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(The Founder of Banaras Hindu University)

(25.12.1861 - 12.11.1946)

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ARTICLES

NOTES & COMMENTS

BOOK-REVIEW

LEGISLATIVE FRAMEWORK FOR RESOLUTION OF NPA PROBLEM IN INDIA : A CRITICAL APPRAISAL

R.P. RAI*

ABSTRACT : Economic stability is significant to any country's growth in competitive global scenario. The banking sector plays the role of backbone for any country's economic upliftment. Since previous decade, the problem of Non-performing Assets has infected the banking sector of many countries including India like a global pandemic. It is government's primary responsibility to cure this economic disease through its policies, statutory solutions and regulations. Time to time Indian Government has taken steps to clean the balance-sheet of banks and to reduce the surging ratio of Non-performing Assets. The present article throws light on different legislative efforts of the government which resulted into three special laws the Recovery of Debt and Bankruptcy Act 1993, the SARFAESI Act 2002 and the Insolvency and Bankruptcy Code 2016. RBI also time to time has published different guidelines, regulations and master circulars. The present article critically examines the merits and demerits of the triangular legislative protection for NPA recovery. Latest RBI reports have shown significant improvement in NPA recovery. The Insolvency and Bankruptcy Code, 2016 has made significant improvement in the recovery of bad loans. IBC 2016, which was earlier enacted as a resolution law, has been proved a boon for the banking sector in case of recovery of their bad loans. Indeed, the code has filled the vacuum caused by anomalies in the DRT and SARFAESI Laws.

KEY WORDS : Debt Recovery, Non-Performing Asset, Insolvency Resolution, SARFAESI, Asset Reconstruction, Hypothecation.

I. INTRODUCTION

A healthy banking system is essential for any economy striving to achieve

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progress and remain constant in a competitive global business environment. If the banking system in a country is effective efficient and disciplined, it brings about a rapid growth in the different sectors of the economy. Banks contribute to the balanced development of different regions of the country by transferring surplus capital from developed regions to less developed regions. The right application of monetary policy and credit control brings price stability in the country market and promotes the economic growth of the country. For past few years, the trends of bank credit have been changing rapidly. A growth in bank credit (on Year to Year basis) is regulated by RBI.[1] However, Banks have been risk-averse in their lending operations. Every bank is bound to follow the policy so determined by RBI.[2] Banks are not only storehouses of the country's wealth but also provide financial resources necessary for economic development.

Like any commercial entities, banks also calculate profit on their banking business. Banks time to time evaluate its assets on the basis of risk weight. Risk weighted assets are the best indicator for the health of the banking industry in a country. These risk-weighted assets popularly called Non-performing Assets (NPA) are the barometer of the banking sector. NPA ratio in aggregate holds importance as Macro financial indicator.[3] It indicates the stability of the banking system. Reduced NPAs generally gives the impression that banks have strengthened their credit appraisal processes over the years and growth in NPAs involves the necessity of provisions, which bring down the overall profitability of banks. RBI issues Master Circular on Prudential Norms on Income Recognition and Asset Classification that defines and describes NPA.[4]

II. NON-PERFORMING ASSETS

Generally Non-performing Asset" (NPA) or "Non-performing Loan" (NPL) and "Non-performing Exposures" (NPE) are the common terms used frequently for denoting bad loans. Non-performing Asset include a leased asset when it stops generating income for the bank.[5] Broadly, Assets may be classified:

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1. V. Kothari, *Tannan's Banking Law and Practice in India*, 550 (Lexis Nexis, Gurgaon, 26th Ed. 2017)
2. *Ibid*
3. I. Rajaraman, S. Bhaumiket. al., "NPA *Variations Across Indian Commercial Banks Some Findings*" 34 3/4 *EPW* 161 (1999)
4. *Supra* Note 1.
5. The Reserve Bank of India, The Master Circular- Prudential norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances 2015-16, Para 2.

Performing and Non-performing Assets. However, RBI has classified the assets of a Bank into four different categories: Standard Substandard, Doubtful and Loss Assets.[6] Standard or performing assets are those assets or accounts, which do not disclose any problem and do not carry more than normal risk attached to the business. Nonetheless, other three kinds of assets are merely different forms of Non-performing Assets. Notably, the SARFAESI Act, 2002 has also defined NPA under section 2(o) in terms of sub-standard, doubtful and loss asset."[7] NPA comes into categories of substandard and doubtful during 12 months and over 12 months. However, when a bank faces loss in respect of any account according to internal or external auditors or the RBI inspection and the dues have not been write-off wholly, it falls under the category of Loss Assets.[8]

NPLs are a natural and unavoidable component of the balance sheet of any bank, but following the financial crisis, they seem to have been moved from being a physiological element to become a pathological problem.[9] Non-performing Asset is the narrow concept, as it refers only to problem loans, but also most commonly used in the academics as well as among market stakeholders in several nations. Non-performing Exposure is typically the wide concept, and it includes loans, debt securities, and certain off-balance sheet exposures, but may exclude certain asset classes, such as foreclosed collateral. However, the Amendment Act, 2016 in the SARFAESI Act, 2002, has broadened the definition of 'NPA' by including 'Debt Securities' in consonance with international practice. The Debt Securities are those securities that have been listed under the Security Exchange Board of India.

In India, the banking system has evolved through various financial sector reforms as part of economic liberalization and has undergone many noteworthy transformations. In order to create a sound competitive and vibrant banking system, the Government and the RBI has started focusing their policies in eradication of the menace of NPA. With a view to early identification of Non-performing Assets and in compliance of international practice used by FDIC, U.S.A., MAS, Singapore, etc. the classification of Special Mention Accounts (SMA) was recommended by the Department of Banking Supervision, RBI in

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6. The Reserve Bank of India, The Master Circular- Prudential norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances 2015-16, Para 4.4
7. The SARFAESI Act, 2002, Section 2(o)
8. *Supra* note 6.
9. C. Scardovi, '*Holistic Active Management of Non-performing Loans*', 9 (Springer; 1st Edn. 2016)

2002[10], but it could only be implemented by the RBI in 2014 through a notification DBOD.BP.BC.No.97/21.04.132/2013-14.[11] SMA has also been classified into SMA-0, SMA-1 and SMA-2 based on 30 days, 31-60 and 61-90 days overdue period. Therefore, Special Mention Accounts are those assets/accounts that show characteristics of bad asset quality in the first 90 days itself. SMA can be distinguished from NPA in the way that NPA has duration of 90 days. On the other hand, the worst type of special mention account (SMA-2) has less than 90 days' duration.

III. CONSTITUTIONAL MANDATE

In India, the Constitution of India plays role as a Grundnorm. It checks the validity of different statutes and regulations through certain fundamental principles. The doctrine of basic structure is one the idea of basic structure flows from the doctrine of constitutionalism i.e. supremacy of the constitution that cannot be brought down in any circumstance.[12] Hence, the Constitution not only acts as a mother document for the Indian laws but also lists down number of rights fundamental to the lives of citizen of India. In constitution, Banking is covered under the term 'business' of Article 19(1)(g). It has been held by the Supreme Court of India in Bank Nationalisation case that the impugned law which prohibited the named banks from carrying on the banking business was protected under Article 19(6)(ii) because it affected the right to carry on banking business which was a necessary incident of the business assumed by the Union under that law.[13] Nevertheless, the right guaranteed under Article 19(1)(g) to carry on any occupation trade or business were, therefore, held to be directly invaded by the nationalization of banks.[14]

In its legislative competence under Article 245 read with 246, the Central

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10. The Reserve Bank of India, Guidelines on preventing slippage of NPA accounts, (The Department of Banking Supervision 2012), *available at:* https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=899&Mode=0 Accessed on 12 January 2017
11. The Reserve Bank of India, Framework for Revitalising Distressed Assets in the Economy - Guidelines on Joint Lenders' Forum (JLF) and Corrective Action Plan (CAP), February 2014, *available at:* https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=8754&Mode=0 Accessed on 12 January 2017
12. Dias, *Jurisprudence* 362 (Lexis Nexis, Gurgaon, 5th Ed. 2013)
13. M. P. Singh, *V N Shukla's Constitution of India* 193 (Eastern Book Company, Lucknow, 13th Ed., 2013).
14. *R. C. Cooper v. Union of India* AIR 1970 SC 564

Government passed the Recovery of Debt and Bankruptcy Act, 1993 (the RDB Act, 1993) and the Securitisation and Reconstruction of Financial Asset and Enforcement of Security Interest Act, 2002 (SARFAESI Act 2002) to deal with menace of NPA in banking sector which is enumerated under entry 45 of the List I the Union List of Seventh Schedule. Constitutionality of these laws have been upheld in cases of *Union of India v. Delhi High Court Bar Association*, (AIR 2002 SC 1479), *Nahar Industrial Enterprises Ltd. v. Hong Kong & Shanghai Banking Corporatio*n, (2009 8 SCC 646), *Mardia Chemicals Ltd. v. Union of India* (2004 4 SCC 311) and *Keshavlal Khemchand and Sons Pvt. Ltd. v. Union of India* (2015 BC 511 SC).[15] Recently, the Supreme Court of India struck down the Circular related to Insolvency Resolution dated 12th February 2018 issued by RBI as *ultra-vires* the Section 35 AA of *the Banking Regulation Act*, 1949.[16]

IV. GENERAL LAWS RELATING TO NON-PERFORMING ASSETS

Earlier, the issue of loan recovery was addressed by general civil laws. Law related to mortgages and charge under chapter IV of the Transfer of Property Act, 1882, law relating to bailment and pledge under chapter IX of the Indian Contract Act 1872 and law related to Hypothecation are applicable to bank loans for creating security interest. Mortgage is a conveyance of a land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given.[17] The interest transferred under mortgage is only an interest not all interests in the property. A peculiar feature of the interest transferred is that such interest itself is an immovable property.[18] The nature of interest may depend upon the form of a mortgage.[19] Additionally, this kind of mortgage takes innumerable form moulded either by custom such as kanom, otti, peruartham mortgages etc. or the caprice of the creditor such as combinations of various mortgages.[20] Pledge is another form in which movable

15. R. C. Kohli, *Taxmann's Practical Guide to NPA Resolution*, (Taxmann Publications, New Delhi 4th Ed. 2017)
16. *Dharani Sugars & Chemical Ltd v. Union of India (2019 SCC On Line SC 460)*
17. MR Lindley in *Santley v. Wilde* (1899) 2 Ch 474
18. R K Sinha, *The Transfer of Property Act* 276 (Central Law Agency, Allahabad Ed. 18th, 2017)
19. Justice M R H Nair, B Paul (eds.), *Mulla The Transfer of Property Act* 442 (Lexis Nexis, Gurgaon Ed. 12th, 2015)
20. *Id* at 493.

property is kept with the bank as a security. The pledge is bailment of goods as security for payment of a debt or performance of a promise.[21] The purpose of the pledge is only to create security for payment of debt. When some goods are pledged, the Pawnee becomes a secured creditor and he has prior claim over the goods pledged than other creditors.[22]Hypothecation as such is not defined in the Indian Contract Act, 1872, but in 2002, its definition found place in the SARFAESI Act, 2002.[23] However, even before 2002, the hypothecation was recognized by usage.[24]

General procedure is provided under the Specific Relief Act, 1963 and the Civil Procedure Code, 1908 to enforce these security interests and to recover such loans in case of default. The procedure involved in a suit filed for recovery of loans before a civil court is proverbially disconcerting to the creditor. Very often, therefore, the protracted delay in recovering loan results into a loss to the creditor in real terms, as the time spent for the procedure itself would have substantially snatched the value of money, even if recovered fully. Not only the delay but other complications of civil procedure keep bankers devoid of adequate remedies. Considering the gruesome problem of bad loans, in parlance with international practice and on recommendations of various committees, the government enacted the special laws pertaining to loan recovery.

V. THE RECOVERY OF DEBT AND BANKRUPTCY ACT, 1993

In 1993, the Recovery of Debt due to Banks and Financial Institution Act (later on renamed in 2016 as the Recovery of Debt and Bankruptcy Act, 1993) was enacted on the recommendation of the Narsimham Committee.[25] With the objective of enabling banks and financial institutions to have a speedier and more efficient mode of recovery of debts, the legislature has provided for the establishment of special forums for the purpose, known as Debt Recovery Tribunal (DRT) and Debt Recovery Tribunal (DRAT).[26] The DRT has been granted

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21. The Indian Contract Act, 1872, Section 172
22. Avtar Singh Law of Contract and Specific Relief 578 (Easter Book Company Lucknow, Ed. 8th 2002)
23. The SARFAESI Act, 2002 Section 2(n)
24. *Supra* note 22.
25. D. Narayana, "Directed Credit Programmes: A Critique of Narasimham Committee Report", 27 *EPW* 255 (1992)
26. C R Dutta, S K Kataria, *Tannan's Banking Law and Practice in India*, 1361 (Lexis Nexis New Delhi 23rd Ed. 2010).1361.

original jurisdiction for matters values more than 10 Lakhs. Below this limit, debt recovery cases may be filed in civil courts. However, Section 18 restricts relieves High Courts in exercising their powers under Articles 226 and 227 of the Constitution of India.[27] Provisions pertaining to the proceedings for filing, hearing and appraisal of application and written statement related to debt recovery have been provided under section 19-24 of chapter 2 of the Act. Section 22 specifically bars the application of the provisions of the CPC, 1908 to the proceedings before the DRT and DRAT. Notably, Tribunals are guided by the principles of natural justice.[28]The duty of recovery of debt has been cast upon recovery officer who shall recover the amount of debt specified in the recovery certificate by adopting one or more above mentioned modes as provided under Section 25 and 28 of the RDB Act 1993.[29] Section 29 gives a way for the application of Second and Third Schedules to the Income-Tax Act, 1961. Apart from this schedule of the said Act, the Income-Tax (Certificate Proceedings) Rules, 1962 of the said Act is applicable with required modifications.[30]

The Act also did not produce any improvement in the recovery of debts. Rather it got plagued with the same disease with which civil courts were infected. The proceedings in the tribunals are stalled for a number of years making the interest and efforts of bank official futile. Apart from this, different research reports revealed that DRTs adopt different approaches to proceed with recovery cases. Moreover, the defaulting parties usually take shelter of the legal flaws as the anomalies like jurisdictional conflict, overlapping with other laws are not properly addressed. Most importantly, the DRT Act is a legislation which provides remedies only of civil nature. This has removed any kind of apprehension from the mind of defaulter. Current criminal laws such as the Indian Penal Code, 1860, the Code of Criminal Procedure, 1973 have been in-appropriate to tackle with defaulters. Bankers have only general remedies under section cheating Criminal Misappropriation, Criminal Breach of Trust, and Forgery which can be treated as general provisions for economic offences. There is no law declaring willful loan default as an offence and prescribing punishment for that. This requires special penal provisions for the prosecution of the defaulters in the same Act.

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27. *Id* at 1931.
28. *Supra* note 26 at 1941.
29. R. C. Kohli, *Taxmann's Practical Guide to NPA Resolution*, 205 (Taxman Publications, New Delhi 4th Ed. 2017)
30. *Supra* Note 1 at 1461.

VI. THE SECURITISATION ACT, 2002

Realizing the inefficaciousness of the Recovery of Debt and Bankruptcy Act, 1993, the Narsimham Committee II recommended banks to be equipped with additional power such as recovery without intervention of court.[31] Thus, the SARFAESI Act 2002 not only paved way for securitisation in India but also for recovery from the borrower directly without intervention of Court. Chapter II of the Act provides for regulation of securitisation and reconstruction of financial assets of banks and financial institutions in the process of securitization, The securities facilitate the investors to purchase a fractional undivided interest in a pool of mortgage loans by providing for a share in the interest income and in the principal payment generated by the underlying mortgage.[32] The pool of mortgages placed with a trust is actually sold in the form of certificates to investors, either directly or through private placement. Additionally, The SARFAESI Act empowers banks and financial institutions to take possession of securities given for financial assistance and sell or lease the same or take over management in the event of default. Earlier such provision has been provided under section 69 of the Transfer of the Property Act, 1882. The section provides for sale of the property privately i.e. without intervention of court.[33] However, due to limitation application of section 69 and also due to other technicalities and other disadvantages of general civil remedies, banks feel difficulty in invoking the section in all situations and prefer to move tribunal under the RDB Act 1993.

The relief granted under the SARFAESI Act, 2002 is complementary to the remedy under the RDB Act, 1993. Together, they compose a single remedy and, therefore, the principle of election does not apply.[34] The provisions of the SARFAESI Act, 2002 are procedural and retrospective in nature. There is no provision in the NPA Act, 2002 like the RDB Act 1993 that specifically draws any limit on the debt required to be securitized or recovered. However, an appraisal of Section 31(h) of the NPA Act, 2002 indicates that the Securitisation Act does not apply to the security interest not exceed Rs. one lakh.[35] Moreover, it can be

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31. The Reserve Bank of India "*Narasimham Committee II*" *available at:* https://www.rbi.org.in/Scripts/PublicationReportDetails.aspx?ID=251 Accessed on 14 August 2017
32. *Supra* note 1 at 1461.
33. *Supra* note 18 at 360.
34. *Transcore v. Union of India*, AIR 2007 SC 712; *Sat Parkash v. State of Punjab*, AIR 2008 ('NOC) 1211 (P&H) (DB); *Anil Kumar Akela v. State Bank of India*, (2015) BC 386 (Jhar)
35. *Supra* note 1 at 1550.

inferred from section 31(i) that the Act does not apply to agricultural land.[36] Section 34 bars the Civil Court from exercising jurisdiction to entertain any suit or proceeding under this Act.[37]

Initially, the SARFAESI proceeding proved fruitful in realising the repayment of debts. However, with the changing scenario of Indian economy rate of recovery of bad loans also declined. Despite the provision of direct recovery, the SARFAESI action seems to have been shrunk to giving of various notices only. There are no adequate measures for acquiring financial assets. On the one side, the SARFAESI and the DRT proceedings can be initiated simultaneously but on the other side, this overlapping of the Acts has been started misused by the borrowers at present. Ultimately, the SARFAESI Act needs provisions related to the protection of the bank's interest as priority is required to be given against other stakeholders. The Act is ignorant of various alternative recourses available to borrower. On the one way, the Act conferred wide power on DRT to regulate the SARFAESI proceedings but at the same time that has been used by the borrowers as tool to evade the SARFAESI proceedings.

VII. REFORM IN DEBT RECOVERY LAWS

Keeping in view the various anomalies in the two Acts, the Enforcement of Security Interest Amendment Act, 2016 was brought into force on 4 November 2016. Though the Amendment Act attempted to address the various issues such as accountability of DRT officers, speedy proceedings and protection of interest of borrowers in both the laws, nevertheless, other problems are still required to be addressed.[38] Hence, Twin Acts namely, the RDB Act and the SARFAESI Act, which were enacted with the aim of speedy recovery of loans, could not improve the scenario. The data published by the RBI do not indicate any significant improvement in the recovery of NPA. In the year 2010-11, GNPA of all the banks was 2.3 percent. GNPA of Public sector Banks in 2016 rose up to 9.3 percent.[39] It reached up to 11.7 percent in 2017 and crossed the alarming limit of 14% in 2018 with Rs. 8956013 billion Gross NPA. Whereas only 13.8 %

36. *Supra* note 29 at 130.
37. *Supra* note 1 at 1554.
38. The Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions the Amendment Act 2016), w.e.f. 01.09.2016.
39. The Reserve Bank of India, Report on Trends and Progress of Banking in India 2017, *available at:*https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/0RTP2018_FE9E97E7AF7024A4B94321734CD76DD4F.PD (Accessed on 4 July 2017).

recovery was resulted from all channels the DRT as well as the SARFAESI, in that also maximum 18.3 % recovery was done by SARFAESI actions in comparison to 10.2% recovery done by DRT proceedings till 2016.[40]

The recovery proceedings under the Commercial laws or through special laws such as the RDB Act, 1993 or the SARFAESI Act, 2002, action through the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) and the winding-up provisions of the Companies Act, 1956 have neither been earned desired results nor have been able to help effective recovery of outstanding debt, nor restructuring of debts. On the other hand, the Presidency and Provincial Towns Insolvency Acts dealing with individual insolvency are almost a century old.[41] In the backdrop of the financial sector reforms, the Government undertook a plan to replace existing insolvency laws with one consolidated and comprehensive law that will facilitate easy and time-bound resolution or liquidation of business entities in distress.

VIII. THE INSOLVENCY AND BANKRUPTCY CODE, 2016

The Insolvency and Bankruptcy Code received the President's assent on 28th May, 2016. The Code contemplates for insolvency and bankruptcy both. Insolvency can be understood as a stage in which a person's liability exceeds his assets and he is unable to pay off his debts whereas bankruptcy is a statutory procedure usually commenced after insolvency by which a person is relieved of most debts and undergoes judicially supervision for the benefit of that person's creditor. The key objectives for establishing a collective insolvency resolution design are maximization of value of assets striking a balance between liquidation and reorganization, timely efficient and impartial resolution of insolvency, equitable treatment of similarly situated creditor.[42] The code provide for insolvency resolution of corporate persons as well as partnership firms and individual initiated by the creditor or corporate debtor or individual himself as the case may be.[43] The code has demarcated a difference between financial and operational creditor for the insolvency purpose since the purposes of both the

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40. *Ibid*
41. *Supra* note 1 at 229.
42. V. S. Wahi, *Treaties on Insolvency and Bankruptcy Code*, 28 Bharat Law House Pvt. Ltd. 2nd Edn, (2017).
43. Taxmann's Guide to Insolvency and Bankruptcy Code 2016 (Taxmann Publications, New Delhi, 4th Ed. (2017).

loans are different. The code has provided separate adjudicating authority for corporate loans individual loans that are National Company Law Tribunal (NCLT) and Debt Recovery Tribunal (DRT) respectively.

The Insolvency and Bankruptcy Code has made significant improvement in the recovery of bad loans. Recovery rate which was downward by 36.6 percent, 31.4 percent, 23.6 percent, 18.4 percent, 10.3 percent in the financial years 2008, 2010, 2011, 2013, and 2015 respectively. In the year 2016, when the Insolvency and Bankruptcy Code came into force the average recovery was 12.4 percent. However, after the Code came into force, there was tremendous improvement in NPA recovery with 41.3 percent 49.6 percent in the years 2017.[44] The improvement in recovery is resultant because of emergence of the new code.

IX. CONCLUSION

The enactment and application of this Code are expected to give a big boost to ease of doing business in India. The Code is drafted in such a way that it would permit market forces to freely determine economic effects. Recent studies show that the reforms embodied in the Code has yielded higher recovery rates for banks and financial institutions and removed a barrier that restricts the development of the financial market. The improvement in bad loans recovery and thereby reduced ratio of NPA can be said to be a cumulative effect of the triangle protection of aforesaid three Acts devised by the government. It depicts the serious concern of the government and efforts of the apex financial regulatory authority towards finance and banking sector reform. IBC 2016, which was earlier enacted as a resolution law, has been proved a boon for the banking sector in case of recovery of their bad loans. Indeed, the code has filled the vacuum caused by anomalies in the DRT and SARFAESI Laws.

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44. *Supra* note 39.

LAW OF EXTRADITION AND HUMAN RIGHTS : RETROSPECT AND PROSPECT

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ABSTRACT : Extradition is a cooperative law enforcement process between the two or more jurisdictions and depends on the arrangements made between them. However, the enforcement process of extradition has been a debatable one for long time. In this context certain issues are: Is there any right of victim has been developed under international human rights law that would be applied in extradition cases? Whether Indian law and practice of extradition is in conformity with international human rights law? How far the extradition law and practice in UK varies with India? Whether there is any possible uniform process of extradition can be developed among States so that human rights of victims in extradition can be protected? This paper examines the aforementioned issues.

KEY WORDS : Extradition, Human Rights, UDHR, International Law, Constitution of India

I. INTRODUCTION

The States have time and again recognised the universality of international crimes which have increased recently and thus States are more involved in extradition in order to stop this development[1] by the formal surrender of a person

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1. See Kevin Jon Heller, *"What Is an International Crime?: A Revisionist History,"* 58(2) *Harvard International Law Journal* (2017) pp. 353-421 at p. 357. See also John Dugard and Christine van den Wyngaert, *"Reconciling Extradition with Human Rights,"* 92(2) *American Journal of International Law* (1982) pp. 187-212 at p. 187.

by a State to another State for prosecution or punishment of fugitive. Extradition is the act of one jurisdiction for delivering a person who has been accused of a crime committed in another jurisdiction or has been convicted for a crime in that other jurisdiction being kept into the custody of a law enforcement agency of that other jurisdiction.[2]The legal aspect of this process involves the physical transfer of custody of the person being extradited to the legal authority of the requesting jurisdiction.[3] Through the extradition process one sovereign jurisdiction typically makes a formal request to another sovereign jurisdiction which may be called the requested state. Whenever the requested state found the fugitive within its territory the requested state may arrest the fugitive and subject him or her to its extradition process. According to the extradition procedure upon which the fugitive is to be subjected is dependents on the law and practice of the requested state. It is one of the important forms of inter-state cooperation in criminal matters whereby a fugitive offender is surrendered to the requesting State having a claim to try or punish him. Thus, extradition is a cooperative law enforcement process between the two jurisdictions and depends on the arrangements made through treaty between them for maintaining international peace, law and order.[4]

Under the ancient law of India any citizen could be extradited, if any person had committed an offence against a foreign ambassador, he was to be dealt with therein as the legal authorities deemed proper. Thus, the *Mahabharata* (a Hindu mythological document in India) maintained the same view when it advised the king "never to forgive a person however dear, if he has committed an offence by act or word".[5]

According to the ancient Indian *Kautilya's Arthasastra*[6] different kinds of

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2. For detail discussion on the concept extradition see Peter Johnston, "The Incorporation of Human Rights Fair Trial Standards into Australian Extradition Law," 76 *Australian Institute of Administrative Law Forum* (2014) pp. 20-42; Christopher L. Blakesley, "The Practice of Extradition from Antiquity to Modern France and the United States: A Brief History," 4(1) *Boston College International and Comparative Law Review* (1981) pp. 39-60; Manuel R. Garcia-Mora, "Criminal Jurisdiction of a State Over Fugitives Brought from a Foreign Country by Force or Fraud: A Comparative Study," 32(4) *Indiana Law Journal* (1957) pp.428-449.
3. See *David A. Sadoff, Bringing International Fugitives to Justice: Extradition and its Alternatives (Cambridge University Press, 2016) at p. 43.*
4. I. A. Shearer, *Extradition in International Law* (Manchester University Press, 1971) at p. 1.
5. See Mahabharata (Shantiparva).
6. L. N. Rangarajan, *Kautilya: The Arthashastra* (Penguine Books, 1992) at Chapter VII.

inter-state treaties and arrangements were made to achieve the peace among the then kings which recognises extradition treaties. However, the codified law on extradition appeared in India with the application of the English Extradition Act 1870 and the Fugitive Offenders Act 1881. However, it is well-recognized that the modern law of extradition is purely a product of treaties and legislations enacted to implement them.[7]The provides a detail scheme for foster international treaty obligation including extradition treaties and has also enacted legislation to implement extradition treaties into India.[8] Thus, Entry 18 of the List I (Union List) of the Constitution of India deals with the "Extradition" while Article 253 vested the legislative power upon the Parliament for giving effect to international agreements. The Extradition Act 1962 provides a detail scheme for implementation of extradition treaties in India.[9]

The extradition law of the United Kingdom (UK) originated in ancient civilisation and thus one of the earliest recorded treaties providing for the mutual return of criminals dates to 1280 BC, between Ramses II, the Pharaoh of Egypt, and King Hattusil III of the Hittites.[10] The modern history of English extradition with foreign States dates back to 1842 with the Webster-Ashburton Treaty between the United States of America and Great Britain dealing specifically with the surrender of suspected offenders in cases of piracy, arson, forgery, robbery, assault with intent to commit murder, and murder.[11] By the early nineteenth century it became settled law in England that no power to extradite existed in

7. See *In re Arton* (1896) 1 QB 509.
8. For various dimensions of Indian extradition law see Aftab Alam, "Extradition and Human Rights", 48 *Indian Journal of International Law* (2008) pp. 87- 104; Upendra Baxi, "Law of Treaties in the Contemporary Practice of India," *Indian Year Book of International Affairs* (1965) pp. 137-176; T. S. Rama Rao, "Some Problems on International Law in India", *Indian Year Book of International Affairs* (1957) pp. 17-41.
9. For a general discussion on implementation of extradition treaties see Nagaraj Narayana, "Judicial Review of Extradition: Position in India," 20(1) *Academy Law Review* (1996) PP. 79-112; Nagaraj Narayana, "Apprehension of Fugitive Criminals," 19(1) *Academy Law Review* (1995) PP. 179-211; D. S. Bedi, "Law and Practice of Extradition within the Commonwealth Countries," 19(4) *Journal of Indian Law Institute* (1977) pp. 419-437.
10. See I. A. Shearer, *Extradition in International Law*, Op. Cit. at p. 5.
11. Article 27 of the Treaty of Amity of 1794 (known as the Jay Treaty which was lapsed in 1807) was first provided extradition between United Kingdom and the United States of America for the return to either government of persons charged with murder or forgery. But extradition was only permissible on evidence of criminality that would justify the arrest and prosecution of the defendant in the country where he was located. See Edward Clarke, *A Treatise Upon the Law of Extradition* (Stevens and Haynes, London, 1903) pp. 18- 22.

the absence of statutory warrant.[12] Ultimately, the English Extradition Act 1870 was enacted to provide the procedural machinery for the surrender of defendants under any treaty then in force with a foreign state and any that might be concluded after its enactment.

In *Government of the Federal Republic of Germany* v. *Sotiriadis*,[13] Lord Diplock explained the relation between bilateral extradition treaties and the 1870 Act and held that in order to determine whether a conduct constitutes an "extradition crime" as per the 1870 Act one could find a potential ground for extradition if that conduct had taken place in a foreign State and thus one can start by inquiring whether the conduct, if it had taken place in England would have fallen within one of the descriptions of crimes listed in the first Schedule to the 1870 Act. Subsequently, the Extradition Act 1989 consolidated and repealed three earlier English legislations such as the Extradition Act 1870, the Fugitive Offenders Act 1967 and the Part I of the Criminal Justice Act 1988. Even after the enactment of the 1989 Act it was realised that extradition law should provide a quick and effective framework to extradite a person to the country where they are accused or have been convicted of a serious crime providing that this does not breach their fundamental human rights.[14] Hence, the Extradition Act 2003,[15] was enacted through which a "fast-track" extradition programme has been introduced. Thus the extradition law and practice varies from state to state. In this background the paper examines the contemporary extradition law and practice in India and UK with special reference to recent developments of international human rights law and suggests necessary modifications for smooth functioning among states.

II. DEVELOPMENT OF INTERNATIONAL EXTRADITION LAW AND HUMAN RIGHTS

As stated above the practice of extradition originated in ancient civilizations as a matter of courtesy and goodwill between sovereigns. Thus, extradition

12. See I. A. Shearer, "Recent Developments in the Law of Extradition," 6 *Melbourne University Law Review* (1967) pp. 186-210 at p. 189.
13. [1975] AC 1, 24.
14. See Gavan Griffith QC and Claire Harris, "Recent Developments in the Law of Extradition," 6 *Melbourne Journal of International Law* (2005) pp. 1-22, at p. 10.
15. Extradition Act 2003 entered into force on January 1, 2004.

treaties are some of the oldest known examples of international treaty law.[16] Few examples are the treaty of Charles I, which wads executed during the English Civil War of the 1640s (leading to the abolition of the monarchy in England for over a decade), the 1661 treaty between Charles II of England and Denmark.[17] These types of international treaties, regarding the surrender of enemies to the sovereign, might properly be understood as gestures of friendship between allies, methods for establishing or maintaining peaceful relationships between countries. These treaties also demonstrated a paramount concern with maintaining the *status quo* among supremacy of state.[18]

Hugo Grotius, the forefather of international law, was of the view that it is a duty of state to extradite a fugitive criminal or a convicted to the state seeking his returned. He was also the active advocate of the principle of "prosecution" or "extradition", which is widely accepted now a days by a number of international treaties dealing with crimes of international concerned or international terrorism. In the view of Grotius, it is a legal duty of a state, based on natural law, either to prosecute the fugitive offender in his own court or extradite him to stand trial in the country where the crime was committed. Another great international lawyer, Emerich de Vattel was also of the view that it is a legal duty to surrender fugitive criminals.[19] However, the principle has not been closely followed by sovereign states. International lawyers are divided on the issue even nowadays. While some international lawyers insists that it is a legal duty of a state to extradite criminals, some say that although state do recognise extradition in absence of a treaty, internal law imposes no obligation upon the states to extradites criminals; others insist that extradition is a moral duty based on the principles of solidarity and cooperation between nations; still others expressed the view that extradition is a moral duty based on reciprocity. Nevertheless it is generally agreed that no legal duty is imposed by customary international law on the states to extradite

16. See Thomas Alfred Walker, A *History of the Law of Nations* (Cambridge University Press, 1899) at p. 38.
17. For detail discussion see M. Cherif Bassiouni, *International Extradition: United States Law and Practice* (Oceana Publications , 2005) at p. 5; Arthur Nussbaum, *A Concise History of the Law of Nations* (Macmillan Company, New York, 1954) at p. 214.
18. See Rebecca Fraser, *The Story of Britain- From the Romans to the Present: A Narrative History* (W. W. Norton, New York, 2005) pp. 327-77; Geoffrey Butler and Simon Maccoby, *The Development of International Law* (The Law Book Exchange Ltd., 2003) at p. 510.
19. See R. C. Hingorani, *Modern International Law* (IBH Publishing Co., Oxford, 1981) at p. 169.

fugitive offenders or criminals,[20] and that there was at international law neither a duty to surrender, nor a duty not to surrender. The grant of extradition depends entirely on reciprocity or courtesy in the absence of a treaty or statute. [21]

It is relevant to mention that State cooperation has so far been carried out on reciprocal basis necessitating a bilateral treaty between cooperating states, duplicating the principles of national law.[22] Thus, the duty to cooperate among States is a well-established principle of international law and can be found in numerous international law instruments. For example, Article 1(3) of the United Nations (UN) Charter 1945 and UN General Assembly (UNGA) Declaration on Friendly Relations 1970[23] provides for establishing cooperate among States. Article 1(3) of the UN Charter provides for achieving "international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all" and there should not be any distinction as to language, sex, race, or religion. This obligation underlies a general international duty to cooperate in fight against impunity. Similarly, the 1970 Declaration on Friendly Relations provides for the development of friendly relations and co-operation between nations are among the fundamental purposes of the United Nations. The obligation to deny safe heavens to terrorists, as found in the Security Council's binding resolution is said to be a corollary of the duty to cooperate in fight against impunity.[24] Thus, the duty to cooperate in fight against impunity represents a rule of customary international law. It is a matter of fact that the working group of the International Law Commission (ILC) on the obligation to extradite and prosecute has reaffirmed that the duty to assist in fight against impunity constitutes a primary foundation of the responsibility.[25]

The need for international cooperation to combat transnational crimes has increases considerably in the last decades and continues to do so. Some of the

20. For detail discussion see Usman Hameed, "*Aut Dedere Aut Judicare* (Extradite or Prosecute) Obligation- Whether a Duty Rooted in Customary International Law?" 5(9) *International Journal of Humanities and Social Science* (2015) pp. 239-248.
21. See Li Zhenhua, "New Dimension of Extradition Regime in the Fight against Terrorism," 42 *Indian Journal of International Law* (2002) pp. 156-172 at p. 158.
22. See Edward M. Wise, "Some Problems of Extradition," 15 *Wayne Law Review* (1968-1969) pp. 709-731 at p. 713.
23. GA Res 2625 (XXV) of 24 October 1970 annex para 1.
24. GA Res 1373(2001). See para 2(c) S/RES/1373 (2001) adopted on 28 September 2001, S/RES/ 1373 (2001).
25. See A/CN.4/648 at 7. See also A/65/10 para 339.

reasons being- it has become easier to be to escape conviction or punishment by fleeing abroad, a growing number of crimes are organised on an international level, technical and other developments make national societies increasingly vulnerable to what happens outside their national territory.[26] The other important development is the international concern, for the protection and promotion of human rights. As highlighted by the *Soering* case,[27] this development has greatly impacted international cooperation in criminal matters. Gradually the conviction has taken root that no assistance should be given to other States if that would contribute to a violation of a person's basic rights by these States. Although a extradition law and practice does not recognise a general exception to extradition where the human rights of the fugitive are threatened in the requesting State, objections to extradition based on human rights grounds have become common place in extradition proceedings.[28]

Hence, the UN General Assembly in 1990 adopted a *Model Treaty on Extradition*,[29] in recognition of 'the importance of a model treaty on extradition as an effective way of dealing with the complex aspects and serious consequences of crime, especially in its new forms and dimensions. In 2002, the *United Nations Convention against Transnational Organized Crime*[30] was adopted, with 147 signatories. This *Organized Crime Convention* attempts to introduce strategies to combat organised criminal activity including money laundering, corruption and other activities of organised criminal groups. [31] It provides that the organised crime covered by the Convention shall be deemed to be an extraditable offence in any extradition treaty between States Parties. If

26. Bert Swart, "Human Rights and the Abolition of Traditional Principles," in Albin Eser and Otto Lagodny (eds.), *Principals and Procedures for a New Transnational Criminal Law* (Herstellung Barth, Freiburg,1991) at p. 507.
27. See Soering v. *United Kingdom*, (1989) 11 EHRR 439. The decision in Soering affirms the extraterritorial applicability of human rights guarantees within the ECHR as well as the absolution prohibition against torture. The Court held that the UK was required by Article 3 of the European Convention on Human Rights- which prohibits torture and inhuman or degrading treatment or punishment-not to extradite Soering to the US where there was a real risk that he would be subjected to inhuman or degrading treatment by being kept on death row for a prolonged period in the state of Virginia.
28. John Dugard and Christine van den Wyngaert, "Reconciling Extradition," Op. Cit. at p. 206.
29. See GA Res 45/116, UN GAOR, 45th sess, 68th plen mtg, annex, UN Doc A/ RES/ 45/ 116 (14 December 1990).
30. See GA Res 55/25, UN GAOR, 55th sess, 62nd plen mtg, Annex I, UN Doc A/ RES/ 55/ 25 (15 November 2000).
31. Ibid., Articles 6-9.

the States Parties do not have an extradition treaty in force between them, the Convention may be taken to operate as the legal basis for extradition.[32] Therefore States cannot simply turned a blind eye to the potential for breaches of basic human rights of extraditee particularly the non-derogable right to freedom from torture, cruel, inhuman and degrading treatment and the right to a fair trial and freedom from discrimination in order to ensure that they meet their obligation under international human rights law.[33] Thus, the recognition of human rights constraints upon the freedom of States to cooperate in matters relating to the extradition of trans-national criminals and terrorists is an important development. There is, however, an inevitable tension between the demand for more effective international cooperation in the fight against terrorism and international crimes and the demand that human rights are respected. It is necessary to find the proper balance between human rights of the fugitives and the interests of States in the suppression of trans-national crimes and terrorism.

III. CONTEMPORARY EXTRADITION LAW AND PRACTICE IN INDIA

The law relating to extradition in contemporary India has two aspects: (i) Constitutional aspect, and (ii) implementation aspect. The Constitution of India is the highest law of the land and thus all law in India must get validity from the Constitution. Thus, according to the Article 13 of the Constitution laws inconsistent with or in derogation of the fundamental rights are void. The extradition treaty making power is an executive power derived from the Constitution and its implementation has to be done through the Parliamentary legislation according to the Article 253 of the Constitution of India. In connection to the Constitutional aspect a number of issues are there: To whom does the power to make and implement extradition treaties lies in India? What position do extradition treaties enjoy under the Constitution of India? Are extradition treaties superior to the Constitution of India or the law of the land? Do extradition treaties under the Constitution of India, in order to be effective, require ratification or approval? If yes, to whom the power lies and what would be the effect of non-exercise of that power on extradition treaties? [34] So far as the implementation

32. Ibid., Article 16.
33. Back Ground Paper on "Extradition and Human Rights in the Context of Counter Terrorism", OSCE Experts Workshop on Enhancing Legal Co-operation in Criminal Matters Related to terrorism, Warsaw, April 2005, ODIHR.GAL/29/05.
34. For critical discussion on the subject see H. M. *Seervai, Constitutional Law of India*: *A Critical Commentary* (Universal Law Publishing Co Ltd, New Delhi, 2005); Durga Das Basu,

of a extradition treaty is concerned the the Parliament has enacted the Extradition Act 1962 which repealed the Indian Extradition Act 1903 that had limited in its extent and application to the British India and was not applicable to the Indian native States. As a consequence the extradition treaty, as acceded to by the 1942 Order, was not applicable to the Indian native States. The 1962 Extradition Act is applied to whole of India and the object of the Act is to "consolidate and amend the law relating to the extradition of fugitive criminals."[35] These two aspects are discussed below.

(A) Constitutional Aspect

The Constitution of India clearly laid down that entering into treaties and agreements with foreign powers is one of the attributes of the Union of India regarding sovereign functions. Thus, extradition treaty making power under the Constitution of India is a sovereign function of the Union of India. The important provisions of the Constitution of India which relevant to extradition treaties are: Articles 51, 73, 245, 246, 253, 260, 363, 372 and Entries 10 to 21 of the Seventh Schedule. Article 51 of the Constitution is concerned with promotion of international peace and security[36] and Article 73 demonstrates the extent of executive power of the Union of India. It is a matter of fact that Article 51 is a provision under Part IV of the Constitution which provides for Directive Principles of State Policy (DPSP) and are non-justiciable by virtue of Article 37.[37] Directive principles are the ideals of the new order as envisaged by the framers of the constitution of India. According to Article 37 of the Constitution, it shall be the duty of the State to apply these principles in making laws. The understanding of directive principles is becoming increasingly important in the wake of third and fourth generation of human rights,

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Introduction to the Constitution of *India*, (*Prentice-Hall of India, New Delhi*, 1994); Durga Das Basu, *Comparative Federalism* (Prentice-Hall of India, New Delhi, *1987);* Durga Das Basu, *Constitution of India* (Prentice-Hall of India, New Delhi, *1967).*

35. Extradition Act 1962, Preamble.

36. Article 51 of the Constitution (Directive Principles) lays down that the State shall endeavor to (a) promote international peace and security; (b) maintain just and honourable relations between nations; (c) foster respect for international law and treaty obligations in the dealings of organized peoples with one another; and (d) encourage settlement of international disputes by arbitration.

37. Article 37 of the Constitution provides: "The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."

environmental rights, gender rights, etc. The Indian Judiciary has clarified or given firm legal characteristics to various principles over a period of time and have recognized the convergence of directive principles and fundamental rights. However, an increasing number of directive principles are being perceived as entailed in fundamental rights such as the right to equality or the right to life, and are becoming justiciable.[38] Article 51 of the Constitution of India speaks of promotion of international peace and security by India, is one of the directive principles of the State Policy of India. Respect for international law is displayed by a State by observing the principles of that law in municipal laws. If they are not observed, the courts may apply these principles on the theory of implied adoption provided such principles are not inconsistent with the Constitution and the law enacted by national legislatures.[39] Article 245 deals with the extent of laws made by Parliament and by the legislatures of States,[40] while Article 246 provides for subject matter of laws made by Parliament and by the legislatures of States.[41]

Under the Constitution of India, the international treaty making power is vested upon the Parliament although there is no separate provision for extradition treaty except Entry 18, List-I (Union List) of the Seventh Schedule.[42] Under Article 246 read with the following entries in List I of the Seventh Schedule of the Constitution, Parliament has exclusive powers to legislate on foreign affairs

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38. See Sujata V. Manohar, *T. K. Toppe's Constitutional Law of India* (Eastern Book Company, Lucknow, 2010), at p. 413.
39. Ibid., at p. 433.
40. Article 245 reads "Extent of laws made by Parliament and by the Legislatures of States: (1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State, (2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra territorial operation."
41. Article 246 reads, "Subject matter of laws made by Parliament and by the Legislatures of States (1)Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the Union List), (2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the Concurrent List), (4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included (in a State) notwithstanding that such matter is a matter enumerated in the State List."
42. Entry 18: "Extradition". See Prema Verma, "Position Relating to Treaties under the Constitution of India," 17(1) *Journal of Indian Law Institute* (1975) pp. 113-130.

including all matters included in Entries 10-18. Article 246 effects a distribution of legislative power between the Union and the States. Article 246(1) says: "Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule." Thus, treaty-making is not within the exclusive competence of the Executive. It is squarely placed within the legislative competence of the Parliament. It shows from a reading of Article 246 along with the Entries in List I that the Parliament is competent to make a law with respect to the several matters mentioned in the above entries 10-18.[43]

Entry 10, List I under the Seventh Schedule reads as follow: "Foreign affairs; all matters which bring the Union into relation with any foreign country". The legislative power of the Parliament under Entry 10 of the List I of the Seventh Schedule of the Constitution is broad enough and covers wide ranging legislative field.[44] The Supreme Court in *Hans Muller of Nurenburg* v. *Superintendent, Presidency Jail, Calcutta*,[45] held that foreign State has a very direct interest in what is done to its subjects in a foreign land. Therefore, legislation that confers jurisdiction upon Governments in this country to deprive foreigners of their liberty cannot but be a matter that will bring the Union into relation with foreign States, particularly when there is no public hearing and no trial in the ordinary courts of the land. But in this particular case, the relation is even more direct, for the provision here is for detention with a view to making arrangements for a foreigner's expulsion from India. A foreign State has a very deep interest in knowing where and how its subjects can be forcibly expelled against their will.

Entry 13, List I under the Seventh Schedule read as follow: "Participation in international conferences, associations and other bodies and implementing of decisions made thereat". Thus, citing Entry 13, List I of the seventh schedule of the Constitution the Supreme Court in *Bhavesh Jayanti Lakhani* v. *State of Maharashtra*,[46] held that in the absence of any request having being made by the foreign government to the Executive government of India or any authorisation made by the latter on its behalf, "interpol warrant" cannot be enforced. Entry 14 reads as follow: "Entering into treaties and agreements with foreign countries

43. See *Report on Treaty-Making Power Under Our Constitution* (Vigyan Bhavan Annexe, New Delhi, 2001) at p. 8.
44. See *Bhavesh Jayanti Lakhani* v. *State of Maharashtra,* (2009) 9 SCC 551: 2009 (11) SCALE 467.
45. See *Hans Muller of Nurenburg* v. *Superintendent,*AIR 1955 SC 367: [1955] 1 SCR 1284.
46. (2009) 9 SCC 551: 2009 (11) SCALE 467.

and implementing of treaties, agreements and conventions with foreign Countries". But it is not clear whether any difference of procedure is contemplated in the making of these instruments, although the expressions "treaties, agreements and conventions" have been used in the Entry 14. Undoubtedly, Entry 14 provides for all legislation in connection with entering into treaties. This cannot, however, justify the conclusion that the makers of the Constitution intended that no treaty should be entered into unless the Parliament has legislated on the matter. The power of legislation on this matter of entering into treaties leaves untouched the executive power of entering into treaties.[47]

The Supreme Court in *Maganbhai Ishwarbhai Patel* v. *Union of India*,[48] observed that the executive power of the Union is vested in the President and is exercisable in accordance with the Constitution. The executive is qua the State competent to represent the State in all matters international and may by agreement, convention or treaties incur obligations which in international law are binding upon the State. But the obligations arising under the agreement or treaties are not by their own force binding upon Indian nationals. The power to legislate in respect of treaties lies with the Parliament under Entries 10 and 14, List I of the Seventh Schedule. But making of law under that authority is necessary when the treaty or agreement operates to restrict the rights of citizens or others or modules the laws of the State. If the rights of the citizens or others which are justiciable are not affected, no legislative measure is needed to give effect to the agreement or treaty.[49] Entry 15, List I under the Seventh Schedule reads as follow: "War and peace" and Entry 16, List I under the Seventh Schedule provides for "Foreign jurisdiction". Other items in Union List unmistakably show that the whole gamut of foreign relations has been placed under the exclusive competence of the Union Parliament. These other items include diplomatic, consular and trade representation (Entry 11), UN organisation (Entry 12), participation in international conferences, associations and other bodies and implementing of decisions made thereat (Entry 13), naturalization and aliens (Entry 17), extradition (Entry 18), admission into and emigration and expulsion from India (Entry 19), piracies and crimes committed on the high seas or in the air, offences against the law of nations committed on the high seas or in the air (Entry 21).

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47. See *Union of India* v. *Manmull Jain*, AIR 1954 Cal 615: (1956) ILR 1Cal 493.
48. AIR 1969 SC 783: [1969] 3 SCR 254.
49. See *Vishaka* v. *State of Rajasthan*, AIR 1997 SC 3011: 1997 (5) SCALE 453.

Article 253 of the Constitution of India confers on the Parliament the capacity to legislate, irrespective of the scheme of distribution of powers, to implement a treaty or a decision made at an international conference. Article 253 provides: "Legislation for giving effect to international agreements- Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."[50] Article 253 contains *non-obstante* clause, thus, operates notwithstanding anything contained in Article 245 and Article 246 (distribution of legislative powers). Article 245 of the Constitution empowers the Parliament not only to make laws for the whole or any part of the territory of India but also indicates that no law made by the Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation. Clause (1) of Article 246 of the Constitution of India confers exclusive legislative power upon the Parliament with respect to any of the matters enumerated in List I in the Seventh Schedule whereas in terms of Clause (2) thereof, the Legislature of any State also has the power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule, subject of course to the legislative competence of the Parliament as contained in Clause (1) but notwithstanding anything contained in Clause (3) thereof. The power of the State Legislature in terms of Clause (3) of Article 246 is subject to Clauses (1) and (2) in relation to the matters enumerated in List II in the Seventh Schedule.[51] Thus one "Report on Treaty Making"[52] stated thus:

> The Article 253 empowers the Parliament to make any law, for the whole or any part of the territory of India, for implementing "any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body." Conferment of this power on the Parliament is evidently in line with the power conferred upon it by Entries 13 and 14

50. See *Union of India* v. *Azadi Bachao Andolan,* (2003) 263 ITR 706 (SC): (2003) Supp 4 SCR 222; *N. Nagendra Rao* v. *State of Andhra Pradesh,* AIR 1994 SC 2663: (1994) 6 SCC 205; *Rosiline George* v. *Union of India,* 1993 (4) SCALE 230: (1994) 2 SCC 80.
51. See *State of W. B.* v. *Kesoram Industries,* 2004 (1) SCALE 425: (2004) 10 SCC 201.
52. See *Report on Treaty-Making Power Under Our Constitution* (Vigyan Bhavan Annexe, New Delhi, 2001) at p. 9.

> of List I. The opening words of the Article "Notwithstanding anything in the foregoing provisions of this Chapter" mean that this power is available to Parliament notwithstanding the division of power between the Centre and States effected by Article 246 read with the Seventh Schedule.

Article 246 confers power on the Parliament to enact laws with respect to matters enumerated in List I of the Seventh Schedule to the Constitution.[53] Entries 10 to 21 of List I of the Seventh Schedule pertain to international law. In making any law under any of these entries, the Parliament is required to keep Article 51 in mind. It would be useful to refer to Entry 14 of List I of the Seventh Schedule which read as under: "Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries." It is thus obvious that entering into a treaty obligation and its performance are two different stages covered by different wings of the Government. Entering into a treaty is the executive act performed by the head of the State whereas its implementation is the legislative function, if in a given case, a law is required to implement the treaty. [54]

(B) Legislative Aspect

In India the Extradition Act 1962 has been enacted to consolidate and amend the law relating to the extradition of fugitive criminals and to provide for matters connected therewith or incidental thereto. The Act is consisting with 37 Sections which is divided into 5 Chapters with one Schedule. The Chapter I[55] is preliminary, while Chapter II[56] provides for extradition of fugitive criminals to foreign state. The Chapter III[57] deals with the return of fugitive criminals to foreign states with extradition arrangements, while Chapter IV[58] provides for the surrender or return of accused or convicted persons from foreign states and the Chapter V[59] is miscellaneous. According to the Act "extradition treaty"

53. See *Binod Kumar* v. *State of Jharkhand,* JT 2011 (4) SC 114: 2011 (4) SCALE 109.
54. For validity of extradition treaties in India see *Verhoeven, Marie-Emmanuelle* v. *Union of India,* AIR 2016 SC 2165: (2016) 6 SCC 456; *Rosiline George* v. *Union of India,* (1994) 2 SCC 80: 1993 (4) SCALE 230; *People's Union of Civil Liberties* v. *Union of India* , AIR 1997 SC 568: (1997) 1 SCC 301; *Babu Ram Saksena* v. *State,* AIR 1950 SC 155: (1950) 1 SCR 573.
55. Extradition Act 1962, Sections 1 to 3.
56. Ibid., Sections 4 to 11.
57. Ibid., Sections 12 to 18.
58. Ibid., Sections 19 to 21.
59. Ibid., Sections 22 to 37.

means a treaty or agreement made by India with a foreign State relating to the extradition of fugitive criminals, and includes any treaty or agreement relating to the extradition of fugitive criminals made before the 15th day of August, 1947, which extends to, and is binding on, India,[60] while "fugitive criminal" has been defined to mean an individual who is accused or convicted of an extradition offence committed within the jurisdiction of a foreign State or a commonwealth country and is, or is suspected to be, in some part of India. [61]

Thus, fugitive is a person who flees or tries to escape from danger, an enemy, justice, a master, etc.[62] The Act is concerned only with the person who had fled from justice of one state to another. Mere presence in another state makes one fugitive, for extradition, purposes, if charges (including an unexpired sentence) are pending in demanding state. In *Verhoeven* v. *Union of India*,[63] the Delhi High Court summarised the legislative scheme of the Extradition Act, 1962 thus:

> A careful analysis of the provisions of the Extradition Act, 1962 (for short 'the Act') shows that it consists of altogether 37 Sections, divided into five Chapters. Chapter I contains Sections 1 to 3. While Section 1 provides for short title, extent and commencement of the Act, Section 2 contains definitions of certain expressions and Section 3 provides for application of the Act to 'Foreign States' and 'Treaty States'. Chapter II contains Sections 4 to 11 which deal with extradition of fugitive criminals to foreign states to which Chapter III does not apply. Chapter III which contains Sections 12 to 18 deals with return of fugitive criminals to foreign States with extradition arrangements. So far as Chapter IV and Chapter V are concerned, they deal with "Surrender or return of accused or convicted persons from foreign States" and "Miscellaneous Matters" respectively.

Regarding the pre-1962 Extradition Act legislations on extradition in India the Supreme Court in the *State of Madras* v. *C. G. Menon*,[64] held that after India

60. Ibid., Section 2(d).
61. Ibid., Section 2(f).
62. See *New Shorter Oxford English Dictionary* (ýOxford University Press,1993) at p. 1038.
63. MANU/ DE/ 2744/ 2015.
64. AIR 1954 SC 517: [1955] 1 SCR 280.

became a Republic, the Fugitive Offenders Act, 1881 has ceased to apply to India. That apart, the existing law relating to extradition was found to have contained certain lacunae on questions such as concurrent requests for the surrender of a fugitive criminal from more than one State. To remove all such anomalies and fill in the lacunae that existed in the law relating to extradition and to enact a consolidated and amended law for the extradition of fugitive criminals to all foreign States and Commonwealth countries, the Extradition Act, 1962 has been enacted and the said Act has come into force with effect from 05.01.1963. Section 37 of the Extradition Act, 1962 declare that the Indian Extradition Act, 1903 and any law corresponding thereto as well as the Extradition Acts, 1870 to 1932 and the Fugitive Offenders Act, 1881 stood repealed. A fugitive is generally called as fugitive from justice as he is a person who has absconded from the justice delivery system of one state and has fled to another state.[65] A fugitive from justice is a person who commits crime in one state and withdraws himself from such jurisdiction. To be a fugitive from justice it is sufficient that such person, legally charged in the requesting state with the commission of a crime within said state, when sought to be subjected to its criminal process for said offence, has left its jurisdiction and is found within the jurisdiction of another state to whom request is made and it is shown that he is charged with a crime or is a convict and has to undergo a sentence. Earlier it was essential to show that at the time of commission of the alleged crime in requesting state, the accused was bodily present or incurred guilt therein, and that he left such state and is within jurisdiction of such state from which his return is demanded. The reason behind is that if a person is not present on the scene of crime how could he commit the offence? With the advent of information technology, a person need not physically cross borders and be physically present in the state for committing the crime. The crime may be committed in one state while sitting in another state through internet or by using computer networks, etc. An escaped prisoner who is found in another state is also a fugitive. A person who is released on parole but violates the condition of parole and escapes to another state is also a fugitive within the meaning of this Act. A person is a fugitive if he is wanted in one state for violation of law and is found in another state, even though at the time he left the requesting state he had no belief that he had violated its criminal laws, and even if he did not consciously flee from

65. See David M. Bierie, "Fugitives In The United States," 42 (4) *Journal of Criminal Justice* (2014) pp. 327-337; Evan T. Barr, "Considerations When Representing A Fugitive Client," *New York Law Journal* (2013) pp. 17-23.

justice in order to avoid prosecution for the crime with which he is charged. His motive in moving from the requesting state is immaterial.[66]

The Extradition Act 1962 is a special law dealing with criminals and persons accused of certain crimes and it prescribes the procedure for trial as well as the embargo of such persons in certain contingencies. The process of extradition is activated with the request of foreign state for surrender of a fugitive. This is so as to enable each state to bring offenders to trial as swiftly as possible in the state where the alleged offence was committed and to preclude any state from becoming a sanctuary for fugitives from justice of another state. The Act provides that the process of extradition is started on a formal request for the surrender of a fugitive criminal belonging to a foreign state by a diplomatic representative of the foreign state at Delhi to the Central Government. Alternatively, the government of the foreign state seeking surrender of the fugitive criminal may communicate with the Central Government through its diplomatic representative in that state or country. The Act does not restrict the mode of initiation of the process of extradition to only these two modes. If these modes are not suitable then the request for surrender of the fugitive can also be made by any other mode as agreed between the government of the foreign state and the Central Government of India.

(C) Application of Human Rights Law in Extradition Cases

It is a matter of fact that after the World War II a large number of rights of individual have been recognise under international human rights law. The 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights, and International Covenant on Economic, Social, and Cultural Rights provide for various rights of victims. The question is whether these rights are recognised in the Constitution of India and if so, whether they are applied in extradition cases? Historically many national legal systems have provided victims with access to justice and even with participatory rights in criminal proceedings.[67] According to Indian legal system, a victim may be represented in criminal proceedings in order to ensure that all available evidence pertaining to the accused is presented in court, and as a way of ensuring the

66. For detail see *United States* v. *Florez*, 447 F.3d 145, 149-51 (2d Cir. 2006); *United States* v. *Eng*, 951 F.2d 461, 464-65 (2d Cir. 1991); *United States* v. *Belimex*, 340 F. Supp. 466, 470 (S. D. N. Y. 1971).

67. See M. Cherif Bassiouni , " International Recognition of Victims' Rights," 6 *Human Rights Law Review* (2006) pp. 203- 279; Jonathan Doak, *Victims' Rights: Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Bloomsbury, 2008).

victims' right to compensation through civil damages arising out of a subsequent civil judgment. The Supreme Court of India time and again held that the right to life enshrined in Article 21 of the Constitution of India means something more than survival of mere animal existence.[68]The right to free legal assistance,[69] right against solitary confinement,[70] right against bar fetter,[71] right against handcuffing,[72] right to live with human dignity,[73] right to prisoners to interview,[74] right to compensation,[75] right to sustenance allowance during suspension,[76] right against delayed execution,[77] right against custodial violence,[78] right against public hanging,[79]right to means of livelihood,[80] right to hygienic environment,[81]right to health,[82] right to speedy trial,[83] right to gender equality,[84] right to a fair trial,[85] right to a quality life,[86] right against police atrocities,[87] right to adequate food,[88] right to portable drinking water,[89] rights of juveniles,[90] and rights of transgender[91]

68. *Kharak Singh* v. *State of U.P,* AIR 1963 SC 1295.
69. *M. H. Hoskot* v. *State of Maharashtra,* AIR 1978 SC 1548.
70. *Sunil Batra* v. *Delhi Administration,* AIR 1978 SC 1675.
71. *Charles Sobraj* v. *Supt. Central Jail,* AIR 1978 SC 1514.
72. *Prem Shankar* v. *Delhi Administration,* AIR 1980 SC 1535.
73. *Francis Coralie Mullin* v. *Union Territory of Delhi,* AIR (1981) SC 746.
74. *Prabha Dutt* v. *Union of India,* AIR 1982 SC 6.
75. *Rudul Sah* v. *State of Bihar,* AIR 1983 SC 1086.
76. *Maharashtra* v. *Chandrabhan* , AIR 1983 SC 803.
77. *T.V. Vatheeswaran* v. *State of Tamil Nadu,* 1983 (1) SCALE 115.
78. *Sheela Bhasre* v. *State of Maharashtra,* AIR 1983 SC 378.
79. *Attorney-General* v. *Lachma Devi,* 1986 Cri L J 364.
80. *Olga Tellis* v. *Bombay Municipal Corporation,* AIR 1986 SC 180.
81. *M.C. Mehta* v. *Union of India,* AIR 1987 SC 965.
82. *Consumer Education and Research Center* v. *Union of India,* AIR 1995 SC 922.
83. *Common Cause* v. *Union of India,* AIR 1997 SC 1539.
84. *Vishaka* v. *State of Rajasthan,* AIR 1997 SC 3011.
85. *Police Commissioner, Delhi* v. *Registrar, Delhi High Court,* AIR 1997 SC 95.
86. *Lal Tiwari* v. *Kamala Devi* , AIR 2001 SC 3215.
87. *Batcha* v. *State,* (2011) 7 SCC 45.
88. See *Centre for Environment and Food Security* v. *Union of India,* 2011 (6) SCALE 212; *Chameli Singh* v. *State of Uttar Pradesh,* AIR 1996 SC 1051; *Kishen Patnaik* v. *State of Orissa,* AIR 1989 SC 677. See also Manoj Kumar Sinha, "Right to Food: International and National Perspectives" 56(1) *Journal of Indian Law Institute* (2014) pp. 47-61.
89. *Environmental and Consumer Protection Fund* v. *Delhi Administration,* 2011 (13) SCALE 503.
90. *Sampurna Behura* v. *Union of India,* 2012 (3) JCR 113 (SC).
91. *National Legal Services Authority* v. *Union of India* , AIR 2014 SC 1863.

have been held to be part of right to life and to be protected under human rights framework.[92]

All the aforementioned Constitutional rights are the elaboration of international human rights instruments ought to be applied in case of extradition. On the other hand, a number of Conventions on international criminal law establish explicitly the duty to prosecute or extradite.[93] These multilateral conventions also establish that they can be relied upon by states that require a treaty for extradition, and they serve as a basis for states that do not require a treaty as a legal basis for extradition. However, the duty to prosecute or extradite, even in the writings of scholars, is an imperfect obligation with respect to non-international crimes as domestic crimes require either the existence of extradition treaties, national legislation, or both. In the course of the evolution of international criminal law, the duty can also be construed as imperfect because it emerged on an ad hoc basis in international criminal law conventions; some conventions do not even explicitly state the duty. But after consistent reaffirmation of the duty to prosecute or extradite in conventional international criminal law, as discussed above, it can be argued that this principle constitutes an emerging customary duty. The duty itself has not been expressed with sufficient specificity to indicate whether it is an alternative or a coexistent duty. Whatever doctrine there is on the subject, it is unclear whether the duty to prosecute or extradite is disjunctive or coexistent.[94]

IV. CONTEMPORARY EXTRADITION LAW AND PRACTICE IN UK

(A) The Background

The contemporary extradition law in the United Kingdom (UK) is based on

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92. International human rights framework includes, *inter-alia*, the Universal Declaration of Human Rights, 1948; International Covenant on Civil and Political Rights, 1966; International Covenant on Economic, Social, and Cultural Rights, 1966. At present more than 100 international human rights instruments are working world over. See Jatindra Kumar Das, *Human Rights Law and Practice* (PHI Learning Private Ltd., Delhi, 2016).

93. See Cherif Bassiouni, "The Penal Characteristics of Conventional International Criminal Law," 15 *Case Western Reserve Journal of International Law* (1983) pp. 27-37.

94. For the extensive argument on the duty in extradition see Donna E. Arzt , "The Lockerbie 'Extradition by Analogy' Agreement: 'Exceptional Measure'or Template for Transnational Criminal Justice?," 18(1) *American University International Law Review* (2002) pp.163-236; Julian Schutte , "Transfer of Criminal Proceedings," 2 *International Criminal Law* (1999) pp. 643- 683; Christian Tomuschat , "The Lockerbie Case before the International Court of Justice," 48 *International Commission Jurists: The Review* (1992) pp. 38-48.

a historical practice through which it was agreed to delivery of fugitive offenders.[95] According to the contemporary law of extradition of UK, when a treaty has been made with a foreign State and the Extradition Acts have been applied by Order in Council, one of Her Majesty's principal Secretaries of State may, upon a requisition made to him by some person recognized by him as a diplomatic representative of that foreign State, by order under his hand and seal, signify to a police magistrate that such a requisition has been made and require him to issue his warrant for the apprehension of the fugitive criminal if the criminal is in or is suspected of being in, the United Kingdom. The warrant may then be issued by a police magistrate on receipt of the order of the Secretary of State and upon such evidence as would in his opinion justify the issue of the warrant if the crime had been committed or the criminal convicted in England.[96] However, in *R.* v. *Governo,*[97] *Armah* v. *Government*,[98] with all their political repercussions emphasized the need for the exclusion of political offences or offences of political character from extradition. Consequently, a legal scheme has been developed which provided: (i)The return of a fugitive offender will be precluded by law if the competent judicial or executive authority is satisfied that the offence is an offence of a political character; (ii) The return of a fugitive offender will be precluded by law if it appears to the competent judicial or executive authority- (a) that the request for his surrender although purporting to be made for a returnable offence was in fact made for the purpose of prosecuting or punishing the person on account of his race, religion, nationality or political opinions, or (b) that he may be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions. In the light of the aforesaid cases and the recommendations of the scheme to exempt the persons accused or convicted of political offences or offences of political character from extradition, these statutes have included in their provisions that a person demanded shall not be returned to the requesting state if in the opinion of the executive or the court of the state of asylum, the offence, of which he is accused or was convicted, is an offence of a political character or where the request for extradition of a person

95. See E. Hartley Booth, *British Extradition Law and Procedure* (Sijthoff and Noordhoff, Netherlands, 1980); H. C. Biron and K. E. Chalmers, *Law and Practice of Extradition* (Stevens and Son, London, 1903).
96. See *Halsbury's Laws of England*, (Butterworths, London, 2007, Vol. 18) para.1161.
97. See *R.* v. *Governor of Brixton Prison,* (1963) 2 Q.B. 45.
98. See *Armah* v. *Government of Ghana*, (1966) 2 All E.R. 1006.

is made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions.[99] It is true, that there is no fundamental agreement among governments and domestic tribunals as to precisely what constitutes a political offence or an offence of a political character. It is, however, accepted that for an offence to be political it must be part and parcel of an organised movement to overthrow the established government.

In the 1970s and 1980s controversy arose with the UK over judicial versus executive powers in connection with the United Kingdom's extradition request for persons charged with violent crimes in connection with the conflict in Northern Ireland.[100] The English law in the matter of treaty-making can better be set out in the words of Privy Council in its celebrated decision of 1937 in *Attorney General for Canada* v. *Attorney General for Ontario*.[101] In this case the court observed that there is clean distinction between (i) the formation, and (ii) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign States. Within the British Empire there is a well-established rule that the making of a treaty is an Executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. Parliament, no doubt, has a constitutional control over the Executive; but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the Executive alone. Once they are created, while they bind the State as against the other contracting parties, Parliament may refuse to perform them and so leave the State in default. In a unitary State whose Legislature possesses unlimited powers, the problem is simple. Parliament will either fulfil, or not, treaty obligations imposed upon the State by its Executive. The nature of the obligations does not affect the complete authority of the Legislature to make them law if it so chooses.[102]

Unlike the law relating to extradition treaties of United States America (USA), the English law of extradition treaties is based on Parliamentary legislation. Thus, the principle in English law provides that in case of conflict between the British

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99. See *Re Government of India and Mubarak Ali Ahmed,* (1952) 1 All E.R. 1060.
100. See *In re* Mackin, 668 F.2d 122 (2d Cir. 1981).
101. 1937 AC 326.
102. The decision was based on Section 92 of the British North America Act, 1867.

statutes and the provisions of a extradition treaty, the former will prevail. Whenever the Parliament undertakes legislation to give effect to an international convention it shall be presumed that Parliament intends to fulfil the international obligations undertaken by the States. However, in 1967 in *Salomon* v. *Commissioner of Customs and Excise*,[103] the English Court observed that such presumption is permissible only where the terms of legislation are not clear and are capable of more than one meaning and further where there is cogent extrinsic evidence showing that the enactment was intended to fulfil obligations under a particular convention. Subsequently, in 1985 Lord Fraser observed in *CCSU* v. *Minister for Civil Service*,[104] that "Conventions are not part of law in this country". Thus the English courts have consistently taken the view that in so far as the provisions of international treaties are concerned, they can be taken into account in the course of interpreting and applying British statutes and thus the courts have taken into account the treaty-based standards to resolve the issues of common law including legality of freedom of association,[105] contempt of court,[106] and telephone tapping.[107] The legal position in English law has further been explained and clarified by the House of Lords in 1990 in *J. H. Rayner Limited* v. *Department of Trade and Industry*,[108] thus:

> "The Government may negotiate, conclude, construe, observe, breach, repudiate or terminate a treaty. Parliament may alter the laws of the United Kingdom. The courts must enforce those laws; judges have no power to grant specific performance of a treaty or to award damages against a sovereign state for breach of a treaty or to invent laws or misconstrue legislation in order to enforce a treaty."

(B) Human Rights Protection in Extradition

The extradition law is an amalgam of international and national law. Normally in extradition law the requested State is to follow the rule of Non-Inquiry which means that the requested State is not to normally make inquiry about the nature of criminal justice system in the requesting State. The actual conduct of trial of

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103. 1967 (2) QB 116.
104. 1985 AC 374.
105. See *Cheall* v. *Association of Professional Executive*, 1983 (2) AC 180.
106. See *Attorney General* v. *BBC*, 1981 AC 303.
107. See *Malone* v. *Metropolitan Police Commissioner*, 1979 (1) Ch. 344.
108. 1990 (2) AC 418.

the extradited accused is left to the criminal jurisprudence followed in the requesting State. This rule of Non-Inquiry is a well developed norm both in India, England, Canada and in America.[109] In the context of extradition law, which is based on international treaty obligations, it must be keep in mind the emerging Human Rights movements in the post World War II scenario and at the same time the need to curb transnational and international crime. The conflict between these two divergent trends is sought to be resolved by expanding the network of bilateral and multilateral treaties to outlaw transnational crime on the basis of mutual treaty obligation. In such a situation there is obviously a demand for inclusion of Human Rights concerns in the extradition process and at the same time garnering more international support and awareness for suppression of crime. A fair balance has to be struck between Human Rights norms and the need to tackle transnational crime. This is best summed up in the leading decision of European Court of Human Rights rendered in *Soering* v. *United Kingdom*,[110] as follows:

> "The whole of the Convention (European Convention on Human Rights) is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interests of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases."

The extradition law, therefore, has to be an amalgam of international and national law. Normally in extradition law the requested State is to follow the rule of Non-Inquiry which means that the requested State is not to normally make

109 See *Canada* v. *Schmidt,* (1987) 1 SCR 500.
110. 1989 (11) EHRR 439.

inquiry about the nature of criminal justice system in the requesting State. In the context of extradition law, which is based on international treaty obligations, we must keep in mind the emerging human rights movements in the post World War II scenario and at the same time the need to curb transnational and international crime. The conflict between these two divergent trends is sought to be resolved by expanding the network of bilateral and multilateral treaties to outlaw transnational crime on the basis of mutual treaty obligation. In such a situation there is obviously a demand for inclusion of human rights concerns in the extradition process and at the same time garnering more international support and awareness for suppression of crime. A fair balance has to be struck between human rights norms and the need to tackle transnational crime.[111]

(C) New Dimensions of Extradition Law

Recently, the United Kingdom has enacted the Extradition Act 2003,[112] through which in UK has introduced a "fast-track" extradition programme. This development in extradition law in UK has evidenced a decline in the significance of the double criminality principle and removes the principle entirely in relation to certain types of crimes. This system would allow extradition from the UK for persons sentenced for offences carrying a maximum sentence of one year or more, without any requirement that they are also offences in the UK. The rationale for this development was given in a Home Office discussion paper: "We considered that it was not necessary to retain the requirement for the offence to be an offence in both the requesting and requested country (dual criminality). This was thought to be an inappropriate judgement on the criminal justice systems of our European partners. If an offence is a crime on the statute book of our European partners then the UK should respect that." [113] The Extradition Act 2003 clearly explained the extradition to category 1 territories,[114] warrant and certificate,[115] arrest under certified warrant, [116] person arrested under warrant,

111. See *Abu Salem Abdul Qayoom* v. *State of Maharashtra*, (2011) 11 SCC 214: 2010 (9) SCALE 460.
112. Extradition Act 2003, Chapter 41. The 2003 Act entered into force on 1 January 2004. 2004. Extradition requests submitted to the United Kingdom before that date are dealt with under the Extradition Act 1989: Extradition Act 2003 (Commencement and Savings Order 2003) (SI 2003/3103).
113. See UK Home Office, *The Law on Extradition: A Review* (2001) at p. 21.
114. Section 1, Extradition Act 2003.
115. Ibid., Section 2.
116. Ibid., Section 3.

[117] provisional arrest, [118] initial hearing, [119] extradition hearing.[120]

However, the 2003 Act imposes bars to extradition by reason of: (a) the rule against double jeopardy; (b) extraneous considerations; (c) the passage of time; (d) the person's age; (e) hostage-taking considerations; (f) speciality; (g) the person's earlier extradition to the United Kingdom from another category 1 territory; (h) the person's earlier extradition to the United Kingdom from a non-category 1 territory. A person's extradition is barred by reason of the rule against double jeopardy if (and only if) it appears that he would be entitled to be discharged under any rule of law relating to previous acquittal or conviction on the assumption: (a) that the conduct constituting the extradition offence constituted an offence in the part of the United Kingdom where the judge exercises jurisdiction; (b) that the person were charged with the extradition offence in that part of the United Kingdom.[121]During the time of extradition hearing a number of other considerations have to be taken into account such as (i) extraneous considerations, [122] (ii) passage of time, [123] (iii) age, [124] (iv) hostage-taking considerations, [125] (v) earlier extradition to United Kingdom, [126] (vi) case where person has been convicted, [127] (vii) matters arising before end of extradition hearing, [128] and (viii) appeal. [129]

The 2003 Act also provides for speciality rule for certain classes of offences. These offences are: (a) the offence in respect of which the person is extradited; (b) an extradition offence disclosed by the same facts as that offence; (c) an extradition offence in respect of which the appropriate judge gives his consent under Section 55 to the person being dealt with; (d) an offence which is not punishable with imprisonment or another form of detention; (e) an offence in respect of which the person will not be detained in connection with his trial,

117. Ibid., Section 4.
118. Ibid., Sections 5-6.
119. Ibid., Sections 7-8.
120. Ibid., Sections 9-10.
121. Ibid., Section 12.
122. Ibid., Section 13.
123. Ibid., Section 14.
124. Ibid., Section 15.
125. Ibid., Section 16.
126. Ibid., Sections 18-19.
127. Ibid., Section 20.
128. Ibid., Sections 22-24.
129. Ibid., Sections 26-34.

sentence or appeal; (f) an offence in respect of which the person waives the right that he would have (but for this paragraph) not to be dealt with for the offence.[130] The 2003 Act provides the guarantee of human rights. Thus, (i) if the judge is required to proceed under this section (by virtue of Section 11 or 20) he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998, (ii) if the judge decides the question in the negative he must order the person's discharge; (iii) if the judge decides that question in the affirmative he must order the person to be extradited in which the warrant was issued; (iv) if the judge makes an order he must remand the person in custody or on bail to wait for his extradition, (vi) if the judge remands the person in custody he may later grant bail. [131]

The aforementioned developments of extradition law in UK is appropriate in the circumstances of relatively 'homogeneous' state, where the degree of integration ensures a high level of familiarity with the legal systems of member States, and where common legal standards with accompanying enforcement mechanisms, such as the Human Rights Act 1998 ensures clear safeguards against potential abuses. The abandonment of the double criminality principle is clearly less appropriate where such commonality is absent. This obvious difference was recognised by the UK Government, which did not recommend the elimination of the double criminality requirement in its extradition relations with states outside the EU.[132] However, the English development on extradition is to some extent different from Australian development on extradition under the Australian Extradition Act 1988. In America the law of extradition is fully regulated through the Constitution of the America.

V. CONCLUSION

As a result of the development of extradition in international law, the law of extradition has become a major element of international cooperation in combating crime, particularly transnational crimes such as drug trafficking and terrorism etc. and thus a general framework of law of extradition has been

130. Ibid., Section 17.

131. Ibid., Section 21.

132. See Gavan Griffith QC and Claire Harris, "Recent Developments in the Law", Op. Cit. at p. 10.

emerged.[133] It is a matter of fact that in a world of increased mobility, interactive technology and new forms of criminality, extradition represents an essential response to the characteristics of contemporary crime. It has been estimated that on the issue relating to extradition there are 500 to 750 bilateral treaties in force, whereas if members of the United Nations were bound by a network of such treaties, there should be more than 14000 such agreements. Of the bilateral treaties in force, most are obsolescent, limited as to the scope of offences reached, and hampered by excessive procedural requirements.[134] However, the alternative of extradition by reciprocity is no solution, even where it is legal, because it neither involves the factor of scorekeeping nor does it prevent the extradition magistrate's problem of interpreting the domestic law of the requesting state in order to determine whether the requirement of double criminality has been satisfied. The framework of extradition treaties is to be considered with the issue of state succession to extradition treaties as the principal rules and practices of international extradition constitute a significant body of international law.

It is the general question of law of extradition that what principle would be applied in case of double criminality and *prima facie* case? The double criminality, or dual criminality, is a requirement in the extradition law of many countries. It states that a suspect can be extradited from one country to stand trial for breaking a second country's laws only if a similar law exists in the extraditing country. The double criminality rule applies and the surrender pursuant to the arrest warrant can be subject to the condition that the act constitutes an offense under the law of the executing member state.[135] It, however, would be erroneous to take the view that the safeguards mentioned above were precisely meant to protect human rights of fugitives.[136] Like the rule of speciality, the right to a fair trial is well established in international human rights law. Fairness in judicial proceedings is required by Article 14(1) of the 1966 International Covenant on Civil and Political Rights which states: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." However, it is a matter of fact that not all human rights violations can

133. Ibid., at p. 34.

134. See I. A. Shearer, *Extradition in International Law*, Op. Cit. at p. 2.

135. See Sharon A. Williams, "The *Double Criminality Rule* and Extradition: A Comparative Analysis," 15(2) *Nova Law Review* (1991) pp. 581-624.

136. John Dugard and Christine van den Wyngaert, "Reconciling Extradition," Op. Cit. at p. 188.

qualify as potential obstacles to extradition. There is no certainty about the content and scope of the rights that are most likely to block extradition. There are some human rights violations that may be absolute obstacles to extradition (such as torture), or that may in appropriate circumstances thwart extradition (such as the denial of a fair trial). Nevertheless, the inevitable conclusion to be drawn from extradition practice is that, despite the link between human rights and extradition, no general human rights exception exists.

A large number of rights of victims are recognised and applied in criminal cases which are constitutionally approved substantive rights but they are not applied in extradition cases as there is specific legislation in India such as Extradition Act 1962. The English Extradition Act 1989 was considered not up to the mark and thus it was realized that the law should provide a quick and effective framework to extradite a person to the country where they are accused or have been convicted of a serious crime providing that this does not breach their fundamental human rights. Consequently, the Extradition Act 2003 was enacted by repealing the 1989 Act which acknowledged extradition as an important tool in dealing with crime internationally; it emphasised that no one should be able to escape justice simply by crossing a border. The 2003 Act sought to provide a quick and effective framework for the extradition of a requested person to the issuing state, provided this does not breach his or her fundamental human rights. Unlike the UK, in the USA the Constitution provides outer framework of law relating to extradition.

The USA achieved independence from UK in 1776. Hence the UK's extradition relationship with the USA deserves particular attention because of its political importance and the volume of extradition traffic between the two countries. The Constitution of USA vested the extradition treaty making power up on the President and Senate.[137] In fact the extradition relations between the USA and UK began with the Treaty of Amity, Commerce and Navigation with Great Britain of 1794. The Article X of this Treaty provided that the extradition shall only be done upon such evidence of criminality as according to the laws of the place where the fugitive or person so changed shall be found would justify his apprehension and commitment for trial, if the crime or offence had had there be committed. The Treaty on Extradition between the government of USA,

137. For detail see Oona A. Hathaway, Spencer Amdur, Celia Choy, Samir Deger-Sen, John Paredes, Sally Pei and Haley Nix Proctor, "The Treaty Power: Its History, Scope, and Limits," 98 *Cornell Law Review* (2013) pp. 239-326; L. L. Thompson, "State Sovereignty and the Treaty-Making Power," 11(4) *California Law Review* (1923) pp. 242-258.

UK and Northern Ireland was signed on March 31, 2003. The Article 8 of the Treaty is most controversial which has the effect of relieving the USA of obligation of supplying evidence to the UK in order to secure extradition whilst at the same time requiring the UK to supply to the USA, where it seeks a defendant's extradition such information as would provide a reasonable basis to believe that the person sought to committed the offence for which extradition is requested.[138] It can also be noted that in *R (Norris)* v. *Secretary of State for the Home Department*,[139] observed that there is at present a lack of symmetry of law extradition between the USA and UK. The Extradition Treaty between the Government of Republic of India and the Government of the USA entered into on 21st July, 1999.[140] By reason of Article 1 thereof the Contracting States agreed to extradite to each other, pursuant to the provisions thereof, persons who, by the authorities in the requesting State are formally accused of, charged with or convicted of an extraditable offence, whether such offence was committed before or after the entering into force of the Treaty.

The duty to extradite by virtue of a treaty, whether bilateral or multilateral, is the most common basis for the practice among States besides the reciprocity and comity. Thus, under the Australian Extradition (Foreign States) Act 1974[141] the treaty, reciprocity and comity used as legal bases of extradition. Thus, according to the 1974 Act of Australia a non-treaty state may be granted or be requested extradition that authorizes and provides the framework, substantive conditions, exceptions, and procedures inherent in it.[142] For extradition the USA[143] requires a treaty, as does the UK[144] and most common law countries. However, Canada permits extradition without the need for a formal treaty, while India requires a treaty.[145] Nevertheless, in Australia there are two legislations such as (i) the Geneva Conventions Act, 1957, and (ii) the War Crimes Act, 1945, provide

138. See *Ahmad* v. *Government of the United States of America,* [*2006*] EWHC 2927 (Admin) para. 12.

139. [2006] EWHC 280 (Admin), para 34.

140. The Treaty was published in the Official Gazette of the Government of India, dated 14th September, 1999.

141. No. 21 of 1974.

142. See Ivan A. Shearer, "Extradition without Treaty ", 49 *Australian Law Journal* (1975) at p. 116.

143. See *United States* v. *Fernandez-Morris*, 99 F. Supp. 2d 1358 (S. D. Fla. 1999).

144. See V. E. Hartley-Booth, *British Extradition Law and Procedure* (Sijthoff and Noordhoff, Netherlands, 1980).

145. See *Babu Ram Saksena* v. *The State*, 1950 SCR 573.

for universal jurisdiction for "grave breaches." The Australian Extradition Act 1988[146] requires a state requesting extradition to provide, amongst other documents, "a duly authenticated statement in writing setting out the conduct constituting the offence."[147] Thus, a uniform law on extradition is to be developed so that the basic principles of human rights which have been recognised for victims are respected by all states while dealing with extradition cases.

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146. Act No. 4 of 1988.

147. Extradition Act 1988, Section 19(3)(c)(ii).

COMPENSATORY OR REVERSE DISCRIMINATION? : THE INDIAN EXPERIENCE[#]

G. B. REDDY*

ABSTRACT : The Constitution of India contains fundamental rights guaranteed to citizens and persons as well under Part III.The system of reservations in post-colonial India is designed to give reserve opportunities and provide a voice for historically disadvantaged. The idea behind reservation has been to disavow caste-monopoly in the different sectors. Nothing in these Articles shall prevent the State from making any provision for the reservation in providing opportunities to the deprived class of citizens which, in the opinion of the State, is not adequately represented in the various sphere running under the State. In this paper a modest attempt is made to visualize the Indian experience on the issue of reservation. .

KEY WORDS : Equality, Constitution of India, Compensatory Discrimination, Reservation, Untouchability.

I. INTRODUCTION

India has been under the foreign rule for several centuries. It was ruled by Muslim rulers and later by the Britishers who probably never understood the ethos of real India and its culture. Ultimately when the country got its independence in 1947, it inherited a deeply divided and compartmentalized society on grounds like religion, race and caste. Caste has been a curse of India which initially had its roots in the professions and occupations practiced by the people. Later on either due to the preaching of certain ancient law givers or the 'divide and rule policy' of the foreign rulers, the entire country has been

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divided on caste lines thereby tearing the social fabric of the country into bits and pieces. Today it has become a menace in the country and has assumed dangerous proportions not only in private but also in the public life.

Caste system[1] as it prevails today in India has been one of the vested interests in almost all the fields .In the immediate aftermath of independence, the caste was not such a powerful force though its importance was recognized by many philosophers and intellectuals like Mohandas Karamchand Gandhi, the father of the nation, Dr. B. R. Ambedkar, the messiah of the downtrodden and weaker sections and many other social reformers. Dr. Ambedkar, who was the chairman of the Drafting Committee that shaped the Indian Constitution, was instrumental in incorporating number of provisions in the Constitution to eradicate the evil effects of the caste in all fields.

II. RIGHT TO EQUALITY

The Constitution of India contains six fundamental rights guaranteed to citizens and persons. The first among them is the right to equality enshrined in Article s 14 to 18. Article 14 provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Article 15 envisages prohibition of discrimination against any citizen on grounds of religion, race, caste, sex or place of birth. Article 16 guarantees equality of opportunity in matters of public employment. Article 17 abolishes untouchability and Article 18 abolishes titles. Apart from the above rules, there are a certain exceptions to the same incorporated in Clauses (3) to (6) under Article 15 and Clauses (3) to (6) under Article 16.These exceptions recognize what is popularly known as the protective discrimination and compensatory discriminations. In other words the right to equality has been subjected to certain

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1. The caste system in India is the paradigmatic ethnographic example of caste. It has origins in ancient India, and was transformed by various ruling elites in medieval, early-modern, and modern India, especially the Munhall Empire and the British Raj. It is today the basis of educational and job reservations in India and a powerful factor even in the democratic system of elections. There are four essential features of the caste system (i) hierarchy (ii) commensality (iii) restrictions on marriage and (iv) hereditary occupation. Most of the caste is endogamous groups. See for Supreme Court's view *K.C.Vasantha Kumar v. State of Karnataka*, AIR 1985 SC 1495
   See NALSA v.Union of India (2014) 5 SCC 438 decided on 15th April 2014 and also *Naz Foundation* case relating to the sexual rights of Gays and Lesbians as decided by the Delhi High Court on 02nd July 2009 and reversed by the Supreme Court in 2013.

well justified exceptions in the larger interest of the weaker sections of the society which suffered discrimination for many centuries due to various reasons.

The Courts in India have interpreted the equality related principles in number of landmark cases. As a result, today equality doesn't mean absolute or mathematical equality but equality among equals. It is subject to reasonable classification based on intelligible differentia and reasonable nexus. It also encompasses the *r*ule against arbitrariness, the doctrine of legitimate expectation, gender equality and means of achieving it[2]. In so far as the removal of discrimination is concerned ,the Constitution contains number of provisions like the Preamble aiming for equality of status and opportunities, equality before law and equal protection of laws under Article 14,prohibition of discrimination by State generally under Article 15 ,equality of opportunity in public employment under Article 16 ,abolition of untouchability under Article 17, and abolition of titles under Article 18.

III. COMPENSATORY DISCRIMINATION UNDER INDIAN CONSTITUTION

Originally, the Constitution of India contained only few exceptions to the right to equality. They include Article 15(3) providing for making special provisions for women and children, Article 16(3) enabling the State to give preference to residence in matters of public employment,16(4) enabling the State to make any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State, and Article 16(5) providing for confining certain public religious posts to the members of the concerned religion. Outside the Part on fundamental rights, Part XVI of the Constitution contains certain special provisions relating to certain classes which included Article 330 providing for the reservation of seats in the Lok Sabha for Scheduled Castes and Scheduled Tribes, Article 331which provided representation of the Anglo-Indian Community in Lok Sabha, Article 332 which provides for reservation of seats for the Scheduled Castes and the Scheduled Tribes in the Legislative Assemblies of the States, Article 335 which directs the state to acknowledge the claims of the SCs/STs while 'making appointments to posts

2. See *NALSA v.Union of India* (2014) 5 SCC 438 decided on 15th April 2014 and also *Naz Foundation* case relating to the sexual rights of Gays and Lesbians as decided by the Delhi High Court on 02nd July 2009 and reversed by the Supreme Court in 2013.

and services' but consistent with the concerns of efficiency, and Articles 341 and 342 which enabled the President to specify SCs and STs etc. This list is only illustrative in nature.

Subsequently, several amendments have been made to the Constitution to ensure social justice to the weaker sections of the society, either in response to public demand or to nullify certain judgments of the courts. These subsequent changes include-

* Special provisions for advancement of Socially and Educationally Backward Classes of Citizens (SEBCs), Scheduled Castes(SCs) and Scheduled Tribes(STs) under Article 15(4)[3]
* reservations for SEBCs, SC & ST in admissions into public and private educational institutions under Article 15(5)[4]
* Article 15 (6) intended to provide reservations to economically weaker sections for admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions[5]
* Article 16(4-A) enabling reservation in promotions for SC and ST employees under the Government[6], and further for protecting consequential seniority[7]
* Article 16(4-B) for enabling making special recruitment drives by exceeding the ceiling on quantity of reservations for SC and ST candidates[8]
* Article 16 (6) added to provide reservations to people from economically

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3. To overcome the difficulty created by the Madras High Court judgment which was confirmed by the Supreme Court in *State of Madras v. Champakan Dorairajan* AIR 1951 SC 226 and inserted by the Constitution (First Amendment) Act, 1951
4. Ins. by the Constitution (Ninety-third Amendment) Act, 2005
5. Ins. by the Constitution (One Hundred and Third Amendment) Act, 2019
6. Ins. by the Constitution (Seventy-seventh Amendment) Act, 1995
7. Subs. by the Constitution (Eighty-fifth Amendment) Act, 2001. It was inserted to dilute the ratio of the judgment in the landmark judgment of *Indra Sawney v.Union of India* popularly known as the Mandal Commission judgment where in it was declared that the reservations shall be applicable only at the entry level of the government post and not in promotions thereafter
8. Ins. by the Constitution (Eighty-first Amendment) Act, 2000. To overcome the difficulty due to the limit of 50% on reservations as laid down in *M R Balaji v. Mysore* AIR 1963 SC 649 and reiterated in many subsequent cases like the Mandal Commission case. This rule allows the government to get exemption from that rule by "carrying forward" unfilled reserved posts from one year to the next.

weaker sections in government posts[9]

* Addition of Proviso to Article 335 for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters or promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State[10]
* Article 338A providing for establishment of a separate National Commission for Scheduled Tribes[11]
* Article 338B to establish a National Commission for Backward Classes for the socially and educationally backward classes by conferring constitutional status on it[12], and
* Article 342A to empower the Parliament to specify Socially and Educationally Backward Classes[13] etc.

It may be noted that the beneficiaries of protective discrimination in India include Women, Children, Physically Challenged, Displaced persons, Victims of pollution etc. The expression 'protective discrimination' is justified in their context as they are perceived to be weak and need protection from the State. As regards the Compensatory Discrimination, the beneficiaries include SCs, STs, SEBCs and Other Backward Classes. This nomenclature is used probably to denote that they are being compensated for the discrimination suffered by their ancestors for generations together and with a view to compensate them now in the form of the concessions, exceptions and other similar benefits.

The areas of Compensatory Discrimination include education, employment, legislatures and Government welfare schemes .The forms of compensatory discrimination include reservations, preferences, financial help, housing allotment, fee waiver/exemption/concession, lowering minimum qualifying marks, and exemption from passing departmental tests to get promotion in government jobs. This list however is only illustrative in nature.

IV. COMPENSATORY DISCRIMINATION AND JUDICIAL RESPONSE

There are number of contentious issues relating to compensatory

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9. Ins. by the Constitution (One Hundred and Third Amendment) Act, 2019
10. Ins. by the Constitution (Eighty-second Amendment) Act, 2000.
11. Ins. by the Constitution (Eighty-ninth Amendment) Act, 2003
12. Ins. by the Constitution (One Hundred and Second Amendment) Act, 2018
13. Ibid.,

discrimination, its policies, its justification, identification of backwardness and the role of caste or class, duration & extent [width] of reservation, entitlement to benefits, carry forward rule, reservations in promotions, inter-caste marriages and impact, *creamy layer* and the conflict of merit versus social justice. As there is no scientifically quantifiable data to identify social and economic backwardness of the people in India, the Governments of the day always followed an *ad hoc* mechanism which is influenced more by political factors and less by the urge to address the real problem of backwardness[14]. This appears to be the crux of the issue.

A look at a catena of decisions shows that the judiciary is the only organ which tried to be objective in its response to compensatory discrimination. In *Champakam Dorairajan's case*[15], the apex court had rightly confirmed the decision of the Madras High Court in invalidating compensatory discrimination in admission into government educational institutions on the ground of caste alone. This decision led to insertion of Article (4) which provides for an exception in case of making special provisions for SCs, STs and SEBCs by way of the first amendment to the Constitution. . It was followed by *M.R.Balaji v. State of Mysore*[16] wherein the apex court held that the total extent of reservations shall not exceed 50% thereby keeping at least the remaining 50% open to all categories purely based on merit. The impugned order categorized the backward classes on the sole basis of caste which is not permitted by Article 15 (4). The reservation of 68% seats is inconsistent with the concept of the special provision authorized by Article 15 (4). The apex court ruled that reservations under Arts. 15 (4) and 16(4) must be within reasonable limits. The interests of weaker sections of society, which are a first charge of the States and the Centre, have to be adjusted with the interests of the community as a whole. Speaking generally and in a broad way, a special provision should be less than 50%. The actual

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14. Justice Desai had observed in *K.C.Vasantha Kumar* in Paragraphs 377 D to G as under:- For a period of three and half decades, the unending search for identifying socially and educationally backward classes of citizens has defined the policy makers, the interpreters of the policy as reflected in statutes or executive administrative orders and has added a spurt in the reverse direction, namely, those who attempted to move upward (Pratilom) in the social hierarchy have put the movement in reverse gear so as to move downwards (Anulom) in order to be identified as a group or class of citizens socially and educationally backward. The Constitution promised an egalitarian society; it was a caste ridden stratified hierarchical society. Therefore, in the early stages of the functioning of the Constitution it was accepted without dissent or dialogue that caste furnishes a working criterion for identifying socially and educationally backward class of citizens for the purpose of Article 15(4).

percentage must depend upon the relevant prevailing circumstances in each case.

In *Devadasan V. Union of India*[17], the Supreme Court invalidated the *Carry Forward* rule which enabled the unfilled reserved posts under a particular employment notification to be carried forward to the next notification.

In *K. C. Vasanth Kumar v. State of Karnataka*[18] the Supreme Court laid emphasis on means test and also time limit for reservations. The court held that:

1. The reservation in favor of scheduled castes and scheduled tribes must continue as to present, there is, without the application of a means test, for a further period not exceeding fifteen years. Another fifteen years will make it fifty years after the advent of the Constitution, a period reasonably long for the upper crust of the oppressed classes to overcome the baneful effects of social oppression, isolation and humiliation.

2. The means test, that is to say, the test of economic backwardness ought to be made applicable even to the Scheduled Castes and Scheduled Tribes after the period mentioned in (1) above. It is essential that the privileged section of the underprivileged society should not be permitted to monopolize preferential benefits for an indefinite period of time.

3. In so far as the Other Backward Classes are concerned, two tests should be conjunctively applied for identifying them for the purpose of reservations in employment and education: One, that they should be comparable to the Scheduled Castes and Scheduled Tribes in the matter of their backwardness; and two, that they should satisfy the means test such as a State Government may lay down in the context of prevailing economic conditions.

4. The policy of reservations in employment, education and legislative institutions should be reviewed every five years or so. That will at once afford an opportunity (i) to the State to rectify distortions arising out of particular facts of the reservation policy and (ii) to the people, both backward and, non-358 backward, to ventilate their views in a public debate on the practical impact of the policy of reservations.

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15. Supra
16. AIR 1963 SC 649
17. AIR 1964 SC 179
18. AIR 1985 SC 1495 , per Justice Chandrachud.

Then came the *Mandal* case i.e., *Indra Sawney v.Union of India*[19] which has changed the way the Indian society considered the caste. A nine judges bench of the Supreme Court held in this landmark judgment that-

(1) Caste[20] is the primary factor in determination of class under Articles 15(4) and 16 (4),

(2) The total extent of reservation shall not exceed 50%,

(3) The advanced sections among the Backward Classes christened as Creamy Layer should be excluded from the purview of reservations, and

(4) Reservations in promotions in government jobs are unconstitutional etc.

This judgment appears to have divided not only the Indian society but also the judges some of whom went overboard to emphasize the importance of caste rather than the class or individual as the units for determining reservations. In a way this judgment which was split in the ratio of 6:3 had also split the social fabric of India. It has caused an unhealthy race among the Indian people to vie for the backward status either by hook or crook. In *Valsamma Paul v.Cochin University*[21] , a Syrian Catholic (a forward class), having married a Latin Catholic (Backward Class) claimed BC status to get appointed as lecturer in a university. She argued that a husband and wife are one under the law, and so long as the wife survives, she is half of the husband, thereby acquiring his social status as well[22] . K. Ramaswami J. who delivered the judgment held in this case as under:

"The recognition of the appellant as a member of the Latin Catholic would not, therefore, be relevant for the purpose of her entitlement to the reservation under Article 16(4), for the reason that she, as a member of the

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19. AIR 1993 SC 477

20. The caste system in India is an important part of ancient Hindu tradition and dates back to 1200 BCE. The term caste was first used by Portuguese travelers who came to India in the 16th century. Caste comes from the Spanish and Portuguese word "casta" which means "race", "breed", or "lineage". Many Indians use the term "jati". There are about 3,000 castes and 25,000 sub castes in India, each related to a specific occupation. In the good old days these different castes fell under four basic *varnas*: Brahmins—priests & teachers, Kshatryas—warriors & rulers, Vaishyas— farmers, traders & merchants and Shudras—laborers.At present this four-fold classification is no more relevant.

21. AIR 1996 SC1011

22. She relied upon two judgments Mussumat Bhoobun Moyee Debia v. Ramkishore Achari Chowdhary (1865) 10 MIA 279 , and Lallu Bhoy v. Cassibai (1979-80) 7 IA 212.

forward caste, had an advantageous start in life and after her completing education and becoming major, married Yesudas; and so, she is not entitled to the facility of reservation given to the Latin Catholic, a backward class" (Para 36).

Similarly in another interesting case, a lady elected as a member of State Legislature claimed the status of Scheduled Tribe by branding herself as an illegitimate child of the Scheduled Tribe father[23].The apex court was a little perplexed by the turn of events and observed that:-

Before we part with this case, we wish to express our dismay at the extent to which a person could go to sustain her seat in the legislature. The appellant brands her five siblings and herself as bastards, and her mother a concubine. We desist from making any further observations on this aspect.'[24]

It would thus be clear that there are attempts of transplantation of forward classes to backward classes. Instead of integrated forward march, it is a retrograde reverse march from forward to backward status to claim reservations. In *Dr.Preeti Sreevastava v.State of MP*[25] ,the Supreme Court invalidated the disproportionate relaxation of minimum qualifying marks for admission into super-specialty courses in medicine by holding that-

In the present case, the disparity of qualifying marks being 20% for the reserved category and 45% for the general category is too great a disparity to sustain public interest at the level of post-graduate medical training and education. Even for the M.B.B.S. course, the difference in the qualifying marks between the reserved category and the general category is smaller, 35% for the reserved category and 45% for the general category. We see no logic or rationale for the difference to be larger at the post-graduate level.

Constitutional validity of Articles 16(4-A) and 16(4-B) was challenged before a Constitution Bench in 2006, in *M. Nagaraj v. Union of India*[26] as violative of basic structure of the Constitution. Along with 16(4-A) and (4-B), the petitioners also challenged the 82nd Constitution Amendment, which had amended Article 335. Apex court held that-

* "equality" is the essence of democracy and, accordingly a basic feature of the Constitution.

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23. Sobha Hymavathi Devi v Setti Gangadhara Swamy & Ors. Decided on 28 January, 2005 by the Supreme Court.
24. Para 12
25. (1999) 7 SCC 120
26. AIR 2007 SC 71

* reservation is necessary for transcending caste and not for perpetuating it. Reservation has to be used in a limited sense otherwise it will perpetuate casteism in the country. Reservation is under-written by a special justification.

* appropriate Government has to apply the cadre strength as a unit in the operation of the roster in order to ascertain whether a given class/group is adequately represented in the service. The cadre strength as a unit also ensures that upper ceiling-limit of 50% is not violated. Further, roster has to be post- specific and not vacancy based.

·* there is no violation of the basic structure by any of the impugned amendments, including the Constitution (Eighty-Second) Amendment Act, 2000. The constitutional limitation under Article 335 is relaxed and not obliterated. As stated above, be it reservation or evaluation, excessiveness in either would result in violation of the constitutional mandate. This exercise, however, will depend on facts of each case

* Social justice is concerned with the distribution of benefits and burdens. The basis of distribution is the area of conflict between rights, needs and means. These three criteria can be put under two concepts of equality, namely, "formal equality" and "proportional equality". Formal equality means that law treats everyone equal. Concept of egalitarian equality is the concept of proportional equality and it expects the States to take affirmative action in favor of disadvantaged sections of society within the framework of democratic polity.

* the ceiling-limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse.

* The State is not bound to make reservation for SC/ST in matter of promotions. However if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance of Article 335. It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling-limit of 50% or obliterate the creamy layer or extend the reservation indefinitely.

Subject to above, the court upheld the constitutional validity of the

Constitution (Seventy-Seventh Amendment) Act, 1995, the Constitution (Eighty-First Amendment) Act, 2000, the Constitution (Eighty-Second Amendment) Act, 2000 and the Constitution (Eighty-Fifth Amendment) Act, 2001.

In *Ashoka Kumar Thakur vs. Union Of India*[27], the 93rd Constitutional amendment which inserted Article 15(5) was upheld and it was also held that the "Creamy Layer" among Backward Classes is to be excluded from SEBCs for availing any benefits of reservation.

Yet another contentious issue emerging now in the present context is reservations for Muslims. In *B. Archana vs State of A.P*[28] , the Andhra Pradesh State reservation of seats in the educational institutions and of appointments or posts in the public services under the State to Muslim Community were held unconstitutional and void as the same were based on the ground of religion[29].There are many other judgments relating to reservations in promotions, roster points and accelerated promotions etc that highlight the over enthusiasm of the State in using the concept of affirmative action mostly for political purposes[30].

One noticeable trend in recent times is the clamor of certain general categories for including certain communities in the OBC category, to avail the benefit of reservations[31]. In *Ram Singh v Union of India*[32] the facts were as under. Pursuant to several requests received from individuals, organizations and associations for inclusion of *Jats* in the Central List of Backward Classes for the States of Haryana, Rajasthan, Madhya Pradesh and Uttar Pradesh, the National Commission for Backward Classes (NCBC) studied their claims and submitted a report. It recommended inclusion in the Central List only of the *Jats* of Rajasthan, except the Bharatpur and Dhaulpur districts. The NCBC also examined

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27. Decided on 10th April, 2008
28. A .P. High Court judgment dated 7 November, 2005
29. The matter is pending before Supreme Court. However the State Government is permitted to reserve seats/jobs for Muslims identified as BCs under the revised criterion subject to the final verdict of the court.
30. See *Union of India* v. *Virpal Singh Chauhan* (1995) 6 SCC 68 , Ajit Singh, (1996) 2 SCC 715,Jagdish Lal And Ors. v. State of Haryana And Ors., (1997) 6 SCC 538, Ajit Singh And Ors.(II) v. State of Punjab (1999) 7 SCC 209 and S. Panneer Selvam v. Government of Tamil Nadu (Supreme Court - per T.S.Thakur & R.Bhanumathi JJ dated August 27, 2015) etc
31. Increasing demands by Jats in North India, Patels in West India, and Kapus in Andhra Pradesh for inclusion among the BCs.
32. MARCH 17, 2015

the claim for inclusion of *Jats* in the Central List for the State of Delhi, and tendered its advice rejecting their claim. Later the Central government included *Jat* community in the central list of Backward classes for the state of Bihar, Gujarat, Haryana, Himachal Pradesh, Madhya Pradesh, NCT of Delhi, Bharatpur and Dholpur districts of Rajasthan, Uttar Pradesh and Uttarakhand. The notification was Set Aside as the court didn't agree with the view of Central Government but found that the view of NCBC is adequately supported by justified reasons. The court observed rightly in this judgment that:-

It is an important reminder to the State of the high degree of vigilance it must exercise to discover emerging forms of backwardness. The State, therefore, cannot blind itself to the existence of other forms and instances of backwardness. An affirmative action policy that keeps in mind only historical injustice would certainly result in under-protection of the most deserving backward class of citizens, which is constitutionally mandated. It is the identification of these new emerging groups that must engage the attention of the State and the constitutional power and duty must be concentrated to discover such groups rather than to enable groups of citizens to recover "lost ground" in claiming preference and benefits on the basis of historical prejudice.(Para 53)

The perception of a self-proclaimed socially backward class of citizens or even the perception of the "advanced classes" as to the social status of the "less fortunates" cannot continue to be a constitutionally permissible yardstick for determination of backwardness, both in the context of Article s 15(4) and 16(4) of the Constitution. Neither can any longer backwardness be a matter of determination on the basis of mathematical formulae evolved by taking into account social, economic and educational indicators. Determination of backwardness must also cease to be relative; possible wrong inclusions cannot be the basis for further inclusions but the gates would be opened only to permit entry of the most distressed. Any other inclusion would be a serious abdication of the constitutional duty of the State. Judged by the aforesaid standards we must hold that inclusion of the politically organized classes (such as Jats) in the list of backward classes mainly, if not solely, on the basis that on same parameters other groups who have fared better have been so included cannot be affirmed.(Para 54).

In *Dr.Subhash Kashinath Mahajan v. The State of Maharashtra and another*[33],the Supreme court of India delivered a judgment in respect of the

33. (2018) 6 SCC 454 decided on 20th March ,2018

automatic arrest of a person accused under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act,1989. The Bench consisting of A .K. Goel and U. U .Lalith JJ. declared that –

> 'in absence of any other independent offence calling for arrest, in respect of offences under the Atrocities Act, no arrest may be effected, if an accused person is a public servant, without written permission of the appointing authority and if such a person is not a public servant, without written permission of the Senior Superintendent of Police of the District. Such permissions must be granted for recorded reasons which must be served on the person to be arrested and to the concerned court. As and when a person arrested is produced before the Magistrate, the Magistrate must apply his mind to the reasons recorded and further detention should be allowed only if the reasons recorded are found to be valid. To avoid false implication, before FIR is registered, preliminary enquiry may be made whether the case falls in the parameters of the Atrocities Act and is not frivolous or motivated.'[34]

In other words, this judgment acknowledged the misuse of the said Act[35] and intended to curb the said practice as is evident from its following observations-

(ii) There is no absolute bar against grant of anticipatory bail in cases under the Atrocities Act if no prima facie case is made out or where on judicial scrutiny the complaint is found to be prima facie mala fide. We approve the view taken and approach of the Gujarat High Court in *Pankaj D Suthar*[36] and *Dr. N.T. Desai*[37] and clarify the judgments of this Court in *Balothia*[38] and *Manju Devi*[39] ;

(iii) In view of acknowledged abuse of law of arrest in cases under the

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34. Paragraph 81 of the judgment.
35. As per the statistics of the National Crime Records Bureau called 'Crime in India 2016-Statistics' as mentioned in paragraph 26 of the judgment.
36. Pankaj D Suthar v. State of Gujarat, (1992)1 GLR 405
37. Dr. N.T. Desai vs. State of Gujarat, (1997) 2 GLR 942
38. State of M.P. v. Ram Krishna Balothia, (1995) 3 SCC 221
39. Manju Devi v. Onkarjit Singh Ahluwalia. (2017) 13 SCC 439

Atrocities Act, arrest of a public servant can only be after approval of the appointing authority and of a non-public servant after approval by the S.S.P. which may be granted in appropriate cases if considered necessary for reasons recorded. Such reasons must be scrutinized by the Magistrate for permitting further detention.

(iv) To avoid false implication of an innocent, a preliminary enquiry may be conducted by the DSP concerned to find out whether the allegations make out a case under the Atrocities Act and that the allegations are not frivolous or motivated.

(v) Any violation of direction (iii) and (iv) will be actionable by way of disciplinary action as well as contempt[40].

This judgment which actually put the things in proper perspective, was severely criticized by the *Dalit*[41] organizations. In the face of protests, the Centre filed a review petition in the top court. In its petition, the Ministry of Social Justice and Empowerment stated: "Alleged potential of misuse would not deserve to be considered as a valid, justifiable or permissible ground for reading down stringent provisions of the PoA (Prevention of Atrocities) Act, 1989"[42]. However the apex court refused to review the judgment , justifying its stand originally taken. On the other hand, the Government of India probably could not with stand this opposition from the organizations and hardcore politicians, and ultimately made an amendment to the Act under reference by restoring the provision for automatic arrest of the accused[43].It is relevant to mention here

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40. Paragraph 83 of the judgment.
41. The people belonging to Scheduled Castes and Scheduled Tribes mostly, who at one point of time were at the bottom of the society in social hierarchy. They misunderstood the ratio of the judgment and misrepresented it as amounting to dilution of the Act of 1989 enacted to protect their rights. The moot question here is how can one presume that justice will be served only when an accused person is arrested and put behind the bars immediately after the filing or registration of a criminal case ? The retributive theory of Punishment seems to have been applied in this context, much before the guilt of the person is conclusively proved.
42. See SC/ST Act: All about the Supreme Court Order and its Political Fallout , available at https://indianexpress.com/Article/india/sc-st-act-all-about-the-supreme-court-order-and-its-political-fallout-5287814/
43. Section 18-A has been inserted in the Act in the year 2018 , which reads- "18A. (1) For the purposes of this Act,— (a) preliminary enquiry shall not be required for registration of a First Information Report against any person; or (b) the investigating officer shall not require approval for the arrest, if necessary, of any person, against whom an accusation of having committed an offence under this Act has been made and no procedure other

that the Madurai Bench of the Madras High Court[44] has subsequently held that anticipatory bail can be granted by a High Court even in cases filed under the PoA 1989, and observed that –

"Section 438 of Cr.PC is not the sole repository of the power to grant anticipatory bail. The High Courts are endowed with inherent powers to make such orders as to secure the ends of justice. I hope I am not indulging in quibbling or hair-splitting when I say that neither Section 18 nor Section 18 A engraft a bar against grant of anticipatory bail. They are to the effect that the provision of Section 438 of the Code shall not apply to a case under the Atrocities Act. Even if Section 438 of Cr.PC is not available, Section 482 of Cr.PC can very much be invoked. Hence, I hold that this Court is very much possessed of the power to grant anticipatory bail even in cases arising under the Schedules Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. The petitions can be filed under Article 226 of the Constitution of India or under Section 482 of Cr.PC."

This series of recent developments shows that the State has become so soft that even a well meaning and well intentioned judgment of the highest court of the land backed by majority of the citizens, was diluted for political considerations. It indicates the possible emergence of reverse discrimination in India. Several intellectuals have condemned the misinterpretation and misuse of compensatory discrimination in India.[45]

V. EMERGENCE OF REVERSE DISCRIMINATION IN INDIA

Today, India appears to be a deeply divided nation. The Indian society is more divided at present than it was at the time of its independence. The groups

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than that provided under this Act or the Code shall apply. (2) The provisions of section 438 of the Code shall not apply to a case under this Act, notwithstanding any judgment or order or direction of any Court."See the E-Gazette of Government of India dated FRIDAY, AUGUST 17, 2018 available at http://egazette.nic.in/WriteReadData/2018/188621.pdf

44. Per Justice G.R.Swaminathan in *Dr.S.Ariharan v.State of Tamil Nadu, Crl OP (MD) No.*17224 of 2019 dated 26-11-2019 available at https://indiankanoon.org/doc/186580740/ last visited on 2nd April 2020.

45. For instance Arun Shourie in his popular but controversial book described reservations by saying that ''the truth about reservations: that they are a sleight of hand of the politician'. See his book *Falling over Backwards* (An Essay on Reservations and on Judicial Populism),1st Edition, 2006 ,Rupa & Company-New Delhi, ISBN: 9788129109521, 8129109522

which remained backward have started asserting their strength numerically and politically. In the name of their past suffering , they have started demanding more privileges, concessions and affirmative action in almost every sphere of public life. They are demanding reservations and preferences even in the private sector. All of this is done in the name of caste and thanks to the selfish politicians even religion is used as the basis of compensatory discrimination. The State and the political rulers have already made as many as more than 20 Constitutional amendments to the provisions relating to Right to Equality, right from the first amendment in 1951 to 103rd amendment in 2019.Any person commenting adversely on the issue of reservation is being targeted in the worst form. Even the judges are not exempted from this kind of intimidation and assault[46].

The unreserved sections of the society particularly the poor among them are the worst hit due to the reverse discrimination policies of the successive governments. Probably, the EWS reservations may offer some little solace to such people crying for the attention of the State. In a way, such unfortunate people have become State created orphans, and their children's future appears to be bleak in India.

It is relevant to note that in USA, the *reverse discrimination*[47] was witnessed in 1970s, in Zimbabwe and Uganda in the 1980s onwards. The definition of discrimination is when one group limits another group of people. This can include jobs, workplace, education, residence, and welfare benefits. Most importantly, discrimination can limit a group's political power and presence. During British rule of Africa, white minority governors ruled their country and in extreme cases like South Africa, they brutally suppressed the majority blacks.

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46. A Gujarat HC *judge* , Justice JB Pardiwala who criticized corruption and reservations as stumbling blocks for development of the country had to retract his criticism of reservations as there were wide spread demands for his impeachment. See What a U-turn, milord! Gujarat judge deletes quota remark to avoid ... available at *www.catchnews.com › Politics.*

47. Reverse discrimination is discrimination against members of a dominant or majority group, in favor of members of a minority or historically disadvantaged group. Groups may be defined in terms of race, gender, ethnicity, or other factors. This discrimination may seek to redress social inequalities under which minority groups have had less access to privileges enjoyed by the majority group. In such cases it is intended to remove discrimination that minority groups may already face. The issue of reverse discrimination first reached the nation's highest court in the 1970s, when a student with good grades named Allan Bakke accused a University of California medical school of twice denying him admission because he was white. Strict racial quotas were unconstitutional, the court said — affirmative action was not.

From Rhodesia to Nigeria, whites or European descendants held political power. Then people started to rise up and secured independence from Great Britain. When the infamous Idi Amin took over Uganda, he started a policy of reverse racism. Robert Mugabe, the late president of Zimbabwe, distributed his land to Africans instead of the whites. During the 1990's, the government of Zimbabwe forced white farmers to give up their land without any "willing buyers" or "willing sellers." The white farmers didn't get any compensation from the government.

The position in India may be different. However there are few signs of reverse discrimination which could pose grave danger to the country. The indifference on the part of the ruling elite would spell doom for the nation[48]. Dr. Ambedkar in his last speech on 25th November 1949 in the Constituent Assembly ultimately emphasized that people must not be content with a mere political democracy, but rather strive for a social democracy with underlying principles of equality, liberty and fraternity. He observed that-

Political democracy cannot last unless there lies at the base of…social democracy. What does social democracy mean? It means a way of life which recognizes liberty, equality and fraternity as the principles of life…They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy …Without equality, liberty would produce the supremacy of the few over the many. Without fraternity, liberty would produce the supremacy of the few over the many. Without fraternity, liberty and equality could not become a natural course of things. It would require a constable to enforce them."

It is trite for the present rulers as well as the ruled to realize the cardinal importance of the caution sounded by the father of the Indian Constitution more than seven decades ago. .

V. CONCLUSION

It is high time to realize that the same constitution applies to all the Indian Citizens and ensures equality to all. The policies of affirmative action during the last 70 years of independence have not yielded the desired result. The backwardness is still rampant even among the beneficiaries of compensatory

48. It might take any form like civil war, brain drain, or even something like genocide. The nation has to wake up to this very likely challenge.

discrimination. These factors necessitate an impassionate and objective introspection among the rulers. The undue emphasis on caste and community would be counterproductive and uncivilized. It is the right time to make individual not the caste/class as a unit for compensatory discrimination. It is absolutely necessary not to perpetuate the dominance of caste .Even the reservations and other forms of the compensatory discrimination should follow the pyramidal model i.e., the broadest at the entry level but as one climbs up the latter gradually getting reduced while going atop. At the top, only the capacity and merit should matter irrespective of the social background. Equality and liberty cannot be counterproductive to fraternity anymore.

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NOBILITY OF LEGAL PROFESSION IN INDIA : LIBERALIZATION OUTSOURCING AND WAY FORWARD

RAJNEESH KUMAR PATEL*

ABSTRACT : In its common parlance, globalization is a state of free economic operation among various nations, who agree in principle that the entire globe must be considered as a single unit and consequently, there should not be any boundary among the nations particularly in economic restrictions. It plays its role when a country provides a free platform to the other country without striking tariffs or other boundaries. It is undoubtedly true that acceptance and implementation of globalization is a need of the time and without it, a country can't compete with others. It is also considered as the only and indispensable means to economic growth. However, the second face of the coin is compelling to remark that, sometimes it may be only a dream for the host country, because, as regarding political, social and economical power, all the countries are not equal then how they can compete and maintain their existence in the market if each country will be bound to open its market boundaries for the other countries. Undoubtedly the wealthy country will enter in other's home market, will bestow them in unfounded competition, and will finally defeat them in their market. This circumstance will be more significant if it will be related with opening up of any profession or service sector instead of good's market, as the area of any service or profession also involves the question of nobility, ethics and in-house regulating mechanism, which should not be mixed with any other culture, jurisdiction, and system which also should not be measured only on the parameter of money.

KEY WORDS : Foreign law firms, Fly-in & Fly Out, Jurisdiction, Globalization, Right to Practice.

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I. INTRODUCTION

From the time immemorial India remains one of the most attractive marketplaces in almost all fields of the business. The area of legal practice is also not an exception for that, as from the day of its independence it preserves a big judicial system at the global level and the arena of Indian legal profession is so wide and highly rewarding it has always been a point of attraction to the foreign law firms. The hike in percentage of foreign direct investments by the government has made this corridor more beneficial and fruitful to the Multi-National Corporations. It is well-known fact that nowadays; the entire sphere is living in the era of globalization, where, behind the wrap of liberalization and privatization, the compulsory opening up of the market by one country to the other countries is the most momentous and vital binding effect that has taken place. As India is a founder member of the World Trade Organization[1], there has been escalating force from other members for opening its legal services sector to other members. On the other hand, from the very beginning, Bar Council of India which is the immediate guardian of the legal profession along with legal education is not in favor to open the door of the legal sector to the overseas law firms or worldwide corporations. The Bar Council of India strongly raises and urged that, if the foreign nationals will be permitted to practice here and the door of the legal sector will be open for them, then it will lead to the declining of opportunities available to the Indian advocates in their home country.

This issue started with the so-called provisional entry of few New-York and England based limited liability firms after taking permission from Reserve Bank of India. After that on the petition of a group of lawyers, the Indian judiciary indicated its view and opined that those firms were involved in the unauthorized practice of law in this country. Their entry was also opposed by the Society of Indian Law firms, headed by *Shri Lalit Bhasin*[2] in a very strong manner. However,

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1. Total 16 countries are not member of World Trade Organization. These nations do not wish to become members. They are Aruba, Curacao, Eritrea, Kiribati, Kosovo, Marshall Islands, Micronesia, Monaco, Nauru, North Korea, Palau, the Palestinian Territories, San Marino, Sint Maarten, Turkmenistan, and Tuvalu.
2. Lalit Bhasin is the managing partner of Bhasin & Company, and president of the Society of Indian Law Firms and the Bar Association of India. He is also president of the Indian Law Foundation. He is an honorary life member of the International Bar Association, chairman of CIArb India, and a member of the ICC Arbitration India Core Group. He is a past president of the Inter Pacific Bar Association and a former chairman of the Film Certification Appellate Tribunal of India. He is chairman of PHD Chamber of Commerce Committee on Americas. He is also chairman of Confederation of Indian Industries (CII) Task Force on Legal Services.

even after the various oppositions, the government of India was too unbending on this point and therefore, it framed a rule, namely, Registration and Regulation of Foreign Lawyers in India Rules, 2016 over the issue and tried to allow them to practice in this country. Finally, this issue has taken a new turn, when Apex Court pronounced that without observing the rules of Advocates Act, 1961, practice by foreign law firms will be bad in the eye of law.

However, even after this unambiguous pronouncement against foreign law firms, when their entry and stay in India is legally banned, they have started using another tactic for the continuance of their business, which is properly known as Legal Process Outsourcing or Legal Services Outsourcing. It will be not out of mark to note here that till date, almost all foreign law firms are continuously working in this country with the help of outsourcing. Similarly, an agenda is also spreading in society that opening the door to foreign law firms is very essential for the development of India and without it, the country will be isolated from the other part of the world economy and will be thrown out from the pathway of expansion.

Actually, on this issue, there are two contradictory views among legal luminaries'. Most of them believe that opening the door of the legal sector to the foreign law firms will be financially and intellectually beneficial. However, another group of law knowing persons, including the various Bar Associations, Society of Indian Law firms, and Bar Council of India itself are arguing that this step will be an attack against the autonomy and nobility of the legal profession. Therefore, a continuing and massive debate over this issue, that whether India should liberalize its legal sector to the member Nations and about the pros and cons of the liberalization of the legal sector is going on.

Against this background, an attempt is made under this paper to discuss and examine the validity of entry of foreign law firms and its true effect on the nation. The study will swing around the existing legal provisions, meant for regulating the legal profession in this country along with the new attempt of the Indian government for permitting them to profess their profession with authority. The present study will also scrutinize the Legal Process Outsourcing; a new way adopted by the foreign law firms to continue their business, even after the clear prohibition against their business activities by the Apex Court. The study will focus on the impact of the entry of foreign law firms on the legal profession as existed today in this country, and finally, it will be concluded with some way-forward.

II. LAW RELATING TO ENROLMENT AND PRACTICE

Before going to discuss and examine the specific issue, whether foreign nationals or foreign law firms are authorized to practice law in India or not, it will be pertinent to converse who and under what conditions one can practice the profession in India. Some of the relevant provisions are discussed as under:

a. Right To Practice

During the entire regime of East India Company as well as the British Crown, the regulatory powers regarding the legal profession were mainly exercised by the judiciary. Starting from Mayor's Court era to the High Court's era the same was always in the hands of the judiciary. Even in the direct jurisdiction of the Company's Court system enrolment and other regulatory powers were given to the Sadar Diwani Adalat. However, after independence when India became a democratic state, then with intent to regulate the legal profession, the Advocates Act, 1961 was constituted. Under this Act, for the first time a unified, independent and autonomous bar was designed, which was free from the legacy of different kinds of practitioners and any kind of biasness towards them. For proper and effective regulation of the legal profession, the Act provides two types of mechanisms in the form of State Bar Council and Bar Council of India. Both bar councils are accompanied by a lot of administrative as well as managerial powers, especially regarding enrolment, the practice of the profession, action-taking and guiding principles of their conduct and behavior.

Here the first question is that who can practice in India? Section 29 which is directly concerned with this question, provides that, subject to the provisions of this Act and any rules made thereunder, there shall, as from the appointed day, be only one class of persons entitled to practice the profession of law, namely, advocates.

By a plain reading of this section, it is clear that, after 16th August 1961, which is the date of enforcement of the Advocates Act, only an advocate can practice the profession of law.[3] The language of the above section is so explicit

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He is regional president of the Indo American Chamber of Commerce (IACC), besides being chair of staff committee and council member of the Services Export Promotion Council (SEPC).

3. See, section 55 of the Advocate Act,1961, as per the section, Notwithstanding anything contained in this Act,— (a) every pleader or vakil practising as such immediately before the date on which Chapter IV comes into force (hereinafter in this section referred to as the said date) by virtue of the provisions of the Legal Practitioners Act, 1879 (18 of 1879), the Bombay Pleaders Act, 1920 (17 of 1920), or any other law who does not elect to be, or is not

and much clear therefore; no one can practice the profession, without being an advocate under the provisions of the Act. This intention of the legislature is again repeated and mentioned under section 33 of the Act, which provides that, except as otherwise provided in this Act or in any other law for the time being in force, no person shall, on or after the appointed day, be entitled to practice in any court or before any authority or person unless he is enrolled as an advocate under this Act.

Hence, by virtue of both sections, it is clear that only an advocate can practice under the Act. It will also be relevant to note here that as per section 2(1) of the Act, "advocate" means an advocate entered in any roll under the provisions of this Act. Therefore, to be an advocate and getting a right to practice under section 30 of the Act, one must be enrolled before any State Bar Councils under the Act.

The condition of enrollment is written under section 24 of the Advocates, Act, 1961.[4] To get enrollment under the Act, he must fulfill the following conditions:

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qualified to be, enrolled as an advocate under this Act; 2[(c) every mukhtar practising as such immediately before the said date by virtue of the provisions of the Legal Practitioners Act, 1879, or any other law, who does not elect to be, or is not qualified to be, enrolled as an advocate under this Act; (d) every revenue agent practising as such immediately before the said date by virtue of the provisions of the Legal Practitioners Act, 1879 (18 of 1879), or any other law,] shall, notwithstanding the repeal by this Act of the relevant provisions of the Legal Practitioners Act, 1879 (18 of 1879), the Bombay Pleaders Act, 1920 (Bombay Act 17 of 1920), or other law, continue to enjoy the same right as respects practice in any court or revenue office or before any authority or person and be subject to the disciplinary jurisdiction of the same authority which he enjoyed or, as the case may be, to which he was subject immediately before the said date and accordingly the relevant provisions of the Acts or law aforesaid shall have effect in relation to such persons as if they had not been repealed.

4. Subject to the provisions of this Act, and the rules made there under, a person shall be qualified to be admitted as an advocate on a State roll, if he fulfills the follwing conditions, namely, he is a citizen of India, Provided that subject to the other provisions contained in this Act, a national of any other country may be admitted as an advocate on a State roll, if citizens of India, duly qualified, are permitted to practice law in that other country; he has completed the age of twenty-one years; he has obtained a degree in law, (i) before the 12th day of March, 1967], from any University in the territory of India; or before the 15th August, 1947, from any University in any area which was comprised before that date within India as Provided that subject to the other provisions contained in this Act, a national of any other country may be admitted as an advocate on a State roll, if citizens of India, duly qualified, are permitted to practice law in that other country; defined by the Government of India Act, 1935; or after the 12th day of March, 1967, save as provided in sub-clause (iii-a), after undergoing a three year course of study in law from any University in India which is recognized for the purposes

(1) He is a citizen of India.[5] However subject to the other provisions contained in this Act a national of any other country may be admitted as an advocate on a State roll, if citizens of India, duly qualified, are permitted to practice law in that other country.

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of this Act by the Bar Council of India; or after undergoing a course of study in law, the duration of which is not less than two academic years commencing from the academic year 1967-68 or any earlier academic year from any University in India which is recognized for the purposes of this Act by the Bar Council of India; or in any other case, from any University outside the territory of India, if the degree is recognized for the purposes of this Act by the Bar Council of India] or he is barrister and is called to the Bar on or before the 31st day of December, 1976 4[or has passed the article clerks examination or any other examination specified by the High Court at Bombay or Calcutta for enrolment as an attorney of that High Court;] or has obtained such other foreign qualification in law as is recognized by the Bar Council of India for the purpose of admission as an advocate under this Act; he fulfils such other conditions as may be specified in the rules made by the State Bar Council under this Chapter; he has paid, in respect of the enrolment, stamp duty, if any, chargeable under the Indian Stamp Act, 1899 (2 of 1899), and an enrolment fee payable to the State Bar Council of 7[six hundred rupees and to the Bar Council of India, one hundred and fifty rupees by way of a bank draft drawn in favour of that Council, Provided that where such person is a member of the Schedule Castes or the Schedule Tribes and produces a certificate to that effect from such authority as may be prescribed, the enrolment fee payable by him to the State Bar Council shall be 1[one hundred rupees and to the Bar Council of India, twenty-five rupees. Explanation. For the purposes of this sub-section, a person shall be deemed to have obtained a degree in law from a University in India on that date on which the results of the examination for that degree are published by the University on its notice board or otherwise declaring him to have passed that examination.] (2) Notwithstanding anything contained in sub-section (1), 3[a vakil or a pleader who is a law graduate] may be admitted as an advocate on a State roll, if he (a) makes an application for such enrolment in accordance with the provisions of this Act, not later than two years from the appointed day, and (b) fulfils the conditions specified in clauses (a), (b), (e) and (f) of sub-section (1). 4[(3) Notwithstanding anything contained in sub-section (1) a person who has, for at least three years, been a vakil or pleader or a mukhtar, or, was entitled at any time to be enrolled under any law , as an advocate of a High Court (including a High Court of a former Part B State) or of a Court of Judicial Commissioner in any Union territory; or 7[(aa) before the Ist day of December, 1961, was entitled otherwise than as an advocate practice the profession of law (whether by of pleading or acting or both) by virtue of the provision of any law, or who would have been so entitled had he not been in public service on the said date; or before the 1st day of April, 1937, has been an advocate of any High Court in any area which was comprised within Burma as defined in the Government of India Act, 1935; or is entitled to be enrolled as an advocate under any rule made by the Bar Council of India in this behalf, may be admitted as an advocate on a State roll if he makes an application for such enrolment in accordance with the provisions of this Act; and fulfils the conditions specified in clauses (a), (b), (e) and (f) of sub-section (1).

5. The citizenship is dealt with Indian Constitution as well as Indian Citizenship Act, 1955. Relevant provisions of the Indian Constitution are given under Articles 5 to 8 of the Indian Constitution.

(2) He has completed the age of twenty-one years.

(3) He has obtained a degree of law, recognized by Bar Council of India, and

(4) He fulfills such other conditions as may be specified in the rules made by the State Bar Council for this purpose, and he has paid in respect of the enrolment, stamp duty, if any chargeable under the Indian Stamp Act and prescribed enrolment fee.

A close scrutiny of the above provision makes it clear that section 24 never prohibits any foreign nationals to be an advocate or practice before Indian courts. Though it indeed prescribes the requirement of citizenship as an essential condition of enrolment, it is not rigid over that condition and by the explanation, to the section, it makes clear that even a person from abroad may be enrolled as an advocate if his own country will allow Indian citizen to enrolled as an advocate there.

Before moving ahead, it is important to note here that, power relating to reciprocity is given under section 47 of the Act which provides that, where any country, specified by the Central Government in this behalf by notification in the Official Gazette, prevents citizens of India from practicing the profession of law or subjects them to unfair discrimination in that country, no person of any such country shall be entitled to practice the profession of law in India.[6] Subject to the above provision, the Bar Council of India may prescribe the conditions, if any, subject to which foreign qualifications in law obtained by persons other than citizens of India shall be recognized for the purpose of admission as an advocate under this Act.

In the above regard, it will not be out of mark to note that, apart from section 29 read with sections 24 and 30 of the Act, which provides the condition of practice and enrolment there is another condition of practice which is given under Part VI, Chapter III of the Bar Council of India Rules, 1975.[7] This rule is known as, Bar Council of India Rules (Conditions for Right to Practice) Rules, 2010, which added another condition of practice by providing that no advocate enrolled under section 24 of the Advocates Act, 1961 shall be entitled to practice under Chapter IV of the Advocates Act, 1961 unless such advocate successfully passes the All India Bar Examination conducted by the Bar Council

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6. See, section 47(1) of the Advocates Act, 1961.

7. As amended by the Bar Council of India through its resolution by its meeting held on 10th April, 2010 and which was published in the Gazette of India on June 12, 2010.

of India.[8] It is clarified that the Bar Examination shall be mandatory for all law students graduating from the academic year 2009-2010 onwards and enrolled as advocates under Section 24 of the Advocates Act, 1961.

Consequently, the combined effect of the statutory provisions[9]contained under the Advocates Act, 1961 and Bar Council of India Rules, 1975 that, for practice in India firstly he has to enroll before State Bar Council and also to pass the above-mentioned examination held by the Bar Council of India. It should be noted that in India right to practice is given only to the individual advocate and not to the group, in any form like partnership firms, associations or companies. However, if all the members of that group are advocates as defined under section 2(1) of the Act, then they can profess the profession authoritatively under section 29 read with sections 30 and 33 of the Act.

b. The Beauty Of Indian Legal Profession

The Indian legal profession is considered one of the most rewarding and increasing profession, with approximately more than 20 million professionals within the territory of India. Regarding the number of advocates, India stood in the second position, as the United States of America is having the highest number of advocates. It will be relevant to mention here that unlike the United Kingdom, where the legal services are rendered by two classes of legal professionals, barristers and solicitors; in India, there is no such type of classification among the advocates. The role of the barrister comprises of litigation, i.e. representing clients in the proceedings of the courts and giving specialist legal opinions. Solicitors, conversely, advice their clients on an array of matters affecting their legal rights, including transactional work; but their work does not include litigation. In India, both these roles are compound and any advocate who is enrolled with the Bar Council of India is competent to perform both the services and he often does so. It goes without saying that why the chief players providing service in this sector include individual lawyers and majorly family-run law firms. It is equally true that individually or jointly as a firm they are governed by the provisions of the Advocates Act, 1961 and the Bar Council of India Rules, 1975.

Considering the above provisions it need not to say here that the legal profession in India, which is viewed as a 'noble profession', is controlled with

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8. The All India Bar Examination shall be conducted by the Bar Council of India. It shall be held at least twice each year in such month and such places that the Bar Council of India may determine from time to time.
9. See, sections 2(1), 29,30,33, 35 and 47 of the Advocates Act,1961.

the above regulations and in several judicial pronouncements, these regulations have been justified on the ground of public policy and dignity of the profession.[10] Though over the past decade there has indeed been a drastic change in world's scenario due to an apparent reason of globalization concept, which is resulting into a very challenging, competitive and promising legal profession, processes of globalization and commercialization, has helped to encourage and develop the Indian economy, but on the other hand, it has always been the beauty of Indian legal profession which has proved that its professionals are not money-oriented and they always prefer their duties over their profit and gain.[11]

As the lawyers are considered as officers of the court, they must assist the court in the administration of justice. They must, therefore, strictly and scrupulously abide by the code of conduct behaving the profession and must not indulge in any activity which may tend to lower the image of the profession in the society. A basic tenet of the professional responsibility of lawyers is that every person in our society has ready access to the independent professional service of a lawyer of integrity and competence. Maintaining the integrity and improving the competence of the Bar to meet the highest standards is the ethical responsibility of every lawyer.

The profession of advocate in India is monopolistic in character and this monopoly itself has certain high traditions, which its members are expected to upkeep and uphold. In the case of, *Bar Council of Maharastra* V. *M.V. Dabholkar*.[12] Mr. Justice V.R. Krishna Iyer very aptly observed:

> "The Bar is not a private guild, like that of barbers, butchers and candlestick makers, but by bold contrast, a public institution committed to public justice and '*pro bono publico service*'. The grant of a monopoly license to practice law is based on three assumptions, first, there is a socially useful function for the lawyer to perform; second, the lawyer is a professional person who will perform that function and third, his performance as a professional person is regulated by himself and more formally, by the profession as a whole. The central function that the legal profession must perform is nothing less than the administration of justice".

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10. See, Prahalad Saran Gupta V. Bar Council of India, A.I.R. 1997 S.C. 1338, Purusottam Eknath Namede V. D.N. Mahajan, 1999 (20) S.C.C. 215.
11. See, C.D. Sekkizhar V. Secretary, Bar Council of Madras, A.I.R. 1967, Mad. 35.
12. A.I.R. 1987 S.C. 242.

Further, the practice of law has also a morals flavor. For example, under rule number, 45 of the Bar Council of India Rules, it is mentioned that it is improper for an advocate to demand or accept fees or any premium from any person as consideration for imparting training in law under the rules prescribed by State Bar Council to enable such person to qualify for enrolment under the Advocates Act, 1961. Thus, this is the clear message of the overriding effect of service over the pecuniary gain. Similarly, it shall also his duty not to permit his professional services or his name to be used in aid of, or to make possible, the unauthorized practice of law by any law agency.[13]

Consequently, they are required to be absolutely fair with moral excellence. They should not betray the confidence and the interest of his client of which he is a trustee. Hence, for these reasons, money is not needed as much as the maintenance of honesty and character for Indian advocates, and as a result, Indian advocates are providing their services in high spirits with their profession. The foregoing discussion also indicated that the framers of the Advocates Act enacted this wonderful piece of legislation with the intent to provide good services to the citizen of this country and not for and private pecuniary gain.

III. THE JOURNEY OF FOREIGN LAW FIRMS TO INDIA

Concerning the new economic era, it is a well-known fact that before the year 1990 India has adopted a fully closed economy system in which its market was not open to other countries. The year about 1990, when India has changed it market policy and adopted the globalization and up to a limited extent opened its door for other countries, then as a result, some foreign firms and corporation stared to arrive here and also found its place of business. Consequently, Indian service sectors were globalized, privatized and liberalized by an international treaty which is known as the General Agreement on Trade in Services[14]. This treaty came into existence as a result of the Uruguay Round of negotiations and entered into force on 1 January 1995. It enjoins upon the member States to grant to all members, a certain minimum standard of market access and national treatment, though they may grant more favorable conditions to others, based on bilateral or multilateral treaties.[15]

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13. See, Rule 37, Bar Council of India Rules, 1975.
14. Properly known as , G.A.T.S.
15. Prior to 1995 only the General Agreement on Tariffs and Trade was in existence which was only confined to trading of goods and not to the services.

Moving to the main theme, the story related with the entry of foreign law firms in India, starting during the decade of early nineties, when reportedly[16] few over-sea limited liability firms applied to the Foreign Investment Promotion Board[17] for permission to operate their working in India, however, their applications were never granted and the same were discarded by the Board. Thereafter, two American Limited Liability Firms, namely *White & Case* and *Chadbourne & Parke* as well as one firm of United Kingdom, *Ashurst Morris Crisp* applied to the Reserve Bank of India and got success, when under section 29 of Foreign Exchanges Regulation Act, 1971 it permitted them for opening up of their liaison offices.[18] The Reserve Bank of India granted that permission, with certain restrictions, such as, they shall not have active participation in legal practices and their liaison offices shall not enter into any contracts on its name;

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16. As per Bombay High Court "it appears that before approaching Reserve Bank of India, these foreign law firms had approached the Foreign Investment Promotion Board and when the Board had rejected the proposal thereafter, these law firms sought approval from Reserve Bank of India and then Reserve Bank of India granted the approval in spite of the rejection of Foreign Investment Promotion Board. Though specific grievance to that effect is made in the petition, the Reserve Bank of India has chosen not to deal with those grievances in its affidavit in reply. In the present case, apparently, the stand taken by Reserve Bank of India and Foreign Investment Promotion Board are mutually contradictory.
17. The Foreign Investment Promotion Board was a national agency of Government of India, with the remit to consider and recommend foreign direct investment which does not come under the automatic route. It has acted as a single window clearance for proposals on foreign direct investment in India. The Foreign Investment Promotion Board was housed in the Department of Economic Affairs, Ministry of Finance and was abolished on 24 May 2017.
18. Without prejudice to the provisions of section 28 and section 47 and notwithstanding anything contained in any other provision of this Act or the provisions of the Companies Act, 1956, a person resident outside India (whether a citizen of India or not) or a person who is not a citizen of India but is resident in India, or a company (other than a banking company) which is not incorporated under any law in force in India or any branch of such company, shall not, except with the general or special permission of the Reserve Bank, carry on in India, or establish in India a branch, office or other place of business for carrying on any activity of a trading, commercial or industrial nature, other than an activity for the carrying on of which permission of the Reserve Bank has been obtained under section 28; or acquire the whole or any part of any undertaking in India of any person or company carrying on any trade, commerce or industry or purchase the shares in India of any such company.2[(1A) A company (other than a banking company) in which the non-resident interest is more than forty per cent. shall not, except with the general or special permission of the Reserve Bank, carry on in India any activity relating to agriculture or plantation or acquire the whole or any part of any undertaking in India of any person or company carrying on any activity relating to agriculture or plantation or purchase the shares in such company.

its expenses shall be met by its head office.[19]

As an outcome of the above permission, setting up of their lesion offices and actual commencement of business by the firms in India; invited a long and hot debate over the issue. On the other hand, the foreign firms and their home governments were not pleased with the above bare permission and therefore, they were demanding and rather indirectly enjoying further relaxation in the laws and policies, governing the subject of the practice of the profession in India, which further led a series of grim gripe by the Indian advocates, bar associations and law firms.

After that, a petition, namely, *Lawyers Collective* V. *Chadbourne and Park and Others*[20] was filed before the Bombay High Court under section 29 of the Advocates Act, 1961, alleging that the said permission was bad in the eye of law. It was strongly argued by the petitioners that the Act, gives the right to practice only to the enrolled advocates and hence only they are entitled to practice the profession of law in India. The chief contention was that the term practice of law should include not only the representation before the court as an advocate but also drafting legal documents and advising clients outside of the court. On the other hand, by observing the duty of respondent in the case, the Central Government contended that Advocates Act, 1961 only prohibits foreign lawyers from appearing before a court and not from advising clients and drafting legal documents.

After hearing the contentions of both side, in its interim order speaking for the Bombay High Court, Mr. Justice Swatanter Kumar and Mr. Justice J.P. Devadhar, observed that the phrase *"to practice the profession of law"* used in section 29 of the Advocates Act, 1961 is extensive enough to cover litigious as well as non-litigious practice.[21] As a result, foreign lawyers and law firms were bound to follow provisions of the Act, and therefore, they cannot open liaison offices in India to carry on the practice in non-litigious matters without being enrolled as Advocates under the Act. Further, the Bombay High Court observed

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19. This time they were permitted set up a liaison office in India to conduct the activities of, amongst other, "coordination, communication between its head office, clients, various governments; establish business contacts, explore foreign investment opportunities in India and other administrative functions".

20. W.P. no. 1526/1995, Bom.

21. It is to be noted that in after the decision of Bombay High Court, the matter was subsequently appealed, and it came on hearing before the Supreme Court of India in March 1996, but the Supreme Court did not, decide and remanded back the matter to the Bombay High Court.

that "In our view, establishing a firm for rendering legal assistance and or for executing documents, negotiations and settlements of documents would certainly amount to practice of law."[22]

Regarding the journey of foreign law firms in India it is also a notable fact that in 2007, the Society of Indian Law Firms and British Law Society came together and signed a *Memorandum of Understanding* concerning cooperation in the legal profession.[23]In the same year, the Bar Council of India and the State Bar Councils jointly put forward a request to the Centre to take a final decision on the matter only with their consultation and approval. Meanwhile, in 2008, the Limited Liability Partnership Act was passed by the Parliament which allowed the traditional partnership firms to convert into Limited Liability Partnerships and gain the flexibility and tax concessions provided under the Act. It is needless to say that under the Act now they can run their business with the facility of limited liability. It should be remembered that the present Act was also an encouraging step towards opening the door of the Indian legal field to the foreign law firms, as the Indian government was regularly taking step for liberalizing their service sectors.

Again, in the year 2009 in the case of *Lawyers Collective* v. *Bar Council of India*,[24] a double bench of the Bombay High Court upheld its earlier interim order of 1995 and observed that the license issued by the Reserve Bank of India, did not amount to a permission to practice law, but only to establish a liaison office to act as a communication channel between the head office and their parties in India. The court further ordered the government to conduct an inquiry to look into the issue and take appropriate action against the firms.[25] Declaring its clear view the court added that the practice of law in India, both non-litigious and litigious, requires prior enrolment under the Advocates Act, 1961.

Yet again, in February 2010, the Tamil Nadu based association of Indian lawyers, filed a writ petition, namely, *Affidavit of Petitioner, Balaji* V.

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22. Following this order, White & Case and Chadbourne & Parke closed their Indian offices while the United Kingdom based firm Ashurst firm stayed behind to be the only foreign firm with a physical office in the country for 15 years.
23. Hindustan Times, Delhi E-paper, 15/01/2007.
24. Published on 18th December, 2009.
25. However, in its final judgment this part was overruled by the Bombay High Court which held that permissions granted by the Reserve Bank of India to the foreign law firms as mentioned above in the early nineties to set up liaison office in India, is not valid in law.

Government of India[26] before the Madras High Court requesting an inclusive forbid on foreign law firms working in India. However, taking a slightly different opinion, in the instant case the Madras High Court held that foreign law firms may enter into the country to conduct arbitrations or advise clients on matters of foreign and international law, on the fly in and fly out basis.

After this decision, some striking incidence also took place in India. For example, on 28th September 2010, the Ministry of Law and Justice issued two statements on behalf of the Bar Council of India.[27] Firstly it was said that"the Bar Council of India, which is concerned with the safeguard of the rights, privileges and interests of advocates, has received numerous representations on the subject. The Bar Council of India has decided not to permit foreign lawyers into India. However, the said decision is being subject to more detailed and rational scrutiny in the light of the opinions and points of view of different stakeholders.[28] The Bar Council of India is committed to taking steps that will be for the benefit of the Indian legal profession. Again in its second statement, it was said that the Bar Council of India, has informed that they perceive the Indian legal profession to be both service-oriented as well as based on business principles. However, it is important to understand the legal profession in the Indian context. At the same time, Indian lawyers are not averse to self-up gradation and skill acquisition. Once the said reform process is initiated, the profession could be stated to be in some readiness to the opening up of the legal sector.[29]

Though, it is true that merely on these two statements of the government, one cannot safely conclude that it was effectually willing to support the foreign law firms, but it may be assumed that the government was perplexed after the decision of Bombay High Court and was in hesitation to take any clear decision on this point. Meanwhile, India becomes the witness of another staged incident when *Ashurst Morris* entered into a best friend referral arrangement with Indian Law Partners.[30] Actually, it was a new tactic of the foreign law firms to defeat the decision of the Bombay High Court. It is also not a hidden fact that even

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26. 18, W.P. No. 5614 of 2010 (Madras H.C. Mar. 18, 2010) (India).
27. Law ministry says it again – No entry of Foreign Law Firms' Bar & Bench, September 28, 2010, http://barandbench.com/law-ministry-says-it-again-no-entry-foreign-law-firms/, visited on 25/02/2017)
28. Ibid.
29. Ibid.
30. Bench-Bar News (E-Content), 16th July, 2011.

after two pending litigation before Bombay and Madras High Court, several foreign firms have established their presence in India by entering into best friends agreements with the domestic law firms and are outsourcing their legal services to private as well as governmental organization.[31]

In the year 2012, a new case was filed before the Madras High Court. In this case of *A .K. Balaji* V. The *Government of India*,[32] the issues and legal questions were the same as it was in case before Bombay High Court. In the instant case, the Madras High Court held that without fulfilling the requirement of the Act, foreign lawyers and law firms cannot practice.

Going through this judgment, one can believe that the above decision of Madras High Court was consistent with the Bombay High Court's decision in 2009 that prohibited foreign law firms from setting up their associate offices in India. However, as indicated above with its interim order, actually it differs from the decision of Bombay High Court, mainly on two points, first, the Madras High Court accepted that nothing is wrong in to visit India on the fly in and fly out the basis by the foreign law firms, and second, the judgment also differs, because it says that if a foreign law firm without establishing any liaison office in India offers advice to their clients on foreign law, there was no legal bar to do so.

Therefore, acceptance of their entry on the fly in and fly out basis was the main reason, why, the Bar Council of India filed an appeal to the Supreme Court against the decision of Madras High Court in the above case. However, before the final decision of the Apex Court on the above issue, some incidences took place in this country which turns the direction of the problem of foreign law firms again in reverse gear. For example, in September 2014 Law Minister of United Kingdom Shri Shailesh Vara spoke in favor of the entry of foreign law firms to practice non-Indian transactional law in India during his visit to India[33].

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31. For instance, firms like *Allen & Overy* (advises on power projects, particularly in the oil & gas sector; acts for Indian banks, besides doing advisory work for corporate houses in India) , *CMS Cameron*(advised the government of Orissa on privatization of the state electricity system), Denton Wilde Sapte (advises Indian companies like Tata Electric and Gujarat State Energy Company) , *Linklaters* (represented clients in their disputes with the Maharashtra State Electricity Board), *Baker and McKenzie*, have been amongst the most active foreign law firms in India for the past two decades. It is submitted that all these firms have formidable experience in IPR, infrastructure and energy laws, domestic and cross border transactions, project financing, TMT, FDI, arbitration and financial laws.,
32. W. P. Number 5614 of 2010, Mad, Dated 21st February, 2012.
33. Times of India (E-Paper) 2nd September, 2014.

Further, in December 2014 a source from the ministry of commerce stated that the commerce ministry is working on a proposal for a phased opening up of the legal sector in non-litigious services and international arbitration.[34]

In this reference it is very necessary to mention here that the Society of Indian Law Firms as well as Bar Council of India, which were regularly opposing the entry of foreign law firms in India, it was a point of time when after initial opposing voice they also came in favor of overseas firms and now they also agreed to permit them after liberalizing the legal profession in India, though, one can also argue that both Society of Indian Law Firms and Bar Council of India was demanding that the entry should be done in a phased manner to allow Indian firms and lawyers to handle with the revolutionize environment.[35]

Further, above and all, as from the very beginning, there was a blowing sign that the Government of India was in favor of allowing foreign law firms to this country, another apparent step was taken by it in the year of 2016. Hence, the Bar Council of India, under direction from the Ministry of Law & Justice, drafted and notified the Registration and Regulation of Foreign Lawyers in India Rules, 2016. These rules allow the entry of foreign law firms and lawyers in India and allow them to practice non-Indian law.

Though this rule has not come into operation yet, to understand the idea of the Indian Government it will be relevant to highlight the key provision of that proposed draft rule. The draft rules relating to Registration and Regulation of Foreign Lawyers in India Rules, 2016, provide for the following:

1. Foreign law firms and lawyers are allowed to set up an office in India, on a condition that they register with Bar Council of India for an initial period of 5 years and practice only non-Indian law.
2. Foreign lawyers would be considered as Indian lawyers under *Section 29, 30, and 33* of the Advocates Act, 1961.

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34. Lalit Bhasin, *Follow a phased, sequential approach for entry,* Business Standard, December 14, 2014.
35. The Society of Indian Law Firms has recommended to the government that foreign law firms be allowed into India in four phases, marking a reversal in position that could lead to the bar being lifted. Shri Lalit Bhasin, president of Society of Indian Law Firms said that "we want that foreign law firms be allowed in India but that has to happen in a phased manner. "In the first phase, Indian firms should be allowed to have brochures and websites, and then foreign law firms should be allowed to advise Indian clients on foreign law. In the third phase, they should be allowed collaborative advice and in the last phase they should be allowed to practice domestic laws with some ex .The government first has to amend the Advocates Act as currently only Indian citizens can pursue law."

3. Foreign lawyers are barred from appearing before Indian courts and tribunals, and cannot provide legal advice relating to any case filed before them.
4. Foreign lawyers are allowed to hire Indian lawyers or form a partnership with them.
5. A registration fee of $25,000 for individuals and $50,000 for partnership firms are required to be paid.
6. Individuals are required to pay a renewal fee of $10,000 and partnership firms have to pay $20,000.
7. Foreign lawyers are allowed to participate in international arbitration in India.
8. Foreign lawyers are required to pay a security deposit to practice in India. This amount is refundable.
9. Foreign lawyers are only registered on a reciprocal basis.
10. The ethics and code of conduct applicable to Indian lawyers are also applicable to foreign lawyers.

A plain reading of the above draft rule makes it clear that not only the foreign nationals in their individual capacity but also jointly in the form of a law firm are welcomed in India for their consultancy as well as drafting services. They have been not only permitted to provide their services but most surprisingly they have been also considered as practitioners under rules which are devoted only to the enrolled advocates. The proposed draft rule also requires payment of registration fees along with a statement that the rules which apply to the Indian advocate shall also apply to them. However, the author is unable to understand how this declaration will be implemented because any group of foreign law firms not only contained the lawyers but other professionals too, here a legal question arises that in case of misconduct how, against whom and in what capacity State Bar Council will take action against the errant member of the firm.

Finally, in the case of *Bar Council of India* V. *A. K. Balaji*,[36] Mr. Justice Adarsh Kumar Goel, for the Supreme Court pronounced the historic and long-awaited judgment on this issue. To understand the tricky points involved in the decision, it may be divided into following heads:

36. Civil Appeal Nos.7875-79 of 2015.

a. Right To Practice

The first question involved in the case was, whether foreign lawyers and foreign law firms can practice the profession of law in India? Replying to this, the Supreme Court stated that the Act covered the broad area of practice of law, including litigious and non- litigious aspects. In the clear opinion of the court, the right to practice includes an appearance in court, consultation with clients and drafting and providing legal opinions. In this context drafting and advisory services is the '*genus*', while the right to appear in courts is a '*specie*'.

Further, relied on the decision of, *Pravin C. Shah* V. *K.A. Mohammad Ali*[37] the court also observed that the scheme elaborated under Chapter-IV of the Advocates Act, 1961 makes it clear that advocates enrolled with the Bar Council alone are entitled to practice law, except as otherwise provided in any other law. All others can appear only with the permission of the court, authority or person before whom the proceedings are pending. Therefore, the regulatory mechanism for the conduct of advocates applies to non-litigation work also.

b. Observance of the Practice Rule

On the second question, whether it is possible for foreign law firms to 'practice law' without following the prescribed requirements of the Advocates Act, 1961, the honorable Supreme Court clarified that "We may, make it clear that the contention that the Advocates Act applies only if a person is practicing Indian law cannot be accepted. Conversely, the plea that a foreign lawyer is entitled to practice foreign law in India without subjecting himself to the regulatory mechanism of the Bar Council of India Rules can also be not accepted. We do not find any merit in the contention that the Advocates Act does not deal with companies or firms and only individuals. If prohibition applies to an individual, it equally applies to a group of individuals or juridical persons."

c. Question Of Fly In And Fly Out

The third issue involved in the instant case was related to the stayed-duration of foreign law firms in India, about which, the court held that "visit of any foreign lawyer on fly in and fly out basis, may amount to practice of law if it is on a regular basis. In case of a dispute whether a foreign lawyer was limiting himself to "fly in and fly out" on a casual basis for the purpose of giving legal advice to their clients in India regarding foreign law or their own system of law and on diverse international legal issues or whether in substance he was

37. (2003) 2 SCC 45.

doing a practice which is prohibited can be determined by the Bar Council of India.

It will be relevant to note that by saying the above line it has modified the Madras High Court's observation on the bar against foreign lawyers visiting India on a fly in and fly out basis to hold that the expression "fly in and fly out" will only cover a casual visit not amounting to practice.

d. International Commercial Arbitration

The Supreme Court considered the fourth question of whether there was a limitation on foreign lawyers and law firms conducting and participating in arbitration proceedings relating to India-seated international commercial arbitration.

The Supreme Court held that it could not be said that there was no absolute bar on the conduct of arbitral proceedings by foreign lawyers in India. If a matter pertained to an international commercial arbitration governed by the rules of an arbitral institution or the Arbitration and Conciliation Act 1996, then foreign lawyers would not be prohibited from conducting arbitration proceedings in India under sections 32 and 33 of the Act. This was not, however, to be construed as an absolute right. Foreign lawyers would be subject to the code of conduct applicable to Indian lawyers. Finally, the Apex Court accepted that the ethics of the profession which applies to the Indian lawyers shall also be observed by the foreign lawyers. It reiterated that the Bar Council of India and the Union of India should implement the appropriate rules on the applicability of any code of conduct to foreign lawyers.

e. Outsourcing of the Legal Profession

Probably this was the last major issue of the case, on which the Apex Court observed that the Business Process Outsourcing Companies providing a range of customized and integrated services and functions to its customers may not violate the provisions of the Advocates Act, only if the activities in pitch and substance do not amount to practice of law. The manner in which they are styled may not be conclusive. As already explained, if their services do not directly or indirectly amount to the practice of law, the Advocates Act may not apply. This is a matter which may have to be dealt with on a case to case basis having regard to a fact situation."

Thus, it is clear from the above decision of the Supreme Court that, visit of any foreign lawyer or law firms on the fly in and fly out basis may amount to

the practice of law if it is on a regular basis. A casual visit for giving advice may not be covered by the expression 'practice'. As per the judgment, prohibition on practicing law applicable to any person in India other than an advocate enrolled under the Advocates Act certainly applies to any foreigner also. So, the foreign lawyers or law firms cannot practice in India without fulfilling the requirements of the Advocates Act, 1961 and the Bar Council of India Rules, 1975. Upholding the Madras and Bombay High Courts' judgments with certain modifications, the Supreme Court rejected the plea that a foreign lawyer is entitled to practice foreign law in India without subjecting himself to the regulatory mechanism of the Bar Council of India Rules, 1975.

It need not to say that the above judgment of the Supreme Court is a landmark judgment on the issue of entry of foreign lawyers and law firms in India, which set a long-debated controversy that, whether foreign law firms can provide their services in India without being registered and without observing the Indian rules of practice further, after going through the provision contained under section 29, one must be clear that only a registered advocate shall be entitled to practice law in India.

It is clear from the above discussion that the journey of the issue of foreign law firms in India that as per the existing laws they are not authorized to open or establish their liaison offices in this country and provide legal services. The Indian judiciary has its explicit, rigid and unambiguous approach that Reserve Bank of India was not empowered to grant any type of permission to them and the offices opened with that permission have no authority in the eye of law. However, on limited and which should not be permanent in nature the foreign law firms may come to this country and only on the basis of fly in and fly out, they can give some suggestions to their own client on any non-Indian law. They are also not free to provide any drafting of legal services to anyone.

IV. NEW TREND IN LEGAL SERVICE

Even after the lucid pronouncement by the Indian judiciary which creates almost a barrier to the entry of foreign law firms in India, firms are still looking at the availability of wide capital gain in India. With intent to collect the same, they have been forging informal paths for entry into the Indian legal market, by establishing strategic affiliations with the Indian Law firms, via their branch offices in other countries. Consequently, the foreign firms have regularly maintained their existence in the Indian market over the years, if not

directly then indirectly through legal process outsourcing[38] or legal services outsourcing[39]. As a matter of fact number of foreign law firms have tied up with India-based legal process outsourcings to outsource their work in India and marked their presence in the country.[40] Under this process of outsourcing work delegated to Indian outsourcing companies is mostly related to a variety of transactional and paralegal work.[41]

This premeditated and calculated arrangement was adopted by the foreign law firms to neutralize the restrictions imposed by the Advocates Act, 1961 as well as the various decisions of the Indian judiciary. These firms offer practices through any over-sea branch offices and by that way they have been forming affiliate relationships with Indian law firms. Moving towards the scheme, they have established this relation by three kinds of models; the first is ad-hoc referral, in which Indian firms work with different foreign firms depending on the matter at hand. This model did not require a direct connection between the partners and can be started by an individual lawyer, associates, networking through international bar associations, or simply from having been on opposite sides of a table in a prior international deal or litigation matter. Apart from the above model, there is another, surrogate model, which is used by those foreign firms that have a more vested interest in India. Under this model, a foreign firm frequently helps a small team of Indian lawyers start up their own local firm, which will informally be a local office of the foreign firm. The benefit of the surrogate model is the obvious control the foreign firm has over the process of either building or taking over the Indian firm. Another model is "best friends". It involves a foreign firm working in close cooperation with a single Indian firm. A "best friends" relationship has been described as a close association between a foreign and Indian firm, whereby the Indian firm would get work exclusively from a foreign firm. It entails active involvement by both the foreign and Indian firms and is also more synergistic than the ad hoc and surrogate models of affiliation.

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38. Properly known as L.P.O.
39. Properly known as L.S.O.
40. A very famous International law firm Clifford Chance has collaborated with legal process outsourcing cum off shoring center, named O.S.C. Services Private Limited in India which provides a wide range of services at low costs through labor arbitrage.
41. Many accountancy and management firms are employing law graduates who are rendering legal services, which is contrary to the provisions of the Advocates Act. It is stated that the Government of India along with the Bar Council of India is considering this issue and is trying to formulate a regulatory framework in this regard.

Hence, now after the final decision of the Apex Court on the above issue, the point of law is also finally fixed, but it is equally true that even after the said decisions the foreign law firms never left this country and as a matter of fact, they are still involved in the same process by using the other methods like outsourcing or friends contract with any Indian companies or firms. Therefore, the question is not only in regard to the legality of their entry but also a number of issues arise about ethics surrounded by the question of their usefulness and drawbacks. The coming discussion will focus on the same.

V. REASONS FOR ALLOWING OR PROHIBITING THE FOREIGN LAW FIRMS IN INDIA

As indicated at the beginning of this paper that on the issue of liberalization of the legal profession not only the Indian legal fraternity but the entire world is divided into two parts. Some are having a soft corner and favoring the scheme of liberalization, privatization and globalization, but some are strongly opposing the same. Actually, the above issue is representing the two conflicting interests, in which foreign law firms are demanding the application of the international treaty to which India is a founder signatory and on the other hand Indian lawyers are claiming their own right of survival and existence. Therefore, there is an urgent need to hit a balancing approach to harmonize these two conflicting interests.

a. Observation of Treaty

The first and foremost argument in support of liberalization is that India is a member-state and founder signatory to General Agreement on Trade in Services.[42] It is a treaty of the World Trade Organization, and therefore India is obliged to conform to its principles.

The fundamental principles which are prescribed under the General Agreement on Trade in Services are as under:

1. National Treatment under Article VII, under which, a member state has to provide equal treatment to foreign firms as they do to domestic firms.
2. Market Access under Article XVI, which states that there can be no restriction for entry of foreign firms into the services market by quotas, economic needs tests, maximum foreign shareholding limits, etc.

42. It came into force in January 1995 as a result of the Uruguay Round negotiations.4321 14

3. Domestic Regulation under Article VI (4), which affords that statutory domestic regulation, must be administered in a reasonable, objective and impartial manner and that qualifications, licensing requirements and technical standards must be fair and not unnecessary.

4. Transparency, under Article VII, requires from member-states. that it must provide all relevant information that is required under the General Agreement on Trade in Services.

It depicts from the above provisions of the General Agreement on Trade in Service, as well as this fact that India has already signed the above treaty; being a responsible member state it is the duty of the Indian Government to open its legal field without any further delay.

On the other hand, it is also true that under this treaty, any member Nation will be responsible to comply with the above principles only if it has made any specific declaration in that regard. It will be interesting to note here that there are twelve total areas classified by the General Agreement on Trade in Service, for which member Nations are free to make specific commitments. Under those twelve sectors, one division is of business. Further, the business services as mentioned under the treaty are divided into six natures of services, which also include professional services. The Professional service sector is further divided into eleven type's services, and that includes legal services. As a matter of fact India has made specific commitments only relating to engineering services and not in regards to legal service; therefore, it is not under any obligation to open its door of the legal market to foreign law firms.

b. Competition Increasing Quality

Advocates of globalization is of opinion that competition amongst professional is very much essential for the overall development of any profession, therefore, they argued that entry of foreign firms into the Indian legal market will strengthen the competition and consequently this competition will speed up the economic development of the domestic market as well as enhance the quality of transactional law in India especially in terms of best practices, joint referrals, shared legal and technical knowledge and improved professional norms.[43] Furthermore, such competition will also enhance the quality on the domestic level too, as the existence of foreign law firms in India will also introduce better practices, enhancing technical knowledge, resources and expertise. Their core

43. Jayanth K. Krishnan, Globetrotting *Law Firms*, 23 GEo. J. LEGAL ETHICS 57, 85 (2010)

contention is that the existing provisions contained under the Advocates Act,1961 as well as Bar Council of India Rules, 1975 are not only preventing the liberalization but at the same time is discouraging the healthy competition between lawyers, which has resulted into dilapidation of legal services. They also argued that imposed restrictions on the entry of foreign firms are directly in contravention of competition policy and the Competition Act, 2002.[44]

In this regard, it is interesting to quote the observation of Shri S.V.S. Raghavan, Chairman, Committee on Competition Policy and Law. Submitting the 96 pages report of the committee he summed up the consequences in these words: "The legislative restrictions in terms of law and self-regulation have the combined effect of denying opportunities and growth of professional firms, restricting their desire and ability to compete globally, preventing the country from obtaining the advantage of India's considerable expertise and precluding consumers from the opportunity of free and informed choice."[45]

On the other hand, those who are against this liberalization of the legal profession, are arguing that Indian advocates are already globally competitive and need no support from any foreign firms or foreign lawyers.[46] They have outrightly rejected the above opinion that the entry of foreign law firms would improve the quality of transactional legal practices in the country, by arguing that it is superficial and is not based on any factual research. Further, indicating towards the poor intentions of the foreign entities, the group believes that India for them is yet another "fertile market" with possible employment opportunities and they have no intentions towards improving the quality of the legal profession in India.

c. Obstacle of Reciprocity Concept

The supporters of liberalization are also not happy with the provision contained under section 24 of the Advocates Act, 1961, as it requires citizenship as an essential condition for enrollment and also permits a non-Indian lawyer to practice law in India if the foreign lawyer's home country allows Indian citizens to practice law and does not subject Indian citizens to unfair discrimination.

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44. The Competition Act, 2002, provides for several factors that shall be considered in deciding whether an agreement has a considerable adverse effect on competition. These factors include creation of barriers to the new entrance into the market, accrual of benefits to consumers, improvements in production or distribution of goods or provision of services and lastly promotion of technical, scientific and economic development by provision of services.
45. To see the report, visit on, theindiancompetitionlaw.files.wordpress.com
46. Interview with Lalit Bhasin, Partner, Bhasin & Co. (Dec. 28, 2009).

Their clear and loud contention is that this type of restriction is against the globalization and liberalization, which is need of the time. The proponents of liberalization further argue that by opening the market for foreign law firms, even the Indian Lawyers will gain an opportunity to branch out internationally, catering their services to major companies both at home and worldwide.[47]

However, there is another voice in the society which is arguing that at least this provision is controlling their illegal and unethical entry and therefore it should continue with the legislation. To support their argument they have also given the example that in foreign jurisdictions particularly the United Kingdom and the United States preventing Indian citizens from practicing law because they require to pass a licensing exam and take some classes.[48]

According to the American Bar Association, only 5 states[49] allow a foreign lawyer to take the bar under any circumstances. That's less than 10% of the jurisdictions in the United States. Thus, to practice in the United States, a lawyer must sit for and pass one of the bar examinations in one of these states. Depending on the lawyer's practice, this may limit the locations where he or she can practice. Since New York and California are both large internationally-oriented cities, this certainly provides substantial opportunity. However, moving to a different state to practice law may be difficult.[50]

d. Non-Litigating Work Only

It is also a chief argument of the supporters of liberalization of the legal profession that, the main work which the foreign law firms will transact in India will be that of advising and soliciting clients on a range of legal issues, of both international as well as of domestic nature, and or drafting legal documents. In other words, the foreign firms will chiefly concentrate on corporate and or commercial transactional work and they will never indulge in the representation of the clients before the courts. It should be remembered that globalization will work only when if the government will not impose any restrictions on trading nations against the flow of goods or services supplied by that country. The country which imposes restriction in the form of tariffs or otherwise and subsidies its own firms then actually it protect domestic producers from international

47. See, Lawyers Collective Case, Supra.
48. Id.
49. New York, California, Alabama, New Hampshire and Virginia.
50. Indian Law Firms in the United States of America, Brus Chambers, Advocates & Solicitors, Mumbai, India

competition and redirect, rather than create trade flows.[51] Hence, as foreign law firms will concern only to non-litigating works, the Indian Government should give full freedom for that area of working. Conversely, it has been argued that, though foreign lawyers might not appear before the court of law to represent their clients in the course of whether civil proceedings or criminal trials, but the decision of Bombay High Court, Madras High Court as well as the honorable Supreme Court, makes it very much clear that even non litigating work comes under the preview of the term practice. Therefore, it is not only the question of the permissible area to the foreign law firms but the question of law and ethics that whether they are legally or morally authorized to do so or not.

It is to be noted that, the existing laws governing the professional conduct and behavior of the advocates, requires a very high degree of decency and nobility towards the profession from the practitioners. Hence, any behavior which may step towards the commercialization of the profession is totally prohibited. For example, under Chapter-III rule number 2 it is clearly mentioned that an advocate shall not enter into a partnership or any other arrangement for sharing remuneration with any person or legal practitioner who is not an advocate.

By virtue of this restrictive provision, it is clear that being an advocate he shares his remuneration to any non-advocate. It must be clear that the foreign national who is a practicing lawyer in his own country cannot be considered an advocate in the meaning of the above rule as he is not enrolled before any State Bar Council under the Act. Similarly, an advocate shall not personally engage in any business; but he may be a sleeping partner in a firm doing business provided that in the opinion of the appropriate State Bar Council, the nature of the business is not inconsistent with the dignity of the profession.[52]

Though, an advocate may be Director or Chairman of the Board of Directors of a Company with or without any ordinarily sitting fee, provided none of his duties are of an executive character. An advocate shall not be a Managing Director or a Secretary of any Company.[53]Again an advocate shall not be a full-time salaried employee of any person, government, firm, corporation or concern, so long as he continues to practice, and shall, on taking up any such employment,

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51. HSC Online - Free trade and protection: advantages and disadvantages of free trade». Available on http://www.hsc.csu.edu.au/economics/global_economy/tut7/Tutorial7.html. 01-jan-2018].
52. See, Rule, 47 of the Bar Council of India Rules, 1975.
53. Ibid, Rule, 48.

intimate the fact to the Bar Council on whose roll his name appears and shall thereupon cease to practice as an advocate so long as he continues in such employment. Nothing in this rule shall apply to a Law Officer of the Central Government or a State or of any Public Corporation or body constituted by statute who is entitled to be enrolled under the rules of his State Bar Council made under Section 28 (2) (d) read with Section 24 (1) (e) of the Act despite being a full-time salaried employee. Law Officer for the purpose of these Rules means a person who is so designated by the terms of his appointment and who, by the said terms, is required to act and or plead in Courts on behalf of his employer.[54]

It is also necessary to note here that, even they are not totally free to advertise their profession[55] and keeping themselves in a very control manner they can put only few information on their website, such as their name, address of residence, telephone number, email address and area of interest and not more than that, otherwise the same shall be considered as professional misconduct and for that, the administrative power is given under section 35 of the Act.[56]

It is clear from the above rules that the bar is constituted not for pecuniary gain but full-time active devotion towards the profession which is a social service.

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54. Ibid, Rule, 49.

55. See, Rule 36.

56. Where on receipt of a complaint or otherwise a State Bar Council has reason to believe that any advocate on its roll has been guilty of professional or other misconduct, it shall refer the case for disposal to its disciplinary committee. 1[(1A) The State Bar Council may, either of its own motion or on application made to it by any person interested, withdraw a proceeding pending before its disciplinary committee and direct the inquiry to be made by any other disciplinary committee of that State Bar Council.] (2) The disciplinary committee of a State Bar Council shall fix a date for the hearing of the case and shall cause a notice thereof to be given to the advocate concerned and to the Advocate-General of the State. (3) The disciplinary committee of a State Bar Council after giving the advocate concerned and the Advocate-General an opportunity of being heard, may make any of the following orders, namely: (a) dismiss the complaint or, where the proceedings were initiated at the instance of the State Bar Council, direct that the proceedings be filed; (b) reprimand the advocate; (c) suspend the advocate from practice for such period as it may deem fit; (d) remove the name of the advocate from the State roll of advocates. (4) Where an advocate is suspended from practice under clause (c) of sub-section (3), he shall, during the period of suspension, be debarred from practicing in any court or before any authority or person in India. (5) Where any notice is issued to the Advocate-General under sub-section (2), the Advocate-General may appear before the disciplinary committee of the State Bar Council either in person or through any advocate appearing on his behalf. Explanation In this section, 2[section 37 and section 38], the expressions "Advocate-General" and Advocate-General of the State" shall, in relation to the Union territory of Delhi, mean the Additional Solicitor General of India.

e. Opening the Door Worldwide

The next argument in favor of liberalization is that many countries including America, England, Singapore and China have opened-up their legal service sectors for almost all the countries. Hence, in this economic era how a country may close its service sectors to others? Even in regard to India fly in and fly out is not a complete solution. Therefore, it is a pragmatic approach if in the era of globalization India will not open its legal sector for other countries.

On the other hand, it has been replied that globalization is a veritable evil out to drive the poor countries back to their colonial days and the poor of these countries to abject poverty. As Shri Bhagirath Lal Das wrote in his book "an Introduction to Globalization and its Impact"[57] that there are voices of the proponents of globalization who proclaim that it has potential for the development and welfare of mankind. They say that it is an inevitable and irreversible process in any case and thus one should endeavor to make the best of it. However, the totally unhindered movement of capital across borders means that foreign firms will be able to bring capital for any activity at any time and take it out at any time.[58] It implies that a foreign firm can invest in establishing a factory or a shop at any place in the country it can buy shares in the market or deposit money in banks it can take away profit or returns in the foreign exchange at any time. It can sell shares, withdraw deposits and take away money at any time in foreign exchange.

Moving one step further he also wrote that, before analyzing the deeper implications of full freedom in private economic operators and its impact on development and poverty let us examine the origin of the pressure for such freedom. Naturally, the prime movers for policies on total freedom of economic operators are those that are the main beneficiaries of this process. Undoubtedly the direct beneficiaries are multinational companies and other business guilds which have their headquarters in one country and operations spread over several countries.

It is also a notable fact that most multinational corporations are originated and related to rich countries from which they expand their business in developing countries.

Finally, he cautions that developing countries should not go by slogans on globalization, pronounced by major developed countries and multinational

57. Third World Network, edition 2001/2004, 121-5, Jalan Utamah 10450 Penang, Malaysia.
58. Ibid, page 21.

corporations. They should formulate policies in this regard with their own interest in view.

Thus, by calculating the overall picture of the legal world the second view on this point is that the law firms situated in countries like the United Kingdom, China, Singapore, United States or Australia have overwhelming lawyers force, operating on the International scale and primarily functioning as business organizations designed to promote the commercial interest of their giant client corporations. The size, power, influence and economical standards of these large international law firms would definitely affect the share of the domestic law firms. It can be said that the Indian law firms cannot, at the present scenario, match, howsoever far they may stretch it, the foreign law firm's size, power, and most importantly economic standard.

f. Employment Opportunity

As a matter of fact, from the very beginning, India is suffering from lack of employment and therefore, considering the huge number of advocates in this country advocacy is also not an exception. This unresolved and serious issue also has been tackled by the supporter of the globalization as it is whispered by many of them that with the arrival of foreign law firms in India, there will also be an increase in the employment opportunities for the Indian lawyers with better pay packages and working conditions, and at the same time to meet the standards set forth by the entry of law firms, there will also be a positive impact upon the Legal education system in India, which at the moment is focused more on the theoretical aspects of law rather than its practical implications.

On the other hand, another group is not happy with this contention as India has been a regular witness of unemployment not only in this field but in any other field.

g. Fear from Foreign Law Firms

Last but not least it has been also a prime argument that Indian advocates are opposing the entry of foreign law firms, due to a superfluous fear that they will be unable to compete with them. In other words, permitting the entry of foreign law firms in India will bring in competition and raise the standards of service in the legal sector, which most Indian law firms and lawyers are not ready to face. They are also suggesting that, in the age of consumerism and competition, consumer's right to free and fair competition is dominant and cannot be denied by any other consideration. Trade-in legal services focus on benefits accruing to consumers from the legal services sector, particularly the quality of

service available with respect to particular fields.

Contradicting the above contention it has been argued that the non-capability of the Indian law firms to contend with their foreign law firms stems from the various restrictions, which the domestic law firms here are subjected under the Act. In brief, the Indian law firms are statutorily precluded from advertising and thus indicating their area of expertise. Moreover, domestic law firms are prohibited from raising capital and are also precluded from entering into any kind of co-operation with non-lawyers. Foreign firms, on the other hand, are not shackled by such limitations. Further, legal profession is a noble profession and the Bar Council cannot consider this profession as a business. It is a duty of the Bar Council of India to protect each and every lawyer of the country.[59] Further, opposing liberalization, the Bar Council of India mainly rests its argument on the grounds that Indian lawyers could not successfully compete with foreign law firms, for they are not financially sound enough to compete at the international level and, moreover, they face certain regulatory restrictions placed upon them by local law which puts them at a disadvantage when compared to foreign law firms. There also seems to be a fear amongst the Indian legal fraternity that 'foreign law firms would recruit all their best talent and leave them more vulnerable.

It depicts from the above discussion that the issue of entry of foreign law firms and even after the clear decision of the Apex Court, their continuous existence in India by using the other methods of the new economic world is a serious issue. Undoubtedly it did not contain only the legal questions but also the issue related to ethics. The above discussion also makes an inference that regarding this issue any watertight compartment answer can't be given by anyone. The concluding part of the discussion will try to find out some way forward on the issue.

VI. CONCLUSION

The study under this paper starts with a serious note on the notion of globalization, liberalization and privatization, from where it moves towards existing laws relating to the enrolment of advocates and their right to practice. It is accepted that in the era of globalization any country can't confine itself under its own boundaries; otherwise, it will be isolated from the rest of the world.

59. Interview with G Subramaniam, Chairman, the Bar Council of India and Solicitor General of India , , Hindustan Times, New Delhi, 10 April 2010.

Further, denial of liberalization will resulted into the loss of wealth and the lowering down of the economy of the country. Therefore, it would not be a sensible decision to forbid any trained and operative foreign law associations from working in India, but at the same time, before permitting them, India should also think properly about its own political, cultural, social specification of the country along with the financial benefit and economy.

The Indian advocacy is enjoying a very remarkable, prestigious and well-being status all over the world, where the money has been accepted but it has been accepted only as a means of livelihood. Therefore, unlike the foreign law firms, Indian advocates are not having barely commercial purpose into their sacred profession.

The controversy regarding permission to the foreign national firms to work in India is no longer playing in the courtrooms or the hi-powered committee meetings, but now this issue is moving amongst the group of legal practitioners, government officials, policymakers as well as stakeholders whose rights are directly connected with the issue. As foreign law firms are still working in this country, it is requested that Joint venture arrangements with Indian Law Firms should be the only possible way to allow the foreign law firms to practice in India, in any case, they should not be permitted for individual service. This will ensure that the international clients, wanting to business in India, are properly advised on the Indian Laws. This in turn will also ensure and facilitate the sharing of best practices, benefiting the lawyers from both jurisdictions. In this joint venture, the percentage of sharing will always maintain in favor of the country.

Experience has proved that globalization has a particularly adverse impact on the poorer and weaker section of society and on small enterprises. Hence a proper awareness of its nature, implications and impact is necessary for the developing countries, where poverty is rampant and business activity is almost entirely limited to small and household units. The degree of freeness should be determined by a country in its own interest. A developing country needs financial and technological resources from outside.

Regarding the plea, that liberalization creates job opportunities, it is submitted that undoubtedly it is true but it must be remembered that it creates losers and winners both as resources move to more productive areas of the economy. We should not forget that multi-national companies are actually business and they will always do the business. They will always search for a profitable area for business. As they are concerned only with their profit, they may invest their capital in the legal profession and any time they may leave the country with

their investment by using the right of foreign exchange. The cultural difference between the Indian advocacy system and the foreign legal system is also obstruction in opening the door of the legal sector to the foreign law firms. It is not a hidden fact that legal practitioners engaged with foreign law firms are free to ask for a contingent fee from the clients, but in India, it is totally prohibited and punishable under the Act. Similarly, foreign law firms are working with Multi-Disciplinary practice, properly known as a single window system. Actually, this system of practice is an idea of an integrated team approach under which a group contains different types of professionals work together and provides legal services along with other services. The said team may be leaded either by any advocate or by other professionals like engineer, doctor, sales agent, managing agents or by anyone.

Therefore, under this system of advocacy, an advocate may be bound to work under the supervision and instruction of any other professionals which will be a direct attack against the independence of the legal profession. It should be remembered that under the Advocates Act, 1961 an autonomous and independent bar has been constituted and if advocates will be bound to work through a single window system they will become simply an employee of the firm. Therefore, if the existing rules are prohibiting the Indian advocates even not to share their remuneration to any non-lawyer then how they can work under multi-disciplinary practice, which is totally against the ethics of the profession. To sum up, it is requested that foreign law firms should be permitted only on a temporary basis and they should not be permitted in India for individual existence but always in collaboration with any Indian law firms.

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FORENSIC USE OF VOICE IDENTIFICATION EVIDENCE IN CRIMINAL PROCEEDINGS

*SUBHASH CHANDRA SINGH**

ABSTRACT : The admissibility of voice identification evidence in the courts has not been without its loopholes. Many courts have had to rule on this issue without having access to all the facts. To compound the problem, courts have utilized different standards of admission resulting in different opinions as to the admissibility of voice identification evidence. Even those courts which have claimed to use the same standard of admissibility have interpreted it in a variety of ways resulting in a lack of consistency. Although many courts have denied admission to voice identification evidence, none of the courts excluding the spectrographic evidence have found the technique unreliable. Exclusion has always been based on the fact that the evidence presented did not present a clear picture of the technique's acceptance in the scientific community and as such, the court was reluctant to rely on that evidence. The majority of courts hearing the issue have admitted spectrographic voice identification evidence, but with caution.

KEY WORDS : Forensic Science, Voice Identification, voice print, ear witness, Admissibility

I. INTRODUCTION

Voice identification has been a neglected topic in witness testimony research. Admittedly, voice identification is involved in a small number of criminal cases. In some such cases, however, voice identification may constitute a vital aspect of the legal proceedings against an offender. The voice of an offender over the phone (for example, in extortion or obscene calls) or during the commission of

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crimes such as rape or armed robbery by an offender who is well hidden by darkness, or is well disguised, or attacks the victim from behind, or when someone overhears offenders planning their crime or reflecting on a crime they have just committed, may be the only identification evidence available. In such cases the victim or the earwitness may later be asked to identify the offender's voice in a tape-recorded voice line-up.

The comparison of human voices now focuses on every aspect of the words spoken; the words themselves, the way the words flow together, and the pauses between them. Both aural and spectrographic analyses are combined to form the conclusion about the identity of the voices in question. Today voice identification analysis has matured into a sophisticated identification technique, using the latest technology science has to offer. The research, which is still continuing today, demonstrates the validity and reliability of the process when performed by a trained and certified examiner using established, standardized procedures.

In the light of some new techniques in the field of voice recognition, it is suggested that the same should be used by courts in their response to voice evidence in order to improve the accuracy of decisions and reduce the number of substantially unfair trials and appeals. This article presents a general overview of modern jurisprudence on voice identification and comparison evidence. Particular attention is paid to possible applications of the results in the field of forensic phonetics in which phonetic knowledge is applied in legal cases where the identity of the speaker in a recording is disputed.

II. VOICE IDENTIFICATION SYSTEM AND ITS FORENSIC IMPLICATIONS

The forensic science of voice identification has come a long way from when it was first introduced in the American courts back in the mid 1960's. In the early days of this identification technique there was little research to support the theory that human voices are unique and could be used as a means for identification. There was also no standardization of how an identification was reached, or even training or qualifications necessary to perform the analysis. Voice comparisons were made solely on the pattern analysis of a few commonly used words. Due to the newness of the technique there were only a few people in the world who performed voice identification analysis and were capable of explaining it to a court. Gradually the process became known to other scientists who voiced concerns, not as to the validity of the analysis, but as to the lack of substantial research demonstrating the reliability of the technique. They felt that

the technique should not be used in the courtroom without more documentation. Thus, the battle lines were drawn over the admissibility of voice identification evidence with proponents claiming a valid, reliable identification process and opponents claiming more research must be completed before the process should be used in courtrooms.

Voice of a person can play a vital role in forensic examination. In the present era, widely available facilities of telephones, mobiles and tape recorders results in the misuse of the device and thus, making them an efficient tool in commission of criminal offences such as kidnapping, extortion, blackmail threats, obscene calls, anonymous calls, harassment calls, ransom calls, terrorist calls, match fixing etc. The criminals nowadays are more frequently misusing these modes of communication, believing that they will remain incognito, and nobody would recognize them. It is fortunately no longer true. The voice of an individual can successfully recognize him and pin the crime on him.[1]

The results obtained through speaker recognition analysis are not easily accepted in the court of law. But with advancements made in this field and with the judges understanding the value of statistical findings, the situation is expected to change in the future.[2] But the results in this case also are vulnerable to two types of voice disguise: deliberate and unintentional. Although the voice of a person cannot be stolen but it can be copied using some recording devices. Therefore, the voice-based security systems must protect themselves against such flaws. The other concern is voice disguise. An imposter can gain illicit entry by disguising or imitating the voice of a genuine speaker, to access this personal data. Similarly, a valid person may be denied the entry because of some accidental changes in his or her voice due to illness, emotional or physical stress etc.

By understanding the critical listening phase of voice identification, we may better understand the value and importance of voice identification as a tool for the audio forensic examiner and audio forensic expert. From forensic perspective, the process of speaker recognition has two broad application areas, explicitly, speaker identification and speaker verification. Speaker identification deals with identifying a speaker of a given utterance amongst a set of known speakers. The unknown speaker is identified as the speaker whose model best

1. See generally, B.R. Sharma, *Scientific Criminal Investigation* (Delhi: Universal Law Publishing Company, 2010).
2. P. French, An Overview of Forensic Phonetics with Particular Reference to Speaker Identification, *ForensicLinguistics* 1: 169-181 (1994).

matches the input utterance. There are two modes of operation related to known voices: closed set and open set. The closed set mode is considered as multiple class classification modes. Such system assumes that the voice which has to be determined or identified belongs to a set of known voices. While in open set the speaker which do not belong to a set of known speakers, is referred as an imposter. This task can be used for forensic purposes, in which an offender is used to reveal his or her identity, among several known suspects.

Vocal Identification in audio forensics relies on the ability to recognize these characteristics in any unknown human voice. In the examples above, the repetition of exposure to those vocal characteristics make you respond without even thinking twice about who could be behind you. The difference in regards to audio forensics is that a forensic expert does not always know anything about the voice in question. This requires the forensic expert to rely on their 'critical listening skills.' So, how is this done? What specific characteristics are forensic experts actually looking for? They look for the types of speaking characteristics that could be relevant and specific in identifying a person's voice. Everyone has very distinct features to their voices, regardless of how slight or severe they might be.

When compiling information for voice identification, the forensic expert must listen over and over to the unknown voice with pen and paper taking scrupulous notes of all speech characteristics. They focus specifically on things such as inflection, pronunciation of certain words, any form of an accent, stutters and lisps, amongst other variables. Forensic experts make careful and precise notes about all of these variables. They try to be as specific as possible. The forensic expert will then create a voice profile for this person. The goal then is to create an audio exemplar[3] of that person saying the same message in question with the same delivery heard in the recording. This is called an 'exact exemplar.' They will review and compare notes from both the original recording and the exemplar itself. An exemplar gives a more neutral quality, and is not biased by background noise, feedback, or any other external features that may have affected the original recording.

III. THEORY AND MECHANICS OF VOICE IDENTIFICATION TECHNIQUES

The fundamental theory for voice identification rests on the premise that

3. An audio exemplar is an audio recording that is created by the audio forensic expert and will be used as a comparison to the evidence for the purpose of identification.

every voice is individually characteristic enough to distinguish it from others through voiceprint analysis. There are two general factors involved in the process of human speech. The first factor in determining voice uniqueness lies in the sizes of the vocal cavities, such as the throat, nasal and oral cavities, and the shape, length and tension of the individual's vocal cords located in the larynx. The vocal cavities are resonators, much like organ pipes, which reinforce some of the overtones produced by the vocal cords, which produce formats or voiceprint bars. The likelihood that two people would have all their vocal cavities the same size and configuration and coupled identically appears very remote.

Several debatable assumptions underlie belief in the reliability of voiceprint identification. One is that each person's voice is unique, like a fingerprint.[4] Another is that the spectrogram accurately reflects whatever uniqueness is inherent in a person's voice.[5]The first premise, that all human voices are unique when speaking the same sounds, is based on the fact that voices are affected by anatomical differences among individuals such as the size, shape, and structure of the larynx and the oral and nasal cavities.[6] Moreover, voice differences are apparently caused by the fact that "people exhibit different, but stable habitual patterns in the way they use the articulators (teeth, tongue, and lips), as well as other parts of the vocal apparatus, in speaking."[7] The combination of many factors appears to render one's speech different from that of all other persons. Nevertheless, this assumption has been criticized. The controversy that exists, centers on the role of the articulators. Proponents of spectrographic analysis state that, the positioning of the articulators becomes so habitual that the speaker cannot significantly change his voice patterns, thereby rendering the unique characteristics of each individual's voice immutable. However, until a person matures physically and linguistically, changes in voice patterns will occur. Thus, voice samples of children must be taken shortly after one another.[8]

The debate concerning the second assumption, that the spectrogram

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4. William R. Jones, Danger—Voiceprints Ahead,11 *American Criminal Law Review* 549 (1973) at 550.
5. For analysis and criticism of this assumption, see Kamine, The Voiceprint Technique: Its Structure and Reliability, 6 *San Diego Law Review* 213 (1969) at 218-22.
6. Jones, *Danger-Voiceprints Ahead, supra* note 4 at 550.
7. Jones, Evidence velnon: The Non Sense of Voiceprint Identification, 62 *Kentucky Law Journal*, 303 (1974).
8. Kamine, *supra* note 5 at 226. Kamine indicates that since speech is a learned process whereby the infant experiments with positions for the articulators until he is satisfied with the intended sound, these habits can be changed even though the positioning eventually becomes habitual. *Ibid*.

accurately reflects the unique character of a person's speech, arises from the nature of the information provided by the voiceprint. While there is no disagreement that the spectrogram portrays the three dimensions of time, frequency, and amplitude accurately, there is a lack of accord among scientists as to whether the spectrogram's representation of the sound is adequate to identify persons.[9] Because of these theoretical and mechanical imperfections of the voiceprint technique, a proper empirical evaluation is necessary to provide true insight into the reliability of this method of personal identification. An obvious vulnerability of the technique, as with most scientific evidence, lies in the potential fallibility of the expert who analyzes and compares the voiceprints.[10]

IV. FACTORS AFFECTING VOICE IDENTIFICATION ACCURACY

On the basis of the available literature it can be concluded that while in many situations human listeners are capable of accurate voice identification, the reliability of earwitness testimony is affected by a number of factors, namely the duration of the verbal communication listened to and the number of voices listened to at the time a crime is being perpetrated. Additional factors are the pitch of the voice, delay in an earwitness being asked to identify the suspect's voice, whether the witness has conversed with the speaker. Finally, the emotional state at the time of encoding as well as the age and gender of the witness and whether the voice is disguised impact on voice recognition accuracy. It would appear that voice recognition is more difficult than visual identification.[11]

It is sometimes the case that a crime is perpetrated by more than one offender. It has been found that if witnesses initially hear a number of voices their subsequent voice recognition accuracy is negatively affected. McGehee reported that voice recognition accuracy decreased significantly within 24 hours when subjects had to recognize three voices instead of one. Many offences against the person (for example, assault, mugging, and sexual assault) involve the use of threat of violence, often backed up with possession of a firearm, or actual use of violence against the victim who no doubt finds the experience

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9. *See* Bolt, Cooper, David, Denes, Pickett and Stevens, Speaker Identification by Speech Spectrograms: A Scientist's View of its Reliability for Legal Purposes, 47 *Journal of Acoustical Society of America*, 597 (1970) at 602-03.
10. See,Comment, TheVoiceprint Technique: A Problem in Scientific Evidence,18 *Wayne Law Review*, 1365 (1972).
11. G.E. Legge, C. Grossman, and C.M. Pieper, Learning Unfamiliar Voices, *Journal of Experimental Child Psychology*, 10, 298-330 (1984) at 297.

very stressful.[12] Yarmey and Pauley investigated the influence on voice recognition accuracy of the presence of a weapon and whether abusive language was used in a videotape of a hold-up by a masked offender. Neither variable was found to impact significantly on voice recognition accuracy or false identification in a voice line-up but allowed 'guilty suspects more easily to escape detection.'[13] One possibility not considered by Yarmey and Pauley is that if the robber wore a mask it clouded any weapon or abusive language effect on the listeners. Whether a speaker is under stress at the time of communicating a message or when being tested later on has been found to impact adversely on the accuracy with which his/her voice will be identified.

The accuracy of voice identification can be correlated with the length of the speech, that is, with the length of exposure. Brickner and Bruzansky looked at the effect of both duration and the length of speech samples on earwitness identification. They found that for the voice of people who worked together there was 98 per cent correct identification for sentences spoken, 84 per cent for syllables and 56 per cent for vowel excerpts.[14] Bull and Clifford reported that voice recognition is possible even with 2-second short speech samples. The longer the duration of the speech sample, however, the better the accuracy. It is said that as speech duration increases to 2 or 6 minutes so does the rate of false identifications. Bull and Clifford concluded that, the greater the variety of a perpetrator's voice that is initially heard the more likely is an earwitness later correctly to recognize the voice. What has not yet been clearly established by research is how short the sample needs to be before subsequent correct recognition is unlikely.[15]

Many offenders attempt to disguise their voices to impede their identification. In addition, easily accessible advanced technology enables one to so transform salient features of a tape-recorded message as to disguise it. There is empirical support for the view that disguising one's voice (for example, by a change in pitch) means a witness can draw on voice characteristics that are crucial in its identification. An easy way to disguise one's voice is to communicate

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12. Andreas Kapardis, *Psychology and Law* (UK: Cambridge University Press, 2003), p.292.
13. A.D. Yarmey, Earwitness and Evidence Obtained by Other Senses, in R. Bull and D. Carson (eds.), *Handbook of Psychology in Legal Contexts* (Chichester: Wiley, 1995), p.266.
14. P. Brickner and S. Bruzansky, Effects of Stimulus Context and Duration on Talker Identification, *Journal of Acoustical Society of America*, 40, 1441-9 (1966).
15. R. Bull and B. Clifford, Earwitness Testimony, in A. Heaton-Armstrong, E. Shepherd and D. Wolhover (eds.), *Analysing Witness Testimony: A Guide for Legal Practitioners and Other Professionals* (London: Blackstone Press, 1999), p.199.

in an angry tone of voice or to whisper a statement. It is said that subjects are significantly less likely to correctly identify a disguised (in terms of tone) than a non-disguised voice.

Accuracy of voice identification evidence is affected by the time factor. How much time elapses between actual earwitnesses hearing a voice and when they are asked to identify it varies from case to case. There has been no consistency in the findings reported about the effect of retention interval on voice recognition accuracy. McGehee had subjects listen to a fifty-word passage read by an unseen speaker at different time intervals. Later subjects were asked to identify the speaker from among four others reading the same passage. It was found that identification accuracy was 83 per cent at two days, 68 per cent at two weeks, 35 per cent at three months, and 13 per cent at five months.[16] It is reported that retention interval (0 days, 7 days, and 14 days) had no detrimental effect on voice recognition accuracy.[17] While voice recognition accuracy did not differ significantly over a one-week period, the false alarm rate increased over the same delay.[18] Forgetting over time depends upon the extent of original learning; some voices because of their distinctiveness may be more easily learned and less affected by delay in testing.[19] As far as the age of theearwitness is concerned, it is known that infants under six months of age can differentiate their mother's voice from that of strangers. Regarding the question of whether adults' voice recognition accuracy is significantly better than children's, some experts found that accuracy among children aged 10 approached that of adults. Available evidence shows that both children and adults are equally poor at voice identification. More research into age differences in voice recognition accuracy is needed before definitive conclusion can be drawn about the children vs. adults' issue. As far as gender differences are concerned, McGehee found male subjects better only at recognizing female voices.[20]

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16. F. McGehee, The Reliability of the Identification of the Human Voice, *Journal of General Psychology*, 17, 249-71 (1937).
17. L.R. Van Wallendael, A. Surace, D.B. Parsons, and M. Brown, Earwitness Voice Recognition: Factors Affecting Accuracy and Impact on Jurors, *Applied Cognitive Psychology*, 8, 666-7 (1994).
18. A.D. Yarmey and E. Matthys, Voice Identification of an Abductor, *Applied Cognitive Psychology*, 6, 367-77. (1992).
19. A.D. Yarmey, Earwitness and Evidence Obtained by Other Senses, in R. Bull and D. Carson (eds.),*Handbook of Psychology in Legal Contexts* (Chichester: Wiley, 1995) at 267.
20. McGehee, *supra* note 16.

V. SAFEGUARDS TOWARDS THE DANGERS OF VOICE RECOGNITION

In many criminal cases, prosecutors have attempted, not always successfully, to introduce evidence of voice identification in prosecutions for a variety of crimes, including extortion, bomb threats, kidnapping, robbery, murder, and the sale of narcotics. Typically, in cases involving aural voice identification, the witness compares the suspect's voice with his memory of the voice of the criminal, often heard only briefly at the scene of the crime. If a tape recording is available, the voices of the suspect and the criminal may be heard in rapid succession and the comparison can be based on short-term rather than long-term memory. Sometimes the tape is treated electronically in an attempt to improve clarity. The witness may have prior familiarity with the voice of the criminal, but this is not required.

Dangers with voice identification are notorious. Since the introduction of such evidence judges have expressed concerns about identification evidence.[21] In *Alexande*r v. *The Queen*,[22] Mason J explained the need for caution: "The problems which afflict identification evidence have their origin in four principle sources: (a) the variable quality of the evidence much of which is inherently fragile; (b) the use by police of methods of identification which through well suited to the investigation and detection of crime, are not calculated to yield evidence of high probative value in a criminal trial; (c) the consequential need to balance the interests of the accused in securing a fair trial against the interest of the State in the efficient investigation and detection of crime by the police; (d) the difficulty of accommodating the reception of certain types of identification testimony to accepted principles of law of evidence.

In criminal proceedings, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant. The 'probative value' of evidence is defined as the extent to which the evidence could rationally affect the probability of the existence of a fact in issue. 'Unfair prejudice' is the danger that the evidence might be improperly valued or misused by the fact-finder.[23] In effect, the trial judge is required to balance the ability of the evidence to influence rationally the assessment

21. See *Craig* v. *TheKing* (1937) 49 CLR429 at 449-50; *Davis* v. *TheKing* (1937) 57 CLR 170; *Kelleher* v. *TheQueen* 1974 131 CLR 534 at 550-51; *Domican* v. *TheQueen* (1992) 173 CLR 555; *Festa* v. *TheQueen* (2001) 208 CLR 593.
22. (1981) 145 CLR 395, 402.
23. Australian Law Reform Commission (ALRC), Evidence Report No. 26 (Interim) Vol. 1 (1985); Also see, *R.* v. *D.* (1997) 94 A Crim L 131 at 151.

of the facts in issue against any real danger that the evidence may be misused by the court. If the danger outweighs the probative value then the judge is obliged to exclude the evidence.

It is said that there are little safeguards toward the dangers of voice recognition. In UK, the Code D of Code of Practice for Police under PACE states, the code does not preclude police from using voice identification parade where they judge it is appropriate in the case. Later, this can be adduced to the court to prove the accused guilt. Though, the dangers of misidentification have been tackled to a certain extent by rules and guidelines, it cannot be said that the rules and guidelines are without potholes. In England and Wales, a suitably adapted *Turnbull* warning should be given by the Judiciary regarding earwitness testimony.[24]

Recognizing the dangers inherent in voice identification, the Court of Appeal in*R* v. *Flynnand St John*[25] provided some safeguards for pre-trial procedures. The court held:

1. Identification of a suspect by voice recognition was more difficult than visual identification;
2. Identification by voice recognition was likely to be more reliable when carried out by experts using acoustic and spectrographic techniques, as well as sophisticated auditory techniques, than by lay listener identification; and
3. The ability of a lay listener to identify voices correctly was subject to a number of variables. The following factors were relevant:
    (a) The quality of the recording of the disputed voice or voices;
    (b) The gap in time between the listener hearing the known voice and his attempt to recognize the disputed voice;
    (c) The ability of the individual lay listener to identify voices in general—the ability of an individual to identify voices varied;
    (d) The nature and duration of the speech sought to be identified—some voices were more distinctive than others and the longer the sample of speech the better the prospect of identification; and
    (e) The greater the familiarity of the listener with the known voice the better his or her chance of accurately identifying a disputed voice—research showed that a confident recognition by a lay listener of a

24. *Hersey,* (1998) Crim L R 281 (CA).
25. (2008) Crim L R 799.

familiar voice might nevertheless be wrong.

The opinion of an expert is admissible, if at all, for the purpose of aiding the fact-finder in a field where he has no particular knowledge or training. The weight and credibility to be given to the opinion of an expert lies with the fact-finder. It is no different in this field than in any other.[26]

In *State* v *Daniel*,[27]Doherty AJ, sitting alone, held:

Evidence that the voice of a person involved in an offence is the voice of a defendant is admissible to prove identification of the defendant where:

(a) the voice is known by the witness and recognized by the witness; and

(b) the voice is not previously known to the witness but has such distinctive features that it leaves a clear mental impression in the mind of the witness enabling him/her to draw the conclusion on hearing it later that it was the same voice.

If 'voice identification' is in issue, the Court should consider the relevant principles enunciated in *R* v *Turnbull& others*.[28] As stated in *R.* v. *Oakwell*,[29] a *Turnbull* warning is generally required in all cases where identification is the sole or substantial issue. Finally, the *Turnbull* guidelines apply equally to police who are identifying witnesses.[30]

In India, no special rules have been developed to help judges to evaluate the testimony of someone who makes a voice investigation based on his own listening. The fact-finder, that is, the judge, is generally entitled to consider the testimony, notwithstanding objections based on such factors as the uncertainty of the identification, unfavourable listening conditions (noise, stress, or shock), and other challenges to the likely accuracy of the identification. Such factors are to be considered by the fact-finders in determining the weight of the evidence and do not affect its admissibility. Special rules govern the use of tape recordings in court, but they relate only to the problem of ensuring that the tape accurately reproduces the sounds heard by the witness and not to the problem of making a comparative judgment.

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26. *US* v. *Baller*, 519 F.2d 463 (4th Cir. 1975).
27. (1988-89) PNGLR 580.
28. (1977) QB 224, at 228-31, 63 Cr.App.R. 132 at 137-40.
29. (1978) 66 Cr. App. R. 174.
30. *Reid* v. *R.* (1990) A.C. 363 (PC); see also, *R* v. *Hersey* (1998) Crim LR 281; *R v Keating (a)* (1909) 2 Cr App R 61; *R* v. *Smith* (1984) 1 NSWLR 462; *Corke*(1989) 41 A Crim R 292 &*R* v.*Brotherton*(1992) 29 NSWLR 95; (1993) 65 A Crim R 301.

VI. JUDICIAL TREATMENT OF VOICEPRINT IDENTIFICATION EVIDENCE

The introduction of voice identification in criminal proceedings raises significant evidentiary problems, primarily concerning the question of relevancy. Determination of the relevance of proffered testimonial or real evidence involves a judicial consideration of both the materiality and probativeness of that which is offered.[31] Generally, when courts consider the relevance of scientific evidence and the testimony of the expert interpreting it, they initially rely on scientific experts to sustain the value and veracity of the scientific technique. It is settled that even without firsthand knowledge, witnesses skilled in a field encompassing a relevant test not within the range of common experience have been allowed to offer their opinions, inferences, or deductions if the testimony will aid the trier of fact.[32] The issue to be settled in each case is the qualification of the expert witness in terms of his own skill or knowledge, the facts upon which he bases his assertion, and the field from which the expert must be drawn.[33] This assures the court that the proffered evidence is of at least minimum probative value.[34]

There are two general rules or standards by which scientific evidence is accepted in courts of law in the United States. The first commonly referred to as the *Frye* rule or test, is based on a 1923 District of Columbia case.[35] Under the *Frye* standard, the "(theory) from which the deduction is made (must) be sufficiently established to have gained general acceptance in the field in which it belongs."[36] What in effect must be demonstrated is such general acceptance of the technique in the field of authority to which the technique relates as to allow for judicial notice of it.[37] The second is based on the argument of McCormick who states: "General scientific acceptance is a proper condition for taking judicial notice of scientific facts, but it is not a suitable criterion for the admissibility of scientific evidence. Any relevant conclusion supported by a qualified expert witness should be received unless there are distinct reasons for exclusion."[38]

The *Frye* standard sets forth a strict standard for admissibility of scientific evidence aimed at avoiding an inordinate degree of judicial discretion on issues

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31. Comment, The Evidentiary Value of Spectrographic Voice Identification, 63 *Journal of Criminal Law, Criminology & Police Science* (1972)at 349.
32. Jones, *The Non Sense of Voiceprint Identification, supra* note 7 at 307.
33. C. McCormick, *Handbook of the Law of Evidence*§ 185 (2d ed. E. Cleary, 1972).
34. *See* R. Donigan& E. Fisher, *TheEvidence Handbook*, 150 (1965).
35. *Frye* v. *United States*, 293 F. 1013 (D.C. Cir. 1923).
36. *Id*. at 1014.
37. Comment, *The Status of Voiceprints as Admissible Evidence*, 24 *Syracuse Law Review*1261, 1265 (1973).
38. See "McCormick on Evidence," 3rd Ed., § 203, at 608.

of admissibility and the injection of irrelevant matter into the fact-finding process.[39] This rule allows a court to overcome its lack of knowledge of the utility of a particular scientific technique while minimizing the possibility that the fact-finder will be swayed by unreliable evidence.[40] New scientific principles or techniques are placed into what the *Frye* court characterized as a twilight zone of reliability. To escape this area, such principle or technique must cross the line between the experimental stage and the demonstrable stage.

For years, *Frye* was the predominant standard for the admissibility of scientific evidence. *Frye* was a murder case involving expert testimony based on an early version of the polygraph technique, which the court found inadmissible because polygraph testing had not achieved general acceptance in the relevant scientific community.[41] In 1993, the U.S. Supreme Court, *in Daubert*v. *Merrell-Dow Pharmaceuticals*,[42]changed the standard governing the admissibility of expert testimony in presenting scientific evidence.*Daubert* requires trial judges to act as gatekeepers and make a preliminary assessment when faced with a proffer of expert scientific testimony. The judge must determine whether the offered expert testimony is (1) scientific knowledge and (2) will assist the trier of fact to understand or determine a fact in issue. These entail preliminary assessments of whether the reasoning or methodology underlying the testimony is sufficiently valid and whether it can be properly applied to the facts of the case. *Daubert* language also imposes the requirement that the scientific evidence "fit" the case, raising the threshold for relevancy.

Voiceprint evidence was widely discredited in the 1970s, and many American courts found it inadmissible under the *Frye* standard.[43] Nonetheless, in the only published case so far to analyze voiceprint testimony under *Daubert*, the Alaska court found it admissible.[44] Because of a growing recognition of the reliability of voiceprint identification in many countries, there is a developing judicial trend toward acceptance of spectrographic test results into evidence in criminal cases. However, auditory analysis evidence is given less value.[45]The unreliability of auditory comparisons was recognized in *O'Doherty*,[46]where the Northern Ireland

39. Frye, *Frye* v. *United States*, 293 F. 1013 (D.C. Cir. 1923)at 1265-66.
40. *Id*. at 1266.
41. Frye, *supra* note 39.
42. 509 U.S. 579 (1993).
43. See, e.g., *People* v. *Kelly*, 549 P. 2d, 1240 (1976), rejecting voiceprint testimony as not generally accepted in the scientific community.
44. *State* v. *Coon*, 974 P. 2d, 386 (Alaska 1999).
45. (1991) 93 Cr App R 161.
46. (2003) 1 Cr App R 5 (77).

Court of Appeal held that, save for a few exceptions, auditory analysis evidence had to be supported or supplanted by acoustic analysis evidence. In *Flynn*[47], the Court of Appeal felt that *O'Doherty*had gone too far and that the key to the admissibility of auditory comparisons made by a lay witness was the witness's degree of familiarity with the suspect's voice.

In *State ex rel. Trimble* v. *Heldman*,[48] the Supreme Court of Minnesota held that "spectrograms ought to be admissible at least for the purpose of corroborating opinions as to identification by means of ear alone".[49] The court was impressed by the testimony of Dr. Oscar Tosi who had previously testified against the use of spectrographic voice identification evidence in courtrooms, but after extensive research and experimentation now described the technique as "extremely reliable".[50] The court made reference to the *Frye* test as the standard for the admissibility of the voice identification evidence.[51] In discussing the issue of admissibility the court held that it was the job of the fact-finder to weight the credibility of the evidence.

In India, voice identification evidence either as human listeners or in spectrographic form is admissible in courts. The court accepted the conversation or dialogue recorded machine as admissible evidence, provided first the conversation is relevant to the matter in issue; secondly, there is identification of the voice; and thirdly, the accuracy of the tape recorded conversation is proved by eliminating the possibility of erasing the tape-record. A contemporaneous tape-record of a relevant conversation is a relevant fact and is admissible under section 8 of the Evidence Act.[52] In *Pratap Singh* v. *State of Punjab*,[53] the Supreme Court relied heavily on the tape-recording which had been put on the record by the petitioner. In *YusufalliEsmailNagree* v. *State of Maharashtra*,[54] the Supreme Court observed as follows:

> The process of tape-recording offers an accurate method of storing and later reproducing sounds. The imprint on the magnetic tape is the direct effect of their relevant

47. (2008) EWCA Crim 970 at para 62.
48. *US* v. *Franks*, 511 F. 2d 25 (6th Cir. 1975).
49. *Commonwealth* v. *Lykus*, 327 N.E.2d 671 (Mass. 1975).
50. *Commonwealth* v. *Vitello*, 327 N.E.2d 819 (Mass. 1975).
51. *State* v. *Olderman*, 336 N.E. 2d 442 (Oh. 1975).
52. *Malkani* v. *State*, AIR 1973 SC 157; *Ziyauddin* v. *Brij Mohan*, AIR 1975 SC 1788; *Shreerama Reddy* v. *V.V. Gi*ri, AIR 1971 SC 1162; *State of Maharashtra* v. *Ramdas Shankar Kurlekar*, 1999 Cri LJ 196.
53. AIR 1964 SC 72.
54. AIR 1968 SC 147.

> incident, a contemporaneous tape-record of a relevant conversation is a relevant fact and is admissible under section 7 of the Indian Evidence Act.

In *Ismail's* case, the Court further observed:

> If a statement is relevant, an accurate tape record of the statement is also relevant and admissible. The time and place and accuracy of the recording must be proved by a competent witness and the voice must be properly identified. One of the features of the magnetic tape recording is the ability to erase and reuse the recording medium. Because of this facility of erasure and reuse the evidence must be received with caution. The court must be satisfied beyond reasonable doubt that the record has not been tampered with.[55]

Besides the above observations and conditions for admission, the Supreme Court in *Ramsingh* v. *Col Ramsingh*,[56]. after reviewing a number of national and foreign case law including the decisions in *R* v. *Maqsud*,[57] and *R* v. *Robson*,[58] have placed further conditions for accepting tape-recorded evidence, viz. (a) the recorded statement must be sealed and kept in safe or official custody; (b) the voice of the speaker should be audible.

VII. CONSTITUTIONAL AND HUMAN RIGHTS DIMENSIONS

While dealing with the aspect as to whether subjecting a person for voice identification parade or asking him to provide voice sample for comparison is violative of constitutional guarantee of life and liberty, the courts have adopted a mixed attitudes. A US Fifth Circuit case demonstrates that a constitutional standard applies to voice identifications, even if a defendant fails to adequately make and preserve a challenge to voice identification evidence at trial, or fails to sufficiently argue plain error in his appeal. What remains for the defendant's objection is a constitutional standard—that the voice identification violated the Fifth Amendment Due Process Clause, as being "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[59]

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55. *Ibid*.
56. AIR 1986 SC 3.
57. (1965) 2 All ER 464.
58. (1972) 2 All ER 699.
59. *Simmons v. United States*, 390 U.S. 377, 384 (1968).

In *United States* v.*Askins*,[60] a federal district court in Maryland considered whether the procurement of a voice exemplar by law enforcement authorities for voiceprint identification purposes violated the defendant's due process rights guaranteed by the Fifth and Fourteenth Amendments.[61] The court stated that "clearly, requiring a person to speak, an activity engaged in by the vast majority of people every day of their lives, cannot, in any sense, be considered the type of conduct which offends 'those canons of decency and fairness which express the notions of justice of English-speaking peoples."[62]

It has been contended that spectrographic identification analysis violates another due process right—the guarantee of fundamental fairness. Commentators have suggested that if the procedures employed in a given voiceprint case were shown to be unnecessarily suggestive and conducive to irreparable mistaken identification,[63] the spectrographic identification evidence could perhaps be excluded.[64] This protest is founded upon the belief that, due to the incriminating nature of the recorded statement itself, an examiner might develop bias and prejudice toward a defendant in his evaluation of a voiceprint derived from an exemplar consisting of a confession or other incriminating statement.[65] Against the findings of the Tosi study concerning the training and professional honesty of the spectrographic examiner, the fears regarding his integrity are largely hypothetical. Therefore, the requirements of due process would not seem to bar either the taking of the defendant's voiceprint exemplar or its analysis by an expert.

It is not unconstitutional for a police to ask a suspect for a speech sample. If the suspect refuses, a court order may be obtained requiring compliance with the request. The case of *Schmerber*v. *California*,[66]and *Gilbert* v. *California*,[67]are landmark cases. There are also many additional decisions at both state and federal court levels in the United States that may be cited to support such a request. Court orders should clearly spell out the minimum number of samples to be obtained, the manner of speech, and the method to be employed.

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60. 351 F. Supp. 408 (D. Md. 1972).
61. The fourteenth amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Constitutionamend. XIV, **§** 1**.**
62. 351 F. Supp. 408, 417 (D. Md. 1972).
63. *Stovall* v. *Denno*, 388 U.S. 293, 302(1967).
64. Note, Voiceprint Identification, 61 *Georgetown Law Journal* 703 (1973) at 743-44.
65. *Id.* See also,Comment, *The Status of Voiceprints as Admissible Evidence*,24 *Syracuse Law Review*1261, (1973) at 1274-75.
66. 384 US. 757 (1966).
67. 388 US. 263 (1967).

The use of human voice as identification evidence has raised a number of concerns about increased police powers and the unquestioning adoption of a conservative crime control agenda in the administration of criminal justice. It is argued that voice identification parade or asking a suspect for voice sample amounts to violation of a privacy right. As we know, privacy is a fundamental human right recognized in the UN Declaration of Human Rights, the International Covenant on Civil and Political Rights and in many other international and regional treaties. Privacy underpins human dignity and other key values such as freedom of association and freedom of speech. It has become one of the most important human rights issues of the modern age. Nearly every country in the world recognizes a right of privacy explicitly in their Constitution. At a minimum, these provisions include rights of inviolability of the home and secrecy of communications.

Here, it may be noted that the Constitutions of South Africa and Hungary include specific rights to access and control one's personal information. In many of the countries where privacy is not explicitly recognized in the Constitution, such as the United States, Ireland and India, the courts have found that right in other provisions. In many countries, international agreements that recognize privacy rights such as the International Covenant on Civil and Political Rights or the European Convention on Human Rights have been adopted into law. In *People's Union for Civil Liberties* v. *Union of India*,[68] the Indian Supreme Court has made it clear that the right to privacy is the part of the right to life guaranteed by article 21 and the right to privacy includes telephone conversation in the privacy of home or office. Telephone tapping is violative of the freedom of speech and expression guaranteed by article 19 (1) (a) unless it comes within the grounds of restrictions under article 19(2). In view of all these discussions, it can be inferred that the samples of voice for comparison is quite complicated from constitutional perspective, but absolute possible.

VIII. ISSUES WITH SCIENCE IN THE COURTROOM

Recently, after a long inquiry, an eminent group of scientists, mathematicians and engineers, joined by a few senior lawyers and judges, reported to the Congress on the condition of the forensic sciences in the United States. Their findings were both surprising and disconcerting. They concluded

68. AIR 1997 SC 568.

that 'with the exception of nuclear DNA analysis .... no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source ....' The law's greatest dilemma in its heavy reliance on forensic evidence…concerns the question of whether—and to what extent—there is sciencein any given forensic science discipline.[69] These concerns are generally applicable to the forensic sciences in India and to most of the methods of voice comparison and voice identification currently used by displaced listeners and investigative familiars accepted by Indian courts, like many others. We must have very serious misgivings about the foundations and reliability of purportedly expert voice identification evidence, particularly its non-institutionalized and ad hoc varieties.[70]

Notwithstanding, or perhaps because of, the lack of specialized knowledge in most areas of forensic voice comparison, our judges have, quite perversely, developed jurisprudence and practices that enable those without relevant training, study, experience or demonstrated ability and who have not given attention to relevant scientific research to, nevertheless, express their incriminating opinions in circumstances where the identity of the speaker is quite often the ultimate issue. Those without demonstrated proficiency are magically transformed into experts for the purpose of litigation. Moreover, lay lawyers and judges unfamiliar with the accused, their voice and even their language may be asked to compare voices speaking in different languages and under different conditions. These practices are not conducive to a fair trial or an accurate verdict.

Scientific evidence has become a useful tool in criminal trials, but an increase in new methods and techniques has necessitated a reconsideration of the viability of such evidence. The admission of scientific evidence poses three dangers to insuring criminal justice. First, because scientific evidence has an aura of certainty, a judge/magistrate may accord it undue weight. Second, because scientific evidence is generally beyond the comprehension of lay people, it might confuse or mislead a judge/magistrate to the point of totally rejecting the evidence. Third, the scientific evidence offered through expert testimony may be insufficiently removed from the knowledge of the average fact-finders, and the expert may not be properly qualified in a particular field to assist the court in its

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69. National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* (National Academies Press, 2009) 7, 9.

70. See Gary Edmond, 'Impartiality, Efficiency or Reliability? A Critical Response to Expert Evidence Law and Procedure in Australia,' (2010) 42 *Australian Journal of Forensic Sciences* 83.

search for truth.

It appears to us that we need to continuously refine practice in ways that accommodate and recognize the knowledge developed in other fields. Centuries ago, Saunders J declared that if matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns, which is an honourable and commendable thing in our law. For this it appears that we do not despise all other sciences but our own, but we approve of them and encourage them as things worthy of commendation.[71]

IX. CONCLUSION

Voice identification evidence helps a court to identify people involved in a case and put the puzzle pieces of a case together. Furthermore, voice identification can also sometimes provide substantial enough evidence to cause people to be convicted or released. We must understand that no two human voices are the same just like no two fingerprints are the same. Despite attempted voice disguise cover up, a trained forensic expert can identify a voice and compare it to another voice to determine identification. Voice identification will continue to be an important part of the litigation process when audio evidence is involved. The science is as exact as the expert is experienced. The more experienced the expert, the more solid the forensic expert's report.

Voice identification evidence is accepted almost in all countries including India but because of notorious dangers, it requires special attention and caution in terms of both admissibility and relevance. In many instances, the most conclusive evidence available is a recording of the criminal. However, the identification of the voice in the recording as being that of a defendant charged with the crime has proved to be a major obstacle to the use of those recordings. Voiceprint identification, if conducted properly, can render extremely reliable results.

It would seem that relevant expert literature on voice identification could help to guide and improve legal practice and correct a range of strange anomalies and beliefs about both human perceptions and the ability of the adversarial trial and its safeguards to substantially address problems with sounds, voices and comparisons. Our lawyers, prosecutors and judges have been remarkably inattentive (or resistant) to the results of scientific research in the field of voice

71. *Buckley* v. *Thomas* (1554) 1 Plowd 118, 125; 75 ER 182, 192.

identification. Lawyers and judges do not cite, and very rarely refer to, relevant empirical and experimental literature in support of judgment. Rather, they tend to rely upon unsystematic impressions and experiences and the rather random way in which weaknesses and limitations may or may not be exposed and considered during trials and appeals. Even though comparison of sounds and identification from sounds is, in many situations, even less reliable than comparison or identification in relation to vision and images, it can be a useful tool in the identification of criminals, if conducted properly. Engaging with experimental studies and scientific research can help courts to make more appropriate decisions on admissibility and weight. Remarkably, the Indian courts are yet to engage with the considerable scientific literature on these subjects.

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EXEMPTIONS FOR EDUCATIONAL PURPOSES UNDER COPYRIGHT LAW IN INDIA

RAJNISH KUMAR SINGH*

ABSTRACT : Copyright law does not confer absolute rights. These rights are subject to certain public interest claims including limitations and exemptions as recognised by Berne Convention, 1886 and later accepted by TRIPs Agreement and WIPO Copyright Treaty, 1996. These exemptions are based on three-step-test and almost all the countries have included these exemptions in their municipal law. Exemptions for educational purpose is one such provision. Indian law contains it in various clauses of section 52(1). Indian law on the issue has witnessed changes because of the amendment done in the Copyright Act in 2012 and also because of the recent decision of the Delhi High Court in the *Rameshwari Photocopy* case. The decision expands the scope of the provision by recognising the right of users. Further, the inclusion of disability clause in section 52 is also seen as an attempt to make copyrighted works accessible to all including disabled people in order to provide human right to education to all. In this context the present paper examines the exemptions under international copyright instruments and Indian law and also analyses the recent judicial trend

KEY WORDS : Exemptions in copyright, fair use, educational use in copyright, disability clause, print disability.

I. INTRODUCTION

Intellectual property rights (IPRs)are considered as private rights. It became explicitly recognised as such after conclusion of the Agreement on Trade-Related Aspects of Intellectual Property Rights, 1995 (the TRIPs Agreement).[1] These rights are not absolute as restrictions have been imposed to balance these right

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1. The TRIPs Agreement, 1995, Preamble.

with competing interest of society. Needless to say that IP laws create limited monopoly. Many public interest provisions including fixed duration of rights, compulsory licensing provisions and fair use defences *etc.* put limitation on the scope of rights created by these laws. In relation to copyright almost all the international legal instruments and municipal laws have provided for the exemptions in various ways for the benefit of society. It has always been a contentious issue to strike a balance between interest of right holders and its users.

There is another way to look at the exemptions provided by the law in favour of users *i.e.* to consider it a matter of right of the users and not just defences in the case of infringement of copyright. This aspect of balancing the two claims may raise may difficult issues and one such issue is reproduction of books *etc.* protected under copyright law for the purposes of imparting education. The three-step-test[2], which has its origin in the Berne Convention of 1886 is the basis for determining the limits on reproduction rights as exemptions to copyright law.[3]It is relevant to note that copyrighted works are often required to be used in course materials and textbooks, class rooms, research works, examination question papers *etc.* by the students and the faculty members and thus, educational institutions are one of the major users of copyrighted materials.[4]Educational institutions are benefitted with the exemptions created for educational purposes under the copyright law.

The issue also has human rights dimension. The international documents like the Universal Declaration of Human Rights, 1948, the International Covenant on Economic, Social and Cultural Rights, 1966 and the Convention on Rights of Persons with Disabilities, 2006 *etc*. recognize the right to education as human rights. The concern is visible in the laws of different countries.

Educational exemptions to copyright laws have been a part of every major intellectual property treaty since the 1886 Berne Convention for the Protection

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2. The three step test of Berne provides that: i) Exemptions to be provided in certain cases only; ii) the use of work by defendant must not come in conflict with the normal exploitation of plaintiff's work; and iii) the use of work by defendant must not unreasonably prejudice the legitimate interests of plaintiff.
3. Robert J. Congleton and Sharon Q. Yang, "A Comparative Study of Education Exemptions to Copyright in the United States and Europe", 3(1) *Athens Journal of Law*, 2017, pp.47-60, at 51.
4. T.C. James, "Copyright Law of India and the Academic Community", 9 *Journal of Intellectual Property Rights*, 2004, pp.207-225, at 217.

of Literary and Artistic Rights.[5]A clear understanding of such exemptions under the copyright law is a must for all educational institutions. The present paper makes an analysis of such exemptions under international legal instruments and in India and also examines the recent developments in India in the light of the decision of Delhi High Court in *The Chancellor, Masters and Scholars of the University of Oxford and Ors* v. *Rameshwari Photocopy Services and Anr.*[6]

II. EDUCATIONAL EXCEPTIONS UNDER INTERNATIONAL TREATIES

There are different international/multilateral instruments dealing with protection of copyright and its exceptions. It would be better to understand the scope of educational exceptions under these instruments and then proceed towards provisions under Indian copyright law. A brief account of these instruments is provided below.

The oldest multilateral instrument in the field of copyright protection is Berne Convention for the Protection of Literary and Artistic Works, 1886 (the Berne Convention). It provides a high level of protection and gives authors the most comprehensive set of rights.It explicitly provides that the authors of literary and artistic works shall have exclusive right to authorize reproduction of such works.[7] Reproductions which are not authorized either by author or by any individual on behalf of author may constitute infringement of authors' exclusive rights. Further, it also provides for exceptions to exclusive right of reproduction but only in special cases.[8]It adds two conditions in a formula which led to a prolonged debate and the interpretation of which produces much difference of opinion amongst member states.[9] It consists of two phrases which should apply cumulatively: the reproduction must not conflict with a normal exploitation of the work and must not unreasonably prejudice the legitimate interests of the author.[10] If the reproduction conflicts with a normal exploitation of the work it is not permitted at all.

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5. Robert J. Congleton and Sharon Q. Yang, *supra* n. 3, at 44.
6. MANU/DE/3285/2016.
7. The Berne Convention for the Protection of Literary and Artistic Works, 1886, Article 9(1).
8. *Id.*, Article 9(2).
9. *Guide to the Berne Convention for the Protection of Literary and Artistic Works*, World Intellectual Property Organization, 1978, at 55.
10. *Ibid.*

The three-step-test is the basis for determining the limits on reproduction rights as exemptions to copyright law.[11] Most of the international copyright agreements since the Berne Convention have incorporated versions of this text.[12]As was presented in the WIPO Copyright Treaty, 1996 the three-step-test confines copyright limitations or exceptions to certain special cases;that do not conflict with a normal exploitation of the work; and do not unreasonably prejudice the legitimate interests of the author. It was left to the signing nations to determine and provide those limitations as outlined in the Berne Convention.[13] One thing which is clear here is that the three-step-test is a cumulative approach as each of its part must be satisfied in order for an exception to reproduction right to be compatible with the Berne Convention.[14]

The TRIPs Agreement started with standards set out in the Berne Convention rather to rebuild the standards of international copyright protection. It requires all it members[15] to comply with Articles 1-21 and the Appendix of the Berne Convention.[16] It extends Berne standards to a wider array of nations and confirms TRIPs Agreement as minimum standard setting agreement that allows states to balance intellectual property protection against other public interest objectives.[17]The scope of permissible uses under the TRIPs Agreement is noticeable with the reproduction of provisions of the Berne Convention in its Article 13. It provides that members shall confine limitations or exceptions to the exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.[18]It begins with a different set of obligation on the members to ensure that no unnecessary restrictions are put on the exclusive rights of authors. It incorporates the principle of the three-step test but arguably has

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11. These rights were debated and revised in subsequent copyright treaties and a compromise was worked out in the 1967 revisions to the Berne Convention. In this revision of the Convention the concept of the three step-test was adopted.
12. "The Three Step Test" *Electronic Frontier Foundation*, available at: *https://www.eff.org/files/filenode/three-step_test_fnl.pdf*
13. Robert J. Congleton and Sharon Q. Yang, *supra* n. 3, at 44.
14. Laurence R. Helfer, "Adjudicating Copyright Claim under the TRIPs Agreement: The Case for a European Human Rights Analogy", 39(2) *Harvard International Law Journal*, 1998, pp.357-441, at 372.
15. Members including those who are not member to the Berne Convention, 1886.
16. The TRIPs Agreement, 1995, Article 9(1).
17. Laurence R. Helfer, *supra* n. 14, at 378.
18. The TRIPs Agreement, 1995, Article 13.

further restricted its scope as it states that "Members shall confine. . ." limitations and exceptions to the same three elements.[19] The WTO panel resolved the issue that both the tests required essentially same analysis.[20]

It applies to all copyright limitations and exceptions both those added by the TRIPs Agreement and incorporated by the Berne Convention and it overrides the more expansive limitations and exceptions set forth in other Berne provisions.[21] It is clear that the Berne Convention's three-step test only applies to exceptions and limitations to the right of reproduction, the three-step test contained in Article 13 of the TRIPS Agreement applies to exceptions and limitations to any of the "exclusive rights" available in the name of copyright.[22] A question arises as to whether the requirements for the specific limitations in the Berne Convention are obsolete for Member States of both the Berne Convention and TRIPs Agreement as all limitations could alternatively rest upon the TRIPs Agreement's three-step-test. The preferable way to solve this conflict is the three-step-test as applies, first of all, directly to limitations of the general right of reproduction as mentioned in Article 9(2) of the Berne Convention as well as to limitations to all exclusive rights additionally granted in TRIPs Agreement and the WIPO Copyright Treaty, 1996 (WCT).[23] All other limitations to the exclusive rights recognized in the Berne Convention must pass the three-step test. As for the WCT, this approach is explicitly laid down as it neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.[24]

III. EDUCATIONAL EXEMPTIONS UNDER INDIAN COPYRIGHT LAW

The Copyright Act, 1957 in section 14 defines copyright and confers exclusive rights to the owner of the works. It is relevant to note that the right

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19. Ruth L. Okediji, "The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries", *International Centre for Trade and Sustainable Development,* Issue Paper No. 15, 2006, at 14.
20. *See,The WTO Dispute Panel Report, United States–Section 110(5) of the U.S. Copyright Act*, June 15, 2000, WTO Doc. WT/DS160/R (2000)
21. Laurence R. Helfer, *supra* n. 14, at 380.
22. "The Three Step Test" *Electronic Frontier Foundation*, available at: *https://www.eff.org/files/filenode/three-step_test_fnl.pdf*
23. Tobias Schonwetter, "The three-step test within the copyright system" available at: *ttp://pcf4.dec.uwi.edu/viewpaper.php?id=58&print=1*
24. The WIPO Copyright Treaty, 1996, Article 10(2).

conferring provisions itself provide that these rights are subject to provisions of the Act[25] which means that, at least theoretically, the right conferring provision is the least important provision of the Act. The public interest provisions are more important than the right conferring provisions. This establishes that the dominant objective of Copyright law is not the creation of monopoly but promoting public interest. Thus, one may describe Copyright Act, 1957 as a public interest statement.

Any use of a copyrighted material (*i.e.* to perform activities reserved for owners in section 14 of the Act) needs permission of the owner of copyright. However, education requires special treatment in view of its role in human development. For this purpose statutory exemptions to copyright are given for some of the uses by educational institutions under the Copyright Act, 1957.[26]Exceptions for educational purposes in the Copyright Act, 1957 can be found both in provisions dealing with statutory licenses as well as in the fair dealing provisions. The law is dealing with different acts in details which are not infringement of copyright and one such act is use of copyrighted material for educational purposes.[27]The reproduction of copyrighted materials by a teacher or a student in the course of instruction; or as part of the questions to be answered in the examination; or in answer to such questions is not infringement of copyright.[28]The understanding of scope of the above exception read with other provisions is necessary in the light of recent controversies as it does not give unlimited right of copying to copyrighted materials.[29]

The Copyright law in India permits fair dealing with a work which includes literary, dramatic, musical, artistic work, sound recording and cinematograph film for the purpose of private use including research and criticism or review of that work or another work.[30]Besides this, there are at least three explicit references of educational exceptions under section 52 of the Copyright Act,

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25. The Copyright Act, 1957, Section 14. Meaning of copyright.- "For the purposes of this Act, copyright means the exclusive right subject to the provisions of this Act, to do or authorize the doing of any of the following acts in respect of a work or any substantial part thereof, namely—……"
26. T.C. James, *supra* n. 4, at 217.
27. The Copyright Act, 1957, Section 52.
28. *Id.*, Section 52(1)(i).
29. V.N. Muralidharan, "Educational Institutions and Copyright Laws", 22, *Journal of Intellectual Property Rights*, 2017, pp.266-269, at 268.
30. The Copyright Act, 1957, Section 52(1)(a).

1957.[31]These provisions are mainly providing for the publication in a collection intended for instructional use of short passages from published literary or dramatic works with the restriction of not more than two such passages from works by the same author are published by the same publisher during any period of five years.[32] The reproduction of any work by a teacher or a pupil in the course of instruction; oras part of the question to be answered in an examination; orin answers to such questions.[33]The performance, in the course of the activities of an educational institution, of a literary, dramatic or musical work by the staff and students of the institution, or of a cinematograph film or a sound recording if the audience is limited to such staff and students, the parents and guardians of the students and persons connected with the activities of the institution or the communication to such an audience of a cinematograph film or sound recording.[34]

In *E.M. Forster* v. *A.N. Parasuram*[35] a guidebook was reproduced based on E.M. Forster's famous novel, *A Passage to India*. It was also a book for general study in the B.A. Course of the Madras University in 1955. When it was alleged as infringement of copyright, the court held that:

> "The guide was a commentary upon the original work, designed to enable University students to give effective answers to questions that maybe set in the university examination upon their study of the novel and everything else was subordinate to that main function."

The reproductions of the guidebook was held as "fair dealing" within the provisions of the law.[36]Opposite to this view the Calcutta High Court in *Secondary Board of Education* v. *The Standard Book Company*[37]was of opinion that guidebooks, which compete with the original textbooks, were not in the "general interest of educational advance of learning" and held them as not eligible for copyright protection. The decision in the case of *Ramesh Chaudhary* v. *Ali Mohd*[38]was in support of *E.M.Forster* where it was observed by the court that:

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31. *Id.*,Sections 52(1)(h), (i) and (j).
32. *Id.*,Section 52(1)(h).
33. *Id.*, Section 52(1)(i).
34. *Id.*, Section 52(1)(j).
35. AIR 1964 Madras 331.
36. T.C. James, *supra* n. 4, at 218.
37. Calcutta Weekly Notes (1966) 1130.
38. AIR 1965 J&K 101.

> "Once the original authors of the books allowd the University to publish it in their syllabus and the University published it as a part of the syllabus prescribed for its students, the matter went into the hands of the general public and no copyright in the strict sense of the term remained with the original authors. …..it became more or less public property. Any member of the public could publish a review or a criticism, or a guide to this book."

Again in *Eastern Book Company and Ors.* v. *Naveen J. Desai*[39]the court observed that:

> "… A copyright is a limited monopoly which has its origin in protection. But, no monopoly can be granted over subject-matter borrowed from the public domain…".

In *Kartar Singh* v. *Ladha Singh*[40]it was held that:

> "The laws which put a restraint on human enterprise and activity must be construed in a reasonable and generous spirit. Copyright cannot be used as a means to close all the avenues of research and scholarship and all franchise of human knowledge."

In the above cases a common element which is apparent is that the courts in India are conscious about the importance of exemptions under copyright law particularly those provided in the context of educational needs of the users of the work. Further, in the case of *Syndicate of Press of the University of Cambridge Trading as Cambridge University Press* v. *M/S Kasturilal and Sons*[41]the Delhi High Court cautions about too generous interpretation of these exemptions to allow plagiarism. It was observed that:

> "…It is true that the law should encourage enterprise, research and scholarship. But, such encouragement cannot come at the cost of the right of an individual to protect against misappropriation of what is essentially a product of his intellect and ingenuity…"

The courts in India have been conscious of the delicate task of balancing the two seemingly conflicting claims of individual interest and public interest.

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39. 2001(1) RAJ.
40. AIR 1934 Lahore 777.
41. 2006(32) PTC 487 (Del).

IV. IMPLICATIONS OF *RAMESHWARI PHOTOCOPY* JUDGEMENT IN INDIA

A suit for permanent injunction was filed before Delhi High Court in 2012 when a few publishers including Oxford University Press, Cambridge University Press and Taylor and Francis Group alleged against the *RameshwariPhotocopy Service*, which was making photocopying of course materials of courses offered by University of Delhi of infringement of copyright in their books. It was alleged that photocopying of substantial excerpts from their publications and selling its compilations in the form of course packs is an infringement of copyright under Section 51 of the Copyright Act, 1957.*Rameshwari* Photocopy shop contested the suit by arguing that its action constituted fair dealing with the books under sections 52(1)(a), 52(1)(i), and 52(1)(h) of the Act and therefore did not amount to infringement of copyright. It was argued that the course packs are the only effective means to ensure access to knowledge and is exempted from copyright infringement under Sections 52(1)(a) and 52(1)(i) of the Copyright Act. It was also argued that the educational exception contained in Section 52(1)(i) of the Copyright Act ought not to be viewed as a mere exception, but a potential right in favour of students and Universities.[42]

In 2016, the Delhi High Court dismissed the suit of the plaintiffs and concluded that the impugned actions of the defendants do not amount to infringement of copyright, relying heavily upon Section 52(1)(i) of the Act, which provides that any reproduction of a copyrighted work by a teacher or pupil in the course of instruction does not constitute copyright infringement. The Court stated that:

> "The various clauses under Section 52(1) deal with different factual situations. I am of the view that once the legislature has in Clauses (h), (i), (j) under Section 52(1) provided specifically for the field of education/instruction, the scope thereof cannot be expanded or restricted by applying the parameters of the omnibus or general Clause (a)…….. I thus hold Section 52(1)(a) to be having no applicability to the impugned action. Thus the extent of Section 52(1)(h), (i), (j) or whichever one is found applicable to specific situation with which we are concerned, cannot be widened or restricted by applying the parameters of Section 52(1)(a)."[43]

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42. A brief of the case is available at:*https://spicyip.com/resources-links/du-photocopy-case*
43. MANU/DE/2497/2016, para 43.

The opinion establishes that the requirement of the use by defendant to be fair for the purpose of exemption under section 52(1)(a) is not applicable to clause (i) of the same section. A subsequent clause does not automatically become subject to the earlier clauses unless it is made so. Thus, no quantitative restriction (which happens to be one of the factors to decide fairness in clause (a) of the section) shall apply in clause (i). It makes clear that students and teachers/ universities are free to make copies of works free from any condition of quantity as long as "in the course of imparting instruction" continues. The phrase "in the course of instruction", includes the entire process of education as in a semester or the entire program of education as in a semester". The Court also clarified that the scope of section 52 need not be understood subject to section 14 of the Act as both these are independent provisions, one dealing with rights of creators and other with the rights of users.

Against the order of single judge of Delhi High Court, the Plaintiff filed an appeal before the Division Bench of the Delhi High Court. The Bench stated that the preparation of 'course packs' *i.e.* compilation of photocopies of the relevant portions of different books prescribed in the syllabus, and their distribution to the students by educational institutions does not constitute infringement of copyright in those books under the Copyright Act, 1957, as long as the inclusion of the works photocopied was justified by the purpose of educational instruction. It observed that:

> "the course packs were claimed to be material used during course of instruction and therefore photocopying copyrighted material i.e. reproduction had to be determined with reference to clause (i), and clause (a) has no relevance."[44]

The court was of opinion that photocopying qualifies as reproduction of the work by a teacher in the course of instruction and thus, does not amount to copyright infringement by virtue of Section 52(1)(i) of the Act. It held that:

> "…the additional reasoning by the learned Single Judge with respect to course packs on the strength of Section 52(1)(a) of the Copyright Act, 1957 is probably intended to support the interpretation placed by the learned Single Judge to Section 52(1)(i). The reasoning being that for purposes of private research, private study and criticism if a single individual could copy a copyrighted

44. MANU/DE/3285/2016, para 75.

> work then it made no difference if same activity was done in the plural. This reasoning overlooks that even if a single individual were to use a copyrighted work for private research, private study and criticism the use would be subject to fair dealing' because clause (a) expressly uses the said expression and thereby limits the contours of the use."[45]

The educational institutions do not require a license or permission from the publishers for making and distributing course packs to students if the copyrighted materials included in them are necessary for the purpose of instructional use by the teacher to the class.[46]The Bench proposed the legal issue which arise for consideration to be whether the right of reproduction of any work, by a teacher or a pupil, in the course of instruction, is absolute, and not limited by the condition of 'fair use'. It also identified the issue regarding the span of the phrase "by a teacher or a pupil in the course of instruction".[47] It identified the issues regarding 'reproduction and publication' as sub-issues.[48]

The judgement expands the scope of interpretation of section 52 generally and the right of the public to use copyrighted material for instructional purposes particularly. The relevant observation of the court on the nature of education may be reproduced as:

> "…teaching is the imparting of instructions or knowledge. It places no limits on where the imparting of knowledge takes place……it is a process involving communication between students inter-se and between the students and the teacher and perhaps teachers inter-se too."[49]

It is relevant to note that some of the observations of the Court may cause slight confusion in understanding the nature of copyright.[50] The court observed that copyright is not natural right it is only statutory in nature. One may argue that the natural law aspects are imbedded in the provisions of the Act and thus

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45. *Ibid*.
46. The Copyright Act, 1957, Section 52(1)(h).
47. Kartik Chawla, "*Oxford University* v. *Rameshwari Photocopy Services*- Reshaping the Copyright Discourse", 13 *The Indian Journal of Law and Technology,* 2017, pp.62-75.
48. *Ibid*.
49. MANU/DE/3285/2016, para 34.
50. *See*, Eashan Ghosh, "Fundamental Errors in Fundamental Places: A Case for Setting aside the Delhi University Photocopying Judgment", 9 *NUJS Law Review,* 2016, pp.1-39.

the right are natural as well as statutory. Further, the court identifies "right to issue copies to public, not being copies already in circulation"[51] to be publication right. The understanding so far was that the right is distribution right *i.e* right to put tangible copies in circulation subject to the so called first sale doctrine.[52] Right to publish does not find express mention in section 14 and internationally it is considered as one of the moral rights *i.e*. right of divulgation. The detailed discussion of the issue is beyond the scope of the paper, however, these remain one of those subjects which need attention of researchers.

Educational Needs of Disabled People and Copyright Provision

A significant change introduced by the Copyright (Amendment) Act, 2012 is the provision on exemption in favour of disabled persons.[53] Realizing that education is the most important foundation for successful life of individuals including people suffering from disability, the legislature included section 52(1)(zb)[54] so as to ensure availability of educational material which are accessible to people with disability. It is relevant to note that at International level the Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities was adopted in 2013 to address the

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51. The Copyright Act, 1957, Section 14(a)(ii).
52. The first sale doctrine also known as doctrine of exhaustion means that the right to distribute the work exhausts on the very first act of distribution *i.e.* the owner of copyright cannot control subsequent sale of the copy of the work which he has sold.
53. *See*,Rajnish Kumar Singh, "Persons with Print Disability and Copyright Law: Marrakesh Treaty and Indian Response", 2(2) *NUSRL JLP*, 2015,pp.95-104.
54. The Copyright Act, 1957, Section 52(1)(zb) exempts the following from infringement liabilities: The adaptation, reproduction, issue of copies or communication to the public of any work in any accessible format, by (i) any person to facilitate persons with disability to access to works including sharing with any person with disability of such accessible format for private or personal use, educational purpose or research; or(ii) any organization working for the benefit of the persons with disabilities in case the normal format prevents the enjoyment of such works by such persons: Provided that the copies of the works in such accessible format are made available to the persons with disabilities on a nonprofit basis but to recover only the cost of production: Provided further that the organization shall ensure that the copies of works in such accessible format are used by persons with disabilities and takes reasonable steps to prevent its entry into ordinary channels of business. Explanation- For the purposes of the sub-clause, "any organization" includes an organization registered under Section 12A of the Income Tax Act, 1961 and working for the benefit of persons with disability or recognized under Chapter X of the Persons with Disabilities (Equal Opportunities Protection of Rights and Full Participation) Act, 1995 or receiving grants from the Government for facilitating access to persons with disabilities or an educational institution or library or archives recognized by the Government."

issue of crisis of educational material in accessible format. India joined the treaty on April 30, 2014 and ratified it on June 24, 2014. The Treaty of 2013recognizes that "despite the differences in national copyright laws, the positive impact of new information and communication technologies on the lives of persons with visual impairments or with other print disabilities may be reinforced by an enhanced legal framework at the international level."[55]It also recognizes the importance of the international copyright system and desiring to harmonize limitations and exceptions with a view to facilitating access to and use of works by persons with visual impairments or with other print disabilities.[56]

Under Indian law , section 52(1)(zb) permits conversion of a work to a format which is accessible to people with disability. It is noteworthy that India introduced the provision before the conclusion of the Marrakesh Treaty. Further, the scope of Indian provision is broader as it is not limited to visual disability but extends to benefit people with all forms of disability.

V. CONCLUSION

The Indian law on the issue of exemptions for educational purposes has expanded by virtue of the case law to be no more known as exemptions. It has been raised to the status of rights of users. As mentioned before, the Indian judiciary has on many occasions expressed views on balancing between claims of owners and users of works. The fact that section 52 is independent of section 14 and different clauses of section 52(1) are not to be interpreted in the light of each other will go a long way in establishing the importance of the provision on exemptions for the educational purpose. It is, however, relevant to note that the recent decision of the Delhi High Court may have tilted the balance in favour of the users which appears to be the correct approach considering the socio-economic condition of India and the educational need of its vast population. Further, as identified before some of the observations about nature of rights in the judgement may need indulgence of researchers to evolve clarity on the subject. The provision on disabled people is a very welcome step. However, it is felt that because the Indian law does not explain terms like 'accessible format' and 'person with disability' *etc*. application of law may become difficult in future. These terms require authoritative interpretations. It may be concluded that the

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55. The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, 2013, Preamble.
56. *Ibid*.

existing legal framework for education under copyright law of India appears to be sensitive towards the needs of users and supports the argument of human rights of users of copyrighted works. It is hoped that the working of the new interpretation of the provisions and the newly enacted provisions will promote the educational purpose of the law and enable all to get unrestricted access to copyrighted works.

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SENTENCING PROCESS IN INDIA VIS-À-VIS UK & USA: A CRITICAL ANALYSIS OF THE SENTENCING MODELS

GANESH JI TIWARI*
AVIN TIWARI**

ABSTRACT : The sentencing judges all over the world enjoy discretion in awarding sentences and are influenced by different theories of punishment at different points of time. However, it is repeatedly demonstrated that there is an unwarranted disparity in the sentencing practices in similar situations and it results in unregulated sentencing discretion. These lead to developments which called for restrictions on sentencing discretion. To do away with the immense disparity in sentencing, many countries across the world formulated their sentencing guidelines and policies. In the present paper, the authors intended to examine how sentencing policies/guidelines are used as a tool in some countries to check over unwarranted disparity. The authors have taken up two countries and compared the sentencing policies of those to understand what kind of sentencing structure would be appropriate for a country like India. England and Wales have been taken up because it is a Common Law country and since India was under the influence of Common Law for years, the laws in India have inherited their feature and structure. In addition to it, the United States has been taken up because the Sentencing Guidelines in the US is very structured and is based on the principle of proportionality. It takes the shape of a two-dimensional grid or matrix and provides for 43 levels of offence seriousness. The authors conclude with the argument that the sentencing disparity in India can be done away with if India adopts a Sentencing Model where there is a Sentencing Commission with

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both Judicial and Non-judicial representation to advise the Judiciary on sentencing. Furthermore, the guidelines issued by the Sentencing Commission should specify the range of sentences by the nature of the offence or heinousness of the crime.

KEY WORDS : Disparity, Proportionality, Sentencing Models, Sentencing Commission.

I. INTRODUCTION

Sentencing is the judicial determination of a legal sanction to be imposed on a person found guilty of a criminal offence.[1] A criminal sentence follows the stage of conviction and the pronouncement of a penalty imposed on the convict.[2] This is the end goal of every justice delivery system[3] and it reflects the amount of denouncement, the society has for a particular crime.

The most public phase is the passing of a sentence, in any criminal justice system[4] and when the court passes sentence, it authorizes the use of State coercion against a person for committing an offence[5] This sanction maybe deprivation, positive obligation or restriction.[6] Smart sentencing is the one where the main purpose of sentencing is to reduce the crime[7] within the boundaries of law, proportionality and resources so prioritized by risk levels, the depositions must be on what is more likely to reduce criminal behaviour.[8]

A sentence must always be proportional to the degree of the offence and the responsibility of the offender.[9] The basis to enhance or reduce a sentence are

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1. Leonard C. Opara Esq, "The Law and Policy in Criminal Justice System and Sentencing in Nigeria", 4 (7) *IJASS*I, 888-89, (2014). See also, Ankita Chakraborty, Concept and philosophy of sentencing, 3(4) JSLR, *available at http://jlsr.thelawbrigade.com/index.php/2017/08/01/vol-3-issue-4-criminal-law-review-august-2017/*, (last visited on June 10, 2018).
2. *Ibid.*
3. R. Nirupama, "*Second Critical Studies Conference: Spheres of Justice*, Paper Presentation", *NALSAR University of Law*, 2007.
4. *Chakraborty, Supra* Note 1 at 9.
5. Andrew Ashworth, *Sentencing and Criminal Justice*, (Cambridge University Press, London, 5th ed., 2010).
6. *Ibid*.
7. *Chakraborty, Supra* Note 1 at 9.
8. John Monahan & Jennifer L. Skeem, "Risk assessment in criminal sentencing", 12 *ARCP,* 493, (2016).
9. The Canadian criminal law notebook, Justia, Proportionality, *available at* https://www.justia.com/criminal/aggravating-mitigating-factors/, (last visited on June 1, 2018).

aggravating or mitigating circumstances relating to the offender or the offence.[10] The judge should scrutinise whether any bias, prejudice based on factors like race, caste, nation, ethnicity, colour, sex, age, religion, mental or physical disability, sexual orientation or any other similar factor etc. is involved in the case or not.[11] This is included in aggravating circumstances. Further, whether the offender abused a position of trust and authority, or whether he was a terrorist or that he committed the crime at the instruction or with the cooperation of a criminal organization etc. may be deemed as aggravating circumstances.[12]

The primary question the philosophers of sentencing and punishment ask is what is the justification behind sentencing or punishment?[13] This question may be answered in terms of the role of the State, its commitment to the citizens and the object of criminal law must be considered.[14] Punishments involve impositions which are unwelcome by the persons punished as it deprives them of personal liberty, money, time etc.[15]

Criminal Law academics observe that a sentence solves two purposes: firstly, the deterring of crime in future by the convict and other potential criminals who may commit the same crime[16] and secondly, they fulfill the object of retribution.[17] For retribution suitable penalty is inflicted upon the criminal.[18] In public perception, sentencing determines whether justice has been served to both the victim and the defendant or not. The underlying rationale of every criminal justice delivery system can be determined by looking at the kind of punishment given for various crimes.[19]

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10. The Canadian Criminal Law Notebook, Sentencing factors relating to the offence, *available at* http://criminalnotebook.ca/index.php/Sentencing_Factors_Relating_to_the_Offence, (last visited on June 7, 2018).
11. *Chakraborty, Supra* Note 1 at 9.
12. Andrew Ashworth & Julia Roberts, *Sentencing Theory: Principle and Practice*, (Oxford University Press, UK, 5th ed., 2012).
13. Punishment and Sentencing, SAGE Publication Inc, 234, *available at* https://us.sagepub.com/sites/default/files/chapter_10._punishment_and_sentencing_0.pdf, (last visited on May 5, 2018).
14. Stanford Encyclopedia of Philosophy, A Duff, Legal Punishment, *available at* https://plato.stanford.edu/entries/legal-punishment/, (last visited on June 2, 2018).
15. Mirko Bagaric, "Consistency & Fairness in Sentencing", 2(1) *BJCL*, 29, (2000).
16. *Chakraborty, Supra* Note 1 at 10.
17. Zachary Hoskins, "Deterrent Punishment and respect for persons", 8 (2) *OHIO SJCL*, 369-370, (2011).
18. Merriam Webster, *available at* https://www.merriam-webster.com/dictionary/retribution. (last visited on Jan 14, 2017).
19. *Chakraborty, Supra* Note 1 at 10.

The main goals of criminal sentencing are punishment, rehabilitation, deterrence & incapacitation.[20]

II. THE SENTENCING PROCESS IN INDIA- PROBLEMS AND PERSPECTIVES

Unlike many other countries across the world, India is devoid of any sentencing policy. This has given immense discretion to the sentencing judges resulting in variation of outcome from the same or similar set of facts.[21] The factors to be considered or not to be considered while determining the sentence are not mentioned anywhere in the criminal justice code. In some cases, the punishment of the offender and the protection of the community may be the most important objective. While in other cases, rehabilitation of the offender may be of greater significance.[22] There are cases where victim restitution is of greater importance. On the one hand, we have judges like J. Krishna Iyer, who observes that "every saint has had a past and that, every sinner will have a future[23]and on the other hand, we have judges like Wadhwa J. who believes that too much stress should not be given on Reformative Theory. Emphasis must also be given to the fact that the rights of the victims of the crime must not be forgotten. Just as the rights of prisoners and the issue of prison reforms have to be given importance, the rights of the victim equally needed to be given primacy.[24] Thus we see that there is a difference in the attitude of the judges while they talk about sentencing an offender.

Justice Cardozo, observes:

> "A judge even when free is still not free, he is not to innovate at pleasure; he is not an errant knight roaming at will pursuing his ideal of goodness and beauty; he is to draw inspiration from consecrated principles. Where there is a clash in the values of a judge and those prevalent in society, then the judge must, in theory, give way to the objective right".[25]

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20. Sameena Farrar, The purpose of Criminal Law, *available at* https://www.academia.edu/10186529/The_Purpose_of_Criminal_Law?auto=download, (last visited on Feb 2, 2017).
21. MK Chawla, "Sentencing structure and policy in India", 12 *NCJRS*, 54, (1976).
22. *Chakraborty, Supra* Note 1 at 8-9.
23. See Mohammad Giasuddin v. State Of Andhra Pradesh, AIR 1978 SCR (1) 153 where Krishna Iyer said that Criminality is curable deviance and every man is born good.
24. KI Vibhute (ed.), *PSA Pillai's Criminal Law*, (Lexis Nexis, India, 13th ed., 2017).
25. Shiv Mohan Singh v. State, AIR 1977 SC 949.

Justice Cardozo rightly concludes that even though a Judge has immense discretion in sentencing, he cannot exercise such discretion upon his whims and fancies. He shall be guided by specific principles, so that ends of justice are met.[26]

But in India, it is claimed that the personality of a specific judge plays an important role in the sentencing process.[27] Judges use their discretionary power to fix the punishment. Neither the Judiciary nor the Legislature has come up with any structured guidelines regarding sentencing.[28] Only in instances of the death penalty the Court has given broad guidelines for judges of Subordinate Courts.[29] The views of the Malimath Committee Report (2003) emphasized on the need to introduce the sentencing policy in India.[30] While emphasizing on the need to formulate sentencing guidelines, the Malimath Committee said that Indian Penal Code talks about offences and provides punishments for the same.[31] However, for many offences, the maximum punishment is prescribed, while for some offences, the minimum is prescribed. Here, the judge has wider discretion in awarding sentences, and there is no guideline to the judge about sentencing. [32] The Madhava Menon Committee on Draft National Policy on Criminal Justice (2008) also stresses the need for statutory sentencing guidelines.[33]

While both the committees specified that there is an urgent need of enacting sentencing guidelines in India; they did not provide for a structure which may be apt for India. Other countries such as the United Kingdom, United States, Australia, South Africa etc. have already enacted sentencing guidelines and it may be equally sensible for a country like India. But, India is still devoid of such guidelines.

1) Sentencing under the Indian Penal Code, 1860

The stage of punishment and sentencing is the final process of criminal jurisprudence, and the principles determining the nature and extent of punishment

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26. *Chakraborty, Supra* Note 1 at 8.
27. Dr Anju Vali Tikoo, "Individualization of punishment, Just desert and Indian Supreme Court decisions: some reflections", 2(20) *ILI LR*, 23-24, (2017).
28. *Ibid.*
29. PTI, "UN experts call for the abolition of death penalty in India," *Gulf News India*, Sept. 12, 2015.
30. K. Deepalakshmi, "The Malimath Committee's recommendations on reforms in the criminal justice system in 20 points", The Hindu, Jan 17, 2018.
31. Shankar Gopalakrishnan, PUCL, Recommendations of the Malimath Committee on reforms of the Criminal Justice System, *available at* http://www.pucl.org/Topics/Law/2003/malimath-recommendations.htm (last visited on Feb 2 2017).
32. *Ibid.*
33. See The Indian Penal Code, 1860, (Act No 45 of 1860), s.53.

to be prescribed by the trial court is provided under Chapter-III of the Indian Penal Code.[34] The Indian Penal Code, 1860 under Sec-53 provides for five types of punishments that a court can impose.[35] This section determines the nature of punishment that a judge can impose on the accused and the discretion of the judge is limited to the various options enumerated in the section like the death sentence, life imprisonment, imprisonment for lesser periods (simple/rigorous), forfeiture of property, fine and/or combination of imprisonment with fine. Sec-53 to 60 talks about the death sentence, life imprisonment, imprisonment for other periods (simple/ rigorous), commutation of the death sentence or life imprisonment under special circumstances by the State or Central Government.[36] Sec-63 to 70 talks about the imposition of fine and alternate sentences in case fines are not paid etc.[37] Sec-71 and 72 talks about the nature of punishment for offences made up of several offences.[38] Sec-73 and 74 talk about solitary confinement as punishment and enumerates the limitations upon its imposition.[39] Sec-75 talks about enhanced punishments for certain offences in case of repeating offenders.[40]

In *the Indian Penal Code*, in most cases, the maximum penalty is given, and it is left to the judicial discretion to inflict the appropriate term within that said limit. In some cases, a minimum sentence is given in the Code, and it is left to the judicial discretion whether the court wants to inflict a sentence beyond that. For some offences, the Code provides for an alternative and the courts are free to choose either of them.[41]

2) Sentencing under the Criminal Procedure Code, 1973

Under Sec-28(1) and (2) of the Code of Criminal Procedure, the High Courts and Sessions Courts are empowered to impose any of these sentences, except in case of a death sentence. A death sentence if imposed by the Sessions Court must be confirmed by it's jurisdictional High Court.[42] Under Sec-29 of CrPC, a chief

34. See The Indian Penal Code, 1860, (Act No 45 of 1860), s.53.
35. *Ibid.*
36. See The Indian Penal Code, 1860, (Act No 45 of 1860), ss. 53-60.
37. See The Indian Penal Code, 1860 (Act No 45 of 1860), ss. 63-70.
38. See The Indian Penal Code, 1860, (Act No 45 of 1860), ss. 71, 72.
39. See The Indian Penal Code, 1860, (Act No 45 of 1860), ss. 73, 74.
40. See The Indian Penal Code, 1860 (Act No 45 of 1860), s. 75.
41. V.R.K.K Sagar, Sentencing Discretion and IPC, Eastern Book Company, *available at* http://www.ebc-india.com/lawyer/articles/94v3a4.htm#Note%E2%80%A0 (last visited on Feb 4, 2017).
42. See, The Code of Criminal Procedure, 1973, (Act No 2 of 1973), s. 28.

judicial magistrate may impose a sentence of not more than 7 years; a magistrate of first class may impose a sentence of not more than 3 years and a fine not more than 10,000 rupees and a magistrate of second class may give a sentence not exceeding 1 year or a fine of not more than 5000 rupees.[43] The Indian Penal Code provides for a discretionary system of sentencing. Usually, the maximum sentence which can be imposed is provided under the Code (and in some cases, the mandatory minimum is there), but judges have the discretion to determine an appropriate sentence.

The Code talks about sentencing in Sections-235, 248, 325, 360 and 361. Sec-235 is a part of Chapter-XVIII of the Code which deals with a proceeding of the court of Sessions. Sec-235 directs the judge to pass a judgment of acquittal or conviction and in case of conviction; the judge must follow clause-2 of the section. It contains the procedure for sentencing a person convicted of a crime. The section provides for a hearing to ensure that the convict is given a fair chance to speak for himself and express his opinion on the sentence imposed on him.[44] The opinions given by the convict may not pertain to Law.[45] It is for the judge to get an idea about the social and personal detail of the convict. It allows the defence counsel to bring to the notice of the court all possible factors which might mitigate the sentence. A sentence not in compliance with Sec-235(2) of CrPC might be struck down as a violation of natural justice. However, this procedure is not required where sentencing is done under Sec-360 of CrPC.[46]

Sec-248 of CrPC ensures that there is no prejudice against the accused. This section comes under chapter-XIX of the Code dealing with warrants case. The section provides that if the Magistrate finds the accused not guilty, he shall provide for acquittal and if he is found guilty, but the Magistrate does not proceed under the provisions of Sec-325 or 360 then after hearing the accused, he shall pass sentence according to Law. Clause-3 of the section provides that where the convict refuses a previous conviction, then the Magistrate can determine if there was any previous conviction based on the evidence provided. However, he cannot exceed his powers as provided under the Code in the name of discretion.[47]

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43. See The Code of Criminal Procedure, 1973, (Act No 2 of 1973), s. 29.
44. Sentence Hearing: Intent and Scope in Criminal Proceedings, *available at* http://14.139.60.114:8080/jspui/bitstream/123456789/17406/1/035_Sentences%20Hearing_Intent%20and%20Scope %20in%20Criminal%20Proceedings%20%28456-465%29.pdf, (last visited on Dec 2, 2018).
45. *Ibid.*
46. See The Code of Criminal Procedure, 1973, (Act No 2 of 1973), s. 235.
47. See The Code of Criminal Procedure, 1973, (Act No 2 of 1973), s. 248.

The Code of Criminal Procedure provides for a separate phase of sentencing. This did not exist in the 1898 Code of Criminal Procedure but was introduced in the 1973 amendment.[48] After the end of the sentencing hearing, the final judgment is given which marks the end of the trial.[49] Under Sec-354 of the Code of Criminal Procedure, every judgment should contain the reasons for the decision made and shall specifically mention the offence for which the convict is sentenced. This section inter-alia says that if a death sentence is given to the convict, the judge must mention the reasons for doing so.[50]

3) Prevalence of Sentencing discretion

Sentencing discretion in India has been provided to judges under both the Indian Penal code, 1860 and the Code of Criminal Procedure, 1973. During the sentencing hearing, the defence counsel is allowed to bring in all the possible factors which might mitigate a sentence.[51] The judges decide after hearing the parties. Besides, there is a final hearing after conviction and before giving the sentence. Here, all the aggravating and mitigating factors are considered. Then, Judges use their discretionary power to fix the punishment.

III. SENTENCING POLICIES ACROSS THE WORLD

While talking about the development of the sentencing system over the years, it must be noted that initially, the classical approach was towards Utilitarianism and Retribution.[52] The philosophies of Hegel, Kant, Mill, Bentham and Beccaria, are heavily influenced by these theories. They have tried to form a link between punishment and the seriousness of the offence. *"Just Deserts"* served as a rationale for the principle of proportionality which is a well-known sentencing principle all over the world.[53] Again, during the 20th century, the Reformation and Rehabilitation

48. The 1898 Act under Sec-265K dealt with Trials before Court of Sessions, and a separate phase for sentencing was not provided for. For further details, see The Code of Criminal Procedure, 1898, (Act No 5 of 1898), s.265K.
49. Krishna Kumari Areti, "Capital Punishment and Statutory Framework in India", 1 *SCRIBD*, 6, (2007).
50. CrPC, the Code of Criminal Procedure, 1973, (Act No 2 of 1973), s. 354.
51. George Hilderbrandt, Presenting factors in your favour to reduce sentencing, GFH, *available at* https://georgehildebrandt.com/blog/2016/01/presenting-factors-in-your-favor-to-reduce-sentencing.shtml, (Last visited on June 1, 2018).
52. Marc O. DeGirolami, "Against theories of punishment: The Thought of Sir James Fitzjames Stephens", 9 *OSJCL*, 703-704 (2012).
53. Susan Easton & Christine Piper, *Sentencing and Punishment*, (Oxford University Press, UK, 4th edn., 2016).

in sentencing resurfaced because of the prominence gained by the human rights perspective after World War-II. Equal significance was given to the criminal and the crime.[54] Concepts like probation, parole, admonition, open-air prisons etc. became prominent throughout the world as a result of reformation and rehabilitation.[55] The sentencing judges all over the world enjoyed individual discretion in awarding sentences and were influenced by different theories of punishment & sentencing at different points of time.[56] It was repeatedly demonstrated that there is an unwarranted disparity in the sentencing practices in sentences of similarly situated offenders and it is the result of unregulated sentencing discretion.[57] These lead to developments which called for restrictions on sentencing discretion. To do away with the immense disparity in sentencing, many countries across the world formulated their sentencing guidelines and policies.

The sentencing policies in some cases awarded judges with very little discretion and in other cases, allowed less limitation on sentencing decisions and left scope for more discretion.[58]

The mandatory sentencing law was enacted in Western Australia and its Northern territory for stealing, criminal damage, robbery etc. and was extended to all adult sex offences.[59] In Florida, the Criminal Punishment Code 1998 was enacted, and it has the features of both structured and unstructured sentencing policies. In Alaska, the Sentencing Commission was established in 1968. There exists a concept of presumptive sentences in Alaska which refers to sentencing such crimes, the degree of which are as serious as it is referred to in the Statute. In Germany, the Public Prosecutor plays a very important role in sentencing decisions.[60]

In South Africa the sentencing guidelines and practices are judge-made, and there is no sentencing institution. A very famous sentencing principle of South Africa is the *"triad of zinn"* which talks about three general guidelines in case of sentencing,

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54. Donald W. Dowd, "The Pit and the Pendulum: correctional law reforms from the sixties into the eighties", 29(1) *VLR*, 2-3, (1984).
55. Krishna Kumari Areti, "Role of Theories of punishment in the policy", *BEPRESS*, 30, (2007).
56. *Mirko, Supra* Note 15 at 1.
57. Sir Leon Radzinowicz & Roger Hood, "Judicial Discretion and Sentencing Standards: Victorian attempts to solve a perennial problem", 127 *VSR*, 1288-89 (1979).
58. *Ibid.*
59. Sentencing Guidelines around the world, SSC1/20151214 Paper 3.1A *available at* https://www.scottishsentencingcouncil.org.uk/media/1109/paper-31a-sentencing-guidelines-around-the-world.pdf. (Last visited on Jan 2, 2017).
60. *Ibid.*

viz. the seriousness of the offence, the personal circumstances of the offender and public interest.[61]

In England and Wales, the Sentencing Panel was established under the Crime and Disorder Act of 1998, and it aimed to provide for consistent sentencing.[62]Then, Sentencing Guidelines Council was established under the Criminal Justice Act of 2003.[63] In the USA, the Sentencing Commission and the Federal Sentencing Guidelines help the judges in sentencing the offenders and provides for consistency in sentencing. The Federal Sentencing Guidelines are monitored by the Rule of Proportionality, and they are in the format of a 2-dimensional grid or matrix.[64]Even if they are non-binding rules, judges have to consider them while sentencing criminals.[65] In the year 2014, China formulated its Sentencing Guidelines. The Guidelines contain basic principles of Sentencing, what consists of aggravating and mitigating factors and the method to determine a sentence.[66]

The Sentencing Guidelines prevalent across the world can be of various types. They may be flexible in the sense that they allow judges to deviate or stringent in the sense that they must be mandatorily followed. The guidelines may be given by the Legislature or formulated by the Judiciary for self-regulation.[67] The guidelines may be presumptive, prescriptive or descriptive.[68] Depending upon the type of guideline, various Guideline Models have been formulated as follows.

IV. SENTENCING GUIDELINE MODELS

1) Indeterminate vs Determinate Sentencing

Sentencing can be determinate as well as indeterminate. By determinate sentencing, it means the one established by the legislature. By indeterminate

61. Hanibal Goitom, "Sentencing Guideline: Australia, England & Wales, India, South Africa, Uganda," *TLLC* 1 *GLRC*, 29, (2014).
62. Umar Azmeh & Kartikeya Tripathi, "Structured sentencing in England & Wales: Recent developments & lessons for India", 23 (1) *NLSIR*, 28-29, (2011).
63. Mike Hough and Jessica Jacobson, "Creating Sentencing Commission for England and Wales: An opportunity to address the prison crisis", 1 *PRT UK*, 9-10 (2008).
64. Russell D. Covey, "Rules, standards, sentencing & the Nature of Law",104(2) *CLR*, 461 (2016)
65. Nancy Gertner, "A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right", 100(3) *JCLC*, 702-704 (2010).
66. Xiaoming Chen, "The Sentencing Guideline: A Primary Analysis", 22(4) *FSR*, 213, (2010).
67. Louis B. Schwartz, "Options in constructing a Sentencing System: Sentencing Guidelines under Legislative or Judicial Hegemony", 67(4) *VLR*, 637, (1981).
68. Michael Tonry & B.D Johnson, *The Oxford Handbook on Crime and Criminal Justice*, 820-28 (Oxford University Press, UK, 2012).

sentencing, it means that the legislature does not set any term and leaves the decision to judicial discretion.[69] In India, the system of indeterminate sentencing is followed.

2) Presumptive vs Prescriptive Sentencing

Sentences can also be presumptive as well as prescriptive. By presumptive sentences, it means that the legislature will specify the normal sentence for each crime, but the judges are permitted to deviate only under special circumstances. England and Wales largely depend on the Presumptive sentencing model. Even U.S.A provides for some amount of sentencing discretion. In case of prescriptive guidelines, the drafting body of the guidelines researches on the values that would suit a specific type of jurisdiction and formulates a sentencing policy for the future.[70]

3) Descriptive sentencing

Sentencing can also be descriptive. In Descriptive Sentencing Guidelines, the past practices of Judiciary are looked into, and then the broad guidelines given by the judiciary is focused upon to reduce disparity and discrepancy in future.[71]

4) Legislative vs Judicial Sentencing

A Sentencing Guideline Model can be categorized into Legislative Model and Judicial Model, depending upon the body which has formulated it. The Legislature may regulate the sentencing judges by prescribing maximum punishments or mandatory minimum punishments. In India, the maximum punishment model is followed, and in the case of some offences, the minimum punishment is prescribed. The Legislature may also provide for guiding principles to the sentencing judges. Here, the Legislature may define the purpose of sentencing, the aggravating and mitigating factors and how to balance between them.[72] In Australia, the Parliament plays a very crucial role, and at federal, state and territory levels, it decides what kind of behaviour shall be considered as a criminal offence.[73]

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69. William G. Nagel, "Determinate vs Indeterminate Sentencing: A Second Look", *114th Congress of Corrections*, *SAGE*, 133-134, (1984).
70. Michael H. Tonry, "Real offence sentencing: The Model sentencing & Corrections Act", 72(4) *JCLC*, 1551 (1981).
71. *Ibid*.
72. *Schwartz*, *Supra* Note 67 at 9.
73. Judge for yourself, A Guide to Sentencing in Australia, Sentencing Advisory Council: Judicial Conference of Australia, *available at* https://www.sentencingcouncil.vic.gov.au/sites/default/files/publicationdocuments/Judge%20For%20Yourself%20A%20Guide%20to%20Sentencing% 20in%20Australia.pdf, (Last visited on Jan 3, 2017, 10:00 am).

By Judicial Model of Sentencing, it means that judiciary may adopt a model where it may decide to self-regulate its sentencing practices. This may be done through an appellate review of sentencing.[74] For example, the United States Sentencing Commission allows for appellate review of sentences imposed ensuring that the sentencing guidelines are applied appropriately.[75] Like America, in England too, the Court of Appeal used to lay down guidelines in the form of judgments during the 1980s.[76]

Judicial Model of Sentencing also relies on guideline judgments. Guideline judgments are a judicially implemented mechanism aimed at enhancing consistency in sentencing outcomes and also sentencing approaches.[77]

5) Grid Model of Sentencing

Other than the above-mentioned Models, there is also the Grid Model or the Numerical Guidance Model of Sentencing. This Model is followed in the U.S.A. The sentencing guidelines in America are in the format of a 2-dimensional grid or matrix.[78] On the vertical level the grid is composed of many levels of crime seriousness, and on the horizontal level, it is composed of 6 categories of prior criminal history. On the vertical axis, *"offence levels"* are there which define the seriousness of the offence and on the horizontal axis *"the criminal history score"* is there. An increase in the criminal history score results in a corresponding increase in the severity of a presumptive sentence. Also, each crime is assigned a base level which may be increased or decreased depending upon the characteristics of the offence. The base level can be adjusted depending upon the offender's role in the crime, the condition of the victim during the crime, acceptance of the offence by the offender or destruction of the evidence by the offender etc. After calculating the base level, the offender's criminal history is looked into to determine the sentencing range. After the sentencing range is determined, increase or decrease in the sentence can be made depending upon aggravating or mitigating circumstances.[79]

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74. John Anderson, "Leading Steps Aright: Judicial Guideline Judgments in New South Wales", 16(2) *CICJ SSRN*, 147-49, (2004).
75. *Hough and Jacobson, Supra* Note 63 at 8.
76. *Gertner, Supra* Note 65 at 9.
77. *Anderson, Supra* Note 74.
78. Ely Aharonson, *"Determinate sentencing and American exceptionalism: the underpinnings & effects of cross-National differences in the regulation of sentencing discretion"*, 76 *LCP*, 170 (2013).
79. Julian Roberts & David P. Cole (eds.), *Making sense of sentencing*, 317-330 (University of Toronto Press, Canada, 1999).

It was repeatedly demonstrated that there existed unwarranted disparity in the sentencing practices across the world in sentences of similarly situated offenders and it is the result of unregulated sentencing discretion. Thus, many countries formulated their sentencing guidelines or policies.[80] To examine how sentencing policies/guidelines have been used as a tool to check over the unwarranted disparity; the authors chose to compare the sentencing policies of UK and U.S.A.

V. THE SENTENCING GUIDELINES IN THE UK & USA

1) ENGLAND AND WALES:

Even when there were judicially created sentencing guidelines in England and Wales for over 25 years; there existed inconsistency and hence the Crime and Disorder Act 1998 created the *Sentencing Advisory Panel (SAP)*[81] which was established to outline and consult on proposals for guidelines and pass them to the Court of Appeals for reconsideration and, in that way, to notify the issuing of a guideline judgment. The Court of Appeals was not obliged to agree to the Panel's recommendations but in most cases did so, sometimes with minor changes. Part-iv of the Crime and Disorder Act, 1998 provides for Sentencing in general.[82]

Sec-80 of the Act talks about sentencing guidelines and says that the court shall consider whether or not to frame guidelines or review them (in case they already exist), and *Sec-81* of the Act provides for a sentencing advisory panel. The Lord Chancellor after discussion with the secretary general of the state and lord chief justice shall comprise of a sentencing panel known as the sentencing advisory panel. The panel shall also create its views on such matter and inform the same to the court. It shall also give relevant information to the court as mentioned under Sec-80(3)(b) and 80(3)(c) of the Act.[83]

a) Criminal Justice Act, 2003

In 2001, the *Halliday Report* recommended the need for comprehensive sentencing guidelines, and thus under the *Criminal Justice Act of 2003,* the Sentencing Guidelines Council was established. The Sentencing Advisory Council continued with drafting and providing its views on the guidelines, but the Sentencing Guidelines

80. Radzinowicz *and Hood, Supra* Note 57 at 7.

81. *Hough and Jacobson, Supra* Note 63 at 8.

82. The National Archives, Legislation.Gov.UK, Crime and Disorder Act 1998, ss. 80, 81, *available at* www.legislation.gov.uk/ukpga/1998/37/contents, (last visited on Jan 5, 2017).

83. *Ibid.*

Council took the final responsibility to create and form any guidelines that were issued.[84]

Part-12 of the Criminal Justice Act, 2003 talks about the general provisions on sentencing and *Sec-142* of the Act talks about the purposes of sentencing viz: punishment, crime decrease, the reform and rehabilitation of offenders, public protection and damages. *Sec-143 of the Criminal Justice Act, 2003* gives certain principles on which the court can decide the gravity of the offence. *Sec-144* of the Act talks about the diminution in the sentence in case of early guilty pleas, and it is done to encourage the guilty persons not to take up the precious time of the court and trouble the victim and the witness pointlessly. *Sec-145*, on the other hand, talks about an increase in sentence for racial or religious aggravation and *Sec-146* talks about an increase in sentence for aggravation related to disability or sexual orientation. *Sec-147 to 151* talks about community sentencing, limits on imposing community sentencing, community sentences not permissible where the sentence is fixed by law. *Sec-152* specifically deals with limitations on discretionary custodial sentencing and says that a court cannot impose a custodial sentence except when the offence in a combination of the past offence calls for that.[85]

b) Sentencing Guidelines Council

In *Sec-167,* the Act talks about *the Sentencing Guidelines Council* which gives guidelines to facilitate all courts dealing with criminal offences to pursue the sentencing of offenders from a universal starting point. It says that there will be seven judicial members and four non-judicial members, and provides that the Lord Chief Justice should be the Chairman of the Council. *Sec-171* says that the Sentencing Council should notify the sentencing advisory panel when it decides to structure new guidelines or revise the old ones. *Sec-172* says that the court must regard the sentencing guidelines issued by the council and *Sec-174* says that the court has a statutory duty to give reasons as to why it opted for the specific sentence and what will be the effect of such sentence. Thus, if the court reduces a sentence on account of a guilty plea or gives custodial sentence, then the court must explicate the aggravating and mitigating factors related to the decision.[86]

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84. Sentencing Council, History, *available at* https://www.sentencingcouncil.org.uk/about-us/history/, (Last visited on Jan 9, 2017).
85. The National Archives, Legislation. Gov.UK, Criminal Justice Act, 2003, ss.142-152, *available at* https://www.legislation.gov.uk/ukpga/2003/44/contents, (last visited on Jan 5, 2017).
86. *Ibid*.

c) Creation of Sentencing Council

The *Sentencing Advisory Panel and Sentencing Guidelines Council* created significant momentums which lead to the creation of the *Sentencing Council.*[87] The *Sentencing Council* was established in 2009 by the *Coroners and Justice Act,* and it was responsible for issuing sentencing guidelines to followed by the courts unless it is opposing the interest of justice.[88] *The Sentencing Council* is an independent non-departmental body of the Ministry Of Justice.[89]

Part-4 of the Act deals with the sentencing and *Sec-120* says that the *sentencing council* must prepare sentencing guidelines and the draft guidelines must be prepared after consulting with the Lord Chancellor, persons whom the Lord Chancellor directs, Justice Select Committee of the House Of Commons and other persons as considered essential by the council.[90] *Sec-121* says that the guidelines should specify the range of sentences according to the nature of the offence. *Sec-128* says that the sentencing council must monitor the operation and effect of sentencing guidelines and consider the information that can be drawn with regard to the monitoring. Another function of the sentencing council is to promote awareness of matters relating to the sentencing of offenders as mentioned under *Sec-129* of the Act.[91]

d) Roles and Function of the Sentencing Council

The roles and functions of the Sentencing Council can be summarized as follows:

The Sentencing Council is a self-governing, non-departmental public body of the Ministry of Justice and substituted the erstwhile Sentencing Guidelines Council and the Sentencing Advisory Panel in April 2010. The Council comprises eight members of the judiciary and six non-judicial members, all with proficiency in the criminal justice system. All judicial appointments that are made by the Lord Chief Justice are made with the consent of the Lord Chancellor while non-judicial appointments are made by the Lord Chancellor with the consent of the Lord Chief Justice by open competition. The Sentencing Council has the responsibility for

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87. The Coroners and Justice Act, 2009, Part-4, s. 118, *available at* http://www.legislation.gov.uk/ukpga/2009/25/pdfs/ukpga_20090025_en.pdf., (last visited on Jan 17, 2017).
88. Julian V. Roberts, "Sentencing Guidelines & Judicial Discretion: Evolution of the Duty of Courts to comply in England & Wales", 51(6) *BJC Oxford*, 997, 1000-1001, (2011).
89. *Ibid.*
90. *Supra* Note 84 at 14.
91. *Ibid.*

developing sentencing guidelines and monitoring their use and assessing the impact of guidelines on sentencing practice.[92] The Council should consider the impact of sentencing decisions on victims; monitor the application of the guidelines and play an important role in promoting the understanding of sentencing guidelines. This way public confidence in sentencing and the criminal justice system can be increased.[93]

Interestingly, both the Sentencing Council and Sentencing Guidelines Council had a majority of judicial membership in them. The sole intention was that judiciary would welcome the guidelines in a better manner when they have their representatives who will draft the guidelines.[94] In addition to it; there were victims who felt that the recent changes in the sentencing process of England and Wales have improved after the Sentencing Guidelines came into play.[95]

The approach taken up by the United States was however very different from that of England and Wales. They focused on a numerical grid approach to do away with the unwarranted disparity.

2) The United States

In the USA, the States adopted the discretionary Model of sentencing where the Legislature fixed the period of punishment, and the courts were provided with sentencing ranges. The judges had the discretion to sentence an offender considering the non-statutory aggravating and mitigating circumstances.[96] Under this system, both federal judges & the State had the discretion to give sentences which took into account the defender's character and background as well as the type of crime that has been committed. During the 20th century, the indeterminate era of sentencing had emerged, and under this system, the judges decided the range of punishment and the Parole Boards decided the actual term. During the 1950s and 1960s, the theories surrounding punishment changed again. Since judges and parole boards

92. Sentencing Council UK: About us, *available at* https://www.sentencingcouncil.org.uk/about-us/, (Last visited on Feb 5, 2017).
93. The Law Library Congress: Sentencing Guidelines: England and Wales, *available at* https://www.loc.gov/law/help/sentencing-guidelines/englandandwales.php, (last visited on Jan 17, 2017).
94. Michael Tonry, "Sentencing commissions and their guidelines," 17 *C&J*, 137-38, (1993).
95. Carol McNaughton Nicholls, Martin Mitchell, Ian Simpson, Stephen Webster, *"Attitudes to Sentencing Sexual Offences", SCRS*, 21-32, (2012).
96. Mrinal Satish, *Discretion, Discrimination & Rule of Law*, 122 (ed. 1, Cambridge University Press, UK, 2017)

had too much discretion, it faced a lot of criticisms, and many state legislatures called for *mandatory minimum sentences* for certain crimes. Then by 1980, state legislatures started to pass reform acts that had determinate sentencing guidelines.[97]

a) Sentencing Reforms Act, 1984 and creation of Sentencing Commission

The Congress passed the *Sentencing Reform Act, 1984* which created the United States Sentencing Commission.[98] The goal behind the new sentencing guidelines system was that people who had committed similar kind of crimes and had similar kind of criminal histories should receive equivalent sentences. It is a part of the broader *Crime Control Act, 1984* and it created the United States Sentencing Commission.[99]

The sentencing commission: It is an independent agency in the judicial branch which is charged with creating sentencing guidelines to further the objectives of the Sentencing Reform Act, 1984. [100]It is also empowered with the responsibility of monitoring the guidelines, submitting modifications regarding the guidelines to the Congress, recommending changes in criminal statutes and establishing research and educational programs.[101] It consists of 7 voting members who are appointed by the President and confirmed by the Senate. However, the commission structure was changed, and now it includes three judges as the maximum number of members. This is to reduce the judicial presence in the commission. The Commission was entrusted with creating sentencing guidelines which came into effect six months after the commission was created. The commission considered seven factors (among other things) relating to the seriousness of the offence which may be considered by it while creating the guidelines like offence seriousness grade, specific aggravating and mitigating circumstances, nature and degree of harm, community view, public concern about the offence, local and national offence frequency and the likelihood

97. *Gertner, Supra* Note 65 at 9.

98. Barry L. Johnson, Excerpt from the Sentencing Reform Act 1984, *available at* http://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/sentencing-reform-act-1984 (last visited on Jan 7, 2017).

99. United States Sentencing Commission, An Overview of the United States Sentencing Commission, *available at* http://isb.ussc.gov/files/USSC_Overview.pdf, (last visited on Jan 9).

100. An overview of the US sentencing commission, *available at* https://www.unl.edu/eskridge/cj211sentence.html, (last visited on June 1, 2018).

101. United States Sentencing, Introduction to the Sentencing Reform Act, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/chap1.pdf. (last visited on Feb 5, 2017).

of achieving general deterrence.[102]

b) The Federal Sentencing Guidelines

The*se guidelines* are a set of non-binding rules that set out a uniform sentencing policy for the defendants convicted in the US Federal Court system and came into effect in 1987.[103] These are written by the US Sentencing Commission. The first set of sentencing guidelines was given in 1987. Since 1987, the federal sentencing in the USA is governed by the *Sentencing Guidelines* which are annually amended.[104] The sentencing court must choose a sentence from within the guideline range. The sentencing guidelines consider both the seriousness of the offence and the offender's past criminal history. It provides for 43 levels of offence seriousness and greater the seriousness of the offence, greater is the level of crime committed.[105] Thus, it is highly influenced by the Principle of Proportionality. It also includes factors of adjustments in the offence level which would increase or decrease the offence level. The sentencing guidelines in America are in the format of a 2-dimensional grid or matrix. On the vertical level the grid is composed of a number of levels of crime seriousness, and on the horizontal level, it is composed of 6 categories of prior criminal history. On the vertical axis, "offence levels" are there which define the seriousness of the offence and on the horizontal axis "the criminal history score" is there. An increase in the criminal history score results in the corresponding increase in the severity of a presumptive sentence. The guidelines, however, acknowledged that some amount of judicial discretion as necessary. The guidelines thus permitted the judges to depart from the presumptive sentence if- (i) the prosecutor filed a motion stating that the convict has provided assistance to the law enforcement authorities; (ii) If the judges show that the guidelines have not taken into account the relevant factors that came up while handling the specific case in hand.[106]

In the case of *United States v Booker*[107] the constitutionality of the guidelines was challenged because it violated the 6th amendment to the US Constitution which

102. *Supra* Note 59 at 8.

103. *Ibid*.

104. United States Sentencing Commission, Introduction, Authority, and General Application Principles, *available at* www.ussc.gov/guidelines/2016-guidelines-manual/2016-chapter-1, (last visited on Feb 7, 2017).

105. United States sentencing commission, An Overview of Mandatory minimum penalties in the Federal Criminal Justice System, *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf , (last visited on Jan 5 2017).

106. Eric Luna & Paul G. Cassell, "Mandatory Minimalism," 32(1) *CLR*, 15-16, (2010).

107. 543 U.S. 220 (2005)

provided for a Right to be tried by a jury of one's peers. In this case, it was held that the guidelines should be made advisory, not mandatory. Thus, judges were allowed to deviate in certain cases.[108] There is, however, still a small degree of variation amongst the judges even if all the sentencing factors are taken into account.[109]

VI. COMPARATIVE ANALYSIS

If we compare the Sentencing Guidelines of UK and US; we find that in both the countries the sole object and purpose behind the creation of the guidelines was to have consistency in sentencing practices. In both the countries, Appellate Review of sentences for is provided. Another similarity is that the sentencing guidelines in both countries are advisory; not mandatory. Thus, no straitjacket formula has been provided for. Judges can deviate from the guidelines laid down by the Sentencing Council of England & Wales or Sentencing Commission of U.S.A provided that they have reasons to do so depending upon the factors and circumstances of a particular case. These reasons have to be strong enough and written down by the court. Thus, both the guidelines are presumptive.[110] In both the Sentencing Council of England & Wales and the Sentencing Commission of U.S.A, we find judicial representation. In fact, in England & Wales, there is a majority of judicial representation (8 out of 14 members are from judiciary) in the Sentencing Council. The sole purpose behind it was that judiciary would welcome the guidelines in a better manner when they have their representatives who will draft the guidelines.[111] In the U.S.A, however, the judicial representation was reduced (3 out of 7 members are from judiciary). The dissimilarity between the Sentencing Guidelines of UK and U.S.A, however, lies in the Model of Sentencing Guideline. U.S.A focused on the Numerical Grid Approach of Sentencing which is very different from that of U.K. Another difference is that the Sentencing Commission of U.S.A is an independent agency in the judicial branch; while the Sentencing Council of England and Wales is a self-governing, non-departmental public body of the Ministry of Justice. Thus, it is a part of the Executive branch.

108. *Gertner, Supra* Note 65 at 9.
109. Amy L. Anderson & Casia Spohn, "Lawlessness in the Federal Sentencing Process: A test for Uniformity and Consistency in Sentence Outcomes", 27 (2) *JJQ*, 366 (2010).
110. Rodney L. Engen, "Assessing determinate & presumptive sentencing-making research relevant", 8 (2) *ASC*, 328 (2009).
111. *Tonry, Supra* Note 94 at 18.

VII. CONCLUSION

From the above discussion, it is reflected that many States across the world have understood the need to have their sentencing policies and have formulated structured or unstructured policies according to their needs. The history of sentencing discretion in Britain and the United States has been an issue which troubled the legal systems for a very long period. Eventually, they developed sentencing guidelines to resolve the problem. Also, it cannot be argued that they have provided for a straitjacket formula because necessary discretion has been given to the judges in situations those require special attention. But India is devoid of such a structure. The present Sentencing structure in India gives immense discretion to the sentencing judges to deal with the individual cases according to their whims and fancies. The Indian Judiciary has resorted to different contentions at different points of time. The lack of unanimity amongst the Judges has resulted in an inconsistency in the basic principles and sentencing assumptions. In such a scenario India should adopt a Sentencing Model where there is a Sentencing Commission with both Judicial and Non-judicial representation. In both the Sentencing Council of England & Wales and the Sentencing Commission of U.S.A, we find judicial representation. The sole purpose behind this is presumed to be that the judiciary will welcome the guidelines in a better fashion while they are involved in drafting the guidelines. The Sentencing Commission can be set up by an Act of the Parliament. The authors propose the Sentencing Commission to be a self-governing, non-departmental public body of the Executive branch; like that of England and Wales. The Commission shall have the responsibility to issue guidelines on sentencing which the courts must follow unless it is in the interest of justice not to do so. The guidelines should specify the range of sentences by the nature of the offence or heinousness of the crime.

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PROTECTION OF RIGHT TO REHABILITATION OF DRUG ADDICTED AND NEGLECTED CHILDREN IN INDIA

ADESH KUMAR*

ABSTRACT : Children are the most valuable assets of human being and soul of nation. But drug abuse in children is a problem which affects social order and growth of the country. Drug addiction in children not only create problem to individual's health but also adversely affect the development of families and the whole atmosphere of the society. After World War II, the international community came together and Single Convention on Narcotic Drugs 1961, Convention on Psychotropic Substances 1971 and Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 were resolved to tackle the abuse of drugs worldwide. Constitution of India 1950 also protects rights of drug addicted and neglected children under Art. 15(3), 21 and 39(e). Parliament of India enacted the Narcotic Drugs and Psychotropic Substances Act, 1985 and the Juvenile Justice Act 2015 to curb the drug abuse and to provide treatment and rehabilitation to drug addicted and neglected children respectively. Government of India started Drug De-Addiction Program (DDAP) at national level in 1988. The Juvenile Justice Act 2015 provides provisions for right to treatment and rehabilitation of drug addicted and neglected children either in conflict with law or in need of care and protection which is a basic right of him. It constitutes Juvenile Justice Board and Child Welfare Committee in every district in relation to rehabilitation, adoption, re-integration, and restoration of child in conflict with law and children in need of care and protection..

KEY WORDS : Drug Addiction, Neglect, Psychotropic Substances, Rehabilitation, Treatment, Child in Conflict with Law and Child in Need of Care and Protection..

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I. INTRODUCTION

Children and childhood across the world is known as golden age. Children are the most valuable assets of human being and soul of nation. The future of any country depends on the thing that how children of the country grow and develop in healthy manner? Being the vulnerable part of society, child has the basic right to be safe and protected. Children are valuable assets of any country also hence drug abuse in children is a problem which affects social order and growth of the country as well as the future of the country. Drug addiction in children not only create problem to individual's health but also adversely affect the development of families and the whole atmosphere of the society and country in long term. Therefore, the problem of drug addiction in children must be taken very seriously. Among so many tools to deal effectively with this problem, one of the important solutions is to protect and ensure right to rehabilitation of children.

II. INTERNATIONAL FRAMEWORK FOR PROTECTION OF RIGHT TO REHABILITATION

In order to control illicit trafficking of drug substance, international attempts took place after the World War II. The international community came together with the efforts of United Nations and Single Convention on Narcotic Drugs[1] and Convention on Psychotropic Substances[2] were resolved which were amended later on[3]. United Nations Convention on Narcotic Drugs[4], was the first convention in United Nations to tackle the abuse of drugs worldwide. Some countries of United Nations were neither member of this convention nor having sufficient domestic legislation in their country to control the abuse of drug. Hence Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 wad drafted and resolved. These three conventions altogether have effective provisions to deal with problem of drug and can request the states parties to enforce the provisions of these conventions effectively and take all necessary steps for early identification of problem, complete treatment, post treatment care and rehabilitation of drug addicted. The member states of these conventions are also requested to endeavour training of professional in

1. 1961
2. 1971
3. Porter L., Arif A.E. & Curran W.J., "*The Law and the Treatment of Drug and Alcohol-dependent Persons- A Comparative Study of Existing Legislation*" WHO, Geneva, 1986.

treatment and rehabilitation of drug addicted with social reintegration. The United Nation Convention on Rights of Child[5] which is most recognising convention for protection of rights of child also guarantees the right to rehabilitation to children. The Convention provides that:

"States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services."[6]

The Declaration on the Guiding Principles of Drug Demand Reduction[7] provides that :

"we the state members of United Nations affirm our determination to provide the necessary resource for treatment and rehabilitation and to enable social integration to restore dignity and hope to children, youth, women and men who have become drug abusers and to fight against all aspects of the world drug problem".[8]

Now states parties of United Nations are consented to act together and to invest and develop a wide range of mechanism for prevention and treatment of drug addicted person[9].

III. REHABILITATION OF DRUG ADDICTED AND NEGLECTED CHILDREN IN INDIA LEGAL SYSTEM

1. CONSTITUTION OF INDIA 1950

The Constitution of India specifically deals with the protection of rights of children. In chapter III of Constitution of India, it empowers the parliament to make law for the protection of children.[10] It also ensures the right to life and right to good health as a fundamental right.[11] In the part IV of Constitution of

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4. 1961
5. 1989
6. UNCRC 1989, Article 24(1)
7. 1998
8. Political Declaration of Guiding Principles of Drug Demand Reduction
9. Drug Abuse Treatment and Rehabilitation: A Practical Planning and Implementation Guide, United Nations Office on Drug Addiction and Crime.
10. Constitution of India, Article 15(3)
11. Ibid, Article 21

India, the state is under obligation to protect the early age of children[12] and children must be given open opportunities and better facilities to excel in a healthy environment with the sense of freedom of work and dignity of life. These provisions ensure the protection to right to rehabilitation of drug addicted and neglected children in India. In order to strengthen these provisions the Parliament of India enacted various legislations to give wider protection to right to rehabilitation of drug addicted and neglected children.

2. STATUTORY PROVISIONS

In India, rehabilitation of drug addicted and neglected children are dealt by the Narcotic Drugs and Psychotropic Substances Act, 1985, the Juvenile Justice Act 2015 and community based programmes through various policies started by Government of India. The Narcotic Drugs and Psychotropic Substances Act, 1985 (here after said NDPS Act) provides wide powers to Government of India in order to tackle with this problem. It empowers the Government of India to take measures with respect to identification and treatment of drug addiction, to render education for its prevention and rehabilitation and social re-integration of drug addicts. The Juvenile Justice Act 2015 deals the rehabilitation juveniles who are either in conflict with law or with children who are in need of care and protection whereas the Government of India is also running community based programmes through its policies in case of drug addiction & other cases.

a) TREATMENT AND REHABILITATION OF DRUG ADDICTED AND NEGLECTED CHILDREN UNDER THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985

For the purpose of elimination, prevention of abuse of narcotic drugs and psychotropic substances and the illicit traffic of it, the NDPS Act empowers the Government of India to adopt all such mechanism as it deems necessary or expedient[13]. It also empowers Government of India to take measures in relation to identification, treatment, education, post addiction care, rehabilitation and social re-integration of addicts[14] and the fund shall be provided by the Government of India to meet out expenditure incurred in connection with the measures taken to deal with this problem[15]. The Act confers powers to central government to

12. Ibid, Article. 39(e)
13. NDPS Act 1985, s. 4(1)
14. ibid, s. 4(2)(d)
15. ibid, s. 7A(2)(c)

establish centers for identification, treatment etc. of drug addicts and to supply of narcotic drug and psychotropic substances. It says that the government may establish number of centers for identification, treatment, management[16], education, after-care, rehabilitation, social re-integration of addicts as it thinks fit. The government may give recognition and approval to the centers already running for said purposes. The government may also supply narcotic drugs and psychotropic substances to centers registered with the government and to others where such supply is a medical necessity, to render to addicts subject to prescribed conditions[17].

In 1988 very important developments took place in country. From a very long time, Ministry of Social Justice and Empowerment (MSJE) and Ministry of Health and Family Welfare are working together to curb the problem of drug abuse in India. Both the ministries together aimed for demand reduction of alcohol and drug in India and started Drug De-Addiction Program (DDAP)[18] at national level which was launched in 1988. The National Drug Dependence Treatment Centre (NDDTC) was established at AIIMS New Delhi. It acts as a primary resource centre of Drug De-Addiction Program[19].

b) REHABILITATION OF DRUG ADDICTED AND NEGLECTED CHILDREN UNDER THE JUVENILE JUSTICE ACT 2015

Right to treatment and rehabilitation of drug addicted and neglected children either in conflict with law or in need of care and protection is a basic right of him. The Juvenile Justice Act also recognises it. The Act ensures basic needs of children by proper care and protection. It protects the right to development, treatment, social re-integration of children through child-friendly approach and disposal of problems in the best interest of children and for their rehabilitation. The Act sets out the rehabilitation of these children as one of objective of this Act in its preamble.[20]

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16. Subs. by Act 16 of 2014, s. 24, for "The government may, in its discretion, establish as many centres as it thinks fit for identification, treatment" (w.e.f. 1-5-2014).
17. Juvenile Justice Act 2015, s. 71(2)
18. STRATEGY AND ACTION PLAN: Enhancing the functioning of Drug De-Addiction Centres under DDAP National Drug Dependence Treatment Centre (NDDTC), All India Institute of Medical Sciences, New Delhi.
19. ibid
20. The preamble of Juvenile Justice Act declares that "An Act to consolidate and amend the law relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs through proper care, protection, development, treatment, social re-integration, by adopting a child-friendly approach in

The Act makes it clear that having contrary provisions in any other law, the provisions of this Act shall apply to all issues regarding children who are in need of care and protection and children who are in conflict with law. It includes any procedure followed and decision taken palce or any order given in relation to rehabilitation, adoption, re-integration, and restoration of children in need of care and protection[21].

The theme of best interest of child which is reaffirmed in United Nations Convention on Rights of Child 1989 is also taken into consideration in Indian legal system through the Juvenile Justice Act 2015. The Act protects the best interest of child and provides that "best interest of child" means the reason behind for any decision taken place for child in order to fulfil his fundamental or natural rights and this definition also includes needs, identity, social well-being and physical, emotional and intellectual development of children[22]. The Act defines the term "child friendly" which means that any behaviour, conduct, practice, process, attitude, environment or treatment that is humane and considered in the best interest of the child[23]. The Act provides that "Childline Services" means a twenty-four hours emergency outreach service round the clock for children in crisis which includes emergency services, long-term care and protection and rehabilitation service[24].

The Juvenile Justice Act is applicable to the child and defines that "child" is person whose age is below eighteen years[25]. In order to rehabilitate the children, the Act categorised two types of child;

(1) "child in conflict with law"

(2) "child in need of care and protection"

The Juvenile Justice Act establishes different authorities and different mechanism to rehabilitate the drug addicted and neglected children under the abovesaid categories of child. This Act ensures the rehabilitation and social integration of all kind of children described under the Act without any

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the adjudication and disposal of matters in the best interest of children and for their rehabilitation through processes provided, and institutions and bodies established, hereinunder and for matters connected therewith or incidental thereto."

21. Supra note 18, s. 1(4)
22. ibid, s. 2(9)
23. ibid, s.2(15)
24. ibid, s. 2(25)
25. ibid, s. 2(12)

discrimination of children. The Act also states that "the process of rehabilitation and social integration of children under this Act shall be undertaken, based on the individual care plan of the child, preferably through family based care such as by restoration to family or guardian with or without supervision or sponsorship, or adoption or foster care provided that all efforts shall be made to keep siblings placed in institutional or non-institutional care, together, unless it is in their best interest not to be kept together[26]."

c) REHABILITATION OF DRUG ADDICTED AND NEGLECTED CHILDREN IN CONFLICT WITH LAW

Punishment is not the solution of problem in case of drug abuse by children. A children indulge in drug abuse needs treatment, rehabilitation and care. It is based on the principle of restorative justice. In case of children in conflict with law, it is necessary to make a balance in relation to problem of drug abuse rather than inflicting punishment to children in conflict with law. It the duty of authorities dealing with children in conflict with law to take reformative measures to make things proper and justified.

As per the Act the term "child in conflict with law" is a child below the eighteen years of age who is either alleged for commencement of an offence or who have committed an offence[27].

To deal with the rehabilitation process of drug addicted and neglected children who is in conflict with law, the state government shall establish either one or more Juvenile Justice Boards in each district as required. The Juvenile Justice Board exercise the powers and discharge its functions relating to children in conflict with law under this Act[28]. The composition of board have a Metropolitan Magistrate or a Judicial Magistrate of First Class having at least three years experience and two social workers among whom at least one shall be a female. The Chief Metropolitan Magistrate or Chief Judicial Magistrate shall not be the member of this board. The board shall preside over as a bench and every such bench shall have the powers which are conferred under Code of Criminal Procedure, 1973[29]. The state government shall make arrangement for training of all members of board including Principal Magistrate of the board. The object of training is to sensitise in relation to care, protection, rehabilitation,

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26. ibid, s. 39(1)
27. ibid, s. 2(13)
28. ibid, s. 4(1)
29. ibid, s. 4(2)

legal provisions and justice for children. This training would take place within a period of sixty days from the date of appointment as member of board[30]. The board is empowered to deal exclusively with all the proceedings in relation to children in conflict with law in its jurisdiction[31]. The powers which are conferred specifically to board under this Act may also be exercised by the High Court and the Children's Court in appeal, revision or otherwise[32]. It is the function of the board to ensure the informed participation of the child and the parent or guardian, in every step of the process[33]. Another function of the board is to ensure that the child's rights are protected during whole process of apprehending the child, inquiry, aftercare as well as rehabilitation[34].

In case where the child is not released on bail, the process of rehabilitation and social integration in relation to children in conflict with law shall be done in the observation homes.[35]The Act is not only limited to the rehabilitation of the children but also ensures restoration and protection of child. It provides that the best interest of child in relation to restoration and protection of a child shall be the prime objective of any Children's Home, Specialised Adoption Agency or open shelter. Where a child is deprived of his family, either temporarily or permanently and he is under their care and protection, Children's Home shall take necessary measures for restoration and protection of a child. The Act provides that "Children's Home" is premises established or maintained by state government, either by itself or with the help of a voluntary or non-governmental organisation in a district or group of districts which is registered for specified purposes.[36]The Act also states that "child care institution" is a Children Home, open shelter, observation home, special home, place of safety, Specialised Adoption Agency which is recognised under this Act for providing care and protection to children[37]. The state government either by itself, or through voluntary or non-governmental organisations shall establish registered observation homes in every district. The child shall be kept in this observation homes during the inquiry under this Act for temporary reception, care and rehabilitation of

30. ibid, s. 4(5)
31. ibid, s. 8(1)
32. ibid, s. 8(2)
33. ibid, s. 8(3)(a)
34. ibid, s. 8(3)(b)
35. ibid, s. 39(2)
36. ibid, s. 2(19)
37. ibid, s. 2(21)

any child alleged to be in conflict with law.[38] The state government may laid down the procedure for registration of observation home and for withdrawal of registration of observation homes.[39] The state government may also frame rules for the management and monitoring of observation homes, including required standards and different types of services to be rendered by them which are necessary for rehabilitation and social integration of a child who is alleged to be in conflict with law. The state government is also empowered to establish registered special homes in every district which are necessary for rehabilitation of children who are in conflict with law and found to have committed an offence and are placed there by an order of the Juvenile Justice Board[40]. The state government may, by rules, provide for the monitoring and management of Children's Homes including the standards and the nature of services to be provided by them, based on individual care plans for each child[41]. The board or the committee shall authorise any person to receive a child for care, protection and treatment for a specified period[42]. The committee shall check the credentials of that person before authorise him.

Where a child is placed in any Children's Home or special home either on a report of a probation officer or otherwise, the committee or the board may consider release of such child. The release of the child shall permit him to live with his or her parents or guardian or under the supervision of any authorised person who is willing to receive. Such person will take charge, to educate and train the child, either for some useful trade or calling or to take care of child for rehabilitation[43].

The government is also empowered to make rules for management and monitoring of observation homes. It can set out certain standards and describe different types of services which are to be provided for rehabilitation and social integration of a child.[44]The government may also make rules rendering better services to provide food, shelter, clothing and medical attention.[45]

Rehabilitation of drug addicted children is challenging task to bring back

38. ibid, s. 47(1)
39. ibid, s. 47(3)
40. ibid, s. 48(1)
41. ibid, s. 50(3)
42. ibid, s. 52(1)
43. ibid, s. 97(1)
44. ibid, s. 110(2) (xxxiv)
45. ibid, s. 110(2) (xxxix)

him in the society. This only be done with regular and continues process of examination and evaluation of socio economic and educational status of children. Rehabilitation measures should be different for those who are in institutional care and who have been released from the institution. It is also necessary that process of rehabilitation should not be interrupted.

d) REHABILITATION OF DRUG ADDICTED AND NEGLECTED CHILDREN IN NEED OF CARE AND PROTECTION

The Juvenile Justice Act comprehensively defines the term "child in need of care and protection". The term "child in need of care and protection" include a child who is found at any place without any home. It also includes a child who is found working in violation of provisions of labour laws. This term also includes the children who is begging or living on the street[46]. The Juvenile Justice Act establishes a committee to rehabilitate the "child in need of care and protection". The Act provides that the state government shall constitute a Child Welfare Committees in every district. The committee shall discharge such duties conferred in relation to children in need of care and protection under this Act.[47] The committee shall have a chairperson including four other members among whom atleast one shall be a female member[48].

A child in need of care and protection may be brought to any member of the committee, when committee is not in session, for being placed in a Children's Home[49]. In case of difference of opinion among members of committee, majority opinion shall prevail. In case where no majority exists, the opinion of the chairperson shall be final[50].

The Committee have authority to final disposal of cases for the care, protection, treatment, development and rehabilitation of children in need of care and protection, as well as to provide for their basic needs and protection[51]. Where a committee has been constituted for any specific area, such committee is entitled to do all proceedings in relation to children in need of care and protection[52].

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46. ibid, s. 2(14)
47. ibid, s. 27(1)
48. ibid, s. 27(2)
49. ibid, s. 28(3)
50. ibid, s. 28(4)
51. ibid, s. 29(1)
52. ibid, s. 29(2)

The committee have to discharge certain functions and have some responsibilities. It includes to ensure care and protection, appropriate rehabilitation or restoration of children in need of care and protection. This would be based on the child's individual care plan and committee shall pass necessary directions to parents or guardians or concerned person in this regard.[53]

The committee shall hold an inquiry when child is either produced or a report is sent to it, in such manner as may be prescribed. The committee may pass an order to send the child to the children's home or a fit facility or fit person either on its own motion or on the report from any person or agency as specified. The social investigation shall be completed by social worker or child welfare officer within fifteen days so as to enable the committee to pass final order within four months after first production of the child. On the basis of inquiry, if committee is satisfied that the child does not have any family or shelter and he is in need of care and protection, the committee shall make an order to send the child to a Specialised Adoption Agency where child is below six years of age, till either suitable means of rehabilitation are found for the child or till the child attains the age of eighteen years. The working of rehabilitation of child shall be reviewed by the committee time to time, as may be prescribed[54].

The children who are in need of care and protection and are not placed in families for any reason they may be placed in an institution registered for such children under this Act. They can be placed on a temporary or long-term basis and process of rehabilitation and social integration of children shall be started wherever the child is so placed[55]. The children in need of care and protection or children in conflict with law who are leaving institutional care or special homes or place of safety on attaining eighteen years of age, they may be provided financial support by state government to re-integrate into the mainstream of the society[56].

The state government may establish and maintain Children's Homes in every district which shall be registered as such for the placement of children in need of care with the object of protection for their care, treatment, education, training, development and rehabilitation[57]. The state government shall make

53. ibid, s. 30(vi)
54. ibid, s. 40
55. ibid, s. 39(3)
56. ibid, s. 39(4)
57. ibid, s. 50(1)

rules for monitoring and management of Children's Homes including the required standards and the nature of necessary services to be provided by them[58]. The board or the committee shall recognise any person fit to temporarily receive a child for care, protection, treatment and rehabilitation of such child for a specified period. It shall be done after due verification of credentials of that person.[59]. The institutions registered under this Act shall provided different services in the process of rehabilitation and re-integration of children. It shall provide basic requirements such as food, shelter, clothing and medical etc. It shall provide necessary equipment for disabled child such as wheel-chairs, prosthetic devices, hearing aids, Braille kits etc. The institutions shall make arrangement for appropriate education, including supplementary education, special education etc. It shall ensure the skill development of child. The institution shall also provide legal aid where required.[60]

Any child kept in a special home or an observation home is a mentally ill person or addicted to alcohol or other drugs which lead to behavioural changes in a person, the committee or the board, may order removal of such child to a psychiatric hospital or psychiatric nursing home. This hospital or nursing home must be in accordance with the provisions of the Mental Health Act, 1987.[61]

When a child is kept in a Children's Home or special home may be released either absolutely or on certain conditions on a report of a probation officer or social worker etc. The committee or the board may permit him to live with parents or guardian or under the supervision of any authorised person willing to receive and take charge, and to look after the child for rehabilitation[62].

The state government may make provision for accumulation of fund for the welfare and rehabilitation of the children.[63] The fund shall be utilized by the department of the state government in such manner and for such purposes as may be prescribed[64].

The state government shall establish a Child Protection Society and Child Protection Unit for the state and every district respectively.[65]

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58. ibid, s. 50(3)
59. ibid, s. 52(1)
60. ibid, s. 53(1)
61. ibid, s. 93(1)
62. ibid, s. 97(1)
63. ibid, s. 105(1)
64. ibid, s. 105(3)
65. ibid, s. 106

The state government shall prepare rules to carry out the purposes of this Act and it shall be notified[66]. The government may make provisions for cancelling or withholding registration of an institution that either fails or unable to provide rehabilitation and re-integration services.[67] The government is also empowered to make rules for management and monitoring of observation homes.

IV. CONCLUSION

Having being sufficient constitutional safeguards as fundamental rights and directive principles of the state policy, statutory protections under the Narcotics Drugs and Psychotropic Substances Act 1985 & the Juvenile Justice Act 2015 and specially Drug De-Addiction Policy in India, the position of treatment and rehabilitation of drug addicted children is largely unsatisfactory. In most of the cases the drug addicted children do not have the access to these Drug De-Addiction Centers. That is why treatment and rehabilitation of a drug addicted child is a almost a dream. Hence the author suggests the followings:

1. Effective enforcement of Juvenile Justice Act, 2015 for treatment or rehabilitation of drug addicted children

Unfortunately the working of the Children's Homes is highly unsatisfactory, inhuman and against the idea of best interest of child. The idea of best interest of child is to secure and protect the child and to provide the necessary resource for treatment and rehabilitation and to enable social integration to restore dignity of child. Rehabilitation for children in conflict with law or in need of care and protection is based on the concept of restorative justice which requires to keep balance rather to inflict punishment for an offence committed. But the children's homes are not working on the idea of restorative justice. The main drawbacks of children's homes is there is neither the trained staff to deal with the treatment and rehabilitation process of the children nor it is equipped with the facilities of treatment and rehabilitation techniques. Hence it is suggested that the provisions of Juvenile Justice Act, 2015 for treatment or rehabilitation of drug addicted children in conflict with law or in need of care and protection must be implemented strictly. The authorities who fail in performing their duty under Juvenile Justice Act, 2015 must be punished because the children are the supreme assets of the nation and their ignorance cannot be tolerated at any cost.

2. Compulsory inclusion of each drug addicted and neglected children

66. ibid, s. 110(1)
67. ibid, s. 110(2) (xxiv)

under scheme of assistance for prevention of alcoholism and substance (drugs) abuse and for social defence services 2015

The government should also incorporate the compulsory inclusion each drug addicted children in the Integrated Rehabilitation Centres for Addicts to ensure treatment, rehabilitation and monitoring of drug addicted and neglected children. The compulsory inclusion of the drug addicted and neglected children should be incorporated under the objectives of Scheme of Assistance for Prevention of Alcoholism and Substance (Drugs) Abuse 2015 and it must be a part of "Components Admissible For Assistance under the scheme"

3. Social inclusion of drug addicted and neglected children in main stream of the society

One of the most important cause of the drug addiction and neglect of the children is the social status of the family. In most of the cases, the family is either migrated or socially excluded. These families are compelled to live in disparity and paucity of livelihood. Due to which the children of these families are compelled to earn their livelihood for their families.

Hence it is suggested that in order to prevent the drug addiction of the children, it is very necessary to ensure the enforcement of all policies of government to these socially excluded families which are far away from the benefits of policies of government. The social inclusion of the families in the main stream of the society would motivate them to stop their child from form child labour which would result in prevention of children form drug addiction or bring their drug child in the main stream of the society to prepare the child in civilized citizen.

4. Wider publicity of preventive education and awareness generation through media.

The main objective of Scheme of Assistance for Prevention of Alcoholism and Substance (Drugs) Abuse 2015 is to render awareness and educate and sensitise people about the ill-effects of alcoholism and substance. Preventive education and awareness generation through media publicity is also part of "Components Admissible for Assistance under the Scheme".

Hence it is suggested that wider publicity should be given to preventive education and awareness generation thorough print, electronic and digital media. Through this education programme it should also be ensured that legal provisions on drug addiction and its treatment are effectively applied in a way that enables drug addicted children to access evidence-based treatment services. In this

process, there should not be threat of punitive sanctions such as criminal prosecution and imprisonment. Through this education the parents of the drug addicted children including drug addicted children be ensured that the treatment and rehabilitation measures are scientifically proved and respect the human rights of drug addicted person.

5. Wider publicity of drug addicted welfare or reformative provisions in the Narcotics Drugs and Psychotropic Substances Act 1985

Narcotics Drugs and Psychotropic Substances Act 1985 is not only punitive but also reformative in nature. The Act ensures the reformative process to those offenders who comply with the provisions of the Act. This power has been conferred to the court. This Act punishes the offender who uses small quantity of Narcotics Drugs and Psychotropic Substances but at the same time it confers Power to court to release certain offenders on probation under Section 39 who uses small quantity of Narcotics Drugs and Psychotropic Substances. It also provides immunity from prosecution to drug addicts volunteering for treatment under section 64-A, who uses small quantity of Narcotics Drugs and Psychotropic Substances. It is very important provisions in favour of drug addicted children to ensure reformative process but hardly known to the needed people.

Hence, it is suggested that there must wider publicity of these drug addicted welfare provisions enshrined in Narcotics Drugs and Psychotropic Substances Act 1985 through the legal awareness campaign. The legal awareness of these reformative process and immunity from the criminal liability will help to the drug addicted children and their parents to prevent this abuse from the society.

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NOTES & COMMENTS

RESIGNATION *v* REMOVAL : THE INDIAN IMPEACHMENT SAGA

UDAY SHANKAR*

ABSTRACT : Acceptance of the resignation of a judge of the High Court of Calcutta by the President of India has raised academic debate on the propriety of impeachment proceedings of a judge. Tendering a resignation and subsequent acceptance in the midst of impending proceedings touches upon the issue of legal process involved in impeachment. . Whether the holder of the highest constitutional office should have waited for the completion of the process undertaken by the constitutional body or the resignation left the matter in fructuous and vitiated the need to drive the impeachment to a logical conclusion, is a question, which, this paper attempts to address. Reliving the nature and scope of impeachment proceeding, the script sheds light on the propriety of the action of the executive when the matter was under consideration before the pillar of democracy i.e., Parliament.

KEY WORDS : Resignation , Removal, anti-corruption, impeachment, proceedings.

I. INTRODUCTION

In the midst of an awakening movement on anti-corruption[1], the initiation of impeachment proceedings[2] against Justice Soumitra Sen Judge of Calcutta High Court, attracted attention of the whole nation.[3] The nation was following

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1. Pearl Kalra, *India Against Corruption Movement*(October 22, 2011), http://www.theworldreporter.com/2011/04/india-against-corruption-movement-anna.html.
2. The only Judge to be impeached in India is Shri Justice S.P Sinha. He was impeached in the pre-constitutional era under the provisions of Government of India Act, 1935.
3. IfthikharGilani, *Justice Sen impeached by RajyaSabha*, TEHELKA(October 22, 2011), http://www.tehelka.com/story_main50.asp?filename=Ws180811IMPEACHMENT.asp.

the proceedings with immense expectation as they surfaced from an instance of corruption in a dignified office.[4] The unprecedented response of the Members of Parliament across party lines, during the impeachment proceedings, raised phenomenal expectation amongst citizens of this country.[5]However, the well-calculated, timely resignation by Judge Soumitra Sen leaves a question mark on such partly concluded proceedings.[6]

There lies a rationale behind devising a procedure of impeachment in high constitutional offices.[7] The special procedure is designed, so as not to subvert the constitutional ideals which the country is cherishing for over six decades. Acceptance of resignation successfully averted the forgone conclusion of impeachment. Withdrawal of proceedings in the lower house of the Parliament has left the judicial proceeding mid-way and has left its effect, inconclusive. This article endeavours to leave its readers with a lightening rod, which the authors believe will stir a new debate on the purpose and scope of impeachment proceedings. With a challenge to Judge Sen's impeachment proceedings being raised before the honourable Supreme Court[8], this article aspires to shed some light on the nature and importance of such proceedings.

II. IMPEACHMENT

Anecdotal history suggests that impeachment is very old in origin. It relocates the power of indictment from ordinary due process in court of law to special procedure before the legislature.[9]

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4. Judge SoumitraSen is not the only judge who has been found indulging in corrupt practices. In recent years, allegations have also surfaced against Justice JagdishBhalla, Justice Dinakaran, Justice NirmalYadav, Chief Justice F.I Rebello, JusticeMehtab Singh Gill. *See*AvinashDutt, *My Lord's, There's a Case Against You,* TEHELKA (November 9, 2011), http://www.tehelka.com/story_main24.asp?filename=Ne123006My_lords.asp.
5. Judge SoumitraSen was charged on two counts and was found guilty by the inquiry committee on both the counts. *See,* Report of the Inquiry Committee, RajyaSabha Secretariat, Volume 1, at 33 (September, 2010).
6. *President Accepts Justice Sen's Resignation,* DECCAN HERALD(September 3, 2011), http://www.deccanherald.com/content/188104/president-accepts-justice-sens-resignation.html.
7. The procedure prescribed by article 124(4) is the only mode of removing a judge of the Supreme Court or the High Court. *SeeAvadesh* v. *State*(1991) 4 SCC 699.
8. http://www.thehindu.com/news/national/article2559769.(22nd October 2011). In light of Judge Sen's impeachment proceedings, the petitioner has sought interpretation of Article 124(4) and 124(5) of the Constitution of India, 1950 and section 6 of the Judges Enquiry Act, 1968.
9. T. F. T.Plucknett, *The Origin of Impeachment, in*TRANSACTIONS OF THE ROYAL HISTORICAL SOCIETY, 4TH SERIES, VOL. 24 47-71 (1942).

One of the perennial debates about impeachment is whether "it is" or "should be" christened as a judicial or a political process.[10] Purpose of impeachment process is toprotect the Constitution and to prevent abuse of power by the executive and judicial branches. By providing for a mechanism for pursuing and removing high ranking public officials for violations of law; the Constitution makes clear that no one is above the law, and that the nation is committed to rule of law. Perhaps, for this reason the standard of proof to establish misbehavior is very high. Therefore, the nature of impeachment is partly judicial and partly parliamentary. At the stage of voting on the motion, the process is political. The Parliament is sovereign with respect to conduct of its business.[11] Any Court cannot have any say in that political process.[12]

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10. "In interpreting the constitutional provisions in this area the court should adopt a construction which strengthens the foundational features and the basic structure of the Constitution. Rule of law is a basic feature of the Constitution which permeates the whole of the Constitutional fabric and is an integral part of the constitutional structure. Independence of the judiciary is an essential attribute of Rule of law. The constitutional scheme in India seeks to achieve a judicious blend of the political and judicial processes for the removal of Judges. Though it appears at the first sight that the proceedings of the Constituent Assembly relating to the adoption of Clauses (4) and (5) of Article 124 seem to point to the contrary and evince an intention to exclude determination by a judicial process of the correctness of the allegations of misbehaviour or incapacity on a more careful examination this is not the correct conclusion. Accordingly, the scheme is that the entire process of removal is in two parts – the first part under Clause (5) from initiation to investigation and proof of misbehavior or incapacity is covered by an enacted law, Parliament's role being only legislative as in all the laws enacted by it; and the second part only after proof under Clause(4) is in Parliament, that process commencing only on proof in accordance with the law enacted under Clause (5). Thus the first part is entirely statutory while the second part alone is the parliamentary process. The Constitution intended a clear provision for the first part covered fully by enacted law, the validity of which and the process thereunder being subject to judicial review independent of any political colour and after proof it was intended to be a parliamentary process. It is this synthesis made in our Constitutional Scheme for removal of a Judge. Indeed, the Act reflects the constitutional philosophy of both the judicial and political elements of the process of removal. The ultimate authority remains with the Parliament in the sense that even if the committee for investigation records a finding that the Judge is guilty of the charges it is yet open to the Parliament to decide not to present an address to the President for removal. But if the committee records a finding that the Judge is not guilty, then the political element in the process of removal has no further option. The law is, indeed, a civilised piece of legislation reconciling the concept of accountability of Judges and the values of judicial independence." *Sub-Committee on Judicial Accountability* v. *Union of India* (1991) 4 SCC 699.
11. Constitution of India, Article 122 (1950).*See alsoM.S.M Sharma* v. *Dr. Shree Krishna Sinha*, A.I.R 1960 SC 1186; *RamdasAthawale* v. *Union of India*, 2010 AIR SCW 2329.
12. *Capt. Virendra Kumar, Advocate* v. *Shiv Raj Patil, Speaker LokSabha*, (1993) 4 SCC 97.

Impeachment from high office is necessary to rehabilitate the damaged constitutional order.[13] The misconduct of the holder of a high office is so serious that it justifies impeachment and conviction, leading to the removal from the office.[14] Removal encompasses the element of punishment. The ways in which each impeachment episode is debated, understood, remembered and has produced winners and losers in history can define the terms of the debate in future impeachment disputes.[15]

III. THE CONSTITUTION : THE PROCESS INITIATED

The Constitution of India stands as the real safeguard of our freedoms.[16] It represents the basic document on which the whole framework of this "Sovereign, Socialist, Secular, Democratic, Republic" stands. The foundations of this Republic have been laid on the bedrock of justice.[17] The judges of the Supreme Court[18] and High

13. "Persons holding office to discharge constitutional duties and obligations are in the position of constitutional trustees and the morals of the constitutional trustees have to be tested in a much stricter sense than the morals of a common man." *In re Dr. Ram AshrayYadav*v.*Chairman, Bihar Public Service Commission*, (2000) 4 SCC 309.

14. "The holder of office of the judge of the Supreme Court or the High Court should, therefore, be above the conduct of ordinary mortals in the society. The standards of judicial behavior, both on and off the Bench, are normally high. There cannot, however, be any fixed or set principles, but an unwritten code of conduct of well established traditions is the guidelines for judicial conduct. The conduct that tends to undermine the public confidence in the character, integrity or impartiality of the Judge must be eschewed. It is expected of him to voluntarily set forth wholesome standards of conduct reaffirming fitness to higher responsibilities." *Krishna Swami* v. *Union of India and Ors.*, AIR1993SC1407.

15. Youngjae Lee, *Law, Politics and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective*, The American Journal of Comparative Law, Vol. 53, No.2 403-432 (Spring 2005).

16. "Constitution is the vehicle of nation's progress. It has to reflect the best in the past traditions of the nation; it has also to provide a considered response to the needs of the present and to possess enough resilience to cope with the demands of the future." H. R. Khanna,Making of India's Constitution(Eastern Book Company, 2ndEdition, 2009).

17. *Bharat Bank Ltd.* v. *Employees* AIR 1950 SC 188.

18. Constitution of India, Article 124(6) (1950)."Every person appointed to be a Judge of the Supreme Court shall, before he enters upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule." Schedule 3 further provides the form of oath. Form of oath or affirmation to be made by the Judges of the Supreme Court and the Comptroller and Auditor-General of India: 'I, A.B., having been appointed

Courts[19]are obligated under the Constitution to vow for upholding the Constitution and other laws. They have also been entrusted with the task of safeguarding the fundamental rights of people and upholding the rule of law.[20] Infraction of the Constitution and other laws by the sitting judges of the Supreme Court and High Courts is not only deleterious for the whole state but is also detrimental for the trust which a common man renders on the judiciary. The legitimacy of judiciary flows from the faith of people. Conduct of a judge as a judge must befit the office of judge as it constitutes the foundation of faith. Constitution has placed each and every organ of the state at the same pedestal. Independence and interdependence of each organ lies at the heart and soul of this basic document. It has also placed checks and balances to protect "we the people" from the plague, which results from a malfunctioning limb of the state.[21] Impeachment of the judges, who are proved to have misbehaved or are proved to lack capacity, is one such check which keeps the judicial organ of the state on its toes. The exercise of impeachment has been provided in the Constitution. Impeachment does not mandate overpowering of one limb by the other.[22] The procedure for

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Chief Justice (or a Judge) of the Supreme Court of India (or Comptroller and Auditor-General of India) do swear in the name of God / solemnly affirm, that I will bear true faith and allegiance to the Constitution of India as by law established, [that I will uphold the sovereignty and integrity of India,] that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or ill-with and that I will uphold the Constitution and the laws.'

19. Constitution of India, Article 219 (1950)."Every person appointed to be a Judge of a High Court shall, before he enters upon his office, make and subscribe before the Governor of the State, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule."Schedule 3 further provides the form of oath. Form of oath or affirmation to be made by the Judges of a High Court: 'I, A.B., having been appointed Chief Justice (or a Judge) of the High Court at (or of).....do swear in the name of God / solemnly affirm, that I will bear true faith and allegiance to the Constitution of India as by law established, 2 [that I will uphold the sovereignty and integrity of India,] that I will duly and faithfully and to the best of my ability, knowledge, and judgment perform the duties of my office without fear or favour, affection or ill-will and that I will uphold the Constitution and the laws.'. *See also Shabbir* v. *State* (1965) AIR All 97(99).
20. *N. Kannadasan* v. *AjoyKhose* (2009) 7 SCC 1; *Supreme Court Advocate on Record Assn.* v. *Union of India*(1993) 4 SCC 441.
21. "Independence of judiciary is not inconsistent with accountability for judicial conduct." Terrence J. Brooks, *How Judges Get into Trouble*, HeinOnline23 JUDGES J. 4 (1984).
22. "No discussions shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties expect upon a motion for presenting an address to the President praying for the removal of the Judge as hereinafter provided." Constitution of India, Article 121 (1950).This article buttresses

impeachment prescribes the grounds on which an impeachment proceeding can be undertaken. The grounds being limited to proved misbehavior and incapacity.[23] The term misbehavior has not been defined in the Constitution. It represents a vague and elastic term, the import of which can embrace within its sweep different facets of conduct as opposed to what is considered as good conduct.[24] Qualification of the word misbehavior by the term "proved", lays emphasis on the fact that before the parliament takes up the motion for exercising its vote, the conduct of the impugned judge has been proved. Parliament, subsequently, puts a stamp on the incapacity or misbehavior by adopting the motion in both the houses. It is only after such endorsement, the misbehavior or incapacity is deemed to have been proved. Perhaps, the reason of using "proved misbehavior" as a ground of removal is because ahigh magnitude of dereliction should be considered for impeachment. Therefore, what constitutes proved misbehavior is aptly left with wisdom of time.

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the premise that independence of judiciary has been given paramount importance in the Constitution.

23. "The constitutional process of removal of a Judge as provided in Article 124(4) of the Constitution is only for proved misbehavior or incapacity. The founding fathers of the Constitution advisedly adopted cumbersome process of impeachment as a mode to remove a Judge from office for only proved misbehavior or incapacity which implies that impeachment process is not available for minor abrasive behavior of a Judge. Removal of a Judge by impeachment was designed to produce as little damage as possible to judicial independence, public confidence in the efficacy of judicial process and to maintain authority of courts for its effective operation. Judicial office is essentially a public trust. Society is, therefore, entitled to except that a Judge must be a man of high integrity, honesty and required to have moral vigor, ethical firmness and impervious to corrupt or venial influences. He is required to keep most exacting standards of propriety in judicial conduct. Any conduct which tends to undermine public confidence in the integrity and impartiality of the court would be deleterious to the efficacy of judicial process. Society, therefore, expects higher standards of conduct and rectitude from a Judge. Unwritten code of conduct is writ large for judicial officers to emulate and imbibe high moral or ethical standards expected of a higher judicial functionary, as wholesome standard of conduct which would generate public confidence, accord dignity to the judicial office and enhance public image, not only of the Judge but the court itself. It is, therefore, a basic requirement that a Judge's, official and personal conduct be free from impropriety; the same must be in tune with the highest standard of propriety and probity. The standard of conduct is higher than expected of a layman and also higher than expected of an advocate. In fact, even his private life must adhere to high standards of probity and propriety, higher than those deemed acceptable for others. Therefore, the Judge can ill-afford to seek shelter from the fallen standard in the society." *C. RavichandranIyer* v. *Justice A.M. Bhattacharjee* (1995) 5 SCC 457.

24. *C. RavichandranIyer* v. *Justice A.M. Bhattacharjee*, (1995) 5 SCC 457, at para 24; *Delhi Judicial Service Association* v. *State of Gujarat* (1991) 4 SCC 406; *Daphtary*v. *Gupta* (1971) 1 SCC 626.

IV. THE BEGINNING OF THE IMPEACHMENT

Impeachment proceedings instituted in the Parliament were brought to halt by the executive by accepting the resignation of Judge Sen. During the course of the proceedings; recurrent themes which occupied the limelight were rule of law and independence of judiciary. Article 124(4) and Article 218 of the Constitution of India, 1950, provide for the mechanism of removal of Judges of the Supreme Court and High Courts respectively. Article 218 enjoins that the same procedure as being followed for the removal of a judge of the Supreme Court shall be followed for removing the judge of a High Court. The President cannot on his own remove a Judge of the Supreme Court or a High Court unless an address by each House of Parliament supported by a majority of the total membership of the House and by a majority of not less than two-thirds of the members of that House present and voting[25], is passed and presented to him for removal of the Judge on the ground of proved misbehavior or incapacity.[26] Law made by the parliament under Article 124(5), namely, the Judges Enquiry Act, 1968 is to be read along with Article 124(4) to find out the constitutional scheme for the removal of a judge. The Act provides that a requisite number of members have to move a motion for the removal of the judge before the speaker of the house. The speaker then decides whether the matter calls for an enquiry or not.[27] If the speaker decides to take up the matter on the consideration of the available material; she has to constitute a committee in order to investigate the accusations made against the Judge.[28] If the findings of the committee point

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25. The term "present and voting" discounts the deemed inclusion of absent members of the Parliament. Abstaining from voting would not tantamount to deemed support for the motion. *Lily Thomas* v. *Speaker, LokSabha*,(1993) 4 SCC 234.

26. Constitution of India, Articles 124(4), 218(1950).

27. "If notice is given of a motion for presenting an address to the President praying for the removal of a Judge signed,(a) in the case of a notice given in the House of the People, by not less than one hundred members of that House;(b) in the case of a notice given in the Council of States, by not less, than fifty members of that Council, then, the Speaker or, as the case may be, the Chairman may, after consulting such persons, if any, as he thinks fit and after considering such materials, if any, as may be available to him either admit the motion or refuse to admit the same." Judges Enquiry Act, S. 3(1) (1968).

28. "If the motion referred to in sub-section (1) is admitted, the Speaker or, as the case maybe, the Chairman shall keep the motion pending and constitute as soon as may be for the purpose of making an investigation into the grounds on which the removal of a Judge is prayed for, a Committee consisting of three members of whom (a) one shall be chosen from among the Chief Justice and other Judges of the Supreme Court; (b) one shall be chosen from among the Chief Justices of the High Courts; and (c) one shall be a person who is in the opinion of the Speaker or, as the case may be, the Chairman, a distinguished

towards the culpability of the Judge, then the parliament considers the motion for removal of the judge along with the committee's report and other available material.[29] Consideration is to be given by both houses of the Parliament. Copy of the report of the committee shall be forwarded to the impugned judge so that he is given a fair opportunity to defend his case.[30] If the parliament adopts the motion by a requisite majority, then the process culminates by the removal of the challenged judge by the President of India. When stamped by the President, the impeachment proceeding receives its proper fate which results in establishing the misbehavior or incapacity of the impugned judge.[31]

A fait accompli of resignation raises a question of status of impeachment proceeding initiated by the House after receipt of the report of the Committee. The overwhelming support in one of the Houses, the House of Learned and Elderly People, on impeachment motion is to be viewed not only as a requirement of technical procedure but also the voice of the constitutional body on issue of removal of a condemned judge. One house has successfully discharged constitutional function; the other house was under an obligation to undertake the function in order to fulfill the mandate of the Constitution. Non-fulfillment of the function makes the removal a goal too near, yet too far.

V. THE RESIGNATION : GOAL TOO NEAR, YET TOO FAR

Resignation of Judge Sen raises the question whether impeachment relates

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jurist: Provided that where notices of a motion referred to in sub-section (1) are given on the same day in both Houses of Parliament, no Committee shall be constituted unless the motion has been admitted in both Houses and where such motion has been admitted in both Houses, the Committee shall be constituted jointly by the Speaker and the Chairman: Provided further that where notices of a motion as aforesaid are given in the Houses of Parliament on different dates, the notice which is given later shall stand rejected." Judges Enquiry Act, S. 3(2) (1968).

29. "If the report of the Committee contains a finding that the Judge is guilty of any misbehaviour or suffers from any incapacity, then, the motion referred to in sub-section (l) of section 3 shall, together with the report of the Committee, be taken up for consideration by the House or the Houses of Parliament in which it is pending." Judges Enquiry Act, S. 6(2) (1968).

30. *SarojiniRamaswami* v. *Union of India* (1992) 4 SCC 506,at para 95.

31. "If the motion is adopted by each House of Parliament in accordance with the provisions of clause (4) of article 124 or, as the case may be, in accordance with that clause read with article 218 of the Constitution, then, the misbehaviour or incapacity of the Judge shall be deemed to have been proved and an address praying for the removal of the Judge shall be presented in the prescribed manner to the President by each House of Parliament in the same session in which the motion has been adopted." Judges Enquiry Act, S.6(3) (1968).

to only the executive and the condemned judge or whether it provides for an obligation to the system of justice and society generally. Legal landscape needs to be different in cases of removal of a holder of high constitutional office than that followed in ordinary service jurisprudence.[32] Impeachment involves the question of position and reputation of office holder on one hand, and on other hand it engages the question of restoration of faith in our cherished constitutional philosophies.

There lies a sea difference between the import of the terms "resignation"[33] and "removal". The moral aspect of indignity and incrimination are absent in resignation. It is for this reason that the terms "removal" and "resignation", as a means for vacating the post of a Judge, have been provided in different provisions of the same Article.[34] Moreover, the benefits which ensue after resignation are different from those which mark removal.[35] In the case of resignation, the High Court or the Supreme Court judge has the privilege to quit their office at their unilateral will, by sending to the President a written letter of

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32. "So it is that we must emphatically state a Judge is not a government servant but a constitutional functionary. He stands in a different category. He cannot be equated with other 'services' although for convenience certain rules applicable to the latter may, within limits, apply to the former. Imagine a Judge's leave and pension being made precariously dependent on the executive's pleasure: To make the government not the State-the employer of a superior court Judge is to unwrite the Constitution." *Union of India* v. *SankalchandHimatlalSheth and Anr*.(1978)1SCR423.

33. "Resignation' in the Dictionary sense, means the spontaneous relinquishment of one's own right. This is conveyed by the maxim :*Resionatioestjurispropiispontanearefutation*. In relation to an office, it connotes the act of giving up or relinquishing the office. To "relinquish an office" means to "cease to hold" the office, or to "loose hold of the office; and to "loose hold of office", implies to "detach", "unfasten", "undo or untie the binding knot or link" which holds one to the office and the obligations and privileges that go with it. In the general juristic sense, also, the meaning of "resigning office" is not different. There also, as a rule, both, the intention to give up or relinquish the office and the concomitant act of its relinquishment, are necessary to constitute a complete and operative resignation, although the act of relinquishment may take different forms or assume a unilateral or bilateral character, depending on the nature of the office and the conditions governing it. Thus, resigning office necessarily involves relinquishment of the office which implies cessation or termination of, or cutting asunder from the office. Indeed, the completion of the resignation and the vacation of the office, are the casual and effectual aspects of one and the same event." *Union of India* v. *Gopal Chandra Misra* (1978) AIR SC 694.

34. Constitution of India, Articles 124(2), 217 (1950).

35. National Commission to Review the Working of the Constitution, *Superior Judiciary* (October 22, 2011), http://lawmin.nic.in/ncrwc/finalreport/v2b1-14.htm.

resignation.[36] Removal of the judges by forced resignation is not only unconstitutional but also parlous to the independence of the judiciary.[37]

A retired judge, which may include a judge who has resigned[38], is endowed with sundry benefits which include amongst others, pensions[39] and ancillary benefits[40]. A retired judge is also entitled to payment of cash equivalent to leave salary for the period of earned leave at his credit on the date of retirement.[41] Moreover, the Constitution itself provides that a retired judge of the High Court can plead before Supreme Court and the other High Courts.[42] She can also be entrusted with the chairmanship of various statutory and non-statutory bodies.[43] Retirement through resignation[44], in such a case apparently seems to be a more lucrative recourse for the erring judges. The authors of this paper argue that just because an easy recourse is available for getting rid of a charged judge; it should not imply that the proper course of removal should not be followed.

Scholars have argued that the Parliament can withdraw the motion presented to it at any stage of the impeachment proceedings.[45] Though the authors endorse this view partially in light of the exit checks which are provided under the Judges Enquiry Act, 1968, such reading of Article 124(4) is contrary to the perception that an accused should, if charged, meet his fate in the form of either vindication or punishment. It can be argued by legal luminaries that the second part of the whole impeachment proceeding, being a political part, cannot be questioned in any Court in light of any irregularity. Such an argumentation, though cogent enough, undermines the aspect that the members of the Parliament are bound to uphold the Constitution[46]. Albeit, parliamentary proceedings are given an inviolable

36. *Supra* note 33.
37. *Supra* note 23.
38. "As far as public officials are concerned, it is clear that resignation is the form of retirement. There is in fact evidence that "retirement" is slightly euphemistic for resignation. " Max Radin, *Legal Philology: Resign; Retire; Emolument*, 23 A.B.A. J. 771(1937).
39. High Court Judges (Salaries and Conditions of Services) Act,S. 14(1954).
40. High Court Judges (Salaries and Conditions of Services) Act, Section 23D (1954); Supreme Court Judges (Salaries and Conditions of Services) Act, S. 23C (1958).
41. *UOI* v. *Gurnam Singh*, AIR 1982 SC 1265.
42. Constitution of India, Article 220 (1950).
43. *Supra* note 35.
44. Voluntary resignation leads to voluntary retirement. Burke Shartel, *Retirement and Removal of Judges*, HeinOnline20 J. AM. JUD. SOC. 133 (1936-1937).
45. M.P Singh, V.N SHUKLA'S CONSTITUTIONAL LAW, (11th ed. Eastern Book Company, 2010).
46. Constitution of India, Article 99 (1950).

sanctity under the Constitution of India, the same cannot be upheld on grounds of fundamental breach of the Constitution. The function of one institution of the Constitution must be in conformity with the other institution. The impending impeachment proceeding should have been a reason for non-acceptance of resignation by the President. The Head of the Executive should have waited for the logical conclusion of the impeachment proceeding initiated by the Parliament. In any case, the President could have accepted the resignation of the Judge after successful completion of the proceeding. The act of acceptance of resignation by the President and the withdrawal of the proceeding by the Speaker raises a constitutional question of impropriety.

Removal of a judge by forced resignation and any deviation from the principle of "justice for all" would amount to transgression of the Constitution and the same cannot be justified on any ground. All the cant and clichés concerning the Rule of Law that surfaced during the recent impeachment proceedings should not obscure a fundamental truth.[47]

VI. CONCLUSION

Casualty, which has resulted from the acceptance of resignation, has been the deprivation of a just result from the proceedings. Charges against the judge came and went, without consequential result. In impeachment proceedings of a judge of constitutional court, the nation reasonably expects a logical conclusion to the proceedings.[48] Tactical subversion of the proceedings in the garb of technical ground of submission of resignation of the condemner amounts to a fraud on the people of this country.[49]

A thread of reasoning justifies logic. Constitution of India enshrines within it a logical norm which has been placed in that exemplary document with a

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47. Deborah L Rhode, *Conflicts of Commitment: Legal Ethics in Impeachment Context*, STANFORD LAW REVIEW, Vol. 52, No. 2 269-351 (January, 2000).
48. A judge holds a dignified place in society and his conduct is subject to high standards of professional and personal conducts. Jeffrey M. Shaman, *Judicial Ethics*, 2 GEO. J. LEGAL ETHICS 1 (1988-1989).
49. "We must not, if the circumstances warrant, abjure the use of the sanction the Framers provided. But precisely because the stakes are so high for all of us, we must assure that the impeachment process is, in fact, a fair and principled one, legitimate in the eyes of the people." Arthur J. Goldberg, *The Question of Impeachment*, 1 HASTINGS CONST. L.Q. 5 (1974).

purpose. The purpose which it serves[50] cannot be subjugated to the whims and fancies of the legislature. This not only defies reasoning, but is also against the constitutional mandate. Removal of judges by way of forced resignation is not what is prescribed in the Constitution of India. Removal by way of impeachment is the route for reinstating the trust of common man in the higher judiciary. That being the case, Justice Soumitra Sen deserves either exoneration or punishment. The purpose which impeachment serves lies in analyzing the direct and indirect repercussions on the public interest.[51] National welfare, by removal of judges, is the paramount duty of the legislature and to abstain from the same appears to be a betrayal from the fundamental tenets of the Constitution. The elusive quest for "justice for all" remains unanswered by the course adopted by the Indian Parliament. Either the judiciary or the legislature has to take the task of filling this hiatus and the authors hope that someday "we the people" will be able to see "justice for all".

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50. "The purpose of a procedure for the discipline and removal of judges is to provide a workable system for taking remedial action when a judge, through fault or disability, fails to execute properly the duties of office. The ultimate sanction of the procedure, invoked when a judge is not fit to retain office, is the termination of his tenure."Jack E. Frankel, *Judicial Discipline and Removal*, 44 TEX. L. REV. 1117 (1965-1966).

51. William L. Burnell, *Judicial Impeachment*, HeinOnline1 W. ST. U. C. L. L. REV. 1 (1972-1973).

ACCESSIBILITY AND REASONABLE ACCOMMODATION IN DISABILITY LAW: A CRITICAL STUDY

ANAND GUPTA*

ABSTRACT : This paper discusses the significance of Accessibility and reasonable accommodation for persons with disabilities. For this purpose the paper analyses these concepts and their relationship with each other. Accessibility deals with the general standards whereas reasonable accommodation deals with the individualized treatment where general standards fail to provide relief to persons with disabilities. They play a significant role in the realisation of various rights such as Education, Employment, Life with Dignity, freedom of movement, participation in political and cultural life of the society etc. Accessibility and Reasonable Accommodation are the central theme of the convention on the rights of persons with disabilities, 2006 and rights of persons with disabilities act, 2016. These legal instruments treat the denial of reasonable accommodation as the ground of non-discrimination. The Supreme Court has treated them as necessary components of the Right to Live with Dignity under Art. 21 of the Constitution of India

KEY WORDS : Accessibility, Reasonable Accommodation, Persons with Disability, Non-discrimination, Dignity, Universal Design.

I. INTRODUCTION

Accessibility in the context of Persons with Disabilities means that the design of physical environment, services, information and communication should be made in such a manner that persons with various types of disabilities can negotiate them independently and without much difficulty. An accessible barrier free environment is the first step towards fulfilling the right of People with

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Disabilities to participate in all areas of community life. The human rights model of disability recognizes that" disability is a social construct and impairments must not be taken as a legitimate ground for the denial or restriction of human rights." The term "Accessibility and "Reasonable accommodation" are sometimes used interchangeably however these are different concepts. Although in some cases the line of demarcation becomes very thin. Convention on the Rights of Persons with Disabilities, 2006 (CRPD) and the Rights of Persons with Disabilities Act, 2016 (RPD Act) which repealed the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 and was passed to give effect to CRPD deal with them. Non-discrimination and Reasonable Accommodation are the central theme of both the instruments. The paper will examine the importance of accessibility and reasonable accommodation for the enjoyment of the various rights by persons with disabilities for this purpose, the paper will also analyse the provisions of International Law, Constitution of India and the Rights of Persons with Disabilities Act, 2016 which deal with accessibility and reasonable accommodation. Further this paper will examine the important judgements of the Supreme Court of India on the subject.

II. SIGNIFICANCE FOR PERSONS WITH DISABILITIES

"Accessibility is a precondition for persons with disabilities to live independently and participate fully and equally in society[1]." CRPD[2] and RPD[3] Act are based on certain principles. "Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity" And "Accessibility" are some of them. Without accessibility, person with disabilities face a lot of difficulty in exercising human rights on an equal basis with others. For example, to enjoy the Right to Education, it is necessary that the study material be available in Braille, Large-print, E-text etc for students with visual disabilities. Similarly, Sign-language Interpreter is necessary for learners with hearing disabilities. Facility of ramps and lifts in educational institutions, workplaces and other public places is required for the benefit of persons with locomotor disabilities. Websites and documents should be in conformity with the Web Content Accessibility Guidelines so that persons having visual disability can access them with help of Screen Reading Software. The Right-based approach

1. CRPD General Comment no. 2 31 March, 11 April 2014, Para 1.
2. Convention on the rights of Persons with disabilities, 2006, Art-2 (d) & (f)
3. Rights of Persons with Disabilities Act, 2016 Preamble Para 2 (d) & (f)

looks disability as not the result of physical impairment in the person him/herself but the result of physical, psycho-social and attitudinal barriers from the society.

Reasonable Accommodation is also the central theme of the CRPD and RPD Act. Disability-based discrimination[4] is defined as "any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation."

III. INTERNATIONAL LAW

International Covenant on Civil and Political Rights[5] guarantees the right of every citizen to have access, on general terms of equality, to public service in his or her country. Access to the physical environment and public transport for persons with disabilities is a precondition for freedom of movement[6].

Everyone has the right of access to any place or service intended for use by the general public[7] such as transport, hotels, restaurants, cafes, theatres and parks.

On the rights of children with disabilities[8] the Committee on the Rights of the Child emphasizes that the physical inaccessibility of public transportation and other facilities, including governmental buildings, shopping areas and recreational facilities, is a major factor in the marginalization and exclusion of children with disabilities and markedly compromises their access to services, including health and education.

IV. THE CONSTITUTION OF INDIA

It is evident from the above discussion that Accessibility and Reasonable

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4. Convention on the Rights of Persons with Disabilities, 2006 Art. 2 para 3. Rights of persons with disabilities act, 2016 S.-2 (h).
5. Art. 25 (c) International Covenant on Civil and Political Rights, 1965.
6. Art. 13 Universal Declaration of Human Rights, 1948 and art. 12 International Covenant on Civil and Political Rights, 1965.
7. International Convention on the Elimination of All Forms of Racial Discrimination, 1965.
8. Committee on Rights of child general comment 9 2006.

Accommodation are necessary for a person with disability to enjoy various Fundamental Rights enshrined in the Constitution on an equal basis with others. Without these affirmative actions on the part of state these rights are meaningless for persons with disabilities. Thus Accessibility and Reasonable Accommodation has direct relation with the Right to Equality enshrined under Art. 14 of the Constitution.

In the same manner, Constitution of India[9] provides, "No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to- access to shops, public restaurants, hotels and places of public entertainment; or the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public." This provision has been used by disability rights movement in India to advance the claim of accessibility for persons with disabilities. Some are of the view that the Constitution should be amended to include disability as one of the grounds of non-discrimination under Article 15.

In *Rajive Raturi v. Union of India*,[10] the Supreme court held that "to provide persons with disabilities adequate access to all the facilities on the road as well as convenient access to transport facilities etc can even be treated as infringement of their fundamental rights under Article 19(1)(c) of the Constitution, which is guaranteed to each and every citizen of this country."

In the same case, the Supreme Court treated accessibility as a necessary condition for dignified living under Article 21 of the Constitution. The Court observed,

"11) Article 21 of the Constitution gives right to life, mandates that every citizen has right to live with dignity. It is an umbrella right which subsumes several other rights that enable life to be led meaningfully[11]. ... every act which offends against or impairs human indignity would constitute deprivation pro tanto of this right to live. This expansive understanding of right to life assumes greater proportions in respect of persons with visual impairments, who need a higher number of compensative skill enhancing facilities in order to go about their daily lives without suffering the indignity of being generally perceived as being dependent and helpless."

In the case of *State of Himachal Pradesh & Anr. v. Umed Ram Sharma &*

9. Constitution of India, Art 15 (2).
10. Decided on 15 December, 2017para, 11, 12 &13.

Ors.,[12] the right to life under Article 21 has been held broad enough to incorporate the right to accessibility under Article 38(2) and under Article 19(1)(d) and Right to Life under Article 21 and thus for residents of hilly areas, access to road is access to life itself, the Court observed,

" 13) Right to dignity, which is ensured in our Constitutional set up for every citizen applies with much more vigour in case of persons suffering from disability and, therefore, it becomes imperative to provide such facilities so that these persons also are ensured level playing field and not only they are able to enjoy life meaningfully, they contribute to the progress of the nation as well. ..."

In *Jeeja Ghosh v. Union of India*, [13] case the Court observed**:**

"37. The rights that are guaranteed to differently-abled persons under the 1995 Act, 'now 2016 Act' are founded on the sound principle of human dignity which is the core value of human right and is treated as a significant facet of right to life and liberty. Such a right, now treated as human right of the persons who are disabled, has it roots in Article 21 of the Constitution. ..."

Similarly, access to information and communication is seen as a precondition for freedom of opinion and expression[14] under International Law. It can also be treated as necessary component of the Freedom of Speech and Expression guaranteed under Article 19 (1)(a) of the Constitution of India.

V. DIFFERENCE BETWEEN ACCESSIBILITY AND REASONABL ACCOMMODATION

Reasonable accommodation duties are different from accessibility duties[15]. Both aim to guarantee accessibility, but the duty to provide accessibility through universal design[16] or assistive technologies is an ex ante duty, whereas the duty

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11. *Francis Coralie Mullin v. Administrator, Union Territory of Delhi & Ors*. (1981) 1 S. 608.
12. (1986) 2 SCC 68.
13. (2016) 7 S. 761, para, 37.
14. Art. 19 Universal Declaration of Human Rights, Art. 19, paragraph 2, International Covenant on Civil and Political Rights.
15. CRPD general comment No. 2, 2014 para-25.
16. Right of persons with disabilities, 2016 S.2 (ze) "universal design" means the design of products, environments, programmes and services to be usable by all people to the greatest extent possible, without the need for adaptation or specialised design and shall apply to assistive devices including advanced technologies for particular group of persons with disabilities.

to provide reasonable accommodation is an *ex nunc* duty:

Accessibility is one of the Guiding Principles of the CRPD and RPD Act. These instruments however do not define it. "Accessibility" and "Reasonable Accommodation" are generally being used as synonymous. Supreme Court also in the cases discussed in the paper has used them in this manner. However these terms have different meanings. CRPD[17] and RPD Act[18] however define reasonable accommodation as, "reasonable accommodation" means necessary and appropriate modification and adjustments, without imposing a disproportionate or undue burden in a particular case, to ensure to persons with disabilities the enjoyment or exercise of rights equally with others;

"Accessibility is related to groups therefore accessibility standards must be broad and standardized. whereas reasonable accommodation is related to individuals. Reasonable accommodation is customised as per the requirements of a person with disability in question. "An accommodation is reasonable if it achieves the purpose (or purposes) for which it is being made." However In certain cases , the reasonable accommodation provided to an individual may become a general standard which can be useful to a large number of people. Accommodation provided to some individuals may be used as general standards of accessibility. Reasonable accommodation can be denied on the ground that it imposes a disproportionate or undue burden in a particular case. However accessibility cannot be denied on this ground.

A *CCPD case*[19] is a good example of how the accommodation provided to an individual can turn out to be a general standard. These directions can be used as standards for hearing disabled candidates appearing for an interview. In this case, respondent Union Public Service Commission issued and employment notice for recruitment of extra Assistant Director Directorate of Coordination (Police wireless) in Ministry of Home Affairs in the category of physically handicapped (hearing impaired).

Complainant alleged that during the interview, members of interview board neither provided questions in writing nor an interpreter and therefore he could not understand questions properly.

The CCPD observed that since the interview did not materialise as the

17. Convention on the right of persons with disabilities, 2006 Art-2, Para-4
18. Right of persons with disabilities Act, 2016 S. 2 (y)
19. *Chandra Kishore Joshi v. Secretary, Union Public Service Commission and Anr* 2001 CCDJ 323 Case no. 630 of 2000 – Decided on 03.05.2001.

interviewee could not comprehend the speech of interviewers hence the interview conducted could be termed as null and void. Therefore the commission might conduct a fresh interview, in which complainant should be provided with the necessary arrangement for example sign language, overhead projection to show written version or oral version. Since the complainant had the ability to speak in Hindi therefore he should be allowed to give answer in Hindi or mixture of Hindi and English orally.

VI. ACCESSIBLE PHYSICAL ENVIRONMENT

The buildings, roads, transports etc needs to be designed in such a manner that persons with various disabilities can use them with little difficulty. For example, there should be the facility of ramps and lifts so that people with Locomotor Disability can go to any part of the building[20]. "measures needs to be undertaken to eliminate obstacles and barriers to indoor and outdoor facilities including schools, medical facilities, and workplaces. The built environment not only covers buildings, but also steps and ramps, corridors, footpaths, curb cuts, parking, entry gate, emergency exits, toilets and obstacles that block the flow of pedestrian traffic."[21]

In *Rajive Raturi case*,[22] internationally acceptable mandatory components of physical accessibility are the following:

a) Safety:

b) Independence:

c) Affordability:

d) Logical layout:

In this case, the Supreme Court directed the Spice Jet Ltd to pay Rupees Ten Lakhs to petitioner, a person with cerebral palsy for forcibly de-boarding her by the flight crew, because of her disability. The court issued directions to government to incorporate the recommendations of the Ashok Kumar Committee appointed by Ministry of Civil Aviation in the 'Civil Aviation Requirements (CAR) 2014 with regards to 'Carriage by Air of Persons with Disability and/or Persons with Reduced Mobility'. These recommendations include inter alia procurement

20. For detailed discussion, see International Best Practices in Universal Design: A Global Review available at: www.chrc-ccdp.ca.D.
21. (https://www.india.gov.in/spotlight/accessible-india-campaign#tab=tab-1)
22. *Supra* note 10.

of standardised assistive devices, a telephonic help desk which would be fully accessible, to be set up to receive assistance requests in advance from passengers with disability, the passengers with disabilities should be allowed to retain the use of their wheelchair imposing conditions which may take care of safety, communication of essential information concerning a flight should be in accessible formats. Likewise, flight entertainment should also be in accessible formats and the cabin crew should assist the passenger to access toilet if requested using on-board aisle chair, appointment of Complaints Resolution Officer (CRO) who is placed at the airport to start with in gbig airports, training and sensitisation to the staff and security personnel dealing with persons with disability or reduced mobility, offloading of passengers needs to be taken care of with all seriousness it deserves, suitable provision in the training module itself be provided.

The convention[23] mandates to take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities. This include facilitating it in the manner and at the time of their choice and at affordable cost, facilitating access to quality mobility aids, devices assistive technologies and forms of live assistance and intermediaries including by making them available at affordable cost.

RPD Act, 2016[24] improves upon the 1995 Disabilities Act. The 1995 Act did not deal with the various important aspects of accessibility such as accessibility of information and communication, consumer goods etc. There was no time limit prescribed in the 1995 Act. Moreover, the state had the obligation to implement them subject to the economic capacity and development. The new RPD Act mandates The Central Government to formulate rules for persons with disabilities laying down the standards of accessibility for the physical environment, transportation, information and communications, including appropriate technologies and systems, and other facilities and services provided to the public in urban and rural areas in consultation with the Chief Commissioner. No establishment shall be granted permission to build any structure if the building plan does not adhere to these rules. Further, no establishment shall be issued a certificate of completion or allowed to take occupation of a building unless it has adhered to these rules. All existing public buildings shall be made accessible in accordance with the rules formulated by the Central Government within a period not exceeding five years from the date of notification of such rules provided

23. Convention on the Rights of Persons with Disabilities, 2006 Art 20.
24. Rights of persons with disabilities act, 2016 S. 40, 41 and 45.

that the Central Government may grant extension of time to the States on a case to case basis for adherence to this provision depending on their state of preparedness and other related parameters.

The act also mandates to provide,—

(a) facilities for persons with disabilities at bus stops, railway stations and airports conforming to the accessibility standards relating to parking spaces, toilets, ticketing counters and ticketing machines;

(b) access to all modes of transport that conform the design standards, including retrofitting old modes of transport, wherever technically feasible and safe for persons with disabilities, economically viable and without entailing major structural changes in design;

(c) accessible roads to address mobility necessary for persons with disabilities.

Government is mandated to develop schemes programmes to promote the personal mobility of persons with disabilities at affordable cost.

In *Rajive Raturi v.Union of India And Others*,[25] a Public Interest Petition was filed for proper and adequate access to public places. to meet the needs of persons with disabilities especially visually disabled persons in respect of safe access to roads and transport facilities. The court issued slew of direction to central and state governments and their instrumentalities and also set deadlines. Some of these directions are:

i) Making the gates to public places accessible by incorporating necessary accessible standards. More specifically, they must be made wide enough to allow wheelchairs to pass easily and must provide enough space for the wheelchair to turn around after entering inside.

ii) Stair must be marked with a broad yellow line to allow the visually impaired to understand the difference in gradient.

iii) At places like airports, railway stations, etc passengers must be clearly informed about the details of their flight/train such as the gate number for boarding, etc via public announcement systems (this practice is, surprisingly, gradually declining).

iv) A minimum of 3-5 parking spaces near the entrance must be reserved for persons with disabilities. This must be clearly indicated by showing the

25. *Supra* note 10.

international symbol for disability i.e. the wheelchair symbol.

v) All unnecessary obstructions must be removed, and all access ways must be well lit. Moreover, clear signposts, along with their Braille equivalents should be put up.

vi) Elevators must have clear Braille signs and auditory feedback. The buttons of elevators must be accessible from a wheelchair. Pictograms must be put up near elevators and other important places such as toilets.

vii) Employees working at public places must be provided necessary training to enable them to understand the unique set of challenges that persons with disabilities face. They should be informed about the best practices for dealing with these challenges.

viii) Wheelchairs and mobility scooters should be available at every public place. The bench also issued the following directives and has set deadlines to meet them:

- Making 20-50 important government buildings in 50 cities fully accessible by December 2017
- Making 50% of all the govt. buildings of the national capital and all the state capitals fully accessible by December 2018.
- Completing accessibility audit of 50% of govt. buildings and making them fully accessible in 10 most important cities/towns of states/UTs by December 2019.
- 50% of all railway stations to be made fully accessible by March 2018.
- 10% of government owned public transport carriers are to be made fully accessible by March 2018.

VII. ACCESSIBILITY OF INFORMATION, COMMUNICATION AND SERVICES

Accessibility is not limited to the Physical environment only. It also includes within its per view the accessibility of Information and Communication. For example, educational institutions should make study material available in braille, large print, audio books, e-text so that the pupil with Visual disability can read the material. These institutions should provide the facility of sign language interpreter so that pupil with Hearing Disability are able to follow the instructions in the class.

In recent years, new dimensions have been added to the concept of accessibility. Now, accessibility also means that the websites should follow certain standards so as to make them accessible to various types of disabilities such as blind people who use Screen-reader software. Similarly, for persons with visual disabilities, images needs to be described in text. For persons with Hearing Disability, audio needs to be interpreted in sign language. Special telephone equipments and facilities need to be provided to people with Hearing Disability. Various electronic consumer items. Which have digital panels should also provide tactile buttons so that people with Visual disability can operate them independently.

"Access to information creates opportunities for everyone in society. Access to information refers to all information. This can range from actions such as being able to read price tags, to physically enter a hall, to participate in an event, to read a pamphlet with healthcare information, to understand a train timetable, or to view webpage."

Persons with disabilities have the right to access telecommunication services, taking into account the relevant International Telecommunication Union (ITU) recommendations[26].

The accessibility of information and communication[27] "the sharing and strengthening of global knowledge for development can be enhanced by removing barriers to equitable access to information for economic, social, political, health, cultural, educational, and scientific activities and by facilitating access to public domain information, including by universal design and the use of assistive technologies".

The report on making television accessible[28] highlights. that a significant proportion of the one billion people who live with some form of disability are unable to enjoy the audiovisual content of television. This is due to the inaccessibility of content, information and/or devices necessary for them to access those services.

Persons with Disabilities especially persons with Visual disability have been denied various banking facilities on including the modern facilities such as ATM, internet banking etc on the ground that these facilities are not accessible hence

26. Art 12 International Telecommunication Regulations (adopted in Dubai in 2012).
27. World Summit on Information Society, held in Geneva in 2003.
28. The report Making Television Accessible, published in 2011 by the International Telecommunication Union in cooperation with the Global Initiative for Inclusive Information and Communication Technologies.

they cannot use them independently. There have been positive developments in this area. The information and communication technology has made these facilities accessible to them if certain standards are followed.

In pursuance to a judgement by the CCPD[29] the Reserve Bank of India[30] advised all the banks to offer banking facilities including all the banking facilities such as cheque book facility including third party cheques, ATM facility, Net banking facility, locker facility, retail loans, credit cards etc without any discrimination and also assist them in withdrawal of cash and other banking facilities. Government of India has formulated guidelines[31] in 2009 in this matter.

RPD Act, 2016[32] Mandates The Government to take measures to ensure that:

(i) all contents available in audio, print and electronic media are in accessible format;

(ii) persons with disabilities have access to electronic media by providing audio description, sign language interpretation and close captioning;

(iii) electronic goods and equipment which are meant for everyday use are available in universal design.

The Government is mandated to take measures to promote development, production and distribution of universally designed consumer products and accessories for general use for persons with disabilities. The service providers whether Government or private is mandated to provide services in accordance with the rules on accessibility formulated by the Central Government within a period of two years from the date of notification of such rules. Provided that the Central Government in consultation with the Chief Commissioner may grant extension of time for providing certain category of services in accordance with the said rules.

In *Rajiv Raturi Case*[33] discussed above, the Court directed that, at least 50% of central and state govt. websites are to meet accessibility standards by March 2017. At least 50% of the public documents are to meet accessibility

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29. Case No. 2791/2003 dated 05.09.2005.
30. RBI / 2008-09 / 261 DBOD.No.Leg.BC. 75 /09.07.005/2008-09 dated 03.11.2008.
31. *Guidelines* for *Indian* Government Websites available at: *mizoram.gov.in/home/downloads/webguidelines.pdf.*
32. Rights of Persons with Disabilities Act, 2016 sec 42, 43 and 46.
33. *Supra* note 10.

standards by March 2018. Train additional 200 sign language interpreters by March 2018.

VIII. CONCLUSION

The above analysis shows that the law on Accessibility and Reasonable Accommodation is in fairly advance level of development. These concepts are the important components of the various Fundamental Rights especially the Right to Equality under Art. 14 and dignified life under Art. 21 enshrined in the Constitution of India. Accessibility of physical environment is directly related to Art. 15 and Art. 19(1)(d). Accessibility of Information and Communication can be treated as part of the Freedom of Speech and Expression under Art. 19 (1)(a) of the Constitution. The General Comments by the treaty monitoring bodies especially the Committee on the Rights of Persons with Disabilities have expanded the scope of these concepts. The new Rights of Persons with Disabilities Act, 2016 which replaced the 1995 Act deal with these concepts in very broad terms which will help in developing jurisprudence on the subject. There is growing realisation amongst all the stakeholders that rights need to be contextualised keeping in mind the specific needs of persons with disabilities. As far as possible, Universal Design should be followed in designing physical environment, transport services, information and communication etc.

Accessibility and Reasonable Accommodation are interrelated but distinct concepts. Accessibility talks about the broad and general standards to be followed in designing the physical environment and services. Whereas Reasonable Accommodation talks about the individualised treatment in cases which are not covered by the general standards. Accessibility is available without asking for it. Whereas Reasonable Accommodation needs to be negotiated with the person in question. These individualised treatments may however turn out to be general standards of Accessibility in some cases. Reasonable Accommodation may be denied if it imposes undue burden. There is no definitive law as to what constitute Undue Burden. Author is of the view that this proviso should be used very sparingly. It should not be used to deny accommodation in genuine cases.

The real problem lies in implementing these beneficial legal provisions. The World Report on Disability Summary, published in 2011 by the World Health Organization and the World Bank,[34] which was prepared after the largest

34. The World Report on Disability Summary, (2011) p. 10

consultation ever and with the active involvement of hundreds of professionals in the field of disability reflects the ground reality of the matter. It states, "the built environment, transport systems and information and communication are often inaccessible to persons with disabilities Persons with disabilities are prevented from enjoying some of their basic rights, such as the right to seek employment or the right to health care, owing to a lack of accessible transport. The level of implementation of accessibility laws remains low in many countries and persons with disabilities are often denied their right to freedom of expression owing to the inaccessibility of information and communication. Even in countries where sign language interpretation services exist for deaf persons, the number of qualified interpreters is usually too low to meet the increasing demand for their services, and the fact that the interpreters have to travel individually to clients makes the use of their services too expensive. Persons with intellectual and psychosocial disabilities as well as deaf-blind persons face barriers when attempting to access information and communication owing to a lack of easy-to-read formats and augmentative and alternative modes of communication. They also face barriers when attempting to access services due to prejudices and a lack of adequate training of the staff providing those services."

■

BOOK-REVIEW

CUSTODY JURISPRUDENCE UNDER CRIMINAL JUSTICE ADMINISTRATION BY KAVITA SINGH, (2018) EASTERN LAW HOUSE PVT. LTD., KOLKATA, 24+328 RS. 675/-

One of the important functions of State in the administration of criminal justice is to take the accused in custody and produce before the court for trial and receiving sentence. The custody may either be protective, pre - trial or punitive. The custody may be with the police or the prison authorities. The custodial violence both in prison and in police station is equally serious as both offend the dignity of the individual. In fact, custodial violence is an affront upon constitutional and human rights. It negates the rule of law. Though the violence in custody is a worldwide phenomenon but it has assumed an alarming proportion in India and people experience fear as daily reflex.

Violence in general and custodial violence in particular is becoming a new culture. While violence may, on one hand, be regarded as constitutive of human nature - it is intrinsic to human conditions and, on the other hand, it is structure and it cannot be seen outside its own structure. The Torture Commission (1855) constituted in India for investigating alleged torture by Police in Madras Presidency found that it was a 'structural problem'.[1]

Violence may be viewed as a product or as a process. If violence is viewed as a product then it is neither regular or continuous nor much dangerous because it is conditioned by time and place; such violence usually is an exception to general norm. But when violence is viewed as a process it is cumulative, limitless and it spreads. It creates a sort of new norm in realizing self consciousness. Such violence usually goes unrecorded because it is internalized and becomes essential part of life; and moreover, it concretizes the importance of its origin and functions. The knowledge about violence may be productive in framing policies and laws in reducing the incidences of violence.

The book under review[2] is divided into seven chapters. Chapter 1 is

1. Custody Jurisprudence under Criminal Justice Administration by Kavita Singh
2. Supra

Introductory. The author has aptly delineated the meaning of 'violence' as'machinery used to assert ones will over another in order to prove a sense of power or dominance.'[3] It is perpetuated by those in power against the powerless and thus it a means to strengthen subordination.[4]. The author on the basis of the National Crime Record Bureau (2014) has highlighted the magnitude of custodial deaths and rapes. The author has attempted to trace the custodial crimes in India since ancient times but it is difficult to infer whether the violence in custody was a recognized form of punishment or it was in addition to punishment. It appears that the forms of punishment during those times might have been cruel and inhuman but it cannot be equated with custodial violence in modern sense of the term. However, the custodial violence by torturing the person to extort confession, money or taxes is distinctly traceable in India during British period. The police in India because of its structure and training started functioning more on coercive than on investigative pattern. This situation remains unabated in post independence period despite several recommendations of Police Commissions and the judicial pronouncements.

Chapter 2 is captioned as Historical Retrospect. In this chapter the author has described various legislations pertaining to Prison including the Prison Act, 1894. The provisions of the Prevention of Torture Bill, 2010 have also been analyzed. The custody of juveniles and mentally retarded person has also been discussed in this chapter. Custodial torture and deaths are heinous crimes which cannot be justified in the name of expediency protecting the society. The title of Chapter does not give correct picture of the contents dealt with in this chapter. The chapter could have been given a better title.

The author has traced the rights of prisoners in western world since 12th century followed by Magna Carta. The author has highlighted various international instruments, constitutional and statutory provisions besides the Protection of Human Rights Act, 1993 intending to protect dignity and freedom of persons including prisoners. Chapter 3 has dealt with the Rights of Prisoners. Chapter 4 is devoted to Custodial Violence. The author has indicated the groups like juveniles, women and insane person who because of nature or deep rooted custom are weak and vulnerable to custodial violence.[5] In this chapter statutory protections available to such vulnerable groups have been discussed. The author

3. Id at 4
4. Ibid.
5. Id. at 126

has also discussed various forms of custodial violence like torture, inhuman and degrading treatment, custodial death, rape, fake encounter and forced disappearance and relevant municipal laws have also been analyzed along with judicial pronouncements.

Chapter 5 deals with the Protection against Custodial Violence. The Courts, Public Prosecutors, Human Rights Commission and use of scientific aid in investigation play important role in tackling the cases of custodial violence. The Supreme Court of India has put restrictions on handcuffing, bar fetters, solitary confinement by treating these methods as inhuman and degrading to the idea human rights.

The grant of bail and speedy trial may reduce the incidence of custodial violence. The State is under an obligation to provide legal aid and the implementation of this may also be equally helpful in reducing the occurrence of custodial violence. The award of compensation to the victim though cannot redeem the dignity but to some extent may be helpful in realizing the existence of human life. All these remedies available to the victim of custodial violence have been discussed in Chapter 6. Chapter 7 concludes with some valuable suggestions. It may be expected that the presence of robust legal framework in India will not occasion the custodial violence to become a process. The book ends with an optimistic observation of Mr. Justice A.S. Anand, former Chief Justice of India: 'Let us hope that in coming years, custodial crimes would decline until altogether eliminated. If human dignity survives, the future has hope.'

The book is an addition to the knowledge and the significance of the book lies in the fact that the relevant international instruments, municipal laws and judicial decisions have been discussed. The foreword of Justice Joymalya Bagchi, Judge, High Court of Calcutta has added beauty to this book by observing that 'the book is a compendium of law relating to prison jurisprudence.' A table of cases is useful to the readers. The book is useful for academicians, the Undergraduate and Postgraduate students, research scholars, members of Bar and Bench besides the persons engaged in the administration of criminal justice. The book may be added to the catalogue of law libraries. The book is handy and price is pocket friendly.

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