician could design from my arguments a computer program that would supply a verdict everyone would accept once the facts of the case and the text of all past statutes and judicial decisions were put at the computer's disposal."*Id.* at 412.
32. According to him, these theories suppose that "that 'law' has a meaning which is shared by lawyers and others. This shared meaning consists of rules for using the word 'law.' These rules, in turn, tie law in positivist theories to historical facts, such as the enactment of a statute or the decision of a case. Dworkin suggests that disagreement about the law, under positivist theories, would invoke legal argument in adjudication only about the historical facts made relevant by the shared meaning of 'law.' See, Steven J. Burton, "Ronald Dworkin And Legal Positivism", 73 *Iowa L. Rev*. 109(1987) at 109-110.
33. Barbara Baum Levenbook, "The Sustained Dworkin", *53 The University of Chicago Law Review,* 1108-1126 at 1108 (1986).
34. "Judges should decide what the law is by interpreting the practice of other judges deciding what the law is." See, Dworkin, *A Matter of Principle* 140 (1985).
35. He justifies this detour saying "The detour is essential" because it is essential for the analysis of interpretation that he constructs and defends. See, *supra* note 30 at 50.
36. *Id.* at 49.
37. David Couzens Hoy, "*Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*", 58 *S. Cal. L. Rev*. 135 at148 (1985).

about interpretation in general) to believe it to be the best (or most plausible) interpretation.[37] He argues that creative interpretation is constructive, and it is a matter of interaction between purpose and object and it aims to decipher the author's purpose or intention. Constructive interpretation, Dworkin tells us, is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong.[38] Constructive interpretation is a methodology for interpreting social practices, texts (and not just legal texts) and works of art. Dworkin applies this method to interpret legal practice.[39] The process of constructive interpretation comprises of three stages.[40]

In *Law's Empire*, Dworkin put forth what he calls an "integrity theory of law".[41] Here, he basically examines the role of judge while interpreting a case. He makes an analogy with a novelist of a chain-novel. Importantly, he is trying to argue against the theory of legal positivism by putting forth his theory of law explained by him in *Law's Empire*. Deeply embedded in the notion of "law as integrity" is the idea that judges create a rationally integrated and coherent network of legal principles which, according to Dworkin, is law. What the theory of law developed by Dworkin does is that it presents before the judges a blueprint for adjudication. And, this blueprint guides the judges to adopt the same methodology, from which integrity was derived, that is, constructive interpretation. Law as integrity holds a vision for judges which states that as far as possible judges should identify legal rights and duties on the assumption that they were all created by the community as an entity, and that they express the community's conception of justice and fairness.[42] That is,

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38. See, *supra* note 30. Brian Bix explains: "One can think of constructive interpretation as being similar to the way people have looked at the collections of stars and seen there pictures of mythic figures, or the way modern statistical methods can analyse points on a graph (representing data), and determine what line (representing a mathematical equation, and thus a correlation of some form between variables) best explains that data." Brian Bix, *Jurisprudence: Theory and Context* 89 (2006).
39. M D A Freeman, *Lloyd's Introduction to Jurisprudence* 722 (2008).
40. The Pre-interpretive Stage: At this stage, the rules or standards taken to provide the tentative content of the practice are identified. The equivalent stage in literary interpretation is the stage at which discrete novels, plays, and so forth are identified textually, that is, the stage at which the text of *Moby-Dick* is identified and distinguished from the text of other novels.
The Interpretive Stage: At this stage, "the interpreter settles on some general justification for the main elements of practice identified at the pre-interpretive stage". The justification need not fit every aspect or feature of the standing practice, but it must fit enough for the interpreter to be able to see himself as interpreting that practice, not inventing a new one himself.
Post-interpretive or Reforming stage: At this stage, the interpreter "adjusts his sense of what the practice "really" requires so as to better serve the justification he accepts at the interpretive stage."See, *supra* note 30.
41. He believes that integrity is the life of law and the claims of integrity can be divided into two more practical principles:
I) Principle of integrity in legislation; and
II) Principle of integrity in adjudication.
While the first categorisation requires that those who create law must keep the law coherent in principle, the latter one requires that those who are responsible for deciding the law, "must see and enforce it as coherent in that way". See, *supra* note 30 at 167. Also see, George C. Christie, "Dworkin's "Empire"", 1987 *Duke Law Journal* 157-189 at 185 (1987) where Christie says, ""*Law's Empire* has greatly softened the sharp distinction Dworkin used to make between the legislative role and the judicial role. He now openly concedes that the regime of principle required by the model of law as integrity applies to legislators as well as judges."
42. Ronald Dworkin, "Laws as Integrity", available at http://theoryofjurisprudence.blogspot.com/2007/12/ronald-dworkin-law-as-integrity.html. Adjudicative principle of integrity instructs judges to identify

law must speak with one voice. According to law as integrity, propositions of law are true if they figure in or *follow from the principles of justice, fairness, and procedural due process* that provide the best constructive interpretation of the community's legal practice.[43] One of the assumptions underlying the notion of "law as integrity" is that judges are in a very different position from the legislators. They are not free in a way the legislators are. They must make their decisions on grounds of principle, not policy.

According to Dworkin, every time a judge is confronted with a legal problem, he or she should construct a theory of what the law is. That theory must adequately fit the relevant past governmental actions (legislative enactments and judicial decisions), while making the law the best it can be.[44] This necessitates that what he (or she) adds must be consistent with what went before (the requirement of fit), and must make best of that existing material by interpreting it in the most plausible and attractive way and adding a contribution that will further enhance it. Since the task of the writer is to continue the story, he cannot simply go off on a personal literary frolic but must create a contribution in a way that is consistent with the best interpretation of the meaning of what went before.[45] To put it simply, when a judge decides a case, he is required to examine the past decisions and come to a decision that shows the judicial system flowing in a seamless manner. He does not have a free hand; he is not writing "the novel" for himself. He is constrained by certain requirements that ensure integrity in the fabric of law. Dworkin outlines the *modus operandi* of a chain novelist judge thus:[46]

> 'He must take up some view about the novel in progress, some working theory about its characters, plot, theme, and point, in order to decide what counts as continuing it and not as beginning anew.'

The dimension of fit, one of the methodology adopted by Dworkin, assumes great importance. A judge engaged in the task of interpretation "cannot adopt any interpretation, however, complex, if he believes that no single author who set out to write a novel with various readings of character, plot, theme, point that the interpretation describes could have written substantially the text he has been given. That does not mean that his interpretation must fit every bit of the text."[47] It is necessary that the interpretation adopted by the judge must

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legal rights and duties, so far as possible, *on the assumption that they were all created by a single author—the community personified*—expressing a coherent conception of justice and fairness. Dworkin says that law as integrity requires a judge to test his interpretation of any part of the great network of political structures and decisions of his community by asking whether it could form part of a coherent theory justifying the network as a whole. See, *supra* note 30.

43. *Supra* note 30 at 225. Emphasis added. "Dworkin argues for law as integrity as the best model of law by establishing that integrity is a distinct and important political ideal He believes that three political virtues are generally accepted by all legal theorists: fairness, justice, and procedural due process. Fairness is a virtue of the procedures by which political choices are made. Justice is a virtue of political outcomes. Procedural due process is a virtue of law enforcement. Dworkin proposes integrity as a fourth political virtue: we should insist that the state act on a single, coherent set of principles. He admits that in a utopian state, where the government is perfectly just and fair, integrity is a side effect of justice. But in ordinary life integrity will conflict with other ideals, just as justice often conflicts with fairness." John Stick "Literary Imperialism: Assessing the Results of Dworkin's Interpretive Turn in Law's Empire", 34 *UCLA L. Rev.* 371(1986) at 420.
44. Bix *supra* note 3 at 89.
45. Roger Cotterrell, *The Politics of Jurisprudence* 167 (2008, Indian edition).
46. *Supra* note 30 at 230.
47. *Ibid*.

"flow throughout the text"; it must have the "general explanatory power", and the interpretation will be flawed "if it leaves unexplained some major structural aspect of the text."[48]

"A complete theory of law, writes Ronald Dworkin, tells us what law *is* and what it *ought* to be. The current "ruling" theory of law combines legal positivism with utilitarianism: it holds, first, that law is a set of explicitly adopted rules and, second, that law ought to maximize the general welfare. Dworkin rejects both branches of that theory. He argues that law contains "principles" as well as rules and that these principles cannot be traced to any explicit adoption or enactment"[49] According Dworkin, positivism as a "model of rules", forces us to miss the important roles of these standards that are not rules.[50]

Hard cases represent one such area of jurisprudential debate that touches upon many aspects of adjudication, and has led to invigorated debates. Dworkin does not explain what he means by "hard cases." These might be cases in which the law appears indeterminate, because of vagueness, conflicting rules, and the like; but Dworkin might also wish to include cases like *Riggs,*[51] in which apparently determinate law is not followed by the courts. Both would be included by saying that hard cases are those in which the decision goes beyond the holdings of past cases and beyond the literal import of established legal rules.[52] In a hard case where no settled rule dictates a decision either way, then, Dworkin says, "it might seem proper that a proper decision could be generated by either policy or principle."[53] Hard cases,

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48. *Ibid.* James Donato explains, "To satisfy the fit requirement the interpreter must critically appraise the text and decide what the text means. Additions or changes to the text must conform to the spirit of the work as a whole. Material that clashes with this spirit or violates the text's thematic or structural integrity must be excluded. Interpretation must fit the data it interprets." James Donato, "Dworkin and Subjectivity in Legal Interpretation", 40 *Stan. L. Rev.* 1517 at 1533 (1988).
49. David Lyons, "Principles, Positivism and Legal Theory", 87 *Yale L. J.* 415 (1977). Dworkin says, "…the thesis that there exists some commonly recognized test for law is plausible if we look only at simple legal rules of the sort that appear in statutes or are set out in bold type in textbooks. But lawyers and judges, in arguing and deciding lawsuits, appeal not only to such black-letter rules, but also to other sorts of standards that I called legal principles, like, for example, the principle that no man may profit from his own wrong. This fact faces the positivist with the following difficult choice. He might try to show that judges, when they appeal to principles of this sort, are not appealing to legal standards, but only exercising their discretion." See, Ronald Dworkin, "Social Rules and Legal Theory", 81 *Yale L. J.* 855 at 855 (1972).
50. Policy is that kind of standard that "sets out a goal to be reached, generally an improvement in some economic, political or social feature of the community" while a principle is a standard "that is to be observed, not because it will advance or secure an economic, political or social situation deemed desirable, but because *it is a requirement of justice or fairness or some other dimension of morality*." Rules *vis-à-vis* principles are "applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision." See, Ronald Dworkin, *Taking Rights Seriously* (2008, Indian Reprint).
51. *Riggs* v. *Palmer*, 115 N.Y. 506, 22 N.E. 188(1889).
52. David Lyons, "Principles, Positivism and Legal Theory", 87 *Yale L. J.* 415 (1977at 427.
53. *Supra* note 12 at 83. He cites the case of *Spartan Steel &Alloys Ltd. V. Martin & Co.*. In this case, the employees of the defendant company had broken the electric cable which belonged to a company which supplied power to the plaintiff's factory, which was shut down during the period the cable was repaired. Whether to allow recovery for economic loss following negligent damage to someone else's property, was the question to be decided before the court. Here, there are two ways open before the court. Dworkin says, "It might have proceeded to its decision by asking whether a firm in the position of the plaintiff had a right to recovery, which is a matter of principle, or whether it would be economically wise to distribute liability for accidents in the way plaintiff suggested, which is a matter of policy." Dworkin lays down his thesis: "judicial decisions in civil cases, even in hard cases

to which no rule is immediately applicable, require the judge, in Dworkin's thesis, to deploy standards other than the rules (since by definition no rule applies). For this purpose, he appoints, Hercules, a judge of superhuman skill, learning, patience and acumen. Hercules is expected to construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents and, so far as to be justified on principle, constitutional and statutory principle as well.[54] Dworkin's theory of adjudication requires Hercules to seek consistency and integrity in answering the legal question before him.[55] He accepts law as integrity.[56]

IV. HERBERT HART'S RESPONSE

Given the fact that Dworkin uses Hart's version of positivism as a springboard to attack the same, it will be apposite to examine Hart's response to the criticisms or onslaughts made by Dworkin against Hart's 'Concept of Law'.[57] Besides, among many critics of Dworkin, Hart has a prominent place given the debate their writings generated.[58] Hart believes that though Dworkin's arguments have been consistent, albeit broadly, over the years, there have been some changes in the substance of the arguments, besides the changes in terminology in which these arguments have been expressed. It is noticeable that a reading of Dworkin's later writings reflects that some of his criticisms so prominent in his earlier writings do not appear in his later writings.[59]

In *Law's Empire,* Dworkin notes that he has taken up an internal, that is, a participant's point of view of law which "tries to grasp the argumentative character or our legal practice and struggling with the issues of soundness and truth participants face."[60] He aims to study legal arguments from "the judge's point of view".[61]To Dworkin's assertion that no adequate account of internal perspective can be provided a descriptive theory which is a view point of an external observer or a non-participant, Hart replies that "there is nothing in fact in the project of a descriptive jurisprudence as exemplified in my book to preclude a non-participant external observer from describing the ways in which a participants view the law from such an internal point of view."[62]

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like Spartan Steel, characteristically are and should be generated by principle not policy". See, *supra* note 12.

54. Raymond Wacks, *Understanding Jurisprudence* 125 (2005).
55. See, *ibid.*
56. *Supra* note 30 at 239. Hercules works like a chain novelist. In a case before, both the sides cite precedent and put forth their arguments that decision if given in its favour would be like continuing the story begun by judges who decide those precedent cases. Hercules is a judge of method, a careful judge. Hercules must form his own view about (the) issue. Just as a chain novelist must find, if he can, some coherent view of character and theme such that a single hypothetical author with that view would have written at least the bulk of the novel so far, Hercules must find, if he can, some coherent theory about legal rights…such that a single political official could have reached most of the results the precedents report. See, *supra* note 30 at 240.
57. See, Jeanne L. Schroeder, "Beautiful Dreamer: Review of A Life of H.L.A. Hart: The Nightmare and the Noble Dream, By Nicola Lacey" 77 *University of Colorado Law Review* 803 at 814 (2006)
58. See for example, Marshall Cohen (ed), *Dworkin and Contemporary Jurisprudence* (1984) for a collection of critical appreciation of Dworkin's theory of adjudication and other related aspects.
59. Though abandoned (in the sense that they have not been explicitly withdrawn) by Dworkin, these criticisms have "gained a wide currency". So, Hart in his postscript decides to respond to them also.
60. Ronald Dworkin, *Law's Empire*, 14 (2002, Indian reprint)
61. *Ibid*.
62. H L A Hart, *Concept of Law* 2005 (Indian Paperback, 2nd Impression) at 242

One of the central and prominent features of Hart-Dworkin debate has been the question of law as comprising of rule and principles. According to Dworkin, the key tenets of positivism regard the law of a community as being "a set of special rules used by the community directly or indirectly for the purpose of determining which behaviour will be punished or coerced by the public power."[63] Besides, the set of these valid rules is exhaustive of 'the law'. The above rules, says Dworkin presenting his picture of positivism, can be identified and distinguished by specific criteria, by tests having to do not with their content but with their *pedigree* or the manner in which they were adopted or developed.[64] Hart responds:[65]

> '…in some systems of law, as in the United States, the ultimate criteria of legal validity might explicitly incorporate besides pedigree, principles of justice or substantive moral values….in ascribing 'plain-fact' positivism to me …Dworkin ignores this aspect of my theory.'

One of the frontal attacks made by Dworkin on Hart was that the latter's version of positivism mistakenly represents law as consisting only of rules which function in an 'all-or-nothing' manner, and such a theory ignores the legal principles which play an important role in the adjudication of cases and in legal reasoning. Prior to moving further to see how Hart responds to Dworkin's criticism, it is pertinent to note two noticeable points that Hart makes:

1. Hart confesses that his concept of law speaks "too little" about the topic adjudication and legal reasoning, especially about legal principles. He accepts that "it is a defect…that principles are touched upon only in the passing."[66]
2. He accepts that "principles are an important feature of adjudication and legal reasoning ….Much credit is due to Dworkin for having shown and illustrated their importance and their role in legal reasoning…"[67]

As to the question of law consisting of principles, Hart says "principles often include a vast array of theoretical and practical considerations only some of which are relevant to the issues which Dworkin meant to raise".[68] He argues that the principles are broad, unspecific or general. Hart counters the argument of Dworkin that principles are different from the rules which function in an all-or-nothing fashion, and that they only point towards or count in favour of a decision. Hart calls such principles as having "non-conclusive" character, and argues that some of the examples of such non-conclusive principles given by Dworkin, such as 'no man may profit from his own wrong', are relatively specific. Besides, he also argues that just as a principle which is not applicable to particular case may survive to be applicable in another case, a rule may be seen in the same light in the sense that a rule which is "defeated in competition with a more important rule may, like a principle, survive to determine the out come in another case where it is judged to more important than another competing rule".[69] If the case of *Riggs* v. *Palmer*[70] is analysed in the light of the law comprising of non-

63. Brian Bix, *Jurisprudence: Theory and Context* 89 (2006). Also see, Ronald Dworkin, *Law's Empire* 31-35(2002, Indian reprint).Also see, Ronald Dworkin, *Taking Rights Seriously* 17 (2008, Indian Reprint).
64. See, Ronald Dworkin, *Taking Rights Seriously*17(2008, Indian Reprint)
65. *Supra* note 62 at 247.
66. *Id*. at 259.
67. *Id*. at 263.
68. *Supra* note 62 at 260.
69. *Supra* note 62 at 262.
70. 115 N.Y. 506, 22 N.E.188 (1889). Also see, Ronald Dworkin, *Taking Rights Seriously*, 22-28(2008, Indian Reprint) and Ronald Dworkin, *Law's Empire* 15-20 (2002, Indian reprint)

conclusive principles and law, one aspect of principles comes to the fore that is in case where they are pitted against each other, principles may win over the rules as it happened in this case. And, this shows as Hart argues "rules do not have the all-or-nothing character, since they are liable to be brought into such conflict with principles which may outweigh them."[71] Hart further argues:[72]

> 'Even if we describe such cases not as conflict between rules and principles, but as a conflict between rules explaining and justifying the rule under consideration and some other principle, the sharp contrast between all-or-nothing rules and non-conclusive principles disappears; on this view a rule will fail to determine a result in a case to which it is applicable according to its terms if its justifying principle is outweigh by another.'

One other aspect of Dworkin's criticism that finds a reply in Hart's argument concerns the rule of recognition. Schauer outlines the Dworkin's thesis thus:[73]

> 'actual adjudication of hard cases is not restricted to the application of such rules. Rather, such adjudication involves the application of principles as well as rules, and no rule of recognition could identify the principles—legal, political, and moral as an interconnected whole—that play such a large role in the decision of actual cases. The notion of a rule of recognition, argued Dworkin, thus turns out to possess far less explanatory force than Hart had claimed.'

Hart points out that Dworkin's preoccupation with constructive interpretation makes him ignore that many principles owe their status to what he calls their 'pedigree' which refers to the "manner of their creation or adoption by a recognised authoritative source". Hart contends that the preoccupation has made Dworkin make two mistakes. The first one is his belief that principles cannot be identified by their pedigree, and the second one is the belief that rule of recognition only provide the pedigree criteria. Hart contends that principles can be identified by pedigree criteria as there is "nothing in their non-conclusive character or their other features" that can preclude such identification. He fortifies his contention arguing that there are some legal principles, like no man can profit from his own wrong, which are identified as law by the pedigree test.

These principles have been taken into consideration and have provided the reasons for decisions in many cases. In the light of above and such other examples, it can not be argued that "the inclusion of principles as part of the law entails the abandonment of the doctrine of a rule of recognition."[74] However, Hart notes that there are at least some legal principles which may be "captured" or identified as law by pedigree criteria provided by a rule of recognition, and if it so conceded, then Dworkin's criticism "must be reduced to the modest claim that are many legal principles that cannot be so captured because they are too numerous, too fleeting, or too liable to change or modification, or have no feature which would permit their identification as principles of law by reference to any other test than that of belonging to that coherent scheme of principles which both best fit the institutional

71. *Supra* note 62 at 262
72. *Ibid.*
73. Frederick Schauer, "(Re) taking Hart", 119 *Harv. L. Rev.* at 872 (2006).
74. *Supra* note 62 at 265.

history and practices of the system and best justifies them."[75] Hart convincingly argues that a rule of recognition is necessary, the reason being:[76]

> "…the starting point for the identification of any legal principle to be brought to light by Dworkin's interpretive test is some specific area of settled law which the principle fits and helps to justify. The use of that criterion therefore presupposes the identification of the settled law, and for that to be possible a rule of recognition specifying the sources of law and their relationships of superiority and subordination holding between them is necessary."

Besides the scope of, and sharp contrast between, the rules and principles, judicial discretion[77] represents one such area where Dworkin and Hart differ. In a legal system there are always certain legally unregulated cases where the law appears indeterminate. Hart says in such a case judge must exercise his "*discretion* and make law for the case in stead of merely applying already pre-existing settled law."[78] Such "legally unprovided-for" case requires that "the judge both makes new law and applies *the established law which both confers and constraints his law-making powers*."[79] As to the criticism that judicial law-making is undemocratic, Hart contends that "delegation of legislative powers to the executive is a familiar feature of modern democracies and such delegation to the judiciary seems a no greater menace to democracy."[80] Besides it may be "regarded as a necessary price to pay for avoiding the inconvenience of alternative methods of regulating (disputes) such as reference to the legislature."[81] And the price says Hart may seem small given the fact that though they exercise discretion, they are constrained in

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75. *Ibid*.
76. *Supra* note 62 at 266. Schauer observes: "Dworkin stood accused of failing to understand that a rule of recognition can recognize principles as well as rules. Dworkin, in challenging the descriptive value of the rule of recognition, pointed to *Riggs* v. *Palmer*, in which the "no man should profit by his own wrong" principle dominated the statute of wills rule, and to *Henningsen* v. *Bloomfield Motors, Inc*., in which the principle of fairness trumped the previously recognized rules of contract law. His critics, however, argued that principles like these have indeed been recognized by a legal rule of recognition and thus have become part of the legal canon. And because the actual rule of recognition in advanced common law systems plainly allows use of such principles, the idea of a rule of recognition and Hart's basic picture of law and legal positivism remain intact." See, Frederick Schauer, "(Re) taking Hart", 119 *Harv. L. Rev.* at 874 (2006).
77. "If the word discretion conveys to legal minds any solid core of meaning, one central idea above all others, it is the idea of choice" and "to say that a court has discretion in a given area of law is to say that it is not bound to decide the question one way rather than another." See, Maurice Rosenberg, "Judicial Discretion of the Trial Court, Viewed From Above", 22 *Syracuse L. Rev*. 635 (1971) at 636-637
78. *Supra* note 62 at 272.
79. *Ibid*. Emphasis added. Dworkin rejects the law-creating discretion of judges and the thesis that by doing so, they fill up the gaps in such legally unregulated or indeterminate cases. According to him, law consists of rules and implicit legal principles which best fit or cohere with the explicit law, and therefore, law is never incomplete or indeterminate. And that being so, a judge has no discretion or "occasion to step outside the law" and exercise law creating power to reach a decision.
80. *Supra* note 62 at 275.
81. *Ibid*.

> the exercise thereof. They deal only with specific issues, and cannot "fashion wide codes or reforms."

There are at times cases where the settled law fails to answer the questions that arise in certain novel cases, may be because the law is indeterminate or it may also so happen that law simply 'runs out'. In such cases, Hart says, a judge should use his discretion and make law in place of just applying the settled law. The judge cannot refer the matter not regulated by the existing law to the legislature, and wait for the latter to remedy the indeterminate nature of law so that it can meet the needs of that particular case that has come before it. In fact, as Cotterrell notes, judicial law-making is, for Hart, the exercise of discretion.[82] He believed that in the vast majority of cases that trouble the courts, neither statutes nor precedents in which the rules are allegedly contained allow of only one result. In most important cases there is always a choice and that all rules have a penumbra of uncertainty where the judge must chose between alternatives. That is, there is some open texture.[83]

V. QUESTIONING LAW AS INTEGRITY

Key to Dworkin's constructive interpretation of legal practice is his conception of law as integrity.[84] It offers a blueprint for adjudication which directs judges to decide cases by using the same methodology from which integrity was derived.[85] Before analyzing the critical aspects of the concept, it is germane to recall that the concept of law as integrity is both a legislative and constructive principle. Embedded in the notion of "law as integrity" is the idea that judges create a rationally integrated and coherent network of legal principles which, to Dworkin, is law, and if we compare the three theories of law—conventionalism, pragmatism and law as integrity, it is the last of the three "that shows our legal system in its best light."[86] While elucidating his concept of law as integrity, Dworkin devises some innovations like the concept of chain novel and the superhuman judge whom he calls Hercules. Be that as it may, the evolving conceptual matrix is beset with criticisms that try to show certain aspects of the conception lack in 'integrity' when tested on the touchstone of jurisprudential parameters. The criticisms are many and divergent. John Stick observes:[87]

> "Dworkin compares three possible interpretive accounts of law, concluding that his theory of law as integrity is preferable. Finally, he applies the theory of law as integrity to the common law, statutory interpretation, and constitutional interpretation. His argument about the proper explanation of law is framed in terms of competing interpretive theories; after the brief and inconclusive introduction, he never establishes the superiority of his notion of interpretation over other philosophical accounts of how legal reasoning works."

Though Dworkin comes to the conclusion that law as integrity is superior to conventionalism and pragmatism, he never, as Stick points out, comes close to establishing such a thing.[88] Stick is critical of Dworkin's argument that "soft conventionalism collapses

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82. Roger Cotterrell, *Politics of Jurisprudence*122(2008)
83. *Supra* note 62 at 131-132.
84. M D A Freeman, *Lloyd's Introduction to Jurisprudence* 724 (2008).
85. See, *Ibid.*
86. See, *Ibid*.
87. John Stick "Literary Imperialism: Assessing the Results of Dworkin's Interpretive Turn in Law's Empire", 34 *UCLA L. Rev.* 371(1986) at 401.
88. See, *Id.* at 402.

into law as integrity" and says that such a stance of Dworkin "is certainly wrong."[89] According to Stick, attempt made by Dworkin to justify law as integrity by criticising other theories like conventionalism "flounders" and describes it as "flimsy" because such a criticism on the part of Dworkin must be supported by his arguments that show convincingly that conventionalism has defects that his law as integrity concept solves. Stick sounds reasonable when says:[90]

> 'Dworkin must convince us both that conventionalism has defects that law as integrity solves and that there is no middle ground, no third intermediate theory that also solves the problems of conventionalism. The more extreme and obviously defective Dworkin makes conventionalism, the more obvious it becomes that intermediate theories must exist. Dworkin has attempted to pre-empt such middle theories by arguing that "soft" conventionalism is no more than a pale version of his own theory. We have seen that this argument is suspect. We now see that strict conventionalism is so extreme that there is no theorist who would subscribe to it. And so Dworkin's discussion of conventionalism does little to justify his own theory of law as integrity.'

One of the integral aspect of law as integrity is the innovation of conception of law as chain novel. Dworkin's imaginary literary genre finds resonance in literature also as Gretchen Craft reminds us that:[91]

> 'Just as when Virginia Woolf's character Clarissa Dalloway quotes William Shakespeare who is himself retelling an old story, and Jorge Luis Borges writes a story imagining a scholar who details the life of an imaginary author who reinvents *Don Quixote* everything that ever was part of the law is still part of it-the Founders, the empire, a skull of egg-shell thinness, cows wandering through neighbouring fields, peasant villages with banners flying.'

The analogy that Dworkin draws between law and literature has to be seen in the light of how judges actually decide cases. Do they follow the *modus operandi* as has been outlined by Dworkin? Besides it raises the question: is it possible for the judges to really follow such a methodology?, and even if the answer to question is in affirmative, the feasibility of the idea remains suspected and questionable. Raz finds a difference between law and literature as he says "law is somewhat unlike literature for the courts combine the role of creative artist and critic. They generate new chapters of law on the basis of an interpretation of previous chapters."[92]

Of the many criticisms that have been made, one of the difficult criticism to counter has been the contention that "how if the judge within the "law as integrity" model is to use

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89. See, *Id.* at 410.
90. *Id*. at 418. As to pragmatism Stick notes that "Pragmatism's strength as a theory is not that it is particularly attractive as a political vision or compelling as a factual portrait. Pragmatism, as a skeptical theory, seems strong only if all the non-skeptical theories seem weak. Dworkin, for this reason, spends little time discussing pragmatism by itself. Instead, he quickly moves on to his own theory of law as integrity." *Id*. at 419.
91. Gretchen A. Craft, "The Persistence of Dread in Law and Literature" 102 *Yale L.J*. 521 at 538 (1992).
92. Joseph Raz, "Dworkin: A New Link in the Chain", 74 *Cal. L. Rev*.1103 at 1118 (1986).

his own political convictions to decide cases, and given that different judges will not necessarily have those convictions, they can be expected to come to the same conclusion.[93] Besides, as Freeman asks, given that integrity allows for disagreement about law, can it yield a single right answer to difficult question of law?[94]

Dworkin says that Law as integrity requires a judge to test his interpretation of any part of the great network of political structures and decisions of his community by asking whether it could form part of a coherent theory justifying the network as a whole, and because no actual judge "could compose anything approaching a full interpretation of all of his community's law at once", he comes up with idea of imaginary literary figure, a superhuman judge Hercules, who is superhuman talents and endless times. However, it is this quality of Hercules that leads to a mounting criticism of the concept of imaginary judge given the fact that it is not possible for a real judge to act like Hercules. An ordinary and real judge lacks the 'luxury' of having endless time. Besides, a real judge lacks superhuman talent. Morrison sounds convincing when he says "Hercules is myth, or worse, a hypocrite. While judges may sometimes sound like Hercules they are merely disguising their real motive." [95]

VI. CONCLUSION

Theory of adjudication as has been advocated by Dworkin has invited many a criticism given the various aspects of the theory that are open to criticism. As Reagan says, "A great many people have attempted to explain what is wrong with the views of Ronald Dworkin. So many, indeed, that one who has read only the critics might wonder why views so widely rejected have received so much attention. One reason is that, whatever may be wrong in Dworkin's theories, there is a good deal that is right in them. But what is right is not always clear. Important passages in Dworkin can be distressingly obscure, or tantalisingly incomplete."[96] This observation of Reagan succinctly sketches the contours of the essence of Dworkin's theories, especially his theory of adjudication in the present context. Despite the "good deal" that is present in his theory of adjudication, the theory is beset with numerous criticisms that at times rip apart some of the fundamental assertions made by Dworkin and certain concepts and assertions which he employs to erect the edifice of the theory. And these are many. For example, he makes a distinction between principles and policies; he puts forth his thesis of "law as integrity"; his idea of law being a seamless web; his denial of judicial law making; analysis of law as literature and so on. There is a great deal of controversy that surrounds these tools of adjudicatory framework devised by Dworkin.

When judges decide cases, they do so by appealing to a system of principles and

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93. *Supra* note 84 at 727-728.
94. *Ibid*.
95. Raymond Wacks points out four objections that have been raised by the critics who find it difficult to accept the "omniscient" Hercules, J.:
1. He is a politician since he substitutes his own political judgement for the judgment "for the politically neutral, correct interpretations of previous decisions".
2. He is a fraud. He thinks that he has discovered the answer to a hard case, but he fraudulently offering his judgement as the judgment of the law.
3. He is a tyrant. He arrogantly assumes his conception of the law is correct, though he cannot prove his opinion is better than that of those who disagree.
4. He is a myth because no real judge can behave in this Utopian style.
See, Raymond Wacks, *Understanding Jurisprudence* 139 (2005).
96. Donald H Reagan, "Glosses on Dworkin: Rights, Principles, and Policies", in Marshall Cohen (ed), *Ronald Dworkin and Contemporary Jurisprudence* 119 (1983).

policies, and invoke what Dworkin calls a political theory, elements of which are accorded the status of law, and which are taken to be embedded in the system and enforceable like ordinary rules. However, he makes a distinction between principles and policies, which is significant as regards the adjudication of cases. Dworkin's argument that judges do not and should not rely on the arguments of policy is based on his twin arguments that can be labelled as *democracy argument* and *retroactivity argument.*

Democracy argument fails to convince in view of the fact that legislature may not or does not have the time to take care of every area of law. Besides, it can not be argued convincingly that the legislature is in a better position to decide all the questions of general welfare than the courts. Even assuming that legislature is better equipped to deal with such questions, there is no apparent reason for the courts to avoid policy when the legislature declines to engage itself with such questions. Moreover, it can be argued that abstinence on the part of legislature is an indication that it has decided to leave to the court to be developed in terms of principles than policies. There are occasions when bold and unconventional action on the part of judges, which may require him or her to take into account policy arguments, becomes a necessity for the benefit of the society in order to overcome stagnation and decay which can be taken care of only by judicial consideration of policy arguments.

Retroactivity argument[97] too is not tenable given the questions it raises but fails to answer. Dworkin argues that if courts rely on policies, it would be unfair to the losing party to suffer because of a fresh policy determination. However, it can be argued, as Greenawalt does, that it is plausible to suppose that people understand that recognition of their uncertain claims of rights will depend on consistency with the general welfare, and therefore if people are aware that their right to some act may sometime be contingent on the act's not being inconsistent with the general welfare, it is no more offensive to deny their claim on the basis of the general welfare than on the basis of some arguable principle.[98] There are decisions of the courts which are not retroactive but prospective in nature, that such decisions simply tell that something is not to be done in future from the date of the decision. The reason behind such decisions is to avoid the retroactive effects.

Moreover, there are decisions that are remedial in nature while others grant injunctions. The point worth considering here is that all judicial decisions do not result in some kind of damage or punishment that is talked about by Dworkin to buttress his argument of retroactivity.[99] Therefore the retroactivity argument fails in view of the fact that not all decisions are retroactive or affect the rights of individuals retroactively.

It is well accepted that fairness and justice demand that legal disputes should be adjudged by a law that was in existence when the dispute took place, and not by application

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97. The concern of Dworkin latent in his argument can be expressed by slightly changing the observation of Stephen R. Munzer who says that the central purpose of law is to guide behaviour. Retroactive laws frustrate the central purpose of law by disrupting expectations and actions taken in reliance on them. This disruption is always costly and rarely defensible. Moreover, retroactivity violates what is often called the rule of law, namely, an entitlement of persons to guide their behaviour by impartial rules that are publicly fixed in advance. This violation undermines human autonomy by hindering the ability of persons to form plans and carry them out with due regard for the rights of others. See, Stephen R. Munzer, "A Theory of Retroactive Legislation", 61 *Tex. L. Rev*. 425 at 427 (1982).

98. Kent Greenawalt, "Policy, Rights, and Judicial Decisions", in Marshall Cohen (Ed), *Ronald Dworkin and Contemporary Jurisprudence* 89 (1983).

99. Dworkin argues that his retroactive argument is "persuasive against a decision generated by policy" because "it would be wrong to sacrifice the rights of an innocent man in the name of some new duty created…." See, Ronald Dworkin, *Taking Rights Seriously*, 85 (2008, Indian reprint)

law made *post factum*. However, there are instances where a legal system tolerates the retroactive effects notably in cases where the legislature takes away a right that existed when the relevant transaction took place, and it does so even after the beginning of litigation.

Dworkin builds up his theory based upon certain concepts like legal principles, law as integrity, rights thesis, and chain novel and so on, besides the innovation of imaginary judge Hercules. These building blocks of Dworkin's adjudicatory edifice have been subject of criticism, and therefore it is necessary to see how far they have been able to sustain the criticism levelled against them. To begin with, "law as integrity" which Dworkin says "shows our legal system in its best light" can be said to be rooted in the idea that integrity requires that one is true to one's own principles and conviction. Dworkin talks of a legal system that is true to its principles. The process of interpretation is constructive. The interpreter is not concerned with finding the intensions of the authors of previous decisions but only with imposing order on those decisions by constructing a scheme of principles that presents them in their best light. Law as integrity argues that rights and responsibilities flow from past decisions and so count as legal, not just when they are explicit in these decisions but also when they follow from principles of personal and political morality the explicit decisions presuppose by way of justification.[100] Law as integrity mandates the interpreter (read Hercules) to ask whether his interpretation of law could form part of a coherent theory that justifies the whole legal system. But, as Raymond Wacks asks, where does "integrity" come in? Dworkin does not 'define' it.[101] As has been discussed before also, it remains questionable given the fact that even integrity recognises scope for disagreement about the law, is it possible that it can yield aright answer to difficult questions of law? Besides, Dworkin has been opposed to the idea of judges using strong discretion because of the resulting defect of retrospectivity that such an exercise of discretion entails. It has been his consistent argument that citizens will find themselves burdened with duties after they have acted because of the retrospective creation of such duties. However, it may argued that Dworkin rights answer thesis may be subjected to same objection given the fact that " If different judges can come to different conclusions using their own political convictions, is it any solace to an aggrieved and surprised citizens to be told that that the answer reached was "right" in the eyes of that judge?"[102]

Going by the Dworkin's theory of law as integrity, in some way legal interpretations must fit the historical materials of the legal system. But such a proposition raises the obvious question: what can determine the legal significance of these materials except some objective positivist criteria of law?[103]

Hercules, the imaginary judge, is required to see that law as integrity guides his action in his work of adjudication. But, it is well-known that the very idea of Hercules has been centre of criticism given the fact that, as Dworkin describes him, he is a superhuman judge, can well be said to having a utopian existence. As regards other aspect of the theory of adjudication, it should be noted that as Raz points out that "the affirmation of the universal existence of right answers, and the denial of judicial creativity and of judicial discretion, appear to have been whittled down to the point where few would disagree. In particular, Dworkin has made these arguments compatible with the claim that judges have discretion as

100. See, Ronald Dworkin, *Law's Empire* 95-96 (2002, Indian reprint).
101. See, *supra* note 16 at 133.
102. MDA Freeman, *Lloyd's Introduction to Jurisprudence* 726 (2008).
103. See, Roger Cotterrell, *Politics of Jurisprudence* 173 (2008).

it is understood by Hart and by many other writers."[104] As regards the issue of legal principles and the importance that has been accorded to them by Dworkin, there has been some criticism of Dworkin's conception of principles. The distinction between principle and rules has led Dworkin to assert that judges do not make law but merely discover law. However, if we look at the concept of principle from a different perspective which shows that there is no thin line difference between rules and principles, it can be argued that judges make law. The thesis that rules prescribe relatively specific acts; principles prescribe highly unspecific action has been advocated by Raz who contends that the distinction between rules and principles is only of degree, there being no hard and fast line between specific and unspecific acts. And based on this argument he argues that in deciding case, judges do have discretion to make law. Raz's this approach is one of the alternatives that show that judges make law, a claim that has been refuted by Dworkin. However, Dworkin's insistence has not gone unappreciated as Hart observed that "credit is due to Dworkin for having shown and illustrated the importance (of legal principles) and their role in legal reasoning…"[105]

Interestingly, it is noteworthy that Dworkin has no good response to the criticism that he is "guilty" of "not taking the postcolonial liberalism of existing south democratic constitutionalism seriously"[106] save the "lame admission that I do not feel competent to discuss that postcolonial experience with any authority."[107] This admission was in response to Baxi's reference to the way Indian Supreme Court has carried out its interpretive performance. It is noticeable as Baxi points out that the Supreme Court "reinscribes fundamental rights that were specifically *excluded*, upon due deliberation, by the constitution makers," the two conspicuous examples being the incorporation of the right to speedy trial under Part III (fundamental rights) of the Constitution and the "judicial reading" of article 21[108] that now inscribes "due process of law" which was originally and deliberately excluded. And these developments to use the words of Baxi "sit uneasily with law as integrity."

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104. Joseph Raz, "Dworkin: A New Link in the Chain", 74 *Cal. L. Rev*. 1103 at 1117 (1986)
105. *Supra* note 10 at 261.
106. See, Upendra Baxi, "A known but an indifferent judge": Situating Ronald Dworkin in contemporary Indian jurisprudence", 1 *Int'l J. Const. L*. (I·CON) 557 (2003). Also, Ronald Dworkin, "Response to Overseas Commentators", 1 *Int'l J. Const. L.* 651 at 655 (2003).
107. See, *Id*. Dworkin.
108. Article 21 of Indian Constitution reads thus: "No person shall be deprived of his life or personal liberty except according to the procedure established by law."

NON-REGISTRATION OF FIR IN COGNIZABLE OFFENCES: A THREAT TO ACCESS TO JUSTICE

MOHD. ASAD MALIK*

ABSTRACT : First Information Report is one of the most important documents on which the entire case of the prosecution is built. This is one of the modes by which criminal law is put in motion. It is the information which is given to the police first in point of time about the commission of cognizable offence by the victim of crime or by any person on behalf of victim. The First Information Report is lodged by a person who claims himself to be aware of the commission of the offence. Any such information is required to be reduced into writing and read it over to the informant by the officer-in-charge of police station. The informant is required to sign it and get a copy of the FIR. The concerned police officer is duty bound to register FIR. If the police refuse to register FIR, It would amount to dereliction of duty on the part of the police officer and the aggrieved person can send the substance of such information in writing and by post to the senior police officers. The registration of the FIR empowers the officer- in-charge of the Police Station to commence investigation with respect to the crime reported to him. It is well settled principle of law that in criminal trial, investigation is proceeded by an FIR on the basis of written complaint or otherwise disclosing the offence said to have been committed by the accused. But at a same time, non-registration of FIR is an obstacle in getting justice, it will frustrate the purpose of access to justice to the victim. In this paper, an attempt has been made to focus on the following issues relating to registration of FIR such as: Whether the police can avoid its duty of registering FIR if cognizable offence is disclosed? What action can be taken against erring officers who do not register an FIR in case of cognizable offence? What remedies are available in case of non-registration? Whether non-registration of FIR is violation of rights of the victims?

KEY WORDS : First Information Report, Non-Registration, cognizable offence, Police Station, Investigation, Victim and Justice.

I. INTRODUCTION

It is the inherent aspect of rule of law that every person should get justice and for a victim in criminal justice system, registration of First Information Report (hereinafter referred as FIR) is the first step towards access to justice. Access to justice is a fundamental requirement of any democratic society. The mechanism of law may be set in motion by any person whether he is himself aggrieved by an offence or not. Any person who is aware of the

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commission of any cognizable offence may give information either oral or in writing to the police officer. Such information is required to be reduced into writing by the officer-in-charge of the police station, which has to be signed by the person giving it and a copy of the FIR should be given to the informant immediately after its registration free of cost. It is to be said that 'information given to the police first in point of time relating to a cognizable offence under section 154 of Code of Criminal Procedure (hereinafter referred as Code) is known as FIR'.

The object of prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, so that police can start the investigation without any delay because it is that information on the basis of which the investigation with regard to cognizable offences commences. The registration of FIR is mandatory under Section 154 of Cr. P. C. if the information discloses commission of a cognizable offence. But at the same time non-registration of FIR is one of the most prevalent problems faced by the victims of crimes in India. A large number of FIRs are not registered every day by the police, which is a clear violation of the rights of the victims. They are treated indifferently by the police and sometimes harassed when they go to the police station with their grievances. Many a time cognizable offences are made non-cognizable and vice-versa. Whenever it happens, the victim gets disillusioned and alienated from the system.

II. LEGISLATIVE APPROACH ON FIR

The purpose of the criminal justice system is to execute effectively administration and protect society from perpetrators of crime. It has a twin purpose; *firstly* to adequately punish the offender in accordance with law and *secondly* to ensure prevention of crime. Registration of FIR is first step towards access to justice for a victim in criminal justice system and to punish the offender. The purpose of registering an FIR is to set the machinery of criminal investigation into motion, which culminates with filing of the police report in terms of Section 173(2) of the Code and magistrate may take cognizance on the basis of the police report. Investigation into commission of a crime can be commenced by two different modes. *First,* where the police officer registers an FIR in relation to commission of a cognizable offence and commences investigation in terms of Chapter XII of the Code, *the other* is when a Magistrate competent to take cognizance in terms of Section 190 may order an investigation into commission of a crime as per the provisions of that Chapter XIV.[1]

The FIR is the information given to a police officer relating to the commission of a cognizable offence and recorded under Section 154 of the Cr. P. C. Such information given by an informant on which the investigation is commenced.[2]

FIR recorded is of great importance because it is the earliest information given soon after the commission of a cognizable offence before there is time to forget, fabricate or embellish. The legal principles governing the registration of FIR in a cognizable offence is discussed in Section 154 of Cr.P.C.

Section 154. of the Code reads as— (1) "Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed

1. *Anju Chaudhary v. State of U.P.& Anr,* (2013) 1 Cr.L.J. 776 (SC)
2. *The State of Bombay* v. *Rusy Mistry And Anr.,* AIR 1960 SC 391

by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

[3][Provided that if the information is given by the woman against whom an offence under Sections 326A, 326B, 354, 354A, 354B, 354C, 354D, 376, 376A, 376B, 376C, 376D, 376E or Section 509 of the Indian Penal Code is alleged to have been committed or attempted, then such information shall be recorded by a woman police officer or any woman officer:-

Provided further that:- (a) in the event that the person against whom an offence under Sections 354, 354A, 354B, 354C, 354D, 376, 376A, 376B, 376C, 376D, 376E or Section 509 of the Indian Penal code is alleged to have been committed or attempted is temporarily or permanently mentally or physically disabled then such information shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such person's choice, in the presence of an interpreter or a special educator, as the case may be;]

(b) the recording of such information shall be videographed;

(c) the police officer shall get the statement of the person recorded by a Judicial Magistrate under clause (a) of sub-Section (5A) of Section 164 as soon as possible.]

(2) A copy of the information as recorded under sub- section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in subsection (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence."

Section 154 of the Code thus casts a statutory duty upon a police officer to register the case, as disclosed in the complaint, and then to proceed with the investigation. The mandate of Section 154 is manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station, such police officer has no other option except to register the case on the basis of such information.[4] The use of word 'shall' in Section 154 (1) of Cr.P.C. clearly shows that it is mandatory to register an FIR.[5]

The term FIR is neither used in Section 154 nor defined in Cr.P.C. only the term 'information' is used in Section 154. But in substance, the first information is that information which is given to the police first in point of time and recorded in the manner as provided by Section 154 of the Cr.P.C. The term FIR is used only in Section 207 (ii) of the Cr.P.C. which says that 'the first information report recorded under Section 154'. So it indicates that the information recorded by the officer-in-charge of a police station in cognizable offences under Section 154 is FIR. As per the language of section 154 it is clear that the registration of FIR in cognizable cases is mandatory.

Rape cases require extra sensitivity from the police. Care must be taken to see that the victim is not made to feel small or uncomfortable and her statement is recorded by a woman.[6] Keeping in view the sudden rise in incidents of rape cases and the problems faced by the victim, the law was amended in 2013. The Criminal Law Amendment Act, 2013 made the

3. Inserted by Section 13 of 'The Criminal Law (Amendment) Act, 2013 *w.e.f.* 03.02.2013.
4. *Lallan Chaudhary & Ors* v. *State of Bihar & Anr*, AIR 2006 SC 3376: Also see *infra* Note 20 and *Naurata* v. *State of Haryana*, 1995 CrLJ 1568 (P&H).
5. *Khub Chand* v. *State of Rajasthan*, AIR 1967 SC 1074.
6. *Delhi Domestic Working Women's Forum* v. *Union of India & Others* 1995 SCC 14.

registration of first information mandatory in sexual assault cases and such information shall be recorded by woman police officer, if a police officer refusing to register such information is liable to punishment under the revised law.[7] Section 166 A,[8] IPC has been enacted which makes guilty of the offence of refusal to register an FIR a punishable act. The intention of the legislature in putting forth this amendment was to strengthen the already existing provisions which provide for safeguards to women against crime.

The Code contemplates two kinds of FIR: the duly signed FIR under Section 154(1) is by the informant to the officer concerned at the police station. The second kind of FIR is one which is registered by the police officer himself on the basis of information received, or other than by way of an informant [Section 157(1)]. This information must also be duly recorded, and a copy should be sent to the Magistrate forthwith.[9]

An overall reading of all the provisions makes it clear that the condition which is *sine-qua-non* for recording an FIR is that there must be information and that information must disclose a cognizable offence.[10] In terms of Section 154 of Cr.P.C., the Police Officers had a duty to register the FIR once the allegations disclosed commission of a cognizable offence.[11] But non-registration of FIR is one of the most prevalent problems faced every day by the victim of crime. Access to justice is an inherent aspect of the 'Rule of Law' and a fundamental requirement of any democratic society. However, despite its essential role for the effective enjoyment of rights by individuals, access to justice is too often hampered by both practical and legal obstacles.[12] If the police authorities refused to register FIR, it significantly contributes to the persistence of barriers to access to justice and violates the rights of victims[13] to get justice. Justice A.S. Anand[14] said that "it is necessary to give central role to the victims of crime, as otherwise, the victim will remain discontented and may develop a tendency to take law into his own hands in order to seek revenge and pose a threat to the maintenance of 'Rule of Law', essential for sustaining a democracy". This challenge was noticed in *P. Ramaachandra Rao* v. *State of Karnataka*[15] , when the Supreme Court expressed its concern for the plight of the victims of crime who, if left without a remedy might to taking revenge by unlawful means resulting in further increase in the crimes.

Thus, the registration of FIR is very much necessary for providing justice to the victim

7. *http://icehm.org* / visited on 26/06/2016.
8. "Section 166A—Whoever, being a public servant.— (a) knowingly disobeys any direction of the law which prohibits him from requiring the attendance at any place of any person for the purpose of investigation into an offence or any other matter, or
(b) knowingly disobeys, to the prejudice of any person, any other direction of the law regulating the manner in which he shall conduct such investigation, or
(c) fails to record any information given to him under sub-section (1) of Section 154 of the Code of Criminal Procedure, 1973, in relation to cognizable offence punishable under Section 326A, Section 326B, Section354, Section 354B, Section 370, Section 370A, Section 376, Section 376A, Section 376B, Section 376C, Section 376D, Section 376E, Section 509 shall be punished with rigorous imprisonment for a term which shall not be less than six months but which may extend to two years and shall also be liable to fine."
9. *Lalita Kumari* v. *Govt. of UP,* (2014) 2 SCC 1.
10. *Prakash Singh Badal v. State of Punjab*, AIR 2007 SC 1274.
11. *Rajinder Singh Katoch v. Chandigarh Administration & Ors*, (2008) 1 Cr.L.J. 356 (SC)
12. *http://assembly.coe.int/* visited on 7/02/16
13. Section 2 (wa) of the Cr.P.C defines a victim as 'a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression 'victim' includes his or her guardian or legal heir.'
14. Justice A.S.Anand, "*Rights of Victims of Crime- Need For A Fresh Look*", XXVI *DLR* 2 (2004).
15. (2002) 4 SCC 578 (at 596).

of crime. Where a police officer refuses to register FIR, it would block the very operation of criminal law. The registration of FIR in a cognizable offence is the statutory duty of a police officer in charge of the police station.[16] If he fails to perform his duty as per law, he must be punished. FIR can be lodged by any person who is aware of the offence:

(a) As an eye witness and
(b) As an hearsay account.
(c) By the accused himself.
(d) By the SHO on his own knowledge or information even when a cognizable offence

III. THE PURPOSE OF FIR

(i) To inform the magistrate of the district and the District Superintendent of the Police who are responsible for peace and safety of the district about the offence reported at the station.
(ii) To inform the judicial officers before whom the case is ultimately tried about the facts given out immediately after the occurrence.
(iii) To safeguard the accused against subsequent variations or additions.
(iv) To obtain information about the alleged criminal activity in order to take suitable action for tracing and bringing the guilty person.

The Supreme Court pointed out that "The object sought to be achieved by registering the earliest information as FIR is inter alia twofold: *one*, that the criminal process is set into motion and is well documented from the very start; and *second*, that the earliest information received in relation to the commission of a cognizable offence is recorded so that there cannot be any embellishment, etc. later."[17]

IV. JUDICIAL APPROACH ON FIR

In the case of *T.T. Antony* v. *State of Kerala,*[18] the Court held that "information given under sub-section (1) of Section 154 Cr.P.C is commonly known as FIR. It is a very important document. And as its nickname suggests it is the earliest and the first information of a cognizable offence recorded by an officer in charge of a police station. It sets the criminal law in motion and marks the commencement of the investigation which ends up with the formation of opinion under Section 169 or 170 Cr.P.C, as the case may be, and forwarding of a police report under Section 173 Cr.P.C."

The court further held that "under the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 173 Cr.P.C only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154 Cr.P.C."[19]

In *Ravi Kumar* v. *State of Punjab*,[20] the Court observed:

> "First Information Report is a report giving information of the commission of a cognizable crime which may be made by the complainant or by any other person knowing about the commission of such an offence. It is intended to set the criminal law in motion. Any information relating to the commission of a cognizable offence is required to be reduced to writing by the officer-in-charge of the Police Station which has to be signed by the person giving it and the substance thereof is required to be entered in a book to be kept by such officer in such form as the State Government may

16. *Supra* Note 1.
17. *Supra* Note 9.
18. (2001) 6 SCC 181.
19. *Ibid.*
20. AIR 2005 SC 1929.

> prescribe in that behalf. The registration of the FIR empowers the officer-in-charge of the Police Station to commence investigation with respect to the crime reported to him. A copy of the FIR is required to be sent forthwith to the Magistrate empowered to take cognizance of such offence. After recording the FIR, the officer-in-charge of the Police Station is obliged to proceed in person or depute one of his subordinate officers not below such rank as the State Government may, by general or special order, prescribe in that behalf to proceed to the spot to investigate the facts and circumstances of the case and if necessary to take measures for the discovery and arrest of the offender."

In *State of Haryana* v. *Bhajan Lal*,[21] it was held that "the officer in-charge of police station by virtue of section 154 of the code, is statutorily duty bound to register a case on the basis of 'information' disclosing commission of cognizable offence. He has no other option except to enter the substance thereof in the prescribed form that is to say, to register a case on the basis of such information. He cannot refuse to register a case on the ground that the information is not relevant or credible. His refusal to do so amounts to violation of his statutory duty."

In *Anuj Choudhary* v. *State of UP*,[22] the Court held that "Section 154 of the Code places an unequivocal duty upon the police officer in charge of a police station to register FIR upon receipt of the information that a cognizable offence has been committed. It hardly gives any discretion to the said police officer. The genesis of this provision in our country in this regard is that he must register the FIR and proceed with the investigation forthwith."

In *Jai Prakash Singh* v. *The State of Bihar & Anr. Etc.*[23] the Apex Court held that "the object of insisting upon prompt lodging of the FIR in respect of the commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of actual culprits and the part played by them as well as the names of eyewitnesses present at the scene of occurrence."

In *Ramesh Kumari* v. *State (NCT of Delhi)*[24] this Court has held that "the provision of Section 154 is mandatory. Hence, the police officer concerned is duty-bound to register the case on receiving information disclosing cognizable offence. Genuineness or credibility of the information is not a condition precedent for registration of a case. That can only be considered after registration of the case."

State of Andhra Pradesh v. *Punati Ramulu*,[25] the Supreme Court held that "if the police officer refused to register FIR on the ground that the said police station had no territorial jurisdiction over the place of crime. It was certainly a dereliction of duty on the part of the constable because any lack of territorial jurisdiction could not have prevented the constable from recording information about the cognizable offence and forwarding the same to the police station having jurisdiction over the area in which the crime was said to have been committed."

In *Superintendent of Police* v. *Tapan Kumar Singh*[26], it was held as under

> "20. It is well settled that a first information report is not an encyclopaedia, which must disclose all facts and details relating to the offence reported.

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21. AIR 1992 SC 604. Also see *Lallan Chaudhary* &Ors v. *State of Bihar & Anr,* AIR 2006 SC 3376.
22. *Supra* Note 1.
23. 2012 SC 4 March 2012 [Dr. B.S. Chauhan & Jagdish Singh Kehar]
24. (2006) 2 SCC 671: Also see *Supra* Note 10.
25. AIR 1993 SC 2644.
26. (2003) 6 SCC 175. Also see *Hardei* v. *State of U.P* March 30,2016 SC.

> An informant may lodge a report about the commission of an offence though he may not know the name of the victim or his assailant. He may not even know how the occurrence took place. A first informant need not necessarily be an eyewitness so as to be able to disclose in great detail all aspects of the offence committed. What is of significance is that the information given must disclose the commission of a cognizable offence and the information so lodged must provide a basis for the police officer to suspect the commission of a cognizable offence. At this stage it is enough if the police officer on the basis of the information given suspects the commission of a cognizable offence, and not that he must be convinced or satisfied that a cognizable offence has been committed. If he has reasons to suspect, on the basis of information received, that a cognizable offence may have been committed, he is bound to record the information and conduct an investigation…. The information given disclosing the commission of a cognizable offence only sets in motion the investigative machinery, with a view to collect all necessary evidence, and thereafter to take action in accordance with law."

In *Lalita Kumari* v. *Govt. of UP*,[27] the Constitutional Bench[28] held that the legislative intent in both old Codes and the new Code is for compulsory registration of FIR in a case of cognizable offence. A police officer cannot avoid his duty of registering the FIR in case of disclosure of a cognizable offence as per Section 154 of the Criminal procedure Code, 1973 and failure to do so will attract actions against the erring officer.

Writing the judgment for the bench, Justice Sathasivam said, "It would be incongruous to suggest that though it is the duty of every citizen[29] to inform about commission of an offence, but it is not obligatory on the officer-in-charge of a police station to register the report."[30]

Further he said that Burking of crime leads to dilution of the rule of law in the short-run and it also has a very negative impact on the rule of law in the long-run since people stop having respect for the rule of law. Thus, non-registration of such a large number of FIRs leads to a definite lawlessness in society. Therefore, reading Section 154 of the Cr.P.C. in any other form would be detrimental not only to the scheme of Cr.P.C. but also to society as a whole.[31]

The Bench said That Investigation of offences and prosecution of offenders are the duties of the state. For 'cognizable offences,' a duty has been cast upon the police to register FIR and to conduct investigation, except as otherwise permitted specifically under Section 157 of the Cr.PC. If discretion, option or latitude is allowed to the police in registration of FIRs, it can have serious consequences for the public order situation and can also adversely affect the rights of victims, including violating their fundamental right to equality.

The above order will help stamp out the chronic practice among police across the country to either refuse or delay registering FIRs with the object of keeping crime figures artificially low or, worse favouring influential accused.

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27. *Supra* Note 9.
28. Hon'ble P.Sathasivam, CJ and Hon'ble DR. B.S. Chauhan, Ranjana Prakash Desai, Ranjan Gogoi and S.A. Bobde, JJ
29. Section 39 of the Cr.P.C. casts a statutory duty on every person to inform about commission of certain offences.
30. *Supra* Note 9.
31. *Ibid.*

The obligation to register FIR has inherent advantages: [32]

a) "It is the first step to 'access to justice' for a victim.
b) It upholds the 'Rule of Law' inasmuch as the ordinary person brings forth the commission of a cognizable crime in the knowledge of the State.
c) It also facilitates swift investigation and sometimes even prevention of the crime. In both cases, it only effectuates the regime of law.
d) It leads to less manipulation in criminal cases and lessens incidents of 'ante-dates' FIR or deliberately delayed FIR."

The Allahabad High Court directed the state government to ensure that all FIRs be uploaded on the website of UP Police, except in exceptional circumstances, "where the need to preserve the identity of victim, the course of proper investigation, the protection of witnesses and other aspects involving a predominant consideration of public interest may warrant the FIR not being uploaded on the website."[33]

As per the scheme of the code and judicial pronouncements it is clear that registration of FIR is mandatory in a cognizable case. But most of the time, it has been observed that the police tries to evade registering FIR on one pretext or the other and ultimate sufferer is the common man. Officially, all the higher authorities including Chief Ministers are happy that there is minimum crime in their state which really is not the case.[34] The person who is aggrieved because of non-registration of FIR has remedies under the Cr.P.C.

V. REMEDIES IN CASE OF NON-REGISTRATION OF FIR

Whenever any information is received by the police about the alleged commission of an offence which is a cognizable one, there is a duty of the police to register an FIR. But the basic question is as to what course is to be adopted if the police do not register it.[35]

If the police refuse to record the information, the victim/person aggrieved is allowed to send it in writing and by post to the Superintendent of Police (SP), the Deputy Inspector General (DIG) or the Inspector General of Police (IGP). Other than this he/she can also complain to the nearest judicial magistrate, who will order the police to register the FIR, if deemed necessary.

If the police is reluctant to register the F.I.R., the appropriate remedy available to the aggrieved is to approach the Superintendent of Police under Section 154(3) of the Cr.P.C. and if that is not effective, to approach the Magistrate under Section 156(3) of the Cr.P.C. and request him to direct an investigation into the incident. The Magistrate can direct for the registration of FIR and can also direct a proper investigation into the incident to be made.

In *State of Haryana* v. *Bhajan Lal*,[36] the Court held that "Non-registration of FIR is one of the most serious, frequent and common grievances against the police. This problem is compounded when the person against whom a complaint is made is rich and powerful. Article 14 of the Constitution guarantees to all persons 'equality before the law and equal protection of the laws within the territory of India'. Police officers must register an FIR immediately on receiving information about a cognizable offence. Persons aggrieved by

32. *Ibid*.
33. *Law Herald,* 19, Vol. 9 Issue No. 1 (January 2016).
34. Sanjeev Sirohi, Registration of FIR is Mandatory in Cognizable offences, 152 *Cri. L.J* (2014)
35. See *Gangadhar Janardan Mhatre* v. *State of Maharashtra* [(2004) 7 SCC 768], *Minu Kumari and Another* v. *State of Bihar and Others,* (2006) 4 SCC 359 and *Hari Singh* v. *State of U.P.* (2006 (5) SCC 733).
36. *Supra* Note 21.

non-registration of FIR can approach the District Superintendent of Police or the concerned Magistrate to get their complaints registered. Alternatively complaints in this regard can also be filed before the National or the concerned State Human Rights Commission."

The Apex Court held in *Anandwardhan* v. *Panduranga*,[37] that in case of refusal to register FIR in cognizable offence, it is open to the complainant to file a petition before Magistrate seeking appropriate direction for registration of FIR, but a writ petition cannot be filed in that matter.

In *Sakiri Vasu* v. *State of U.P. And Others,*[38] the Apex Court held that "if a person has a grievance that the police is not registering his FIR under Section 154 Cr.P.C., then he can approach the Superintendent of Police under Section 154(3) or other police officer referred to in Section 36 Cr.P.C. by an application in writing. Even if that does not yield any satisfactory result in the sense that either the FIR is still not registered, or that even after registering it no proper investigation is held, it is open to the aggrieved person to file an application under Section 156 (3) Cr.P.C. before the learned Magistrate concerned. If such an application under Section 156 (3) is filed before the Magistrate, the Magistrate can direct the FIR to be registered. Moreover he has a further remedy of filing a criminal complaint under Section 200 Cr.P.C."

In case the police officials fail to do so, the modalities to be adopted are as set out in Sections 190 read with Section 200 of the Code. It is open to any person aggrieved by the inaction of the police officials to adopt the remedy in terms of the aforesaid provisions. [39]

The provisions of Section 154 (1), Cr. P.C. is mandatory and, therefore, the police cannot refuse to lodge the FIR. In *Nagesh* v. *State of Karnataka*,[40] the Hon'ble Apex Court directed to take disciplinary action against the erring police officer who was found to omit to perform their duty of lodging FIR despite knowledge of information about a cognizable offence.

In *Hemant Yashwant Dange* v. *State of Maharashtra*,[41] a two Judge Bench of the Supreme Court has reiterated that to enable the police to start investigation, it is open to the Magistrate to direct the police to register an FIR and even where a Magistrate does not do so in explicit words but directs for investigation under Section 156(3) of the Code, the police should register an FIR….. Because Section 156 falls within Chapter XII of the Code which deals with powers of the police officers to investigate cognizable offences, the police officer concerned would always be in a better position to take further steps contemplated in Chapter XII, once an FIR is registered in respect of the concerned cognizable offence.

Above mentioned judgments reflects that judiciary again and again reiterated that the police is duty bound to register FIR, if information discloses commission of cognizable. If any police officer refused to register FIR it will be considered a dereliction of duty on the part of police office and disciplinary action should be taken against such police officers.

VI. CONCLUSION

As per the scheme of the code, the registration of FIR is mandatory. But in practice, it

37. 2006 (2) Crimes 165 (SC).
38. AIR 2008 SC 907.
39. *Aleque Padamsee And Ors* v. *Union Of India And Ors*, (2007) 4 Cr.L.J. 3729 (SC)
40. 2012 (3) PLJR (SC) 258
41. (2016) Retrieved from *http://judis.nic.in/supremecourt* . Also see *Mohd. Yousuf* v. *Afaq Jahan (Smt.) (2006) 1 SCC 627* and *Suresh Chand Jain* v. *State Of Madhya Pradesh & Another,* 2001(2) SCC 628.

is very difficult for a common man to register an FIR after the commission of a cognizable offence. Expressing concern over the non-registration of FIR, the Constitution Bench in *Lalita Kumari case* said that number of FIRs not registered is approximately equivalent to the number of FIR actually registered. A victim of crime has to face more tension in registering an FIR than he does face when an offence is committed. Non-registration of FIR leads to definite lawlessness in the society as well as violation of fundamental rights of the victim. This right includes access to the mechanisms of justice and prompt redressal. The worst part is, if an FIR is not being registered then our governments both at the State and Centre hardly do anything to alleviate the pain and distress faced by the common man. The governments must take steps to provide access to justice to the victims of crime. Political interference is one of the main causes for non-registration of FIR. If a victim has approach with local leaders of political party then it will be easy to register FIR, if not, then there is remote possibility of registration of FIR. I think it is very necessary that the police should be made independent from the clutches of politicians.

The police should be separated into two wings one, to deal with law and order and other to deal with investigation as many a time suggested by the Apex court. All the investigations should be completed by the police working under Central Government within time, which has to deal with investigation. The police under the State should only deal with the law and order situation. One officer of Central Government should be appointed in each and every police station as an observer to ensure the registration of FIR. It is also necessary to ensure that all FIRs be uploaded on the website of Police in all states, except in exceptional circumstances, as Allahabad High Court recently directed[42] the state government. There should be online complaint helpline where the person aggrieved (because of non-registration of FIR) can submit their complaint. There is also a need to launch online registration of FIRs in all kind of offences. Thus, the police must compulsorily register the FIR on receiving a complaint, if the information discloses a cognizable offence. Compulsory registration of the FIR will ensure transparency in the criminal justice delivery system. Non-registration of FIR is dereliction of duty on the part of a police officer therefore; strict action should be taken against such police officers.

A Police officer who willfully or inadvertently ignores the Apex Court directives (which is binding as per Article 141 of the Constitution) should also be liable for contempt of court. It is also necessary that any person who registered false FIR against any person and if after investigation it is found that FIR is false then strict action should be taken against such person. No person should be allowed to misuse the law as no person is above the law.

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42. *Supra* Note 33.

STRENGTHENING CONSUMER PROTECTION LAW: A ROAD MAP

SUSHILA*

ABSTRACT : The Consumer Protection Act, 1986 was made to provide a better protection to the interests of consumers. Its purpose was to make provision for the establishment of consumer councils and other authorities for the settlement of consumer disputes and the matter connected therewith. After three decades, the Act failed to achieve it goal. But, the law substantially succeeded in bringing about fair play in the supply of goods and services of consumer grievances through the consumer fora. This article provides an analysis to the CPA 1986 and proposed other amendments in this regard.

KEY WORDS : Consumer, Unfair Trade Practice, Consumer Rights, MRTP, Consumer Coplaint Council.

I. INTRODUCTION

The Consumer Protection Act, 1986 was enacted to provide for better protection of the interests of consumers and for the purpose, to make provision for the establishment of consumer councils and other authorities for the settlement of consumer disputes and for matter connected therewith. It sought *inter alia* to promote and protect the rights of consumers such as (a) the right to be protected against marketing of goods which are hazardous to life and property; (b) the right to be informed about the quality, quantity, potency, purity, standard and price of goods to protect the consumer against unfair trade practices;(c) the right to be assured, wherever possible, access to an authority of goods at competitive prices;(d) the right to be heard and to be assured that consumers interests will receive due consideration at appropriate forums; (e) the right to seek redressal against unfair trade practices or unscrupulous exploitation of consumers; and(f) right to consumer education.[1]

The law completed twenty-five years of its enactment in December 2011. The law substantially succeeded in bringing about fair play in the supply of goods and services and redressal of consumer grievances through the consumer fora. The Act to a large extent has also given a boost to the consumer movement in the country.

However, in spite of three earlier amendments (1991, 1993 and 2003)[2] to the Act, there are still serious gaps, which need to be addressed for effective and efficient enforcement of the law, which is *sine qua non* for ensuring better promotion and protection of the rights of consumers.

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1. The Statement of Objects and Reasons, *the Consumer Protection Act, 1986*.
2. *Infra*, *note*

II. EARLIER AMENDMENTS[3]

The Consumer Protection Act, 1986 was earlier amended in the years 1991, 1993 and 2002. The amendments made in 1991 were mainly to incorporate provisions for the quorum of District Forum, appointing persons to preside over State Commissions/District Forums, in case of absence of President to enable the court function uninterruptedly. In 1993, the Act was further amended to address the inadequacies in the coverage of the main Act. It aimed to plug loopholes and enlarge the scope of areas covered and entrust more power to the redressal agencies under the Act. In 2002, the Act was again amended to facilitate quicker disposal of complaints, enhancing the capability of redressal agencies, strengthening them with more powers, streamlining the procedure and widening the scope of the Act to make it more functional and effective.[4] Before dealing with the shortcomings and deficiencies in the existing statute as amended up-to-date, it would be apposite to survey in brief the amendments carried out on three earlier occasions to the Act for removing the difficulties faced in the implementation and execution of law besides doing away with the grey areas.

(i) 1991 Amendments

Within four years of its enforcement *i.e.* in 1991, the Consumer Protection Act,1986 was amended to provide clarification that the proceeding of the District Forum, State Commissioner the National Commission, as the case may be, can be conducted by the President and one member and not necessarily by all the members. The amendments mainly focused on filling up the vacancy in the office of the President. It was also made clear that the vacancies or defects in appointment shall not invalidate any act or proceeding of the Consumer Disputes Redressal Agencies[5].

(ii) 1993 Amendments

The Act was further amended in 1993 basing upon the recommendation of the high power committee constituted by the Ministry of Civil Supplies and Public Distribution, Government of India. The salient among the amendments made in 1993 are as follows:

(i) Housing construction was included under the definition of service.
(ii) The State Governments were empowered to establish more than one District Forum in a district.
(iii) Two years period of limitation was inserted for filing complaints before the redressal agencies. Redressal agencies were given power to condone the delay on a sufficient cause.
(iv) Monetary jurisdiction of the District Forum was enhanced to five lakh from one lakh.
(v) The National Commission and the State Commissions were given administrative control over the lower Forums.
(vi) Redressal agencies were empowered to dismiss frivolous or vexatious complaints and also given power to impose costs on the complainant not exceeding Rs.10,000 payable to the opposite party[6].

(iii) 2002 Amendments

The Act was further amended for the third time in 2002 with a view to widen the scope of some of the provisions of the Act and to make it more effective. Some of the prominent amendments made in 2002 are as follows:

3. Consumer Justice (A Manual for Consumer Forum Members) P.V.V. Satyanarayana Murthy INDIAN INSTITUTE OF PUBLIC ADMINISTRATION
4. Act No. 34 of 1991, Act No.50 of 1993 and Act No.62 of 2002.
5. *The Consumer Protection(Amendment) Act*, 1991.
6. *The Consumer Protection (Amendment) Act, 1993.*

(i) Prescribing time limits within which complaints are tobe admitted, notices to be issued and appeals are to be decided.

(ii) Provision to restrict grant of more number of adjournments was inserted and made it obligatory on the redressal agencies to record in writing the reasons for allowing adjournments.[7]

(iii) The monetary jurisdiction of the District Forum was further enhanced up to rupees twenty lakh and of the State commission up to rupees one crore.[8]

(iv) Provision for charging of fee for every complaint was inserted.[9]

(v) A provision for deposit of fifty per cent of the amount due in terms of lower Forum's order by the person against whom such order was passed was mandatory for preferring an appeal.[10]

(vi) Services availed for commercial purposes have been excluded from the purview of the Act.[11]

(vii) Minimum qualifications have been prescribed for members of the Consumer Disputes Redressal Agencies.[12]

(viii) Conferring the powers of a judicial magistrate of the first class on the consumer disputes redressal agencies.[13]

(ix) Empowering the redressal agencies to issue interim orders.[14]

(x) Making it mandatory on the part of Central and State governments to establish Consumer Protection Councils[15].

(xi) Provision was inserted for establishment of circuit benches at State Commissions and National Commission in order to bring justice close to aggrieved consumer also for quick dispensation of justice[16].

(xii) Power of transfer of cases from one forum to another by State Commission and from the District Forum of one State to a District Forum of another State or before one State Commission to another State Commission, was conferred on National Commission[17].

(xiii) The National Commission was conferred with the power to review any order made by it, when there is an error apparent on the face of record.[18]

(xiv) Power to set aside *ex parte* orders conferred[19].

III. PROPOSED REFORMS

In July 2004, a Working Group was set up to examine the provision of the Act and consider relevant amendment to make the Act more meaningful, functional and vibrant. A number of proposed amendments were circulated to all State Governments, concerned Central Ministries and National Consumer Disputes Redressal Commission (NCDRC) in July 2006.

7. *Section 3A, the Consumer Protection Act, 1986.*
8. *Sections 11(1),17 (1), the Consumer Protection Act, 1986.*
9. *Section 12, the Consumer Protection Act, 1986.*
10. *Section 15 proviso, section 19 proviso, section 23 proviso, the Consumer Protection Act, 1986.*
11. *Section 2 (d) (ii), the Consumer Protection Act, 1986.*
12. *Section 10 (1) (b), the Consumer Protection Act, 1986.*
13. *Section 27 (2), the Consumer Protection Act, 1986.*
14. *Section 13 (3B), the Consumer Protection Act, 1986.*
15. *Sections 8A, 8B, the Consumer Protection Act, 1986.*
16. *Sections17B, 22B, the Consumer Protection Act, 1986.*
17. *Sections17A, 22B, the Consumer Protection Act, 1986.*
18. *Section22, the Consumer Protection Act, 1986.*
19. *Section 22 A, the Consumer Protection Act, 1986.*

Revised proposed amendments were re-circulated in 2009 and in light of the comments received on the draft proposal, the Department of Consumer Affairs in consultation with the Ministry of Law and Justice formulated "Consumer Protection (Amendment) Bill, 2010. In meantime some fresh additional comments of the Department of Financial Services were received on the proposed sections regarding unfair trade practice and unfair contract. These changes were got approved by the Ministry of Law and Justice and formed part of the draft proposal of Consumer Protection (Amendment) Bill, 2011. The Bill was introduced in Lok Sabha on 16.12.2011. The Bill was referred to Standing Committee on Food, Consumer Affairs and Public Distribution on 26.12.2011[20].

Based on the experience and implementation of the Consumer Protection Act, 1986 and practical difficulties so faced, the following shortcomings were reported by the Department of Consumer Affairs to the Standing Committee on Food, Consumer Affairs and Public Distribution (2012-13) which had an occasion to examine the amendments proposed through the Consumer Protection (Amendment) Bill, 2011[21]:

(i) A number of definitions in the Act were restrictive and did not cover all situations/ contingencies not specifically mentioned in the definition *e.g.* definition of branch office, defect, deficiency *etc*.

(ii) The seller of goods or provider of services after selling such goods or rendering of such services, could refuse to take back or withdraw the goods or withdraw or discontinue the service and refuse to refund the consideration thereof, if paid, and there was no legal restriction on him in this regard.

(iii) Refusal of the seller of goods/service provider to furnish a bill to the consumer for payment made was not considered as an unfair trade practice against which a complaint could not be filed in a Consumer Fora.

(iv) 'Unfair contract' has not been specifically included as a ground for filing a complaint in the Consumer Fora.

(v) Although the Department of Consumer Affairs has been writing to States/UTs that where a District Forum has become non-functional due to vacancy of President or Member, the President of the adjacent Consumer Fora may be given additional charge of the non-functional District Forum, however, there was no legal provision in the Act for the same.

(vi) Although the Act provided for the National Commission as well as State Commissions for setting up additional benches for quicker disposal of cases, similar provision was not available for the District Forum.

(vii) There was a lack of clarity in the Act as to whether the President of the District Forum is also eligible for reappointment like the Members, leading to ambiguous interpretations in different States.

(viii) Although the Act has provisions for the National Commission and State Commissions to hold circuit bench sitting at notified places other than the headquarters, similar provision was not available for the District Forum.

(ix) Although the computerization and computer networking of the Consumer Fora is being done yet there was no legal provision for online filing of complaints and payment of fees in the Consumer Fora.

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20. Report of the Standing Committee on Food, Consumer Affairs and Public Distribution (2012-13) on the Consumer Protection (Amendment) Bill, 2011.

21. *Ibid*.

(x) There was presently no time limit mentioned for the other member to give his opinion on points referred to him in cases where the proceeding is conducted by the President and One Member, and they differ on any point or points.

(xi) While mentioning the composition of the Selection Committee for appointment of the Members of the State Commission, it was not clear that the appointment of the Members only is through the Selection Committee but not that of the President.

(xii) Unlike the National Commission, the State Commission did not have any power to review any order made by it.

(xiii) Unlike the President, State Commission, who is in fact the Chairman of the Selection Committee for Selection of Members of bothState Commission as well as District Forum, the President, National Commission, was not part of the Selection Committee for selection of Members in the National Commission.

All the above shortcomings were proposed to be rectified through the proposed amendments included in the Consumer Protection (Amendment) Bill, 2011.Accordingly,with a view to widening and amplifying the scope of some of the provisions of the said Act, to facilitate faster disposal of cases and to rationalize the qualifications and procedure of selection of the Presidents and Members of the National Commission, State Commission and District Forum, the Consumer Protection (Amendment) Bill, 2011 was finally prepared and introduced in Lok Sabha on December 16, 2011[22].

(a) Objectives of the Proposed Amendments (2011)

The Consumer Protection (Amendment) Bill, 2011 was introduced with the following avowed objectives:

(a) Widening the scope and amplifying the provisions of the Act[23]

(i) The definition of 'complaint' is being widened to include loss suffered by the consumer as a consequence of an unfair contract.

(ii) To facilitate filing of complaint, it is also proposed to widen the definition of 'deficiency in services' by including any act of omission or commission that cause damage to the consumer.

(iii) The definition of the term 'unfair trade practices' is also being widened to make it an inclusive clause to cover all types of unfair trade practices.

(iv) The scope of unfair trade practices is being amplified by including the unfair terms of contract, which are one sided, unilateral, unequal.

(v) To specifically provide the power to a consumer forum to award interest to a complainant along with the price paid.

(vi) To empower the State Commissions alsoto review their own orders when there is an error apparent on the face of records, so that the aggrieved party does not have to file an appeal for correcting the order.

(vii) In order to provide an opportunity for consumer organisations and other interested parties to intervene in a consumer dispute concerning large number of consumers, pending in the State Commissions/National Commission/Supreme Court, the State/ National Commission/ Supreme Court to be empowered to entertain such interested

22. The Bill was referred to the Standing Committee on Food, Consumer Affairs and Public Distribution by Hon'ble Speaker for examination and report in December26, 2011.The Committee presented its report in December, 2012. The Bill is currently pending before Lok Sabha and is likely to lapse on dissolution of its term in 2014.

23. Report of the Standing Committee on Food, Consumer Affairs and Public Distribution (2012-13) on the Consumer Protection (Amendment) Bill,2011.

parties and also *suo motu* invite the services of the such interested parties on the lines of *amicus curiae*.

(b) Facilitating quicker disposal of complaints[24]

Following amendments have been proposed to reduce the pendency and to facilitate quicker disposal of complaints in the consumer fora.

1. To ensure that no forum remains non-functional it is proposed to give powers to the State Governments, for clubbing of neighbouring District Forum or authorising/ deputing the President/Members of another District Forums to officiate in a particular forum, wherever considered necessary.
2. It is also proposed to include an enabling provision to empower the State Governments to appoint more than two members in a District Forum in order to constitute benches/ circuit benches and specifically provide for appointment of judicial members to enable functioning of benches.
3. It is proposed to make provision to enable the State Governments and the Central Government to frame the rules governing salary, allowances and other terms and conditions of service of officers and other staff or employees of the District Fora, State Commissions and National Commission, as may be required to suit the characteristics of the quasi-judicial body, by making appropriate amendments to include the words 'officers and other staff or employees' after the word 'Member'.
4. To facilitate quicker appointments of posts of President/Members in the District Forum and the posts of Members in the State/National Commission, based on the recommendations of the Selection Committee, it is proposed to provide that the State or Central Government, as the case may be, shall convey its decision within two months of receipt of the panel if none of the persons on the panel are found suitable.
5. It is proposed to enable the District Forum to hold Circuit Benches in order to take the justice to the doorstep of the consumers.
6. In view of the computerisation and computer networking of Consumer Fora being undertaken which would extend facilities for filing complaints online including payment of fee, it is proposed to make it legally permissible to file complaints and make payment of fee online thus facilitating e-governance.
7. To avoid delays in the matter of disposal of references made where there is a difference of opinion amongst the members in the bench, it is proposed to prescribe a time limit of disposal of such references i.e. within a period of three months from the date of such reference.

(c) Rationalising the qualifications and procedure of selection of the Presidents and Members of consumer fora[25]

1. To ensure that the grounds for disqualification provided for appointment of President/ Members are continued to be made equally applicable to them while in office, it is proposed to amend the proviso by inserting 'and for being' before the words 'a member' in case of a District Forum, State/National Commission.
2. It is also proposed to make the membership or office-bearership of a political party as a disqualification to become/ for continuing as, a member.
3. To enable the Selection Committees to have a wider zone of consideration, it is proposed to include the field of 'consumer affairs' also as one of the fields of experience under

24. *Ibid*.
25. *Ibid*.

qualifications for appointment of Members of District Forum, State Commission & National Commission.

4. To ensure that only capable persons are appointed as Members in the Consumer Fora at all levels, it is proposed to introduce that the Selection Committee which recommends re-appointments of President and Members of the District Forum, Members of State/ National Commission should take into consideration the performance appraisal of the person concerned by the President of the State and the National Commission, as the case may be, apart from looking into the qualifications and disqualifications criteria prescribed.

(d) Strengthening Penal provisions/ Enforcement orders of consumer fora[26]

To ensure speedy and proper execution of the orders of the consumer fora it is proposed to provide that every order made by a consumer forum shall be enforced in the same manner as if it were a decree made by a court in a suit pending therein.

It is also proposed to add a provision that where any order made by a consumer forum is not complied with, such person not complying with the order shall be required to pay not less than five hundred rupees or one-half per cent of the value of the amount awarded, whichever is higher, for each day of delay of such non- compliance of the order till it is paid, in addition to the payment of the awarded amount. As regards the penal provisions available in section 27, the powers of a judicial magistrate of the 1st class for trial of offences under the Act, already available with Consumer Fora, have been made more explicit.

IV. A CRITICAL APPRAISAL

Though the proposed Bill covers within its sweep a series of amendments ranging from widening the scope and amplifying the provisions of the Act to facilitating quicker disposal of complaints to rationalising the qualifications and procedure of selection of the Presidents and Members of consumer fora to strengthening penal provisions/ enforcement orders of consumer fora; the paper focuses upon the following critical issues:

(i) Jurisdiction of the Act-Needs to be set at rest

Section 3 of the Act states that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force, yet the Supreme Court has cast serious cloud on the scope of this provision. The Supreme Court in its judgement in *G.M., Telecom* v. *M. Krishnan &Anr*.[27],C. A. No. 7687 of 2004 decided on 01.09.2009 held that when there is a special remedy provided in section 7-B of the Indian Telegraph Act, 1887 regarding disputes in respect of telephone bills, then the remedy under the Consumer Protection Act,1986 is by implication barred. It also held that it is well settled that the special law overrides the general law.

It is submitted that the judgement besides being bad in law has virtually set at naught the clear legislative intendment as reflected in section 3 of the Act which notes in categorical terms that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Besides, if the logic of this judgement is allowed to stand and taken to its logical conclusion, the jurisdiction of the consumer fora shall stand ousted at a first whiff of such so called special remedy giving rise to much mischief at the hands of unscrupulous litigants.

It is therefore proposed that the Act needs to be suitably modified to nullify the basis of the judgement through appropriate amendment.

26. *Ibid*.
27. C. A. No. 7687 of 2004

(ii) Misleading and Disparaging Advertisements: A Regulatory Vacuum

Globalization of the Indian economy has led the firms to promote aggressively their products and services. In such a competitive scenario, such practices raise questions about truthfulness or otherwise of the representations made by the firms about their products and services. Misleading and disparaging advertisements are not just unethical, they distort competition and consumer choice.

The *Monopolies and Restrictive Trade Practices Act, 1969* originally did not contain any provision for protection of consumers against false, deceptive, disparaging or misleading advertisements or other similar unfair trade practices. The High-Powered Expert Committee, which reviewed the working of the MRTP Act, made a number of recommendations in its report, submitted in August, 1978, for amending certain provisions of the MRTP Act and *inter alia* recommended that the scope of the MRTP Act should be enlarged to cover unfair trade practices.

The MRTP Act was, accordingly, amended in the year 1984 and Part B 'Unfair Trade Practices (UTPs)' was added therein. Section 36-A of the newly added Part defined unfair trade practice. The unfair trade practices falling under the following categories were introduced: misleading advertisement and false representation; bargain sale, bait and switch selling; offering of gifts or prizes with the intention of not providing them and conducting promotional contests; product safety standards; and hoarding or destruction of goods. Making false or misleading representation of facts disparaging the goods, services or trade of another person was also prohibited.

Consequent upon notification of section 66 of *the Competition Act, 2002, the MRTP Act* stood repealed and a regulatory vacuum arose exposing the potential consumers to the hazards of such misleading and disparaging advertisements without any remedy. The Competition Act, 2002 does not extend to deal with such unfair trade practices.

In this connection, it may be mentioned that *the Consumer Protection Act,* 1986 deals with UTPs and the term unfair trade practice has been defined in section 2(r) thereof in a similar manner as it was defined under the MRTP Act. However, complaints under the Consumer Protection Act, 1986 can be filed by a consumer who has been defined there under as a person who buys goods or hires/avails services against consideration. Hence, the protection provided there under is not available to public at large against such misleading or disparaging advertisements unless they are actually led to buy such goods or services and suffer damages. In sum, the scope of consumer law is essentially remedial than preventive[28].

The legislative history of the United States, the United Kingdom and other democratic and progressive countries of the world also showed that they had specific legal provisions for regulating unfair trade practices in order to supplement and bolster the law relating to restrictive trade practices. In the United Kingdom, the law relating to consumer protection *via* maintenance of competition had undergone a comprehensive change whereby it can now deal adequately with all trade practices which are anti-competitive, restrictive, deceptive and unfair. There is, indeed, a greater recognition now all over the world that the consumer needs to be protected not only from the effects of restrictive practices but also from practices which are resorted to by the trade and industry to mislead or dupe him.

This regulatory gap in India is sought to be filled by the industry through self-regulation. It may be pointed out that the Advertising Standards Council of India (ASCI), a self-regulatory

28. Section 14(1) (hc) of the Consumer Protection Act, 1986 enables consumer fora to issue corrective advertisement to neutralize the effect of misleading advertisement at the cost of the opposite party responsible for issuing such misleading advertisement.

voluntary organization of the advertising industry, through its Consumer Complaints Council (CCC) deals with complaints against advertisements, from a cross section of consumers and the general public covering individuals, practitioners in advertising, advertiser firms, media, advertising agencies and ancillary services connected with advertising. The Code for Self-Regulation in Advertising as adopted by ASCI is stated to be drawn up by people in professions and industries in or connected with advertising, in consultation with representatives of people affected by advertising and is further stated to be accepted by individuals, corporate bodies and associations engaged in or otherwise concerned with the practice of advertising with a set of basic guidelines with a view to achieve the acceptance of fair advertising practices in the best interests of the ultimate consumer[29].

Though ASCI's efforts are commendable, the Code lacks legal backing and compliance is voluntary. It is, however, gratifying that ASCI's Code is now part of ad code under Cable TV Act's Rules.

In such a scenario of legal vacuum and occupation thereof by self-regulatory industry specific codes, it may be noted that the different laws *viz. the Food Safety and Standards Act, 2006*[30], the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954,[31] certain advertisements the act tries protect the interests of the consumers. Section 3

29. The Advertising Standards Council of India (ASCI), established in 1985, is stated (on its website) to be committed to the cause of Self-Regulation in Advertising, ensuring the protection of the interests of consumers. ASCI was formed with the support of all four sectors connected with Advertising, viz. Advertisers, Advertising Agencies, Media (including Broadcasters and the Press) and others like PR Agencies, Market Research Companies *etc*. Further, the Consumer Complaints Council is described as ASCI's heart and soul. It is the dedicated work put in by this group of highly respected people that has given tremendous impetus to the work of ASCI and the movement of self- regulation in the advertising.

30. The Food Safety and Standards Authority of India (FSSAI) has been established under Food Safety and Standards Act, 2006 which consolidates various acts and orders that have hitherto handled food related issues in various Ministries and Departments. FSSAI has been created for laying down science based standards for articles of food and to regulate their manufacture, storage, distribution, sale and import to ensure availability of safe and wholesome food for human consumption. Various central Acts like Prevention of Food Adulteration Act, 1954 , Fruit Products Order, 1955, Meat Food Products Order , 1973, Vegetable Oil Products (Control) Order, 1947,Edible Oils Packaging (Regulation)Order 1988, Solvent Extracted Oil, De-Oiled Meal and Edible Flour (Control) Order, 1967, Milk and Milk Products Order, 1992 *etc.* stand repealed after commencement of FSS Act, 2006.The Act also aims to establish a single reference point for all matters relating to food safety and standards, by moving from multi- level, multi- departmental control to a single line of command. To this effect, the Act establishes an independent statutory Authority – the Food Safety and Standards Authority of India with head office at Delhi. Food Safety and Standards Authority of India (FSSAI) and the State Food Safety Authorities shall enforce various provisions of the Act.
According to the provisions of the Act, any person who publishes, or is a party to the publication of an advertisement that falsely describes any food or is likely to mislead as to the nature or substance or quality of any food or gives false guarantee, shall be liable to a penalty that may extend to 10 lakh rupees.

31. The Drugs & Magic Remedies (Objectionable Advertisements) Act, 1954 prohibits certain advertisements the act tries protect the interests of the consumers. Section 3 of the Act prohibits advertisement of certain drugs for treatment of certain diseases and disorders. The Act says that no person shall take any part in the publication of any advertisement referring to any drug in terms which suggest or are calculated to lead to the use of that drug for-
(i) the procurement of miscarriage in women or prevention of conception in women; or
(ii) the maintenance or improvement of the capacity of human beings for sexual pleasure; or
(iii) the correction of menstrual disorder in women; or
(iv) the diagnosis, cure, mitigation, treatment or prevention of any disease, disorder or condition specified in the Schedule, or any other disease, disorder or condition (by whatsoever name called)

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(ii) the maintenance or improvement of the capacity of human beings for sexual pleasure; or

(iii) the correction of menstrual disorder in women; or

(iv) the diagnosis, cure, mitigation, treatment or prevention of any disease, disorder or condition specified in the Schedule, or any other disease, disorder or condition (by whatsoever name called) which may be specified in the rules made under this Act, *the Infant Milk Substitutes, Feeding Bottles and Infant Foods Act, 1992*[32]*, the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003* [33] The Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (COTPA) has prescribed the manner in which the information and health warnings are to be printed. Section 7 of COTPA states that no person shall, directly or indirectly, produce, supply or distribute cigarettes or any other tobacco products unless every tobacco package carries a specified warning including a pictorial warning as may be prescribed in the rules. Further, Section 8 of the COTPA says that the specified warning on the package of cigarettes or any other tobacco products shall be legible and prominent, conspicuous as to size and colour. Every package containing cigarettes or

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which may be specified in the rules made under this Act.

Section 4 prohibits misleading advertisement relating to drugs. It states that no person can take any part in the publication of any advertisement relating to a drug if the advertisement contains any matter that directly or indirectly gives a false impression regarding true character of the drug. Further, Section 5 prohibits the advertisement of magic remedies for treatment of certain diseases and disorders.

32. The Infant Milk Substitutes, Feeding Bottles and Infant Foods Act, 1992 provides for the regulation of production, supply and distribution of infant milk substitutes, feeding bottles and infant foods with a view to the protection and promotion of breast feeding and ensuring the proper use of Infant Foods and for matters connected therewith or incidental thereto.

As per the provisions of section 3, no person shall advertise, take part in promotion of use or sale, supply of or donate or distribute infant milk substitutes or feeding bottles, or give an impression or create a belief in any manner that feeding of infant milk substitutes is equivalent to or better than mother's milk. Section 6 gave direction that such container of infant foods and milk substitutes must affix label clearly written in local language that "Mother's milk is best for your baby", "Should be used only on the advice of a health worker", "a warning sign if used replacing mother's milk".

33. The Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (COTPA) has prescribed the manner in which the information and health warnings are to be printed. Section 7 of COTPA states that no person shall, directly or indirectly, produce, supply or distribute cigarettes or any other tobacco products unless every tobacco package carries a specified warning including a pictorial warning as may be prescribed in the rules.

Further, Section 8 of the COTPA says that the specified warning on the package of cigarettes or any other tobacco products shall be legible and prominent, conspicuous as to size and colour. Every package containing cigarettes or any other tobacco products shall be so packed as to ensure that the specified warning appearing thereon, or on its label, is before the package is opened, visible to the consumer.

Incidentally, the rules for the COTPA were notified on March 15 (World Consumer Rights Day), 2008. It says that the health warning 'Smoking Kills 'and 'Tobacco Kills' is to be printed in white font on a red background.

any other tobacco products shall be so packed as to ensure that the specified warning appearing thereon, or on its label, is before the package is opened, visible to the consumer.

Incidentally, the rules for the COTPA were notified on March 15 (World Consumer Rights Day), 2008. It says that the health warning 'Smoking Kills'and 'Tobacco Kills' is to be printed in white font on a red background. and the Standards of Weights and Measures Act, 1976[34]*etc*. also deal with such practices within the framework of their respective laws.

Thus, it is manifest that the extant legal regime is scattered and ineffective besides it does not extend to cover all sectors. Self-discipline through frontline regulators is laudable but is not an effective substitute for a uniform and all-encompassing regime backed by statute.

The process of liberalization and globalization required prevention of practices having adverse effect on competition; promotion and sustaining of competition in markets; protection of the interests of consumers besides ensuring freedom of trade carried on by other participants in markets through better regulation and creation/strengthening of the institutional support. The reverse seems to have happened in India. Even the limited protection available through the MRTP Act has gone away. The opening up of the economy, on its own, is not going to create and sustain competition. An appropriate law, adequate enforcement, strong infrastructure, and a quick dispute settlement mechanism would be needed to sustain competition. Retreat of the State, in the context of free economy, is not to be misunderstood as the State leaving the economy unregulated. The State would need to develop adequate knowledge of the working of businesses in a free economy, enact laws, and create infrastructure and mechanisms for sustaining competition. In the absence of it, we would only be regressing from a 'license permit raj' to the 'jungle rule of the marketplace.' The processes of liberalization and globalization are nascent. The Competition Commission of India is neither mandated to look into such deceptive practises, nor is it advisable to empower CCI with such mandate looking at the experience of the MRTP Commission in resolving such corporate rivalries having impact upon consumers, as resolution of such disputes engaged much of the MRTP's working to the detriment of its chief mandate. Accordingly, it is imperative need of the hour to fill such legal vacuum. A suitable chapter may be inserted in the Consumer Protection Act, 1986 to deal with such cases.

(iii)Enforcement of orders of District Forum, State Commission or National Commission

The Consumer Protection (Amendment) Bill, 2011 *inter alia* seeks to provide that an order of the District Forum, the State Commission or the National Commission may be enforced by it as if it were a decree of a civil court or it may send, in case of its inability to execute such order to the court having jurisdiction.

The proposed amendment seeks to restore the original mechanism for enforcement of orders of consumer fora with more teeth.

The present mode of enforcement of order is highly unsatisfactory. As per the *extant* mechanism, it is provided that where any amount is due from any person under an order made by a District Forum, State Commission or the National Commission, as the case may be, the person entitled to the amount may make an application to the District Forum, the State Commission or the National Commission, as the case may be, and such District Forum or the State Commission or the National Commission may issue a certificate for the said amount to the Collector of the district and the Collector shall proceed to recover the amount in the same

34. Repealed by *the Legal Metrology Act*, 2009.

manner as arrears of land revenue[35].Prior to the amendments made in the year 2002,the provision provided that every order made by the District Forum, the State Commission or the National Commission may be enforced by the District Forum, the State Commission or the National Commission, as the case may be, in the same manner as if it were decree or order made by a Court in a suit pending therein and it shall be lawful for the District Forum, the State Commission or the National Commission to send, in the event of its inability to execute it, such order to the court within the local limits of whose jurisdiction.

To begin with, it may be noted that section 25 of the Act is applicable only to money recoverable under an award passed by the consumer fora. It is not applicable to non-monetary claims such as failure to obey directions given by the fora. The present provision empowers a consumer forum to issue a recovery certificate for the amount payable under its order, which is sent to the Collector, who would recover the amount in the same manner prescribed for recovering arrears of land revenue. Apart from delay in executions or wrongly refusing or avoiding executions, the Collector while executing the recovery certificate usually recovers his administrative costs from the amount recovered. The deduction results in the complainant not getting the entire amount due to him.

The proposed amendment apart from restoring *status quo ante*, also provides that where any order made by the District Forum, State Commission or the National Commission, as the case may be, is not complied with, such person not complying with the order shall be required to pay not less than five hundred rupees or one-half per cent. of the value of the amount awarded, whichever is higher, for each day of delay of such non-compliance of the order till it is paid, in addition to the payment of the awarded amount. Further, without prejudice to the above provisions, the proposed amendment provides that where *any* order (unlike the existing provision which provides for attachment in respect of interim orders only) made under the Act is not complied with, the District Forum or the State Commission or the National Commission, as the case may be, may order the property of the person, not complying with such order to be attached. The current provision providing for recovery through Collector as arrears of land revenue is also retained as another mode of recovery.

It is submitted that the proposed amendments for enforcement of orders of consumer fora are long overdue and would greatly help the redressal agencies in effectively enforcing their orders.

(iv) Power to review Order

The amendment proposes to empower the State Commission, as provided to the National Commission presently, to review their own orders when there is an error apparent on the face of records. It was felt that such power would be in the interest of justice as at present the aggrieved parties do not have any recourse other than filing an appeal to the National Commission to set right the errors made in the order of the State Commission.

The Committee[36] while appreciating the insertion of new section to the Principal Act giving power to the State Commission to review any order made by it, when there is an error apparent on the face of record, however, noted that as the consumer cases emanate from District Fora, this power of review should also be given to the District Fora as well.

It is submitted that the power to review should be available to all consumer for a for setting right the errors apparent on record. It is not readily understood as to why this power is restricted to higher fora only when such errors are equally, if not more, likely to occur at

35. Section 25 of *the Consumer Protection Act*, 1986.
36. *Supra* note 19.

lower level as well. Such a differentiated regime, apart from driving the litigant public to approach the State Commission for rectification of apparent errors and wasting money, is *ex facie* discriminatory and does not appear to be based on any *intelligible differentia*.

(v) Insertion of 'Unfair contract'

The proposed amendment seek to add a new clause in section 2(1) of the Act to define 'Unfair contract' *meaning* as a contract which contains any one or more of the following types of clauses:

(i) requires manifestly excessive security deposits to be given by a party to the contract for the performance of contractual obligations; or

(ii) impose any penalty on a party to the contract for the breach thereof which is wholly disproportionate to the loss occurred due to such breach to the other party to the contract; or

(iii) refuses to accept early repayment of debts on payment of applicable penalty;

(iv) entitles a party to the contract to terminate without reasonable cause the contract unilaterally.

This provision appears to be intended to protect consumers who are placed in an unequal bargaining capacity by making 'unfair contract' also as one of the grounds for filing a complaint in the consumer fora.

The Committee[37]though welcomed the inclusion of term 'Unfair Contract' in the Bill, however, felt that the definition of 'Unfair Contract' should be *inclusive* definition. The Committee also desired that the term 'Unfair Contract' should state the general ground for which a contract will be considered unfair and it may give an illustrative list of examples. Further, it recommended that it should be added that 'Unfair Term Contract' includes the following, but it is not limited to the following. The Committee further noted that the 'service' clause provided by manufacturers/business entity should also include 'Unfair Contract Term' so as not to be unfair in providing service conditions to the consumers. The Committee, therefore, recommended that section (2) (o) of the Consumer Protection Act, 1986 which defines 'service' should be amended to make the definition of term service 'inclusive' so as to include unfair contract term.

It is submitted that though the proposal is laudable and would provide huge relief to consumers from standard forms of contract where there is asymmetrical powers and positions of the parties, yet the consequential amendments are also required to be made in the Act giving the power to consumer for a to declare such contracts/clauses as null and *void* in explicit terms.

(vi) Return policy

A new sub-clause is proposed to be added in section 2(1) (r), which defines 'unfair trade practice' providing that'….*after selling such goods or rendering of such services, refuses to take back or withdraw the goods or withdraw or discontinue the service and refuses to refund the consideration thereof, if paid, within a period of thirty days after the receipt of goods or availing of services if it is so requested by the consumer*'.

This provision would enable the consumers to file complaints against those sellers who sell their products and services though e-commerce and telemarketing *etc*. who do not take back the goods or services if found defective by the consumers on its receipt, inasmuch as the product and services are not seen/ inspected or examined by them beforehand and

37. *Ibid*.

simply purchased in good faith, on the basis of their advertisements[38].

While examining the Bill, the Committee[39] noted with dismay that in our country goods once purchased by consumers in good faith are not taken back by shopkeepers. Some of the shopkeepers even write '*Goods once sold are not taken back*', hence, leaving no room for consumers for getting the goods exchanged/returned even after some defect has been detected. The Committee felt that the consumers are exploited by the shopkeepers and are compelled to buy goods merely on faith. This goes even worse when the purchasing of products and services are done through e-commerce and telemarketing where there is lack of accountability and responsibility on the part of the sellers. The Committee, therefore, recommended the Government to make provision for a law to govern and guard such purchasing especially done through e-commerce and telemarketing thereby fixing responsibility on sellers and also facilitate online filing of complaints as well as payment of fees. The Committee further desired that a 'return policy' should be chalked out which should be mandatory and required amendments to this effect may be made.

It is submitted that the provision would radically alter the consumer relations and appears to be a step in the right direction. It is, however, suggested that appropriate safeguards need to be built to ring-fence the proposal from its misuse or overuse.

V. CONCLUSION

Though the proposed amendments as well as the other reforms analysed above would go a long way in widening and amplifying the scope of some of the provisions of the Act besides facilitating faster disposal of cases, the author believes the enforcement efforts of the Act, which essentially operate at *ex post* stage, need to be supplemented and complemented by a robust National Consumer Policy which can at *ex ante* stage ensure uniform standards to the various arms of Government both at the Centre and States levels as well as to the various regulatory bodies and the Consumer For a besides laying down guiding principles of complaint resolution. As there is a consumer dimension in almost every area of governance, there exists a pressing need to take into consideration consumer's interests in all policy decisions and implementation thereof.

Further, there is a greater recognition to supplement and bolster consumer protection *via* maintenance of competition. The Competition Act, 2002 was also enacted *inter alia* to protect the interests of consumers. A vibrant and dynamic competition law would reinforce the consumer protection regime provided under the Consumer Protection Act, 1986 and the other *extant* laws.

In sum, Consumer Laws, Consumer Policy, Competition Law &Policy and other legal and regulatory framework should operate in synergetic manner instead of operating in silos.

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38. *Ibid*.

39. Standing Committee on Food, Consumer Affairs and Public Distribution (2012-13) which examined the Consumer Protection (Amendment) Bill,2011

INTERNATIONAL COMMERCIAL ARBITRATION: A JUDICIAL PERSPECTIVE

J. ADI NARAYANA*

ABSTRACT : The Arbitration and Conciliation Act, 1996 aims to mark a departure from the traditional close supervision of the courts and to reinforce the principle of a party autonomy. At the same time, increasing international trade and investment is accompanied by growth in cross-border commercial disputes which requires an efficient dispute resolution mechanism thereby international arbitration has emerged as the preferred option for resolving cross-border commercial disputes and preserving business relationships. This has led to tremendous focus from the international community in India. In the recent past, the Indian judiciary has decided cases especially involving a foreign party, the international community and others which raises certain controversy. In this paper an attempt has been made to overview the International commercial arbitration.

KEY WORDS : International Commercial Arbitration, conciliation Public Policy, Amendment.

I. INTRODUCTION

The enactment of the *Arbitration and Conciliation Act*, 1996 was intended to mark a departure from the traditional close supervision of the courts and to reinforce the principle of a party autonomy. However, the Judiciary plays an important role in support of the arbitration process, where there is a gap or a failure in the arbitration mechanism, where there is a need to make provisional arrangements pending an award, to enforce the award. Furthermore, it is necessary to recognise the essential role that courts play in maintaining the integrity of commercial arbitration process.[1]

By and large, parties to international transactions choose to arbitrate eventual disputes not because arbitration is simpler than litigation, not because it is cheaper, not because arbitrators may have greater relevant expertise than national judges, although any one of those factors may be of interest; they arbitrate simply because neither will suffer its rights and obligations to be determined by the courts of the other party's nationality.[2]

Increasing international trade and investment is accompanied by growth in cross-border commercial disputes. Given the need for an efficient dispute resolution mechanism, international arbitration has emerged as the preferred option for resolving cross-border

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1. Key note address by JJ Spigelman AC, Chief Justice of New South Wales at 20th Biennial Lawasia Conference on International Commercial Litigation: An Asian perspective, Hong Kong, 7th June 2007.
2. International Arbitration in the 21st Century: Towards Judicialisation and Uniformity? Twelfth Sokol Colloquium, R.Lilich & C.Brower eds.1993.

commercial disputes and preserving business relationships. With an influx of overseas commercial transactions and open ended economic policies acting as a catalyst, international commercial disputes involving India are steadily rising.

This has led to tremendous focus from the international community in India's international arbitration regime. Owing to certain controversial decisions by the Indian judiciary in the recent past, especially in cases involving a foreign party, the international community has kept a close watch on the development of arbitration laws in India and has often criticised the Indian judiciary for its interference in international arbitration and extra territorial application of domestic laws to awards obtained outside India. But this attitude of the Indian judiciary towards arbitration is now rapidly changing since the past couple of years. Never before has one seen so many pro-arbitration rulings by Indian Courts.

From 2012 to 2014 the Supreme Court of India declared the Indian arbitration law to be seat centric, removed Indian judiciary's power to interfere with arbitrations seated outside India, and denied strict limit of interference in India seated arbitrations, declared fraud to be arbitrable in India, referred non-parties to an arbitration agreement to settle disputes through arbitration, defined the scope of public policy in foreign seated arbitration, recognised the importance and independence and impartiality of even government appointed arbitrators, and has thus shown the much needed.

II. HISTORY OF THE ARBITRATION IN INDIA

Until the Act, the law governing arbitration in India consisted mainly of three statutes:

i. *The Arbitration (Protocol and Convention) Act, 1937*
ii. *The Indian Arbitration Act, 1940, and*
iii. *The Foreign Awards (Recognition and Enforcement) Act, 1961*

The 1940 Act was the general law governing arbitration in India and it resembled the English Arbitration Act of 1934. The Arbitration Act, 1940, dealt with only domestic arbitration and during its tenure intervention of the Court was required in all the three stages of arbitrations in India, i.e. prior to the reference of the dispute to the arbitral tribunal, in the duration of the proceedings before the arbitral tribunal, and after the award was passed by the arbitral tribunal. Before an arbitral tribunal took notice of a dispute, Court intervention was required to set the arbitration proceedings in motion. The existence of an agreement and of a dispute was required to be proved. During the course of the proceedings, the intervention of the Court was necessary for the extension of time for making an award. Finally, before the award could be enforced, it was required to be made the rule of the Court.

While the 1940 Act was perceived to be a good piece of legislation, however, in its actual operation and implementation by all concerned including the parties, arbitrators, lawyers and the Courts, it proved to be ineffective and was widely felt to have become outdated. This Act was largely premised on mistrust of the arbitral process and afforded multiple opportunities to litigants to approach the Court for intervention. Coupled with a sluggish judicial system, this led to delays rendering arbitrations inefficient and unattractive.

THE ARBITRATION *AND CONCILIATION ACT, 1996*

To address these concerns and with a primary purpose to encourage arbitration as a cost-effective and time-efficient mechanism for the settlement of commercial disputes in the national and international sphere, India in 1996, adopted a new legislation modeled on the Model Law in the form of the Act. The Act was also brought in to provide a speedy and efficacious dispute resolution mechanism to the existing judicial system, marred with inordinate delays and backlog of cases.

III. INTERNATIONAL COMMERCIAL ARBITRATION

Section 2(1) (f) of the Act defines an International Commercial Arbitration (ICA) to mean one arising from a legal relationship which must be considered commercial[3]where either of the parties is a foreign national or resident or is a foreign body corporate or is a company, association or body of individuals whose central management or control is in foreign hands. Thus, under the Indian Law, an arbitration with a seat in India but involving a foreign party, will also be regarded as an ICA and hence subject to Part I of the Act. Where an ICA is held outside India, Part I of the Act would have no applicability to the parties but the parties would be subject to Part II of the Act.

The scope of this section was determined by the Supreme Court in the case of *TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd*.[4] where despite TDM Infrastructure Pvt. Ltd. had a foreign control, the SC concluded that, "a company incorporated in India can only have Indian nationality for the purpose of the Act."

Thus though the act recognizes companies controlled by foreign hands as a foreign body corporate the Supreme Court has excluded its application to companies registered in India and which thus have Indian nationality. Hence in case a corporation has dual nationality, one based on foreign control and other based on registration in India, for the purpose of the Act such corporation would not be regarded as a foreign corporation.

IV. PUBLIC POLICY IN INDIA

The narrow construction of the public policy clause with regard to foreign award was the first mandate of the Supreme Court in Renusagar. The Supreme Court had explicitly stated that the expression "public policy" with regard to a foreign award does not cover the field covered by the words "laws of India". Thus, though there was a wide interpretation of the term "public policy" *vis-à-vis* domestic awards, there was still a very narrow construction of the term "public policy" when it concerned foreign awards in India.

But as explained above, the Supreme Court opened the possibility of challenge to a foreign award in India as if it was a domestic award, through Bhatia International and Venture Global, under Section 34 of the Act, making it difficult to avoid prolonged litigation while enforcing foreign awards in India.

Subsequently, to make matters worse, the Supreme Court in its judgment dated October 12, 2011 in the matter of *Phulchand Exports Ltd.* v. *OOO Patriot*[5] held that "patent illegality" under the term "public policy of India", as laid down in Saw Pipes, needed to be looked at while examining the enforcement of a foreign award under Section 48 (2) (b) of Act. By examining the validity of a foreign award under the laws of India, the Supreme Court has struck a heavy blow on the narrow construction that Renusagar had sought to propagate.

However in September 2012 through its decision in BALCO and subsequently through its decision in Lal Mahal[6] the Supreme Court has been able to secure the sanctity of a foreign award and remove obstacles to its enforcement in India.

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3. 'Commercial' should be construed broadly having regard to the manifold activities which are an integral part of international trade today *(R.M. Investments & Trading Co. Pvt. Ltd* v. *Boeing Co*, AIR 1994 SC 1136).
4. 2008 (14) SCC 271
5. (2011) 10 SCC 300
6. 2003 (2) ARBLR 5 (SC)

In Lal Mahal, the Supreme Court while dealing with objections to enforceability of certain foreign awards on the grounds that such awards are opposed to the public policy of India and while overruling Phulchand, has significantly curtailed the scope of the expression 'public policy' as found under Section 48(2)(b) of the Act, thereby limiting the scope of challenge to enforcement of awards passed in foreign seated arbitrations.

However, in Western Geco, by widely defining the term "fundamental policy of India" which is recognized as an ingredient of public policy both under Renusagar and Saw Pipes, the Supreme Court seems to have taken a regressive step. Though Western Geco was delivered under Section 34 of the Act, its findings may in the future impact the interpretation of the term 'public policy' even with regards to arbitrations seated outside India.

THE 246TH LAW COMMISSION REPORT

Law Commission releases proposed amendments to the Arbitration & Conciliation Act, 1996; Large-scale amendments are designed to plug major gaps identified over time and if implemented, will work to impart confidence in Indian arbitration and recognition and boost to institutional arbitration in India.

V. INTERNATIONAL COMMERCIAL ARBITRATION : JUDICIAL PERSPECTIVE

World Sport Group (Mauritius) Ltd v *MSM Satellite (Singapore) Pvt Ltd*[7]

The Supreme Court held that only bar to refer parties to foreign seated arbitrations are those which are specified in Section 45 of the Act i.e. in cases where the arbitration agreement is either (i) null and void or (ii) inoperative or (iii) incapable of being performed and expressly removed allegations of fraud as a bar to refer parties to foreign seated arbitrations.

Reliance Industries Ltd & Ors v. *Union of India*[8]

The Supreme Court in this case, held that it is important to ensure that doubts are not cast on neutrality, impartially and independence of the Arbitral Tribunal. It re-affirmed that under Section 11(9) of the Act it is not mandatory for the court to appoint an arbitrator not belonging to the nationality of either of the parties to the dispute. After relying on renowned scholars it held that qualification, experience and integrity should be the criteria for appointment of an arbitrator.

Swiss Timing Limited v. *Organising Committee, Commonwealth Games 2010*, Delhi[9]

The Supreme Court has held that allegations of fraud and other malpractices are arbitrable in India. N. Radhakrishnan does not lay down the correct law. Contention of substantive contract being void / voidable is not a bar to arbitration and the court must follow the policy of least interference. The court further held that arbitration and criminal proceedings may continue simultaneously.

Union of India v. *U.P. State Bridge Corp Ltd*[10]

The Supreme Court acknowledged that it is a common sight that government officers are appointed as arbitrators, because of their status and position; discharge of their other duties assumes more importance and their role as arbitrators take a back seat - this kind of behavior showing a casual approach in arbitration is anathema to the very genesis of arbitration. The Court directed that where the government assumes the authority and power

7. Judgment in Civil Appeal No. 895 of 2014 dated January 24, 2014
8. AIR 2014 SC 2342
9. AIR 2014 SC 3723
10. 2014 (10) SCALE 561

to appoint the arbitral tribunal, it should be vigilant and responsible in choosing arbitrators who are in a position to conduct arbitral proceedings in an efficient manner. The Court further held that the principle of 'default will apply and courts are not powerless to remedy situations arising from inaction of arbitral tribunals to protect the interest of all parties.

Associate Builders v. *Delhi Development Authority*[11]

In this case the Supreme Court clarifies the narrow scope of 'public policy' for challenge of Indian Award. Supreme Court provided guidance on the term 'public policy' under Section 34 of the Act and clarifies the extent of judicial intervention in a India seated arbitration. The court discussed the term 'morality' in a challenge under Section 34 of the Act and draws a distinction between 'error of law' and 'error of fact' and the extent of interference permissible to that effect. The court further held that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected unless the arbitrators approach is arbitrary or capricious.

The Board of Trustees of the Port of Kolkata v. *Louis Dreyfus Armatures SAS & Ors*[12]

In this case the Calcutta High Court refused to inject investment arbitration against India. The Calcutta High Court held that if there is a valid arbitration agreement between the parties; there is no escape from arbitration. Unless the facts and circumstances demonstrate that foreign arbitration would cause a demonstrable injustice, civil courts in India would not exercise its jurisdiction to stay foreign arbitration. An anti-arbitration injunction can be granted only if (a) the Court is of the view that no agreement exists between the parties; or (b) the arbitration agreement is null and void, inoperative or incapable of being performed; or (c) the continuation of foreign arbitration proceeding might be oppressive or vexatious or unconscionable. The Court held that whether a claim falls within the parameters of a Bilateral Investment Treaty would only be decided by an arbitral tribunal, duly constituted.

Bharat Aluminum Co v *Kaiser Aluminum Technical Service, Inc*[13]

The Supreme Court in this case, removed interference of Indian Courts in foreign seated arbitrations. The constitutional bench of the Supreme Court after laudable consideration of the jurisprudence laid down by various Indian & foreign judgments and writings of renowned authors, ruled that its findings in Bhatia International and Venture Global were incorrect. It concluded that Part I of the Act has no application to arbitrations seated outside India, irrespective of the fact that whether parties chose to apply the Act or not, thereby getting Indian law in line with the well settled principle recognised internationally that "the seat of arbitration is intended to be its center of gravity".

Although the Court has overruled many of its previous decisions, it provides no relief to parties who have executed their arbitration agreements prior to the date of the present judgment, as the Court directed that the overruling was merely prospective and the laws laid down therein applied only to arbitration agreements made after September 6, 2012.

Chloro Controls (I) P. Ltd v. *Severn Trent Water Purification Inc. & Ors*[14]

In yet another landmark ruling, the Supreme Court has held that the expression 'person claiming through or under' as provided under Section 45 of the Act would mean and take within its ambit multiple and multi-party agreements and hence even non-signatory parties to some of the agreements can pray for and be referred to arbitration. This ruling has widespread

11. 2014 (13) SCALE 226
12. 2014 SCC OnLine Cal 17695
13. 2012 (9) SCC 552
14. AIR 1994 SC 1136

implications for foreign investors and parties as in certain exceptional cases involving composite transactions and interlinked agreements, even non-parties such as the parent company, subsidiary, group companies or directors can be referred to and made parties to ICA.

Shri Lal Mahal Ltd v. *Progetto Grano Spa*[15]

The Supreme Court made enforcement of foreign awards easier by removing 'patent illegality' from the scope of public policy. The ever-growing judicial support to ICA and the seminal shift in judicial mindset is now more than established from a landmark ruling of the Supreme Court, wherein the Court has in fact overruled its own decision passed in Phulchand. The Supreme Court while dealing with objections to enforceability of certain foreign awards on the grounds that such awards are opposed to the public policy of India, has significantly curtailed the scope of the expression 'public policy' as found under Section 48(2) (b) of the Act and thereby limiting the scope of challenge to enforcement of awards passed in foreign seated arbitrations. Therefore, enforcement of foreign awards would not be refused so easily. Thus, a practical take away from the above would be to give preference to a foreign seated arbitration as mechanism for dispute resolution as this would afford a speedy remedy without significant Court interference.

Mulheim Pipe coatings GmbH v. *Welspun Fintrade Ltd and Anr*[16]

In this case the Bombay High Court reaffirmed and explained separability of an arbitration clause. The Bombay High Court formulated the principles of the doctrine of severability and held that an arbitration clause in a share purchase agreement could survive annulment of the share purchase agreement by the parties. The Court held that for the arbitration agreement to be null and void, inoperative or incapable of performance, the doctrine of separability requires a direct impeachment of the arbitration agreement and not a simple parasitical impeachment based on a challenge to the validity or enforceability of the main agreement. By applying this principle, it upheld the validity of arbitration agreement within a share purchase agreement which was declared null and void by a settlement agreement entered into by the parties.

Konkola Copper Mines (PLC) v. *Stewarts and Lloyds of India Ltd*[17]

The Bombay High Court provided assistance to a certain degree and indicated that the interpretation to various provisions of the statute as provided in BALCO would not be limited to a prospective application. As per the judgment, the question regarding whether Part I would apply to an arbitration where the arbitration agreement was entered into prior to September 6, 2012 would be decided in accordance with the principle laid down in the Bhatia International case. However having once decided that Part I applies, the question as to which Court would have jurisdiction to entertain applications under Section 9 or Section 34 of the Act etc. would be decided in accordance with the principles provided in the BALCO judgment. The Court explained that while the ratio of the BALCO judgment i.e. Part I of the Act would apply only to arbitrations seated in India, would operate with a prospective effect, the interpretation of Section 2(1) (e) of the Act as provided by the Supreme Court would not be limited to a prospective application.

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15. *(2014) 2 SCC 433; Bharat Aluminum Co.* v. *Kaiser Aluminum Technical Service*, Inc, 2012 (9) SCC 552
16. Appeal (L) No. 206 of 2013 in Arbitration Petition No. 1070 of 2011 in Suit No. 2287 of 201
17. 2013 (5) Bom CR 29

Tata Capital Financial Services Limited v. *M/s Deccan Chronicle Holdings Limited*[18]

The recent judgment of the Bombay High Court in Tata Capital Financial Services Limited v. M/s Deccan Chronicle Holdings Limited gains significant importance in light of the recent spur in lending disputes. The Bombay High Court while dealing with a petition seeking interim reliefs in aid of arbitration under Section 9 of the Act has held that even though certain debts may be secured by a mortgage, the lender may choose to bring only a claim for recovery of the amounts due and not sue for enforcement of mortgage. Accordingly, as money claims arising under contracts are arbitrable disputes, Courts are empowered to grant interim reliefs under Section 9 of the Act.

Antrix Corp. Ltd v. *Devas Multimedia Pvt. Ltd*[19]

This case is yet another example of the pro-arbitration approach adopted by the Supreme Court, where the Courts, to the extent possible, deter from interfering in the arbitration process or with the Arbitrators' judgment. The Supreme Court has relied upon a fairly simple proposition that once an arbitration agreement has been invoked on a particular dispute and an Arbitrator has been appointed, the other party to the dispute cannot again independently invoke the provisions of the arbitration agreement. The issue revolved around a petition filed under Section 11 of the Act, wherein the Supreme Court relying on the above proposition held that once the power to appoint an Arbitrator has been exercised, no powers *are left to refer the same dispute again to arbitration under Section 11 of the Act.*

Bharat Oman Refineries Ltd v. *M/s. Mantech Consultants*[20]

The Bombay High Court held Arbitration award delivered after efflux of prescribed time to be bad in law thereby ensuring timely adjudication of arbitration proceedings. The Division Bench of the Bombay High Court held that the award passed by the Arbitrator after an efflux of period prescribed in the agreement is bad in law and upheld the principle laid down in NBCC Limited v. J.G. Engineering Private Limited that the contract of arbitration is an independent contract and parties to such contract including the Arbitrator, are bound by the terms of such contract. The present case, proceeds on the principle that if the arbitration agreement prescribes a period within which the award is to be passed, any award passed beyond such period would be bad in law unless the parties have mutually agreed to extend this period.

Denel Proprietary Ltd v. *Govt. of India, Ministry of Defence*[21]

This case lays down two clear principles with regard to appointment of Arbitrator under Section 11(6) of the Act. First, failure to appoint an Arbitrator within 30 days as prescribed under Sections 11(4) and (5) of the Act does not amount to forfeiture of rights unless the opposite party has filed its petition under Section 11 (6) prior to the said appointment. Secondly, though it is a well-established principle that appointment is required to be done as per the terms and conditions of the contract, however if circumstances exist, an independent Arbitrator may be appointed as an exception to the general rule, if there is reasonable apprehension of bias and impartiality.

Enercon India Ltd. & Ors v. *Enercon GmBH & Anr*[22]

The Supreme Court in this case has rendered a landmark decision affirming the pro-

18. 2013 (3) BomCR205
19. 2013 (7) SCALE216
20. 2012 (2) ArbLR 482 (Bom)
21. (2012) 2 SCC 759
22. Civil Appeal No.2086 of 2014 (Arising out of SLP (C) No. 10924 of 2013), decided on February 14, 2014.

arbitration outlook the Indian courts have developed in the past few years. This judgment is a step in the right direction to bring Indian arbitration law in line with international jurisprudence and will aid India in being perceived as an arbitration-friendly jurisdiction. The international outlook and the pragmatic approach followed by the Supreme Court is clear evidence that the arbitration law in India has finally evolved to meet the demands of ever-dynamic arbitration jurisprudence.

The Supreme Court though addressing issues involving an International Arbitration, took aid of provisions under Part I of the Act, making a point that the legislative mandate even in Part I of the Act is for courts to aid, support and facilitate arbitration. This indeed is welcome news for Indian and foreign parties alike. Parties would now be encouraged to choose India as the seat of arbitration.

Lastly, this judgment re-establishes the importance of specifically mentioning in the arbitration agreement the law governing it and the seat of arbitration in order to avoid litigation.

VI. CONCLUSION

Thus, the Indian arbitration jurisprudence has been evolving since its inception to suit the needs and complexities of international trade and investment. Though a series of judicial decisions in the first decade of the new millennium showed lack of pro-arbitration approach by the Indian judiciary while interpreting arbitration laws, the trend has now changed and Indian courts are increasingly adopting a pro-arbitration approach. Further, the Government too is committed to make India into an arbitration friendly country which could serve as an International Arbitration hub for the world. This is aimed to be achieved by amending the existing Act and bringing it to international standards. In totality, the road ahead looks very promising for International Arbitration in India and against Indian parties.

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CHILD LABOUR-PROBLEMS AND PROSPECTS: A SOCIO LEGAL ANALYSIS

SONU SHARMA*

ABSTRACT : Children are the greatest gift to humanity. They are the potential human resources for the progress of any society. Every nation links its future with status of child and neglecting children would result in a loss to the society as a whole. Child labour is one of the worst forms of violation of human rights. Child labour exploits children physically, morally, economically, and blocks their access to education. The problem of child labourers over the years has assumed international dimension. Despite vigorous campaign and efforts to eliminate child labour , a 2013 report of the International Labour Organisation (ILO) estimates that there are still about 168 millions child labourers in the world , accounting for almost 11 percent of the total child population. United Nations International Children's Emergency Fund report, 2011, estimated that in India, 28 million children between the ages of five and 14 were engaged in child labor. Inspite of improved legislations like *(Prohibition and Regulation*) *Act 1986* and National Policy on Labour and other action programmes for welfare of children the incidence of child labour has not come down significantly. This article provides a study of socio legal aspects of child labour.

KEY WORDS : Child Labour, Constitutionof India, Labour Laws, Family Law.

I. INTRODUCTION

The prevalence of child labour has been more or less in all periods of time, though varied in its nature and dimension, depending on the existing socio-economic structure of society.[1] However its perception as a social evil is of recent origin. In the ancient times the accepted principle was that every child worked with parents both at home and the workplace. The parents, no doubt, had to be take proper care of the education of the child, whether male or female. Occupations and professions being hereditary and caste determined, such work gave the children the necessary preparations to face life when they come to age. In the earlier times children were part of the artisanal and agricultural labour force who worked mostly within their families. The work load is less and the children get sufficient time to play and to interact with other children.

The British rule and the factory system that came closely on its heels changed the situation. Children moved far away from their native villages and worked in hazardous industries in urban areas. Exploitation of children really started with the change in the nature

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1. U.C. Sahoo, "*Child Labour in SuratTentile Industry*", *Social Change*, Vol.20, no.3 at 29 (1990) .

of work done by the working children who came from poor families belonging to lower levels in the social hierarchy. While pauperization of the people in the lower social strata brought on by British Rule became the main cause for child labour, growing urbanization and industrialization provided the scope for its use. Much of same practice continued till the advent of British rule. The imposition of the British legal system, a specifically designed educational system and other practices meant to serve the British interest produced far-reaching effects on people and society in India. The transfer of village lands to outsiders through sale broke the isolation and self-contained nature of the villages. It led to the creation of a new class of land-less agricultural labourers who, through time, drifted from rural to urban areas by economic necessity. The rise of the factory system in the mid-nineteenth century opened up avenues for employment of children of the vulnerable sections in factories and other places. The children were forced to work in very harsh working conditions and very low wages most of the children had burnt themselves out by time they came of adulthood.[2] In the new reckoning child labour assumed the proportion of a problem. The seriousness of the problem rose day by day. Today child labourers are not employed in large and medium industrial units. Thousands of economically active children are found working in small workshops, cottage industries, handicraft units and in almost all commercial manufacturing units. Most of the children are engaged in the making of glass bangles, carpets, matches, locks, readymade garments, biris and fire work. A large number of children are working in slaughter houses and also as domestic hands.[3]

It is widely recognized now that child labour as a mode of exploitation was necessitated by economic compulsions of the parents and the child himself. It is keeping these two aspects of the issue in the view that V.V. Giri tended to call child labour as an economic necessity but a social evil.

II. CONCEPT OF CHILD LABOUR

The complex nature of the concept of 'child labour' as it involves differing interpretations of 'child' and 'labour' and further 'work' and 'labour', makes it difficult to have a consensually validated definition of 'child labour' both in national and international context. Some agencies, organizations and countries, however, use the term child labour and child work interchangeably.[4] The worldwide concern with child labour has resulted in two major international conventions on children, which set age limits for childhood and entry into work.[5] The Indian Constitution also has set the age limit for children.[6] However, it is to be noted that perceptions of childhood differs in different countries and societies. In many societies childhood does not end when a child attains a certain age, but entrance into adulthood is a gradual process, or is based on criteria other than age. Thus, the two main approaches to defining child labour are (i) any labour force activity by children below a stipulated minimum age; and (ii) any work economic or not –that is injurious to the health, safety and development of children.De La Luz Silva defines a child as "someone who needs

2. N.P Patro, "Child Labour in the Global Era-A New Perspective", quoted in Dr. R.N.Misra (ed.), *Problems of Child Labour in India, at 1* (2004).
3. *Id.* at 3.
4. Thomas Paul, "Child Labour-Prohibition v. Abolition: Untangling the Constitutional Tangle", *Journal of Indian Law Institute*, Vol.50, at 145 (2008) .
5. ILO, Minimum Age Convention, 1973 (No.138, Art.3); and UN Convention on the rights of the Child,1989, Arts.1 and 32.
6. Article 24 of The Constitution of India.

adult protection for physical, psychological and intellectual development until able to independently integrated into the adult world".[7]

When the business of wage earning or of participation in self or family support conflicts directly or indirectly with the business of growth and education, the result is child labour . The function of work in childhood is primarily developmental and not economic. Children's work, then, as a social good, is the direct, antithesis of child labour as a social evil.

The United Nations Convention on the Rights of the Child, 1989, defines perception of what constitutes child work. The term child under Article 1, "as every human being below the age of eighteen years unless, the law applicable to the child, majority is attained earlier".[8]

Kulshresthais of the view that:

"child labour in a restricted sense means the employment of child in gainful occupations which are dangerous to their health and deny them the opportunities of development.[9]

The word child and an adolescent used in different labour laws have created confusion. Section 2 (b) of the Factories Act, 1948 defines adolescent , as a person who has completed the age of 15 years but has not completed 18 years. Same definition has been given in 2 (a) of the Motor Transport Workers Act, 1961 while no definition of adolescent has been given in Beedi Workers (Conditions of Employment) Act, 1966. A child as defined in different Acts, as discussed above means a person who has not completed 15 years. This demarcation between the children and the adolescent creates more confusion instead of distinguishing these two terms and clarifying them. It is suggested that the term "Adolescent" should be abolished and a minimum age should be laid down for the employment of children for the sake of uniformity. It is further suggested that the minimum age for employment of children should be fixed as 15 years and this should be strictly adhered to Irrespective of any consideration.

III. DEFINITION OF CHILD UNDER VARIOUS INDIAN LAWS

1. The Constitution of India

Article 24 of the Constitution of India provides: No child below the age of 14 years shall be allowed to work in a factory, a mine or in any hazardous employment.[10] According to Article 45 of the Constitution of India:- State shall strive to provide free and compulsory primary education for all children until they complete 14 years of age.[11]

Census of India Child means, a person below the age of 14 years. The Indian Majority Act, 1875 a child attains majority on the completion of 18 years.[12]

2. Labour Laws differ in defining a child

a) The Minimum Wages Act, 1948- Child means a person who has not completed his fourteenth year of age.[13]

b) The Factories Act1948- Child means a person who has not completed his fifteenth year of age.[14]

c) The Motor Transport Workers Act1961- Child means a person who has not completed his fifteenth year.[15]

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7. Jerry Rodger and Guy Standing, *Child Work, Poverty and Underdevelopment,* at 7 (1981).
8. Article 1 of the United Nations Convention on the Rights of the Child,1989.
9. J.C. Kulshrestha, *Child Labour in India*, at 2 (1978)
10. Article 24 of The Constitution of India.
11. Article 45 of The Constitution of India before constitutional 86th Amendment Act, 2002.
12. Section 3 of The Indian Majority Act, 1875.
13. Section 3(bb) of Minimum wages Act,1948.
14. Section 2(c) of The Factories Act,1948.
15. Section 2 of The Motor Transport Workers Act,1961.

d) The Beddi and Cigar Workers (Conditions of Employment) Act, 1966- Child means a person who has not completed fourteen years of age.[16]

e) The Apprentices Act, 1961-14 years[17]

f) The Plantations Labour Act 1951-14 years[18]

g) The Mines Act, 1952-18 years[19]

h) The Child Labour (Prohibition and Regulation) Act, 1986- Child means a person who has not completed his fourteenth year of age.[20]

3. Criminal Law

a)The Indian Penal Code1860: Nothing is an offence, which is done by a child under 7 years of age.[21] Nothing is an offence which is done by a child above 7 years of age under 12 years, who has not attained sufficient maturity of understanding to judge the nature and consequences of his conduct on that occasion.[22] (section 83)

b) The Juvenile Justice(Care and Protection of Children) Act,2000 : "Juvenile is a boy, who has not attained the age of 16 years and girl who has not attained the age of 18".[23]

4. Family Law

a) The Prohibition of Child Marriage Act, 2006 - "Child means a person who if a male, has not completed twenty-years of age, and if a female, has not completed eighteen years of age".[24]

b) The Hindu Marriage Act,1955 -21 years for males, 18 years for females.[25]

c) The Hindu Adoption and Maintenance Act1956-18 years[26]

d) The Hindu Minority and guardianship Act1956- 18 years[27]

e) The Guardians and Wards Act, 1890-18 years[28]

5. Law of Contract

The Indian Contract Act, 1872- A person who has not completed 18 years of age is incompetent to enter into a contract [29]thus the legal conception of the child varies depending upon the purpose, and differing economic and socio –cultural circumstances. The Hindu Marriage Act,1955 and The Prohibition of Child Marriage Act,2006 even prohibit a male from marrying before attaining 21 years. However, a human being not considered old enough to manage his/her property, marry, commit an adult crime with adult punishment, is considered old enough to work long hours at machines in a factory, work on a ship at sea, in shops, hotels and other establishments all day. The field where maximum child labour is employed is that of agriculture, where there is no minimum age specified at all. A child, who is sucking at the mother's breast at four years, can suddenly and rudely be put to work grazing the landlord's cattle.The government should, in a uniform manner, consider all children below the age of 18 as children.

16. Section 2(b) of The Beedi and Cigar Workers (conditios of employment) Act,1966.
17. Section 3 of The Apprentices Act,1961.
18. Section 2(c) of The Plantation Labour Act,1951.
19. Section 2(b) of The Mines Act,1952.
20. Section 2(ii) of The Child Labour(Prohibition and Regulation) Act,1986.
21. Section 82 of The Indian Penal Code, 1860.
22. Section 83 of The Indian Penal Code 1860.
23. Section 2(k) of The Juvenile Justice (Care and Protection of Children) Act, 2000.
24. Section 2(a)of The Prohibition of Child Marriage Act, 2006.
25. Section 5(iii) of The Hindu Marriage Act, 1955.
26. Section 3(c) of The Hindu Adoption and Maintenance Act,1956.
27. Section 4(a) of The Hindu Minority and Guardianship Act, 1956.
28. Section 4(1) of The Guardians and Wards Act, 1890.
29. Section 11 of The Indian Contract Act, 1872.

IV. CAUSES OF CHILD LABOUR IN INDIA

The first step in the direction of abolition and Prohibition of child Labour in India is to understand the causes of child labour in a complex socio-legal context. Poverty is one of the Causes of Child Labour. The unrelenting poverty forces parents to pledge and sell their children into labour bondage. Another important reason is complete lack of schools and even the expenses of schooling lead to child labour. The attitude of parents also promotes Child Labour. Children are seen as economic assets and a source of income-earning for their parents as one of their pious duties. Thousands of young children of school going age in India are found working for long hours in the field in industrial and service establishments and even in hazardous occupations and are being deprived of opportunities for normal, physical, mental and social growth and development. Generally it may be said that children are compelled to work because of their poor socio-economic conditions. Thought poverty is said to be the major cause of child labour yet it is not the only cause. The extent and nature of child labour are also influenced by the structure of the economy and the level and pace of development. The causes of child labour are being inter-related and an exact classification of them is not possible. However they may be grouped as follows allowing some overlapping. The following are main reasons for child labour in India"[30] :-

1. Inadequate income of adult bread earners of the family;
2. Absence of scheme for family allowances;
3. Inequitable distribution of land and assets;
4. Social and cultural factors
5. Industrialization and urbanization
6. Education backgrounds and ignorance of parents
7. Employees preference for engaging children for work
8. Population explosion
9. Inefficacy of protective legislation for working children

V. MAJOR FORMS OF CHILD LABOUR

Most children in all most all societies work in one way or another, though the types of work they do and the forms of their involvement vary among societies and overtime. The major forms of child participation in economic activities can be broadly summarized as follows.

1. Domestic work cleaning, cooking, child-care etc.

2. Non-domestic non –monetary work, farm work, fuel and water collection and such other activities that are complementary to adults work.

3. Bonded labour usually illegal, most exploitative feature of child labour in agrarian societies.

4. Wage employment Children working either as a part of family group or individually in agricultural work sites, in domestic services, in manufacturing process and service activities etc. It may be of piece- rate or time –rate basis as regular or casual workers, in jobs that may or may not involve some training.

5. Marginal work is a different type of activity in which large number of children is involved. The types of activities in this category vary in nature and intensity. They may be irregular or of a short term nature such as selling newspaper, shoe- shining, looking after vehicles, garbage collection and sorting out objects from garbage etc. there are

30. Dr. S.S.Sharma, "*Causes of Child Labour in India*", *Labour and Industrial cases,* Vol. 34, at 22 (February, 2001).

altogether different forms of child activity such as theft, prostitution and other social undesirable or illegal activities.

VI. MAGNITUDE OF THE PROBLEM

The problem of child labour continues to pose a challenge before the nation. United Nations International Children's Emergency Fund report, 2011, estimated that in India, 28 million children between the ages of five and 14 were engaged in child labor.[31]According to the 2001 Census there are 1.26 crore working children in the age group of 5-14 as compared to the total child population of 25.2 crore. There are approximately 12 lakhs children working in the hazardous occupations/processes which are covered under the Child Labour (Prohibition & Regulation) Act i.e. 18 occupations and 65 processes. However, as per survey conducted by National Sample Survey Organisation (NSSO) in 2004-05, the number of working children is estimated as 90.75 lakh.[32]

VII. THE NATIONAL POLICY AND LAWS ON CHILD LABOUR IN INDIA

The very preamble of the Constitution of India stands as a testimony to witness the presence of philosophy of socio economic and political justice under our national charter. In order to achieve goal of social, economic and political justice, the Constitution of India guarantees special protection to the children against exploitation. To impart justice to them, the state has been empowered to make special provisions to their welfare so as to bring them at par with other sections of the society. There are various provisions in the Constitution which put the state under duty to ensure that the tender age of children is not abused and they are not exposed to economic necessity to enter avocation unsuited to their age and strength. Article 15(3) of the Indian Constitution empowers the state to make special provisions for women and children.[33]The constitution of India has laid down that the state shall direct its policy towards securing the health and strength of all workers – men , women and children- and ensuring that citizens are not forced by economic necessity to enter vocations unsuited to their age or physical capacity. It was held that children, particularly, should be given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity. Children and youth are to be protected against exploitation, and to this end those below the age of 14 years are prohibited from working in factories, mines or any other hazardous employment. Since independence, there are several laws and regulations prohibiting employment below a certain age and providing protection for working children.[34]According to Article 24 of the Constitution of India - "No child below the age of 14 years shall be employed in work in any factory or mine or engaged in any other hazardous employment." Similarly, Article 39(e) of the Constitution of India clearly says that "The State shall, in particular, direct its policy towards securing that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age and strength[35], Article 39(f) of the Constitution states that the children are given opportunities and facilities to develop in

31. Available at: *http://digitaljournal.com/news/world/child-labour-in-india-hidden-shame-or necessity/article/368942* (Accessed on 11 June 2014)
32. Available at: *http://labour.nic.in/content/division/child-labour.php (*Accessed on 6 June 2014).
33. L.B. Punecha, *Child Labour: A social Evil*, at 60 (2006).
34. Ashok Narayan, "Child labour policies and programmes:The Indian Experience", quoted in AssefaBequele and Jo Boyden (eds.), *Combating Child Labour , at* 145 (1988).
35. Article 39(e) of The Constitution of India.

a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.[36]" Direction for free and compulsory education for children has been provided under Directive Principles of the Constitution. The State shall endeavour to provide, within a period of 10 years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of 14 years.[37]Notwithstanding these constitutional provisions, there are a number of enactments in the country which protect and safeguard the interests of the child labour. The employment of children below 14 years of age has been prohibited under:

(i) The Children (Pledging Labour) Act, 1933,

(ii) The Factories Act, 1948,

(iii) The Mines Act, 1952,

(iv) The Motor Transport Workers Act, 1961; and

(v) The Bidi and Cigar Workers (Conditions of Employment) Act, 1966.

(vi) The Plantation Labour Act, 1951 prohibits child labour during night, i.e. from 7.00 P.M. to 6.00 A.M. Children are, however, permitted to work in plantations only where certificate of fitness is granted by a certifying surgeon.[38]

(vii) The Child Labour (Prohibition and Regulation) Act, 1986 is a comprehensive law which prohibits employment of children in hazardous occupation and processes. It also regulates the working hours and bans night work.[39] Punishment with an imprisonment for a period not less than three months for employersbut which may extend to one year or with fine which shall not be less than ten thousand rupees but which may extent to twenty thousand rupees or with both.[40] Any person, police officer or inspector can file a case against any employers for this offence.

National Advisory Body by the Labour Department can suggest inclusion of other occupations as hazardous, as if they find.[41] The Supreme Court in numerous cases observed that all laws on Child Labour including the constitutional mandates have been violated with impunity and state system has failed to do its duty in enforcement of these laws. One of the important Judgment[42] where the Supreme Court directed that:

(1) Offending employer must be asked to pay Rs.20,000/- as compensation to every child employed in violation of CLPR Act 1986.

(2) A Child Labour Rehabilitation-Cum-Welfare Fund was to be established in every district.

(3) Employer should be asked to recruit any adult suggested by parents of children who are removed from work.

(4) Where alternate employment could not be made available, parents of the child concerned would be paid Rs.25,000/- from the corpus provided the parent sent the child to school.

Numerous Supreme Court Judgments during the period 1986-1997 generated a renewed interest in Child Labour issues in India. A number ofNGOs and social action groups emerged

36. Article 39(f) of The Constitution of India.
37. Article 45 of The Constitution of India before constitutional 86th Amendment Act, 2002.
38. Section 25 and 27 of the Plantation Labour Act,1951.
39. Section 7 of The Child Labour (Prohibition and Regulation Act),1986.
40. Section 14 of The Child Labour (Prohibition and Regulation) Act,1986.
41. N.P Patro, " Child Labour in the Global Era-A New Perspective", quoted in Dr. R.N. Misra(ed), *Problems of Child Labour in India, at 18* (2004).
42. *M.C.Mehta* v. *State of Tamil Nadu*, AIR 1997, SC 699.

like Child Relief and You (CRY) and others to pressurize the Government to fulfill the constitutional mandates of abolition of Child Labour and provision for compulsory and free education of children.[43] India formulated a National Policy on Child Labour in 1987.

Some of the poverty alleviation Schemes launched already includes Nehru RozgarYogna (1989), Integrated Rural Development Programme (IRDP) (1978). In recent years, Government has played a very pro-active role towards the final goal of elimination of Child Labour in India. The National Rural Employment Guarantee Scheme (NREGA) launched in 2005 has been a rare success in some of the States. It has secured minimum of one hundred days of paid work to the rural unemployed poor. This has a considerable impact in checking migration of poor workers to other areas in search of work and livelihood. Consequently, their children have fair chance of stable and uninterrupted schooling. Their Children now are less prone to labour bondage, exploitation as Child workers on account of extreme poverty.

Another powerful legislative response for abolition of Child Labour in India is the recent enactment of The Right of Children to Free and Compulsory Education Act 2009.

another major initiative in the direction of abolition of Child Labour through alleviation of extreme poverty The National Food Security Act,2013 for all families below the Poverty Line (BPL).

Inspite of improval legislation like *Child Labour Act 1986* and National Policy on Labour and other action programmes for welfare of children the incidence of child labour has not come down significantly.

VIII. CONCLUSION

Considering the magnitude and extent of the problem and that it is essentially a socio-economic problem inextricably linked to poverty and illiteracy, it requires concerted efforts from all sections of the society to make a dent in the problem. Child Labour Act was enacted in 1986 has been in operation from last 28 years and being a social legislation need to revisited on account of the societal changes having occurred since then. The efforts that have been put so far and the solutions thereof, to tackle the enormity of the problem of child labour in India need to be evaluated, it altogather indicate that the problem of child labour needs to be solved at war-footing. Law alone is not an end to eliminate child labour unless there is social transformation and people employing child labour feel ashamed. People have to be sensitized towards the children irrespective of their cast, creed, colour, sex or religion. It is possible only with the combined efforts of Government and Society.

■

43. Veer Singh, "*Child Labour in India: The Genesis and the Prognosis*", *NALSAR Law Review,* Vol.5, at 7 (2010).

BOOK-REVIEW

Ratanlal & Dhirajlal's *Law of Crimes* (Vol. I , 27th Ed., 2013),

A Commentary on Indian Penal Code 1860 revised by

Shriniwas Gupta and Preeti Mishra, Bharat Law House,

New Delhi, Pp381, Price Rs. 2495.00- (Hardback), ISBN 978-81-7737-223-6

Law of Crimes, in common parlance, is a law that controls crimes and regulates conduct of criminals in the society. The purpose of criminal law emphasizes on maintaining peace and tranquility in the society by punishing the wrong doers. Crime is an act forbidden by law and revolting to the moral sentiments of the society. Every democratic country has always made an attempt to enact tough penal statute to create fear in the mind of wrongdoer. The general law of crimes is contained in the statute law, *viz., the Indian Penal Code, 1861* as amended from time to time. Various others statutes are enacted by the Union and the State legislatures also make an act or omission punishable under the law which may be special or local in nature. It is important to note that a virtue of yesterday may become crime tomorrow and crime of yesterday may not remain crime for tomorrow. So, a moral sentiment which is an important component of crime may vary from time to time, country to country and culture to culture.

India has also enacted tough penal statute to deal with the crime and criminals more effectively. The general law on substantive crimes is contained in the *Indian Penal Code, 1861*. The Code is the basic governing statute for determining the criminal liability for offences stated in it, and also for declaring exceptions to the questions of criminal liability for the offences covered under the special or local laws.

Likewise, there has been long debate for abolition or retention of death sentence, but, the Supreme Court by evolving the test of 'rarest or rare' has finally resolved this debate. Now, trial courts are free from every doubt with regard to death sentence because of 'Rarest of rare' doctrine.

The basic purpose of Criminal Law is to punish the criminal and to ensure public peace in the society. Since, Law of Crimes plays a vital role in prevention of crime, therefore, its efficacy depends upon to address the new crimes with severe punishment so that criminals do not repeat the crime. To keep pace with the changing times, the law makers introduce innovations in criminal law. The amendments in the criminal law have to take care of changes in the time and trends to ensure justice to the victim of crime.

Literature on Law of Crimes in India is scanty so a good book is always praiseworthy. The revising author has taken enormous pain in updating the work thoroughly and scholarly. He has critically analyzed the innumerable decisions of the Supreme Court and included *the Criminal Law (Amendment) Act 2013* introduced in the wake of Delhi gang rape case. Definitely this edition shall be of great help to the Academicians, Researchers, Law students and Bar and Bench professionals. Expositions as well as the texture of the work are lucid and simple and readers, students and Law professionals may find it easy to grasp.

The revised book is a monumental work on Law of Crimes. The author outlined the

meaning and objectives of law of crimes by including new amendments in relevant topics. The author has thoroughly elaborated Chapter IV which deals with general exceptions with help of recent judicial pronouncements of the Supreme Court and various High Courts judgments.

In this chapter the author has made very good attempt to explain the provisions as well as essential ingredients of the relevant general exceptions which would be helpful to all those aspirants who are preparing for judicial services examination of different states as well as academicians and person associated with legal fraternity.

A discussion by the author on offences against human body and property with reference to latest decisions particularly offences against women and children based on Malimath Committee and J. S. Verma Committee which provides new insights to the readers of Law of Crimes. Due to such exhaustive commentary, this revised book will surely attract the attention of Academicians, students and lawyers across the country.

The revised book is a monumental work on Law of Crimes. The author outlined the meaning and objectives of law of crimes by including new amendments in relevant topics. The author has thoroughly elaborated Chapter IV which deals with general exceptions with help of recent judicial pronouncements of the Supreme Court and various High Courts. This updated revised book is divided into two volumes. The revising author has inserted more than thousands case laws decided by the apex court and the High Courts at relevant places which provides additional edge to the academicians and students of law.

The title of the book at the cover page is appropriate. It may, however, be suggested that the book could be improved further by adding one chapter on 'offences against women and children'. Over all the work is highly informative and full of new insights. The book is well documented and every chapter contains new insights which reflect the author's depth of knowledge on the subject. The big strength of this book is its precision, coherence and simplicity of language.

The author has, however, done a commendable work on Law of Crimes, the book shall be of immense use to the academicians, students who are pursing LL.B or LL.M courses and also for the students who are preparing for judicial services examination and as well as lawyers.

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