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(25.12.1861 - 12.11.1946)

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ARTICLES

NOTES & COMMENTS

BOOK-REVIEW

SCOPE OF RESIDUARY LEGISLATIVE POWER AND THE HUNDRED FIRST CONSTITUTIONAL AMENDMENT UNDER THE INDIAN CONSTITUTION: AN EXPERIMENT

ALI MEHDI*

ABSTRACT : Indian federation was adopted after meticulous examination of the provisions in other federal Constitutions and the working thereof. It was a transformation from a system of Unitary to divided scheme of governance after the British rule. Undoubtedly the framers of the Constitution had a fair opportunity to opt and incorporate the federal principle either sticking to the classic examples of United States of America, or the Canadian Constitution. The provisions pertaining to distribution of powers between the Union and the States, therefore, have the features of the both. Allocation of Residuary power assumed significant place in drafting of the Constitution as found to be a balancing subject in the federal scheme. But where ever it was placed, it remained within the exclusive domain of the respective legislature. The constitutional amendment made in the year, 2016, placed a new model of the placement of the residuary legislative power. The present paper examines the related provisions to examine the scope of the residuary tax power in view of the present amendment under Article 248 of the Constitution.

KEY WORDS : Federal principles, States powers of taxation, Code of taxation, Power of Amendment.

I. INTRODUCTION

One of the distinguishing features of a federal Constitution is distribution of powers between the central and the provincial units. Each of these authorities act in coordination and the Constitution does not permit intervention except in pre-determined and well guarded situations. The framers of Indian Constitution made detailed provisions contemplating the future needs based on the regional demands and the growing role of the central government. The scheme of distribution of powers is more elaborate than that of a typical and oldest federal Constitution of the United States of America. Under the scheme, place of residuary legislative powers in a federal set up attracts attention as it indicates the level of federalism the Constitution is known to have pursued in the background of its formation. The historical retrospect of the Constitution of USA and India are the appropriate example to support the view; the former owes to the agreement

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amongst the various federating units resulting into limited power to the federal government and the latter came into existence by adoption by the people of India from unitary status through the Constituent Assembly, assigning qualitatively and quantitatively better and more power to the national government. Residuary powers also acts as indicator to point out the characteristics of federal constitution as classic federal or federal with variations. The framers of Indian Constitution responding to then geo-political situation of the country preferred the location of residuary legislative power to place with the Parliament. Since enforcement of the Constitution of India, the provisions pertaining to distribution of legislative powers between Parliament and State legislatures have remained almost un-amended and been used efficiently and the courts have interpreted fairly well to locate the source of power to decide the constitutionality of the impugned legislation challenged on the ground of *ultra-vires*. The 101th Constitution (Amendment) Act, 2016, however, brought amendments in these provisions aiming at the need to have uniform and singular code of laws levying taxes. Such exercise has also shadowed the scope of residuary legislative power.

II. AGLANCE OVER THE HISTORICAL RECORD OF THE PRE-CONSTITUTIONAL POSITION

During the British rule in order to have a better management of the affairs the East India Company, the Regulating Act, 1773 conferred powers on the Governor-General in Council subject to the condition that the Rules made there under shall not be repugnant to the Laws of England. The Charter of 1833 provided for the centralization of law making power to the Governor-General in Council, whereby it had the power to make law for whole of the British India. By the Council Act 1861, the concentration of power was diluted and the Government of Madras and Bombay regained the power of legislation withdrawn by the Charter of 1833. There was no distribution of power between Centre and the provinces but the subjects like finance, military, post and telegraph and religion were the subjects for Governor-General in Council. So seeds of federalism can be traced down to the Council Act of 1861. That view can further be strengthened by looking into the statement of Secretary of State for India in the House of Commons on Aug 20, 1917, wherein he, referring to the British Government policy, observed,..."the gradual development of self-governing institutions, with a view to the progressive realisation of responsible Government in India"... is in full accord to the Majesty's Government[1]. Montagu-Chelmsford Report underlined the federation as the only possible means of fulfilling the aspirations of the people and therefore, recommended : "giving the provinces the largest measure of independence-legislative, administrative and financial of the Government of India which is compatible with the due discharge by the latter of its own responsibilities"[2].

By the Government of India Act, 1915, on the basis of Montagu-Chelmsford Report steps were considered necessary to give meaning and substance to the policy of introducing responsible government in provinces. The preamble to the Act reads, inter alia, "gradual development of self governing institutions in the Provinces of India". The Government of India Act, 1919, for the first time, relaxed the rigidity of the unitary system

1. Referred to V.N. Shukla's *Constitution of India*, (2012) A-6.
2. M Rama Jois, *Legal and Constitutional History of India*, 1984, Vol 1, 277.

of governance and made demarcation between the Central and Provincial spheres. The broad principle of demarcation was that the subjects of uniform application were treated as Central subjects and the subjects of local importance were referred to Provincial subjects. The Governor General in council was empowered with the sanction of the Secretary of the State to make rules providing for classification of subjects for the Central and Provincial legislatures to function accordingly[3].

Federalism in India emerged as a means of reconciling conflicting interest in the then existing political scenario. It seemed to be the only political device for integration of the Indian and British India Provinces along with communal split in the people. The Government of India Act, 1919 envisaged for appointment of a Statutory Commission to assess the desirability of continuance of the system under the Act and so Simon Commission was constituted that recommended for a federal form of government with the residuary legislative powers to the provincial legislatures[4]. For the Indian Provinces a similar recommendations were put forth by the Indian State Committee[5]. Subsequently the Congress Working Committee, however, for specific settlement of the common issues placed the proposal that vesting the residuary powers with the Provincial legislatures would be against the best interest of India[6]. The British Government, in such divergent views bases on the respective interest, issued a white paper proposing a new Indian Constitution with responsible governments in the provinces. It followed the appointment of a Joint Select Committee of both the Houses of Parliament in the year 1933. The Committee had the reasons to believe that a detail enumeration of subjects would provide a firm basis for a federal system and if any matter would arise that could not be foreseen at the time of drawing up the lists the Governor General on his satisfaction would make ad-hoc decision assigning that subject either to the Centre or the Province[7]. This recommendation formed the basis and resulted into passing of the Government of India Act, 1935.

III. PROTOTYPE OF THE CONSTITUTION OF INDIA

The Government of India Act, 1935 marks a model of the evolution of federal scheme in India as the Provinces got a distinct authority separate from the federal government in deriving their powers. It laid down detailed list of subjects for the Central, Provincial legislatures exclusively and also provided a list of subjects for the concurrent powers of both. It also envisaged under Section 104, space to the residuary subjects that reads as:

> (1) The Governor General may by public notification empower either to the Federal Legislature or a Provincial Legislature to enact a law with respect to any matter not enumerated in any of the Lists to the Seventh Schedule to this Act, including a law imposing tax not mentioned in any such list, and the executive authority of the Federation or of the

3. Section 45-A read with Section 129-A, Government of India Act, 1919. Devolution Rules were framed there under.
4. Indian Statutory Commission Report, 1930, Vol II, para, 21, 96.
5. Report of the Indian States Committee, 1929, para 83.
6. Supra, 2, 297.
7. Report of the Joint Parliamentary Committee, 1933, para 56, 143.

> Provinces, as the case may be, shall extend to the administration of any law so made, unless the Governor General otherwise directs.
>
> (2) In the discharge of his function under this Section the Governor General acts in his discretion.

Piloting the constitutional Bill of 1935, Sir Sanual Hoars remarked that because of the controversy amongst the parties in India, the three lists had to be made, "each as exhaustive as to leave little or nothing for the residual field and all that is likely to go into the residuary field are perhaps some quite unknown to spheres of activity that neither my Hon'ble Friend nor I can contemplate at the moment"[8]. The residuary legislative power could not be assigned exclusively either to federal or provincial legislatures owing to the political autonomy an issue among the Provinces and the socio-political condition of the country at that time instead left to the pleasure of the Governor General. The scope of residuary legislative power in view of the exhaustive entries in three lists was found to be restricted to the overlooked or forgotten subjects. In interpreting the subjects in any of the Lists the Federal Court gave liberal and broad interpretation to the entries so as to find the subject within the arena of Central or the State legislatures. Gwyer, CJ observed,

> I think however that none of the items in the list is to be read in a narrow or restricted sense and that each general word would be held to extend to all ancillary or subsidiary matters, which can fairly and reasonably be said to be contemplated in it[9].

Thus apparently the residuary power was assigned to the Central authority as it was left to the discretion of the Governor General. The method adopted left little scope for the residuary power but to guard against human fallibility and the limitation of human foresight[10].

IV. STRONG CENTRE - A NEED

Prior to the drafting of the Constitution the Constituent Assembly appointed a number of committees to consider the various important matters requiring provisions in the Constitution. The partition of the country[11] too provided another dimension of consideration for the members in the Constituent Assembly to frame the scheme of distribution of power. The Union Constitution Committee and the Provincial Constitution Committee appointed to submit report on the federal scheme had a joint meeting and observed that the limitations imposed under Cabinet Mission Plan[12] had no significance at all. The Union Constitution Committee on the choice between Unitary or Federal

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8. Referred to Aiyanger, N Rajagopal; *Government of India Act*, 1935, 133.
9. *United Provinces v. Mt. Atiqa begam* AIR 1941 FC 16, 25.
10. HM Seervai, *Constitutional Law of India*, 1984, vol I, 151
11. Mountbatten announced partition of the country on 3rd of June, 1948.
12. Cabinet Mission Statement, May 16, 1946, para 5(1)-(4). Suggestion was made where by the Centre could have jurisdiction over the subjects of foreign affairs, defence and communication and finance. All other subjects including the residuary power were to vest in the provinces. The Indian States shall retain all subjects and power other than ceded to the Union.

system recommended[13] for the Federal structure with strong Centre with three exhaustive lists containing subjects for federal, provincial and concurrent powers and the residuary power to stay with the Central legislature. These propositions, however, were found to be unviable at that stage and were postponed to the decision of the second Report of the Union Power Committee[14] that was expected to define the respective fields of legislation of the Centre and the States. The Union Power Committee took the view that weak central authority would be injurious to the national interest but the unitary system would be a retrograde step politically and administratively both. Therefore it concluded that the framework of the Constitution was a federation with strong Centre[15]. Finally the drafting Committee submitted a draft Constitution on 21 Feb, 1948 providing for Parliament to have the residuary legislative power to make any law with respect to any matter not enumerated in the Concurrent List or the State List. The power included tax imposing legislation as well[16]. The draft was considered by the Assembly and the same was adopted and incorporated in the Constitution.

The pre-constitutional period in the historical retrospect was marked at one hand by the strong feeling of the Indian States concerned for the autonomy and on the other hand the political situation arising out of division of the country; the allocation of residuary legislative power, in such backdrop got a significant attention of the founding fathers of our Constitution. The power of Parliament over the residuary subjects, however, was a deviation from the position in the classic federal Constitutions[17] of the world.

V. INTERPRETATION BY THE SUPREME COURT OF INDIA

The Constitution of India in Chapter I of Part XI contains provisions pertaining to the legislative relation between Parliament and the Legislatures of States. Articles 245, 246, 248 therein mandate for territorial as well as subject wise distribution of power to Parliament and the State Assemblies. These Articles speak of the substantive powers but the field for the action is mentioned in the VII Schedule comprising three Lists one each for the Parliament and the Legislatures of the States and one providing for the concurrent operation. The residuary legislative power under Article 248 along with related Entry in List I may be reproduced as:

> Article 248
>
> (1) Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.
>
> (2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists.

Entry 97 of List I, Schedule VII reads as:

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13. Union Constitution Committee Report, June 6, 1947. B Shiva Rao, *Select Documents* (1967) vol II, 584.
14. B Shiva Rao; The Framing of India's Constitution, 1968, 606.
15. CAD vol V, p 59.
16. Article 223 read with Entry 91, List I.
17. Residuary legislative power lies with the Congress in USA and the Commonwealth Parliament in Australia.

Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.

The meaning of the residuary power clause is manifest from the literal and grammatical rule of interpretation expressing the idea that the residuary subjects have been assigned to the exclusive authority of Parliament. But what subjects shall be the residuary subject, the question is left to interpretation of the court. The Constitution (One Hundred and First Amendment) Act, 2016 inserted inter-alia a substitution after Article 246 and in Article 248 to read as:

> Article 246A.
>
> (1) Notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.
>
> (2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.
>
> Article 248
>
> (1) Subject to Article 246A , Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.

The provisions under Article 248 prior to amendment, and Entry 97 List I, contain almost the same construction but the words, "other" in Entry 97 definitely demarcates the subject from the subjects mentioned from 1 to 96 in the same List, and further exclusion by reference to Concurrent and State Lists strengthen the view that the subjects not mentioned in any of the three Lists, are the residuary subjects[18] and Parliament has exclusive power thereto. Though there are not many cases that required interpretation of the apex court but there has been split in the opinion of the court by way of concurrence and dissent with regard to the scope of the residuary legislative power of Parliament as well the interpretation of the subject itself about its location whether beyond all the three lists or only out of the Concurrent and State List. The resort to residuary legislative power, as reckoned, in view of the most detailed listing of the subjects would be very less, is found to be true. The Supreme Court has found the legitimacy to the laws passed by Parliament often in Article 248 sometimes as alternative or supplementary source of power to the power of Parliament under Article 246 of the Constitution and that too with respect to imposition of tax.

On analysis of judicial decisions in some well known leading cases contrary view can be under lined where the apex court has been relying upon it to find reason to support the stand. The scope of residuary legislative power at one time got extended to the level of constituent power of Parliament making amendments in the Constitution. In

18. Ali Mehdi, *Residuary Legislative Power in India*, (1990), P. 59.

Golak Nath v. State of Punjab[19], five judges led by Subba Rao, CJ, observed that the power of amendment was a legislative power deriving from Article 248 along with Entry 97, List 1. Chief Justice observed that Article 368 of the Constitution was not the source of power empowering Parliament to amend the Constitution; it merely, as per the marginal notes, provided for the special procedure different from the ordinary course of business to be complied with for passing of the constitutional amendment Bill. The source of power of amendment of the Constitution was, therefore, found to be Article 248[20]. Hidayatullah J, in his concurrent judgment[21], however, did not find the source of power in Article 248 but further advanced his view that Parliament could constitute Constituent Assembly by resorting to Entry 97 List I and that body should amendment the Constitution. The stipulation was that all that had no mention in the substantive provisions may be Articles, 246, 368 or for that matter in any of the Lists in VII Schedule stand a residuary subject and, therefore, fall within the residuary power of Parliament. It is interesting to note that the scope of residuary legislative power at the very initial stage of preference to a federal system was restricted to unforeseen[22] subjects though the amendment to the Constitution was inevitably within the foresight of the founding fathers.

Supreme Court by a majority with 3+1:1, after a gap of five years, had the occasion to interpret the scope of residuary legislative power in the case of Union of India v. HS Dhillon[23]. In brief the facts were that Parliament by the Finance Act, 1949, amended the Wealth Tax Act, 1957, for inclusion of value of agricultural land in computing the net wealth of assesses despite express exclusion under Entry 86. List I, that reads as "Taxes on the capital value of the assets, exclusive of agricultural land of individuals and companies; taxes on the capital of companies". The amendment in the instant legislation was defended in appeal before the Supreme Court on the ground that the subject was not mentioned in the State List denying authority to the State legislature and, therefore, it would necessarily fall within the domain of Parliament. Further the words, "exclusive of agricultural land" in Entry 86, could not whittle down the reach of either Article 248 or the ambit of Entry 97 List I. The respondent on the other hand pleaded that the object and effect of the words, "exclusive of agricultural land" in Entry 86 was also to take out of the last Entry 97 in List I, and so out of reach of Article 248. The majority opinion delivered by Sikri CJ, based its reason on lack of competence on part of State legislature to pass such law and, therefore, the subject ultimately returns to the authority of Parliament.

The Court brushed aside the view that the residuary power could be exercised only for the subjects not known to the framers[24]. The judge concurring with Sikri CJ and other two JJ, observed that "the residuary field of legislation no longer lies barren or unproductive"[25]. The minority opinion rested with the concept of residuary legislative power and observed that the power was incorporated only with respect to a matter which was not foreseen or contemplated and which by reason of changed circumstances had

19. AIR 1967 SC 1643
20. Ibid. 1718.
21. Ibid. 1719.
22. Supra. 7. See also Hidayatullah ,J. *Harikrishna Bhargav v. UOI* AIR 1966 SC 619, 624.
23. AIR 1972 SC 1061.
24. Ibid.1071.
25. Ibid.1121.

arisen and therefore fell beyond the Lists of VII Schedule[26]. In *Keshavanand Bharti* v. *State of Kerala*[27] the Supreme Court on the source of power of amendment of the Constitution unanimously held that provisions relating to amendment to the Constitution had been incorporated in the Constitution and so it could not be said to reside in the residuary power of Parliament. The opinion stands supporting the minority view in Golaknath case that only the subjects that could not be foreseen or were beyond contemplation were the residuary subjects. The obiter was, however, in relation to the constitutional amendments by addition of the word, "power to amend", in the marginal note of Article 368, by the 24th Amendment, 1971, in the backdrop of *Golaknath's* split opinion. The Supreme Court further clarified the view in *M/S Satpal and Co. Ltd* v. *Governor of Delhi*[28]*:*

> ...Parliament would have power to legislate on the subject in exercise of residuary power under 97 list I and it would not be proper to unduly circumscribe, corrode or whittle down this power by saying that subject of legislation was present in mind of the framers of Constitution because apparently it falls in one of the Entries in list II and thereby denying power to legislate under Entry 97.

Taking note of some of the leading cases it is apparent that the Supreme Court took help of the literal meaning and followed the ordinary principle of interpretation like, "unforeseen", "unanticipated subjects" or "State's incompetence" to elaborate the scope of residuary power of Parliament by taking rigid to liberal or expansive approach.

VI. RECOMMENDATION OF COMMISSION

At times there have been exercises[29] to have a fresh look on the Centre- State relations. Before the Sarkaria Commission (1983-1988) there was proposal from the States of Kerala and Punjab to shift the residuary subject to the Concurrent List citing an example of cooperative federalism. But the Commission did not appreciate simply for the reason of cooperative federalism though admitted, "such an arrangement would have the advantage of enabling both the Union and the States to legislate in regard to a new matter which is not enumerated in the three lists"[30]. The Commission recommended that the residuary power of legislation in regard to tax matter should remain with Parliament while the residuary field other than tax should be placed in the Concurrent List[31]. The reason Commission put forward was that no tax Entry was subjected to Concurrent jurisdiction to avoid Union-State friction, double taxation and frustrating litigation between them and placement of whole of the residuary subjects in Concurrent list, "would run counter to those basic considerations"[32]. It further observed that power to tax be used to regulate

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26. Ibid 1091.
27. AIR 1973 SC 1461
28. AIR 1979 SC 1550
29. Administrative Reform Commission, Rajamannar Commission, West Bengal Memorandum, Srinagar Declaration, Sarkaria Commission.
30. Commission on Centre-State Relations Report, 1988, Part I, 31.
31. Ibid.
32. Ibid.

economic activities by the Union government not only to raise revenue. Classification of residuary subjects into tax and non-tax Entries was a new proposition unlike in any of the federal Constitutions of the world that were examined by the framers at the time of drafting of Indian Constitution. The tax Entry missing in the Concurrent list right from the commencement of the Constitution was the reason as evident from the observation of the expert committee on Financial Provisions as:

> We cannot think of any important new tax that can be levied by the Provinces, which will not fall under one or the other of the existing categories included in the Provincial list[33].

VII. SCOPE OF ARTICLE 246A

Prior to amendment Parliament did not have the power to impose tax on sale of goods except the inter-state sale and the States could not levy tax on the service. The 101st Amendment to Article 246 and 248 refers to imposition of tax on goods and services and curtails down the scope of residuary legislative power as making it subject to the new Article 246A that gets a plenary position affecting the broader base of Indian federalism as contained in Article 246 of the Constitution. Article 246 (1) had been the non-obstante clause prevailing over clauses (2) and (3) and defined and segregated the power of Parliament apart from the State legislatures, either with exclusive or the concurrent authority. Article 246A supersedes the provisions of Article 246 with the sole object of empowering Parliament in making law with respect to goods and services. It provides space also to the state legislature to make law within the State on the subject but leaving the inter-State transactions for the domain of Parliament.

Residuary power of Parliament by the amendment has further been made subject to Article 246A. Such substitution has carved out "goods and services tax" out of the ambit of the residuary power clause and induces an entirely new idea about the meaning of the residuary subject and object of the residuary power clause. The "unforeseen" subject has been treated a very significant subject and made a subject for Parliament and with limited scope for the State under Article 246A. Such scheme of imposition of tax is a constitutional innovation un-contemplated by the founding fathers of the Constitution. The legislative history tells a rigid approach[34] but the judicial interpretation in independent India adopted a liberal approach[35] to the scope of residuary power of Parliament. Sarkaria Commission hesitated in its report to recommend allocation of residuary tax-subject to both of the legislatures[36]. The Commission preferred to split the unenumerated subjects in non-tax and tax-field; recommendation was that the power of legislation on non-tax subjects should lie in the concurrent domain and, tax matters should remain with the Centre[37]. The recommendations did not desire to disturb the settled basic considerations. The State Legislatures have few tax entries in comparison to List I meant for the Centre and the Concurrent List is devoid of any tax entry.

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33. CAD, Vol. VII, 69
34. Supra note 10.
35. Supra note 23.
36. Supra 32.
37. Commission on Centre-State Relations Report, 1988, Part I, 31.

Parliament by the Hundred First Amendment Act has in fact partially and ingeniously followed the spirit of the recommendation of the Sarkaria commission favouring cooperative federalism. It took away certain power from the exclusive domain of Centre in the residuary arena out of Article 248 and assigned to Parliament as well as the State legislatures without reference to the Concurrent List for imposition of tax. The meticulous examination, however, does not point out any increase in the number of subject assigned to the State's List. Case laws on the residuary legislative power depict the bone of contention between Centre and the States has been 'the taxation'.

Presently by reading all these relevant provisions together under the scheme of distribution of legislative power the position of residuary power on tax on a particular matter is subjected to further restriction under Article 246A in addition to law imposing tax not mentioned in either of two lists. Scope of residuary power except as provided in the amendment (tax on goods and services) remains intact and Parliament shall maintain exclusive power to make law imposing tax on the subject not mentioned in list II and III. The amendment has resolved the controversy about the constitutionality of the goods and services tax had it been passed under Article 248 read with Entry 97 list I as it had abolished many of the tax-entries with respect to different subjects in List I and II. The decision though with thin majority in Dhillon case would have helped further and the residuary tax power once again would have been resorted to support the legislation on service. Further it has eliminated the risk of finding conflict situation on screening the List II, lest the impugned legislation should not interact with any of the State subject in List II as there has been a consistent concern of the court that the subject should not be mentioned in the State's domain for fair application of Article 248.

VIII. CONCLUSION

It would, however, be relevant to mention that the amendment in the residuary power marks a new design of federal scheme of constitutional distribution of power neither thought nor proposed under any of the federal Constitutions. Such arrangement was also beyond the contemplations of the Constituent Assembly members as the scope of residuary power was extended to the left out area beyond the spheres of the Union and the States. Further Entry 97, List I, remains unchanged adding to the complex situation in interpreting "any other matter", to mean other than what was mentioned in List II and III as well as in the preceding series from one to ninety six Entries or ignoring any of those subjects. The amendment Act does not designate an exclusive substantive provision to the residuary legislative powers that was a distinguishing feature of a federal Constitution rather gives another point of describing the Indian federalism remarkably one step further away from a truly and ideal federal Constitution. Though it seems fair that the GST shall be collected by the Central Government and redistributed to the States but the States cry foul in getting back their dues. The reason for amending the residuary power clause pertaining to tax on a particular subject and giving it to concurrent power did widen the authority of the State Legislatures but the execution does not seem conforming to it.

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GOODS AND SERVICES TAX: A MAJOR REFORM IN THE INDIRECT TAXATION SYSTEM OF INDIA

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ABSTRACT : Prior to implementation of Goods and Services Tax, a number of Indirect taxes were being levied in India by the Centre and the States. Goods and Services Tax has subsumed seventeen indirect taxes which were being levied prior to it i.e. eight kinds of indirect taxes being levied by the Centre and nine kinds of indirect taxes being levied by the States. Prior to adoption of Goods and Services tax, value addition method of computation were adopted for computation of Central Excise Duty and Service Tax by the Centre and Taxes on Sales and Purchases by the States. This gave relief to certain extent to the consumers from cascading effects of taxes on the commodities and services. However, because of various indirect taxes being levied separately under separate statutes, some cascading effects of taxes still existed. Hence, need was felt to introduce only one kind of indirect tax throughout the country which is known as Goods and Services Tax. In this article an attempt has been made by the author to explain the value addition method of computation of tax, cascading effect before and after adoption of Value addition method of computation in some of the Indirect Taxes, elimination of cascading effect after implementation of Goods and Services Tax, merits and demerits of Goods and Services Tax and expected impact of Goods and Services Tax on our Indirect Taxation system.

KEY WORDS : Direct Tax, Indirect Tax, cascading effect, value addition, input tax credit

I. INTRODUCTION

Goods and Services Tax (GST) has been introduced in the whole country with effect from st July, 2017. It has subsumed seventeen Indirect Taxes being levied prior to implementation of GST into a single tax[1]. GST is an Indirect Tax. The difference between a Direct Tax and an Indirect Tax is that burden of Direct Tax is born by the tax payer himself whereas in case of an Indirect Tax the payer of the tax does not bear the burden of the tax. He collects the amount of tax along with price of the goods from the purchaser of the commodities or services and hence the burden of tax in case of an Indirect Tax is ultimately born by the consumer of the goods or services. Since GST is based on the Value Addition method of computation of tax, it is necessary to know what is meant by

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1. Dr. Vinod K. Singhania, *Taxmann Students' Guide to GST and Customs Law*, University.

Value Addition method of computation of tax or Value Added Tax. When we say Value Added Tax, it should not be considered that Value Added Tax is a specific kind of tax rather it is only a method of computation of tax which may be applied for computation of any kind of Indirect Tax. When this method of computation was applied to Excise Duty in India, the Excise Duty was named as Central Value Added Tax (CENVAT). When this method of computation was applied by the States in India for computation of Taxes on Sales or Purchases of Goods, the same was given the name of Value Added Tax by the States, though it was simply a tax on Sales and Purchases of Goods by the States under Entry 54 of the State List (i.e. List II of the Seventh Schedule) of the Constitution[2]. Had Value Added Tax been a kind of specific tax, it could not have been imposed by the States without any specific entry in the State List giving power to impose Value Added Tax as States are not having a residuary power to impose any tax not mentioned in the State List unlike the Parliament which is having a residuary power under Union List in Entry 97 to impose any other tax not mentioned in the Union List[3].

II. VALUE ADDED METHOD OF COMPUTATION

Value Added Tax as the name suggests is a tax on the value added to the commodities or services and not on the total turnover of the commodities or services which causes cascading effect because of tax upon tax[4]. The value of a commodity or service in a commercial sense is determined by its price. Now the question is how the value addition to a commodities or services can be computed. There may be three methods of computation of value addition to the commodities or services[5].

(a) Addition Method

In addition method 'value added' to the commodities or services is determined by adding the value of all the elements which contribute in increasing the price of the commodity or service such as wages, rents, interest, transportation charges, profit of the assessee etc. In other words value addition will be profit + Trade and manufacturing expenses. For example, suppose the assessee has following details for a particular Tax period:

Profit Rs.15 Lakh, Shop rent Rs.4 Lakh, Wages paid Rs.6 Lakh, Electricity charges Rs.1 Lakh, Other expenses Rs. 3 Lakh. So total value addition will be Rs.29 Lakh. If the tax

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2. As Entry 54 stood prior to amendment by the Constitution (One Hundred and First Amendment) Act, 2016.
3. *Jindal Stainless Ltd. & Another vs State Of Haryana & Others* decided by Hon'ble Supreme Court on 11 November, 2016.
4. Tax on total turnover means tax paid on total price of the goods or services. For example, suppose 'A', a manufacturer sells the goods to the wholesaler 'B' for Rs. 100/- and the rate of tax is 10%, then total price of goods to 'B' will be Rs.100+10=110/-. Similarly, if 'B' the wholesaler sells the same goods to 'C', the retailer for Rs. 120/- , the total price of the goods to 'C' will be Rs. 120+12=132. Again if retailer 'C' sells the same goods to 'D' the consumer for Rs. 140/-, the total price of the goods to 'D' will be Rs. 140+14= Rs. 154/- Here, whenever the goods by one trader is sold to another trader, the tax imposed on earlier sale is included in the price of goods and then tax is again levied on the increased price of the goods which increase is not only because of profit and trade expenses of the latter trader but also because of the tax imposed on earlier sale. This is called cascading effect because of tax upon tax.
5. Chaturvedi, M.K. and Nirmala Asokan, *Guide to Mastering VAT*, 2005 Edition, Chapters 2 and 3.

is to be imposed @ 10% on value addition, then Tax on value addition or Value Added Tax will be Rs.2.9 Lakh.

In this method of computation, purchase price of the commodities or services will be immaterial and the assessee will be liable to pay the tax on value addition even if he suffers a loss.

Impracticability of addition method[6]

(i) The Addition Method of computation of Value Addition is possible only after the end of the tax period and that also when final accounting statements for the said tax period is prepared which may get some time after the tax period is over. However, in case of an indirect tax, the seller is to collect taxes from the buyers at the time when each commodity is sold or service is rendered during the tax period. Hence Addition Method of computation of value addition to commodities or services is impracticable.

(ii) In the addition method of computation of value addition, the assessee would be liable to pay tax even if he sells the commodities or services at a loss as still there will be trade expenses which will be computed as value addition. So in this method of computation of value addition, though the commodities are sold at a loss, for the tax purposes, there will be value addition by the assessee to the commodities or services and the assessee will be liable to pay tax. This will amount rubbing the wound with salt.

(b) Subtraction Method

In subtraction method 'value added' to a commodity or service is computed by subtracting from the value of output i.e., sale proceeds, the value of input i.e., the value of purchases. Thus difference between the output value and the input value of the commodity will be the value added to the commodity or service.

For example, suppose a dealer buys a commodity for Rs. 1000/- and sells the same for Rs.1200/-. The value added to the commodity in this case by the dealer will be Rs.1200 - 1000 = Rs. 200/-. If the tax rate is 10% then the tax on the value addition to be collected at the time of sale of the commodity will be Rs. 20/-

Impracticability of subtraction method[7]

(i) In subtraction method of computation of Value Addition, the seller must know exactly the purchase price of the each commodity being sold. However, where a dealer buys and sells thousands of different commodities, it would be very difficult for him to remember the exact purchase price of each of the commodity being sold by him for the purpose of calculation of tax on value addition. The seller will be required to keep the records of the purchase price and sale price of each of the items separately. For example, suppose the seller has purchased six varieties of Turmeric (*Haldi*) powder at six different rates having a slight price difference, he has to maintain the sale accounts of all these six varieties of turmeric powders separately to charge tax on value addition and issue the receipt like this:

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6. Supra note 5 Chapter 2 p. 10
7. Ibid p. 11

Name of commodity	Price/Tax in Rupees
Turmeric Powder:Purchase Price	55/-
Sale Price	60/-
Value Addition	5/-
Tax on Value Addition@10%	0.50/-

Further, if the purchase price and sale price will be known to the purchaser, the purchaser will insist the seller, to reduce the price and make a less profit. This will result in prolonged bargains and noisy arguments between the purchaser and seller and will affect the normal course of business. Even if the purchase price is not disclosed by the seller on the receipt issued to the buyer, an intelligent buyer will know the profit of the seller from the amount of the tax charged, for example, suppose the sale receipt is drawn as follows.

Name of commodity	Price/Tax in Rupees
Turmeric PowderSale Price	60/-
Tax on Value Addition@10%	0.50/-
Total Price	60.50/-

Now an intelligent purchaser will make a reverse calculation like this. If tax on value addition is Rs. 0.50 and rate of tax on value addition is 10%, then the value addition (which the purchaser generally considers the profit of the seller) is Rs 0.50×10 = Rs. 5/- although the whole Rs. 5/- may not be the profit of the seller as there will be a part of trade expenses of the seller also in this increase of price.

(c) Input Tax Credit Method

Since addition method and subtraction method of computation of tax on value addition proved to be impracticable, another method of calculation of Tax on Value Addition has been invented viz., Input Tax Credit method. In this method of computation of tax on value addition, taxes charged are shown separately in the bills and they are not included in the amount of the purchase price of the dealer. Dealer is required to pay to the government the tax which will be difference of what tax he has charged and what tax he has paid at the earlier stage.

Taking the aforesaid example, and supposing that the Manufacturer of turmeric powder purchased turmeric from farmers and after manufacture, Turmeric powder was sold by the manufacturer to the wholesaler and by the wholesaler to the retailer and by the retailer to the ultimate consumer. The method of tax on value addition to be collected and to be paid to the Government may be explained by the following chart:

Dealer	Purchase Price	Value Addition	Sale Price	Tax @ 10%	Input Tax credit	Tax to be paid to the Government
Manufacturer		45/-	45/	4.50/-	Nil	4.50/-
Wholesaler	45/-	5/-	50/-	5/-	4.50/-	0.50/-
Retailer	50/-	5/-	55/-	5.50	5/-	0.50/-
Consumer	(**55/-**) + (**5.50/-** Tax) = Rs. **60.50/-**					

Here, when the goods has been sold by the manufacturer for Rs. 45/-, the whole of the value addition will be considered by the manufacturer and he has paid 10% of Rs. 45/- i.e. Rs. 4.50/- as tax to the Government by charging the same on the wholesaler as it is an indirect tax. Although the wholesaler paid to the manufacturer Rs. 45 + 4.50 (tax), yet wholesaler will keep his purchase price as Rs. 45/- because he will get an input tax credit of Rs. 4.50/- when he will sell the same to the retailer. Similarly, retailer has purchased the goods for Rs. 50 + Rs.5/- paid as tax, however he will keep his purchase price as Rs. 50/- since he will get an input tax credit of Rs. 5/- when he will sell the same to the consumer. For consumer the goods will cost Rs. 60.50/- as he is not a dealer in goods and cannot claim input tax credit. The wholesaler and retailer have added Rs 5/- each as value addition to the goods and therefore each is paying tax to the Government 10% of Rs. 5/- i.e. Rs.0.50/- However, method of calculation of tax is devised in such a manner that to every purchaser it appears that he is paying tax at the full value of the goods, though he will keep the tax invoice for the purpose of claiming input tax credit if he is a trader, but he cannot know the actual profit/margin of the seller. The total tax paid to the government also remains very much clear at each of the stage of sale. For example, in the aforesaid example, the total tax paid to the government is Rs. 4.50/- when the manufacturer sold the goods, Rs. 5/- when wholesaler sold the goods which includes the tax paid by the manufacturer as the wholesaler will pay only Rs. 0.50 to the Government out of Rs. 5/- collected from the retailer. When the goods is ultimately sold to the consumer, the tax paid by the consumer is the actual total tax paid to the Government.

III. REASON FOR INTRODUCTION OF GOODS AND SERVICES TAX

Although because of introduction of value added tax system of computation in Excise Duty, Taxes on Sales and Purchases of goods, Service Tax, the cascading effect to a large extent was minimized, still because of a number of taxes, some of the cascading effect was still present due to which the prices of goods were increasing as well as computation of taxes in various statutes was causing difficulties to the businessmen and it was hampering the trade. The cascading effect even after introduction of Value Added Tax system of computation in Excise Duty, Service Tax, Taxes on Sales and Purchases of Goods (popularly known as States' VAT) may be explained by way of following chart:

(a) Comparisons of Tax impacts under Pre- VAT regime, VAT regime and GST regime:

Suppose a manufacturer M purchases four commodities viz. A, B, C and D as raw materials for manufacturing a new commodity E.

Under pre - VAT regime his cost of production and price of final commodity would have been as follow, if we presume that rate of Excise Duty and Sales Tax each would have been 10%:

Dealer	Purchase Price	Value Addition	Sale Price	Tax @ 10%	Input Tax credit	Tax to be paid to the Government
Manufacturer		45/-	45/	4.50/-	Nil	4.50/-
Wholesaler	45/-	5/-	50/-	5/-	4.50/-	0.50/-
Retailer	50/-	5/-	55/-	5.50	5/-	0.50/-
Consumer	(**55/-**) + (**5.50/-** Tax) = Rs. **60.50/-**					

So total Cost of raw materials to M will be: 484/-

Suppose Production value of manufactured commodity E is 1000/- [It means Profit and Manufacturing Expenses is (1000 – 484) = 516/-]

Excise Duty @ 10% will be 100/-. Hence price before sales tax will be 1100/-.

Sales Tax @ 10% of 1100/- will be 110/- and price after sales Tax will be 1100+ 110 = 1210/-.

Suppose R is the retail seller who purchased the commodity from M for Rs. 1210/- and sells it to consumer C for Rs. 1300/- (i.e. profit and trade expenses is Rs. 90/-). Sales Tax @ 10% will be Rs. 130/- and total price to consumer C will be Rs. 1430/-.

Under VAT regime his cost of production and price of final commodity would have been as follow:

Cost of Raw Material	**Value addition (i.e. profit and manufacturing expenses**	**Production Value**	**Excise Duty@ 10%**	**Price before Sales Tax**	**Sales Tax i.e. State's VAT @ 10%**	**Total price**	**Excise Duty (i.e. CEN VAT) on Input**	**Sales Tax (i.e. State VAT) on input**
400/-	516	916/-	91.60	1007.60	100.76	1108.36/-	40/-*	40/-*

*Rs. 40/- Excise Duty (CENVAT) and *Rs. 40/- Sales Tax (State VAT) will not be added in cost of production as manufacturer will get Input Tax Credit for the same.

Manufacturer will pay Excise Duty (CENVAT) to Central Govt. (91.60 – 40) = Rs. 51.60

Manufacturer will pay Sales Tax (VAT) to State Govt. (100.76 - 40) = Rs. 60.76

Suppose R is the retail seller who purchased the commodity from M for Rs. 1007.60 + 100.76 (VAT) and sells it to consumer C for Rs. 1097.60 (i.e. profit and trade expenses is Rs. 90/-). Sales Tax (State's VAT) @ 10% will be Rs. 109.76 and total price to consumer C will be Rs. 1207.36/-.

The retailer will pay Sales Tax (State's VAT) to the State Govt. (109.76 – 100.76) = Rs. 9.00/-

Cost of Raw Material	**Value addition (i.e. profit and manufacturing expenses**	**Production Value**	**CGST @ 9% on sale**	**SGST @ 9% on sale**	**Total price**	**CGST @ 9%**	**SGST @ 9%**
400/-	516	916/-	82.44	82.44	1080.88/-	36/-*	36/-*

Under GST regime his cost of production and price of final commodity will be as follow:

*Rs. 36/- CGST and *Rs. 36 SGST will not be added in cost of production as manufacturer will get Input Tax Credit for the same.

Suppose R is the retail seller who purchased the commodity from M for Rs. 916 + (82.44 CGST and 82.44 SGST) and sells it to consumer C for Rs. 1006 (i.e. profit and trade expenses is Rs. 90/-) then again CGST and SGST @ 9% respectively will be levied on price of Rs. 1006/- i.e. Rs.90.54 + Rs. 90.54. Thus total price of the commodity to the consumer will be (1006 + 90.54 + 90.54) i.e. Rs. 1187.08.

The retailer will pay CGST and SGST to the Central Govt. And State Govt. Respectively (90.54 – 82.44) i.e. Rs. 8.10 and Rs. 8.10 respectively.

Another Example

Under VAT System

Items	Price	Customs Duty @20%	Excise Duty also called as CENVAT@10%	Sales Tax (VAT) @ 12.5%	CST @ 2%	Service Tax @ 15%
Raw Material imported from outside country	Rs. 1,00,000	20,000	-	-	-	
Raw Material purchased from local market	Rs. 2,00,000	-	Rs. 20,000	Rs. 25,000	-	
Raw Material purchased from another State	Rs. 50,000	-	-	-	Rs. 1,000	
Storage and Transportation cost	Rs. 10,000					1500
Manufacturing Expenses	Rs. 30,000					

Cost of Production will be as follows:

Imported raw material Rs. 1,00,000 + 20,000 = 1,20,000 [As no ITC was available for Customs Duty]

Raw Material from local market Rs. 2,00,000 [Excise Duty and VAT is not included in cost as ITC for them was available]

Raw material purchased from another State Rs. 50,000+1,000 = Rs. 51,000 [As no ITC was available for CST]

Storage, Transportation(10,000 +1,500) and Manufacturing Expenses: Rs. 11,500+ 30,000 = Rs. 41,500

Hence Total cost of production [1,20,000+2,00,000+51,000+41,500] = Rs. 4,12,500

Suppose Profit is @ 10% of Rs. 4,12,500 i.e. Rs. 41,250.

Hence value of manufactured goods will be [Rs. 4,12,500+41,250] = Rs.4,53,750

Excise Duty on manufactured product @ 10% of Rs. 4,53,750 = Rs. 45,375

Price including Excise Duty = [Rs. 4,53,750 + Rs 45,375] = Rs. 4,99,125

State VAT @ 12.5% of Rs. 4,99,125 = Rs 62,390

Hence price to purchaser = [Rs. 4,99,125+ Rs.62,390] = Rs. 5,61,515

Manufacturer will pay Excise Duty [Rs. 45,210 – Rs.20,000] = Rs. 25,210

Manufacturer will pay VAT [Rs. 62,390 – Rs.25,000] = Rs. 37,390

under GST system

Items	Price	Customs Duty@ 10%	IGST @ 18%	CGST @ 9%	SGST @9%
Raw Material imported from outside country	Rs. 1,00,000	10,000	18,000	-	-
Raw Material purchased from local market	Rs. 2,00,000	-	-	18,000	18,000
Raw Material purchased from another State	Rs. 50,000	-	9,000		
Storage and Transportation cost	Rs. 10,000			900	900
Manufacturing Expenses	Rs. 30,000				

Cost of Production will be as follows:

Imported raw material Rs. 1,00,000 + 10,000 = 1,10,000 [As no ITC will be available for Customs Duty].

Raw Material from local market Rs. 2,00,000 [CGST and SGST is not included in cost as ITC for them is available].

Raw material purchased from another State Rs. 50,000 [IGST is not included in cost as ITC for the same is available]

Storage and Transportation Rs. 10,000 [CGST and SGST is not included in cost as ITC for them is available].

Manufacturing Expenses Rs. 30,000

Hence Total cost of production [1,10,000+2,00,000+50,000+10,000+ 30,000] = Rs. 4,00,000

Suppose Profit is @ 10% of Rs. 4,00,000 i.e. Rs. 40,000.

Hence, value of manufactured goods will be [4,00,000+40,000] = Rs. 4,40,000

Now Price to purchaser [Rs. 4,40,000+39,600 (CGST @9%) +39,600 (SGST @9%)] = Rs. 5,19,200

IV. MERITS OF GOODS AND SERVICES TAX

(a) Uniform Tax System in whole country

Prior to GST on production, supply and sales of goods and services, separate taxes were being levied by the Centre, States and Union Territories at different rates. Centre levied Excise Duty on manufacture or production of goods, Service Tax on supply of goods and States levied Entry Tax on entry of goods in the States for sale and VAT on

sale of the same goods. Further, the rate of VAT in certain cases and Entry Tax were different in different States. In some of the States the rate was more, in some of the States the rate was less and in some of the States the same goods were exempted from tax. For example, the rate of VAT on sale of tea was 5% in some of the States, 8% in some other States and 14% in some other States[8]. After GST it is 5% in every States. It was not therefore uncommon for people living on the Border States to make purchases in other States to avoid or reduce sales tax (State's VAT).

(b) Elimination of Cascading Effect which was because of several kinds of taxes

Prior to GST on manufacture or production of goods, Centre was levying Excise Duty, Service tax on supply of goods by transport services, Central Sales Tax (CST) if the goods were sold in other States, then Entry Tax by the State in which the goods entered for sale and VAT by the State in which the goods were sold to the ultimate consumer. Every time tax was being levied on the increased value of the goods including value increased because of levy of the tax. This was having cascading effect on the value of the goods. For example, on manufacture of Motor Cycle, Excise Duty was being levied at the rate of 12.5%, Central Sales Tax 2%, Entry Tax 2% and VAT 14%. The total effect of these taxes was about 34% due to cascading effect of taxes[9]. Under GST now the rate of tax is 28%.

(c) Increase in revenue

GST requires keeping Tax Invoice and filing of returns through computerized and online method. Hence, it will prevent Tax evasion, which ultimately will result in increase in tax revenue despite low rate of tax.

(d) Computation of Tax will be simple

Prior to GST, a number of taxes were being levied at different rates and under different statutes. (GST has subsumed under it 17 indirect taxes (8 Central and 9 State taxes). Multiplicity of taxes at the Central and State levels resulted in a complex indirect tax structure in the country which made computation of taxes difficult as different experts were required having knowledge of different statutes. This resulted in ridden and hidden compliance costs for trade and industry.

(e) Less chances of spurious goods

Under GST every businessman, whether he is manufacturer of goods, whole seller or retailer, in order to claim input tax credit, he will receive invoice from the supplier of the goods. Hence, supplier of goods can easily be identified and chances of supply of spurious goods will be less.

(f) Reduction in loss of revenue which was due to rebates and incentives

In order to attract industries in the States, the State Governments were giving several kinds of rebates and incentives which were resulting in loss of revenue to the State Governments. Under GST, the rates of tax and goods exempted from tax will be uniform. Hence there will be no flight of capital and industry from high to low rate tax States and industries may be established on the basis of availability of raw materials,

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8. Shreepal Sakalecha and Anit Sakalecha, *Taxmann GST Evam Customs Kanoon*, University Edition, First Edition (2018) p.10.

9. Ibid. p.11

manpower etc. which are basic considerations for establishing industries. This will help in reducing unnecessary transportation of raw materials and finished goods which will reduce cost of production.

(g) Uniform Trading opportunity to traders

The ill effect on trade due to different rates of Sales Tax (VAT) in the States has been removed as the rate of GST in all the States will be uniform. For example, if the rate of VAT on a commodity in U.P. was 14% and in Delhi 5%, then consumers living on the border of U.P. and Delhi were purchasing the commodity in Delhi which was affecting the trader living on the border State. Due to uniformity in tax rates, the common national market has been developed and the pricing structure is uniform throughout the country.

(h) Reduction in time of transportation of goods

Prior to GST, there were Check Posts on the borders of the States to check Form C to verify payment of CST when the goods were sold to the dealer of other States or Form F when the goods were not sold rather were being consigned to other States by a business man on his branches of business in other states. Besides, for payment of Entry Tax, checking Vehicle Permit, contraband goods also the Trucks were standing for hours on these Check Posts. Now with abolition of CST and Entry Tax, these Check Posts are no longer required which has reduced the time in transportation of goods.

(i) Ease in Inter – State Trade

Elimination of Check Posts on State borders has made Inter State trade easy.

(j) Disputes regarding Manufacture, Sales of Goods, Sale of Goods or Service will not arise

GST is a tax on supply of goods or services. Hence whether a process is manufacture or not for imposition of Excise Duty, whether a transaction is sale of goods or not for imposition of VAT, whether a transaction is sale of goods or providing services, these disputes will not arise in imposition of GST.

(k) Many small traders exempted from Registration and Payment of Taxes

Under VAT (in most of the States), the exemption limit was Rs. 5 Lakh, for Service Tax the exemption limit was Rs. 10 Lakh. However under GST the exemption limit for most of the States is Rs. 20 Lakh which has been decided to increase to Rs. 40 Lakh for traders in goods from Financial Year 2019-20 for traders selling goods intra state. [For suppliers of Services and traders selling goods inter-state, the exemption limit has not been proposed to increase]. Those who are selling goods and also supplying services, for them also the exemption limit has not been proposed to increase.

(l) Composition Scheme for small businesses

Under VAT composition scheme was available only for traders selling goods intra-state, if annual turnover did not exceed Rs. 50 Lakh. Under GST, composition scheme is available to certain dealers whose annual turnover does not exceed Rs. 1.5 crore which is likely to be extended up to Rs. 2 crore. [Composition Scheme under GST is available to intra-state traders of goods including Manufacturers (except manufacturers of ice creams, pan masala and tobacco products), Composition Scheme is not available to supplier of services except supply of food for human consumption i.e. Composition Scheme is available to persons doing restaurant business. Composition scheme is also not available

to suppliers of goods through an e-commerce portal.

Composition Scheme is optional. A dealer who opts for composition scheme cannot make inter-state supply. He is not allowed to charge GST in his invoice. Such a dealer will have to pay tax on his total turnover (out of his own pocket) at the following rates: Manufacturers and Traders 1% (i.e. 0.5% CGST and 0.5% SGST) and Restaurants 5% (i.e. 2.5% CGST and 2.5% SGST).]

(m) GST will help in encouraging Exports:

Exports are zero rated in GST. Export industries would be able to have internationally competitive prices due to absence of cascading effect under GST as input tax credit will be available for the whole taxes paid. Earlier, input tax credit was not available for some of the taxes like CST, Entry Tax, Escise Duty while computing VAT.

V. DEMERITS OF GOODS AND SERVICES TAX

(a) Difficulties in implementation

Traders and administrators have not fully understood the provisions of GST hence they are finding difficulties in its compliance.

(b) Difficulties in computation

Because of input tax credit and reverse charges computation of GST is not easy. Several records are to be kept to determine the cost of goods and taxes paid on inputs. As GST is a multi point tax, all the demerits of multi point tax is present in GST.

(c) On some of the commodities tax burden has increased

Rates of taxes in GST have been divided into seven categories viz. 0%, 0.25%, 3%, 5%, 12%, 18% and 28%. Very few commodities have been kept under the category of 5%. Under 12%, 18% and 28% categories many commodities are placed on which the earlier State VAT rates were 4%, 6%, or 8%. Similarly many commodities which were earlier free from VAT, now have become taxable under GST. Similarly rate of Service Tax earlier was 15% but under GST the rate is 18%.

(d) Difficulties because of multiple rate structure

As we have seen GST presently has a seven slab structure as tax rates are 0%, 0.25%, 3%, 5%, 12%, 18% and 28%. The multiple tax structure is justified on the ground that necessary items of mass consumption should either be exempted from tax or be taxed at a lower rate while luxury items should be taxed at higher rates. It is pleaded that multiple rates are likely to increase administrative complexity as well as create classification disputes.

(e) Difficulties to small businessmen as payment of Tax under GST system is fully computerized

Under GST all accounts keeping, filing of return, payment of taxes etc. have to be done on line through computer. GST- compliant invoice issued must have mandatory details such as GSTIN, place of supply, HSN codes etc. In our country, there are lack of small and medium sized businessmen who do not have knowledge of computer and digital record keeping. Such businessmen are facing difficulties under GST as they have to hire experts who may do all these things.

(f) Possibility of vertical integration

GST is a multi point tax. Number of times the goods or services will be supplied, the GST will be imposed. Thus if number of intermediary traders between manufacturer and ultimate consumer will increase, the burden of tax will also increase. Hence, manufacturer will try to get the goods delivered directly to the consumer to reduce the burden of taxation. This may eliminate or reduce the number of intermediary traders which is called vertical integration. This is not good for a country like India where number of unemployment is more.

(g) Lack of skilled resources and need of re-skilling of existing workforce

As GST is a new tax, skilled staff with complete and updated subject knowledge of GST is not easily available. Hence there is urgent need of adequate number of skilled persons well versed with updated provisions of GST for compliance of the provisions. In addition the businessmen will need to re-train their employees in GST compliance, which will increase the business expenses.

(h) Increased costs due to Software purchases

Businessmen have to train their existing staff or to purchase GST software to keep their business going. Both the options will increase the expenditure of business.

(i) Wrong conception that GST will check Tax Evasion

It is a wrong conception that GST will check or reduce tax evasion. If the goods are sold without invoice at the first step, then the goods will continue to be sold further without invoice till the last stage and Government will get no revenue at any stage.

(j) Complex procedure of account keeping and filing of Returns

It was expected that under GST keeping of accounts and filing of Returns will become easy as the system is completely online and computerized. However, in practice, this has proved burdensome to the businessmen. Because of failure of the online techniques time and again, the businessmen are finding it difficult to prepare accounts and file the returns. Under GST, every businessman paying GST is required to submit 37 Returns in a year within the times prescribed. All returns are to be filed online. If there is failure in the internet connection then submission of returns within the prescribed time is not possible. Further, if there is a mismatch in the returns submitted by the seller and the purchaser, then its solution is proving difficult.

(k) Possibility of Increasing Corruption under GST

Prior to GST, big companies could evade taxes by having connivance (or settings) with officers of two separate departments viz. officers of Excise Department and VAT officers. Now in order to run parallel unaccounted production they have to cajole (*pataana)* only officers of GST. Thus their task has become easy and corruption may increase.

(l) Loss of Revenue to Manufacturing States

Since GST is a destination based tax, the taxes will belong to the States where the goods or services would be finally delivered for consumption. Thus the manufacturing State will lose the revenue which it was getting as Central Sales Tax (CST) on inter-state sales of the manufactured products.

(m) Loss of Revenue to States because of elimination of various State Taxes

States levies like State VAT, CST, Luxury tax, Entry Tax, Entertainment Tax, Taxes on lotteries, betting and gambling and State Cess and surcharges have been abolished, hence States are likely to suffer a major loss of revenue. Hence, Goods and Services Tax (Compensation to States) Act, 2017 has been enacted to compensate the States for the loss of revenue arising to0 the States because of implementation of Goods and Services Tax.

VI. CONCLUSION

Goods and Services Tax may be said as a big tax reform in the field of indirect taxation. Now most of the indirect taxes which were previously being levied by the Centre and the States have been subsumed under Goods and Services Tax. The rates of Goods and Services tax and the provisions for its levy and collection throughout India has become uniform which can be considered a great relief to the businessmen. As it is a new tax, in the beginning some difficulties may be felt, however, in long term it will prove to be much fruitful for the business and industry.

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RESERVATION POLICY IN INDIA
(WITH SPECIAL REFERENCE TO RESERVATION IN PRIVATE SECTOR)

SIBARAM TRIPATHY*

"Ability is nothing without opportunity"
Napoleon I (1769-1821), French Emperor.

ABSTRACT : Reservation policy has become a political game in India. Every political party are playing their political cards before every election without paying any heed to its pragmatic approach. The first decade of the 21st century there has been a hue and cry in India for the implementation of the reservation policy even in private sectors it was vehemently criticized the different political parties in India, after the demise of the UPA government at the center the matter is gone to cold storage. With the advent of new government there has been an outcry in Indian politics for the overhauling of reservation policy in India, even some of the BJP stalwarts criticized the present reservation policy so also for back-peddling of the said policy. Instead, the new government has taken a hasty decision and implemented the reservation for the economically backward class for citizens of India. Now the question arises, can there be a political move for the implementation of reservation policy in private sectors without giving any stress to the proficiency of the administration? Can it be implemented at the cost of Article 35 of the Indian Constitution? In this article attempt has been made to highlight the need of reservation, efficacy of reservation vis-à-vis Article 35 of Indian Constitution and the implementation of proposed reservation policy in private sectors and its merits and demerits.

KEY WORDS : Affirmative actions, Private sector, Equal opportunity, Appointment and Employment.

I. INTRODUCTION

No issue is more contentious than the policies of reservation in our country. The superstructure of Indian democracy stands among other ideals, on 'equality' and 'freedom'. Articles 14 to 18 of the Constitution are the provisions which guarantee the fundamental right of equality to the citizens of the country. The equal protection of law and equality before law has ramified to protection from discrimination on certain grounds. However, the state has been given powers to make special provisions for socially and educationally backward classes as well as the schedule caste and schedule tribes and also other categories of persons.

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India, after a long subjugation emerged to freedom at 'the midnight hour' to 'redeem the pledges', hence a socialistic egalitarian thought became a predominant undercurrent in constitution making. Besides, the global scenario was rich with the idea of 'welfare states', the Great War was just over and the scale of disaster, devastation and human miseries was affecting political decision making process. The Founding Fathers were involved in freedom movement and were aware about the social and economic condition of the country and their vision was to establish India as a strong nation without social, economic and political discrimination. They were all socialists of different shades, as Nehru would declare in the Constituent Assembly. Hence, with this anxiety to abolish the Social discrimination and to further a true and meaningful equality they inserted provisions in the constitution and in such a chapter, that the state was made responsible as the oversight agency.

It was understood that attempts only of prohibition of untouchability and end of discrimination would not be enough, so extension of economic empowerment to the socially downtrodden could in the long run bring about the actualization of the vision of the Founding Fathers. It was also realised at the making of the Constitution that the mere declaration of equal opportunity would not be enough for those sections of society, who have been suppressed and exploited for such a long time, therefore, special measures were called for to provide a special protection to these classes. Initially, it was thought to continue the special protection for a period of time, and as identification of economic criteria was difficult and the objective was to eliminate social discrimination, the special protection became caste and tribe based. The Indian society traditionally was suffering from caste stratification and the enjoyment of social privileges depended on the caste identity. The constitutionally promised equality intended to dismantle this stratification and to usher in an era of social equality. The Constitution hence while declared about equality and non-discrimination generally and also in public employment, it placed in a system of state protection, a discrimination which was protective.

The Benthamite idea of greatest good of greatest number became an inspiration in Indian social justice and compensatory discrimination to alleviate the age old social and economic prejudices. While doing that the framers of the Constitution were not oblivious to merit and efficiency in administration and taken care of that in Art. 335 of the Constitution. Justice V.R. Krishnaiyer endorses the view of Granvil Austin that Indian Constitution is foremost a social document. The task of achieving equality in a society fractured with caste and dispersed economic strata required placing of a special protection for certain groups to augment relative equality in the competition of excellence. However, Andre Betille is of the view that discrimination is a dangerous instrument, no matter how pure the intentions are of those who use it and how careful we have to be. The protective discrimination in many cases has become a 'crutch' for the state to assuage the social feelings and for the downtrodden to depend on government. It is often alleged that reservation has been continuing to create or reinforce a vote-bank politics, and perhaps it has been legitimised by the implementation of the Mandal Commission Report by Prime Minister V.P. Singh manifestly to augment his political perceptive. The nation went to a loud protest and was only quelled after a historic judgement of the Supreme Court, validating but balancing the implementation.

The Supreme Court since the days of Chapakam (1951) has always taken an approach to balance the relative interests of classes as well as reservation *vis-a-vis* merit in

administration. The Court in Indira Sawhney (2000) devised the concept of 'creamy layer' while capping the reservation at fifty percent level. On the question of merit the Court has equally been very articulate in Jagdish Saran (1980) and Preeti Srivastava (1999). The ratio of the Court in Ajit Singh (1999) and Balmukund Shah (2000) are also quite relevant in interpretation of the provisions. Moreover, the amendments of Art. 15 and 16 of the constitution and the 9th schedule have diluted much of the impact of the Court verdicts. The modification in schedule 9 in the 76th amendment in 1994 to incorporate the Tamil Nadu Act (Act 45 Of 1994) and the changes of Article 16 in 77th, 81st and 85th amendments in 1995, 2000 and 2001 are but examples of it. The 93rd amendment in 2005 inserting a clause in Art. 15 have extended the reservation of seats for admission in all categories of educational institutions except the minority institutions. Accordingly, legislation (Act 5 of 2007) has been passed in the Parliament for reservation in all India institutions, which was challenged along with the 93d Amendment of the constitution before the Supreme Court in Ashok Kumar Thakur (2008). The Court, however in its decision held that both the amendment and the Act to be valid. The creation of sub-quota out of the 27% reservation for the OBC through an office memorandum in Andra Pradesh was rejected by the High Court of the State in R. Krishaiah (2012), the matter is pending before the Supreme Court.[1]

II. PERSPECTIVE OF RESERVATION POLICY

The policy of reservation has been envisioned primarily for the upliftment and advancement of weaker sections of the society. Envisioned by social problem, the founding fathers of the Constitution framed a policy of reservation for the first ten years of the republic, on the basis firstly; as an exception to the well accepted principle of equality; secondly; as such policy serves as compensation for those who suffered for centuries for "no fault of theirs"; thirdly; such reservation policy when introduced did not affected the efficiency system; fourthly; the policy aimed for nonsufferance eventuality of the society as a whole; and finally; the reservation policy was considered transitory in nature.

In this regard it becomes necessary to generically examine the principle of equality[2] since it has been treated as one of the fundamental right of all citizens of India. Further the State, on its own disposal, is expressly prohibited not to discriminate against any citizen in any manner, which includes the matters relating to employment or appointment to any office of the State, on grounds of religion, race, caste, sex, decent, place of birth or any of them[3]. It also emphasizes that no citizen shall be subjected to any disability, liability, restriction or condition by the State or even by the private individuals with regard to (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) use wells, tanks, bathing ghats, roads and places of public resort maintained totally or partially out of State funds or is being dedicated to the use of general public.[4]

Despite such constitutional promises there are certain exceptions to the equality policy. Firstly; the State enjoys the right to make any special laws in favor of women and

1. Mahapatro, B.C. and Mahapatro, S. R., *Reservation Policy in India*, Research India Publication, New Delhi.
2. The Constitution of India, Article 14.
3. Ibid, Article 15(1) and 16(1)
4. Ibid, Article 15(2)

children[5] so that they could be protected against exploitation;[6] and secondly; in matters of State employment in favour of any backward class of society, when not adequately represented in the service[7]. Accordingly reservations in favor of SC/ST in the seats of the legislative bodies were made for a stipulated period[8], besides there is also a constitutional provision to nominate one or two members of the Anglo-Indian community, if such community is not adequately represented by the people.[9]

Thus, in the analysis of the constitutional provisions, one can say that reservation policy impinges upon the (i) prohibition of discrimination in general and (ii) the equality of opportunity in matters of public employment. Therefore it becomes pertinent that in regard to SC/ST/OBC, it may be admitted that such people were neglected in the past, for which their rights to claim, enjoy and to have the capacity to realize as equal citizens was not as per expectations of the society. As such there was no denial by any authority, when such special treatment of education or employment was extended to them.

There is no doubt that reservation policy provides an apparent preference over the merit and excellence. The Constitution provides for special treatment to certain classof persons like SC/ST/OBC woman, children, etc; which is being considered as healthy order of ensuring equality in the society[10], (At the same time it must not be forgotten that merit and excellence are concerned as primary requirement for higher studies)[11]. Therefore any preference over merit or excellence should be considered as impermissible and concurring this view, aptly the Apex Court held in *Sadhana Devi v. State of UP*[12] that higher one goes to any discipline, lesser should be the reservation. Even Krishna Iyer, J. was of the opinion that reservation must be kept in check by the demands of competence as the same is more relevant in to-day is society otherwise it becomes mawkish sympathy with the weaker sections of the society, who happens to be sub-standard candidates. Such extension of reservation would punish the whole society as there is a denial of prospect of excellence[13]. Therefore the object of extension of reservation must be based for bringing out a real equality of opportunity between those who are unequal[14].

Reservation at this juncture raises an issue to resolve a delicate and complex problem involving various social and economic factors in one hand while on the other hand a balanced and harmonious adjustment of competing interest of the society is the judicious concern of all. It must not be forgotten that while framing the regulations regarding

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5. Article 15(3)
6. Ibid, For instance, in the offence of adultery, a man is subjected to punishment but not a woman, Yusuf v. State of Bom., AIR 1954 SC 321. The view is also supported by K. T. Shah, who held that such special provisions aims to safeguard, protect or lead to the betterment of woman in general for which the long range interests of society do not suffer; CAD Vol. VII at p. 655 (01.29.2020)
7. Art. 16 (4). However Art.335 emhasises that while providing employment to the members of SC/ST in State service, maintenance of efficiency of administration should be taken into consideration.
8. Arts. 330, 332 read with 334
9. Arts. 331, 333 read with 334.
10. Article 15(4)
11. Pradip Jain v. Union of India, AIR 1984 SC 1420
12. AIR 1997 SC 1120.
13. *Jagadish Saran v. Union of India*, AIR 1980 SC 820 at p. 834.
14. *D.N. Chanchala v. State of Mys*., AIR 1971 SC 1763: State of UP v. Pradip Tandon, AIR 1975 SC 5637.

reservations that is providing preference to some class of persons, society extended its cooperation that despite difference and denial of equality, the acts of privileges as constitutionally granted to them, were considered to be equal in obeisance to the 'equality'[15] under Art. 14. Now therefore if at all such reservation policies are allowed to remain, it must be based, firstly, on reasonable and intelligible differentia; and secondly, such differentiation must be on rational basis[16].

III. RESERVATION INPRIVATE SECTORS IN INDIA

Justice Krishna Iyer raised basic question, whether Indian being free, are Indian free? And he himself replied by quoting Dr. Ambedkar "One must distinguish between the freedom of country and freedom of people, in the country. Philosophically, it may be possible to consider a nation as a unit but sociologically it cannot be regarded as consisting of many classes and the freedom of the nation if it is to be reality must vouchsafe the freedom of different classes comprised in it, particularly those who are treated as the servile classes.[17]

The concept of equality under the constitution is a dynamic concept. It takes within its sweep every process of equalization and proactive discrimination. Equality must not remain mere idle incantation but it must become a living reality for the large masses of people. In a hierarchical society with an indelible feudal stamp and incurable actual inequality, it is absurd to suggest that progressive measures to eliminate group disabilities and promote collective equality are antagonistic to equality on the ground that individual is entitled to equality of opportunity based purely on merit judged by the marks obtained by him. We cannot countenance such a suggestion, for to do so would make the equality clause sterile and perpetuate existing inequalities. Equality of opportunity is not simply a matter legal equality, its existence depends not merely on the absence of disabilities but on the preserve of abilities, it is, therefore, necessary to take into account *de facto* inequalities which exist in the society and to take affirmative action by way of giving preference to the society and economically disadvantaged persons or inflicting handicaps on those more advantageously placed, in order to bring about real equality. The State must, to use again the words of Krishna Iyer J. in Jagdish Saran case[18] "where those special facilities into the web of equality, which in an equitable setting, provides for the weak and promoting their leveling up so that, in the long run, the community, at large may enjoy a general measure of real equal opportunity".

a) Meaning

The term 'reservation' has not been defined under the Indian Constitution. Hence, one has to depend on the dictionary and judicial pronouncements, about the meaning of the term "reservation'. It C.I.T. v. Century Spinning and Manufacturing Co. Ltd.[19] Relating to income tax proceeding, the S.C. observed "the term reservation is not defined in the Income Tax Act and we must resort to ordinary natural meaning which is understood in

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15. *State of Raj. v. Ashok Kumar*, AIR 1989 SC 177.
16. *Saurabh Chaudari v. Union of India*, AIR 2004 SC 631
17. V.R. Krishna Iyer,: *Social Justice and Undone Vast*, B.R.Publishing, *1991*
18. SCC p.782 Para 29
19. (1953) 24 I.T.R. 499, 503-504, SC

common parlance".

According to the law Lexicon Vol. II, the word "reservation' signifies that it can be small portion of the maim. From the social point of view, the reservation policy is one of the mechanism of social adjustment so as to ensure the participation of the traditionally neglected section of society. It includes the fixation of quota for the depressed class in the legislative organ of the government, admission in educational institution and employment.

Reservation means reservation of post in the service and education for a segment of our society, those who are trailing behind and not coming to the forefront or to the main-stream of our society exclusively the S.C., S.T. and other Backward Communities. In other words, it means a unilateral statement however phrased or named by the State when signing, rectifying, accepting, approving or according to the treaty in their application to that State.

b) Objectives of Reservation Policy

The object of reservation policy is to remove backwardness and to promote the socio-economic and political standard of the deprived class of people in our society. Here two views are given: juristic view and judicial view.

c) Jurist view

D.N. Sandanshiv has mentioned the objective of reservation, "reservation are meant to ensure that no community is deprived of its rightful place in true democracy. It is not caste or class concession. It is a compensatory device to negate the disabilities and handicaps imposed by poisonous caste system".[20]

d) Judicial view

The Hon'ble S.C. of India in *Union of India v. Mahadev*"[21] has described the objective of reservation as "Means to ensure socio-economic justice for S.Cs/S.Ts. The S.C. of India in *Indra Sawhney v. Union of India*[22] said "the objective of reservation is not only to elevate poverty but also to share governance by the Reservationist classes".

IV. GENESIS OF CASTE SYSTEM IN INDIA

India has been a land of culture and tradition. In India, one can find almost all types of people belonging to various caste creed, race, religion, sex etc. The people have come and settle in India considering India as their own land. The historical details are of a great importance in the height of the fact that the reservation granted to the socially backward people in India have been granted on the very basis of injustice in the past.

Reservation, as in the sense of the term we see it today, for the first time appeared in India during Aryan period. It is perhaps because of this that Dr. Udit Rai, says in his essay "Reservation for Dalits in private sector' that 'Reservation is traditional propriety in India'. This is mainly so because the Aryans after invading India wanted to have

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20. Sandanshiv D.N., *Bombay Reservation for Social Justice a Senior Constitutional Approach*, as quoted, S.K. Bishwas pp. 17-18
21. (1997) 2 SCC 332
22. LAIR 1993 SC 477

superiority over natives. Thus, these Aryans conjured up myths on the basis of reservation in religion, occupation and privileges. The Aryans did this in chief because they had realized it pretty early that for them to settle in India, it would need much more than the rule of the sword. Thus, was born the myth of superiority and rezervation. Furthermore, the same scene also witnessed the Aryans strengthening their theory of reservation by giving the natives a sense of lackingness. They further coupled it with the miserable life of indigenous people of India that is, Dalit, attributing it to sins of past lives, fate, curse, and divine will. Thus, came about reservations in India at least initially as brought about the Aryans. It was mainly from this set up that the system of caste based learning oriented. Hindu society is divided into four varnas or classes, a convention which had its origin in the Rig Veda, the first and most important set of hymns in Hindu Scripture which dates back to 1500-1000 B.C.[23] In this system, at the top of hierarchy are the Brahmins or priests, followed by the Kshatriyas or worriors, the Vaishyas, the farmers and artisans constitute the third class in the then social matrix of India. At the bottom are Sudras, the class responsible for serving the three higher groups. Finally, the untouchables fall completely outside of this system. It is for this reason that the untouchables have also been termed Avarna (no class). None was accepted to deviate from this caste based occupation system. Thus reservations have been in existences since time immemorial and there have to a certain extent been responsible for the reservation to exist in the society today.

Jaati or caste is a second factor specifying rank in the Hindu social hierarchy. Jaties are roughly determined by occupation, often, religion specific, they are more precise than the sweeping Varna System which is common across India and can be divided further into sub-castes and subsub-castes. This is also case among untouchables.

Andre Betteiles[24] a famous sociologist, who studied the Indian caste system, defines caste as:

> "A small and named group of persons characterized by endogamy, heredity membership and a specific style of life which sometimes includes the pursuit by tradition of a particular occupation and is usually associated with a more or less distinct ritual status in a hierarchical system."

Jaati in the three highest varnas in the hierarchy -*Brahmins, Kshatriyas* and *Vaisyas* are considered 'twice born' according to Hindu scripture, meaning thereby, they are allowed to participate in Hindu ceremonies and are considered more pure in comparison with Sudras and "polluting" untouchables. The concept of pollution versus purity governs the interaction between the members of different castes. The touch of untouchable is considered defiling to upper castes. In southern India where caste prejudice has been historically most severe, even the sight and shadow of untouchable considered polluting. Untouchables usually handled impure, tasks, such as human excrete and dead animals. As a result, until reforms began in the 19th century, untouchables were barred from entering temple, drawing water from upper caste wells and all social interaction with upper caste Hindus (including dining in the same room). These social rules were strictly

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23. Fuller, *The Camphor Flame: Popular Hinduism and Society in India,* Princiton University Press, 1992, p. 12.

24. Andre Betteile, *Caste, Class and Power*: *Changing patterns ofstratification in Tanjore village*, (Delhi) Oxford University Press, 1996, p. 46.

imposed and the violators were severely punished, some extent may be killed.

V. HISTORY OF RESERVATION IN INDIA

The Christian Missionaries took active lead in adopting the cause of depressed class seeking to provide welfare for them. By 1850s, either inspired or shamed in to action by the missionaries' example, Hindu reformers emerged. Jyotibai Phule was one of such activist and in 1860 he called attention to the plight of victim of caste discrimination in Maharastra." In 1880s British officials set up scholarships, special schools and other programmes for the benefit of depressed class. The king of Baroda, Kolhapur and Travancore had taken similar initiatives.[25]

As early as 1958 the govt. of Bombay Presidency declared that "all schools maintained at the sole cost of govt. shall be open to all classes of its subjects without discrimination. In 1915 and subsequently in 1923 an announcement was made cutting off and to educational institutions that refused admission to the members of depressed classes.[26] And other initiative followed including the 1943, Bombay Harijan Temple Entry Act 1947, Bombay Harijan (the Removal of Civil Disability Act). In the United Provinces, now Uttar Pradesh the 1947 United Province of Social Disability Act was put into force.[27]

In the present State of Kerala, the Maharaja of Travancore announced the Temple Entry proclamation in 1936, in what was called a pioneer in the field of reform relating to eradication of untouchability before independence. It was followed by the initiatives taken by Kerala in 1950, i.e. Travancore Cochin Temple Entry (the Removal of Disability Act).[28]

The Reservation policy in India got support from the British government by the Act of 1909 and 1919. But the Simon Commission rejected separate electorates for the depressed classes. Even though the same matter raised in 1st Round Table Conference and 2nd Round Table Conference but any how it was subsided. Mac Donald's announcement of communal award and Poona Pact of 1932 provided fresh lease of life of having separate electorate for the depressed class of people in India, which provided 78 reserved seats. Again, the reservation of seats for the depressed classes was incorporated in the Government-India Act of 1935. By the Act of 1935, the government had official designated depressed classes "Schedule Castes",

VI. RESERVATION AND CONSTITUTIONAL FRAMEWORK

So far as reservation policy and constitution of India is concerned, the preamble of the constitution, in its outset, depicts out the idea of reservation that we the people of India having solemnly resolved to constitute India into sovereign socialist, secular, democratic Republic and secure all its citizens, justice, social, economic and political, liberty of thought, expression, belief, faith and worship. Equality of status and opportunity and to promote among them all. Similarly, Art. 14 says Right to Equality forbids class

25. Ibid at 95
26. Dept. of Social Welfare, Govt. of India, Report of the Committee,1969, p. 3
27. Ibid. pp. 4-5
28. Ibid. p. 3

legislation. Art. 15(3) provides special provisions for women and children, Art. 15(4) provides special provisions for the advancement of socially and educationally backward class of citizens and the S.Cs. & S.Ts. Art. 16(4), Art. 16(4)A, and 16(4)B make provisions for the reservation of appointment or employment of post for backward class of citizens, in the opinion of the state, is not adequately represented in the services under the state. Art. 46 provides the state shall promote with special care the educational and economic interest of the weaker section of the people.

Apart from Preamble, Fundamental Rights and Directive Principles, Art.330 and 332 provide reservations to the S.Cs and S.Ts in Lok Sabha and in Vidhan Sabha, Art. 331 and 333 provides reservation for Ango-Indians. Art. 243D makes provision for reservation to S.Cs and S.T's in Gram Panchayats, Kshetra Panchayats and Zilla Panchayats, likewise, Art. 243T provides reservation in Nagar Panchayats, Municipalities and Corporations.

VII. RESERVATION IN PRIVATE SECTORS – A COMPARISON WITH AFFIRMATIVE ACTION OF AMERICA

The story of affirmative action in the United States is a story about repeated attempts long recognized problems. It is about balancing the rights of majority and minority. It is about determining the price to be paid today to correct problem created and fostered by generation long ago. It is about increasing accessibility of the American dream without risking it entirely. It is about keeping American economy vibrant and competitive in sea of global competition. It is about sustaining meritocracy while becoming more inclusive. It is story about social engineering

14th Amendment in 1868 of American constitution from which our Art.14 is adopted give equal protection before law. When all the other avenues fail, the due process clause serves the basis for seeking legal remedies from loss of Rightsand Freedom from Government action. American Government passed Public Works Employment Act of 1977, in which there is a provision of minority business enterprise. According to that provision 100% federal funds granted for local public works project must be used by state and local grantees to procure services on supplies from business owned and controlled by "minority group members" which includes Negroes, Spanish-speaking Orientals etc.

This provision was challenged in *Fulilove v. Kultznick* before USA, Supreme Court, as denying the equal protection clause of 14th Amendment of US Constitution. The court while uploading the law relied on official reports which was to the effect that the effects of past inequalities stemming from racial prejudice have not remained in the past and the reality was that past discriminatory practices have to some degree, adversely affect the present economic system.

The court upheld the validity of the legislation as if contained provisions designed to uplift those socially, economically disadvantaged persons to a level where they may effectively participate in business mainstream of USA economy.

The arguments were raised as to why the private contractors should be compelled to limit their choices. American Supreme Court held that private contractors are not held responsible for any violation of anti-discrimination law but this legislation was enacted to prohibit practices which perpetuate the effect of discrimination being practiced with a

view to eliminate those barriers and to ensure that minorities were not denied equal opportunity to participate in federal grants to state and local Govt, which is one of aspect of equal protect of laws.

Thus it is fallacious to say that if similar law is made in India non- backward class people will be thereby thus discriminated because as US Supreme Court said, "It is not a constitutional defect in this programme that it may disappoint the expectations of non-minority firms."

When effectuating limited and properly failured remedy to, cure the effects of prior discrimination such a sharing of burden is not impermissible. American Supreme Court said that if we are ever to become fully integrated society one in which the colour of a persons' skin will not determine opportunities available to him or her. We must be willing to take steps open to those doors. The same principles aptly apply to the positions of Schedule Caste and Schedule Tribes in India.

The non-backward people cannot in law complain of being deprived of equal opportunity. It is settled law that equal protection requires affirmative action by the state towards unequal by providing facilities and opportunities. Every classification is in some degree likely to produce some inequality but differential treatment does not per se constitute violation of Art. 14. As justice Holmes of U.S. Supreme Court said, "if law presumably hits the evil, where it is most felt, it is not be overthrown because there are other instances to which it have been applied."

In America and Europe, the Affirmative Action was running successfully. The success achieved by racially discriminated people in various field like music, sports commerce and industry, academic administration, military force etc. one of the important factor that have ushered a new era in the life of racially discriminated people is the change in attitude of their countrymen, industries and political leadership as well.[29]

VIII. RESERVATION IN PRIVATE SECTOR : ITS CONSTITUTIONALITY

The U.P.A. prime minister said his colleagues to examine the issue of reservation in private sectors which cause a distressing spell on the industrial heavyweights like confederation of Indian society (CII), Federation of Indian Chambers of Commerce and Industry (FICCI) and Associated Chambers of Commerce and Industry of India (ASSOCHAM) against this policy. It is true that there is no specific provision in the constitution of India relating to reservation in private sectors but if there will be reservation in private sectors it will be having constitutionality. We can find the flavour of reservation in private sectors in the preamble of the Indian constitution. Art. 46 specifically empower the state to promote the weaker section society including S.Cs/S.Ts and to give them socio-economic justice. Apart from that, 93rd constitutional amendment came into force on 20th January 2006 extends the ambits of reservation even to private educational institutions referred to in clause (1) of Art. 30. That implies, indirectly it brought reservation in private sectors.

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29. Praful Sakya's, *Reservation Policy*, *Devoid of Proper Execution divided India and Prejudices*, March 2005.

a). Judicial Response

Since 1996, several obstacles have cropped up with regard to filling up of posts reserved for SCs and STs. This has happened despite the 1995 amendment of the Constitution (77th Amendment) to nullify the effect of the Supreme Court judgment in the *Indira Sawhney v. Union of India*,[30] which held that the benefit reservation could be given only once at the time of recruitment and the same principle did not apply to promotions. The amendment introduced clause 4(a) to Article 16 which mentions Affirmative Action for the SCs and STS.

In a series of judgments, the S.C. has stated that –

(1) According to Article 335, SC/ST and BC claims to public service posts may be considered only if they are consistent with maintaining efficiency in the administration; but lowering of marks or reducing evaluation criteria for their promotion were not permissible1[31];

(2) If due to reservation on SC/ST candidate is promoted and later a person from the General Category is promoted into the same grade, the SC/ ST candidate loses his edge and is treated at par with the general candidate who now has the same seniority.[32] But where there are two non SC/ST candidates, seniority between them is based on among other things the date of their promotion; and

(3) Where there is only one post available in a gradeor category then that post cannot be reserved at all for on SC/ST but automatically falls into the general quota.[33] Subsequently DPT issued several memos to implement the orders of the Supreme Court. The paper notes that there is a complaint that the government has gone beyond the mandate of the Supreme Court while amending promotion rulesto the disadvantage of SC/STs. Post-Mandal judicial pronouncements have adversely affected the interest of Scheduled Castes and Scheduled Tribes in the civil services. In 2000 clause 4(B) was inserted into Article 16 by the 81st Amendment to the Constitution, again to neutralize the *Indra Sawheny* judgement on the issue of filling upo of backlog vacancies. In the year 2001, Article 16(4)(A) was amended by virtue of the 85th Amendment to provide consequential seniority in promotions to the Scheduled Caste & Scheduled Tribes, which they had lost as a result of Ajit Singh Janjua case. Art. 335 was amended by the 82nd Amendment in the year 2000 to provide for relaxation of standards in the matter of promotions. Few judgments, such as that in the R.K. Sabharwal case still affect fitments through reservation. The judgment in the Inamdar case is only the latest among a plethora of judgments lave seriously affected the interests of Scheduled Castes, Scheduled Tribes and Other Backward Classes, precluding the enjoyment of their rights as provided by the constitution.

The Inamdar case judgment of 2005 was a logical continuation of the TMA Pai Foundation case on the issue of admissions and administration in minority educational institutions. The serious implications of the judgments are that the natural powers available

30. 1992 SC 217.

31. *S. Vinod Kumar v. Union of India* 1996 SC 3639.

32. *Virpal Singh Chauhan v. UOI* 1996 SC 2894 and in *R.K. Sabharwal & Others v. State of Punjab & others* 1995 (2) SC 646.

33. PGIMER *Chandigarrh y. Faculty Association* 1998 (2) SC 794.

to the State under Art. 1906) to impose reasonable restrictions have been abrogated. This judgment has reaching consequences even on the issue of reservations in the private sector where provisions of equal employment opportunities in the private sector could be imposed as a reasonable restriction through Art.19(6) in all trade, business and occupations in the private sector under Art. 19(1)(g). Moreover some noteworthy developments in this regard, are –

(1) In a non-official resolution passed in the Rajya Sabha for the first time ratified reservation in private employment after reservation in educational sector.[34]

(2) The Maharastra government recently passed an act for reservation in private sector employment.[35]

(3) Private sector reservation finds an approval in the National Common Minimum Programme of the UPA government, which has even set up a group of ministers to arrive at a workable policy on reservation policy in private sector.[36]

(4) The first step in this regard was taken by theMadhya Pradesh government to provide SCs and STs reservation in government contracts.[37]

IX. CONCLUSION

Reservation for Scheduled Castes and Scheduled Tribes in public sectors has become a constitutional mandate, since the enforcement of our constitution. One segment of our society were trailing behind, their emotions, sentiments were recklessly suppressed, oppressed and depressed by caste hegemony and were not allowed to come to the main-stream of the society, therefore, reservation for S.Cs and S.Ts in private sector has become a practical necessity with diminishing job opportunities in the public sector due to rapid privatization. Further, only small percentages of jobs are available in the organized sector. It is against this backdrop the UPA government under Common Minimum Programme has committed to bring in a legislation in private sector for the S.Cs & STs. But to a utter surprise, the government of India has not brought a single legislation to this effect and put the commitment to the cold storage. We hope the government of India will initiate it again, which will pave the way for a new era of progress and prosperity for our fellow fraternity.

// Om Sarve Bhavantu Sukhinah Sarve Shantu Nir-Aamayaah Sarve Bhadraanni Pashyantu Maa Kashcid-Duhkha-Bhaag-Bhavet, Om Shaantih Shaantih Shaantih //

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34. Mr. R.S. Gawai, 16th April, 2006.

35. Businessline: June 15, 2004

36. In the agenda of the *National Common Minimum Programmee* of the UPA.

37. Bhopal Declaration 2002.

OPPOSITION IN PARLIAMENTARY DEMOCRACY : A CRITIQUE

J. P. RAI*

ABSTRACT : The role of the opposition is that of a security instrument, a safety valve, the second line of defense in a democracy. The opposition also plays the role of a communication medium between the public and the government. If the opposition is put to an end, democracy will end automatically. The existence of a healthy, constitutional, effective opposition is also in the interest of the ruling party itself; an attempt to suppress, destroy or neutralize the opposition is a sign of political stupidity.

KEY WORDS : Democracy, Opposition, Leader of Opposition, Public Interest, Parliamentary Form of Government

I. INTRODUCTION

The real triumph of democracy lies in the fact that it deals with differences and criticism through open, free and value-based discussion.[1] Governments play a pivotal role in society, one which defines the fate of the citizens they govern. A government, therefore, to be called democratic does not need mere structural frame-work and institutions.[2] But the way governments operate is not same; in fact the variation is immense. Governments are like fingers of our hands, just like each finger has its own length and shape; different governments have their different form and functioning.

Government and Opposition are two pillars in any democratic system, in absence of one other can't survive. It follows, therefore, that the culture of democracy rests on the principle of majority rule, coupled with tolerance of dissenting views. The word

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1. J P Suda, *A History of Political Thought*, Jai Prakash Nath and Co., Educational Publishers, Vol.4, Meerut, 1965), p. 457. The need of free discussion was emphasize by Govind Ballabh Pant as: "Since democracy proceeds by free discussion and debate, the laws framed by the elected representatives of the people carry a moral sanction. Democracy cannot function unless those who have framed the law, as those who may differ, are willing to submit to the supremacy of the law. Law in democracy does not derive its sanction from the force which the State has at its command, but from the moral obligation on all those who may differ to abide by the decision which has been arrived at by free discussion."
2. A C Kapur, *Principles of Political Science*, Published by S. Chand and Company Ltd., 14th Revised ed., New Delhi, 1979, p. 292.

"opposition" has been derived from the Latin word "*oppositio*" which means to oppose.[3] In the context of parliamentary democracies, it is generally termed as the 'Shadow Cabinet' or the 'Alternative Cabinet'[4]. The opposition party plays an important role in the democratic system along with the ruling party. Actually, the opposition is complementary to democracy. For the success of parliamentary rule, it is necessary that the legislature controls the government. Proper guidance in political, economic and administrative matters by the ruling party is not possible due to the party system; it requires an organized, strong and capable opposition.

India has accepted democracy and opposition parties have contributed significantly in the development of democracy, in the establishment of parliamentary traditions and in making the governance to people oriented. The role of the Indian opposition in preventing the government from becoming autocratic and as a vigilant watchdog of civil rights is a veritable fact of history. This paper makes an attempt to critically analyse the status, position, rights and duties, responsibilities and accountability of the Opposition in the Indian parliamentary democracy.

II. OPPOSITION: HISTORICAL PERSPECTIVE

The parliamentary system of governance is a modern phenomenon developed in the present form between last two centuries and similarly the parliamentary opposition is also a new ideology. Nevertheless, there were some signs of democratic governance in the States of Greece and Rome, and the system of opposition was visible in the policies, legislatures and practices of governance. For example, in Rome, there was an institution called the Tribunal, which could oppose the decision taken by the government and reject the decision taken by them.[5]

The feudal monarchy of the medieval period also had some signs of opposition in governance. The church and legislature were to limit the king's rights. The separation of the legislature from the executive was also a symptom of opposition in the government. But the opposition was not a separate institution. The medieval English Parliament could oppose the king but did not snatch his executive power[6].

The development of the idea of Parliamentary opposition began after the Great Revolution in 1688, followed by developments in France, who were dissatisfied with the liberal representative body of the then ruler, Louis XVIII.[7] The opposition in the British parliamentary system developed as an institution in 1938, when John Cam Hab, who was the fame of the Radical Statesman, used the term royal opposition.[8] After this, in the 20th century, the practice of forming a Shadow Cabinet by the defeated party came into vogue.

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3. Maurice Diverter, *Political Parties: Their Organization and Activity in the Modern State*, Methuen & Co., London, p. 413.
4. H S Fartyal, *Role of Opposition in the Indian Parliament*, Chaitanya Publishing House, Allahabad, 1971, p. 1.
5. *Ibid*.
6. *Ibid*.
7. C D Kerning, *Marxism Communism and Western Society: A Comparative Encyclopaedia*, Thrift Books, p.158.
8. Duncan Robert Turner, *Shadow Cabinet in British Politics*, Routledge & Keman Books, London 1969, p. 2.

The opposition as a legal institution was structured in 1937 by "The Minister of the Crowns Act" in which the British Parliament arranged for the salary of the leader of the opposition party.[9] The Chairman of the House recognizes the opposition within the House.[10] Statutory recognition was conferred on the Leader of the Opposition in 1905, 1920, 1946 respectively by the Constitutions of Canada, Australia and South Africa, and in 1969, the opposition party and its leader were given statutory recognition in the Lok Sabha for the first time in India.[11] In 1977, legal recognition was granted to the leader of opposition in India by The Salary and Allowances of Leaders of Opposition in Parliament Act, 1977. [12]

III. NEED OF OPPOSITION IN PARLIAMENTARY DEMOCRACY

The most obvious symptom of parliamentary democracy is that of the opposition. Opposition is the life blood of parliamentary democracy. Even a democratic system, in the absence of necessary and effective counterpoise, is likely to lose its essence and can degenerate into dictatorship of one sort or another. Thus the object of having opposition under democracy emanates from the basic concept of limiting power by power[13].

It is easy for any government or ruler to claim that they have been elected by the people in a free election and that they, therefore, enjoy confidence and backing of the masses. But in developing countries, in particular where political consciousness of the masses, the sophisticated ideas of representative democracy and the people's ability to examine, analyse and dissect every policy and all aspects of government's activities are limited, it is easy to take shelter under the cloak of majority and of popular vote. It is just such a government that needs to be carefully watched by the people to ensure that massive majorities are not used by the rulers to destroy their liberties[14].

There are many people, who will not subscribe to the ideology and policies of a particular party and will prefer to have an alternative. This will be available to them only when there is more than one party contesting the elections[15]. The democratic system,

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9. A R Mukharjee, *Parliamentary Procedure in India*, Copycats, Oxford University Press, Calcutta, 1967, p.35. In the House of Commons in Britain, an opposition party that is in a position to form an alternative government is considered a recognized opposition party.
10. Walter Bagehot, *The English Constitution*, Chapman & Hall, London, 1867, p 150.
11. Umesh Kumar Jha, *Opposition Politics in India*, Radha Publication, New Delhi, p. 2.
12. Ch .IX, General Directions, Para 121(1)(c), in Direction by the Speaker, available at http://parliamentofindia.nic.in/is/direct/dirp9.html archived at http://prerana.cc/EE8X-NBJL No criterion is adopted in the Indian Parliament to officially recognize a party as an opposition party. Any union of members in India that proposes to constitute a parliamentary opposition in either of the two Houses of Parliament should fulfill these conditions- 1. It should have a clear ideology and program and it should be a cohesive unit capable of developing in an organized manner. 2. It should have some organization inside Parliament and outside Parliament.3. It should have a minimum member number in Parliament which is required for quorum in Parliament. i.e., its member's number should not be less than the number of quorum required for the meeting of the House. At present, this number is one tenth of the total number of members of each House of Parliament.
13. Maurice Duverger, *Political Parties: Their Organization and Activities in the Modern States*, Methuen & Co., London, 1954, p 413.
14. Sarto Easteves, *Prospects of Indian Democracy*, Meenakshi Prakashan, Meerut, 1976, p.8.
15. *Ibid*, at p 12.

implies an appeal to the people by contending parties supporting different policies.[16] Democratic government thus demands not only a parliamentary majority but also a parliamentary minority[17]. Modern society, if it is free even in a very limited sense requires a medium through which to ventilate its grievances, speaks its mind out; and one of the most important media through which to do so is to have an opposition party on the political plane. Without an opposition party, freedom, in a sense, becomes hollow and meaningless.[18] If there is no opposition, there is no democracy[19].

Thus, the duty of the opposition is to criticise the wrong policies of government and ventilate people's grievances. However, the real function of opposition is mush more complicated. An Opposition must oppose, but not obstruct; It must be constructive, not disruptive. Indeed, in many accounts opposition is understood as a form of collaboration.[20] In fact, opposition and government are carried on alike by agreement. The minority agrees that the majority must govern, and the majority agrees that the minority should criticise. The process of Parliamentary government would break down if these were not mutual forbearance.[21] Thus, while criticising the policies of government, the opposition should adopt a rational approach and extend its cooperation in carrying out those policies which are dictated by national interests and particularly those which involve the principle of continuity of policies.[22]

The function of opposition is not merely to discredit the Government in the eyes of the voters, but also to induce it to modify its policy. The effect of opposition criticism is, therefore, to maintain a close relation between Government policy and public opinion. The opposition must also present the image of a 'credible alternative government'[23]. It should propose alternative programmes and policies differing from those of the party in power. 'It must show its capacity to govern in the parliamentary arena'[24]. Whenever the majority party fails to carry out its policies and programmes, dissatisfaction grows against it and in course of time its government is discredited and it is forced to resign. In any such eventuality, the opposition should be prepared to form an alternative government and save the country from the risk of chaos or disorder[25].

Role of the opposition in a developing society like India has to be different. The weak and divided opposition, though cannot aspire for power, can definitely cause hurdles in the task of economic development and nation-building by adopting obstructionist policies and method. Therefore, it becomes necessary for the opposition to reconcile their role to the "claims of democracy with the needs of economic development and

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16. Ivor Jennings, *Cabinet Government*, Cambridge University Press, London, (Reprint) 1980, p.15.
17. *Ibid*.
18. *Supra* note 14, at p.13.
19. *Supra* note 16, at p.16.
20. G, Sartorial, *Opposition and Control: Problems and Prospects*, in Barker, R.(ed).
21. Ivor Jennings, *Cabinet Government*, Cambridge University Press Cambridge, 1957 p. 167.
22. Ivor Jennings, *Parliament*, Cambridge University Press, Cambridge, 1957, p.173.
23. Anthony H Birch, *The British System of Government*, George Allen & Unwin, London, p 159.
24. Ivor Jennings, *Parliament*, Cambridge University Press, Cambridge, 1957, p.174.
25. H S, Fartyal, *Role of Opposition in the Indian Parliament*, Chaitanya Publishing House, Allahabad, 1971 p.6.

social change"[26], thereby avoiding charges of irresponsibility. In fact, the opposition is compelled by the logic of parliamentary democracy to behave in a responsible way. Thus, a Parliamentary opposition is expected "to act as responsible outlet for criticism, as the incorruptible searcher after scandals needing exposure, the organized expression of legitimate grievances, and to act as a partly formed, trained, responsible team prepared to take over the reigns of Government"[27]. It can perform its role well only if it is alert and vigilant and well-informed about the activities of the ruling party. It must keep continuous political communication with people to keep them well-informed as to what the government has been doing and what are the omissions of the Government[28].

IV. OPPOSITION : COMPARATIVE PERSPECTIVE

Democracy in the world is an acceptable governance system in many countries, but democracy has been accepted in different forms in different countries of the world. [29]

a) United Kingdom

In the United Kingdom (UK),[30] the legitimacy of opposition parties is confirmed by law. The Largest party which does not form the Government becomes the official opposition, which is also known as Her Majesty's Opposition.[31] Under the Ministers of the Crown Act 1975, the Leader of the Opposition is defined as the Leader of that party in the House in opposition to Her Majesty's Government having the greatest numerical strength in the House. The Leader of Opposition does not have many official functions, according to legislation or parliamentary rules. However, he or she, through control of the Opposition Whips[32], plays a large part in deciding, together with the Government, the business arrangements of the House of Commons.

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26. Ashoka Metha, "The Opposition in the New States", *Indian Journal of Political Science*, Vol. XX, No.1, Jan-March ,1959, p 8.
27. Norman Wilding and Laundry, *An Encyclopaedia of Parliament*, Cassel & Co Ltd, London, 1968 p 495.
28. Rajani Kothari, *Politics in India*, Orient Longman Ltd., Delhi, 1970, p 19.
29. Few countries in the world have "collective responsibility" executive under the parliamentary governance system. In these countries the parliament is either unicameral or bicameral like India and Britain, the Parliament is bicameral, but in New Zealand, the Parliament is unicameral. In those countries, which have two houses, Leader of Opposition is recognized in the both Houses. But the leader of the opposition in lower house has more powers in many cases than the leader of opposition in the upper house. Presidential governance has been adopted in many democracies of the world, in these countries the President is privileged in government appointments. Over which Parliament enjoys a limited amount of control. In a democracy of Presidential governance, the Leader of the Opposition has the power only in relation to the proceedings of Parliament. He does not get the rights in respect of Executive appointments.
30. Available at *https://www.parliament.uk/business/commons and http://parliament.uk/lords*
31. The constitutional status of the Opposition is implicitly recognized in the Intelligence Services Act 1994,Section 10, which requires the Prime Minister to consult the Leader of the Opposition before appointing members of the Intelligence and Security Committee constituted by the Act. Available at Colin Turpin, *British Government and the Constitution: Text, Cases and Materials*, 4th ed. London: Butterworths, 1999, p. 435.
32. Whips are officers of each party in Parliament with particular responsibilities for party management and organization of the business of Parliament and its committees.

b) New Zealand

New Zealand is a unitary state with a parliamentary system of government.[33] With the introduction of Mixed Member Proportional system (MMP)[34] in 1996, it is less likely that one party will obtain an absolute majority and be able to govern without forming a Coalition Government with one or more other parties. Despite this change, the distinction between the Government and the Opposition remains very much a constitutional reality in New Zealand.

The leader of the largest non-Government party is the Leader of the Opposition. It is not an office created by statute; it is a product of the conventions of the parliamentary system. The Leader of the Opposition is recognized in the Standing Orders[35] and is entitled to make the first speech in reply to important Government legislation or speeches in the House by the Prime Minister.

c) United States

In federal United States (US), having a presidential system, the main opposition i.e. the second largest party is referred to as the minority party.[36] The leader of the main opposition party in both the House and the Senate is called the Minority Leader. Under the Rules of the House of Representatives[37], the House Minority Leader has certain roles and responsibilities.[38]

d) Canada

Canada is the first country in the world to legally recognize the Leader of the Opposition in 1905[39]. The Opposition Leader is accorded certain rights and privileges, including the right to a seat on the Board of Internal Economy,[40] the right to a seat in the front row of the Chamber directly across the floor from the Prime Minister, and the right to unlimited time to participate in debates.[41]

e) India

The official opposition is recognized by Chairman of the Council of States or Speaker of the House of People. Leader of opposition in relation to either House of the Parliament,

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33. It has a unicameral legislature- the House of Representatives. New Zealand is part of the British Commonwealth and the Queen, who is the head of the state, is represented in New Zealand by the Governor General.

34. "Systems of Government in Some Foreign Countries: New Zealand," Research and Library Services Division, Legislative Council Secretariat, April 2000 and Jonathan Boston et al. (eds.), Electoral and Constitutional Change in New Zealand: An MMP Source Book, Palmerston: Dunmore Press, 1999.

35. Available at https://www.legco.gov.hk/yr02-03/english/sec/library/0203rp01e.pdf

36. The legitimacy of the minority party is confirmed by congressional practices and political culture.

37. Available at *http://www.house.gov/rules/house_rules_text.htm.*

38. Walter J Oleszek, "*The Role of the House Minority Leader: An Overview",* CRS Report, RL30666, September 2000.

39. *An Act to amend the Act respecting the Senate and House of Commons,* SC 1905, c 43, s 2 (now the *Parliament of Canada Act*, 2003, s 62.(1)(g)). Canada was the first of the Commonwealth Parliaments to fund the office of Leader of the Opposition.

40. Section 50(2), The Parliament of Canada Act, 2003

41. Available at https://www.ourcommons.ca/about/procedureandpractice3rdedition/ch_01_2-e.html

means that member who is for the time being, leader in that House of the party in opposition to the government having the greatest numerical strength and recognized as such by the concerned presiding officer of the respective house.[42]

There was no provision in the original Constitution of India regarding the Leader of the Opposition although in Article 86 of the original draft of the Indian Constitution, Mr H S Lari proposed an amendments that "the leader of the opposition shall be entitled to get salary payable to a Minister without cabinet rank",[43] but was rejected.

V. ROLE AND TECHNIQUES OF OPPOSITION : INDIAN PERSPECTIVE

The forum of Parliament provides the opposition with the instrument to keep the Government on its mettle. Since the primary purpose of opposition is not to justify, but to criticise, it enjoys a greater freedom of debate and initiatives.[44] It initiates discussion on issues that agitates the popular mind and tries to score points over the Government. Parliamentary debate is, however, only one of the instruments of opposition. The opposition is a party outside the Parliament also. Within a parliamentary system, it has a complete series of central and local organizations all engaged in propaganda. In a federal parliamentary set up, the intermediary level, where the opposition operates with its well oiled organizational structure, is state/ provincial level.

An organized opposition makes the use of various parliamentary methods such as asking questions[45], raising urgent matters of public

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42. Section 2, The Salary and Allowances of Leaders of Opposition in Parliament, 1977.

43. Available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/8/1949-06-13. Mr. HS Lari wanted a strong opposition to be formed in India, which along with the government would contribute significantly to the development of democracy. He gave the following reasons behind giving legal recognition to the Leader of Opposition in India, viz; *First,* it is necessary to promote parliamentary opposition which along with the rule of law and a strong press constitutes the bulwark of democracy. *Second,* Statutory recognition to the institution of parliamentary opposition, which unfortunately has come to be regarded in certain circles as tantamount to sedition, and there by dispel a misconception. *Third,* to create condition in which a dead chamber may revive into a lively legislature. *Fourth,* to complete the edifice of parliamentary democracy which is being transplanted from the surroundings of England to Indian environment.

44. Ivor Jennings, *Parliament*, Cambridge University Press, Cambridge, 1957, p.177.

45. The art of questioning is part of the technique of opposition. Though the purpose of asking questions is to seek information; in actual practice the question hour is used by the opposition as a means of embarrassing the Government. Sometimes, a question is the only means of securing redress of an individual grievance which a member has already put before the appropriate minister without securing satisfaction. Grievance redressal has been one of the most traditional functions of the Parliament in the Anglo-Saxon tradition. Whatever may be the purpose of the member, the power to ask a question is very important indeed. It compels the departments to be circumspect in all their actions; it prevents those petty injustices which are so commonly associated with bureaucracies. It compels the administrator to pay attention to the individual grievance. It keeps the whole administration on alert. They often serve as pegs on which to hang an insidious supplementary. It is common knowledge that the answers to questions on the paper are prepared by civil servants. Supplementary questions, however, may be put on the spur of the moment, and, though, there may be a civil servant in the 'box' and a parliamentary private secretary in attendance ready to act as a channel of communication between the 'box' and the front 'bench', ministers usually have to answer supplementary questions out of their heads. Moreover, the added advantage if, that supplementary need not be asked by the original questioner,

importance[46] through adjournment motions[47], calling attention motion[48] and no-confidence motion[49] etc. to compel the government to admit its mistakes and adopt appropriate remedies.

Often, a question produces a barrage of supplementary by different members, thus, putting the government on the defensive. While asking supplementary, the member start with the assumption that the minister knows nothing about the subject and even if he does, he can probably be persuaded to say more than he intends to. The opposition members try their best to trap the minister into any unwary admission of facts or an assurance to take action. The parliamentary skill of a minister is hard put to test and sometimes leads to tumultuous atmosphere and to the extent to which he has a mastery of facts combined with a capacity to score, heavily with a witty remark, he may make or mar his Ministerial career. By all accounts this is the time which ministers fear most for they can be hauled up for any wrong or unsubstantiated statement made on the heat of the moment. Thus, questions and supplementary questions are important techniques through which the opposition tries to expose the omissions and commissions of government and seeks redressaJ of individual and public grievances. Available at Ivor Jennings, *Parliament*, Cambridge University Press, Cambridge, 1957.

46. Subhash C Kashyap, *Our Parliament*, National Book Trust, India, New Delhi, 1989, p.95. For raising urgent matters of public importance requiring immediate attention of the government and Parliament, several additional procedural devices are available to a Member of Parliament and the Opposition is expected to take full advantage of these devices. These include: Adjournment Motions, call Attention Notices, Short Duration Discussions etc. Similarly, Opposition can move various Motions and Resolutions to initiate discussions on matters of public interest and draw the attention of the House and the government.

47. Akmal K, Parvatiy, "The Role of Opposition in India", *Journal on Constitutional and Parliamentary Studies*, Vol. X, No. 4, 1976, p.448. The 'Adjournment Motion' is an extraordinary procedure which, if admitted, leads to setting aside the normal business of the House for discussing a 'definite matter of urgent public importance'. If the motion is passed it amounts to censuring the government. Though it does not amount to voting the government out of office, it goes to show that a government which has failed to prevent an adverse vote on adjournment motion, will not be able to survive a direct 'motion of No Confidence' in the Council of Ministers. By custom permission is rarely granted for the discussion of a matter through an adjournment motion. However, notices of adjournment motion, even when disallowed, enable the opposition to get certain issues clarified by the government in its explanatory statements to the House. The censure implied in the adjournment motions tabled may have a cumulative effect resulting in withdrawal of confidence in the ministry. Thus, adjournment motions raise special grievances and get them redressed.

48. Subhash C Kashyap, *Our Parliament*, National Book Trust, India, New Delhi, 1989, p.98 &p.100. The provision of calling attention notices, an Indian innovation in the modern parliamentary procedure, is yet another device in the hands of opposition to raise an important, urgent issue. Since the procedure of bringing an adjournment motion was in the nature of a censure motion against government, its was restricted in its scope. It was, therefore, considered that some precise procedure might be devised whereby members might have an opportunity of bringing urgent matters to the attention of the government. And so the provision for the 'Calling attention notice' was first made in the year 1954. It combines the asking of a question for answer with supplementary and short comments in which all points of view are expressed concisely and precisely. It gives opportunity to opposition to criticise the government, directly or indirectly, and to bring to the surface the failure or inadequate action of government in an important matter. The opposition can also utilise the provision of raising a discussions for short duration to bring to the notice of the House matters of urgent public importance. The member who raises the discussion has no right to reply. There is no formal motion nor is there any vote. The purpose of discussion is that members are in possession of some facts about the matter, should apprise the House of the same and the Minister clarifies the position for the benefit of the House and the nation.

49. The opposition can express a lack of confidence in the Government by moving a 'no-confidence' motion against it, and, if the motion is passed, the government is constitutionally bound. Though such a motion can hardly succeed unless there is a deep dissension and conflict within the

Besides these well-accepted parliamentary techniques and procedures, the opposition can also adopts other strategies of obstruction, walk-outs, dharana etc. In a situation where the government constantly refuses to give due regards to the opposition viewpoints, the opposition can feel justified in resorting to these drastic methods of protests. The frequent use of these methods are, however, not considered to be legitimate or in the interest of a healthy Parliamentary democracy. In fact, in most of the developing countries, where the opposition is weak and divided and has little prospect of coming to power, it has shown little regard for parliamentary procedures and etiquettes.

In parliamentary democracy, a stable and capable opposition is as necessary and important as a stable and capable government. The role of the opposing party in Parliament is constructive and multi-faceted. Opposition function in Parliament is not just to criticize and oppose. In fact, the opposition also gets the right to protest and criticize on the basis of the belief and assurance that when it gets an opportunity, it will show something better than the ruling party. The existence of a capable opposition can be an assurance not only against the autocratic rule of a dictator, but also from the brutal rule of the staunch majority to save the country.

Nevertheless, the role of Leader of Opposition is important in many parliamentary committees and other proceedings. The power to summon a House of Parliament is vested in the President but the decision is taken in confidence of Leader of Opposition.[50] Similarly, the debate on the President's speech[51], which is held in the House on a motion of thanks to the President for his speech,[52] shows the importance of the Leader of opposition. Even more, when the Prime Minister loses the majority in the Lok Sabha or if the majority is against him, then the President is not obliged to accept the advice of the Prime Minister to dissolve Lok Sabha and the President should attempt to form an alternative government and may give an opportunity to the Leader of Opposition to form the Government.[53]

A member of the opposition acts as Chairman of Public Accounts Committee[54]. The

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ruling party; yet it provides an occasion when the entire policy of the government or a part of it, comes under fire. The opposition tries its best to expose and attack the failure of the government on various fronts.

50. Article, 85(1), The Constitution of India. In actual practice, however, the decision to convent a House is taken by its Leader in consultation with his cabinet colleges, the speaker and probably the leader of the opposition groups. M P Jain, *Indian Constitutional Law*, Lexis Nexis,, 2015, Gurgaon, p. 52.

51. Article, 87(1), The Constitution of India.

52. Rule 21 & 22, Rules of Procedure and Conduct of Business in the Lok Sabha, 15th edition, 2014, Lok Sabha Secretariat, New Delhi and Rule 14 & 15, Ruled of Procedure and Conduct of Business in the Council of States (Rajya Sabha), 9th Edition, 2016, Rajya Sabha Secretariat, New Delhi. Amendments can be moved to this motion. The motion of thanks is regarded as a no confidence in the government. If the motion is defeated or amended, in spite of the Government's opposition, it may be regarded as a vote of no confidence in the council of Ministers resulting in its resignation.

53. *S R Bommai* v.*UOI* (AIR 1994 SC 1918)*; Bijayananda Patni* v. *President of India (*AIR 1974 Ori. 52*)*

54. The Public Accounts Committee in India is a close replica of British model.55 It consists of fifteen members elected by Lok Sabha every year from amongst its members. A Minister cannot be its member. Seven members of Rajya Sabha are also associated with the committee (Rule 308 & 309, Rules of Procedure and Conduct of Business in Lok Sabha, 15th Edition, 2014, Lok Sabha Secretariat, New Delhi.).

committee examines the accounts showing the appropriation of the sums granted by Parliament for government's expenditure. The committee also examines the account of the government corporations and autonomous and semi-autonomous bodies.

In the matter of appointment, of Lokpal,[55] Central Vigilance Commissioner and Vigilance Commissioners,[56] Central Information Commissioner and Information Commissioners[57], Chairman and members of the National Human Rights Commission[58], Director and members of CBI[59], the Leader of Opposition is member in the recommending[60] committee to the appointing authority. The Leader of Opposition, in Lok Sabha is the ex-officio Trustee of the Jallianwala Bagh Memorial Trust.[61]

The effective functioning of a parliamentary opposition depends on strict adherence to basic principles and the application of well-known techniques adopted to given situations as they arise from time to time. To get deeply involved in parliamentary techniques without respecting the basic principles of parliamentary opposition is putting the cart before the horse. These basic principles are Unity of Policy[62], Effective

55. Under Section 4 of the Lokpal And Lokayuktas Act, 2013, Lokpal is appointed by the President on the recommendation of a Selection Committee consisting of the Leader of Opposition in the House of the People as member. In the case of *Mr. Justice Chandra Shekaraiah* v. *Janekere C. Krishna*, judgment dated January 11, 2013, SLP No 15658-15660/2012, by Supreme Court of India the Court held that the duty to consult is so integrated with the exercise of the power that it can be done only in consultation with the two consultants. Consultation though does not mean concurrence or consent; it is not an empty formality, as envisaged under the provision. No doubt, the final decision is with the Consular (i.e. the Governor) but before he reaches a decision accepting one name and rejecting other names floated for the purpose, there should be a real, full and effective consultation amongst himself, the Chief Justice and the Leader of the Opposition.

56. Section 4, The Central Vigilance Commission Act, 2003.

57. Section 12(3), The Right to Information Act, 2005.

58. Section 4, The Protection of Human Rights Act, 1993.

59. Section 4(A), The Delhi Special Police Establishment Act, 1946.

60. In the case of *People's Union for Civil Liberties* v. *Union of India,* (2005) 2 SCC 436, Supreme Court held that requirement of Section 4 is not of "consultation" but of recommendation by the Committee, after taking into consideration all relevant factors, eschewing irrelevant ones. Undoubtedly, for meaningful and purposeful recommendation, there ought to be complete disclosure of relevant factors, considering that appointment is being recommended for a highly expert body in relation to protection of human rights.

61. Section 2(1)(d), The Jallianwala Bagh National Memorial Act, 1951.

62. Harold J, Laski, *Parliamentary Government in England*, Allen and Unwin, London, 1938, p.176. A Parliamentary opposition must reflect unity in thought and action. Divisions on policy within the opposition, if they are on points of major importance, so weaken its striking power as to prevent it from seizing the initiative when the moment comes for its seizure. A bad government cannot only live for a long time when the ranks of its opponents are divided; it may even win an election by default. For if the opposition is not agreed upon the positive policy it presents to the electorate, the chances are overwhelmingly that the country will not understand the case is trying to make. A Government, in these circumstances, may well be returned to power because the electorate cannot be persuaded that the victory of its rivals implies the ability to use their majority successfully.

Leadership[63], Proper Selection of Issues[64] and Initiative.[65] The effective parliamentary opposition demands that the opposition must be strong, united and ideologically cohesive group; vigilant and well-informed and led by a charismatic leader, a leader who has wide appeal among the masses. It should have the ability to take the offensive whenever necessary to do so and should avail every opportunity of attacking the weak spots of governmental policies. The opposition must present the enemy a solid front. It must also be ready to provide alternatives in terms of policies, programmes and even shouldering the responsibility of taking over the regime of administration.

VI. CONCLUSION

Democracy is the basic structure of the Indian Constitution. A strong opposition to monitor and control the actions of the government is essential in a democracy. It should be the duty of both the ruling party and the opposition to maintain the values and influence of democratic institutions. The job of the opposition is to play the role of the watchdog of democracy and see that the Parliament and the government follow the right path and pay attention to the public interest and the problems of the nation.

The Leader of the Opposition is the Leader of the Opposition in and outside Parliament. The Leader of the Opposition is the person behind whom the entire opposition remains united and organized; hence the Leader Opposition has been given legal recognition in many countries of the world. It is when the Leader of the Opposition in India is also strengthened and it should be included in some important executive works.

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63. *Ibid.* p. 175. An effective leadership is an essential imperative for projecting a bright image of the opposition in the minds of the electorate. Without effective generalship, the opposition case goes by default. The effective work of criticising the Government fails to be done without an effective, inspiring leader. The ears of the country do not listen to the proceedings of the House, and the educative force of its debates is lost without the forceful voice of the leader who speaks.

64. Ivor Jennings, *The Queen's Government*, Penguin Book, 1954, p. 88. The Opposition leadership must, therefore, keep in constant touch with the electorate and with the party organization outside the legislature at all levels in order to be able to feel the pulse of the electorate and take up such issues as would be of topical interest and have a mass appeal.

65. The offensive initiative is more important for the Opposition than for the Government, because while the normal functioning of the Government is sufficient to bring it a reasonable amount of publicity and respect, the Opposition can never hope to become effective unless it takes the offensive whenever an opportunity for doing so presents itself.

ARTISTIC WORK AND THE COPYRIGHT-DESIGN OVERLAP : INDIAN CONTEXT

RAJNISH KUMAR SINGH*

ABSTRACT : Artistic work is a subject matter of the Copyright Act, 1957, it also forms the basis for a design and thus may come close to the protected subject matter under the Design Act, 2000. It is this interface which needs to be examined as the issue attracts attention of stakeholders. The significant difference between the terms of protection under the two laws may make it lucrative for the owners of design based on some artistic drawings to claim protection under Copyright law in addition to Design Act. The issue whether such dual protection is acceptable in the light of provisions of the two laws forms the subject matter of the present paper. The paper shall evaluate the observations of various courts to see if consistency has evolved. The paper also brings to fore the issue of moral rights and the effect of moral rights on any attempt to evolve harmonization of laws.

KEY WORDS : Artistic work, Design, Harmonization of Copyright and Design, Dual Protection, Moral Rights.

I. ARTISTIC WORK UNDER COPYRIGHT LAW

"Artistic work"[1] means - (i) a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possesses artistic quality; (ii) a work of architecture; and (iii) any other work of artistic craftsmanship. A drawing (including a diagram, map, chart or plan) is covered by the definition of artistic work Section 2 (c) (i) and accordingly if it is original it is entitled to copyright protection as an artistic work irrespective of its artistic quality. A drawing is not defined under the Copyright Act except as stated above. It will therefore, mean any kind of drawing including mechanical or engineering.[2]

Copyright is a bundle of rights including, *inter alia,* rights of reproduction, communication to the public, adaptation and translation of the work. The precondition for granting protection is originality of the work. The qualified monopoly afforded to the copyright owner of artistic works includes the exclusive rights to make reproductions or

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1. *The Copyright Act, 1957,* Section 2(c).

2. *Copyright Manual on Registration of Artistic Works and Incidental Issues*, at 18, available at: *http://copyright.gov.in/Documents Public_Notice_ inviting_reviews_and_comments_of_ stakeholders_on_ draft_guidelines/Artistic_Works.pdf*

adaptations of such works. 'Reproduction' in relation to an artistic work is defined to include a version produced by converting the work into three-dimensional form, or, if it is in three-dimensions, by converting it to two-dimensional form.[3] 'Adaptation' in relation to an artistic work is defined to include a transformation of the work in such a manner that its original substantial features remain recognizable.[4] Making a reproduction of something which is itself a reproduction of a copyrighted work also constitutes reproducing that copyrighted work, *albeit* indirectly.[5] From the above it is clear that the potential existed for the law of copyright to make immense inroads into the arena of industrial design protection.[6]

The copyright in an artistic work is infringed, *inter alia*, by reproducing, directly or indirectly, or adapting that artistic work in a two-dimensional or three-dimensional form. Such artistic work can be a design drawing or the prototype of an industrial article. Infringement occurs when reproduction or adaptation takes place in relation not only to the work as a whole but also in relation to any substantial part of it. In other words, making a copy of an industrial product which is derived either from an original drawing or an original prototype can constitute infringement of the copyright in the underlying work if such copy is made without the consent of the copyright owner.

II. INDUSTRIAL DESIGN

The Designs Act, 2000 recognizes two types of design: aesthetic and functional. The primary objective of the law is the protection of Designs. "Design" means only the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device, and does not include any trade mark as defined in clause (v) of sub-section (1) of section 2 of *the Trade and Merchandise Marks Act*, 1958 or property mark as defined in section 479 of *the Indian Penal Code* or any artistic work as defined in clause (c) of section 2 of the Copyright Act, 1957.[7]

The earlier law, *viz*. *the Designs Act*, 1911, on the other hand, defined a 'design' in the following terms: design means only the features of shape configuration patterns or ornament applied to any article by any industrial process or means whether manual mechanical or chemical separate or combined which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction

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3. *The Copyright Act, 1957*, section 14(c) (i) to reproduce the work-in any material form including- (a) the storing of it in any medium by electronic or other means; or (b) depiction in three-dimensions of a two-dimensional work; or (c) depiction in two-dimensions of a three-dimensional work.
4. *The Copyright Act*, 1957, Section 14(c)(v) read with Section 2(a)(ii).
5. Owen H. Dean, "*The Interplay between Copyright and Design Protection*", 6 *S. Afr. Mercantile L.J.*, 1994, at 199.
6. David P. Grinlinton, *"Industrial Design and Copyright- Recent Developments*", *4 Auckland U. L. Rev.*1983, at 401.
7. *The Design Act*, 2000, Section 2(d).

or anything which is in substance a mere mechanical device and does not include any trade mark as defined in clause (v) of sub-section (1) of section 2 of *the Trade and Merchandise Marks Act* 1958 or property marks as defined in section 479 of the Indian Penal Code. What is to be noted immediately is that unlike the definition in *the Designs Act,* 1911, the present definition in the Act of 2000 specifically excludes any artistic work as defined in Section 2(c) of the Copyright Act, 1957.

To qualify for registration a design must be new and original.[8] It would appear that this definition further restricts what is registerable under this Act. In *Amp Inc*. v. *Utilux Pty Ltd*.[9]Lord Reid said: .. the words "judged solely by the eye" must be intended to exclude cases where a customer might choose an article of that shape not because of its appearance but because he thought that the shape made it more useful to him. The emphasis of design protection under the Designs Act is the antithesis of functionality and demonstrates why proprietors of designs have sought protection instead under *the Copyright Act*.[10]

The requirement of design being applied to an article through a process is important. An 'article' is a manufactured object and may be of any substance – artificial or a mixture of artificial and natural–and include any part that is capable of being made and sold separately. Design refers to any pattern or ornament 'applied' to such article. In relation to the expression 'applied to an article' it is believed that conventionally, and on a normal reading, the terms 'pattern' and 'ornament' refer to external and mostly decorative elements applied to an article. the expressions are used for two as opposed to three dimensions.[11]

The Act contains provisions for registration of design and provides for copyright in registered designs. Chapter 3 contains provisions concerning copyright in registered design. Section 11 of the chapter is in the following terms:

"Copyright on registration - (1) when a design is registered, the registered proprietor of the design shall, subject to the provisions of this Act, (2) have copyright in the design during ten years from the date of registration. If, before the expiration of the said ten years, application for the extension of the period of copyright is made to the Controller in the prescribed manner, the Controller shall, on payment of the prescribed fee, extend the period of copyright for a second period of five years from the expiration of the original period of ten years."

Thus, the most important aspect is that a design is applied to any article for its pattern, shape, or configuration. So a design relates to the outward appearance of an article which must be an article of manufacture and intended to be multiplied by an industrial process.

There is a discernible difference between the inventive, functional products and

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8. *Id.*, Section 4. A design which (a) is not new or original; or b) has been disclosed to the public anywhere in India or in any other country by publication in tangible form or by use or in any other way prior to the filing date, or where applicable, the priority date of the application for registration; or (c) is not significantly distinguishable from known designs or combination of known designs; or (d) comprises or contains scandalous or obscene matter shall not be registered

9. [1972] R.P.C. 103.

10. David P. Grinlinton, *supra* n. 6, at 400.

11. Garnet Kevin, Davies Gillian and Harbottle Gwilym (ed.) *Copinger and Skone James on Copyright* (Thompson Reuters Ltd., 2011) para.13-289.

processes which fall into the ambit of patents on the one hand; and creative, artistic copyright works on the other. However, many products which are neither inventive nor constitute copyright works are marketed with features that have an artistic, aesthetic or functional value. It is these features, either of the appearance or arrangement of a commercially exploited article, which is the subject of design rights. Design rights occupy the gap in protection which would otherwise fall between patents and copyright.[12]

III. POSSIBLE DUAL PROTECTION FOR DESIGN

Since beginning the law as it has developed at international level has treated literary and artistic property rights differently from the industrial property rights. The division is embodied in the "Great Conventions" of IP: The Berne Convention and the Paris Convention. The literary and artistic property rights segment is primarily associated with copyright protection under the Berne Convention,[13] while, the industrial property segment is embodied in the Paris Convention, which enumerates the objects of industrial property.[14]In the spectrum of IP landscape design protection assumes a distinct position because of the fact that the subject matter of design protection leads to overlap of copyright law and design protection law. It presents challenge because it has the potential to blur the above distinction between the subject matter of Berne and Paris Conventions.

In the 1954 case of *Mazer* v. *Stein*[15] it was observed that "Neither the Copyright Statute nor any other says that because a thing is patentable it may not be copyrighted. We should not so hold." The contention that useful articles were beyond the limits of copyright was formally put to rest: "The dichotomy of protection for the aesthetic is not beauty and utility but art for the copyright and the invention of original and ornamental design for design patents. We find nothing in the copyright statute to support the argument that the intended use or use in industry of an article eligible for copyright bars or invalidates its registration. We do not read such a limitation into the copyright law." The observation indicates a possibility of dual protection to industrial designs, both under designs law and copyright law.

It is thus apparent that definitions of artistic work in Copyright Act and industrial design in Designs Act indicate that theoretically it is possible to protect a design under both the laws. There are arguments both for and against dual protection. The principal

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12. Colston Catherine & Middleton Kirsty, *"Modern Intellectual Property Law*" cited from Manasvini Raj, *"Flashing Badges and Design- Copyright: A Case Comment*", 22 *Nat'l L. Sch. India Rev.*, 2010, pp.199-200.

13. Features of copyright protection include automatic and mandatory protection, and the idea-expression dichotomy. Copyright protection is granted to the works entitled to it, as determined by national laws, via a "generous but relatively soft form of protection against copying only that lasts a long period of time." Jennifer E. Laygo, "The Nexus between Creativity and Innovation: A Comparative Approach to Copyright and Industrial Design Protection", 62*Ateneo L.J.*, 2018, pp.1281-82.

14. Industrial property includes "patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition." Industrial property is often associated with the patent paradigm and its variants, which normally have stringent requirements for eligibility of protection and relatively shorter periods of protection as opposed to the copyright paradigm. Jennifer E. Laygo, *Ibid.*

15. 347 U.S. 201 (1954).

argument in favour, is that the creator of an artistic work should be allowed to make the maximum use he can of the work without undergoing a loss of copyright protection if his work is taken into the industrial area. The first argument against dual protection is that the Designs Act affords a monopoly protection which not only enables the designer to prevent others copying his creation, but also enables him to prevent a person who independently produces the same invention from making use of it during the monopoly period; thus it is considered unfair to allow a "designer" with monopoly rights for 15 years to have copyright protection at the same time, and on the expiration of the design protection period, a further period of copyright protection which could in an extreme case last for one hundred years.[16]

Traditionally, many countries have protected industrial design under the laws of copyright, approaching such objects as though they were creative works like paintings, sculptures and other forms of two-dimensional and three-dimensional visual arts. In the United States, while copyright law has never embraced industrial design, it has not totally rejected it either. Instead, the relationship between copyright and design has been ambiguous, often incomprehensible, and subject to seemingly endless analysis and interpretation. This confusion extends to the current Copyright Act, under which the design of a "useful article" -arguably any item with a utilitarian function-may be copyrightable as a "pictorial, graphic, or sculptural work," but only to the extent that the article possesses artistic features that can be separated from its utilitarian elements.[17]

In Canada, the visual aspects of industrial products may be protected under two different regimes, industrial designs and copyright. Though both regimes can be used to obtain a monopoly over the trading of products bearing specific aesthetic characteristics, the overlap is subject to strict rules and exceptions. Industrial design protection extends to the aesthetic aspects of a product: its shape, configuration, pattern or ornament. These features must be judged solely by the eye, and any aspect of the design that is solely dictated by function will not be protectable by industrial design.[18] It is important to note that it a useful article is reproduced more than 50 times, it will not be copyright infringement for a third party to copy the article.[19]

IV. COMMON AREAS OF PROTECTION : ANALYSIS IN INDIAN CONTEXT

Section 15 of the Copyright Act is a special provision regarding copyright in designs which are registered or are capable of being registered under *the Designs Act*, 2000. It states that :

(1) Copyright shall not subsist under this Act in any design which is registered under the Designs Act, 2000.

(2) Copyright in any design, which is capable of being registered under the Designs

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16. Sheila McGregor, "Copyright/Design Overla - *Ogden Industries Pty. Ltd. and Others* v.*Kis (Australia) Pty. Ltd.*", 10 *Sydney L. Rev.,* 1984, pp.419-20.

17. Eric Setliff, "*Copyright and Industrial Design: An Alternative Design Alternative*", 30 *Colum. J.L. & Arts*, 2006, at 50.

18. Christopher Carani, *"How do Design and Copyright Interact*", 225 *Managing Intell. Prop.*,2012-2013, at 51.

19. *Ibid*.

> Act but which has not been so registered, shall cease as soon as any article to which the design has been applied has been reproduced more than fifty times by an industrial process by the owner of the copyright or, with his license, by any other person.

Industrial production, hence should be taken as the moment when the copyright owner takes his work out of the purely artistic genre and into the industrial, thus losing his copyright.[20] Whereas a "design" implies "features of shape, configuration, pattern, ornament or composition of lines or colours" applied to any article, an "artistic work" includes a drawing, which includes a diagram or plan as also any work of artistic craftsmanship. The features of shape, configuration, etc. can always be reduced to a drawing including a diagram or plan, whereas such drawing can *vice versa* be used to create such features of shape, configuration, etc. But for that reason, designs and artistic works (in drawings) are not interchangeable concepts. They are still different. When an artist creates a sculpture, he applies features of shape, configuration, etc. to his material, but it is obvious that he is not thereby creating a 'design', but an 'artistic work'. So also, when a designer makes a diagram or a plan for creating a refrigerator or a mixer or better still, a textile, he is not creating an 'artistic work' but a 'design', though the drawing or diagram or plan can technically be subsumed under the definition of 'artistic work'. Thus, what is clear is that to avoid a potential conflict between what is a design and what is an artistic work, we need to draw lines to distinguish between the two by considering the interplay of the relevant provisions of the two Acts.[21]

One of the keys to finding an answer is in the definitions of 'artistic work' and 'design' respectively under the Copyright Act, 1957 and Designs Act, 2000. As mentioned before an 'artistic work' is the drawing itself and the copyright of the artist consists in its reproduction in any medium and in any dimensions, whether two- dimensions or three dimensions. On the other hand, the features of shape, configuration, etc., which are elements of a design, are "applied to any article".

When a sculpture of an artist is cast in a certain material, the artist is not applying the features of its shape, configuration, etc. to the material, but reproducing the very sculpture in a three-dimensional form. When, we copy a painting, whether in hand or by print, we are not applying the features of shape, configuration, etc. to the canvas or the paper, but reproducing the very painting which is the copyrighted work of the artist. The sculpture or the painting is an artistic work; even though it may not have any artistic qualify. This is distinctly different from applying the features of shape, configuration, etc. to, say, a refrigerator or a mixer or even applying a pattern to a textile. A refrigerator, a mixer or a textile piece are articles to which these features or patterns are applied. These features or patterns, though they are contained in drawings, diagrams or plans and though they may have artistic quality, are 'designs'. Such designs, when registered under the Designs Act, 2000, give a copyright to the registered proprietor during ten years following their registration, extendable by further five years. That is under Section11 of the Designs Act, 2000. When they are not so registered, but since they are capable of

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20. Garnet Kevin, *supra* n. 11.

21. *Pranda Jewelry Pvt. Ltd. AndOrsv.Aarya 24K and Ors*, available at: *https://indiankanoon.org/doc/196384280/*para 11.

being registered as designs, they enjoy copyright for fiftyone applications. After they are applied more than fifty times, the copyright in them is lost. That is under Section 15 of the Copyright Act, 1957.[22]

In *Microfibres Inc.* v. *Girdhar& Co. &Anr*[23], the Delhi High Court summed up the position of law in following words:

a) The artistic work may or may not have visual appeal.

b) The rights to which a holder of an original artistic work is entitled are enumerated in Section 14(c) of the Copyright act.

c) It is the exclusive right of the holder of a Copyright in an original artistic work to reproduce the work in any material form. For example, a drawing of an imaginary futuristic automobile, which is an original artistic work, may be reproduced in the three-dimensional material form using an element, such as a metal sheet.

d) The design protection in case of registered works under the Designs Act cannot be extended to include the copyright protection to the works which were industrially produced.

e) A perusal of *the Copyright Act* and *the Designs Act* and indeed the Preamble and the Statement of Objects and Reasons of the Designs Act makes it clear that the legislative intent was to grant a higher protection to pure original artistic works such as paintings, sculptures etc. and lesser protection to design activity which is commercial in nature. The legislative intent is, thus, clear that the protection accorded to a work which is commercial in nature is lesser than and not to be equated with the protection granted to a work of pure art.

f) The original paintings/artistic works which may be used to industrially produce the designed article would continue to fall within the meaning of the artistic work defined under Section 2(c) of the Copyright Act, 1957 and would be entitled to the full period of copyright protection as evident from the definition of the design under Section 2(d) of the Designs Act. However, the intention of producing the artistic work is not relevant.

g) This is precisely why the legislature not only limited the protection by mandating that the copyright shall cease under the Copyright Act in a registered design but in addition, also deprived copyright protection to designs capable of being registered under the Designs Act, but not so registered, as soon as the concerned design had been applied more than 50 times by industrial process by the owner of the copyright or his licensee.

h) In the original work of art, copyright would exist and the author/holder would continue enjoying the longer protection granted under the Copyright Act in respect of the original artistic work *per se*.

i) If the design is registered under *the Designs Act*, the Design would lose its copyright protection under *the Copyright Act*. If it is a design registrable under *the Designs Act* but has not so been registered, the Design would continue to enjoy copyright protection under the Act so long as the threshold limit of its application on an article

22. *Id.*,para 12.

23. 2009 (40) PTC 519 (Del.).

by an industrial process for more than 50 times is reached. But once that limit is crossed, it would lose its copyright protection under the Copyright Act. This interpretation would *harmonize the Copyright and the Designs Act* in accordance with the legislative intent.

The court has also observed that the interpretation as is canvassed on behalf of the plaintiff in the present case, and which is also canvassed in that case of entitlement of protection under *the Indian Copyright Act* even if the design is not registered under *the Designs Act*, would lead to a design under *the Designs Act* being given protection of copyright even under the Indian Copyright Act as an original artistic work resulting in rights being enforced simultaneously under *the Indian Copyright Act* and *the Designs Act* which was not the intention of the legislature. In para 43 of the judgment, the Division Bench has clearly observed that an interpretation to give protection under *the Indian Copyright Act* although the drawing, sketch or design is to be registered under the Designs Act would result in *the Designs Act* being redundant because every design for its origin would have an intermediate product such as engraving or mould or diagram.

In *Ritika Private Limited* v. *Biba Apparels Private Limited*[24], the Delhi High Court relied on Microfiber's case and observed that:

> 'If the facts were that from the copyrighted works of the plaintiff prints were created and such prints which have protection under the copyright work are as it is lifted and printed upon the dresses of the defendant, may be in such a case without saying so finally on this aspect, an issue of violation of the copyright of the work of the plaintiff under Indian Copyright Act may have arisen. However, in the facts of the present case the defendant is creating dresses or creating articles by an industrial means and process by application of the design or drawing or sketch and the defendant is not as it is affixing a print taken from the copyrighted work of the plaintiff as a print on a dress created by the defendant. Issue in the present case therefore will not be a violation of a copyright of the plaintiff under the Indian Copyright Act.'

In *Pranda Jewelry Pvt. Ltd. AndOrs* v.*Aarya 24K and Ors*,[25] the Bombay High Court observed thus:

> 'An 'artistic work' so long as it can qualify as an artistic work reproduced in any form shall continue to enjoy the copyright available to it under the Copyright Act, 1957. But when it is used as the basis for designing an article by its application by an industrial process or means, meaning thereby an article other than the artistic work itself in a two or three dimensional form, it would enjoy a lesser period of protection of copyright under Section 11 of *the Designs Act,* 2000, if registered as a design under that Act, and if not so registered (despite being registrable), would cease to enjoy any copyright after more than fifty such

24. CS (OS) No.182/2011, available at:*https://indiankanoon.org/doc/20292476/*

25. *Supra* n. 21.

> applications, under Section 15(2) of *the Copyright Act*, 1957. Once again, as an original artistic work it would continue to enjoy the full copyright under *the Copyright Act*, 1957 and cannot be reproduced in any two or three dimensional form by anyone except the owner of the copyright. What it would cease to enjoy is the copyright protection in its industrial application for production of an article. In practice, it works like this. If a painting, say Hussain's painting of a horse, is simply reproduced in any medium, i.e. on paper, canvass or even a cloth, and in any form, i.e. in two or three dimensions, whether by an industrial process or otherwise, it will continue to enjoy full copyright in such reproduction under t*he Copyright Act*. But if the painting is used as a motif to produce, say, sarees, the industrial application, namely, use as a motif in a saree, would lose copyright protection, if not registered as a design under *the Designs Act*, 2000, after more than fifty applications. The difference between the former use and the latter use, is that what is reproduced is an artistic work itself in the former and what is produced in the latter case is an article, which is not by itself an artistic work.'

In *J.C. Bamford Excavators Limited* v.*Bull Machines Pvt. Ltd.*[26], the Delhi High Court observed that the operation of Section 15(2) of *the Copyright Act* does not exclude from the ambit of Copyright protection either the original "artistic work" upon which the design is based or the design which by itself is an artistic work. It cannot be disputed that the original paintings/artistic works which may be used to industrially produce the designed article would continue to fall within the meaning of the artistic work defined under Section 2(c) of *the Copyright Act,* 1957 and would be entitled to the full period of copyright protection. This is also evident from the definition of the design under Section 2(d) of *the Designs Act*. This, in our view, in fact is a factor which would go against the appellants in construing the nature of protection to be given to the original artistic work such as a painting, as contrasted with the applied artistic work that is the design, which in the present case does not mean the intermediary medium such as a mould, engraving devised/produced only to enable industrial application of the painting to produce the furnishing products of the appellant.

Thus, while the original painting would indeed be entitled to the copyright protection, the commercial/industrial manifestation of such paintings such as the design derived from and founded upon the original painting for the purpose of industrial production of furnishings would only be covered by the limitations placed in Section 15 of *the Copyright Act* and would get protection if registered as a design under the Designs Act but would enjoy lesser period of protection in case of a registered design. The Delhi High Court interpreted the provisions in similar fashion in the case of *Holland Company LP and Ors* v. *SP Industries*[27]

Droit Moral (Moral Rights)

Another important point which has not been examined so far in the context of the

26. CS(OS) No. 2934 of 2011, available at: *https://indiankanoon.org/doc/70487596/*

27. CS(COMM) No. 1419 of 2016, available at: *https://indiankanoon.org/doc/64357368/*

copyright-design overlap is the effect of the concept of moral rights on this interface.The focus of copyright protection is the close relationship between the creator and the work. This relationship is characteristic to copyrights not seen in any other industrial property. It may be understood that this is a matter of "*droit moral*" (Moral Rights) and these rights are for perpetual duration. When an author creates a work, it is possible to conceive of many rights which may flow. The first and foremost right is the "Paternity Right" in the work, i.e. the right to have his name on the work. It may also be called the 'identification right' or 'attribution right'. The second right is the right to disseminate his work i.e. the 'divulgation or dissemination right'. It would embrace the economic right to sell the work for valuable consideration. The third right is the right to maintain purity in the work. There can be no purity without integrity. It may be a matter of opinion, but certainly, treatment of a work which is derogatory to the reputation of the author, or in some way degrades the work as conceived by the author can be objected to by the author. This would be the moral right of "integrity". Lastly, right to withdraw from publication one's work, if author feels that due to passage of time and changed opinion it is advisable to withdraw the work. This would be the authors right to "retraction".[28] The reference of moral rights is important because these rights are independent of copyright and remain with the author even after the assignment of copyright. As section 15 only refers to exhaustion of copyright, i.e. it only provides that in case an artistic work is registered as a design or is registrable as design but not yet registered and any article to which the design has been applied has been reproduced more than fifty times by an industrial process, the copyright protection ceases to exist. Should we interpret it to mean that no protection remains under this Act including moral rights? The answer is not clear. If the answer is 'no', it may create problems in the harmonization of two laws *viz. the Copyright Act* and *the Design Act* as suggested in *Microfiber's* case.

V. CONCLUSION

The foregoing indicates that the judicial approach toward the issue is by and large consistent and the law laid down in *Microfiber's* case guides us. Thus, one may argue that the types of legal protection given to creative activities must be considered with a focus on particular aspects of purpose and objects for protection. What is the purpose of Design Law? What is the purpose of Copyright Law? In the course of market trade in modern society, it is clear that the significance of design has increased as a tool to assist in the sales of goods. This is what makes a design different from any other artistic work. A contrary view may be that a design is also a creative form of human expression and, in this sense, the Author would think that works of art and designs have a common base, so there is no reason to exclude cumulative protection both by Copyright and Design Laws. These arguments need to be evaluated considering that the term of protection offered in two laws is significantly different. The issue of moral rights and the implications for the relationship between the copyright law and design law also needs attention of stakeholders.

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28. *Amar Nath Sehgal* v. *Union of India and Another,* 2005 (30) PTC 253.

INTERACTION OF COMMON LAW, LEGAL ENGLISH AND LEGAL EDUCATION : A REVISITATION

ARTI NIRMAL *

'Most of the disputes in the world arise from words.'

- Lord Mansfield[1]

'The argument strongly put is not the same as the argument put feebly anymore, than the 'tasteless, tepid pudding' is the same as the pudding served to us in triumph with all with the glory of the lambent flame.'

- Justice Cardozo[2]

ABSTRACT : This paper is a modest attempt to study how common law, legal English, and legal education interact. The birth and evolution of legal English and legal education are bound up with that of the common law and the history of Great Britain. Therefore, to understand the unique nature of legalese, it becomes necessary to revisit the evolution of Common Law. This paper is divided into five parts. The first part deals with the changing dimensions of Common Law from a historical perspective; in the second, the development of legalese in British history has been discussed. Part third talks about how literature plays a vital role in the enrichment of legal language while locating the areas of possible synergy between law and literature; and the fourth part centers around the idea that law is expressed in a language and, therefore, the importance of hermeneutics in the interpretation of law also needs to be comprehended. The need to revise legal pedagogy in the existing legal education system has also been highlighted in the fifth part of this paper before drawing the inferences. The paper concludes by stressing the importance of legal language and the need to reform existing pedagogy to equip law students with good communication skills necessary for legal practice in modern times.

KEY WORDS : Anglo-Saxon, Norman Conquest, Common Law, Legalese, hermeneutics.

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1. *Morgan v Jones* (1773) Lofft 160 at 176.
2. B. Cardozo, *Law and Literature* (1939) 39 Col LR 119 at 121

I. INTRODUCTION

Legal language, also popularly known as 'legalese', evolved in over more than 1000 years, especially since the Norman conquest in 1066 AD. Although several factors, political, social, and economic, have contributed to the development of legal language in their way, the history of legal language is bound up with the history of common law and the history of Great Britain. Just as British history has gone through many turbulence and upheavals, so has been the case of the history of common law that was influenced by conquests, political strife, and military coupes from time to time. Thus, the changing dynamics and dynamism of legal English cannot be properly understood without revisiting the evolution of Common Law. The very fact that Common Law as applied and administered by the courts in the United States, the United Kingdom, Australia, New Zealand, former Commonwealth countries, and even in countries outside the Common Law system, to a varying extent has developed as a result of the judgments of courts that speak volumes about the continuing role of legal English in the legal profession. As the evolution of common law has not been smooth and spontaneous, it was bound to attract scholars' attention to understand its history and its inextricable link with legal English, which we read, write, and use in legal communication and transaction.

This, in turn, requires the study of the evolution of legal English from a historical perspective, at least for the following reasons: first, the impact of other languages such as Saxon, Latin, and French on legalese. In order to understand why, how, and in what circumstances, a plethora of Latin maxims and French words have crept in legalese in the course of its development; second, the growing globalization of legal education as a result of the globalization of legal practice; third, growing recognition of English as an international language for trade, commerce, business, academics, science and technology; and fourth, the emergence of a global society as a result of the ongoing processes of globalization of trade and culture (to some extent). It is gratifying to know that the Bar Council of India, the regulatory body for legal education in India, has realized the growing importance of the study of legal English (legalese) as an integral part of the curricula designed for LLB (3-Year) and B.A. LLB (5-Year Honors) courses. Moreover, in this postmodern era and information technology governed society, the objectives of education and pedagogy for the transmission of knowledge and research have also undergone a sea change along with human life. Hence, it becomes necessary to have a re-look at the course prescribed for legal English in the context of challenges encountered by the global legal practice and redesign the existing pedagogy to serve the needs of the consumers of legal education.

Against this background, a modest attempt has been made in this paper to discuss and consider the issues related to the evolution and development of Common Law and legal language. This paper consists of five parts. The first part deals with the changing dimensions of Common Law from a historical perspective; in the second, the development of legalese in the shadow of troubled and turbulent British history has been discussed. Part third talks about how literature plays a role of far-reaching significance in the enrichment of legal language while locating the areas of possible synergy between law and literature; and the fourth part centers around the idea that law is expressed in a language (for present study English) and therefore the importance of text and texture along with hermeneutics in the interpretation of law also needs to be comprehended. A brief reflection on the need to revise legal pedagogy in the existing legal education

system has also been highlighted in the fifth part before concluding. The paper shall conclude with pithy and pertinent remarks on the content of the paper of legal language taught and the need for change in pedagogy to equip law students with communication skills necessary for legal practice in modern times.

II. CHANGING DIMENSIONS OF COMMON LAW: A HISTORICAL PERSPECTIVE

The common law practiced in the United Kingdom and other Commonwealth countries were precisely the common law of England, created after the Norman Conquest in 1066. Before Norman Conquest, and after the accession of Alfred Great in 871, the Anglo-Saxons developed a set of rules based on those practiced by the Germanic people of northern Europe. The local customs governed most of the matters, whereas the government worked under Church's tutelage. When the Normans invaded England and established their colony, the prevailing Anglo-Saxon customary law also gradually changed. Thus, the English common law may have originated in the early middle ages in the King's court (*curia regis* in Latin) with the establishment of a single royal court for almost the entire country at Westminster near London. As the new court was in its nascent form, it did not function on substantive rights but more on the procedural remedies. Interestingly, the English common law continued to be developed mostly by the judges than the legislators until the late 19th century. As per the Norman common law, the government was centralized, the bureaucracy was built, and written records were maintained.[3] Although the Anglo-Normans succeeded in replacing the Anglo-Saxons legal system, yet some of the legal terms and concepts given by the Anglo-Saxons entered into the new legal system in the forms of *jury, ordeal, writs*, etc. The outlawry practice, orders requiring a person to appear before the court, trial by physical test, etc. also descended from the Anglo-Saxon's legal system. When King Henry II mounted on the throne, the administration of justice became a bit systematic and consolidated, and the Church and the State got separated to have their individual law and court systems. During the late 12th century, several remedies were made in the King's court, which signaled the formal origin of the common law.

The early common law was decentralized in nature as the judges used to visit the provincial towns and disseminate the Westminster law, both civil and criminal, through local customs. It was during this time that the expression 'common law' came to be applied for the first time to the legal system in 1166 by the Assizes of Clarendon and Northampton 'in recognizing the legal system by requiring judges of the realm to go out regularly on circuit and bring the King's justice system to every man. This had the effect of evolving a law *common* to the whole realm as opposed to local custom which might vary from one district to another.'[4]

The Normans conversed in French and had developed a customary law in Normandy; however, they had no professional judges or lawyers. Therefore, the illiterate clergymen became the administrators. Some of them had faint familiarity with the Roman

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3. Andrew D. E. Lewis, Albert Ronald Kiralfy and Mary N Geldon, "Common Law", Encyclopedia Britannica, *available at:* https://www.britannica.com/topic/common-law, 05/08/2016 (acc. on 27/03/ 2017).

4. G.G. Weeramantry, *An Introduction to the Law,* 44 (New Delhi: Lawman (India) Private Limited, 1998).

law and the Christian church's canon law, which developed in the 12th-century universities.[5] Though the Normans were dominating, yet canon law was used in the English church courts, and the revived Roman laws became less influential. As the society was mostly agrarian and the economy depended largely on it, the political power was also rural by nature and depended on land ownership. Thus, the law was affected by the feudal system. As land was a prominent property, its title was provisioned to be transferred by a formality of ritual rather than deed.[6] Common law practiced in England was very different from that of the neighbours France and Germany, which were ruled by the monarchs. By the 13th century, three central courts, namely, Common Pleas, Exchequer, and King's Bench, applied the common law. The court machinery was now built around the writ system, each one issued from the writing office of the court of chancery.

When England welcomed Henry III to its throne, a treatise in 1235 was prepared entitled "On the Laws and Customs of England". It is assumed that it was drafted by the royal judge Henry de Bracton who modeled it on the 6th-century Roman legal classic by the Byzantine emperor Justinian I (highly admired for his actions and procedures). Bracton utilized several thousand cases from plea rolls to write this. Henry III's successor, Edward I had admirable qualities, and he enforced significant reform in civil legislation, which amended the unwritten common law, which was later supplemented by making necessary amendments from time to time. "From among various statutes approved by Edward I, few may be necessarily mentioned such as, the first Statute of Westminster (1275) which made jury trial compulsory in criminal cases; The statute of Gloucester (1278) limited the jurisdiction of local courts and extended the scope of actions for damages; the second Statute of Westminster (1285) made land an asset for paying judgement debts and liberalized appeals to high circuit courts; and the Statute of 1290 barred the granting of new feudal rights". [7]

In modern times, the statutes issued before 1286 are sometimes treated as common law rather than statute law because they explained what the law was rather than making new ones. In the 14th century, the royal council, at times operating through the chancery, began to pronounce new remedies keeping in view the requirement of a particular case and also preserve it for future reference. The rigidness seeping into the process of dispensing justice was required to be eliminated in which Chancery courts proved useful. The ancient principle of equity, which was as old as common law, was not required until the 14th century but was brought into force now to lend some fluidity to the harshness of the firmly established common law. This may be understood by the fact that in the reign of Richard II (1372-99), the chancellor's jurisdiction transformed into the Court of Chancery just in view of administering equity. Worth noticing, proceedings commenced with bills were being presented in the vernacular instead of Latin.

Law gradually became a profession that needed permanent institutions and some sort of legal education too. As the legal profession advanced, experienced barristers started to accompany the judges who were designated the rank of sergeant-at-law. Consequently, four Inns of Court- Gray's Inn, Lincoln's Inn, Inner Temple, and Middle Temple came into being as official bodies having the right to admit persons to the bar.

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5. Andrew D. E. Lewis, Albert Ronald Kiralfy, et al., supra note 3.
6. Andrew D. E. Lewis, Albert Ronald Kiralfy, et al. "Common Law", *Encyclopedia Britannica,* https://www.britannica.com/topic/commom-law.

The most significant contribution of the common law is that besides parliamentary enactments, it led to the emergence of a large reservoir of judicial decision in some form of Year Books, the first of which appeared in around 1289, and since then, the practice has continued till date. However, after Bracton's work, the printed and arranged Yearbooks appeared only after the invention of the printing press in the 16th century. With the accession of Henry VII in 1485, numerous courts were created which promoted the growth of bureaucratic written processes contrary to the customary common law.

Later, in the 16th century, a noticeable change in law took place throughout Europe. One determining impact on the law was that of universities like Oxford and Cambridge which was also producing trained lawyers. Although numerous decisions appeared from the 12th century onwards, English law still lacked in drawing together its underlying principles. As compared to the systematic and organized civil law, common law or English law still seemed "a somewhat barbarous system".[8] It was so because, as stated earlier, the book produced by Bracton on the laws and customs of medieval age England failed to give it an ordered presentation. Other writers, namely Fortescue, Littleton, St. Germain, took it a step further, but the next remarkable development in common law was made by the contribution of Sir Edward Coke, who helped draft the Petition of Right in 1628. His *Reports* appeared in 11 volumes between 1600 and 1615; and the four volumes of *Institutes of the Lawes of England* (1628-1644), which dealt with the law of real property, medieval statutes, criminal law, and the jurisdiction of court. Coke certainly gave a new turn to the evolution of common law, but the most unprecedented work was that of the famous English jurist Sir William Blackstone who entered the bar in 1746 and, in 1758, became the first person to lecture on English law at an English university. His *Commentaries on the Laws of England* (1765-1769) which consisted of four works: *Of the Rights of Persons* (family and public law); *Of the Rights of Things* (real-property law); *Of Private Wrongs* (civil liability); and *Of Public Wrongs* (criminal law) proved a milestone in the modernization of common law in Great Britain. Blackstone, though, has been criticized for superficiality and lack of historical sense, yet his works stand as a benchmark. He had outreaching fame even in the United States due to which his *Commentaries* became the primary source of knowledge of English law for the new world after the American Declaration of Independence in 1776.

It took a long time for the English Common law to evolve as compared to the civil law, but it is remarkable to see that it is very distinct and unique from the law of the rest of the countries of Europe that were profoundly influenced by the Roman Law. This unusual nature of the English legal system has been puzzling the scholars for a long time. A close study of the history of England gives some clues to comprehend the reason. Out of many, one major factor is the 'national pride' aspired and cherished by the people of England. The prevalence of national sentiment attached to their land and a deep sense of pride in their laws and customs has undoubtedly played an incredible role in defining and determining the unique nature of their law. There was a strong desire in the judges and the lawyers to develop English law as an independent system quite different from the Roman model of jurisprudence. It does not mean that the Roman influence was entirely eliminated as it gradually entered into the development of English law partly through the canon law and some from the judges of the Ecclesiastical Court. It was also to some

7. *Ibid.*
8. *Supra note* 4 at 44.

extent due to the personal inclination of few judges towards Roman law, as was the case of Justice Mansfield. Nevertheless, on the whole, 'English lawyers had a deep desire to be free from Roman influence'.[9]

The early history of England is of invasions by Romans, Anglo-Saxons, Scandinavians, and then the Normans, which granted a distinct character to the law, language, literature as well as culture on the whole of English people. The invading Germanic tribes uprooted the Celts (Roman) even before they could settle properly in the English territory, which also was responsible for preventing the Roman influence. Commenting upon the following developments, the scholars say that the "barbarian codes" on the continent were in Latin, whereas the Anglo-Saxon laws were in English,[10] which helped in independent development. The internal rivalry of Anglo-Normans with Anglo-Saxons to prove their administration and governance better also paved the way for the distinct quality of the English law. Thus, the origin and development of common law also determine the evolution of legal English and legal education. Undermining the significance of any of these would give us just a partial understanding of the current legal system *vis- a- vis* legal education.

III. ORIGIN AND DEVELOPMENT OF LEGAL ENGLISH

A look at the journey of Common Law in England foregrounds clearly that the legal English evolved simultaneously along with it. Close scrutiny of the history of legal English will help understand the typical color of legal language, i.e., legalese. It is a known fact that words are the essential tools of law as cases are decided by the meaning judges ascribe to words. Therefore, the lawyers have the responsibility to use the right words in the right context and spirit so that it may be convincing and persuasive and avoid ambiguity. But since the legal register is different from plain language, the lawyers are often blamed for using a complex sort of language, beyond the comprehension of laypeople. As Bentham wittingly says, "The power of the lawyer is in the uncertainty of the law."[11] His attitude towards law was quite paradoxical, as is evident in his following words, 'lawyers are the only persons in whom ignorance of the law is not punished'.[12] Considering the complex nature of legal language, George Coode in 1843 also wrote in "Legislative Expression":

> There is apparently a notion among amateurs that legislative language must be intricate and barbarous. Certain antic phrases are apparently thought by them to be essential to law writing. A readiness in the use of "nevertheless," "provided also", "it shall and may be lawful", "is hereby authorized, empowered and required," "nothing in any act or acts to the contrary notwithstanding", etc., etc., seem to constitute the qualifications for drawing Acts of Parliament.[13]

9. *Supra note* 4 at 45.

10. *Ibid*.

11. As qtd. in Alice L. Linsley, "*A Thumbnail sketch of Jeremy Bentham*" (2013), available at: https://justgreatthought.blogspot.com/2013/10/a-thumbnail-sketch-of-jeremy-bentham.html, (17/10/2013, acc. On 29/03/2017).

12. *Ibid*.

13. Printed in "Law Library", Vol 29. Also found in *Brightly's Purdon's Digest* (1873).

In view of Peter Butt, 'Legal English has traditionally been a special variety of English. Mysterious in form and expression, it is larded with law-Latin and Norman French, heavily dependent on the past, and unashamedly archaic'.[14] The German author Bertolt Brecht too writes in *The Threepenny Opera* (1928), "The Law was made for one thing alone, for the exploitation of those who don't understand it",[15] whereas for Hunt, ambiguity is the most serious disease of language, and nowhere is the absence of this disease more important than in legislation.[16] It would be interesting to consider George Orwell's view too who satirizes the inflated style of legal language by calling it 'a kind of euphemism' that conceals real meaning.[17] Hence, it has to be admitted that legal English has a typical trait of its own which lends it complexity as compared to the 'plain language'. However, the legal professionals are bound to use legalese, which has been formed and shaped by numerous socio-political, linguistic, and cultural factors in its journey.

Language by nature is fluid, dynamic, and malleable, and therefore, by looking into the history of legal English, one can understand the reason behind the complexity of legal expression. Legal English is peculiar because of its structure, terminology, grammar, punctuation, usage, etc. It is so mainly because its origin and development are closely linked with the history of Great Britain and is based on common law. It has traditionally been preserved by lawyers and jurists of countries, namely the U.S., the U.K., Ireland, Canada, Australia, New Zealand, Kenya, and South Africa that shared common law traditions. Due to the expansion of Legal English worldwide as a language of international business, it has become globally significant.

The traditional common law, in prehistoric Britain, was basically a Celtic law. Before the Roman invasion, the people of Britain spoke a Celtic dialect, and therefore, the Celtic law was discussed in the vernacular only. After conquered by the Romans, Britain followed Roman legal tradition, but the Romans soon left the region, and just a few Celtic words remained in Britain. Latin made little impact until St. Augustine arrived in 597 to spread Christianity.[18] Their influence encouraged the use of writing, which influenced law tremendously. As E. Albert in *History of English Literature* writes, "The departure of the Romans in 410 left the British population open to the inroads of the invaders from the north".[19] Then followed 'the Christianization of the pagan English tribes, beginning in Northumbria with the work of Irish missionaries, though the influence from Rome begins in Kent in 597. In succession followed the inroads of the Danes in the ninth century; the rise of Wessex among the early English kingdoms with the important contribution of Alfred the Great; the establishment of the Dane law in England with the permanent settlement of Danes in the country; the accession of a Danish king in 1017'.[20] This was

14. Peter Butt. "Legalese versus Plain Language" 28 *Amicus Curiae*. 35, 28-32 (2001), available at: https://sas-space.sas.ac.uk/3751/1/1332-1452-1-SM.pdf
15. Bertolt Brecht, *Threepenny Opera* (Grove Press, 1934).
16. B. Hunt, 'Plain Language in Legislative Drafting: An Achievable Objective or a Laudable Ideal?' *Statute Law Review* 24, 112-124 (2002)
17. George Orwell, *Politics and the English Language*, First Ed. (1946), Sahara Publisher's Book, 2013.
18. "Introduction to Legal English", available at: *lawexplores.com*, (07/11/2015, accessed on 28/03/2017).
19. Edward Albert, *History of English Literature* 9 (Oxford University Press, 35th impression 2004).
20. Edward Albert, *History of English Literature* 9-10 (Oxford University Press, 35th impression 2004).

followed by the Anglo-Saxon invasion from mainland northern Europe, which included the Angles, the Jutes, and the Saxons whose vernacular combined to produce the Old English or Anglo-Saxon. Since the Germanic tribe dominated it, the new language was much similar to German. The Anglo-Saxon law was written in Old English since 600 and the Law of Ethelbert could be considered as the first such legal record. Words in English used today, such as *God, woman, child, love, live, go, at*, *too* - are of Anglo-Saxon origin. It was followed by the Vikings (Scandinavians) at the English north east coast in about the 8th century, whose language also influenced the vocabulary of the Old English. The eagerness of the Vikings in the Dane law to communicate with the Anglo-Saxons led to the inflection in both languages.[21] English words such as *law, husband, take, knife*- are the contributions of the Vikings. In this way, Middle English was 'the descendant of the Old English Language and the ancestor of Modern English'.[22] Another form of English language developed by this time was Middle English, which according to the Oxford English Dictionary, was spoken between 1150-1500. It brought significant changes in grammar, vocabulary, and pronunciation besides 'orthography'.[23]

It is believed that the invention of the printing press by Johannes Gutenberg in 1439 helped in establishing the London dialect as Chancery Standard and cleavage between the Scottish dialect and the other northern dialects. Middle English also saw an adoption of Norman French vocabulary, particularly in politics, law, and religion. However, the conventional English did not change much as it retained the Germanic sources in words along with the Old Norse (Old Nordic or Old Scandinavian, which was a North Germanic language and was spoken by the dwellers of Scandinavia and their settlements outside from the 7th to the 15th centuries[24]).

The most significant influence came in 1066 AD when the French forces from Normandy led by William the Conqueror invaded the British territory. These were Normans whose name comes from Northman. With the Norman Conquest, Anglo-Norman French (Law French) became the official language of legal proceedings in England, and it remained so for nearly 300 years and introduced terms such as *court, parliament, justice, sovereign, marriage,* among numerous others. However, English continued to be the language of the common people. Interestingly, the court, government, legal officials, religious dignitaries, and military personnel used French which was regarded as the language of the elite and aristocrats. It would be pertinent to mention Sir Walter Scott's view from his novel *Ivanhoe* (1820), which supplements our understanding of the history of legal English. He writes, "French was the language of honour, of chivalry, and even of justice, while the far more manly and expressive Anglo-Saxon was abandoned to the use of rustics and hinds, who knew no other"[25]. Therefore, the French, which was now the language of power, exerted a strong influence on not only Legal English but the language of the country on the whole. In fact, modern English has retained all the French words which

21. Albert Baugh, *A History of the English Language* (London: Routledge & Kegan Paul, 1951). pp. 110-130 (Danelaw), 131-132 (Normans); Jesperson Otto, *Growth and Structure of the English Language* (Leipig, Germany: B.G. Teubner. 58-82 (1919).
22. Albert Ronald Kiralfy "Common Law". *Britannica online Encyclopedia*. www.britannica.com
23. A set of the convention for writing a language
24. Ekkehard König and Johan van der Auwera (eds.), *The Germanic Languages* 38 (Routledge 2002).
25. Walter Scott, *Ivanhoe: A Romance* 5 (Archibald Constable and Company, 1820).

were in legal or official use, such as, *attorney, contract, agreement, claim, covenant, guardian, trespass, pledge, obligation, debt, property, appeal, court martial, jury, plaintiff, lease*, and numerous other. In this way, for several centuries after Norman Conquest, trilingualism was practiced in England, including French, English, and Latin.

In the beginning, the Normans wrote the legal documents in Latin instead of French, but around 1275, statues in French started to appear. By 1310, nearly all the acts of Parliament were drafted in that language and by the reign of Edward I (towards the end of the 13th century) French became the language of the royal court. Remarkable enough that outside the legal domain, Anglo-French had started to decline after 1300. In the year 1363, the Statute of Pleading was enacted (in French), which pronounced that all legal proceedings should be conducted in English but recorded in Latin. Wills began to be written in English at about 1400. Consequently, by 1490 during the seventh year of the reign of Henry VII, the Acts of Parliament switched primarily to English but legal reports and treatises remained mostly in French, and this continued till the first half of the 17th century. As a result, it marked a formal commencement of Legal English, whereas Law French continued to be used in different forms for a long time.

In 1549, Thomas Cranmer, the first protestant Archbishop of Canterbury, took cognizance that despite the decline of French long ago, it was still in use by the English lawyers. He said, "I have heard suitors murmur at the bar because their attorney pleaded their cause in the French tongue which they understood not" (as qtd. in Dusunge).[26] When the Puritans came into power, they beheaded the King and made a law in 1650, which enforced that all case reports as well as books of law, should be in 'the English Tongue only'.[27] However, with the restoration of the monarchy in England in 1660 when Charles II (who was on exile to France for 12 years due to political upheavals in England and had developed a great love for French during the exile) resumed power, this order was repealed, and the old one was resumed. During 1730s, by the Proceedings in Courts of Justice Act, the Parliament finally stopped using Latin and French in legal proceedings, which helped in the emergence of the Modern English. Nevertheless, the invaders had left their linguistic legacy to be carried forward by the English language, particularly legal English. With the expansion of British imperialism, America and many other colonies of the former adopted the common law for a system of justice and its language. Though Latin was replaced long ago, yet Latin words such as *adjacent, frustrate, inferior, legal, quiet, de facto, bona fide, ad hoc, inter alia, subscribe, negligence*, among many others, are in use even today as English which imparts a special character to the Legal English.

Thus, modern legal english reflects a mixture of various languages, which includes French and Latin in great proportion. Contemporary legal English, according to Y. Malay is used in legal reports and as courtroom language by judges, counsel, court officials, witnesses, and other participants; used to prepare legal documents such as contracts, regulations, deeds, wills, or statutes; and for communication between legal professionals and clients.[28] Hence, proficiency in legal language is needed to ensure justice by the just

26. Rameshwar Barku Dusunge, *Legal English: Background and Perspectives*" 356, Vol. 18.3, 354-61 (2018), available at: http://www.languageinindia.com/march2018/rameshwarlegalenglish1.pdf

27. *Ibid*.

28. Y. Maley, *The Language of the Law* in John Gibbons (ed.), *Language and the Law* (London: Longman, 1994).

interpretation of facts. Legal language differs from everyday language, particularly on the semantic level. Proof, validity, consistency, completeness, reason, persuasion, and precision are some of the chief qualities which a language to ensure justice must possess. As far as legal writing is concerned, it can broadly be categorized into four depending on the need and function: academic legal writing for journals, books etc.; juridical legal writing as performed by the judges and personnel in legal practice; legislative legal writing used for drafting laws and regulations; and legal writing for correspondence.

The legal register is technically called legalese, and the use of technical terminology, which makes it unfamiliar to the layman, is known as 'terms of art' in the legislative context. Legal register means 'that legal language has a set of linguistic features that obtain with such regularity that, when we see those features concentrated in a text, we can readily identify it as a legal text'.[29] Following are some of its characteristic features which distinguish legalese from the English language used outside the legal system: a) Archaism; b) Insufficient use of punctuation marks; c) Precision; d) Use of modifiers; e) Quasi technical phrasal verbs; f) Terms of art; g) Redundancy; h) Legal jargons; i) Use of shorthand and clipping; j) Abundant use of French and Latin words; k) French drawn words ending with the suffix –ee ; l) Performatives; m) Euphemism; o) Unusually long sentences; and p) Preference for passive voice.

In recent years, we can perceive a growing challenge to traditional legal English, chiefly attacking its complex nature and unusual syntax. Scholars may be seen speaking in favour of a rather plain language against legalese. They argue that if precision is aimed in legal practice and that legalese is considered apt, one must not overlook the intricacies involved in it, and as far as precision is concerned, it can be ensured by using plain language. To quote Wittgenstein, "Everything that can be put into words can be put clearly." Clarity of meaning and precision are indeed the hallmarks of any communication to be excellent and useful, but every discipline has a distinct nature and purpose of its own. In this consideration, legalese is still a coveted form of language considered fit for legal purposes.

IV. LAW AND LITERATURE : A POSSIBLE AREA OF SYNERGY

The concern of legal studies is confined not only to the knowledge of legislative nuances but also to the language which communicates it. Literary texts, too, have a treasure trove of law in it to teach the members of the legal fraternity. It also needs to be mentioned here that the birth and growth of English literature goes hand in hand with common law and its language. In the 16th century, when the law started to emerge as one of the most aspired and sought for professions, particularly for the elites, most of the barristers trained themselves for legal professions in universities like Oxford and Cambridge. Long ago, when surgery was considered a barber's job, law was still revered as a noble profession. Likewise, the 'University Wits' in the history of English literature was a group of those playwrights, namely-George Peele, Robert Greene, Thomas Lodge, Thomas Kyd, and Christopher Marlow, who graduated in these great universities. It is also worth mentioning that most of the early English authors (Pre-Shakespearean dramatists) Edmund Spender, Sir Thomas Wyatt, Sir Henry Howard, Thomas Sackville,

29. M. L. Sastri, *Legalese Revisited* 198 *Law Library Journal* 80:193, 139-215 (1988).

George Gascoigne, Michael Drayton, Samuel Daniel, and others have either been the Earls, lords, courtiers, clergymen, and barristers or someone linked to Church and inns.

The law remained the most respectable profession for a long time (it is even today) in England and most of the literary artists, at first, served law in one way or the other. To mention a few celebrated English authors, namely Francis Bacon, John Donne, Henry Fielding, John Milton, W. Goethe, Thomas Hardy, Charles Dickens, Thomas Carew, John Ford, Edward Hyde, R. B. Sheridan, Walter Scott, George Meredith, ETA Hoffman, Frantz Kafka, William Faulkner, and Wallace Stevens either studied law or practiced it which naturally influenced not only their understanding of the problems of society but also their literary expression. Hence, it may now be realized why it is essential to study the symbiotic relationship between law and literature and how it refines law.

Martin Škop writes, "literature has the ability of cultivating law and lawyers. This process of cultivation by literature also includes improved ability to create a text and interpret it." [30] It is also believed that Law and Literature feed each other in a mirrored dialogue.[31] Thus, literature can be a useful tool in understanding some concepts of judicial rulings as it helps a judge draw a comprehensive picture of reality. The movement of establishing a synergy between Law and Literature was initiated by John Wigmore and Benjamin Cardozo, who studied the relation between the two in an in-depth manner and suggested the attorneys and other legal professionals to improve their literary competence, as it would help them in rendering more persuasive decisions. They regarded poets and novelists as the principal teachers of the law in the first half of the 20th century. James Boyd White's celebrated work *The Legal Imagination* (1973) is recognized as the first significant work under this movement of blending literature and law. It emphasizes that by understanding literary narratives that possess high moral and ethical values, interpreting legal texts can be enhanced manifold. Literature not only effects better interpretation and comprehension but also facilitates impressive and persuasive ability in the law practitioners. In the opinion of White, Jane Austen's *Pride and Prejudice* (1813) "is meant to teach the reader how to read his way into becoming a member of an audience it defines-into becoming one who understands each shift of tone, who shares the perceptions and judgments the text invites him to make, and who feels the sentiments proper to the circumstances. Both for its characters and readers, this novel is in a sense about reading and what reading means".[32]

Among modern legal theorists, Ronald Dworkin is the most prominent thinker who emphasized the art of interpretation and drew an interesting analogy between legal text and novel. Richard S. Weisberg, too, notices an intrinsic value in the use of literature as an instrument to understand legal topics. Jack Balkin, Daniela Carpi, Adam Gearey, Eric Heinze, Allan Hutchinson, Ian Ward, Robin West, Malanie Williams, and Carmelo D. Cintrón are few more contributors in exploring a synergetic interaction between law and literature. Advocacy, as the word suggests, is largely the ability to convince. Hence, the

30. Martin Škop, *Law and Literature: A Meaningful Connection* 11 *Filozofia Publiczna I Edukacja Demokratyczna,* 4. 1, 6-20 (2015); See also, Louis Bloomer's *The Law as Literature: An Anthology of Great Writing in and About Law* (1961).

31. Lorena Martoni de Freitas, *Law and Literature: The Absurd in Law in The Stranger by Albert Camus*139 *Anamorphosis*, 1. 1, 139-156 (2015) DOI: 10.21119/anamps.11.

32. "Law and Literature", available at: *Wikipedia*. https://en.wikipedia.org/wiki/Law_and_literature. (Acc. on 27/03/2017)

manner in which an advocate argues the case decides its fate to a large extent. Aesthetics, thus, becomes an integral and embedded component of literature. Besides, inculcating values, revealing realities, and foregrounding problems and resolving it, literature since the invention of the printing press has found a room of its own in the legal sphere. It has often been the most important stimulus for inspiring law reforms.[33] Law certainly influences the direction of our society and remains a prominent theme in much of literature because the law is a quintessential dominant force that holds our political and economic structure together.[34]

The works of Plato and Aristotle serve as the foundation of Western thought on the law. For example, Plato's *Republic* is a critical treatise to deliberate on the subject of duty, morality, and justice. Geoffrey Chaucer's 'The Man of Law' in his *Prologue to the Canterbury Tales*, composed in the 14th century, could be considered a path breaking literary text dealing with law. In the *Prologue*, Chaucer writes, "nowhere so busy a man as he there was / And yet he seemed busier than he was." Thomas More's *Utopia* exposed the hollowness of law, which should serve as a tool of justice.

The great English playwright William Shakespeare refers to the law and legal system in his not less than 22 plays. His plays *Henry VI, Book II* (1591-92), *The Comedy of Errors* (1593), *Romeo and Juliet* (1594), *The Taming of the Shrew* (1594), *King John* (1595), *The Merchant of Venice* (1596), *Richard II* (1596), *Henry IV, Book I* (1597), *The Merry Wives of Windsor* (1600), *As You Like It* (1600), *Hamlet* (1601), *Troilus and Cressida* (1602), *Measure for Measure* (1604), *King Lear* (1605), *Pericles* (1608), *Timon of Athens* (1607) and *The Winter's Tale* (1610) are monumental texts of law too besides being path breaking literary pieces. Provisions of law in some or the other manner relating to Contract, Equity, Fundamental Justice, Natural Law, Succession, Marriage, Social regulations governing courtship and gender roles, Justice for common mass, and Human Rights practiced in the Elizabethan age have been effectively portrayed by Shakespeare. A thorough reading of these plays offers a remarkable understanding of: the extent to which the law should be used to enforce morals (*Measure for Measure*); how law can benefit society by channeling the passion for revenge (*Hamlet*); the impartiality of the judiciary (*Henry IV, 1 & 2*); the role of the law in protecting one's reputation against slander (*Othello, Much Ado About Nothing*, and *The Winter's Tale*); the timeless meaning of professionalism (*Taming of the Shrew*); the need to avoid rigid interpretation of formal rules and contracts that can have unjust results unless tempered by equity (*Measure for Measure, The Merchant of Venice*); and the principle that no one- not even the King – is above the law (*Richard II and King Lear*), and so on.

The post-Shakespearean dramatist John Webster's *The Duchess of Malfi* (written in 1612) is another strong social, moral, and legal critique of its time, reflecting well on the legal precedents on marriage, individual rights, marriage, succession, and right to property. John Milton, the prominent puritan, emphasized the need for reformation in the socio-political and religious systems. In *Areopagitica,* he evocatively argues against the licensing order of 1643. He believed that the government should not censor works because

33. C. G Weeramantry. *An Invitation to the Law* 64 (New Delhi: Lawman (India) Private Limited, 1998).

34. "Herman Melville's Billy Budd: A Study Guide", available at: https://public.wsu.edu/~hughesc/melville.html (Acc. on. 29/03/2017)

the search for truth is an ongoing process, and hence it should not be restricted. Likewise, the political tract *The Ready and Easy Way* (1660) was written by him to support the constitution of an English Republic. His magnum opus *Paradise Lost* (1667), though, is an epic written 'to justify the ways of God to man' has also been seen as a political allegory by many with several legal considerations embedded in its narrative. "Insofar as *Paradise Lost* narrates the transition from immortality to mortality – nature to nations – the encounter Milton creates between unfallen Adam and fallen Eve can be seen as an illustrative collision of legal epochs".[35]

Literary scholars have underlined the importance of the natural law tradition in Daniel Defoe's writings, particularly in *Jure Divino: A Satyr*, where he writes while satirizing the Divine Rights of Kings, "*Self-Preservation* is the only Law,/ That does *Involuntary Duty Draw*; /It serves for Reason and Authority, /And they'll defend themselves, that *know not why*".[36] *Gulliver's Travels* (1726) by Jonathan Swift, which is usually seen as children literature, is another strong political allegory that, in a satirical manner, exposes the political debate of its time by calling our attention to legislators' role. Many authors of the late 18th century got inspired by the ideals of the French Revolution, and hence, articulated in favour of equality, democracy, and justice in their writings.

Law becomes more humane and beneficial to humankind when interacts with literature. For instance, the novels written during the Victorian age in England by Charles Dickens and Thomas Hardy powerfully portray the social realism of their time. They comment, among many other things, on the court, laws, and legal system, seeking reform. The novels of Dicken expose the legal hypocrisy of his time as he studied law as an apprentice of an attorney at the age of 15. He criticizes the adverse effects of the Industrial Revolution and attacks the issue of malnutrition, child abuse, child labour, prison reforms, and other forms of corruption. In his view, "the law is a ass" as he writes in the novel *Oliver Twist* (1937). He believed that law and prison await those who violate the law, and this is a recurrent theme in his novels *Bleak House* (1852-53), *Great Expectations* (1860), *Hard Times* (1854), *Little Dorrit* (1855), and *A Tale of Two Cities* (1859). In 1829, Dickens became a reporter at the Court of Chancery, the experiences of which dominate the theme of *Bleak House*. His fictional character Sydney Carton in the novel *A Tale of Two Cities* is a lawyer by profession. In *Great Expectations*, too, he continues to explore the theme of the relation between law and the moral life. The lawyer Jagger in this novel is one of the Dickens' best known characters who is a tough and highly successful barrister who strides the legal world of London. Dickens highlights this irony of legal practice when he writes about the character Jagger in this manner: "He knows the law is a game, and he acts entirely in accordance with its rules – that's his job, that's what he is paid for. For a fee, he will turn murder into manslaughter, lies into truth".[37] Convict Magwitch in *Great Expectations* is the most generous benefactor of Pip, the protagonist. Dickens has commented on law elsewhere too saying, 'if there were no bad people, there would be no good lawyers,' or 'Charity begins at home, and justice begins next door'.

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35. Christopher N Warren, John Milton and the Epochs of International Law, *European Journal of International Law*, 24. 2, 557–581 (2013), available at: https://doi.org/10.1093/ejil/cht024, (5/06/2013. Acc. on 29/03/2017)

36. Daniel Defoe, *Jure Divino: a Satyr, Book III* 10 (P. Hills in Black – Fryars, 1706).

37. Charles Dickens, *Great Expectations* (*Google Books,* Boston: Estes and Lauriat, 1881).

Another influential novelist of the Victorian age is Thomas Hardy, who, like many of his contemporary authors, was a legal practitioner, and therefore, his fiction has a deep influence of first hand experiences at the court. Legal inequality experienced by the women under coverture and its connection with the anxiety of men over property, inheritance, and illegitimacy gets realistically reflected in Hardy's novels *The Mayor of Casterbridge* (1886), *Tess of the d'Urbervilles* (1891), *Desperate Remedies* (1871), and *Jude the Obscure* (1895). His depiction of the trial scene on the question of morality in the courtroom in *The Mayor of Casterbridge,* and long interrogation by a barrister of a woman passing patriarchal judgment on women's moral behavior in *A Pair of Blue Eyes* (1893) and *Desperate Remedies* (1871), offer an understanding of the Victorian codes and legal system.[38] Hardy, in his novel *Tess of the d'Urbervilles*, has forcefully challenged the double standards of Victorian morality by giving it the subtitle 'A Pure Woman'.

John Galsworthy is also well known for offering social critique in his novels *Justice* (1910) and *Loyalties* (1922) that engage with the questions of morality and justice. In *The Man of Property* (1906), Galsworthy attacks a solicitor who considers his wife not more than property. His book *The Silver Box* (1906) criticizes the unjust treatment of law with the poor, whereas the novel *Justice* is a realistic portrayal of prison life in such a way that it succeeded in enforcing reformation in the system. *Lady Chatterley's Lover* (1928) is yet another example of modern-day legal fiction written by D.H. Lawrence, which prompted huge uproar for its uninhibited expression on love and sex. It fought and won a legal battle seeking freedom of expression.

Bernard Shaw is another noteworthy playwright whose socialist views get reflected in his writings on the problems of his time. His plays comment well on the law concerning domestic and personal matters. For instance, he writes, "It is a woman's business to get married as soon as possible, and a man's to keep unmarried as long as he can".[39] Social machineries, including law, have been much critiqued by him. In the preface to *Major Barbara* (1905) he comments, "Our laws make law impossible; our liberties destroy all freedom; our property is organized robbery; our morality is an impudent hypocrisy; our wisdom is administered by inexperienced or male experienced dupes; our power wielded by cowards or weaklings; and our honour false in all its points. I am an enemy of the existing order for good reasons..."[40]

Oscar Wilde is another Irish author who impacted people's thought in the early modern age in an unprecedented manner. His writings are scratching satire on the social, moral, legal, political questions of his time. To quote one of his poems, "I know not whether Laws be right, / or whether Laws be wrong. / All that we know who lie in goal. / Is that the wall is strong: /And that each day is like a year, /A year whose days are long".[41]

German thinker, critic, and playwright Bertolt Brecht's *Threepenny Opera* (1928) studies the provisions of copyright. European civil law, truth, and justice have been convincingly communicated in *The Caucasian Chalk Circle* (1948), where the heroine is

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38. Trish Ferguson, *Thomas Hardy's Legal Fiction* (Edinburg University Press, 2013).
39. G.B. Shaw, *Man and Superman* (First Pub. 1903, The Floating Press, 2012).
40. G.B. Shaw, *Major Barbara* xxxiii-xxxiv (First Pub. 1905, New York: Dover Publications, 2002).
41. Oscar Wilde, *De Profundis: The Ballad of Reading Goal and other Poems* (Wordsworth Editions 1999).

saved by the "good, bad judge" Adzak, who lambasts the rigid conventions of the legal system in this play. The character Adzak speaks in the play :

> In view of a large number of cases, the court today will hear two cases simultaneously. Before I open the proceedings, a short announcement: I receive – *he stretches out his hand; only the blackmailer produces some money and hands it to him* – I reserve for myself the right to punish one of these parties here – *he glances at the invalid* – for contempt of court. You – *to the doctor* – are a doctor, and you – *to the invalid* – are bringing a complaint against him. Is the doctor responsible for your condition? [42]

Reflections on law may be noticed in the writings of George Orwell too in his *Animal Farm* (1945) and *Nineteen Eighty-Four* (1949) in which he attacks the emergency legal system in the time of world war. Leo Tolstoy's writings, particularly *War and Peace* (1869) and *Anna Karenina* (1877), are insightful documents on judicial ethics, human rights protection, and injustices of man-made law. Russian author Fyodor Dostoevsky's *Crime and Punishment* (1866) stresses on the chief problems of criminology. As in *The House of the Dead* (1862), he once said: "The degree of civilization in a society can be judged by entering its prisons."[43] Victor Hugo's portrayal of the miserable conditions of galley slaves in *Les Miserables* (1862) and Franz Kafka's exposure of the inexorable nature of pre-arranged trial in *The Trial* are also worth mentioning texts. *One Flew over the Cuckoo's Nest* (1962) by Ken Kessey, which narrates the conditions in prisons and the dangers of psychiatric treatment, also questions the coercive methods of social authorities.

French author of the literature of absurd Albert Camus emerges to be a great humanist and moralist around the 1940s and 50s. His book *The Stranger* (1942) remarkably hints upon the interdisciplinary relations between law and literary studies and strongly resists the conventional notions of justice. The novel details the criminal element addressed in the trial of the protagonist. That is the criticism directed to the penal process, which not only extends for long periods, putting the defendant through the suffering of waiting for an institutional outcome but also excludes the defendant itself, who often does not understand how it works and is limited to trusting his lawyer.[44]

John Steinback's *The Grapes of Wrath* (1939), which captures the horrors of the Great Depression and probes into the very nature of equality and justice in America, is also a noteworthy example of the law in literature. The Champion of democracy in America and a great poet Walt Whitman writes in his *Leaves of Grass* (1855), "Were you looking to be held together by lawyers?/ Or by an agreement on a paper or by arms?/Nay, nor the world, nor any living thing, will so cohere".[45] Harper Lee's *To Kill a Mocking Bird* (1960) highlights the complicated relationship between the individuals and the abstract legal

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42. Bertolt Brecht, *The Caucasian Chalk Circle* (First pub. 1948, Nairobi: East African Educational Publishers Limited, 2008).
43. Fyodor Dostoevsky, *The House of the Dead* (First pub. 1862, Marc Ponomareff, 2005).
44. Lorena Martoni de Freitas, *Law and Literature: The Absurd in Law in The Stranger by Albert Camus*, 151-52 *Anamorphosis* 1. 1, 139-156 (2015), doi: 10.21119/anamps.11.
45. Walt Whitman, *Leaves of Grass* (first pub. 1855, OUP, 2005).

system, and John Grisham's novel *The Client* (1993) is a legal thriller centering on a man's attempt to suicide. Nadine Gordimer, too, fights boldly against the Apartheid Laws of her country in her novel *My Son's Story* (1990).

American author Herman Melville may be considered as an accidental legal historian. His novella *Billy Budd* (1924) though, is set on a ship voyaging in the sea, yet it is a classic example of legal text. There is a jurisprudential question at the heart of this book as the protagonist is sentenced to death by hanging on false charges of the opponents by Captain Vere. Former Judge Richard Posner, the author of *Law and Literature* (1988), considers the death sentence of Billy Budd by Captain Vere as lawful and consistent with his duty of commanding a major warship. However, in the novel, it is shown towards the end that Captain Vere perceived the emergence of the image of Christ in the sky, which grants the sacrifice of innocent Billy Budd a force of divinity. American author, thinker, and transcendentalist David Thoreau also said once, "The law will never make men free; it is men who have got to make the law free. They are the lovers of law and order who observe the law when the government breaks it."[46]

In India, Bankim Chandra Chatterjee's *Anand Math* (1882), Vijay Tendulkar's *Silence, the Court is in the Session* (1963), and Mani Shankar Mukherjee's *Kato Ajanare* (1959) are few prominent examples of such literary texts which are based on the subject of law or legal practice. These works could be seen as an Indian contribution to the synergetic field of law and literature.

V. LEGAL LANGUAGE AND HERMENEUTICS

As discussed in the previous section, law and literature share one common feature- 'Language', and therefore, both are subject to interpretation. Both literary as well as legal texts, call for unbiased and objective interpretation so that true meaning embedded in the linguistic signs may be grasped. Here comes the role of hermeneutics, which is an act of interpretation. The relation between law and hermeneutics came to be known as 'legal hermeneutics' understanding of which is desired to interpret legal codes, regulations, and statutes, thus dispense justice. Swiss linguist and modern critic Ferdinand de Saussure considered law as a social product linked with the ability to speak[47] whereas for Robert Cover, the law is a language.[48] Umberto Eco, an Italian semiotician, realiges the importance of interpretation in the process of reading text and holds a view that a text can have no meaning without a reader who contributes it meaning.[49] James Boyd White, too, believes that 'law is a culture of arguing and interpreting'.[50]

In this way, the interpretive nature of legal text brings us to recognige its close connection with language. Considering law as a text which is subject to interpretation in view of comprehending its true meaning and dispensing justice, the role of hermeneutics

46. David Thoreau, *Civil Disobedience* in *Collected Essays and Poems* 338 (1975).
47. Ferdinand de Saussure, *Course in General Linguistics* 9 (Trans. Wade Baskin, *Philosophical Library*, New York 1959).
48. Robert Cover, "The Supreme Court, 1982 Term-Foreword: Nomos and Narrative" 8 *Harvard Law Review*, 1, 1-68 (1983).
49. Umberto Eco, *Lector in Fabula* (Bompiani: Milano, 2006)
50. James Boyd White, *Law as Language: Reading Law and Reading Literature*, 436 *Texas Law Review*, 60. 3, 415-445 (1982).

needs to be underlined. Interpretation of legal text is key to legal hermeneutics as language serves as a vehicle through which law conveys itself to the public. Hermeneutics plays a significant role in the legal theories of H.L.A. Hart, Lon L. Fuller[51], and Ronald Dworkin. Hart, a prominent English legal theorist, applied "positivism" to the law in 1958 to underline the difference between the 'law as it is and the law as it ought to be.' The debate between Hart's legal positivism and the natural law theory of Dworkin argues over the relationship between law and morality and the distinction between 'duty imposing and power conferring rules'.[52] Joseph Raz too in *Ethics in the Public Domain*, states that "it is a major task of legal theory to advance our understanding of society by helping us understand how people understand themselves."[53] Hart argues that judges do have discretion because of the "open texture" of legal rules.[54]

Law is supposed to have an "open texture" which means that law is indeterminate as there can be various interpretations of a law depending upon the different factors. Hart says :

> Whichever device, precedent or legislation, is chosen for the communication of standards of behavior, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they will have what has been termed an open texture.[55]

The phrase 'open texture' may be comprehended as an analogy with the fabric's texture, which always has some scope for inserting new threads in it. Thus, due to the open texture, the law can be variedly interpreted concerning the limitations of language, place, time, and context.

Hart's 'positivism' was challenged by Ronald Dworkin**,** the American legal philosopher, and hermeneutician, in his seminal works *A Matter of Principle* (1985) and *Law's Empire* (1986), where he proposes that law should be grounded in moral integrity. He claims that our concept of law is an interpretive concept[56] and considering 'law as interpretation'[57] Dworkin attacks Hart's separation between 'law as it is and law as it ought to be.' He observes 'law as literature' and argues that like literature, law is an 'interpretive concept', and the judges are just like interpreters of an unfolding novel. Thus, judges should also be seen as authors engaged in a 'chain novel'[58] each one of whom is supposed to write a new chapter. Here, the law is compared to a collective novel, as he opines: "In this enterprise a group of novelist writes a novel seriatim; each novelist in the chain interprets the chapter he has been given in order to write a new chapter,

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51. Lon L. Fuller, *The Morality of Law* (Yale University Press. 1964).
52. HLA Hart, *The Concept of Law* (2nd edition 1994). See also, HLA Hart's *Hermeneutic Positivism: On Some Methodological Difficulties in The Concept of Law* by H. Hamner Hill in *Canadian Journal of Law & Jurisprudence*, 3.1, 113-128 (1990) DIO: 10.1017/S0841820900001077.
53. Joseph Raz, Ethics in the Public Domain*: Essays in the Morality of Law and Politics* 221 (1994).
54. HLA Hart, *The Open Texture of Law*, 124-35 *The Concept of Law* (OUP, 2012).
55. HLA Hart, *The Concept of* Law 127-28 (OUP, 2012). See also, Sean Coyle, *From Positivism to Idealism: A Study of the Moral Dimensions of Legality* (Routledge, 2017).
56. Batchelor Thomas Nim, *The role of hermeneutics in the debate between natural law theory and legal positivism* 4-5 (Ph.D. dissertation, University of Nebraska-Lincoln, 1989)
57. Ronald Dworkin, *Law as Interpretation*, *Texas Law Review*, 60, 527-550 (1982).
58. Ronald Dworkin, *Law's Empire* 228 (Harvard University Press, 1986).

which is then added to what the next novelist receives, and so on."[59] In this way, a judge performs the simultaneous task of being a narrator as well as an interpreter of law. "The chain novel" metaphor helps us remarkably understand the constraints that affect judges' reasoning while practicing law and the reason why all the interpretations of law are not equal and coherent.

VI. NEED FOR CURRICULUM REVISION AND CHANGE IN PEDAGOGY

The inference drawn from the understanding of the process of human evolution and civilization tells that education is the most potent instrument of change. Unfortunately, education, though, is an ongoing process, that aims to bring an overall development in the cognitive, affective, and psychomotor behavior of an individual has come to be understood by many in a narrower sense. Concerning legal education in India, it needs to be comprehended that education has both intrinsic as well as instrumental value. Regarding intrinsic value, great saint Bhartrihari has long ago said that 'man is nothing but an animal without knowledge.[60] On the other hand, education as an instrument not only develops the personality of the learners but also enables them to make their contribution to human society.

It should be borne in mind that law is not just a liberal education; it is also a professional education today, and as such, its very purpose is to produce competent lawyers, judges, policymakers, and human rights and social justice activists. For this reason, "Legal education reform is taking place around the globe to make it more responsive than ever before to the legal need of the community – nation as well as global and the learning needs of the students to become professionally competent to play their role in our increasingly interdependent world."[61]

In view of the aforesaid importance of legal English in making a lawyer competent enough to meet the needs of society, the syllabus for legal English must be redesigned in such a manner that our law graduates become fully equipped in written and communicative skills to present their arguments in a highly impressive, convincing, and persuasive manner. To this end, students need to be made acquainted with the development of legal English, its relationship with common law on the one hand, and its natural and obvious connection with English literature on the other. To achieve this objective, suitable study material be prepared, among other things, by including the history of legal English and select literary texts mentioned above. It must be realized and understood that justice delivery depends on the lawyers and judges in society, and therefore, in order to improve the standards of justice delivery in any country, it becomes crucial to oversee the way legal education is imparted.[62]

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59. *Id* at p. 229

60. विद्या नाम नरस्य रूपमधिकं प्रच्छन्नगुप्तं धनं, विद्या भोगकारी यशःसुखकारी विद्या गुरुणां गुरुः।
विद्या बन्धुजनो विदेशगमने विद्या परा देवता, विद्या राजसु पूजिता न तु धनं विद्याविहीनः पशुः।।
Neeti Shatak,20 https://www.hindisahityadarpan.in/2014/11/without-knowledge-a-man-is-animal-bhartrihari.html (accessed on 21/02/2017)

61. B. C. Nirmal, *Legal Education in India: Problems and Challenges*, 142 *IIUM Journal*, 20. 1, 139-167 (2012).

62. B.C. Nirmal and Rajnish Kumar Singh (eds.), Introduction, *Contemporary Issues in International Law: Environment, International Trade, Information Technology and Legal Education* 30 (New Delhi: Satyam Law International, 2014).

Days are gone when teaching moved around the law teachers in the class in which the teacher was the active participant and students were passive listeners. As legal education aims to make a student think like a lawyer, write like a lawyer, speak like a lawyer, and counsel like a lawyer, the traditional Socratic method of teaching must be replaced by a more scientific and practical teaching and learning method. The objectives of legal education in India should be redefined to produce legal professionals of a global character. Today legal education has to meet not only the requirements of the Bar but also of the new needs of trade, commerce, and industry in the context of growing internationalization of the legal profession.[63] As Joseph P. Broadly suggests, He ought to be a man of a large understanding; he must be a man of large acquirements and rich in general information; for he is a priest of the law, which is the bond and support of civil society and which extends to and regulates every relation of one man to another in the society, and every transaction that takes place in it.[64]

As we have left the era of industrialization and modernization and entered the era of globalization and information technology, where we are marching to perform in 'Education 4.0' [65] (fourth generation of the education system in India), the teaching of law in general and legal English in particular needs to be restructured to make it more relevant than ever before by bringing it in sync with modern tools of e-learning. An eminent scholar of International Law B.C. Nirmal says, "In view of the international dimensions of legal practice today, we need lawyers who can look beyond the law jurisdiction in which they practice and forge new tools and techniques appropriate to the changing needs and time." [66] Whether one agrees to the words of Victor Hugo or not (although, in a different context), techno-pedagogy is 'an idea whose time has come'.[67]

Therefore, there is an urgent need to reorient the objectives of legal education, reframe its legal curriculum, customize the pedagogy, and adopt an unconventional approach. In this view, the pedagogy of teaching legal English should also change in a country like India. For this, it would be beneficial to encourage the reading of 'law in literature' for which select literary texts, including plays and novels or anthology of select literary texts based on law, should be prescribed in the syllabi of courses in law. The knowledge of grammar, syntax, legal maxims and terminology is necessary, but too much emphasis on grammar needs to be avoided. The students should be trained hermeneutically also to enable them to interpret legal texts, and little training in the study of literature may prove wonder in this regard. Rhetorical proficiency, the art of communication, articulation, and argumentation in lawyers play a crucial role in persuasion,

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63. B. C. Nirmal, *Legal Education in India: Problems and Challenges*,147 *IIUM Journal*, 20. 1, 139-167 (2012). See also, B.C. Nirmal, *Legal Education in India: A Law School Perspective*, *Lexigentia* 2, 19-30 (2015), also *Interface between Law and Society and Role of Law Reform and Legal Education*, *NUSRL JLP* 1.2, 1-13 (2014).

64. Joseph P. Broadly, *Introductory Lecture on Law, Its Nature and Office as the Bond and Basis of Civil Society*, 266 (University of Pennsylvania, 01/10/1884).

65. The first generation of the education system in India was the *Gurukul* system; the second was the traditional university system, whereas the third generation began with the trend of distance education. The fourth is the education system governed by techno-pedagogy with too much thrust on e-learning in the virtual world.

66. *Supra note* 64 at 144

67. Victor Hugo, *The History of a Crime* (Jazzybee Verlag, 1877), '*Nothing is as powerful as an idea whose time has come'*.

and consequently, decision making. Furthermore, the most important thing is that in framing policies, reforming pedagogy, and determining curriculum, the participation of all the stakeholders of the education system (including the learners) be ensured. Above all, it should be learner-centric because it is the learner whose personality and profession are shaped and determined.

VII. CONCLUSION

Human society has its dynamics and dynamism, and therefore, it keeps changing with time. Hence, history, polity, law, language, customs, tradition, and culture that build a society also transform. One can see in the case of English society, whose early history is characterized by a series of invasions that the diverse ethnic communities and human races that invaded the territory not merely plundered it but also, in due course of time, contributed to the evolution of common law, legal English, English literature, and legal education. Legal English is an integral part of legal education and legal practice in many parts of the world, and therefore, it is also essential to keep on searching for appropriate measures to make its teaching and learning more useful and relevant.

There might be diverse views regarding the teaching of English in countries outside England with a particular perspective to see it as a colonial legacy or the language of rulers. However, it needs to be understood here that the English language has two purposes: cultural and communicative. From the cultural perspective, few may see it as colonizers' language while today it is mostly an international language of trade, commerce, and international relations. Moreover, it plays a vital role in conducting a comparative study and enriching the vernacular. There was strong opposition to English during the freedom struggle and the post-independence period because of the aversion of a section of educated people to it for being the language of the colonial masters, but much water has flown under the river Ganges since then. With the growing industrialization, modernization, and westernization of Indian society on the one hand and the increasing role and importance of India as a power to reckon with at the global stage on the other, there has been a perceptible revolutionary change in the attitude of the people towards English. Although we all are emotionally attached with Hindi as a national language and our respective vernacular languages as an integral component of our culture and identity, we cannot be oblivious to the fact that English is not only the *lingua franca* in our motherland but is also the language of the Supreme Court and high courts. The erstwhile enemies of Britain in Europe have now agreed to the proposal of making English a *lingua franca* in Europe too. It should be, therefore, an eye-opener to all those who still have an Ostrich like attitude on the issue of English. One should not forget that due to competence in spoken and written English, India's law graduates are bound to have a significant USP and an edge compared to the graduates of non-English speaking countries.

Turning to the use of legal English in the legal profession, this study reinforces its symbiotic relationship with common law and, to some extent, with English literature that developed in England in more than 600 years. What is curious to note is the contribution of lawyers in the early development of English literature and its continuing impact on legalese. The role of language and hermeneutics in the interpretation of law continues to play a far-reaching role in the administration of justice. Given the significant role legal English plays in the legal profession, this subject must be taught in the law schools with

all sincerity and seriousness it deserves in view of the advantages that law graduates may reap from their competence in legal English in the era of transnational legal practice. Hence, innovative pedagogy and digital and technological mode of legal training is also a *sine qua non* for realizing the objectives of the legal education as defined and redefined by the Bar Council of India and prestigious law schools in response to the needs of the global legal service market.

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DOMESTIC SUPPORT UNDER AGREEMENT ON AGRICULTURE : WTO COMMITMENTS *VIS-À-VIS* INDIAN RESPONSE

ANOOP KUMAR*

ABSTRACT : WTO Agreement Agriculture (AoA) is the most comprehensive multilateral rules on agricultural trade and related issues. It includes three policy pillars i.e Market access, domestic supports and export subsidies. The AoA establishes a framework to reduce domestic support for agriculture. Articles 3, 6 and 7 of the AoA require limits on domestic support programs, developed nations had to reduce domestic support by 20% and developing nations by 13.3%. The AoA divides domestic support into three general categories such as Green box, Blue box and Amber box. Considering all the exemptions, WTO members are still allowed to provides substantial amounts of subsidies to agriculture. In the same context, the present Paper will explore the policy space available under WTO Agreements and also attempts to examine the implications of WTO subsidies rules on Indian agriculture and India's negotiation position on agriculture in Doha Round.

KEY WORDS : WTO, Agreement on Agriculture (AoA), Domestic support, Subsidies, Green Box, Blue Box, Amber Box, Agreement on Subsidies and Countervailing Measures (SCM Agreement).

I. INTRODUCTION

Governments intervene in the agricultural sector to provide adequate food for the population, to achieve self-sufficiency and to promote rural welfare. Although at least in theory the GATT covered trade in agricultural products, the Contracting Parties were unwilling to subject their domestic agricultural policies[1] to the same disciplines as industrial

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1. For a partial list of literature on issue relating to agriculture and Domestic Support, *see,* Dominic Coppens, *WTO Disciplines on Subsidies and Countervailing Measures: Balancing Policy Space and Legal Constraints* (United Kingdom: Cambridge University Press, First Publish, 2014); A.K. Koul, *The Agreement of Tariff and Trade (GATT)/ WTO* (New Delhi: Satyam Book, First Edition, 2005); Mihaela Daniela Tancu, *US's and EU's Agricultural Policies in the Context of GATT/WTO,* Ph.D. Thesis, Department of Business Law, Centre of International Business Law, Aarhus School of Business, Aarhus University; Nestor Stancanelli, "The Historical Context of the Green Box", in Ricardo Melediz-Ortiz, *Agricultural Subsidies in the WTO Green Box, Ensuring Coherence With Sustainable Development Goals* (Cambridge: Cambridge University Press, 2009); Jonathan Hepburn and Christophe Bellman, "Doha Round Negotiations on the

products.

The Agreement on Agriculture (AoA) was considered to be a starting point for liberalizing trade in agriculture. This framework consists of three main pillars. The first pillar, on market access, requires members to convert non-tariff barriers into ordinary customs duties and subsequently to bind and reduce the latter. The other two pillars deal with subsidies. The second pillar consists of commitments and general disciplines on domestic support and the third pillar covers the export subsidies.

The Agreement on Agriculture establishes a framework to reduce domestic support for agricultural. Domestic support measures are basically categorized in three boxes, *first*, green box support are deemed not to be, trade-distorting and allowed without limits. *Second*, blue box support linked to production could also be offered if it is made in the framework of a production-limiting programme. *Third,* all other types of domestic support are in principle subject to reduction commitments because of their trade-distorting effect known as amber box.In addition to these three general boxes, two other boxes includes First certain *de minimis* level of amber box support and Next, Special and differential (S&D) treatment is given to developing countries regarding some types of domestic support.

The present Paper will discuss the interplay between these set of disciplines and the Agreement on Agriculture and also try to explain the application of SCM Agreement on agriculture.The paper also attempts to examine the implications of WTO subsidies rules on Indian agriculture and India's negotiation position on agriculture in Doha Round and further, India's obligations under the AoA and Indian response in the same context.

II. EVOLUTION OF LAW RELATING AGRICULTURE UNDER INTERNATIONAL TRADE REGIME

1. Agriculture under the GATT

Agriculture remains one of the highly protected areas of international trade as the trade in agricultural goods was governed by exceptions to the General Agreement on

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Green Box and Beyond", in Ricardo Meledi-Ortiz, *Agricultural Subsidies In The WTO Green Box, Ensuring Coherence With Sustainable Development Goals* (Cambridge: Cambridge University Press, 2009); Harry De Gorter, "The Distributional Structure of US Green Box Subsidies", in Ricardo Meledi-Ortiz, *et.al.,* (eds.) *Agricultural Subsidies in the WTO Green Box, Ensuring Coherence With Sustainable Development Goals* (Cambridge: Cambridge University Press, 2009); Schoenbaum J. Thomas, "Fashioning A New Regime for Agricultural Trade: New Issues and Global Food Crisis", 14(3) *Journal of International Economic Law,* 2011, pp.593-611; Joseph A. McMahon, "The Agreement on Agriculture", in Patrick F. Macro, *et. al.* (eds.) *The World Trade Organization: Legal, Economic and Political Analysis* (New York: Springer, Vol. II, 2007); World Trade Report on *Exploring the Links between Subsidies, Trade and the WTO*, 2006; Schoenbaum J. Thomas, "Fashioning A New Regime for Agricultural Trade: New Issues and Global Food Crisis", 14(3) *Journal of International Economic Law,* 2011;l Kym Anderson, Will Martin, and Ernesto Valenzuela, "The Relative Importance of Global Agricultural Subsidies and Market Access ", 5(3) *World Trade Review,* 2006; Peoples' Commission on GATT, on the constitutional implications of the Final Act embodying the results of the Uruguay round of multilateral trade negotiations, Centre for Study of Global Trade System and Development, 1996; A. B. Deogirika, *W.T.O. and Indian Economic* (Jaipur: Shree Niwas Publication 2004 First Edition; D. McNiel, "Furthering the Reforms of Agricultural Policies in the Millennium Round", 9(41) *Minnesota Journal of Global Trade,* (2000)

Tariffs and Trade 1947(GATT).[2] During the early GATT negotiations rounds (Geneva 1947, Annecy 1949, Torquay 1950-51, Geneva 1956) the main focus was on reducing tariffs and agriculture was notably avoided, thus no improvements have been brought to this sector.[3] Only one provision of the GATT, Article XI:2[4] would specifically refer to agriculture, while Article XVI referred to primary commodities, which include agricultural products. Differences between Article 25 of the Havana Charter and GATT Article XVI on the use of subsidies would not be reconciled until the 1955 GATT Review Session. By that time, serious damage had been done to the credibility of the GATT. The bifurcation of treatment in international trade between industrial and agricultural products, occasioned by the failure of the International Trade Organization (ITO) and events in the early history of the GATT, has only recently begun to be eliminated.[5]

2. The Haberler Report

A wider attempt to influence the agricultural policies of all Contracting Parties was made by the agricultural section of the 1958 report of a Panel of Experts established to consider trends in international trade, including agricultural trade. The report, best known after its Chairman as the Haberler Report, recognized that the domestic agricultural policies of the Contracting Parties were major factors in restraining the growth of international agricultural trade.[6]

3.Multilateral Trade Negotiations

i. The Kennedy Round

After the conclusion of the Dillon Roundin 1962, the Contracting Parties planned to launch another round of multilateral trade negotiations. One of the prime motivations

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2. A.K. Koul, *The Agreement of Tariff and Trade (GATT)/ WTO* (New Delhi: Satyam Book, First Edition, 2005) at 375.
3. MihaelaDaniela Tancu, *US's and EU's Agricultural Policies in the Context of GATT/WTO,* Ph.D. Thesis, Department of Business Law, Centre of International Business Law, Aarhus School of Business, Aarhus University, at 4.
4. The GATT, 1994, Article XI:2 provides that the general prohibition on import restrictions contained in Article XI:1 would not extend to: Import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures which operate: (i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or (ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or (iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible.
5. Joseph A. McMahon, "The Agreement on Agriculture", in Patrick F. Macro, *et. al.* (eds.) *The World Trade Organization: Legal, Economic and Political Analysis* (New York: Springer, Vol. II, 2007) at 189.
6. Summarizing the current state of international trade in agricultural products, the report noted: ". ..whether or not agricultural protectionism has increased in the highly developed countries, there are two incontrovertible facts. First, agricultural protectionism exists at a high level in the most industrialised countries; and second, the development of production and consumption of agricultural production in such countries has been such as to make net agricultural imports into these countries more and more marginal in relation to their total domestic production and consumption of such products."

for this round was a change of emphasis in American agricultural policy that sought to reduce the levels of domestic price support for major products towards prices prevailing on the international market.

Although the Kennedy Round failed with respect to agriculture, it was reasonably successful in other respects; for example, the Round brought the GATT close to its goal of eliminating tariff barriers as an obstacle to trade in manufactured goods. The focus of GATT negotiations would now shift to non-tariff barriers.[7]

ii. The Tokyo Round

The Tokyo Round produced a series of codes seeking to reduce or eliminate non-tariff barriers. Little progress was made with respect to agriculture. One reason for this was the limited mandate given to the EC Commission by the Member States, which stressed that the principles and mechanisms of the CAP should not be called into question and that they should not constitute a matter for negotiation.

In addition to the usual tariff concessions in the agricultural sector, estimated to cover thirty percent of trade and yielding an unweighted average tariff reduction of forty percent, the Tokyo Round ended with two international agreements on agriculture, limited to bovine meat and dairy products respectively. The Subsidies Code recognized the legitimacy of subsidies as instruments of social and economic policy whilst trying to control the impact of such subsidies on other Contracting Parties. Disputes in the early 1980s would show the limited impact of the Code on agriculture.[8]

iii. Uruguay Round Negotiations

The Ministerial Declaration of *Punta del Este* of 20 September 1986,which launched the Uruguay Round, included comprehensive negotiations in agriculture for the first time in a multilateral round.[9]

The Uruguay Round stated that: The Contracting Parties agree that there is an urgent need to bring more discipline and predictability to world agricultural trade by correcting and preventing restrictions and distortions ...so as to reduce the uncertainty, imbalances and instability in world agricultural markets.[10] Negotiations shall aim to achieve greater liberalisation of trade in agriculture and bring all measures affecting import access and export competition under strengthened and more operationally effective GATT rules and disciplines, taking into account the general principles governing the negotiations.

Despite the preparatory work undertaken by the GATT Committee on Trade in Agriculture since its establishment in 1982, the progress of the negotiations was slow, which was hardly surprising given the contrasting negotiating positions of the various

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7. Joseph A. McMahon, "The Agreement on Agriculture", in Patrick F. Macro, *et. al.* (eds.) *The World Trade Organization: Legal, Economic and Political Analysis* (New York: Springer, Vol. II, 2007) at 195.

8. *Id.,* at 196.

9. Nestor Stancanelli, "The Historical Context of the Green Box", in Ricardo Meledi-Ortiz, *Agricultural Subsidies in the WTO Green Box, Ensuring Coherence With Sustainable Development Goals* (Cambridge: Cambridge University Press, 2009) at 25.

10. Jonathan Hepburn and Christophe Bellman, "Doha Round Negotiations on the Green Box and Beyond", in Ricardo Meledi-Ortiz, *Agricultural Subsidies In The WTO Green Box, Ensuring Coherence With Sustainable Development Goals* (Cambridge: Cambridge University Press, 2009) pp.36-69.

Contracting Parties.[11]

The Uruguay Round was formally concluded by the Marrakesh Declaration of April 15 1994, adopted by the 124 governments (and the EC) that had participated in the negotiations. The Uruguay Round was a historic achievement with respect to agriculture, as it was in so many other areas. The Agreement on Agriculture, which considerably strengthened the GATT rules on agriculture, was designed to shape the future agricultural policies of the Members of the newly created World Trade Organization (WTO). Agreement aims to achieve greater liberalization of trade in agriculture; its preamble also expresses the concerns of members opposing further liberalization.[12]

III. OBJECTIVE OF AOA AND COVERAGE OF PRODUCT UNDER THE AGREEMENT

1.Objective of AoA

The Agreement on Agriculture is a step towards serious reform of international rules governing trade in agricultural product. In *Canada- Dairy*,[13] the Panel referred to the Preamble[14] and identified the "main purpose" of the Agreement on Agriculture as fallows:

"As enunciated in the preamble to the Agreement on Agriculture, the main purpose of the Agreement is to 'establish a basis for initiating a process of reform of trade in agriculture' in line with, *inter alia*, the long-term objective of establishing 'a fair and market-oriented agricultural trading system'. This objective is pursued in order 'to provide for substantial progressive reductions in agricultural support and protection sustained over an agreed period of time, resulting in correcting and preventing restrictions and distortions in world agricultural markets'."

After quoting several recitals from the Preamble, the Panel stated that: "This language makes clear that the working assumption in agricultural trade is not that of a market free of government intervention. The establishment of a fair and market-oriented agricultural trading system,through progressive reductions in agricultural support and protection, is the long-term objective, and the Agreement on Agriculture has established a 'basis for initiating the process of reform' aimed at achieving that long-term objective. In the meantime, markets subject to a certain degree of government regulation would appear to be rather the rule in agricultural trade, and regulation-free markets the exception.[15,16]

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11. *Supra* note 7, at 201.
12. Dominic Coppens, *WTO Disciplines on Subsidies and Countervailing Measures: Balancing Policy Space and Legal Constraints*(United Kingdom: Cambridge University Press,First Edition, 2014) at 279.
13. *Canada- Measures Affecting the Implementation of Milk and Exhortation of Dairy Products,* WT/DS103, 113/R,adopted on 27 October, 1999, para.7.25.
14. The Agreement on Agriculture, 1994, Preamble.
15. *Supra* note 13, para. 196.
16. In *Chile - Price Band System*, the Appellate Body recalled the Preamble prior to addressing the specific issues raised under Article 4.2 of the Agreement on Agriculture: "Before addressing these specific issues appealed by Chile, we recall that the preamble to the Agreement on Agriculture states that an objective of that Agreement is 'to establish a fair and market-oriented agricultural trading system', and to initiate a reform process 'through the negotiation of commitments

2. Product Coverage

The coverage of the Agreement on Agriculture is provides in Article 2[17] of AOA and in detail in Annex I of the Agreement. The definition covers not only basic agricultural products such as wheat, milk and live animals, but the products derived from them such as bread, butter and meat, as well as all processed agricultural products such as chocolate and sausages. The coverage also includes wines, spirits and tobacco products, fibers such as cotton, wool and silk, and raw animal skins destined for leather production. Fish and fish products are not included, nor are forestry products.[18]

IV. DOMESTIC SUPPORT COMMITMENTS UNDER THE AGREEMENT ON AGRICULTURE

The Agreement on Agriculture is best analyzed as containing four categories of commitment polices: *i.e*. Market access, Domestic support, export subsidies and non-trade concern. Keeping in view of the scope of present paper the provisions relating to Domestic Support are elaborated and discussed in detail.

The Agreement on Agriculture establishes a framework to reduce domestic support for agricultural products. Domestic support measures are basically categorized in three different general boxes, depending on their trade distortive potential. *First*, some types of support are deemed not to be, or only minimally, trade-distorting and are therefore allowed without limits (*i.e*. green box support). *Second*, some support linked to production could also be offered if it is made in the framework of a production-limiting programme (*i.e*. blue box support). *Third,* all other types of domestic support are in principle subject to reduction commitments because of their trade-distorting effect (*i.e*. amber box).

In addition to these three general boxes, two other boxes should be distinguished. First of all, all countries are allowed to offer a certain *de minimis* level of amber box support (*i.e*. *de minimis* box). Next, Special and differential (S&D) treatment is given to developing countries regarding some types of domestic support (the so-called S&D box). Both boxes are equally exempted from reduction commitments.[19]

1.Green box Domestic Support

Domestic support measures in the green box shall meet the fundamental requirement that they have no, or at most minimal, trade-distorting effects or effects on production.[20]

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on support and protection and through the establishment of strengthened and more operationally effective GATT rules and disciplines'. The preamble further states that, to achieve this objective, it is necessary to provide for reductions in protection, 'resulting in correcting and preventing restrictions and distortions in world agricultural markets,' through achieving 'specific binding commitments,' *inter alia,* in the area of market access.

17. The Agreement on Agriculture, 1994, Article 2: Product Coverage. This Agreement applies to the products listed in Annex 1 to this Agreement, hereinafter referred to as agricultural products.

18. "WTO Agreement on Agriculture and its Implications", 1(5) *India and the WTO*, 1999, New Delhi: A Monthly Newsletter of the ministry of commerce) A Monthly Newsletter of the Ministry of Commerce at 4.

19. *Supra* note 12, at 314.

20. *See* Annexure 2, para. 1 of the Agreement on Agriculture: 1. Domestic support measures for which exemption from the reduction commitments is claimed shall meet the fundamental

To meet this requirement, the Agreement on Agriculture stipulates general and policy-specific criteria in Annex 2.

Two general obligations are established, *first* ,support must be provided through a publicly funded government programme (including government revenue forgone) not involving transfers from consumers, and it must not have the effect of providing price support to producers.

Second, the support programme must fit into the list of programmes given in the Agreement on Agriculture and meet the policy-specific criteria in question.[21] In broad terms, the list covers general services programmes, food-security related expenditures, and decoupled direct payments to producers. List of programmes are as fallows.

First, service programmes are government expenditures in relation to programmes which provide service or benefits to agriculture or the rural community[22](*e.g.*, research and training services or marketing and promotion services). As part of the Bali package concluded in December 2013, members agreed on a non-exhaustive list of general service programmes related to land reform and rural livelihood security.[23]

Second, food security expenditures relate to public stockholding for food security purpose as well as domestic food aid.[24] To fall within the green box, public stockholding

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requirement that they have no, or at most minimal, trade-distorting effects or effects on production. Accordingly, all measures for which exemption is claimed shall conform to the following basic criteria:(a) the support in question shall be provided through a publicly-funded government programme (including government revenue foregone) not involving transfers from consumers; and,(b) the support in question shall not have the effect of providing price support to producers.

21. *Id.,* Annexure 2, paras.2-13 of the Agreement on Agriculture.

22. *Id.,*Annexure 2, para. 2 of the Agreement on Agriculture, General Services: Policies in this category involve expenditures (or revenue foregone) in relation to programmes which provide services or benefits to agriculture or the rural community. They shall not involve direct payments to producers or processors. Such programmes, which include but are not restricted to the following list, shall meet the general criteria in paragraph 1 above and policy specific conditions where set out below: (a) research, including general research, research in connection with environmental programmes, and research programmes relating to particular products; (b) pest and disease control, including general and product-specific pest and disease control measures, such as early-warning systems, quarantine and eradication; (c) training services, including both general and specialist training facilities; (d) extension and advisory services, including the provision of means to facilitate the transfer of information and the results of research to producers and consumers; (e) inspection services, including general inspection services and the inspection of particular products for health, safety, grading or standardization purposes; (f) marketing and promotion services, including market information, advice and promotion relating to particular products but excluding expenditure for unspecified purposes that could be used by sellers to reduce their selling price or confer a direct economic benefit to purchasers; and (g) infrastructural services, including: electricity reticulation, roads and other means of transport, market and port facilities, water supply facilities, dams and drainage schemes, and infrastructural works associated with environmental programmes. In all cases the expenditure shall be directed to the provision or construction of capital works only, and shall exclude the subsidized provision of on farm facilities other than for the reticulation of generally available public utilities. It shall not include subsidies to inputs or operating costs, or preferential user charges.

23. The list covers (i) land rehabilitation; (ii) soil conservation and resource management; (iii) drought management and food control; (iv) rural employment programmes; (v) issuance of property titles; and (vi) farmer settlement programmes, all in order to promote rural development and property alleviation. WT/MIN(13)/37 WT/L/912, 11 December. 2013.

24. *See* Annex 2, para. 3 - 4 of the Agreement on Agriculture.Annex 2, para. 3 Public stockholding for food security purposes: Expenditures (or revenue foregone) in relation to the accumulation

must be purchased by the government at the current market price and not sold below the current domestic market price. At the Bali Ministerial Conference, members did not relax these conditions, but inscribed a peace clause for non-conforming public stockholding by developing countries. This means that non-conforming public stockholding resulting in domestic support above commitment levels (*i.e.* in excess of Amber box limits) could not be challenged under the Agreement on Agriculture.

Third, direct payments to producers could also fall under the green box if such payments are decoupled (*i.e* delinked) from various aspects of production decisions. Here, two different sets of policy specific disciplines could be distinguished, depending on the type of decoupled payments. On the one hand, decoupled income support[25]and all non-listed types of direct payment must be decoupled from type or volume of production, domestic or international prices and factors of production employed. Additionally, it must not require production to receive the payment. These requirements thus aim at neutrality with regard to production decisions. The appellate Body in *US-Upland Cotton*[26] agreed that a domestic support programme that includes anegative requirement not to produce certain crops is not decoupled from production, because a partial exclusion of some crops from payments has the potential to channel production towards the production of crops that remain eligible for payments. On the other hand, specific criteria are stipulated for each listed type of decoupled direct payment. These payments include income insurance and income safety-net programmes, payments for relief of natural disasters, structural adjustment assistance provided through retirement programmes or investment aid and payments under environmental and regional assistance programmes.

If the general as well as the policy specific criteria are fulfilled domestic support measures qualify under the green box, implying that they are not subject to reduction commitments and may even is increased.[27]

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and holding of stocks of products which form an integral part of a food security programme identified in national legislation. This may include government aid to private storage of products as part of such a programme. The volume and accumulation of such stocks shall correspond to predetermined targets related solely to food security. The process of stock accumulation and disposal shall be financially transparent. Food purchases by the government shall be made at current market prices and sales from food security stocks shall be made at no less than the current domestic market price for the product and quality in question.Annex 2, para. 4 Domestic food aid: Expenditures (or revenue foregone) in relation to the provision of domestic food aid to sections of the population in need. Eligibility to receive the food aid shall be subject to clearly-defined criteria related to nutritional objectives. Such aid shall be in the form of direct provision of food to those concerned or the provision of means to allow eligible recipients to buy food either at market or at subsidized prices. Food purchases by the government shall be made at current market prices and the financing and administration of the aid shall be transparent.

25. *Id.,* Annexure 2, para. 6 of the Agreement on Agriculture: *Decoupled income support*: (a) Eligibility for such payments shall be determined by clearly-defined criteria such as income, status as a producer or landowner, factor use or production level in a defined and fixed base period.(b) The amount of such payments in any given year shall not be related to, or based on, the type or volume of production (including livestock units) undertaken by the producer in any year after the base period.(c) The amount of such payments in any given year shall not be related to, or based on, the prices, domestic or international, applying to any production undertaken in any year after the base period.(d) The amount of such payments in any given year shall not be related to, or based on, the factors of production employed in any year after the base period. (e) No production shall be required in order to receive such payments.

26. Appellate Body Report, United States – Subsidies on Upland Cotton, WT/DS267/AB/R, adopted 21 March 2005. Available at:*https://www.wto.org/english/tratop_e/dispu e/267abre.doc*[Accessed on 18 June, 2015].

27. *Supra* note 12, at 316.

However, the assumption is that support measures fulfilling these green box criteria are not, or are only minimally, trade distorting does not necessarily hold in practice. Support measures that are not formally linked to production decisions could still affect such decisions and thus boost production. For instance such support could reduce fixed costs, implying more production in a market characterized by uncertainty.[28] The green box should be maintained for expenditures that provide public goods or prevent negative externalities.[29]

2. Blue Box Domestic Support

Some support that is linked to production could be offered without limitation insofar as it is part of production-limiting programmes. These payments must also be based on a fixed acreage and yields or on 85 per cent or less of the base level of production.[30] In the case of livestock payments, it must be based on a fixed number of head.[31] This 'blue box' exemption resulted from a compromise between the EU and US during the Uruguay round.[32] Payment are directly linked to acreage or animal numbers, but under a programme that limits production by imposing production controls in the form of quotas or acreage constraints (*i.e.* land set-asides). Contrary to green box measures production is thus still required, but the support does not directly relate to actual output levels. Hence it is generally acknowledged that these subsidies are trade distorting, but the assumption is that output levels would fall over time and so would demand for trade protection. Therefore some members, in particular the EC, consider blue box subsidies as a necessary first step to converting distorting subsidies into green box subsidies, whereas others, however, aim to limit or to abandon this category. There currently exist no limits on providing blue box subsidies. All members could offer such support, though it is in practice mostly deployed by developed countries.

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28. In the current negotiations, some countries argue that some of the subsidies listed in Annex 2 might not meet the criteria of the annex's first paragraph — because of the large amounts paid, or because of the nature of these subsidies, the trade distortion they cause might be more than minimal. Among the subsidies under discussion here are: direct payments to producers (paragraph 5), including decoupled income support (paragraph 6), and government financial support for income insurance and income safety-net programmes (paragraph 7), and other paragraphs. Some other countries take the opposite view — that the current criteria are adequate, and might even need to be made more flexible to take better account of non-trade concerns such as environmental protection and animal welfare.

29. Harry De Gorter, "The Distributional Structure of US Green Box Subsidies", in Ricardo Meledíz-Ortiz, *et.al.,* (eds.) *Agricultural Subsidies in the WTO Green Box, Ensuring Coherence With Sustainable Development Goals* (Cambridge: Cambridge University Press, 2009) at 324.

30. At present there are no limits on spending on blue box subsidies. In the current negotiations, some countries want to keep the blue box as it is because they see it as a crucial means of moving away from distorting amber box subsidies without causing too much hardship. Others wanted to set limits or reduction commitments, some advocating moving these supports into the amber box.

31. The Agreement on Agriculture, Article 6.5 (a): Direct payments under production-limiting programmes shall not be subject to the commitment to reduce domestic support if: (i) such payments are based on fixed area and yields; or (ii) such payments are made on 85 per cent or less of the base level of production; or (iii) livestock payments are made on a fixed number of head.

32. This result from the so-called Blair House Agreements between the United States and the EU.

3. Amber Box Domestic Support

All domestic support measures considered to distort production and trade (with some exceptions) fall into the amber box, which is defined in Article 6 of the Agriculture Agreement as all domestic supports except those in the blue and green boxes. These include measures to support prices, or subsidies directly related to production quantities.[33]All other subsidies are placed in the amber box *sensulato* and are principle subject to reduction commitments. Nonetheless, a limited amount of such trade-distortive subsidies that would normally be subject to reduction commitments can be provided (*i.e.* the *de minimis* box[34]). In the case of product specific subsidies, support of up to 5 per cent of the value of total agricultural production can be provided. These *de minimis* thresholds are raised to 10 per cent for developing countries,[35] except for China which committed to a *de minimis* level of 8.5 per cent.[36]

4. Special and Differential Box Domestic Support

Developing countries are not obliged to reduce direct or indirect measures of assistance to encourage agricultural and rural development. In particular, three forms of assistance are included in this S&D box: (a) investment assistance generally available to agricultural; (b) input subsidies generally available to low-income or resource poor producers; (c) support to producers to encourage diversification from growing illicit narcotic crops.[37]Among all developing countries, India has been the main user of exempted

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33. "Agriculture Negotiations: Background Fact Sheet Domestic Support in Agriculture, Amber Box", Available at: *ttps://www.wto.org/english/tratop_e/agric_e/agboxes_e.htm* [Accessed on 26 January, 2014].

34. All domestic support measures in favour of agricultural producers that do not fit into any of the above exempt categories are subject to reduction commitments. This domestic support category captures policies, such as market price support measures, direct production subsidies or input subsidies. However, under the *de minimis* provisions of the Agreement there is no requirement to reduce such trade-distorting domestic support in any year in which the aggregate value of the product-specific support does not exceed 5 per cent of the total value of production of the agricultural product in question. In addition, non-product specific support which is less than 5 per cent of the value of total agricultural production is also exempt from reduction. The 5 per cent threshold applies to developed countries whereas in the case of developing countries the *de minimis* ceiling is 10 *per cent*.

35. The Agreement on Agriculture, Article 6.4: (a) A Member shall not be required to include in the calculation of its Current Total AMS and shall not be required to reduce: (i) product-specific domestic support which would otherwise be required to be included in a Member's calculation of its Current AMS where such support does not exceed 5 per cent of that Member's total value of production of a basic agricultural product during the relevant year; and (ii) non-product-specific domestic support which would otherwise be required to be included in a Member's calculation of its Current AMS where such support does not exceed 5 per cent of the value of that Member's total agricultural production. (b) For developing country Members, *the de minimisper cent*under this paragraph shall be 10 *per cent*.

36. *Supra* note 12, at 318.

37. The Agreement on Agriculture, Article 6.2: In accordance with the Mid-Term Review Agreement that government measures of assistance, whether direct or indirect, to encourage agricultural and rural development are an integral part of the development programmes of developing countries, investment subsidies which are generally available to agriculture in developing country Members and agricultural input subsidies generally available to low-income or resource-poor producers in developing country Members shall be exempt from domestic support reduction commitments that would otherwise be applicable to such measures, as shall domestic support to producers in developing country Members to encourage diversification from growing illicit narcotic crops. Domestic support meeting the criteria of this paragraph shall not be required to be included in a Member's calculation of its Current Total AMS.

S&D box support. This is not unexpected, given that India has, contrary to some other large developing countries (*e.g.* Brazil, Argentina), no right to offer amber box subsidies above the *de minimis* level.[38]

In conclusion, exempted domestic support measures are (i) green box subsidies; (ii) blue box subsidies; (iii) *de minimis* box; (iv) S&D box subsidies in the case of developing countries. All domestic support that is not exempted is considered subject to reeducation commitments. (*i.e.* amber box *sensustricto*).[39] This leftover category captures product specific and non-product specific subsidies. Included in product specific subsidies are market price support, non-exempt direct payment and other non-exempt policies such as input subsidies or marketing cost reduction measures.

5.Concept of Aggregate Measurement of Support(AMS) and Amber Box

The concept of Aggregate Measurement of Support (AMS) refers to annual support in monetary terms in the form of non-exempted product-specific and non-product-specific support. For each basic agricultural product a specific AMS is established, and all non-product-specific support is totaled into one non-product-specific AMS.

The AoA, for the first time made a systematic effort to lay down rules for subsidies on agricultural products.[40] The domestic support or Aggregate Measurement of Support (AMS) is the annual level of support in monetary terms extended to the agricultural sector. The key aim of reducing domestic support is to correct trade distortions with a view to promote efficient allocation and use of world resources. All domestic support measures, except exempt measures, provided in favour of agricultural producer are to be measured as the AMS. The subsidies provided to farmers include:

(a) Non-Product Specific subsidies such as those provided for irrigation, electricity, credit, fertilizers, seed etc.

(b) Product Specific subsidies, which are, calculated as domestic prices minus international reference price.

The sum of these two is termed as Aggregate Measurement of Support (AMS) also called Amber Box. The Amber Box subsidies are considered to be trade distorting and were entitled to progressive reduction commitments, base year being 1986-88. The maximum limit for the total AMS is fixed at 5 percent of the value of domestic agricultural output for developed and 10 percent for developing countries.[41]

The centerpiece of the commitments in the area of domestic support is the concept of the Aggregate Measurement of Support (AMS), which is defined in Article 1(a) as "the annual level of support, expressed in monetary terms, provided for an agricultural product

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38. *Supra* note 12 at 318.

39. The Agreement on Agriculture, Article 6.1: The domestic support reduction commitments of each Member contained in Part IV of its Schedule shall apply to all of its domestic support measures in favour of agricultural producers with the exception of domestic measures which are not subject to reduction in terms of the criteria set out in this Article and in Annex 2 to this Agreement. The commitments are expressed in terms of Total Aggregate Measurement of Support and "Annual and Final Bound Commitment Levels".

40. Rajan Sudesh Ratna, Sachin Kumar Sharma, Murali Kallummal and Anirban Biswas, "*Agriculture under WTO Regime: Cross Country Analysis of Select Issues*", *Centre for WTO Studies Indian Institute of Foreign Trade,* 2010, at 37.

41. *Id.* ,at 40.

in favour of the producers of the basic agricultural product or non-product-specific support provided in favour of agricultural producers in general .."[42] Annex 3 to the Agreement gives detailed guidance on the calculation of the AMS. According to the provisions of this Annex, the AMS is to be calculated on a product-specific basis for each product receiving any type of non-exempt support. The purpose is to calculate the value of all of the financial factors that influence the decision of a farmer to produce a particular product. Annex 3 identifies three kinds of support that are to be included in the calculation of the AMS:

* *Market price support,* which is based on the difference between a fixed external reference price and the applied administrative price; this is then multiplied by the quantity of production that is eligible to receive the applied administrative price. The applied administrative price is the price that the government determines producers should receive. The external reference price is based on the period from 1986 to 1988, and is country-specific. For a net exporting country, it is generally the average Free on Board (*f.o.b.)* value for the product and for a net importing country it is generally the average Cost, Insurance and Freight(*c.i.f.*) value for the product, adjusted if necessary for quality differences.
* *Non-Exempt Direct Payments,* which consist of payments that are dependent on a "price gap" calculated on the difference between a fixed external reference price and the applied administrative price multiplied by the quantity of production that is eligible to receive the applied administrative price. If the direct payments are not dependent on a price gap, the AMS calculation will be based on budgetary outlays.
* *Other Non-Exempt Measures,* such as input subsidies and marketing-cost reduction measures, which are to be valued based on budgetary outlays.

After, calculating the AMS by product, the next step is to calculate the Total AMS.[43] This is defined in Article 1(h) as being the sum of all non-exempt domestic support

42. The AMS is defined in article 1(a) of Agreement on Agriculture in the following terms: "Aggregate Measurement of Support" and "AMS" mean the annual level of support, expressed in monetary terms, provided for an agricultural product in favour of the producers of the basic agricultural product or non-product specific support provided in favour of agricultural producers in general, other than support provided under programmes that qualify as exempt from reduction under Annex 2 to this Agreement, which is: (i) with respect to support provided during the base period, specified in the relevant tables of supporting material incorporated by reference in Part IV of a Member's Schedule; and (ii) with respect to support provided during any year of the implementation period and thereafter, calculated in accordance with the provisions of Annex 3 of this Agreement and taking into account the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule.

43. The Total AMS is defined in Article 1 (h) of Agreement on Agriculture:Total Aggregate Measurement of Support and Total AMS mean the sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all aggregate measurements of support for basic agricultural products, all non-product-specific aggregate measurements of support and all equivalent measurements of support for agricultural products, and which is: (i) with respect to support provided during the base period (i.e. the "Base Total AMS") and the maximum support permitted to be provided during any year of the implementation period or thereafter (i.e. the "Annual and Final Bound Commitment Levels"), as specified in Part IV of a Member's Schedule; and (ii) with respect to the level of support actually provided during any year of the implementation period and thereafter (*i.e.* the "Current Total AMS"), calculated in accordance with the provisions of this Agreement, including Article 6, and with the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule;

provided to agricultural producers. It includes all aggregate measurements of supports for basic agricultural products, all non-product-specific aggregate measurements of support, and all equivalent measurements of support for agricultural products. In Part IV of each Member's schedules, a table can be found which consists of several columns. The first column specifies a Base Total AMS that is a figure for the support provide during the base period. The final column in the table is the Final Bound Commitments, which represents the effect of the implementation of the reduction commitment on the Base Total AMS. Between these two figures are the Annual Bound Commitments, which represent the AMS commitments for each year of the implementation period.

Under the Modalities Agreement, each developed country Member is committed to reduce its Total AMS by twenty percent during the six-year implementation period. Developing countries are committed to a 13.3 percent reduction over ten years, while no reduction is required in the case of the least developed countries. In order to comply with the reduction commitments, the Current Total AMS in any given year must not exceed the corresponding Annual or Final Bound Commitments specified in Part IV of the Member's Schedule.

The Agreement on Agriculture distinguishes between the *Total AMS* and the *Equivalent Measurement of Support*.[44] Both play same role, that is, to serve as benchmarks for the commitments entered. Recourse to one or the other depends on the partiality of the use each time.[45]Recourse to the Equivalent *Measurement of Support* be needed, particularly when recourse to the AMS is impracticable.

Price support measures have been the most important type of policy measure within the non-exempt category of domestic support. Price support can be provided either through administered prices (involving transfers from consumers) or through certain types of direct payments from governments. For the purpose of Current Total AMS calculations, price support is generally measured by multiplying the gap between the applied administered price and a specified fixed external reference price ("world market price") by the quantity of production eligible to receive the administered price. Calculation details are specified in Annexes 3[46] and 4 of the Agreement on Agriculture and also

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44. The definition Equivalent Measurement of Support is provided in Article 1(d) of Agreement on Agriculture: "Equivalent Measurement of Support" means the annual level of support, expressed in monetary terms, provided to producers of a basic agricultural product through the application of one or more measures, the calculation of which in accordance with the AMS methodology is impracticable, other than support provided under programmes that qualify as exempt from reduction under Annex 2 to this Agreement, and which is: (i) with respect to support provided during the base period, specified in the relevant tables of supporting material incorporated by reference in Part IV of a Member's Schedule; and (ii) with respect to support provided during any year of the implementation period and thereafter, calculated in accordance with the provisions of Annex 4 of this Agreement and taking into account the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule;

45. *Supra* note 12, at 303.

46. AnnexureII, Domestic Support: Calculation of Aggregate Measurement of Support- 1. Subject to the provisions of Article 6, an Aggregate Measurement of Support (AMS) shall be calculated on a product-specific basis for each basic agricultural product receiving market price support, non-exempt direct payments, or any other subsidy not exempted from the reduction commitment ("other non-exempt policies").Support which is non-product specific shall be totalled into one non-product-specific AMS in total monetary terms. 2. Subsidies under paragraph 1 shall include

incorporated into Members schedules by way of references to Supporting Material. For each product, the implicit subsidy of price support measures is added to other product-specific subsidies - a product specific fertiliser subsidy, for example - to arrive at a product-specific AMS which is then evaluated against the applicable *de minimis* threshold. Non-product specific subsidies are calculated separately and, as in the former case, are included in the Current Total AMS only if they exceed the relevant *de minimis* level. [47]

V. RELATIONSHIP BETWEEN THE SCM AGREEMENT AND AoA ON DOMESTIC SUPPORT

The previous discussion has demonstrated that the Agreement on Agriculture is more lenient on domestic subsidies. The Agreement on Agriculture provides in Article 21.1 that 'the provisions of GATT and of the SCM Agreement shall apply subject to the provisions of this Agreement'. Now the question is up-to what extent SCM Agreement applied on agriculture?

Article 21.1 should be read together with the peace clause *i.e* Article 13 of AoA which temporarily limited the applicability of the SCM Agreement to certain subsidies conforming with the Agreement on Agriculture. Export subsidies in conformity with the Agreement on Agriculture disciplines could not be considered prohibited or actionable subsidies but could be countervailed, although due restraint had to be shown in initiating CVD investigations. Regarding domestic subsidies, green box subsidies could not be

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both budgetary outlays and revenue foregone by governments or their agents.3. Support at both the national and sub-national level shall be included.4. Specific agricultural levies or fees paid by producers shall be deducted from the AMS.5. The AMS calculated as outlined below for the base period shall constitute the base level for the implementation of the reduction commitment on domestic support.6. For each basic agricultural product, a specific AMS shall be established, expressed in total monetary value terms.7. The AMS shall be calculated as close as practicable to the point of first sale of the basic agricultural product concerned. Measures directed at agricultural processors shall be included to the extent that such measures benefit the producers of the basic agricultural products. 8. Market price support: market price support shall be calculated using the gap between a fixed external reference price and the applied administered price multiplied by the quantity of production eligible to receive the applied administered price. Budgetary payments made to maintain this gap, such as buying-in or storage costs, shall not be included in the AMS. 9. The fixed external reference price shall be based on the years 1986 to 1988 and shall generally be the average f.o.b. unit value for the basic agricultural product concerned in a net exporting country and the average c.i.f. unit value for the basic agricultural product concerned in a net importing country in the base period. The fixed reference price may be adjusted for quality differences as necessary.10. Non-exempt direct payments: non-exempt direct payments which are dependent on a price gap shall be calculated either using the gap between the fixed reference price and the applied administered price multiplied by the quantity of production eligible to receive the administered price, or using budgetary outlays.11.The fixed reference price shall be based on the years 1986 to 1988 and shall generally be the actual price used for determining payment rates.12.Non-exempt direct payments which are based on factors other than price shall be measured using budgetary outlays. 13.Other non-exempt measures, including input subsidies and other measures such as marketing-cost reduction measures: the value of such measures shall be measured using government budgetary outlays or, where the use of budgetary outlays does not reflect the full extent of the subsidy concerned, the basis for calculating the subsidy shall be the gap between the price of the subsidized good or service and a representative market price for a similar good or service multiplied by the quantity of the good or service.

47. Domestic support, available at: *https://www.wto.org/english/tratop_e/agric_e/ag_intro03_domestic_ e.htm*[Accessed on 25 December, 2016].

considered to be actionable subsidies and could not be countervailed. All other domestic support measures in conformity with the Agreement on Agriculture were countervailable subject to the exercise of due restraint and could not be considered actionable subsidies if the support granted to a specific commodity was not in excess of the support provided in 1992.[48]

However, the peace clause expired at the end of 2003, raising the question whether the applicability of the relevant SCM Agreement disciplines has expanded since then. This section consecutively examines whether disciplines in part II (prohibited subsidies), Part III (actionable subsidies) and Part V (CVDs) of the SCM Agreement are currently applicable to agriculture subsidies.

1. Agricultural Domestic Support whether Actionable under the SCM Agreement

There are strong arguments that agricultural domestic subsidies in conformity with the Agreement on Agriculture have been challengeable under Part III of the SCM Agreement since the expiration of the peace clause. *First,* in contrast to the introductory clause of Article 3 of the SCM Agreement (prohibited subsidies), part III of the SCM Agreement explicitly exempts from its scope subsidies on agricultural products as provided in Article 13 of the Agreement on Agriculture (peace clause). This difference in reference to the Agreement on Agriculture should be given meaning. *Second*, the opposite reading that domestic subsidies could even in the absence of the peace clause still not be challengeable, would go against the principle of effective treaty interpretation. It would render the meaning of whole clause as being in a state of inutility. *Third*, non-green box support was only under certain specific conditions exempted from challenges under the SCM Agreement by virtue of the peace clause. Indeed, such support was not exempted if granted in excess of that decided during the 1992 marketing year. If such non-green box support were still to be exempted, what about the application of this condition now that the peace clause has expired. *Forth*, in the absence of the peace clause, only Article 21.1 of the Agreement on Agriculture could be advanced as a legal basis for exemption of agricultural domestic subsidies from actionable subsidy claims. Yet domestic support disciplines under the Agreement on Agriculture do not deal specially with the same matter.[49]

The Agreement on Agriculture sets general, non-product-specific reduction commitments on domestic support based on their alleged trade-distortive effect (by putting support into different boxes), whereas part III of the SCM Agreement offers the opportunity to challenge specific subsidies in cases where they cause adverse effects. Given that actionable subsidy claims depend on the demonstration of adverse effects, the provisions and negotiations under the Agreement on Agriculture regarding domestic support reduction would not be rendered as being in a state of inutility in a case where the SCM Agreement is applied. These could be seen as different tracks to cut back agricultural domestic subsidies. Fifth and finally, the *US-Upland Cotton* case law implicitly confirmed that agricultural domestic subsidies are challengeable under Part III of the SCM Agreement.[50]

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48. *Supra* note 12, at 324.
49. *Supra* note 12, at 330.
50. *Supra* note 12, at 331.

In sum, now that the peace clause has lapsed, there seems to be no ground for exempting domestic agricultural support from scrutiny under the SCM Agreement. For, a challenge to be successful, it must be demonstrated that such support is a specific subsidy causing adverse effects in the meaning of the SCM Agreement. This claim will only be successful if it could be demonstrated that such agricultural export subsidies fall within the subsidy definition of the SCM Agreement and cause adverse effects.

2. Agricultural Subsidies whether Counter vailable under SCM Agreement

The peace clause no more than partially narrowed this unilateral venue. CVD action was only foreclosed for 'green box' support, where all other types of domestic support could be countervailed subject to the additional procedural requirement to exercise 'due restraint'.[51] With the end of the peace clause, these limitations also expired. No element in either the SCM Agreement or the Agreement on Agriculture suggest otherwise. Since CVD action is not spelled out under the Agreement on Agriculture, there is no provision specifically dealing with the same matter. Accordingly, Article 21.1 of the Agreement on Agriculture does not exempt agricultural subsidies from CVD Action. The panel in *Mexico-Olive Oil*[52] confirmed that CVDs could indeed be imposed on agricultural imports.

In relation to the applicability of the SCM Agreement regarding agricultural subsidies,three categories of agricultural subsidies have been distinguished: export subsidies, local content subsidies, and other domestic subsidies.

First, regarding agricultural export subsidies, a distinction is made depending on their conformity with the Agreement on Agriculture. On the one hand, export subsidies in conformity with the disciplines elaborated under the Agreement on Agriculture seem also to be exempted from the SCM Agreement's prohibition on export subsidies. This holds for export subsidies to scheduled products within reduction commitments and arguably for marketing or transport export subsidies offered by developing countries. Yet these export subsidies could be challenged under the actionable subsidy provisions of the SCM Agreement and are vulnerable to CVD action. On the other hand, export subsidies inconsistent with the Agreement on Agriculture are likewise prohibited under the SCM Agreement. All export subsidies for unscheduled agricultural products and for scheduled agricultural product above reduction commitments are inconsistent with the Agreement on Agriculture.

Second, The Appellate Body confirmed in *US-Upland Cotton* that subsidies contingent on the use of domestic agricultural products are prohibited under Article 3.1 of the SCM Agreement, regardless of whether such support conforms to the Agreement on Agriculture.

Third, domestic agricultural support, regardless in which box it is located under the Agreement on Agriculture, appears actionable and countervailable under the SCM Agreement. In case where the multilateral track is used, it has to be demonstrated that such support measures qualifyas specific subsidies under Articles 1 and 2 of the SCM Agreement that cause adverse effects. If the unilateral track is pursued the CVD

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51. Panel Report, Mexico- Olive Oil, Panel Report, Mexico- Definitive Countervailing Measures on Olive Oil from the European Communities, WT/DS341/R, adopted on 21 October, 2008, para.7.67.

52. *Id.*,para. 7.59.

investigating authority has to show that specific subsidies caused injury to its domestic industry.This section could be concluding in three points:

i. the observance of the Agreement on Agriculture disciplines does not create a 'safe harbor' for the measures in question under the SCM Agreement;

ii. a subsidy which does not violate the Agreement on Agriculture but does violate the SCM Agreement is provisionally exonerated from any legal challenge under the WTO Agreement .That is, until 31 December 2003, no legal challenge at all could be mounted against such practices. Ever since however, such legal challenges are perfectly possible.

iii. a subsidy which violates the Agreement on Agriculture could be found to be inconsistent with the SCM Agreement as well.[53]

VI. INDIAN PERSPECTIVE ON DOMESTICE SUPPORT

The globalization has given rise to new opportunities but it has also brought with its new challenges and responsibilities. It means that the global economy can no longer be viewed from a spectator's standpoint. There are significant implications for India.[54]

The tendency for subsidies to increase much faster than public investment was checked to some extent during the Tenth Plan, but it reappeared again during the Eleventh Plan. Budgetary subsidies to agriculture (excluding food subsidy, which should be treated as a consumer subsidy) increased from an average of 4.1 per cent of agricultural GDP during the Tenth Plan to average 8.2 per cent in the first four years of the Eleventh Plan.[55]Compared to these numbers, public investment in agriculture averaged only about 3 per cent of agricultural GDP during both Plan periods.[56] Domestic support to Indian agriculture may be explained as a input and output subsidies.

1. AgriculturalInput Subsidies in India

i. Irrigation Subsidies

Assured irrigation is a key input for increasing agricultural production, expansion of irrigation through public investment in major and medium irrigation projects has been at the center of the government's strategy for expanding agricultural production in the country. The central and state governments have collaborated in making large public investments in river-valley and other major and medium projects during the period 1951-

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53. *Supra* note 12, at 297.

54. India has been a WTO member since 1 January 1995 and a member of GATT since 8 July 1948. Any analysis of India's existing trade agreements as well as its position on important WTO issues has to bear in mind the economic and policy environment from which these strategies have evolved. From historical perspective, the period 1947 to 1991 was an era of protectionism based on a development strategy anchored on the concept of large- scale import substitution.

55. Actual subsidies to agriculture were higher in both periods since CSO books budgeted subsidy on domestic urea manufacture entirely to industry and because part of the power subsidy received by agriculture is not budgeted but borne by utilities.

56. The subsidy bill for 2014-15 was placed at Rupees 2.60 lakh crore which was 23.4 per cent of non-Plan revenue expenditure and 2.0 per cent of GDP. In the post financial crisis period, the subsidy bill had increased from 2.2 per cent of GDP in 2009-10 to 2.5 per cent of GDP in 2012-13. The main items under this head from 2009-10 to 2012-13 were food and petroleum subsidies.

2015.[57]An important concern in agriculture relates to subsidies on irrigation, which have resulted in overuse of water[58] resources as well as place financial constraints on new investment in agriculture.

ii. Fertilizer subsidies

Fertiliser consumption in the country has been increasing over the years and now India is the second largest consumer of fertilisers in the world, after China, consuming about 26.5 million tonnes of Nitrogen, Phosphorus, and Potassium (NPK).[59-60]

In India, there are three main recipients of fertilizer subsidies—Urea, Di-Ammonium Phosphate (DAP) and Muriate of Potash (MOP). However, at present only urea is under the Retention Price Scheme (RPS) of the Central Government, which is the key scheme that guides the production and use of fertilizers. The main objective of the RPS was to insulate farmers from the rising trend in fertilizer prices, while ensuring adequate supplies of fertilizer to feed into the green revolution strategy for agricultural development in India.

iii. Power Subsidies

Providing cheap power to the agricultural sector for the purpose of irrigation was a policy in line with promoting green revolution in the country. Though the intention was justified, no prudence was shown in the way it was implemented and, of late, it has become a subject of public debate. Power subsidies constitute one of the largest shares of input subsidies to Indian agriculture.[61] Farmers are charged flat rates on the basis of the horsepower of pump sets rather than the actual amount of power consumed.

iv. Crop Insurance

Crop insurance[62]helps in stabilization of farm production and income of the farming community. It helps in optimal allocation of resources in the production process. Crop insurance is considered domestic support to agriculture in the terms of Agreement on Agriculture of WTO. For exemption from the reduction commitments, crop insurance scheme must be conforming to Annexure 2 clause 7 and 8 (a-e) of Agreement on Agriculture

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57. AnwarulHoda and Ashok Gulati, *India's Agricultural Trade Policy and Sustainable Development* (Geneva: International Centre for Trade and Sustainable Development (ICTSD)) at 9.

58. Agriculture, with two-thirds of production dependent on irrigation and accounting for 83% of consumptive water use, has had an overriding bearing on the sustainability of the resource. Rapid rural electrification along with subsidized power to agriculture has led to high dependence on underground water sources.

59. Twelfth Five Year Plan (2012–2017) Economic Sectors, Vol.II, at 44.

60. The consumption of chemical fertilizers has increased from 5.5 million tonnes in 1980/81 to 17.36 million tonnes in 2001/02, amounting to per hectare fertilizer application level to 90.12 kg. In the case of fertilizers, they are firm-specific and import-consignment specific, they vary by type of fertilizer, and some are on a fixed-quantity basis while others are variable. Mehar K Meeta, "Trade Related Subsidies-bridging the North –South Divide an Indian Perspective", International Institute For sustainable Development Paper, 2004, available at: http://www.iisd.org/pdf/2004/trade_related_subsidies.pdf, at 19 [Accessed on 25 December, 2010].

61. Mehar K Meeta, "Trade Related Subsidies-bridging the North –South Divide an Indian Perspective", *International Institute For sustainable Development Paper,*2004,available at:*http://www.iisd.org/pdf/2004/trade_related_subsidies.pdf*,at 17 [Accessedon 25 December, 2016].

62. See generally, Anoop Kumar, Implications of Crop Insurance on Agricultural Subsidies in India with Special Reference to PMFBY, 2016, Vol.45, No.2 *Banaras Law Journal* (2016), pp. 127-145

(AoA). A new crop scheme launched by government of India in the year 2016 *i.e*. *Pradhan Mantri Fasal Bima Yojana* (PMFBY), covered all farmers including sharecroppers and tenant farmers growing the notified crops in the notified areas. However, farmers should have insurable interest for the notified/ insured crops.With the objective of supporting sustainable production in agriculture sector *Pradhan Mantri Fasal BimaYojana* (PMFBY) proposes to achieve wider objective.[63]

2. Agricultural Output Subsidies in India

i.Government Purchase of Agricultural Goods

Price support operations in rice and wheat usually result in the central government carrying stocks that are much larger than the optimum buffer stock level. As long as the PDS is continued in its present shape, there may not be any need to reduce the scale of purchases.[64]The procurement pricing and Minimum Support Price (MSP) schemes were aimed to act as 'safety-nets' for those engaged in the agricultural sector in the country. The government provides both producer and consumer subsidies totaling about Rupees125,000 Crore as rice and wheat subsidies. Wheat and rice are procured from farmers at guaranteed above-market minimum support prices (MSPs for Ravi Crops of 2016-17 Rs.1625/Quintal[65] for wheat, and for Kharif Crops of 2016-17, Paddy, CommonRs.1470/Quintal and for Grade A, Rs. 1510/ Quintal)[66]This measure protected the farmer, there was also the mechanism of procurement prices that has served to protect consumers against sharply rising prices arising from crop failures leading to supply shortages and subsequent price rise.

3. Policy Initiative in context of Domestic Support in India

In the light of foregoing, Indian government identified the following as some of the challenges and policy recommendations for Indian agriculture[67]which are relevant in context of domestic support regime under WTO.

* Agriculture and food sectors need huge investment in research, education, extension, irrigation, fertilizers, and laboratories to test soil, water, and commodities, and ware housing and cold storage. Rationalization of subsidies and better targeting of subsidies would generate part of the resources for public investment.
* There are wide differences in yields between states. Even the best of states have much lower yield in different crops when compared to the best in the world. This provides ample opportunity to increase production by bridging the yield gap to

63. *See Generally,* Operational Guidelines, Pradhan Mantri Fasal BimaYojana, Department of Agriculture, Cooperation and Farmers Welfare Ministry of Agriculture & Farmers Welfare Krishi Bhawan, New Delhi- available at:*110001http://agricoop.nic.in/Admin_Agricoop/Uploaded_File/Oprational Guidelines 1822016.pdf* [Accessed on 20 July, 2016].
64. Anwarul Hoda and Ashok Gulati, "*India's Agricultural Trade Policy and Sustainable Development*", *International Centre for Trade and Sustainable Development,* 2004*,* at 44.
65. Statement Showing Minimum Support Prices - Fixed by Government (Rs.quinta) available at: *https://farmer.gov.in/mspstatements.aspx* [Accessed on 20 July, 2017].
66. Government of India Ministry of Agriculture & Farmers Welfare Department of Agriculture, Cooperation & Farmers Welfare, Minimum Support Prices (MSP) and bonus for Kharif Crops of 2016-17 season, available at: *https://eands.dacnet.nic.in/PDF/MSP-kharif-2016-17.pdf* [Accessed on 20 July, 2017].
67. Economic Survey 2014-15, Vol. II, at 18, available at: *http://indiabudget.nic.in/es2014-15/echapter-vol2.pdf*[Accessed on 2 January, 2016].

the extent feasible within the climatic zone.

* Providing irrigation can improve yield substantially, as vast cropped area is still un-irrigated. For a shift in production function, investment in basic research would be necessary.
* Recommendations of the Shanta Kumar Committee[68] provide useful suggestions for the future road-map of food policy. Every effort should be made to bring states on board for creating a national common market for agricultural commodities.
* Distortions emerging from various policies, including exempting user charges for electricity and water should be removed.
* For providing efficient advance price discovery to farmers and enabling them to hedge price risk, the Forward Markets Commission should be strengthened and empowered to regulate the market more effectively.[69]

Any proposal for reducing subsidies will be opposed by farmers on the grounds that output will fall if the subsidy cut reduces input use. This is true unless other investments are made simultaneously but such investments would indeed be facilitated by the resources released. Efforts were made in the Eleventh Plan to encourage more efficient practices without actually reducing the quantum of subsidy. For example, many States have undertaken separation of feeders so that electricity supply for agricultural use can be treated differently from that for rural non-agricultural use, and stricter scheduling imposed on the former while maintaining its lower price. Similarly, the Centre introduced a new scheme, the 'National Project on Management of Soil Health & Fertility' (NPMSH&F)and another new mission that will be launched during the Twelfth Plan is the National Mission for Sustainable Agriculture (NMSA)[70] to promote soil testing and issuance of soil health cards to farmers, aimed particularly to spread awareness of micronutrient deficiencies resulting from excessive and unbalanced fertiliser use and to encourage balanced and judicious use of chemical fertilisers in conjunction with organic manures to maintain soil health and fertility. Moreover, in order to rational is fertiliser subsidies, a nutrient-based subsidy (NBS) system was adopted to subsidise fertiliser products uniformly on basis of nutrient content, rather than set product-wise subsidies and separate maximum retail prices (MRPs) for each product. The objective was to reduce deadweight of the fertiliser control order, set nutrient specific subsidies that maintain desirable NPK balance, and evolve a subsidy protocol to encourage both development of new complex fertiliser products (including micronutrients) and more investment in the sector.These initiatives have had some success in particular regions, but they do not as yet show up in national data in terms of higher additional output per unit additional use of these inputs.[71]

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68. *Santa Kumar Report on FCI-restructuring, Buffer stock, PDS & Food security & Direct Benefit Transfer*, 22-January-2015, available at: *http://pib.nic.in/newsite/PrintRelease.aspx?relid=114860* [Accessed on 3 January, 2016].
69. *Supra* note 67, at 18.
70. 12thFive Year Plan document 2012-2017, Vol.II, at para 12.167.
71. *Supra* note 67, at 18.

VII. INDIAN RESPONSE ON WTO REGIME ON DOMESTIC SUPPORT

India participated in the Uruguay Round negotiations as a contracting party of the General Agreement on Tariffs and Trade. India's resulting schedule (Schedule XII) shows a blank for Bound total AMS. India's AMSs are therefore subject to the de *minimis* levels as ceilings. The reporting of India's farm input subsidies has raised many points of discussion in the Committee on Agriculture. These points concern not so much the measurement of such support but rather the classification of the support measures and the reporting of the support as exempt or not from the AMS calculations. In both domestic support with their obligations under the Agreement (AGST) and its 1995 notification India accounted for the full amount of the input subsidies (fertilizer, credit, electricity, irrigation, and seeds) as part of the non-product specific AMS. In the 1995 notification India commented that almost 80 percent of these subsidies would qualify for exemption from non-product-specific AMS on grounds of being not only generally available input subsidies but that these subsidies went to low-income and resource-poor farmers, *i.e.*, in conformity with Article 6.2 (the article actually mentions low income or resource-poor producers, *i.e.*, possibly a larger set than low-income and resource-poor producers).[72]

India has no specific total AMS reduction commitments in its schedule. Domestic support to agricultural producers was provided through operations of the Ministry of Agriculture and other Government agencies. All support is covered by the domestic support categories which are exempt from reduction commitments under the Agreement on Agriculture. The attached supporting tables provide details of these exempt measures.[73]

India has made notifications on domestic support for the year 1995-96, 1996-97 and 2004-2005.[74] (till December, 2015 WTO source provides information only upto 2004-2005). It is based on annual report of Committee on Agriculture published in June 2015. The product specific subsidy was negative for all commodities (except pulses (Gram, Arhar, Urad, Moong and Lentils)) during 1995-1997 to 2004-2005. The non-product specific subsidy was also within the *de minimis* limit These notifications show that India has no obligation to reduce domestic support to agriculture sector.

In case of domestic support, India has no obligation to reduce domestic support under the Agreement on Agriculture. The product specific subsidy was negative for all crops except sugarcane. However, the picture is totally different in developed nation. USA, Japan and Australia are providing support to agriculture sector through Amber box, whereas in case of India, the AMS is below the *de minims* level. In these countries, the product specific support is highly concentrated on few products. Across all the countries, the green box accounted for the major share in the total domestic support to agriculture sector. High support given to agriculture sector by developed nation creates distortion in international trade. Various programmes under

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72. Lars Brink, Support to agriculture in India in 1995-2013 and the rules of the WTO, at 28, available at: *http://ageconsearch.umn.edu/bitstream/166343/2/WP%2014-01%20Brink.pdf* [Accessed on 20 December, 2015].

73. Domestic Support: India, Reporting Period: Marketing Year 2004-2005 To 2010-2011 Current Total Aggregate Measurement of Support, WTO, Committee on Agriculture, G/AG/N/IND/10, 10 September, 2014, at 2.

74. WTO notification G/AG/N/IND/1 and G/AG/N/IND/10.

three boxes (Amber, Blue and Green) enable the developed nations to enjoy artificial comparative advantage in agriculture trade. This lead to excess production in developed nations and downward trend in international prices of agriculture commodities. In this way, it hampers the competitiveness of agriculture sector and so the welfare of people (as large portion of population is dependent on agriculture sector) in developing countries.[75]

In India, input subsidies are available to all farmers and not only to low income producers. If India excludes input subsidies from AMS, then it will be obliged to provide such subsidies only to low income farmers.[76] Similarly, exemption from AMS reduction of subsidies on food available through the PDS to the needy, that is those who do not meet a minimum nutritional criterion, is possible and government purchase of agricultural products on market price not administrative price may be exempted from will come under AMS. From Indian perspective the same must be defended in WTO.

India has very huge arable area and lot of investment is being donein agriculture. The amount of agricultural subsidies is increasing year by year and at the same time total cultivated agricultural land and investment is also increasing. The agriculture subsidies are distributed by every country but its percentage in India is very low whereas numbers of dependents is very large. The government of India took measures for development of agriculture sector and agriculture subsidies are one of vital tool to help for growth of agriculture sector in India.[77]However, India still needs to work for the most judicious method of distributing subsidies.

VIII. DOHA ROUNDNEGOTIATIONS AND MINISTERIAL CONFERENCE *VIS-À-VIS* DOMESTIC SUPPORT

1. Doha Round Negotiations

Under the present framework of Doha Round negotiations, all members are allowed to provide green box subsidies and *de minimis* level of amber box subsidies. In addition, developing countries are free to offer support falling under the S&D box and since the Bali Ministerial Conference, benefiting from a peace clause with regard to certain public stockholding programmes.[78] Finally, the largest subsidizing countries, namely those that had non-exempted subsidies in place, are allowed to offer an additional level of amber box subsidies (*i.e.* amber box *sensustricto*) corresponding to their final bound AMS.

Compared with these existing commitments, the limits set on such spending in the latest draft agreement tabled under the Doha Round negotiations are much more substantive. First, members would commit to a reduction in the level of overall trade distorting domestic support (OTDS), composed of amber box *sensustricto* (Final Bound Total AMS), blue box subsidies, and *de minimis* support and *de minimis* box spending. Reductions commitment would be undertaken on the basis of a tiered formula, whereby the largest cuts will have to be made by those countries having the highest levels of

75. *Supra* note 200, at 71.

76. MuchkundDubey, *An Unequal Treaty, World Trading Order after GATT* (New Delhi: New Age International Ltd., 1996) at 77.

77. RajanSudeshRatna, Sachin Kumar Sharma, MuraliKallummal and AnirbanBiswas, "Agriculture under WTO Regime: Cross Country Analysis of Select Issues",*Centre for WTO Studies Indian Institute of Foreign Trade,* 2010, at 47.

OTDS. These reductions would be gradually implemented over five years. Developing countries would have to make lower cut (two third) over a longer implementation period (eight years). Moreover, exempted from reeducation in OTDS are developing countries that have no *Final Bound Total AMS* and some recently acceded members. Next, a similar tiered formula would be set. Lastly, two other novelties are specific reductions on the (non) product specific *de minimis* box spending as well as on blue box payments. An overall blue box as well as a product specific blue box ceiling would be defined based on percentage of the value of production. Regarding each of these reduction commitments, more flexibility would be offered to developing countries (S&D treatment) as well as to recently acceded members. No reductions will have to be made on green box and S&D box support.[79]

Reduction in blue box payments might become more acceptable to its principal user, as the EU is converting its blue box support into green box support. The same trend is observable in the US, which soon after the Uruguay Round, cancelled its blue box support but also steadily increased its green box support. As part of the 2002 Farm Bill, the US introduced countercyclical payment (i.e. support to counter price drops), although the *US- Upland cotton*[80]ruling rejected their qualification as green box measures. Because such payments are not made as part of a production limiting programme, they likewise do not qualify as blue box measures and accordingly fall under the amber box. As a result, direct payments would under the new draft qualify as blue box measures not only if they are made under a production limiting programme but also if no production is requires at all.

2. Bali Outcome

The ninth Ministerial Conference of the WTO ('MC09') is held in Bali, Indonesia in 03-07 December 2013. In the Bali Ministerial conference members agreed on following points:[81]

1. Members agree to put in place an interim mechanism as set out below, and to negotiate on an agreement for a permanent solution,[82] for the issue of public stockholding for food security purposes for adoption by the 11th Ministerial Conference.
2. In the interim, until a permanent solution is found, and provided that the conditions set out are met, Members shall refrain from challenging through the WTO Dispute Settlement Mechanism, compliance of a developing Member with its obligations under Articles 6.3 and 7.2 (b) of the Agreement on Agriculture (AoA) in relation to support provided for traditional staple food crops[83] in pursuance of public stockholding programmes for food security purposes existing as of the date of the Decision, that are consistent with the criteria of paragraph 3,

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78. *Public Stockholding For Food Security Purposes Draft Ministerial Decision*, 7 December, 2013, WT/MIN(13)/38WT/L/913; 11 December 2013 Available at: *https://mc9.wto.org/system/files/documents/w10_1.pdf* [Accessed on 22 June 2015].
79. *Supra* note 12, at 322.
80. *Supra* note 26.
81. Ministerial Decision of 7 December 2013, available at: *https://www.wto.org/english/thewto_e/minist_e/mc9_e/desci38_e.htm*[Accessed on 25 Dec. 2017].
82. The permanent solution will be applicable to all developing Members.

footnote 5, and footnote 5&6 of Annex 2 to the AoA when the developing Member complies with the terms of the Decision.[84]

Developing Member benefiting from this decision shall upon request hold consultations with other Members on the operation of its public stockholding programmes notified under paragraph 3.a.[85] The Committee on Agriculture shall monitor the information submitted under this decision.

Members also agreed to establish a work programme to be undertaken in the Committee on Agriculture to pursue this issue with the aim of making recommendations for a permanent solution. This work programme shall take into account Members' existing and future submissions. In the context of the broader post-Bali agenda, Members commit to the work programme with the aim of concluding it no later than the 11th Ministerial Conference. The General Council shall report to the 10th Ministerial Conference for an evaluation of the operation of this Decision, particularly on the progress made on the work programme.[86]

3. Nairobi Outcome

The Tenth Ministerial Conference of the WTO ('MC10') is held in Nairobi, Kenya in 15-19 December 2015. Decision of Nairobi Ministerial Conference (2015) in relation to export subsidies in agricultural is as follows[87]*First,* Developed Members shall immediately eliminate their remaining scheduled export subsidy entitlements as of the date of adoption of this Decision. [88,89].*Second,* Developing country Members shall eliminate their export subsidy entitlements by the end of 2018.[90]*Third*, Developing country Members shall continue to benefit from the provisions of Article 9.4 of the Agreement on Agriculture

83. This term refers to primary agricultural products that are predominant staples in the traditional diet of a developing Member.

84. This Decision does not preclude developing Members from introducing programmes of public stockholding for food security purposes in accordance with the relevant provisions of the Agreement on Agriculture.

85. *Supra* note 81.

86. *Supra* note 81.

87. Export Competition, Draft Ministerial Decision of 19 December 2015, Ministerial Conference, Tenth Session, Nairobi, 15-18 December 2015, WT/MIN(15)/W/47, 19 December, 2015.

88. This paragraph shall not cover quantities counted against export subsidy reduction commitments found to exist by the Dispute Settlement Body in its recommendations and rulings adopted in disputes DS265, DS266, and DS283, with respect to the existing programme, which expires on 30 September 2017, for the product concerned by those disputes.

89. This paragraph shall not cover processed products, dairy products, and swine meat of a developed Member that agrees to eliminate as of 1 January 2016 all export subsidies on products destined for least developed countries, and that has notified export subsidies for such products or categories of products in one of its three latest export subsidy notifications examined by the Committee on Agriculture before the date of adoption of this Decision. For these products, scheduled export subsidies shall be eliminated by the end of 2020, and quantity commitment levels shall be applied as a standstill until the end of 2020 at the actual average of quantity levels of the 2003-05 base period. Furthermore, there shall be no export subsidies applied either to new markets or to new products.

90. Notwithstanding this paragraph, a developing country Member shall eliminate its export subsidy entitlements by the end of 2022 for products or groups of products for which it has notified export subsidies in one of its three latest export subsidy notifications examined by the Committee on Agriculture before the date of adoption of this Decision.

until the end of 2023, *i.e.* five years after the end-date for elimination of all forms of export subsidies. Least developed countries and net food-importing developing countries listed in G/AG/5/Rev.10 shall continue to benefit from the provisions of Article 9.4 of the Agreement on Agriculture until the end of 2030.

IX. CONCLUSION

In relation to agriculture, the Uruguay Round was a historic achievement as it began the process of moving the main problems in agriculture within the legal system of WTO. The Agreement on Agriculture would shape the future content of the agricultural policies of the WTO Members through the adoption of specific commitments.The developed nations are protecting their agricultural sector through domestic support, tariff and non-tariff barriers. Developing countries are entitled to a greater *de minimis*percentage than developed countries and certain programs are exempted from the reduction commitments. Least developed countries are not required to make any commitments. In India at present all support to farmers is covered by the domestic support categories which are exempt from reduction commitments under the Agreement on Agriculture.

Overall, India's stake is much higher than developed countries as 55 percent of Indian population is directly employed in agriculture sector. The agriculture sector plays an important role in India in terms of GDP, employment, poverty eradication and rural development in comparison to developed countries. The welfare of farmer and poor section of the society is directly linked to this sector. The government of India took measures for development of agriculture sector and agricultural subsidies are one of the vital tool to help the growth of agriculture sector in India. However, India still need to work out the most judicious method of distributing subsidies.India, can change farming pattern through subsidies, if subsidies are used in suitable manner. Other view is, subsidies have led to overuse of resources like fertilizer and water *etc*. Therefore judicious use must be the choice preferred over withdrawal of subsidies for India.

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NET NEUTRALITY IN INDIA : ISSUES, CHALLENGES AND THE WAY FORWARD

ANIL KUMAR MAURYA*

ABSTRACT : Growth of Internet requires fair treatment, transparency and free flow of data traffic so as to provide the end users benefits of unrestricted access to the internet and choices to avail different Over the Top (OTT) services. A free internet space without any intermediary blocking, throttling and discriminatory pricing etc. will help small e-commerce and startups to progress. However, Telecom Service Providers (TSPs) and Internet service providers (ISPs) across the globe treat data traffic differently to address multiple issues such as network congestion, resource constraints, business arrangements, and other practical considerations of network functioning. These measures adopted by TSPs and ISPs has led to friction among consumer's right to freedom of expression and right to information and TSPs/ISPs commercial and proprietary rights to manage their network resulting into widespread demand for ensuring net neutrality through legal measures. India, similar to other countries, has also grappled with net neutrality debate and is now attempting to address these issues. This article is an attempt to explore these issues in detail and argues that while addressing the concern of revenue loss to the TSPs and ISPs, the regulatory authorities must prohibit any attempt to throttle and screen the data traffic. This Article suggests that a careful crafting of Traffic Management Practices have the potential to address the genuine concerns of the TSPs, ISPs and end users.

KEY WORDS : Net Neutrality, Data Traffic Management, Free Access, Data Equality, TRAI

I. INTRODUCTION

When the idea of internet was fostered, the makers of internet have envisioned the idea of providing a platform wherein every person in the world could get connected with each other freely, However attempts have been made to restrict the openness.[1] In

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1. web as an open platform that would allow everyone, everywhere to share information, access opportunities, and collaborate across geographic and cultural boundaries. In many ways, the web has lived up to this vision, though it has been a recurring battle to keep it open. Tim Berners Lee, 4I invented the web. Here are three things we need to change to save it' (The Gaurdian, 12 March 2017) <https://www.meguardian.com/technology/2017/mar/ll/tim-berners-lee-web-inventor-save-internet> last accessed on 02 July 2017

its origin, it was the interconnection of ideas which was forecasted to supersede over the capital.[2] Since then, rapid growth in the technology coupled with internet has helped transforming societies across the globe.[3] The benefits of internet are manifold which ranges across different sectors.[4] It has assumed a character wherein human lives in the absence of technology and internet can hardly be imagined to sustain for a longer period.[5] India also stands as no exception to these developments and has moved forward in adopting e- governance for its services.[6] It has positioned itself as one of the leading IT hubs across the globe offering various e services.[7] The penetration of internet in the remotest areas has also been increasing every year and the government is intending to explore the 5G technology in India which may further strengthen the bandwidth and will provide the end users an experience of faster internet access.[8]

With this tremendous growth of internet, India amongst other countries, is also facing a shift from voice revenues for Telecom Service Providers (TSPs hereinafter) towards data revenues wherein other stakeholders also comes into picture.[9][10] With this increasing

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2. Ronda Hauben, 'Open Architecture' in Raul Rojas (ed), *Encyclopedia of Computers and Computer History* (Fitzroy Dearborn, Chicago, 2001. vol. 2 pg 592).
3. Aparna Vishwanathan, *Cyber Law- Indian And International Perspectives On Key Topics Including Data Security, E-Commerce, Cloud Computing And Cyber Crimes* (First edn. LexisNexis 2012)
4. OECD/WTO (2017), Aid for Trade at a Glance 2017: Promoting Trade, Inclusiveness and Connectivity for Sustainable Development, WTO, Geneva/ OECD Publishing, Paris.
5. Thomas Streeter, 'Internet' in Benjamin Peters (ed)s *Digital Keywords: A Vocabulary of Information Society and Culture* in (Princeton University Press 2016)
6. The National e-governance plan (NeGP) in India, takes a holistic view of e-Governance initiatives across the country, integrating them into a collective vision, a shared cause. Around this idea, a massive countrywide infrastructure reaching down to the remotest of villages is evolving, and large-scale digitization of records is taking place to enable easy, reliable access over the internet. The ultimate objective is to bring public services closer home to citizens, as articulated in the Vision Statement of NeGP. Details can be accessed at *https://meity.gov.in/divisions/national-e-governance-plan* (last accessed on 18 Sept. 2017)
7. India despite several global uncertainties, in the upcoming financial year of 2017-18, would be pushing towards one trillion digital economy. For details kindly see Nasscom, 'IT-BPM Industry in India: Sustaining Growth and Investing for the Future'(nasscom.in,22 June 2017)<https://www.nasscom.in/sites/default/files/NASSCOM_Annual_Guidance_Final_22062017.pdft> last accessed on 27 July 2017.
8. Telecom Regulatory Authority of India (TRAI), *"Spectrum, Roaming and QoS related requirements in Machine-to-Machine (M2M) Communications"* 2017 (September, 2017)<https://main.trai.gov.in/sites/default/files/Recommendations_M2M_05092017.pdf> last accessed on 20 September 2017
9. Subhashish Gupta, Telecommunications at the Crossroads in India, IIMB Management Review (2015)27,196-208
10. In the net neutrality debate, relevant stakeholders in internet space are primary of four kinds. They are: (i) the consumers of any internet service, (end users) (ii) the Telecom Service Providers (TSPs) or Internet Service Providers (ISPs), (iii) the over-the-top (OTT) service providers (those who provide internet access services such as websites and applications), and (iv) the government, who may regulate and define relationships between these players. TRAI is an independent regulator in the telecom sector, which mainly regulates TSPs and their licensing conditions and other associated issues. For details kindly see; Apoorva, 'The Net Neutrality Debate in India'(prsindia.org 09 Feb. 2016) <https://www.prsindia.org/theprsblog/net-neutrality-debate-india> last accessed on 20 July 2017

shift the TSPs have started facing competition from unlicensed application platforms, termed Over-the-Top (OTT hereinafter) players, in their traditional voice communication field since number of OTTs have started providing an alternate service of voice calls called as voice over internet protocol.[11] A lot of OTT players provide Voice over Internet Protocol (VoIP) and service which enables an end user to directly make a call to another end user without spending extra charges as levied for similar services by the traditional telecom operators.[12] In order to address the revenue losses, the TSPs have introduced several measures such as charging higher data tariffs for VoIP services, charging content application providers and providing the content free to users (zero rating plans).[13] Introduction of such measures in different jurisdictions across the globe has raised concerns about Net Neutrality. The inherent apprehension in differential treatment to the flow of data traffic, as claimed, will lead to discouragement of innovations, bias against minor OTT players etc among other concerns.[14]

The Article is an attempt to put forth some of the critical issues involved in net neutrality which has been outlined by TRAI in its consultation paper seeking public opinion on various issues of net neutrality. This article argues that although any attempt to throttle and screen the data traffic should be completely prohibited, the regulatory authorities at the same time make provisions for addressing the concern of revenue loss to the TSPs and ISPs. This Article suggests that a careful crafting of Traffic Management Practices have the potential to address the genuine concerns of the TSPs, ISPs and end users. For the purpose of clarity and convenience the article is divided in total four parts. Part I of the article contextualizes the net neutrality debate. Part II of the article discusses the legal measures adopted in India to address various aspects of net neutrality. Part III of the article discusses the position of net neutrality debate in other jurisdictions and makes a comparison. Part IV of the article concludes the debate with certain recommendations.

PART-1

II. WHAT IS NET NEUTRALITY

Net neutrality (a.k.a. "network neutrality" or "open internet") "is the principle

11. The term over-the-top (OTT) refers to applications and services which are accessible over the internet and ride on operators ' networks offering internet access services e.g. social networks, search engines, amateur video aggregation sites etc. The best known examples of OTT are Skype, Viber, WhatsApp, Chat On, Snapchat, Instagram, Kik, Google Talk, Hike, Line, WeChat, Tango, e-commerce sites (Amazon, Flipkart etc.),Ola, Facebook messenger, Black Berry Messenger, iMessage, online video games and movies (Netflix, Pandora). For details kindly see; Telecom Regulatory Authority of India, 'Consultation Paper on Regulatory Framework for Over-the-Top (OTT) Services 2015, (September, 2015)<https://main.trai.gov.in/sites/default/files/OTT-CP-27032015.pdf> last accessed on 15 Aug. 2017

12. $52bn revenues are estimated to be "lost" to OTT VoIP globally in 2016 and Over $40bn SMS revenues lost to OTT social messaging in 2014.
For details kindly see; Slaheddine Maaref, ITU Regional Economic and Financial Forum of Telecommunication/ICT for Arab Region, (International Telecommunications Union, 2015) <https://www.itu.int/en/ITU-D/Regional-Presence/ArabStates/Documents/events/2015/EFF/Pres/Maaref%20OTT%20Presentation%20Manama%202015 .pdf> last accessed on 15 Aug. 2017.

13. Department of Telecommunication, *Net Neutrality,* 2015 (May 2015),<https://dot.gov.in/sites/default/fite last accessed on 01 Aug. 2017

14. Apoorva, 'The Net Neutrality Debate in India'(prsindia.org 09 Feb. 2016) <https://www.prsindia.org/theprsblog/net-neutrality-debate-india> last accessed on 23 Aug. 2017

that those who manage networks should provide access to all applications, content, platforms, and websites on a non-discriminatory basis."[15] Net neutrality is usually referred to as the equal treatment of data, regardless of the type of content, provider or consumer. However, in reality the issue is much more complex.[16] As such there is no accepted definition of net neutrality because it is understood by different stakeholders in a different perspective.[17] Tim Wu who coined the term "network neutrality" back in 2002 to describe the concept that internet service providers should treat all data on the Internet the same and not block, speed up or slow down traffic based on paid prioritization or other preferences.[18] Hahn and Wallsten point out that it "usually means that broadband service providers charge consumers only once for Internet access, do not favor one content provider over another, and do not charge content providers for sending information over broadband lines to end users."[19]

The Telecom Regulatory Authority of India in its consultation paper on 'Regulatory Frtimework for Over the Top (OTT) Services has defined the net neutrality as a concept which means that TSPs must treat all internet traffic on an equal basis, no matter its type or origin of content or means used to transmit packets. All points in a network should be able to connect to all other points in the network and service providers should be able to deliver traffic from one point to another seamlessly, without any differentiation on speed, access or price. The principle simply means that all internet traffic should be treated equally.[20]

III. ISSUES SURROUNDING NET NEUTRALITY DEBATE

The net neutrality debate prerequisites general understanding of the functioning of Internet. A key element of Internet architecture is that user data is relayed throughout the Internet in the form of standardized packets of information without regard for their content, senders, or receivers.[21]In actual practice, however, data packets are

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15. Simone A. Friedlander, Net Neutrality and the FCC's 2015 Open Internet Order, (2016) Berkeley Technology Law Journal, Vol.31, No. 2, pp. 905-930
16. Maria Fernanda Aguila-Marin Moreno, 'Understanding Net Neutrality' (new.it.int 12 August 2015)<https://news.itu.int/understanding-net-neutrality/> last accessed on 23 Aug. 2017
17. The Body of European Regulators for Electronic Communications (BEREC) in its report on net neutrality, while quoting the definition given by TRAI of net neutrality, has refused to give an absolute definition of net neutrality and adopted to approach and address the basic principles of net neutrality. In fact, BEREC while commissioning its study on net neutrality had chosen to study the approach adopted by national regulatory authorities in three benchmark Non European countries i.e. India, Chile and USA. Analyses Mason, *Study on Net Neutrality Regulation 2017,* (September, 2017)<https://berec.europa.eu/eng/document_^ on 26 Aug. 2017
18. Tim Wu, Network Neutrality, Broadband Discrimination, J. On Telecomm. & High Tech. L., Vol.2, 142
19. hahn, R.W., and Wallsten, S. *The economics of net neutrality*. Economists' Voice, 3, 6 (2006), 1-7
20. Telecom Regulatory Authority of India, 'Consultation Paper on Regulatory Framework for Over-the-Top (OTT) Services 2015, (September, 2015)<https://main.trai.gov.in/sites/default/files/OTT-CP-27032015.pdf> last accessed on 15 Sept. 2017
21. Rus Shuler, How Does the Internet Work? (Stanford, 2002)<https://web.stanford.edu/class/msande91si/www-sprO4/readings/weekl/InternetWhitepaper.htm> last accessed on 26 April 2017.

sometimes treated differently to address network congestion, resource constraints, business arrangements, and other practical considerations of network functioning.[22] The complex and often competing nature of internet has led to friction amongst consumer's right to freedom of expression and right to information and TSPs/ISPs commercial and proprietary rights to manage their network.[23]

Proponents of net neutrality contend that when a service provider breaches neutrality of a network, new entrants become vulnerable to unfair competition as their access to the internet infrastructure is restricted. They argue that any preferential treatment of internet traffic would put newer online companies at a disadvantage and slow down innovation in online services. Further, any departure from net neutrality will allow TSPs and ISPs to discriminate, restrict and degrade contents which will hamper the consumer's right to access to internet. However, voices in favor of TSPs and ISPs argue that mandating Network Neutrality would be inconsistent with sound economic management of the internet. If the TSPs and ISPs are not permitted to levy differential charges for their network, then it will reduce the ability of providers to offer properly tiered services to third parties as the bandwidth of networks is limited and demand for data has increased over the period of years.[24] If each data is floated freely it will ultimately flooded with huge data and overall quality of services will hamper. The service provider's right to earn profit for their services is also in picture.[25]

Therefore, Traffic Management Practices have been evolved to address the balance between above mentioned competing rights. Traffic management is typically employed to ensure that a basic quality of service is always available, meaning pure net neutrality is rare. There are also questions as to what extent network management activities become discriminatory practices, potentially restrict access to content, and limit Internet users 'free expression. Following are five specific challenges commonly discussed in net-neutrality dialogue:[26]

a) BLOCKING AND FILTERING

Blocking or filtering of content is a practice in which end users are denied access to certain online content based on regulatory controls or the business objectives of Internet service providers (ISPs) or network infrastructure operators to favor their own content. Some see selective filtering of Internet content as contrary to the Internet principles of free and open access, particularly when it favors an ISP's services.

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22. Internet Society, Welcome to net neutrality: Training Module (Internet Society, 2016) <https://www.internetsociety.org/wp-content/uploads/mtorials/Network_Neutralk^^ last accessed on 26 April 2017
23. Department of Telecommunication, *Net Neutrality,* 2015 (May 2015),<https://dot.gov.in/sites/defau^last accessed on 01 July. 2017
24. As per the TRAI report monthly data usage per subscriber during December 2013 to December 2016 has increased from 50MB a month to 884MB a month. See; TRAI, A Twenty Year Odyssey 1997-2017 <https://main.trai.gov.in/sites/default/files/A_TwentyYear_Odyssey_1997_2017.pdf^> last accessed on 29 Sept. 2017
25. Maria Fernanda Aguila-Marin Moreno, 'Understanding Net Neutrality' (new.it.int 12 August 2015)<https://news.itu.int/understanding-net-neutrality/> last accessed on 23 Sept. 2017
26. Editorial, 'Policy Brief:Network Neutrality' (Internet Society, 30 Oct 2015) <https://www.internetsociety.org/policybriefs/networkneutrality/>

Others view blocking and filtering as necessary ways to protect minors from objectionable content or limit the proliferation of illegal online content.

b) INTERNET FAST LANES

The term *Internet fast lanes* refers to the practice of giving preferential network treatment to certain data streams based on business agreements among Internet operators. For example, specific video content might be provided with faster delivery across a network in accordance with business agreements between network operators. Some view these agreements as an unacceptable discriminatory practice by giving preferred treatment to some data on the network and potentially degrading the performance of other data. Others, however, view "fast lanes" as an effective way to deliver content to users with improved quality of service.

c) THROTTLING

The term *throttling* refers to certain business practices that reduce the data throughput rates of delivered content to end users. Throttling can include techniques like specifically limiting the user upload or download rates of certain types of data streams, as might be the case with peer-to-peer traffic management practices. Some view throttling as a necessary means to avoid congestion and poor network performance. Others find these practices controversial when the practice is not fully disclosed or when operators unfairly discriminate against certain data streams.

d) ZERO-RATED SERVICE

The term *zero-rated services* describe a general business practice whereby certain Internet content is delivered to an end user at a substantially reduced cost or for free. In this scenario, the provider of the Internet service typically subsidizes the cost of the Internet access in exchange for tangible or intangible market advantages. These market advantages might come in the form of an increased base of subscribers, preferential access rights to provide Internet services, or the ability to monetize data collected about service subscribers. There is debate about whether these services discriminate against the data streams that are not I provided under a zero-rated service. Similarly, it is unclear whether providing only a subset of full Internet access under a zero-rated service to those who would otherwise have no Internet access is better or worse than the potential harm incurred from limited access to the Internet.

e) MARKET COMPETITION

Healthy *market competition* is a frequent component of net neutrality discussions. In markets where users have limited affordable Internet service options, those users are potentially more vulnerable to having their access to available content restricted or to experiencing poorer network performance. Competition in the marketplace for ISPs is helpful in that it offers consumers a choice and encourages innovation among service providers. In addition, ensuring a competitive market for Internet access provision supports overall user choice in services and online experiences.

PART- II

IV. REGULATORY MEASURES OF NET NEUTRALITY IN INDIA

In India, the responsibility to regulate the telecom sector is divided between

Department of Telecommunication (DoT) and Telecom Regulatory Authority of India (TRAI). While the DoT is responsible for things like licensing, spectrum management and overall policymaking, the TRAI Act, 1997 empowers the regulator to look into issues of tariffs, interconnection between providers, quality of services and to monitor compliance with licensing terms. In addition, the law also entrusts it with the function of making recommendations to the Government on various aspects, including terms and conditions of license agreements.

Debate regarding net neutrality in India has started when zero rating plans were announced by certain companies. Among others, most important companies which announced the plans were Facebook's Internet.org or Free Basics project and Bharti AirteFs Airtel Zero.[27] India banned Free Basics in 2016, along with similar zero-rating programs which were discriminatory in nature.[28] The focus then shifted to deciding how India would regulate other practices such as blocking, slowing down of particular traffic and preferential treatment of content, the other key components of the net neutrality debate.

A series of multiple consultations and legal steps have been taken by the DoT, Govt. of India and the sole regulator of telecom sector in India, TRAI in India to address the different perspectives of net neutrality. A committee was established by Department of Telecommunications on 19th January 2015 to provide recommendations on net neutrality. The report was submitted by committee in May 2015.[29]Numbers of important recommendations were made by the committee. While advocating for strict implementation of net neutrality the committee has further outlined that user rights on the Internet need to be ensured so that TSPs/ISPs do not restrict the ability of the user to send, receive, display, use, post any legal content, application or service on the Internet, or restrict any kind of lawful Internet activity or use. The committee has further accepted that in case of VoIP OTT communication services, there exists a regulatory arbitrage wherein such services also bypass the existing licensing and regulatory regime creating a non-level playing field between TSPs and OTT providers both competing for the same service provision. In order to immediately address the issue of net neutrality concerns till adequate laws are codified by competent bodies, the committee has suggested that TSPs and ISPs should adhere to the principles of net neutrality else their licenses may be cancelled on this ground. It has also opined that New legislation, whenever planned for replacing the existing legal framework, must incorporate principles of net neutrality. The committee further suggested that Tariff shall be regulated by TRAI as at present. Whenever a new tariff is introduced it should be tested against the principles of Net Neutrality. Post implementation, complaint regarding a tariff violating principle of Net Neutrality may be dealt with by DoT.

On 27th March, 2015, the Telecom Regulatory Authority of India issued a consultation

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27. Gulveen Aulakh, Telcos, zero rating critics wary of Trai's free data proposals (economic times, 21 Dec. 2016)<https://econornictimes.indiatimes.com/tecMproposals/articleshow/56092248.cms?from=mdr> last accessed on 03 July 2017.

28. These prohibitions were imposed by virtue of Prohibition of Discriminatory Tariffs for Data Services Regulations', 2016.

29. Department of Telecommunication, *Net Neutrality,* 2015 (May 2015),<https://dot.gov.in/sites/default/ffl^^last accessed on 01 Sept. 2017

paper on 'Regulatory Framework for Over the Top (OTT) Services.[30], Among other issues, this consultation paper involved questions on the principles of net neutrality, reasonableness of traffic management practices, non-price based discrimination of services and transparency requirements.[31] On 9th December, 2015, TRAI issued a consultation paper on 'Differential Pricing of Data Services'. After a detailed and widespread consultation process, TRAI issued the 'Prohibition of Discriminatory Tariffs for Data Services Regulations', 2016 in February, 2016.[32] These regulations prohibit Telecom Service Providers from charging different tariffs from consumers for accessing different services online. Prior to the recent TRAI regulations prohibiting discriminatory tariffs, there was no specific law or regulation directly concerning the services provided by OTT service providers. In pursuance of the request of DoT in March 2016 to make recommendations on net neutrality as whole, TRAI initiated a detailed consultation on the issue.[33] These recommendations are expected to be submitted to DoT in December 2017 or First quarter of 2018.

PART-III

V. REGULATION OF NET NEUTRALITY IN OTHER JURISDICTIONS

Internationally, countries like the USA, Japan, Brazil, Chile, Norway, etc. have some form of law, order or regulatory framework in place that affects net neutrality. Chile was the first country in the world to define a net-neutrality law, which sets out a principled approach for its national telecommunications regulator SUBTEL to regulate the industry. After some initial high-profile violations involving zero rating, net neutrality in Chile appears to be progressing without further incident. SUBTEL is currently focusing on gathering quality-of-service (QoS) data and transparency; monitoring of net-neutrality-specific practices is limited to qualitative information provided by Internet service providers (ISPs).[34]

In the United States of America, the core issue to net neutrality is how ISPs should be classified under the Communications Act of 1934, if they should be Title I "information services" or Title II "common carrier services". The classification affects the Federal Communications Commission's (FCC) authority over ISPs: the FCC would have significant ability to regulate ISPs if classified as Title II common carriers, but would have little control

30. Telecom Regulatory Authority of India, 'Consultation Paper on Regulatory Framework for Over-the-Top (OTT) Services 2015, (September, 2015)<https://main.trai.gov.in/sites/default/files/OTT-CP-27032015.pdf> accessed on 27 Sept. 2017

31. OTT services accessible over the internet and made available on the network offered by TSPs. They offer internet access services such as Skype, Viber, WhatsApp, Facebook, Google and so on. Therefore, OTT services can broadly be of three types: (i) e-commerce, (ii) video or music streaming and, (iii) voice over internet telephony/protocol services (or VoIP communication services that allow calls and messages). For details kindly see; Apoorva, 'The Net Neutrality Debate in India'(prsindia.org 09 Feb. 2016) <https://www.prsindia.org/theprsblog/net-neutrality-debate-india> last accessed on 20 Aug. 2017

32. for details; kindly see; <https://www.trai.gov.in/sites/default/files/Regulation_Data_Service.pdf>accessed on 26 Sept. 2017

33. Anandita Singh Mankotia, Trai asked to submit recommendations on net neutrality; government gears up to finalise policy'(economic times, 17 March 2016)<https://economictimes.indiatimes.com/tech/intemet/trai-asked-to-submit-recommendations-on-net-neutrality-government-gears-up-to-flnalise-policy/articleshow/51433246.cms?from=mdr> accessed on 17 Aug. 2017

34. Analyses Mason, *Study on Net Neutrality Regulation 2017*, (September, 2017)<https://berec.europa.eu/eng/document_register/subject_last accessed on 29 Sept. 2017

over them if classified as Title I. Because the Communications Act has not been amended by the United States Congress to account for ISPs, the FCC has the authority to designate how ISPs should be treated in addition to what regulations they can set on ISPs. The makeup of the 5-member FCC has changed with each new administration, leading to the state of net neutrality flipping back and forth over the last two decades.

In 2005, the FCC adopted network neutrality principles "to preserve and promote the vibrant and open character of the Internet as the telecommunications marketplace enters the broadband age." Between 2005 and 2012, five attempts to pass bills in Congress containing net neutrality provisions failed. Opponents claimed that these bills would have benefited industry lobbyists instead of consumers. In response to legal challenges from ISPs challenging the FCC's ability to set net neutrality principles, the FCC released new internet rules in March 2015, which mainly disallow: (i) blocking, (ii) throttling or slowing down, and (iii) paid prioritization of certain applications over others. The Court of Appeals for the District of Columbia upheld the FCC's new rules in a legal challenge raised by advocate groups representing ISPs. However, very recently in April 2017 the FCC has again proposed to repeal the neutrality policies, returning to the previous classification of ISPs as Title I services.[35] The draft of the proposed repeal, published in May 2017, led to over 20 million comments to the FCC. However it has been claimed that most of these anti net neutrality comments were made by bots.[36]

The reforms made in the United States were followed in the European Union (EU) or at least it has started the debate to bring similar reforms. By way of comparison, the EU delegates the implementation of its Telecom Single Market regulation to the National Regulatory Authorities (NRAs) of individual member states, while BEREC (the Body of European Regulators for Electronic Communications) issues guidelines for the NRAs to follow as they implement the regulation. In September 2013, the European Commission launched its 'Telecommunications Single Market" Regulation. This was a heavily political proposal, which needlessly squeezed fully and partially unrelated issues such as roaming, spectrum, net neutrality and users * rights into the same instrument. The initial draft to ensure net neutrality by the commission in September 2013 was criticized heavily for being misleading. The rules framed were applicable to only certain basic net neutrality components such as agreements on data volumes and speeds. The proposal limited the scope of the ban on discriminatory treatment to discrimination that fell within "any data volumes or speeds", thus severely limiting the range of the ban on discriminatory traffic management. Although the European Parliament though its amending provisions have attempted to address these loopholes in April, 2014. Clause 23.5 of the regulation was amended in the following words:

> "Providers of internet access services and end-users may agree to set limits on data volumes or speeds for internet access services. Providers of internet access services shall not restrict the freedoms provided for in paragraph 1 by blocking, slowing down, altering, degrading or discriminating against specific content, applications or services, or specific classes thereof, except in cases where it is

35. Cecilia Kang, F.C.C. Chairman Pushes Sweeping Changes to Net Neutrality Rules (New York Times, 26 April 2017) <https://www.nytimes.com/2017/04/26/technology/net-neutrality.html> last accessed on 24 July 2017

36 Karl Bode, A Bot Is Flooding The FCC Website With Fake Anti-Net Neutrality Comments... In Alphabetical Order, (techdirt.com, 10 May 2017)<https://www.techdirt.con^ comments-alphabetical-order.shtml> last accessed 13 Aug. 2017

necessary to apply traffic management measures."

The European commission's proposal was dismissed by the Council of Member States and after lot of debates, the Parliament had been successful in convincing the Council to move from its position and adopt the net neutrality principles. However, there are five points for which the final agreement text between parliament and council needs clarification are private law enforcement, congestion, traffic management, price discrimination and specialized services.[37]

Norway put in place co-regulation for net neutrality in 2009, which had been in negotiation since 2008. The need for net neutrality resulted from an IAP choosing not to carry the video traffic of the state broadcaster, resulting in strong political pressure for neutrality. Sorensen for the regulator explains that: 'In 2009 the Norwegian guidelines for net neutrality were launched and there have since been annual stakeholder meetings to monitor the status of net neutrality in Norway.' The Norwegian Electronic Communications Act 2013 did not introduce any (hard) law for net neutrality, but the corresponding Communication (Proposition) to the Norwegian Parliament (Stortinget) confirmed the running soft law approach to deal with issues of net neutrality. Norway is unique in that its co-regulatory net neutrality approach was agreed prior to other European nations, yet remains in place unchallenged by affected companies. A possible reason of the same has been outlined as Norway practices an advanced form of Scandinavian social democracy, supported by strong and independent bureaucracy and government, a social compact between companies and society, and economic growth fuelled by North Sea oil wealth exists.[38]

In mid-June 2011 the Netherlands moved to implement the powers to require Quality of Service guarantees without discrimination. Netherlands network neutrality regulation was voted on by its Senate on 6 March 2012, which made it the first European nation to formally introduce mandated network neutrality. Implementation of the law was delayed until spring 2013 by the need for secondary legislation from the ministry mandating the regulator to implement the law, and the regulator was merged into the competition authority in April 2013, delaying implementation by over two years. By late 2014 it was issuing regulatory decisions to enforce net neutrality and prevent discrimination.[39]

In between 2010 and 2014, four South American governments from Chile, Colombia, Peru and Brazil enacted net neutrality laws, while Argentina and Ecuador are debating the subject also at a legislative level. At the time of writing, there is no specific *ex ante* regulation to address net neutrality concerns in Australia, and instead the general competition regime administered by the Australian Competition and| Consumer Commission (ACCC), and some sector- specific telecoms regulation are the only tools available.

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37. Luca Belli, Primaera De Filippi, Net Neutrality Compendium: Human Rights, Free Competition and the Future of the Internet (eds) *Net Neutrality: An Analysis of the European Union's Trialogue Compromise* (Springer 2016)

38. Christopher T. Marsden, A brief history of net neutrality law, (manchesteropenhive.com, 23 Feb. 2017) <https://www.manchesteropenhive.com/view/9781526105479/9781526105479.00021.xml#fhnote-139> accessed on 21 Aug. 2017

39. Christopher T. Marsden, A brief history of net neutrality law, (manchesteropenhive.com, 23 Feb. 2017) <https://www.manchesteropenhive.com/view/9781526105479/9781526105479.00021.xml#mnote-139> accessed on 21 Aug. 2017

The general competition regime in Australia is found principally in the *Competition and Consumer Act* 2010 (CCA) and is similar to that of many other developed jurisdictions such as the EU. The main elements of Australian competition law are a prohibition on collusive conduct (section 45), the misuse of market power i.e. abuse of a dominant position (section 46) and exclusive dealing (section 47).[40]

Although the regulatory structures differ in all countries, the substance of the TRAI efforts till this date is appears to be more robust than the rules in other countries. As it it well evident, TRAI has made it very clear that principles of net neutrality should be accepted. As compared to other jurisdiction it has declined to permit price discrimination and creation of fast lanes. It has adopted a progressive and futuristic policy which can be exemplified as model for other countries.

PART-IV

VI. CONCLUSION

A discussion on the competing rights in the foregoing paragraphs makes it clear that protection of the net neutrality is a prerequisite for small e commerce businesses and start ups, particularly in a developing country like India, as they have lesser capacity to pay for the exorbitant prices which may be set forth by the TSPs and ISPs. Further, net neutrality will also ensure greater choices available to the end users, ensure right to information, right to freedom of expression, consequently leading to greater competition among the OTTs. It is pertinent to mention here that increase of competition will foster greater use and consumption of data, therefore, the revenue loss concern of TSPs and ISPs would be minimized to a certain level. In this regard, it is necessary that principles of net neutrality should be observed completely in India however, exceptions must be made for some of the specialized services offered by TSPs and ISPs in order to fully compensate them against the revenue loss. At this juncture, it would be premature to form an opinion on which of the services offered by TSPs and ISPs be designated as 'special services' since new form of services are continuously being offered and stopped by TSPs and ISPs, it would be better that TRAI should formulate a list of'special services' which can be excluded from the purview of net neutrality principles. Such list should be periodically reviewed by the TRAI so as these exclusionary clauses may not be misused to subvert the principles of equality, fairness, objectivity and transparency in Internet.

Further, as already discussed, owing to the complex nature of functions performed by TSPs and ISPs and their exposure to manifold liabilities, it is necessary that such traffic management practices which are reasonable, transparent, framed to address exigencies, court decisions and government directives should also be outside the purview of net neutrality principles. In the last, It is also recommended that a multi-stakeholder body consisting of TSPs, ISPs, OTTs, Civil Society, Regulators Representatives etc. should be established for the purpose of looking into the different perspective of transparent and quality internet services.

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40. Luca Belli, Primaera De Filippi, Net Neutrality Compendium: Human Rights, Free Competition and the Future of the Internet (eds) *Net Neutrality: An Overview of Enacted Laws in South America* (Springer 2016).

NOTES & COMMENTS

CONSENSUAL SEX ON A PROMISE TO MARRY *VERSUS* RAPE : A CONCEPTUAL CONFLICT

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DENKILA BHUTIA**

ABSTRACT : The presence or absence of consent in a sexual intercourse between two adult participating partners plays a pivotal role in determination of the nature of the act of sexual intercourse. Sexual intercourse without consent between participating partners on fulfillment of all essential ingredients of section 375 amounts to rape. Offence of rape provides very severe punishment under section 376 of Indian Penal Code which may range from seven years to life imprisonment. There is no justification to bring sexual intercourse in consenting partners, the consent to which has been obtained on the basis of a promise to marriage within the ambit of rape. There is a dearth of study on the issue, even the Indian Judiciary has been sparingly confronted with a question whether the sexual intercourse between the consenting partners the consent to which has been obtained on the basis of a false promise of marriage amounts to rape? This research paper revolves around the nature and implications of consent for sexual intercourse on a promise of marriage. The paper tries to point out the ambiguity inherent under section 375 on the point of deception. The methodology adopted in the present study is doctrinal and the study is based on secondary sources like judicial decisions, case comments, newspaper reporting etc. The present study is limited to the analysis of nature and standard of consent in context of rape.

KEY WORDS : Sexual Intercourse, Rape, Promise, Consent, Deception.

I. INTRODUCTION

In order to understand the effect of consent on the nature of the act of sexual intercourse whether it is rape or a private affair of two individuals with which the state is generally not concerned with, it is necessary to understand the nature of the act. Rape has immediate and long-term physical and emotional impact on the women subjected to rape. Susan Brownmiller has described rape as "sexual invasion of the body by force, an incursion into the private, personal inner sense without consent, in short an internal assault from one of the several avenues and by one of the several methods. It constitutes

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a deliberate violation of emotional, physical and rational integrity and is a hostile degrading act of violence."[1] In the words of Nicholans A. Groth, "rape is a pseudo sexual act, a pattern of social behaviour that is more concerned with status, hostility, control and dominance than sexual pleasure or sexual satisfaction."[2] It is a traumatic experience that impacts it's victim in a physical, psychological, and sociological way.[3] Justice Krishna Iyer in the case of *Rafiq v. State of U.P*[4] made a remark that, "*a murderer kills the body, but a rapist kills the soul."* It results in tangible and intangible [5] costs on the victim and is also violative of human rights of the victim. In some countries where a woman's virginity is considered to be matter of family honour, unmarried women when complain against rape are compelled to marry the offender.[6] Sometimes a woman consents to a sexual intercourse on a promise to marry. At times the offense of rape is condoned on the consent of the offender to marry the unmarried girl who has been ravished by him. So it becomes relevant to examine the relationship if any between offense of rape and a promise of marriage.

India has ratified the human right treaties like Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and various human right treaties thus it is duty bound to prevent and eliminate sexual violence in general and rape in particular. It has thus penalised the offence of rape.

II. ESSENTIAL ELEMENTS OF RAPE : AN ANALYSIS

Section 375 of the Indian Penal Code clearly states that a man commits 'rape' when he has sexual intercourse with a woman if he fulfills six conditions. First, if the act is done against her will, secondly, when it is done without her consent. Thirdly, "when the consent is obtained by putting her in fear of death or of hurt," Fourthly, "with her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is lawfully married." Fifthly, "when her consent is obtained because of unsoundness of mind or intoxication, stupefication, she is unable to understand the nature and consequences of what she is consenting to." Lastly, "with or without consent, when she is under sixteen years of age."

The expression "sexual intercourse" has not been defined. The dictionary meaning of the word "sexual intercourse" is "hetro sexual intercourse involving penetration of the vagina by the penis."[7] The definition of rape was initially confined to the forced acts of penile-vaginal intercourse. However Criminal Law Amendment Act of 2013 extended the definition of rape to include oral sex as well as the "insertion of an object or any other

1. https://shodhganga.inflibnet.ac.in/bitstream/10603/78428/5/05_chapter.pdflast (visited on April 17, 2017)
2. Nicholans A. Groth, *Academic and Workplace Sexual Harassment* (Suny Press, 1991).
3. Dr. Sushma Suri and Sanjeeda "*An Analytical Study of Rape in Delhi"* (IJEPR) Vol. 2, pp: 60-68, (2013).
4. 1981 SCR (1) 402.
5. Miller, T. R., Cohen, M. A., & Wiersema, B., *Victim costs and consequences: A new look Washington, DC: National Institute of Justice* (1996).
6. https://www.who.int/gender/violence/v6.pdf
7. *Sakshi vs Union Of India* 2004 Supp(2) SCR 723.

body part into a woman's vagina, urethra or anus."[8] Penetration does not mean full penetration, of the male organ within the vulva of the woman.[9] Here it is pertinent to mention that slightest amount of penetration is sufficient to constitute sexual intercourse necessary for the offence of rape. Penetration can be with or without violence.[10]

In the phrase without her consent[11] the word consent is a foundation stone of the offense of rape. So it becomes necessary to understand the meaning and nature of consent to fasten criminal liability of rape on an offender. Consent is "An act of reason accompanied with deliberation, the mind weighing, as in a balance, the good or evil on either side. Consent supposes three things - a physical power, a mental power and a free and serious use of them. Hence it is that if consent be obtained by intimidation, force, mediated imposition, circumvention, surprise or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind."[12] The Court of Appeal in England in the case of *R v Bree*[13], examined the issue of capacity to consent and the consent, and stated that when under an influence of liquor or otherwise victim temporarily loses her capacity to decide whether to have sexual intercourse or not , and sexual intercourse is committed with her she cannot be considered to have consented. But if the victim voluntarily consumes liquor, and was capable of deciding whether to have intercourse, and consents to the sexual intercourse it would not be rape. It was further held that capacity to consent may be lost well before the victim loses her consciousness. However whether the victim lost her consciousness before consenting to the sexual intercourse depends on the circumstances of the case.[14] The House of Lords in *DPP* v. *Morgan*[15] applied a subjective test in determining the guilt of the accused and held that in fastening a criminal liability for an offence of rape. The cardinal principle

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8. Under the new section 375, a man is said to commit rape if there is:
   * Penetration of penis into vagina, urethra, mouth or anus of any person, or making any other person to do so with him or any other person;
   * Insertion of any object or any body part, not being penis, into vagina, urethra, mouth or anus of any person, or making any other person to do so with him or any other person;
   * Manipulation of any body part so as to cause penetration of vagina, urethra, mouth or anus or any body part of such person or makes the person to do so with him or any other person;
   * Application of mouth to the penis, vagina, anus, urethra of another person or makes such person to do so with him or any other person;
   * Lastly, touching the vagina, penis, anus or breast of the person or makes the person touches the vagina, penis, anus or breast of that person or any other person.
9. *Mohammed v. State of Kerala* [1987 (2) KLT 565].
10. *Aman Kumar And Anr* v. *State Of Haryana* Available at https://indiankanoon.org/doc/366037/ (last visited on 4.4.2017)
11. According to Explanation 2, consent means an unequivocal voluntary agreement when the person by words, gestures or any form of non-verbal communication, communicates a willingness to participate in the specific sexual act. Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of the fact, be regarded as consenting to the sexual activity.
12. Jowitt's Dictionary of English Law, IInd Edn 01. 1 cited in *State of Karnataka* v. *K.P.Thimmappa Gowda* ILR 2004 Karnataka 4471.
13. [2007] EWCA 256.
14. https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-3-consent (last visited on May 15, 2017).
15. [1975] UKHL 3, [1976] AC 182.

in deciding the guilt of accused will depend upon whether the accused honestly believed that the woman was consenting even though a reasonable man put under the circumstances would have conceived otherwise. Thus an honest even though unreasonable belief of consent to sexual intercourse will absolve the accused from liability for rape.

Often submission of a woman against the sexual intercourse even if it is carried out against her consent and will, is confused with sexual intercourse with consent and will of the woman concerned. It needs to be differentiated with the intercourse with consent. A mere fact of failure to offer resistance on the part of victim may be due to numerous reasons like, helplessness, duress, compulsion or fear. Such giving up on the part of woman who is a victim of rape cannot be considered to have consented for sexual intercourse.[16] Consent requires not only voluntary participation based on quality and moral nature of the act but also freely exercising the option of resisting or consenting to the act of sexual intercourse.[17] There is a difference between consent and submission. Consent involves submission but submission does not always mean consent. "Consent of the girl in order to relieve accused of an act of a criminal character, like rape, must be an act of reason accompanied with deliberation, after the mind has weighed as in a balance, the good and evil on each side, with the existing capacity and power to withdraw the assent according to one's will or pleasure."[18] The expression used in the offence of rape namely "against her will" and "without her consent" reinforces the requirement of voluntary and willful nature of the act of sexual intercourse. The two phrases sound similar but at times have different connotation. Various sections of the offence of rape have been drafted comprehensively and meticulously to contemplate all the conditions of sexual intercourse which may amount to rape. Such a design to prevent offence of rape is compatible with principle of strict interpretation of Penal statutes. In *State of U.P* v. *Chhotey Lal* [19] the Supreme Court held that "expressions `against her will' and `without her consent' may overlap sometimes but surely the two expressions in clause First and clause Second have different connotation and dimension. The expression `against her will' would ordinarily mean that the intercourse was done by a man with a woman despite her resistance and opposition. On the other hand, the expression `without her consent' would comprehend an act of reason accompanied by deliberation."

In the Mathura rape case[20], where the accused were acquitted because the victim did not raise any alarm and there were no visible marks of resistance meaning thereby that she had consented to the act of sexual intercourse.[21] This resulted in massive outrage across the country. Public outrage led to an amendment in the Evidence Act;

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16. In *Pratap Misra and others* v. *State of Orissa* the Supreme Court concurred with the medical opinion that single man cannot rape a woman without facing stiffest possible resistance on the part of woman raped.
17. AIR 1958 P H 123.
18. *State of Karnataka* v. *K.P. Thimmappa Gowda,* ILR 2004 Karnataka 4471.
19. (2011) 2 SCC 550.
20. *Tukaram* v. *State of Maharashtra,* AIR1979S.C 185
21. Alfred S. Taylor, II *Principles and Practice of Medical Jurisprudence* 64 (Nabu Press 2013), Observes that in most of the cases where a woman offers resistance to sexual intercourse local injury will be present on the victim.

Section 114A was inserted in 1983.[22]Having regard to the difficulty of the prosecution to prove that the act of sexual intercourse has been committed against the consent of the women parliament decided to create a presumption against consent in offences of rape. In *Rao Harnarain Singh Sheoji Singh* v. *The State Punjab & Haryana*[23] *the* court held "The object of the new clause was to protect and safeguard the interest of the woman who accords consent for sexual intercourse without knowing the nature and consequences of the act by reason of unsoundness of mind or under the influence of stupefying or unwholesome substance or intercourse with a defective. In such cases, it is presumed that the consent of the woman is not free and voluntary to exonerate the accused of the charge of rape."[24]

Sexual intercourse with a woman under 18 years of age forms a separate category of cases from sexual intercourse which amounts to rape under the Indian Law of Rape. It is qualitatively different from the sexual intercourse which amounts to rape and involves violence.

III. CONSENT IN DECEPTION

Deception as a crime is nowhere defined in the Indian Penal Code but we all use this term in general in our day to day life. Deception is a generic term which involves fraud, misrepresentation, coercion, undue influence. So it becomes necessary to examine the various catagories of deception under which offence of rape is committed. However it is pertinent to point out that sexual intercourse committed under a deception may involve any of such categories or it may be a combination of more than one category. In context of fraud "The legal, academic, and business communities call out for clarity in this important area of the law; yet the very word "fraud" is itself a misnomer. Fraud, or more properly, fraudulent misrepresentation, traditionally designated as "deceit," represents just one part of the corpus of misrepresentation law. "Pure" fraudulent misrepresentation, grounded on intent to deceive, forms the foundation of the tort cause of action for fraud, called deceit."[25] Thus fraud involves a false representation made with intent to deceive, and relied upon to his damage by the party injured.[26] A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. Cambridge dictionary defines fraud as someone who deceives people by saying that they are someone or something that they are not.[27] Thus fraud connotes taking away a property by taking unfair advantage and causing loss to someone or it involves representing something or

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22. Section 114-A of the Indian Evidence Act, 1872 deals with the presumption as to absence of consent in certain prosecution for rape. A reading of the Section makes it clear that where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped, and such woman states in her evidence before the court that she did not consent, the court shall presume that she did not consent.
23. AIR 1958 P H 123
24. Clause (5) of section 375 IPC was added vide the Criminal Law (Amendment) Act of 1983.
25. Frank J. Cavico, "Fraudulent, Negligent, and Innocent Misrepresentation in the Employment Context: The Deceitful, Careless, and Thoughtless Employer", 20 *Campbell L. Rev.* 1 (1997).
26. https://openjurist.org/law-dictionary-ballentines/deceit (last visited on May 16, 2017).
27. https://dictionary.cambridge.org/dictionary/english/fraudulent(last visited on 3.4.2017).

some person which is not true and the person representing someone or something does this knowingly and intentionally. The only sort of fraud, which adversely affects consent of the woman for sexual intercourse woman's consent, is the fraud regarding the nature of the act itself ("sexual intercourse"), or as to the identity of the person accused of rape.[28] Thus it is the misconception created as to the identity of person or to the nature of the act which is fraud.[29] Sexual intercourse by deception contemplates a situation where a person commits sexual intercourse with a woman who gives her consent under a misconception about the nature of act or that the person with whom she engages into sexual intercourse is her husband and the person does this knowing that he is not the husband of the woman concerned.

IV. LEGAL STATUS OF PROMISE OF MARRIAGE

The word promise has not been defined under Section 375 of Indian Penal Code. Nor it has been defined elsewhere under the Indian penal Code. The word promise has been imported from law of contract into the law of rape under section 375 of Indian Penal Code.

So it will be relevant to examine the term under the law of contract. Promise is a "A declaration, verbal or written, made by one person to another for a good or valuable consideration in the nature of a covenant by which the promisor binds himself to do or forbear some act, and gives to the promisee a legal right to demand and enforce a fulfillment."[30] Marriages in India take place under personal Law of the religion to which parties belong or under the provisions of the Special Marriage Act. Marriage constitutes a contract between a man and a woman, which confers rights and obligations on the parties.[31] A promise of marriage is a contract entered into between a man and woman that they will marry each other. In order for a contract of marriage to be a valid it shall fulfill all the essential elements of contract and should not be specifically prohibited. The parties to the marriage must be competent to marry and there shall be a consideration unless the validity of a contract is permitted without a consideration.[32] It should also be for a lawful

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28. Under section 24 of I.P.C whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly."Similarly Under section 25 of I.P.C person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise.

29. https://shodhganga.inflibnet.ac.in/bitstream/10603/78428/5/05_chapter.pdf (last visited on May 16, 2017).

30. *Taylor* v. *Miller* ,113.N.C.340.

31. *Indra Sarma vs V.K.V.Sarma* Available at https://indiankanoon.org/doc/192421140/(last visited on 4.2.2017)

32. Section 25:Agreement without consideration, void, unless it is in writing and registered or is a promise to compensate for something done or is a promise to pay a debt barred by limitation law.—An agreement made without consideration is void, unless— —An agreement made without consideration is void, unless—"

(1) It is expressed in writing and registered under the law for the time being in force for the registration of 1[documents], and is made on account of natural love and affection between parties standing in a near relation to each other; or unless

(2) It is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or unless.

object and shall not be against public policy.[33] "A promise to marry must be based upon legal consideration. Generally, one individual's promise is adequate consideration for the promise of the other party. A promise to marry must not be based solely upon illegal or immoral consideration, such as sexual relations between the parties. A promise based upon legal consideration will not, however, be vitiated merely because unlawful sexual intercourse took place between the parties either prior to or following the promise."[34]

The right to marry a person of one's choice is integral to right to life given under the Constitution. The Constitution guarantees the right to life. This right cannot be taken away except through a law which is substantively and procedurally fair, just and reasonable. Intrinsic to the liberty which the Constitution guarantees as a fundamental right is the ability of each individual to take decisions on matters central to the pursuit of happiness.[35] It has been kept outside the scope of Indian Contract Act.[36] Promise to marry is not an enforceable agreement under the Law of Contract. [37]

In fact promise to marry has some similarity with "live in relation" though it is qualitatively different from live in relation because promise to marry does not entail long cohabitation as is the case with live in relation. The Delhi High Court in context of "live-in relationship" said "Live-in relationship' is a walk-in and walk-out relationship. There are no strings attached to this relationship, neither this relationship creates any legal bond between the parties. It is a contract of living together which is renewed every day by the parties and can be terminated by either of the parties without the consent of the other party and one party can walk out at will at any time."[38]This holds true and relevant in cases of sexual intercourse on a promise to marry. However it is pertinent to mention that that Law Courts in various countries have started conferring various benefits upon

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(3) It is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits. In any of these cases, such an agreement is a contract. Explanation 1.—Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made. Explanation 2.—An Agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

33. Section 23. What consideration and objects are lawful, and what not.—The consideration or object of an agreement is lawful, unless— —The consideration or object of an agreement is lawful, unless—" it is forbidden by law; 14 or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

34. https://law.jrank.org/pages/4849/Breach-Marriage-Promise-Offer-Acceptance.html

35. Article 21, the constitutionof India.

36. Section 26 of Indian Contract Act provides - Agreement in restraint of marriage, void.—Every agreement in restraint of the marriage of any person, other than a minor, is void.

37. *See*, *R* v.*Clarence* (1888) 22 QBD 23. "The consent obtained by fraud is not consent at all is not true as a general proposition either in fact or in law. If a man meets a woman in the street and knowingly gives her bad money in order to procure her consent to intercourse with him, he obtains her consent by fraud, but it would be childish to say that she did not consent."

38. *Alok Kumar v State & Anr.*

heterosexual unmarried cohabitants.[39]In *Badri Prasad vs. Dy. Director of Consolidation*[40] the Supreme Court gave recognition to live in relationship and considered live in relation equivalent to a valid marriage for certain purposes.

V. MARRIAGE AS A MIRAGE IN CONSENT

The Supreme Court in the case of *Lata Singh* v. *State of U.P. & Anr.*,[41] stated that premarital sex in India though not an offence is considered immoral. Even in the societal mainstream, there are people who do not consider anything wrong in getting into premarital sex. Sexual intercourse on a basis of false promise to marry is immoral. Even isolated act of false assurance of promise to marry in itself can be considered immoral. Perceptions about social morality are subjective in nature which varies from person to person but the process of criminal law cannot be used as a means to interfere with the issues of personal liberty to marry or not to marry. Immorality is not necessarily a criminal offence.[42] The ratio of *Balfour* v. *Balfour*[43] states that agreements entered between a husband and wife to provide capitals cannot be generally considered to be a contract because in majority of the cases, the parties do not intend that on failure to fulfill the agreement they should be attended by legal ends. Thus agreements between husband and wife are not enforceable agreements unless they intend to create binding agreements. The agreements between husband and wife in this way are akin to an agreement between two persons of heterogeneous sex entering into an act of intimate relationship like husband and wife. At times this agreement may be devoid of any intention to go with the promise, in such circumstances it cannot operate as binding on the parties entering into sexual intercourse on a promise to marry. If a full grown girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact. Section 90 IPC cannot be invoked in such a case to pardon the immoral.[44] As we have seen that promise to marry has no legal status in India. It cannot be considered to be reasonable on a part of woman who acts on a promise to marry and later claim that she consented for sexual intercourse on a deception.

Anson says:

> "The consent [to a contract] is none the less 'genuine' and 'real' even though it may be induced by fraud, mistake or duress. Consent may be induced by a mistaken hope of gain or a mistaken estimate of value or of the lie of a third person, and yet there is a contract and we do not doubt the 'reality of consent.' Fraud, mistake, and duress are merely collateral operative facts that co-

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39 *Indra Sarma* v *V.K.V.Sarma* Available at https://indiankanoon.org/doc/192421140/(last visited on 12.2.2017)

40. AIR 1978 SC 1557.

41. AIR 2006 SC 2522.

42. *S. Khushboo* v. *Kanniammal & Anr.* Available at https://indiankanoon.org/doc/1327342/(last visited on 4.3.2017)

43. [1919] 2 KB 571.

44. *Honayya* v. *State Of Karnataka* , 2000 (5) KarLJ 57.

exist with the expressions of consent and have a very important effect upon resulting legal relations."[45]

In order that the consent is given on a misconception there must be a misstatement of an existing fact. Therefore, in order for consent to sexual intercourse may amount to a consent given on a misconception it must be based on misstatement of fact in existence. Criminal liability for sexual intercourse on misconception of a fact has to pass at least two tests firstly it has to be a fact; secondly there must be an act of deceiving. Oxford Advance learner dictionary defines fact as "used to refer to a particular situation that exists"[46]Black's Law dictionary defines a fact as "Actual, real; as distinguished from implied or inferred Resulting from the acts of parties, instead of from the act or intendment of law."[47] Section 3 of Indian Evidence Act contemplates present things which can be perceived.[48]

A promise to marry contemplates a future event. Thus it can be inferred that promise to marry is not a fact. Let us examine whether it is an act of deceiving on the part of the person accused of rape on a false promise to marry. Misconception is not defined under section 90 of Indian penal Code. However the term "Misconception" is a term of broadest connotation. As we have seen above that this term includes fraud, misrepresentation, cheating, dishonestly individually or combination of all these offences. But in Section 90 misconception has been used[49] in conjunction with the phrase "if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent." Thus misconception should be confined to nature and consequences of the act of sexual intercourse. In the absence of such evidence, section 90 cannot be invoked. [50] Thus a sexual intercourse even on the basis of a false promise is not a misconception within the terms of Section 90 of Indian Penal Code. The judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact.[51] However a false promise of marriage creates a legitimate expectation in the woman that a person with whom she consents for sexual intercourse is going to marry her. Creating a legitimate expectation in a mind of someone but later not fulfilling the expectation is definitely immoral. But it is necessary to understand that there are certain conditions of life where the woman agrees to have sexual intercourse for the reason of love and passion for the accused and not solely on the grounds of misconception created by accused. Yet there are circumstances where an accused fails to fulfill his promise on account of circumstances which he could not have foreseen at the time of

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45. William. R. Anson, *Principles of The Law of Contract* 199 n.1 (Arthur L.Corbined., 3d edn. 1919), as cited in Black's Law Dictionary 300, (7th edn.).
46. Oxford Advance Learners Dictionary 7th Edn. 2005 Page 546.
47. Thelawdictionary.org.fact(last visited on 16.4.2017)
48 "Fact" means and includes—
(1) any thing, state of things, or relation of things, capable of being perceived by the senses;
(2) any mental condition of which any person is conscious.
49. Later part of section 90.
50. *Edgomgtpm* v. *Fotz,airoce* (1885) 29 Ch.D 459.
51. *Uday* v. *State Of Karnataka* [2003 (2) Scale 329].

making the promise. [52]

VI. CONCLUSION

The only authoritative case on the point of sexual intercourse on a false promise of marriage is Deelip's case and was decided on an erroneous view of the phrase "misconception of fact." It cannot be considered to be a good law. Promise to marry do not have recognition under the Indian law. So promise to marry which forms the basis of sexual intercourse between consenting partners can in no way change the nature of the act of sexual intercourse. There can be numerous reasons beyond human contemplation which renders for the promisor to fullfil the promise of marriage which is the basis of sexual intercourse.

The phrase "promise to marry" has been imported into law of rape from law of contract. But a promise of marriage is not enforceable under the Law of Contract. If criminal liability is fastened on a person accused of rape on a ground that consent to sexual intercourse was obtained on a false promise of marriage, a deception, it will place a heavy burden on accused to rebut the presumption against consent. There is a possibility of misuse of process of law to compel an accused of rape on a promise of marriage. So it is suggested that sexual intercourse, the consent to which is obtained on a promise to marry should not be considered rape. Instead of making such an intercourse a ground for criminal liability for rape, it should be made a ground for a civil liability and need to be redressed under the Law of Torts for liability arising out of sexual intercourse on a false promise of marriage. Indian Courts have recognised live in relationship and conferred upon heterosexual unmarried cohabitants certain rights and obligations. It shows a way of providing compensation to a woman who enters into a sexual intercourse, the consent to which is given on a basis of false promise of marriage.

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52. Whether This Case Involves A .vs State Of Gujarat,Available at https://indiankanoon.org/doc/155431918/(last visited on 15.4.2017).

INDIAN JUDICIARY TOWARDS PROTECTION OF WORKING WOMEN'S RIGHTS

SHAILAJA*

ABSTRACT : Over the last decade, the participation of women in workforce has increased in most of the world. India is no exception to it. The rapid growth of modernization, industrialization, urbanization, privatization and globalization influenced the women go for employment, resulting in economic empowerment of women in India. Such development of society gave birth to new problem in the way of working women. These include discrimination in wages, termination from employment on pregnancy and separate strict conditions of employment. To eradicate these problems working women's human rights are recognized as species of domain human rights of women. To protect these rights Indian constitution provided some special rights in the form of fundamental rights and imposed duty on state to take necessary measures to implement them. To implement the constitutional provisions several legislations are enacted in the sphere of industrial laws for the welfare of the women workers. These include Factories (Amendment) Act 1980, Maternity Benefit Act 1961, The Minimum Wages Act, 1948, The Employees State Insurance Act, 1948 and others. The objectives of these laws are to remove the obstacles in the way of working women relating to gender discrimination, quantum of payment, safety at workplace, working hours and conditions of employment. The focus of Indian legislature is on reducing inequality of any sort, and thereby promoting a fair, non-discriminatory and safe work environment. There are several employment rules, regulations that are not favorable to women and force her to withdraw herself from the employment. Such questioned before the court as violation of women's human right depriving her from employment. In this paper attempt has made to provide a comprehensive review of the High Court and Supreme Court cases relating to protection of women employment rights in the light several legislations and constitutional provisions.

KEY WORDS : Women's Rights, Maternity Benefit Act, Human Rights, Justice.

I. INTRODUCTION

The role of higher judiciary in India in the protection of human rights of women and in expanding its meaning is very important. To eradicate gender bias and to provide equal

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justice without discrimination on sex, almost all countries judiciaries are playing effective role. Several countries of the world are signatories of United Nations Universal Declaration on human rights and to the elimination of all forms of discrimination against women. India being a signatory to these conventions influenced the judiciary to have its role in implementation of these conventions in Indian society.

The Supreme Court of India has greatly influenced by these international conventions. The impact of I.L.O., Manila seminar held in 1993 did have impregnable impact on judicial thinking and in Vishaka /State of Rajasthan[1] The Supreme Court in an epoch makings judgment took a serious note of the increasing manner of sexual harassment at work place elsewhere. Economic independency of women is one of the major human rights of women recognized at international and national level. Employment is one mode of assuring and identifying the economic security to women. There are several employment rules, regulations that are not favorable to women's employment and discriminates women to have employment depriving women to gain economic independency. However, some rules and regulations treats women preferentially that discriminates against women. Because of this policy, several cases filed before the court challenging, the employment rules/regulations. The findings of courts in these cases are mixed.

Another major problem, which a woman faces in enjoying her economic and employment right, is imposition of too many stringent restrictions. With regard to this subject, the judiciary is playing a vital role in curtailing the rules of principles that debarred women to go for that employment.

The court emphasized the importance of economic independence for women and the importance of not imposing conditions that discourage such independence of woman. Following are some cases where the court declared such rules as unconstitutional because they violates the women human right of economic independence.

II. JUDICIAL TRENDS

Maya Devi v State of Maharastra[2] In this case the condition which applies for public employment to married women was in question. There is a requirement that married women has to obtain consent of their husbands before applying for public employment and was challenged in violation of Article 14, 15 & 16 of the constitution and thus violate the human rights of women. The court was of the view that consent requirements were an anachronistic obstacle to women's equality. In order to achieve economic independence women should not, at least in be treated, different from men. Further, observed that this is a matter purely personal between husband and wife. It is unthinkable that in presently prevalent social conditions, a husband can prevent a wife from being independent economically just for his whim or caprice [3].The decision of the court in this case reflects formal mode of equality and a sameness approach to gender difference, which requires that women and men be treated as the same. The decision also supports a substantive approach to equality that is, a recognition that the consent requirement contributed to the subordination of women. This decision of the court is milestone in

1. (1997) 6 SCC 241.
2. (1986) 1SLR 743.
3. Ibid.

removing the obstacles in the path of women to enjoy her human rights.

Another major problem which the women face in the field of employment are discrimination in wages, conditions for employment which deprive her to go for that employment because of her biological features of body and sexual harassment at work place. The court played the important role in removing all these hurdles, helped the women to go for employment without any hesitation, and thus protects the human right of women's economic independence. Following cases of the judiciary reflects lights on these issues. *Omana Oomen v Fact Ltd.* [4] In this case women trainees at factory were not regularized, because the factories act permits women employees to work only between 6.00 AM to 7.00 PM , the company had only two shifts, between 4 PM and 12 midnight and 12 midnight and 8 AM. Female apprentice trainees denied the opportunity to write an internal examination based on restrictions imposed on the working hours of women by section 66 of the Factories Act. The petitioner contended that they could have accommodated in the day shift in which there were several male technicians and that women technicians had been absorbed in other divisions of the company. When the female trainees challenged their non-regularization, the Kerala High Court made the following observation. Proviso to Section 66, provided that the working hours could be extended from 5 AM to 10 AM, a total of 15 hours and it was possible for the company to accommodate two more shifts in that time. For female employees who were working in the day shifts and hence non-regularization of the petitioners would amount to discrimination on sex alone and was against constitutional mandate. Thus, the court laid the following principle, 'Restriction of women candidate for jobs on the ground of statuary prohibition is not valid if the statue provides enough pathways".

In June 1990, the general conference of ILO adopted a protocol relating known as the protocol of 1990 to the night work (women) convention (revised), 1948. Under the provisions of the protocol, the competent authority in a country under its national laws and regulations authorized to modify the duration of the night shifts or to introduce exemption from the prohibition within certain limits. In order to provide flexibility in the matter of employment of women during the night, central government proposed to amend the said section. During night shifts, the occupier has to ensure occupational safety and adequate protection to the women employees. The relaxation of this restriction is resulting in disadvantage for the women workers. the employees are searching for different ways to get rid of women laborers, thus resulting in the decline of the number of workers on one hand and on the other hand, in view of poor economic conditions women workers forced to sell their labor at less remuneration.

Another great hurdle faced by the women is their biological nature of begetting the children. The only difference in the matter of absenteeism that we can see between married women and unmarried women is in the matter of maternity leave, which is an extra facility available to married women. To this extent, only married women are more likely to be absent than unmarried women. This extra leave facility available to married women deprived her to get job because some employers are not ready to give this facility to women. Such restriction that she should not be marry for certain period of employment and that she should not become pregnant for certain period are struck down by the court

4. AIR 1991 Ker 129.

in violation of human rights of women. In addition, right to maternity leave was recognized as important human right of working women.

III. LANDMARK JUDGEMENTS

In *Radha Charon / State of Orissa*[5], In this case, Rule 6(2) of the Orissa Statutory Judicial Service Rule 1963, was challenged, the rule was clearly prohibits the married women to enter judicial service. The rule provides that married women would not have a right to be appointed to the service and if appointed when single, but married later, she could be made to resign for the "maintenance of the efficiency of the service". Thus from this rule married women were disqualified from being appointed as District Court Judge. The court analyzing the differential treatment sought to given, noted that it could arguably be justified as based not merely on sex, but on sex and the factor of marriage and the efficiency of the service. However, the disqualification operating against women in this case was based essentially on sex, in as much as married men were not subject to such treatment. The rule therefore held to be unconstitutional and discriminatory.

The same question came before came before the judiciary once again in,*C. B. Muthamma /Union of India*[6] In this case, the constitution validity of Rule 8(2) of the Indian Foreign Service (conduct and discipline) Rule 1961 and Rule 18(14) of the Indian Foreign Service (Recruitment, cadre, seniority and promotion) Rule 1961 was challenged before the Supreme Court. The impugned provisions are,Rule 8(2) requires that, a married women member of the service to obtain permission of the government in writing before her marriage is solemnized and at any time after the marriage, a woman member of the service may be required to resign from the service if the government is satisfied that her family and domestic commitments are likely to come in the way of the due and efficient discharge of her duties as a member of the service". Rule 18(4) runs in the same judicial strain, which provides that "no married women shall be entitled as a right to be appointed to the service". The petitioner complained that under the guise of these rules. She had been harassed and shown hostile discrimination by the chairperson, UPSC from the joining stage to the stage of promotion. The petitioner denied promotion to Grade I of the Indian Foreign Service on the ground that she had married without observing the service rule. The arguments made before the court reveals that biological feature of women were the main drawback to go for certain services. The argument in that case was that domestic responsibilities and consequential motherhood affected women, physically and physiologically, and thus married women were discriminated against, not on the ground of sex only, but on the ground of consequential impairment of their usual capacity as a result of marital life. The Supreme Court held that the rule was discriminatory against women and hence unconstitutional and in violation of Article 14 and 16(1) of the constitution. While delivering the judgment the court made the following observations.

The discrimination in this case can conceivably be justified as being not only based on sex alone, but also based on sex coupled with an objective biological phenomenon arising out of difference in sex, which results in a disability for women, in

5. AIR 1969 ORI 237.
6. AIR 1979 SC 1868.

carrying out the duties required. The essence of classification in such case is sex, and that even objective biological criteria predicated on sex derived from this core distinction. So discriminating based on such criteria would amount to discrimination based on sex itself. Discrimination against women, in traumatic transparency, is bounded in this rule. If a woman member shall obtain the permission of government before she marries the same government, runs risk if a male member contracts a marriage. If a family and domestic, commitments of women member of the service likely to come in the way of efficient discharge of duties, a similar situation may well arise in the case of male members. In these days because of nuclear families, intercontinental marriages and unconventional behavior, one fails to understand the naked bias against the gentler of the species" [7]. Lastly, the court concluded strongly urging the government to overcome with all service rules to remove the stain of sex discrimination.

The court adopted a formal approach to equality, and a sameness approach to gender. For the purposes of employment in the Foreign Service, women and men are to consider the same. According to the court, women and men must both balance the demands of work and family. Women and men must therefore be treated the same in law. Since the independence, Indian society is a purely patriarchal and approved only the stereotype roles of women. Because of this picturisation of women and her fixed role stands in the way of performing her official duties and it becomes objectionable and the officer may asked to resign. Muthamma case was first of a kind that would speak about harassment endorsed by law. Nevertheless, the Supreme Court by declaring those laws, which discriminates on the ground of sex and prohibits women from entering some services and depriving her from benefits of service in violation of fundamental rights, thus violates the human rights of women remove the hurdle in the way of women.

Supreme Court in *Air India* V/s *Nagesh Mirza*[8] made sensational findings regarding the discrimination on sex in the field of employment. In this case, Airhostesses employed under the Air India and Indian Airlines corporations challenged the disparity in the pay scales. Promotional provisions and retirement provisions of the male and female cabin crew of these corporations. The regulations of Air India provided that an air hostess could not get married before completing four years of service. Usually an airhostess recruited at the age of 19 years and the four years bar against the marriage meant that on airhostess could not get married until she reached the age of 23 years. If she married earlier, she had to resign, and if after 23 years she got married, she could continue as a married woman but had to resign on becoming pregnant. If an airhostess fulfilled both these conditions, she continued to serve until she reached the age of 35 years. The impugned Regulation 46 provided that an Airhostess would retire from the service of the corporation upon attaining the age of 35 years, or on marriage, if it took place within 4 years of service, or on first pregnancy, which ever occurred earlier. Under Regulation 7 the Managing Director was vested with absolute discretion to extend the age of retirement prescribed at 45 years. Both these provisions were challenged on behalf of the Airhostesses that those were discriminatory on the ground of sex, as similar provisions did not apply to male employees doing similar work. The decision of the court on each issue and reasons for decision are given as below.

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7. AIR 1979 SCC 260.
8. AIR 1981 SC 1829.

The first requirement that an airhostess should not marry before the completion of four years of service was upheld by the court. The court held that, "so far as the question of marriage within four years in concerned, we do not think that the provision suffer from any constitutional infirmity. According to regulations, an Airhostess starts her career between the ages of 19 to 26 years. Most of the Airhostesses are not SSC which is the minimum qualification but possess even higher qualification and there are very few who decide to marry immediately after entering the service. Thus, the regulation permits an Airhostess to marry at the age of 23 years if she has joined the service at the age of 19 years which is by all standards a very sound and salutary provision. In addition to improving the health of the employee, if helps in the promotion and boosting up of our family planning programme.

In respect of second issue that the termination of employment on first pregnancy declared as invalid, unreasonable and is in of violation of article 14. The court made the following observations :

> "Air India Regulation 46 does not prohibit marriage after four years and if an Airhostess after having fulfilled the first condition becomes pregnant, there is no reason why pregnancy should stand in the way of her continuing in service. The corporation represented to us that pregnancy leads to a number of complications and to medical disabilities, which may stand in efficient discharge of the duties of the Airhostesses. It said that even in the early stage of pregnancy some women are prone to go sick due to air pressure, nausea in long flights and such other technical fact. This however, appears to be purely an artificial argument once a married women is allowed to continue in service then under the provisions of *the Maternity Benefit Act, 1961* will come to apply. If a woman married, near about the age of 20 to 23 years. She becomes fully mature and there is every chance of such marriage proving a success, all things being equal".

In the above findings of the Supreme Court regarding the justification of bar to marriage for period of 4 years of service looks to be unreasonable. At the same time coming to the conclusion that if women marries between the ages of 20 to 23 years, she become fully matured and there was more percentage of success of marriage was also not acceptable one. However, these findings of the court are judicial law and do not have strict application. If the above findings of the court were accepted then it is fair to make an amendment to the provisions of the Child Marriage Restraint Act and the Hindu Marriage Act, relating to age of the parties to marriage, i.e., the bride age to increase from 18 – 21 years. Maternity Rules 1965, she is entitled to certain benefits including maternity leave. In case, however, corporation feels that pregnancy from very beginning may come in the way of the discharge of the duties by some of the air hostesses, they could be given maternity leave for a period 14 to 16 months and in the meanwhile there could be no difficulty in the management making arrangements on a temporary and adhoc basis by employing additional air hostesses. After utilizing the service for four years, and terminating her service by the management if she becomes pregnant amounts that the poor airhostess was compelled not to have any children and thus interfere with and divert the ordinary course of human nature".

The discretion given to managing director to extend the age of retirement in individual cases by a maximum of ten years was held arbitrary and violative of Article 14 as it was uncontrolled, unguided and there was not even any provision for appeal from the decision of managing director.

Another issue raised in this case was, air hostesses were being discriminating against assistant flight pursers who did more or less the same kind of work on flight but had better service conditions, later date of retirement and other facilities. In order to solve all doubts with regard to violations of the provisions of the equal remuneration Act, the government issued a notification, which unequivocally stated that, the "differences in regard to pay etc of these categories of employees are based on different conditions of service and not on the difference of sex". This notification was issued in pursuance of section 16 of the *Equal Remuneration Act,* 1976, which empowers the appropriate government to make a declaration subsequent to the conditions of employment that discriminates in remuneration, is based on a factor other than sex. The Supreme Court accepted this declaration and held that "If at the threshold the basic requirements of two classes are absolutely different and poles apart even though both the classes may during the flight work as cabin crew, they would not become one class of service".

The Air India case illustrates the problems faced by working women during employment. The court played vital role in this case in protecting the human rights of working women. In this case, the courts approach in recognizing the difference in the context of pregnancy and maternity was appreciable. Pregnancy and maternity not simply seen as a biological difference, which in the interest of treating women equally, must recognized. Rather, in the courts view, it was also a difference in the roles of women and men, according to which women are not only responsible for child bearing but also for child rearing. In this view, women's role as mother is as natural and a product of biology, rather than product of the sexual decision of labour. The approach adopted by the court was based upon and served to reinforce, the ideology of motherhood that has constructed around these physical differences. Notwithstanding, the fact that the court struck down the pregnancy destruction on women's employment, its understanding of women as different precluded on analysis of the sexist ideologies that continue to inform systematic gender discrimination with this findings court protected the working women's right to maternity relief and right to economic and employment independency.

Equal pay for equal work without discrimination of gender is one important human right of working women. This right of women is protected under Section 5 of the Equal Remuneration Act, it states that no employer shall, while making recruitment for the same work or work of similar nature, make any discrimination against women unless employment of women is prohibited or restricted by any law"[9].

In *Mackinon Mackenzie Co. Ltd.* V/s. *Andrey D'Costa*[10], the question was regarding the payment of equal pay for equal work. In this case, the female and male stenographers who are discharging some nature of work were not getting equal remuneration and there was discrimination. This discrimination was challenged before the court.

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9. Equal Remuneration Act, Sec 5.

10. AIR 1987 SC 281.

In this case court held that discrimination between male and lady stenographers was only on the ground of sex and that being not permissible, the employer was bound to pay the same remuneration to both of them when they were doing practically the same kind of work. And found that the question of equal work depends on various factors like responsibility, skill, effort and conditions of work. Hence, if woman stenographer were doing work of the some kind as male stenographers, irrespective of the place where they were working, the employer was obliged to pay equal remuneration. The statistics of national sample survey of India in respect of average daily earnings of men and women states that private sector pays higher wages to male workers of all levels of education while the case of women in public sector are different. The women continued to lag behind then in the race for competing in life because of failure to comply the promise made in the Directive Principle of state policy under constitution. The Supreme Court has realized this harsh reality and that is why it has been trying to revise ways and means to rectify the lapses.

Another historical decision, which protects human rights of working women to have maternity benefit, was in *Neera Mathru* V/s *LIC*[11], In this case, a woman discharged from service during her probationary period. Reason for discharge was that at the time of her appointment she had in declaration form furnished incorrect information with regard to the date of her menstruation period in order in order to suppress the fact of her pregnancy. The court ordering her reinstatement directed the LIC to delete those columns in the declaration form, which required the women to disclose her private facts. The court found the furnishing of such information to be "embarrassing if not humiliating". Further Supreme Court held that the questionnaire amounted to invasion of privacy and that, therefore, such probes could not made. The right to personal liberty under Article 21 included the right to privacy.

Even after having these women friendly legislation, women are keeping away from the labour market. Mere legislative process on any issues does not produce desired results because new ways are innovative to circumvent these provisions. These provisions have also either resulted in employers refusing to employ married women or dismissing them on pregnancy. Continuous monitoring of these laws to provide a protective umbrella to women might help in many cases.

IV. CONCLUSION

In the above discussed cases and decisions of the court it becomes clear that the Indian judiciary has greatly influenced by the international women's human rights conventions and declarations in extending the horizons of right to equality to the Indian women. The major findings on the role of judiciary in protecting human rights of women depicted hereunder. Judiciary declared employment rules that restrict the employment of married women as unconstitutional. In *Omana Oomen v Fact Ltd*. the court held that restriction on women not to write an internal examination because of restriction on working hours imposed under Section 66 of the Factories Act, in violation of Articles 14 and 15. Similarly the rule requiring the unmarried women to give up her position on marries was declared in violation of human rights of women in C. B. Muthamma case the court declared

11. (1992) 1 SCC 286.

the Indian Foreign Service rules prohibiting appointment of married women and unmarried women in employment obtain permission before marriage as discriminatory and directed to remove impugned rules. In Air India case, the court concluded that the pregnancy restrictions were unreasonable, arbitrary, and thus in violation of Article 14 and women are right to equality. The court by striking down the restriction of women's employment emphasized the importance of economic independence for women and the importance of not creating conditions that discourage such independence. In several cases, which involved challenge to employment rules, regulations, and practices that treat women preferentially the courts was always in favor of preferential treatment to women. Hence, the separate legislation The *Maternity Benefit Act* 1961, with object to provide benefits to women worker in connection with their pregnancy was held as valid legislation without discrimination.

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BOOK-REVIEW

Corporate Governance, by **Christine Mallin, Fifth ed. (2017), Oxford University Press, India, pp. 368, price Rs. 835/-, ISBN: 9780198755807**

Corporate Governance refers to practices by which organisations are controlled, directed and governed. The fundamental concern of Corporate Governance is to ensure the conditions whereby organisation's directors and managers act in the interest of the organisation and its stakeholders and to ensure the means by which managers are held accountable to capital providers for the use of assets.

The Organisation for Economic Cooperation and Development (OECD), which, in 1999, published its *Principles of Corporate Governance* gives a very comprehensive definition of corporate governance, as under[1]:

> "a set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined. Good corporate governance should provide proper incentives for the board and management to pursue objectives that are in the interests of the company and shareholders, and should facilitate effective monitoring, thereby encouraging firms to use recourses more efficiently."

The Government of India has notified the Companies Act, 2013 (New Companies Act)[2], which replaces the erstwhile the Companies Act, 1956. The New Act has greater emphasis on corporate governance. The new Act covers corporate governance through its many provisions like new Companies Act introduces significant changes to the composition of the boards of directors. Every company is required to appoint 1 (one) resident director on its board. Nominee directors shall no longer be treated as independent directors. Listed companies and specified classes of public companies are required to appoint independent directors and women directors on their boards. New Companies Act for the first time codifies the duties of directors. Listed companies and certain other public companies shall be required to appoint at least 1 (one) woman director on its board. New Companies Act mandates following committees to be constituted by the board for prescribed class of companies and so on.

With the enactment of new Companies Act in India the issues of corporate governance became much important. Literature on corporate governance and related laws and policies are so many in the country but a good text book like of which is under review is always welcome. The book is concise in space but exhaustive in its ambit. The

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1. OECD, *Principles of Corporate Governance* OECD publishing 1999 Paris
2. The Companies Act, 2013 (ACT NO. 18 OF 2013), August 29, 2013

author has presented the subject is such a way that it is easy for the reader to appreciate the subject. The author has taken pain in bringing home to the reader the nature of the subject and almost all the important aspects. Exposition as well as texture of the book is simple and the readers may find it easy to grasp a subject as difficult as corporate governance. This new edition has been thoroughly revised to incorporate up-to-date coverage of international governance issues, as well as the latest codes and guidelines. The book is packed with case studies and examples to help illustrate the application of corporate governance in real-world scenarios, including clippings from the financial times.

The book is divided into four parts and fourteen chapters. In chapter I entitled as introduction author has outlined the meaning and development of corporate governance. The author has devoted to the developments in area of corporate governance and in this chapter much focus has been given on such developments.

In part two of the book first chapter is chapter II in which author has discussed the theoretical aspects of corporate governance. In this chapter the author traces the principles and theories on which law of corporate governances founded. The author has discussed so many theories and jurisprudential aspects of corporate governance and has focused on the need and justification of such law and policies.

Chapter III, of the book is devoted to developments of corporate governance code. The author has discussed the historical aspects of development of code related to corporate governance.

Chapter IV to chapter VII is the part three of the book. Chapter IV is about shareholders and stakeholders. The term stakeholder can encompass a wide range of interest it refers to any individuals or group on which the activities of the company have an impact shareholders can be viewed as a stakeholders. In this chapter author has discussed the relation between shareholder and stakeholder very well. How and in what sense shareholder is distinct from stakeholder can be understand by the discussion made in this chapter.

In chapter V author has explained about family owned firms. How a family owned firm forms and what are the difficulties faced by family owned firm in implementation of corporate governance may be better understand by the discussion given under this chapter.

Chapter VI The role of institutional investors in corporate governance deals with role of institutional investors in corporate governance and development of guidance on institutional guidance responsibilities. Chapter VII is about socially responsible investment. Chapter VIII and chapter IX comes under the part III of the book name as Director and Board structure. In this part of the book author has discussed the role and status of director and boards in any company. How director plays an important role in the management and in governance of a corporation.

Part IV of the book is devoted to international corporate governance in which there are four chapters related to corporate governance in different countries and another chapter in form of conclusion. Chapter X and XI are related to corporate governance system of continental and central Europe. Chapter XII is about Asia pacific and chapter XIII is devoted to the discussion related to corporate governance in South Africa, Brazil and India. Last chapter of this book is chapter XIV Conclusion, in this chapter author has

discussed a brief summary of whole discussion taken place in this book. Author suggested good corporate governance system for good governance and for the health of economy of any country.

On the whole the piece of work is very informative. The strength of this book is its precision, coherence comprehensive treatment and simplicity of language. This textbook provides readers with an accessible and comprehensive introduction to corporate governance. As a renowned expert in the field, Mallin draws upon theory and practice to address the latest global developments and uses topical examples to help students place key theories in context. The book shall be of immense use to experts, teachers, students along with any common reader having interest in the subject. The publisher should also be appreciated for providing a good gait up to this book at moderate price.

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