DELHI LAW REVIEW

ISSN 0971-4936

VOL. XXXV

2019-20

FACULTY OF LAW

UNIVERSITY OF DELHI

DELHI LAW REVIEW

Volume XXXV 2019-20

A double-blind peer reviewed Journal

Mode of Citation : 35 DLR <page number> (2020)

ISSN : 0971-4936

Published by

Faculty of Law
Chhatra Marg
University of Delhi
Delhi – 110007

DELHI LAW REVIEW

Volume XXXV 2019-20

CONTENTS

BOOK REVIEWS

MESSAGE FROM THE ACTING DEAN

I am delighted to present DLR Vol. 35 to the reader. It has been a privilege to bring about the revival of this journal in my present tenure as Dean of Faculty of Law, University of Delhi.

Since its launch in 1924, the Faculty of Law, University of Delhi has made immense contributions to the academia and legal profession. Our pioneering approach to legal education through application of the case method has been time-tested and immensely successful. Our alumni command high respect and occupy the highest echelons of the judiciary, advocacy, corporates, academia and social service. The Faculty of Law continues to produce future legal luminaries with every passing batch. We have kept up with the challenges of legal education in India as per the changing times, and continue to rank amongst the top institutions of the country for law.

I must commend this very competent Editorial Board under the able stewardship of Prof. (Dr.) L. Pushpa Kumar for having produced this edition notwithstanding the immense uncertainties and difficulties brought about by the COVID-19 pandemic. I am thankful to all those associated with this revival edition, especially to the Student Editorial Board which has made a notable debut in this edition.

The present edition covers nine papers providing critical analysis on a spectrum of topics, ranging from Outer Space to Judicial Vacancies, Investment Treaties to Terrorism, and Competition Law to Secularism. It includes two foreign authored submissions on the evolution of the Constitution of Nepal and Patentability in Vietnam. It also includes six book reviews on a diverse range of subjects.

It is my earnest hope that the foundation established for the journal this year will continue for the years to come, and bring back the DLR to its position of pre-eminence in legal academia, not just in India but also abroad.

Prof. (Dr.) Vandana
Acting Head and Dean
Faculty of Law
University of Delhi

FROM THE EDITOR'S DESK

It is with great pride that I introduce the reader to the 35th Volume of the Delhi Law Review. This journal was conceived with the idea of engaging the academic community in order to 'to pinpoint the role of law in a changing society' (Dean's Note, DLR 1972). This edition, albeit after a significant break, continues with the journal's rich tradition of adding notable legal scholarship through its 48 year old history. This edition has an eclectic selection of articles by authors from India and abroad.

In the last year, humanity as a whole faced incredible difficulties posed by COVID-19. Notwithstanding these myriad of challenges, we have returned with much enthusiasm and a fresh approach, committed to many more annual editions in the years ahead.

DLR is and has always been faculty reviewed, following a double-blind peer review process. This year, in light of the resounding success of its offshoot 'Delhi Law Review (Student Edition)', the 35th edition of the DLR has for the first time inducted a Student Editorial Board with a team of committed student editors to assist the Faculty Editorial Board in the evaluation, peer review process, and editing of manuscripts. The Student Board has infused fresh energy into the journal, and we intend to continue with the Student Board for editions henceforth.

I would like to categorically acknowledge the contributions of the Student Editorial Board, working under the capable leadership of Ribhav Pande. The contributions of Aakanksha, Daksh, Zeeshan, Samridhi, Tanisha, Tanya and Aashita have been most noteworthy towards this volume.

The immense contributions of our former faculty colleague Dr. Thulasidhass in the initial phase of the work as a part of the Faculty Editorial Board are thankfully remembered. Ms. Ankeeta Gupta's quality help in the editing process of book reviews and research articles are highly appreciated.

We hope that this edition makes for an interest read for you.

Prof. L. Pushpa Kumar
Editor
Delhi Law Review

QUEST FOR RECOVERY AND USE OF RESOURCES IN THE OUTER SPACE: SOME REFLECTIONS ON THE US EXECUTIVE ORDER 2020 AND BEYOND

Bharat H. Desai and Jay B. Desai***

I. INTRODUCTION

The planet Earth is now passing through an age of the 'Anthropocene' as a new geological epoch. It was decided by the Anthropocene Working Group (AWG),[1] at its meeting on 21 May 2019, in view of an unmistakable imprint of human activities on our small planet. For decades now, some of the technologically capable countries have been engaged in an ambitious goal to explore and exploit the outer space. Over the years, there have been numerous manned and unmanned missions by several countries to the outer space.

The credit for peaceful uses of the outer space can be attributed to the 1967 Outer Space Treaty ('OST').[2] This treaty lays down the rules and regulations that all countries are required to follow in the exploration of outer space for peaceful purposes. It reflects high idealism, actual working of the sovereign equality of all nations and efficacy of the principles for sharing the benefits arising from odyssey of the outer space. As the OST itself explicitly proclaims, this area is to be devoid of any claims of ownership whatsoever:

---

* Jawaharlal Nehru Chair and Professor of International Law at Centre for International Legal Studies, School of International Studies, Jawaharlal Nehru University, New Delhi, India. He can be reached at desai@jnu.ac.in.

** M.A. in International Relations, School of Liberal Studies, Pandit Deendayal Energy University, Gandhinagar, India. He can be reached at jay.dma19@sls.pdpu.ac.in.

The authors appreciate inputs provided by Dr. Moumita Mandal and Dr. Vivek Joy K.

[1] The AWG took this 'epoch-making' decision on 21 May 2019 with the help of the guidance provided by the Sub-commission on Quaternary Stratigraphy and the International Commission on Stratigraphy. The AWG have completed a binding vote on the question: 'Should the Anthropocene be treated as a formal chrono-stratigraphic unit defined by a GSSP?' It received 29 votes in favor (out of potential 34 members; 88% of votes cast); 4 voted against; no abstentions, *available at:* http://quaternary.stratigraphy.org/working-groups/anthropocene/ (last visited on July 30, 2020).

[2] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (1967), 610 *UNTS* No 8843, 205, *available at*: https://unoosa.org/pdf/publications/STSPACE11E.pdf (last visited on July 5, 2020).

> The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind.[3]

The 1967 OST brought into vogue a new phrase 'province of all mankind' in the treaty-making that forbade any kind of unilateralism or access or occupation of the outer space. The OST does not define what 'outer space' entails. It has been, generally, regarded as 'a zone that occurs about 100 kilometers (60 miles) above the planet, where there is no appreciable air to breathe or to scatter light'.[4] It underscores both human limitations and humility in the quest for reaching out to the celestial bodies scattered in the farthest areas of our expanding universe.[5] The 'sheer size and complexity of the Universe have never deterred humans from thinking about it, though there are more questions than answers'.[6] The term deter is used by Howell in her study to mean that as the size of universe is immeasurable, it deters human beings from getting all the answers about it and leaves so many questions behind.

As humans have embarked upon exploration of the perceived abundant resources of some of these celestial bodies that litter the sky above us, it posits several questions as regards international legal regulation of an area regarded as the 'province of all mankind'. How far can international law govern the quest to explore and exploit the outer space? How do we regulate the human quest for exercise of jurisdiction in outer space?

As humans are intending to explore the area beyond earth's gravity and utilize the resources of other celestial bodies in the space, as regards the regulation of 'the province of all mankind' by international law, exercise of jurisdiction by the sovereign states in space, future colonization of outer space and dispute resolutions.

---

[3] *Id.*, art 1.

[4] Elizabeth Howell, "What is space?" *Space.com,* June 08, 2017, *available at*: https://www.space.com/24870-what-is-space.html (last visited on Jan. 28, 2021). Interestingly, through highly sophisticated telescopes, the scientists are able to take a peep into the deep space at a distance of almost 13.7 billion light-years.

[5] In 1925, it was the American astronomer Edwin Hubble who made the observations and proved that the universe is expanding. Known as the Hubble's Law, it showed a "direct relationship between the speeds of distant galaxies and their distances from Earth"; , "What does it mean when they say the universe is expanding?" Library of Congress, Nov. 19, 2019, *available at*: https://www.loc.gov/everyday-mysteries/item/what-does-it-mean-when-they-say-the-universe-is-expanding/ (last visited on July 30, 2020).

[6] Sonal Desai, "No final frontier: The Universe may be expanding", *Down To Earth*, 46 (1999).

This article seeks to analyze and reflect upon the abovementioned concerns in the context and implications of the United States President's Executive Order on Encouraging International Support for the Recovery and Use of Space Resources of 06 April 2020 ('Recovery and Use of Space Resources').[7] That, ironically, was issued even as the unprecedented Covid-19 pandemic raged across the world. It gave the go ahead with 'promotion of commercial participation in the long-term exploration, scientific discovery, and use of the Moon, Mars, or other celestial bodies.[8]

II. THE US BID TO MINE THE MOON

Even as the Covid-19 pandemic[9] took heavy tool of lives and livelihoods and there were predictions of the global recession,[10] the United States (US) President issued an Executive Order on 'Encouraging International Support for the Recovery and Use of Space Resources' ('The US Executive Order'). It has prepared a ground for mining of the moon and other celestial bodies. Is this the classic case of eying for the Moon when the Earth itself is in deep trouble? It has been dubbed as the worst form of commercial venture that goes against the 'collective good'.[11]

---

[7] The White House, United States, *Executive Order on Encouraging International Support for the Recovery and Use of Space Resources of 06 April 2020***,** Or. No. 13914, 85 F.R. 20381; *available at*: https://www.whitehouse.gov/presidential-actions/executive-order-encouraging-international-support-recovery-use-space-resources/ ; https://www.federalregister.gov/documents/2020/04/10/2020-07800/encouraging-international-support-for-the-recovery-and-use-of-space-resources (last visited on Jan. 25, 2021).

[8] *Ibid*., section 2 provides, "The Moon Agreement. The United States is not a party to the Moon Agreement. Further, the United States does not consider the Moon Agreement to be an effective or necessary instrument to guide nation states regarding the promotion of commercial participation in the long-term exploration, scientific discovery, and use of the Moon, Mars, or other celestial bodies. Accordingly, the Secretary of State shall object to any attempt by any other state or international organization to treat the Moon Agreement as reflecting or otherwise expressing customary international law".

[9] Armin von Bogdandy and Pedro A. Villarreal, "International Law on Pandemic Response: A First Stocktaking in Light of the Coronavirus Crisis" *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2020-07,* (2020) *available at*: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561650&download=yes (last visited on Aug. 02, 2020).

[10] Darshan Mehta, "Covid-19 Impact: Morgan Stanley Expects Global Recession in First Half of 2020" *Bloomberg | Quint,* Mar. 29, 2020, *available at*: https://www.bloombergquint.com/coronavirus-outbreak/covid-19-impact-morgan-stanley-expects-global-recession-in-first-half-of-2020 (last visited on Apr. 23, 2020).

[11] David Bollier, "Trump's Scheme to Sell the Moon: Executive Order by US to Mine the Moon Shows How Prevailing Neoliberal Ideas about 'Value' Trump the Collective Good" *Aljazeera, Apr. 26, 2020, available at*: https://www.aljazeera.com/indepth/opinion/trump-scheme-sell-moon 200421085841018.html (last visited on Apr. 26, 2020).

The US Executive Order has invoked the U.S. Commercial Space Launch Competitiveness Act, 2015 ('CSLCA')[12] and the Space Policy Directive-1, 2017 that called to 'lead the return of humans to the Moon for long-term exploration and utilization, followed by human missions to Mars and other destinations'.[13] It provides justification for innovative and sustainable space exploration programs so as to pursue:

> Successful long-term exploration and scientific discovery of the Moon, Mars, and other celestial bodies will require partnership with commercial entities to recover and use resources, including water and certain minerals, in outer space. Uncertainty regarding the right to recover and use space resources, including the extension of the right to commercial recovery and use of lunar resources, however, has discouraged some commercial entities from participating in this enterprise.[14]

The Executive Order has made the case for this unilateral US action invoking the so-called 'differences between the Moon Agreement and the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies — which the United States and 108 other countries have joined — also contribute to uncertainty regarding the right to recover and use space resources' (Section 1). The timing of the US step and its sheer audacity goes against the legally binding 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (the Moon Agreement). The Agreement was appended to the UN General Assembly ('UNGA') resolution 34/68 of 1979, titled 'Agreement Governing the Activities of States on the Moon and Other Celestial Bodies'.[15]

The Moon Agreement emphatically proclaimed that: '[a]ll activities on the moon, including its exploration and use, shall be carried out in accordance with international law' (Article 2). It also underscored that the 'moon shall be used by all

---

[12] *U.S. Commercial Space Launch Competitiveness Act* (2015), H.R. 2262, 114th Congress.

[13] *Space Policy Directive- 1: Reinvigorating America's Human Space Exploration* Program, 82 (239) *Federal Register*, p.59501-59502 (2017).

[14] *Supra* note 7, sec 1.

[15] UN General Assembly, *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies* (1979), GA Res 34/38, *GAOR, UN Doc A/RES/*34/68 (Dec. 05, 1979). It came into force on 18 December 1984*; available at:* https://www.unoosa.org/pdf/gares/ARES_34_68E.pdf (last visited on July 9, 2020).

States Parties exclusively for peaceful purposes' (Article 3). The vision behind the Moon Agreement is laudatory as it proclaimed that: 'exploration and use of the moon shall be the province of all mankind and shall be carried out for the benefit and in the interests of all countries' (Article 2-4). It rules out any threat or use of force on the Moon. Thus, the US action flies in the face of this legally binding agreement even though it is not a party to the Moon Agreement.

The US Executive Order provides that: 'the Secretary of State shall object to any attempt by any other state or international organization to treat the Moon Agreement as reflecting or otherwise expressing customary international law'.[16] Notwithstanding this, it has been contended by some scholars that consistent State practice, through law-making in outer space under the UN auspices, have made this obligation a part of customary international law.[17] As a corollary, it may be surmised that:

> Indeed some of the principles contained in the 1967 Outer Space Treaty have become customary international law as they have been widely accepted by the international community, and the State practice associated with those principles has also been consistent.[18]

In fact, it appears that the cardinal treaties on space law pensively denote customary international regime and regulation for the activities of the States' in space. Therefore, it could be argued that such principles are 'applicable to States' parties as well as non-parties to the 1967 Outer Space Treaty'.[19] The adoption of OST and subsequently, of the Moon Agreement indicated a major shift of customary international law from its traditional nature. The concept of instant customary international law emerged with the adoption of the OST. The basic principles that are included in the OST and subsequently other laws relating to space are the part of

[16] *Supra* note 7, s. 2.
[17] Jakhu, Ram S., Pelton, Joseph N., et.al., *Space Mining and Its Regulation*, Montreal: Springer Praxis Books, 114. (2017).
[18]Ram S Jakhu (ed.), *International Space Law: A Basis for National Regulation*, 1 (National Regulation of Space Activities, Heidelberg: Springer, 2010).
[19] *Ibid.*

customary international law. For example, the principle of non-appropriation that states that outer space is not subjected to national appropriation.[20]

III. OUTER SPACE TREATY

In 1959, the UNGA established the Committee on the Peaceful Uses of Outer Space ('UN-COPUOS')[21] that reviews international cooperation in the peaceful uses of outer space and studies legal problems arising from the exploration of outer space. The 1967 OST[22] and the other space law instruments were negotiated and adopted through this committee especially its legal subcommittee. The 1967 OST is the primary international legal instrument to govern outer space. It deals with the general principles and guidelines regulating activities of the state parties in the outer space. The US is a party to the 1967 OST. Apart from OST, there are four other UN treaties on outer space: the 1968 Rescue Agreement, the 1972 Liability Convention, the 1975 Registration Convention and the 1979 Moon Agreement.[23]

The right to explore and use the outer space has been equally ascribed to all nations. As a corollary to this spirit, the 1967 OST recognizes the 'common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes' as well as 'the exploration and use of outer space should be carried on for the benefit of all peoples irrespective of the degree of their economic or scientific development' (Preamble). Therefore, it lays down three cardinal principles that are as follows:

---

[20] Nandasiri Jasentuliyana, *International Space Law and the United Nations* 190 (Kluwer Law International, 1999). "Outer Space Treaty is the primary document that establishes fundamental rules about States' activities in space"; see, D Abigail Pershing, "Interpreting the Outer Space Treaties Non Appropriation Principle: Customary International Law from 1967 to Today" 44(1) *The Yale Journal of International Law*: 150-178 (2018) *available at*: *https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1697&context=yjil* (last visited on Jan. 26, 2021).

[21] For details on COPUOS, see UN Office for Outer Space Affairs, Committee on the Peaceful Uses of Outer Space, *available at*: https://www.unoosa.org/oosa/en/ourwork/copuos/index.html (last visited on July 9, 2020).

[22] *Supra* note 2. It was adopted *vide* the UN General Assembly resolution 2222 (XXI) on 19 December 1966. The Treaty opened for signature on 27 January 1967 in London, Moscow and Washington, D.C., and entered into force on 10 October 1967; *available at*: https://unoosa.org/oosa/en/ourwork/spacelaw/treaties/outerspacetreaty.html (last visited on July 9, 2020).

[23] For the text of these five UN treaties, see: United Nations, Office for Outer Space Affairs, *International Space Law: United Nations Instruments*, UN Office Vienna (2017); *available at*: https://www.unoosa.org/res/oosadoc/data/documents/2017/stspace/stspace61rev_2_0_html/V1605998-ENGLISH.pdf (last visited on July 9, 2020).

> Outer space, including the Moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies.
>
> Outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.
>
> States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the Moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation and understanding.[24]

In essence, the 1967 Treaty has prescribed a global commons framework for the humankind in their quest to explore and exploit resources of the far away celestial bodies. Only a handful of countries have the technological means and wherewithal to pursue such an audacious mining task in the outer space.

The treaty serves as a constitutional mechanism in the quest for peaceful uses of the outer space. As already stated, the 1967 treaty clearly states that countries are free to explore the outer space for scientific purposes on the basis of *common interest of all mankind*. The International Space Station provides living testimony to the human quest to explore celestial bodies located deep into the outer space.

The *raison d'être* of the OST is centered around peaceful purposes and for the benefit of the entire humankind. As a corollary, it has explicitly forbidden the 'establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military maneuvers on celestial bodies'.[25] Thus, barring scientific research, the OST *per se* would not allow placement of any weapons of mass destruction in the outer space. Moreover, no country can claim sovereignty over the Moon or any other celestial body in space. The treaty has undoubtedly laid down a framework for peaceful exploration of space. It is for the state parties to the

[24] *Supra* note 2, art. 1, 1-3.
[25] *Supra note 2*, art 4.

treaty to uphold the treaty in letter and spirit so as to explore the outer space responsibly.

The 1967 OST strictly prohibits the deployment of weapons of mass destruction such as nuclear, chemical and biological weapons in space and prohibits them from being deployed in orbit around earth (Article IV). In fact, the treaty was crafted in the 'cold war' era with the objective to avoid a potential all-out nuclear war between the two main rivals of the time: the US and the Soviet Union. It was propelled after the Soviet Union launched its Sputnik satellite in 1957. The US sought to gain the lead and announced that they would be the first to put a man on the Moon. The treaty is applicable to Moon and other celestial bodies as it provides the basic principles regarding legal control of outer space.[26]

IV. THE MOON AGREEMENT

The Moon Agreement is supplemental to 1967 OST. The OST that came into force on 10 October 1967 has, as on 01 January 2020, 110 parties.[27] Hence, it comprises an overwhelming number of the UN member states as parties. It was annexed to the UNGA resolution 2222 of 19 December 1966.[28] Both these agreements were adopted by the plenary organ of the UN. Though the General Assembly resolutions *per se* may not be legally binding,[29] the treaty-making processes carried out by the UNGA carry considerable legitimacy.[30] This is done through the UNGA's subsidiary organ (International Law Commission), treaty texts appended to a specific resolution or

---

[26] *Supra* note 19.

[27] UN Office for Outer Space Affairs, *Status of International Agreements Relating to Activities in Outer Space as on 1 January 2020*; *available at*: https://www.unoosa.org/documents/pdf/spacelaw/treatystatus/TreatiesStatus-2020E.pdf (last visited on July 12, 2020).

[28] UN General Assembly, *Resolution for Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*, GA RES *2222*(XXI), GAOR, UN Doc A/RES/2222(XXI) (Dec. 19, 1966, Annex); *available at*: https://unoosa.org/oosa/en/ourwork/spacelaw/treaties/outerspacetreaty.html (last visited on July 12, 2020).

[29] Sergei A. Voitovich, *International Economic Organizations in the International Legal Process*, 95 (Dordrecht : Martinus Nijhoff Publishers, 1995).

[30] Simon Chesterman, David M. Malone *et.al. (eds.), Part I Evolution—UN Treaty-Making in Practice and in Theory, Ch.3 Treaty-Making at the United Nations: the view from the secretariat* in, (*The Oxford Handbook of United Nations Treaties*, UK: Oxford, 2019), *available at*: https://opil.ouplaw.com/view/10.1093/law/9780190947842.001.0001/law-9780190947842-chapter-4 (last visited on Jan. 26, 2021).

through the global conferencing (such as the 1992 Rio Earth Summit). There have been outstanding scholarly works that decipher legal significance in the declaratory resolutions of the UNGA. Asamoah, has, for instance, forcefully contended that the 'Assembly does and can make binding decisions'.[31] As a plenary organ of the UN, the UNGA has ordained such a role for itself, as Wolfgang Friedmann argued, so that its declaratory resolutions:

> …constitute a necessary phase of law in a field in which the law-making authority is still deplorably weak…bridge a gap between a legal vacuum and the full acceptance of a legal principle through treaty or custom.[32]

In a way, every treaty has its own halo of normativity around it. The Moon Agreement required ratifications by only five states (Article 19)[33] and, hence, it legally came into force on 11 July 1984.[34] Moreover, the Moon Agreement possesses enough legitimacy being adopted as a sequel to the 1967 OST. Therefore, no country can seek to ride roughshod over the Moon Agreement even if it is not a party to it. In fact, the entire corpus of the 16 space related treaties (1967-1992) have been regarded as a part of customary law and hence it is binding even on the non-parties.[35]

In a similar vein, the 1979 Moon Agreement also enunciates that the exploration and use of outer space including the Moon and other celestial bodies shall be carried out for the benefit and in the interest of all countries irrespective of their degree of economic or scientific development. It emphatically proclaims that any such human activities on the Moon and other celestial bodies shall be based on the premise that:

---

[31] Among others, , Obed Y. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations*, (The Hague: Martinus Nijhoff, 1966).
[32] *Id*, Preface, p.v.
[33] UN Office for Outer Space Affairs, *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, 1979, Resolution 34/68. "Article 19: 3. This Agreement shall enter into force on the thirtieth day following the date of deposit of the fifth instrument of ratification.", *available at*: https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/moon-agreement.html (last visited on Jan. 26, 2021). See also, UNOOSA, "Agreement Governing the Activities of States on the Moon and Other Celestial Bodies"; *available at*: https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/intromoon-agreement.html (last visited on Jan. 26, 2021).
[34] *Ibid*.
[35] Bin Cheng, *Studies in International Space Law*, Oxford: Clarendon Press, p. 798. Also UN (2020), "Status of International Agreements Relating to Activities in Outer Space as on 1 January 2020" (1997), *available at*: https://www.unoosa.org/documents/pdf/spacelaw/treatystatus/TreatiesStatus-2020E.pdf (last visited on Jan. 29, 2021).

> The exploration and use of the moon shall be the *province of all mankind* and shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development. Due regard shall be paid to the interests of present and future generations as well as to the need to promote higher standards of living and conditions of economic and social progress and development in accordance with the Charter of the United Nations (emphasis added).[36]

Thus, the Moon Agreement resolutely rules out ownership claims by any country as the Moon belongs to everyone. The US now seeks to upturn the applecart of the 1979 Moon Agreement, taking shelter under the fact that the 'United States has neither signed nor ratified the Moon Agreement' the US Executive Order argues that:

> In fact, only 18 countries have ratified the Moon Agreement, including just 17 of the 95 Member States of the United Nations Committee on the Peaceful Uses of Outer Space. Moreover, differences between the Moon Agreement and the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies — which the United States and 108 other countries have joined — also contribute to uncertainty regarding the right to recover and use space resources.[37]

In taking this position the US Executive Order ignores the fact the Moon Agreement has legally come into force in 11 July 1984.[38] Bin Cheng's authoritative work has already stated that 'entire corpus of 16 space related treaties (1967-1992) have been regarded as a part of customary law and hence it is binding even on the non-parties'.[39] Therefore, the US Executive Order is against the established principles of customary international law.

---

[36] *Supra* note 33, art 4, *available at*: https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/intromoon-agreement.html (last visited on Jan. 26, 2021).
[37] *Supra* note.7, s. 1.
[38] The Moon Agreement (1979), with ratifications by Chile, Paraguay, Netherlands, Austria and Philippines, the treaty entered into force 11 July 1984, n.37. Also see: https://unoosa.org/oosa/en/ourwork/spacelaw/treaties/outerspacetreaty.html (last visited on July 12, 2020).
[39] Bin Cheng (1997), p.36, p.798.

There has been cause of concern as regards arms race in outer space. In fact, the 1967 OST is product of the Cold War era and persistent fears of deployment of nuclear weapons in outer space. Therefore, all the states parties to the OST have agreed on not deploying such weapons of mass destruction in space. This has been held for a very long time.

Now the technology is driving this elucidation of space for military means. The U.S. Air Force's Communications/Navigation Outage Forecast System (C/NOFS)/ NASA Coupled Ion Neutral Dynamic Investigation (CINDI) mission satellite (2008-2015) has been one of the most important military technologies in space. It aimed at 'upper atmosphere and ionosphere affect space satellites as well as communications and navigation here on Earth'[40] that helped as an enabling technology in command, control and communication. This satellite is one example of how it is not direct weaponization of space but it is special purpose space infrastructure that has helped the US to reach out and fight the global wars against terrorism and the regimes that the US Administration designates as 'rouge' states.

V. UNDERMINING THE GLOBAL COMMONS

The US doesn't view space as a global commons, though the Moon Agreement has clearly enshrined the principle. Thus the US action seeks to open the way for the mining of the moon without any legality or legitimacy provided by an international treaty. It has deftly sought to bypass and undermine the Moon Agreement without being a party to it.

In order to unilaterally advance its national interests, the US intends to access resources of the moon exclusively. This is in stark contrast to the letter and spirit of the Moon Agreement that has sought to secure them for the entire mankind through its four elements: (a) orderly and safe development of the natural resources of the Moon; (b) rational management of those resources; (c) expansion of opportunities in the use of those resources; and (d) equitable sharing by all states parties in the benefits derived from those resources.

[40] For details see: NASA, Coupled Ion Neutral Dynamic Investigation (CINDI) mission satellite, *available at:* https://www.nasa.gov/mission_pages/sunearth/missions/cindi-cnofs.html (last visited on Aug. 2, 2020).

The main thrust of the US order is an assertion that: 'Americans should have the right to engage in commercial exploration, recovery, and use of resources in outer space, consistent with applicable law'.[41] It intends to do so under its CSLCA, 2015. Its main purpose has been 'spurring private aerospace competitiveness and entrepreneurship' and 'space resource exploration and utilization'. Interestingly, the same Act contains a disclaimer that:

> It is the sense of Congress that by the enactment of this Act, the United States does not thereby assert sovereignty or sovereign or exclusive rights or jurisdiction over, or the ownership of, any celestial body.[42]

As per NASA reports, the plan for sustained lunar exploration and development for the next several years includes humans returning to the Moon and a mission thereafter to emplace and build the infrastructure, systems, and robotic missions that can enable a 'sustained long-term presence on the lunar surface and use the Moon to validate deep space systems and operations before embarking on the much farther voyage to Mars'.[43] In fact, the US plans to return to the Moon in 2024. For the execution of the aforesaid plan, NASA wants to 'develop Artemis Base Camp at the South Pole of the Moon'.[44]

VI. LEGALITY OF THE US ACTION

This raises important questions as regards legality and legitimacy of the planned US action: What propels the US to bypass the legally binding 1967 OST as well as the 1979 Moon Agreement that regard space as the global commons? Can a country unilaterally explore and exploit resources of the moon and other celestial bodies? What is the status of mining carried out by the US when the moon does not fall within any national sovereign territory? It matters especially since the Moon

---

[41] *Supra* note 7, s. 1.
[42] Commercial Space Launch Competitiveness Act (2015), note 12, art.403.
[43] NASA "NASA Outlines Lunar Surface Sustainability Concept" (2020). Also see, "NASA's Plan for Sustained Lunar Exploration and Development"; *available at*: https://www.nasa.gov/feature/nasa-outlines-lunar-surface-sustainability-concept;
https://www.nasa.gov/sites/default/files/atoms/files/a_sustained_lunar_presence_nspc_report4220final.pdf (last visited on July 30, 2020).
[44] Keith Cowing (2020), "NASA Releases Its Artemis "Plan" - 5 Months Late"; *available at*: http://nasawatch.com/archives/2020/04/nasa-releases-i.html (last visited on July 30, 2020).

Agreement has laid down an 'international responsibility for national activities on the moon' irrespective of such activities carried on by governmental agencies or other non- governmental entities.

The controversial US action seems to have gone unnoticed and without reaction in India. India became part of the original 18 members of the UN-COPUOS in 1958. Late Vikram Sarabhai laid the foundation for India to emerge as a space power.[45] Hence it is in the fitness of things if an emerging space power like India duly takes up this matter even during the global pandemic crisis that has been unleashed since early 2020. As India already has ongoing space exploration programs[46] like *Chandrayaan* and *Mangalyaan*, it fits well into India's national interests to safeguard moon and other celestial bodies. It needs to thwart unilateral efforts of the US to commercially mine the moon. This once again earmarks an historic opportunity for India to take international law seriously and ensure that it works. It is to see if India will play any sobering leadership role, to bring about restrictions on the ambitious space exploration drives of countries like the US, when it takes up non-permanent seat (2021-22 term) at the UN Security Council on 01 January 2021.[47]

In view of the US decision, one possible course of action could be at the 75th session of the UNGA that commenced on 15 September 2020. Since the whole corpus of international space law has taken shape under the UN auspices, as a logical corollary, the UNGA could seek an advisory opinion[48] of the International Court of Justice ('ICJ') as it was done in the case of the legality of threat or use of nuclear weapons (1996).[49]

---

[45] U.R. *Rao, (2014), India's Rise as a Space Power 8* (New Delhi: Foundation Books, 2014).

[46] See Government of India, Indian Space Research Organisation, *Glimpses of Indian Space Program, available* at: https://www.isro.gov.in/glimpses-of-indian-space-program (last visited on Apr. 26, 2020*)*.

[47] "India Elected for 8th Term as Non-Permanent UNSC Member", *The Wire*, June 18, 2020, *available at:* https://thewire.in/diplomacy/india-elected-non-permanent-un-security-council-member-for-two-year-term (last visited on Aug. 2, 2020).

[48] United Nations, Charter of the United Nations and Statute of the International Court of Justice, San Francisco, Article 96(l) and (2). Article 65(1) to the Statute of the ICJ also provides: "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request"; *available at*: https://treaties.un.org/doc/publication/ctc/uncharter.pdf (last visited on Aug. 2, 2020).

[49] Bharat H. Desai, "*Non Liquet* and The ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons: Some Reflections", 2 *Indian Journal of International Law* 201-218 (1997). Also see, *Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons I.C.J.* Reports 226 (1996).

The potential question for an advisory opinion of the ICJ could be worded as follows: Is the unilateral state action for commercial mining of the moon, regarded as the common interest/province of all mankind under the 1967 Outer Space Treaty and the 1979 Moon Agreement, permissible under international law in any circumstance?

If such an advisory opinion is sought by the UNGA and the ICJ decides to deliver it (as it is not bound to give it) as the principle judicial organ of the UN, it would boost adherence to the corpus of the international space law regime. Though not legally binding, an advisory opinion of the ICJ would constitute *corpus juris* as a matter of far-reaching consequence as regards human exploration, and exploitation of the Moon and other celestial bodies in our expanding universe.

VII. LEGALITY OF MINING IN OUTER SPACE

Having seen the plight of the planet Earth, we need to ensure that the outer space does not fall prey to human greed. Can we make the instrumentality of international law work in our own common interest? In the larger interest of healthy international relations, institutionalized cooperation will help in giving effect to the space law regime designed to secure outer space and avoid destabilizing situations.[50] Furthermore, the provisions of the cardinal instruments like the 1967 OST to which the 1979 Moon Agreement is a supplement, needs to be interpreted in a way that doesn't undermine public international law. Articles 3, 6 and 7 of the 1967 OST stipulate international cooperation, international responsibility for national activities and duty to inform results of activities conducted in outer space.[51] Article 11 specifically requires states to consult and inform the international scientific and diplomatic/ intergovernmental community of the results of its activities in space, in order to promote cooperation.[52]

In view of this, the US decision to mine the moon is not only violative of its international obligations, but also of the judicial decisions rendered by the US Court. For instance, in *Nemitz* v. *United States*, while examining a claim over an asteroid on

[50] P.J Blount, "International Cooperation: The Key to Space Security", *Proceedings of the International Institute of Space Law*, 53 (2010).
[51] *Supra* note 2. Outerspace Treaty (1967), Governing the Activities of States in the Exploration and Use of Outer Space, art. 1, n.2, arts. 3, 6, 7.
[52] *Id.*, art. 11.

which NASA landed its spacecraft, the US Court dismissed the claim by holding that the US being party to the 1967 OST does not create any private or property rights in outer space, including the Moon and other celestial bodies.[53]

The latest US move to mine the Moon follows similar efforts in the past. The US policy makers have silently and stealthily played the cards to justify their present decision to mine the Moon, since their ratification of the 1967 OST. It is pertinent to note that, while ratifying the 1967 OST, the US Senate had imbibed an 'understanding' put forth by the Committee on Foreign Relations.[54] The said understanding provided that: 'nothing in Article 1, Para 1 of the Treaty diminishes or alters the right of the United States to determine how it shares the benefits and results of its space activities'. *Prima facie,* it appears that the aforesaid understanding adopted by the US is violative of and conflicts with the treaty obligations under the 1967 OST. The text of the understanding uses a 'notwithstanding' clause to circumvent its obligations under Article 2, which bars national appropriation of the outer space, including the Moon and other celestial bodies by claims of sovereignty, means of use or occupation, or by any other means. Hence, the US understanding, being contradictory, could be regarded as a violation of international law.

Ironically, the US Executive Order of 06 April 2020 has come at a most difficult time when the world is grappling with the worst pandemic and the global lockdown resulting in severest loss of lives and livelihoods since the Second World War. In fact the US itself has paid a very heavy price during this grave pandemic. However, the US action remains unchallenged both by major powers and within the UN system. In adopting the policy to mine the moon, the US has silently equipped its domestic laws to shift the responsibilities and liabilities undertaken by it under the 1967 OST to private entities.[55] This shift of liability is inherently illegal as the 1967 OST casts such responsibility on the state parties and not to the private entities.

---

[53] Brian Abrams, *First Contact: Establishing Jurisdiction over Activities in Outer Space,* 42 GA.J.INT'L & COMP.L,797-824, 808.808 (2014), quoted in footnote 67 *Nemitz v National Aeronautics and Space Administration*, 126 F.App; x343 (19th Cir 2005) *available at*: https://georgia-international-journal.scholasticahq.com/article/3597-first-contact-establishing-jurisdiction-over-activities-in-outer-space (last visited on Jan. 27, 2021).

[54] *Id*. at 803.

[55] *U.S. Commercial Space Launch Competitiveness Act* H.R. 2262, 114th Congress (2015).

By ensuring the apportionment of liability to private entities in its domestic law, the US legitimizes its own act of non-conformity with the applicable principles of international law within the international space law regime. By fixation of liability on private entities, the US has sought to legalize and permit the commercial utilization of outer space, including the Moon and other celestial bodies by private persons or business conglomerates.

VIII. CONCLUSION

The US Executive Order and the inherent unilateralism arising from it, is incompatible with the current times wherein the global efforts to protect common resources have hovered around the futuristic ideas of 'common heritage',[56] 'common interest of all mankind',[57] 'common concern',[58] and 'province of all mankind'.[59] It is especially so when the 1979 Moon Agreement explicitly requires that all 'activities on the Moon, including its exploration and use, shall be carried out in accordance with international law' (Article 2). The corpus of international law in general and international space law in particular do not permit any unilateral exploration and use of the Moon or other celestial bodies to further commercial interests of a particular nation. It was pushed through an executive order of the US President, just seven months ahead of his second bid for the office in November 2020 Presidential elections. In a global situation wherein governments are exhaustively preoccupied with issues of tackling unprecedented global challenges of Covid-19 pandemic, huge loss of lives and livelihoods around the world (with the US at the top of the chart during 2020 and 2021) as well as excruciating global recessionary trends, any unilateral effort to venture into the outer space, deprives the international community

[56] UN, The Law of the Sea: United Nations Convention on the Law of the Sea, New York. Part XI, (1983) art. 136 (Common Heritage of Mankind) states: "The Area and its resources at the common heritage of mankind". Taking the notion further, it further underscores that "No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources…" (art. 137) and "All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act" (art. 138); available at: https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (last visited on July 30, 2020).

[57] *Supra* note 2, 1967 OST Governing the Activities of States in the Exploration and Use of Outer Space, art. 1.

[58] As a trigger for usage of the rubric 'common concern' in the international law discourse, see the General Assembly Resolution 43/53, U.N. Doc. A/RES/43/53 (adopted, without vote, on 6 December 1988); *available at*: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/43/53 (last visited on Jan. 27, 2021)

[59] *Supra* note 57.

of enough breathing space to protect these cherished global commons. The action, *prima facie*, appears to be neither genuine nor in good faith.

The US move calls for an urgent attention of the UNGA, a plenary organ of the UN, where all initiatives for crafting basic principles of international space law and relevant instruments have taken place. The Assembly needs to adopt an urgent resolution at the 76th session (September 2021-August 2022), calling upon the US to desist from this ill-advised and unilateral move to allow for the mining of the Moon. Such a call to a permanent member (P5) of the UN Security Council, will forestall similar moves by the other space faring countries. It needs to be followed up by seeking an advisory opinion of the ICJ to preclude the proposed action (allowing commercial entities to commence mining of the moon and other celestial bodies) in the 06 April 2020 US Executive Order. The question that remains is: will the UNGA rise to the occasion in the larger common interest of the humankind?

It would also be in the fitness of things for the new Joseph R. Biden Administration that took over on 20 January 2021, to reverse the Trump Administration's 06 April 2020 Executive Order. In an extraordinary action, soon after the oath-taking ceremony at the Capitol Hill on 20 January 2021, President Biden did revoke several Executive Orders of the previous Trump Administration.[60] Hence, one can only hope that wiser counsel will prevail in this matter too.

We are still oblivious of any extra-terrestrial presence or existence of any other human or human-like species either in our planetary system or in any other galaxy in the deep recesses of the mysterious universe. This factor would possibly bring about some sobering effect on the potential *problematique* arising from our quest for colonization of the Moon and other celestial bodies in the near or the distant future.

---

[60] The White House, Executive Order on Revocation of Certain Executive Orders Concerning Federal Regulation, Presidential action, 20 January 2021, s. 2, *available at*: https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-revocation-of-certain-executive-orders-concerning-federal-regulation/ (last visited on Jan. 29, 2021).

ARBITRAL AWARD IN THE 'ENRICA LEXIE' CASE BETWEEN ITALY AND INDIA: SOME REFLECTIONS

*V. K. Ahuja**

I. INTRODUCTION

On May 21, 2020, the Arbitral Tribunal (Registry - Permanent Court of Arbitration) gave an award in the *Enrica Lexie* case[1] between Italy and India (hereinafter referred to as *Italian Marine Case*). The award came from the arbitral proceedings which were instituted on June 26, 2015 at the initiative of Italy under the United Nations Convention on the Law of the Sea, 1982 (UNCLOS). Both India and Italy are parties to the UNCLOS and are bound by its provisions.

The summary of facts of the case is that on February 15, 2012, the Italian vessel *M.V. Enrica Lexie*, which was flying the flag of Italy, was heading for Djibouti. On the way, it came across *St. Antony*, an Indian fishing vessel at a distance of 20.5 nautical miles (n.m.) away from the Indian coast. Two Italian marines, Massimilano Latorre and Salvatore Girone, on board *Enrica Lexie*, mistook *St. Antony* to be a pirate vessel and opened fired at it. As a consequence of firing, two Indian fishermen on board *St. Antony* were killed. After the said killings, *Enrica Lexie* kept on sailing to Djibouti. When it had proceeded 38 n.m. on High Seas, it received a message from 'Maritime Rescue Co-ordination Centre, Mumbai', which asked it to return to Cochin Port and assist in the enquiry against it regarding the aforesaid killings. In response to the message, *Enrica Lexie* returned to Cochin Port on the following day.

The Master of *Enrica Lexie* was informed that an FIR has been filed in respect of killing of two Indian fishermen. Massimilano Latorre and Salvatore Girone, on board *Enrica Lexie*, were arrested for the alleged killings on February 19, 2012. Both the

* Professor at Faculty of Law, University of Delhi and Joint Director, Delhi School of Public Policy and Governance (Institute of Eminence), University of Delhi, Delhi, India.

[1] *Italian Marine Case* (*The Italian Republic* v. *The Republic of India* concerning the *Enrica Lexie Incident*), PCA Award of 21 May 2020, PCA Case No. 2015-28.

marines filed a writ petition before Kerala High Court challenging the jurisdiction of the State of Kerala on 20 February 2012.[2] In the meantime, a charge sheet was filed against the two accused under the 'Indian Penal Code' (IPC) and the 'Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002' (SUA Act).

The Kerala High Court dismissed the writ petition, holding that entire Indian Penal Code, 1860 (IPC) was extended to the Indian Exclusive Economic Zone (EEZ).[3] It was also stated by the Court that under SUA Act, the State of Kerala has jurisdiction within the EEZ up to 200 n.m. from the coastal line. The petitioners, being aggrieved by the High Court's judgment, filed Special Leave Petition (SLP) before Indian Supreme Court challenging the order of dismissal by the Kerala High Court of their writ petition.

The Supreme Court held that the State of Kerala did not have jurisdiction into the matter. It was Union of India only which had jurisdiction. The Court directed the Union of India to set up a 'Special Court' for the purpose of trying and disposing of this case. The Special Court so set up was to apply the Maritime Zones Act, 1976, the IPC, the Code of Criminal Procedure, 1973 (CrPC) and the provisions of UNCLOS 1982 to the extent that there was no conflict between UNCLOS and domestic law. The Supreme Court also directed to transfer the proceedings which were pending before the Chief Judicial Magistrate, Kollam.[4] Thus, disposing of the SLP and other Writ Petition along with all other applications, the Supreme Court held that India has jurisdiction to try Italian marines.

II. PRESCRIPTION OF PROVISIONAL MEASURES BY ITLOS AND ARBITRAL TRIBUNAL

Italy requested for the constitution of an Arbitral Tribunal under Annex VII to the UNCLOS. However, pending its constitution, Italy on July 21, 2015 requested for the

[2] *Massimilano Latorre* v. *Union of India*, WP(C) No. 4542 of 2012 (High Court of Kerala).
[3] *Ibid*.
[4] *Republic of Italy & Ors*. v. *Union of India & Ors*., Writ Petition (Civil) No. 135 of 2012 with *Massimilano Latorre & Ors*. v. *Union of India & Ors*., Special Leave Petition (Civil) No.20370 of 2012, para 101.

'prescription of provisional measures' with the International Tribunal for the Law of the Sea (ITLOS) under Article 290(5) of the UNCLOS.

A request was made by Italy to the ITLOS to prescribe the following 'provisional measures':

(a) India shall 'refrain from taking or enforcing any judicial or administrative measures' against its marines and from 'exercising another form of jurisdiction' over the Incident; and

(b) 'India shall take all necessary measures to ensure that restrictions on the liberty, security and movement of the Marines be immediately lifted to enable [Girone] to travel to and remain in Italy and [Latorre] to remain in Italy throughout the duration of the proceedings before the Annex VII Tribunal'.

Against Italy's request, India filed her written observations on August 6, 2015 requesting ITLOS to reject Italy's submission and 'refuse prescription of any provisional measure[s]'. ITLOS, thereafter, held a hearing on provisional measures on August 10-11, 2015 and gave the order on August 24, 2015. The ITLOS ordered India and Italy to suspend all court proceedings and not to initiate new ones which could aggravate or extend the dispute which has been submitted to the arbitral tribunal under Annex VII or which could 'jeopardize or prejudice the carrying out of any decision' of the arbitral tribunal in due course.

Apart from the aforesaid, it also decided that both the parties shall submit to it the initial report latest by September 24, 2015, which was done by the parties. Complying with the provisional measures, the Indian Supreme Court stayed/deferred the four pending proceedings in the Indian courts regarding *Italian Marines* case 'till further orders'.

Italy requested for the Prescription of Provisional Measures under Article 290(1) of the UNCLOS to the Arbitral Tribunal on December 11, 2015. Italy, after reiterating its earlier submissions, requested the Arbitral Tribunal to prescribe that 'India shall take such measures as are necessary to relax the bail conditions on [Girone] in order to enable him to return to Italy under the responsibility of the Italian authorities, pending the final determination of the Annex VII Tribunal'.

In response, after reiterating her earlier submissions, India requested the Tribunal to reject the Italian's submission for the prescription of provisional measures and also to refuse 'to prescribe any new provisional measures'.

The Arbitral Tribunal while relying on *Mavrommatis Palestine Concessions (Greece v. Great Britain)*[5] held that there existed a 'dispute'[6] between the parties.[7] The provisional measures prescribed unanimously by the Tribunal are as under:

(a) Both the countries are required to cooperate, including before the Indian Supreme Court in order to 'achieve a relaxation of the bail conditions of [Girone] so as to give effect to the concept of considerations of humanity, so that [Girone], while remaining under the authority of the Supreme Court of India, may return to Italy during the present Annex VII arbitration'.

(b) Italy has an obligation to return to India its marine Girone if the Tribunal finds that India has jurisdiction over the marine in respect of the incident.

In addition, the Arbitral Tribunal also decided that both the parties were required to report to it on the compliance of the aforesaid provisional measures. The Tribunal also authorized its President to seek information from both the countries in case no such report was submitted within 3 months.[8]

III. ARBITRAL AWARD ON JURISDICTION OF THE CASE

The hearing on jurisdiction of the Arbitral Tribunal concerning the *Italian Marine Case* was held from July 8-20, 2019 at the headquarters of the PCA at The Hague. The Tribunal rendered its award on May 21, 2020. The award contains findings regarding 'jurisdiction and admissibility'; and decision on 'merits of the dispute'.

Regarding 'jurisdiction and admissibility', the Arbitral Tribunal found that there existed a dispute between Italy and India as to which of them was entitled to exercise jurisdiction over the incident, and that the dispute is related to the 'interpretation or

[5] Judgment of 30 August 1924, P.C.I.J. Series A, No. 2, p. 11.
[6] A dispute exists between the parties when they have 'a disagreement on a point of law or fact, a conflict of legal views or of interests'. See *ibid*.
[7] Order of the Arbitral Tribunal on Request for the Prescription of Provisional Measures, dated 29 April 2016, para 53.
[8] *Id*., para 132.

application' of the UNCLOS. It also found that it 'has jurisdiction over the dispute, subject to its decision on the specific objections to its jurisdiction raised by India in its Submission (1.a)'. The Indian submission (1.a) is that in the alternative to adjudge and declare that the Tribunal has no jurisdiction, it is requested to 'adjudge and declare that it has no jurisdiction with respect to Italy's Claims 2(a), 2(f), 2(h), and 3(a) and, in the further alternative, to dismiss and reject those Claims'.

The aforesaid claims 2(a), 2(f), 2(h), and 3(a) of Italy were 'to adjudge and declare' that (a) India by maintaining Maritime Zones Act, 1976, and Notification of 1981 of Home Ministry[9], did not comply with various Articles of UNCLOS, i.e., Article 33(1) (Contiguous Zone), Article 56(1) (sovereign rights of coastal States in EEZ), Article 56(2) (jurisdiction of coastal States in EEZ), Article 58(2) (Applicability of Articles 88 to 115 and other pertinent rules of international law to the EEZ), Article 87(1)(a) (freedom of navigation on high seas) and/or Article 89 (invalidity of claims of sovereignty over the high seas); (f) India by exercising her criminal jurisdiction over Italian marines has been violating her obligation under Article 2(3) (sovereignty of coastal states over the territorial sea), Article 56(2), Article 58(2) and Article 100 (duty of States to cooperate in the repression of piracy) to respect the immunity of the marines as they are officials of Italy and were exercising their official functions; (h) the assertion of India that she has jurisdiction is contrary to the provisions of UNCLOS.

Further according to claim 3(a) of Italy, all wrongful acts by India in breaches of UNCLOS must cease. India shall cease the applicability of the Maritime Zones Act, 1976 and the Notification of 1981 to the extent of their incompatibility with the UNCLOS. Criminal jurisdiction of any form over Italian Marines by India must also cease.

Regarding India's counter-claims, the Arbitral Tribunal unanimously found them admissible. As to her counter-claims, India requested the Tribunal to adjudge and declare that 'India's counter-claims are admissible'; and that by firing and killing two Indian fishermen on board *St. Antony*, Italy: (i) violated sovereign rights of India under Article 56 (rights, jurisdiction and duties of the coastal State in the EEZ); (ii)

[9] Ministry of Home Affairs Notification No. S.O. 671(E) dated 27 August 1981.

breached its obligation to have due regard to the rights of India in her EEZ under Article 58(3) (obligations of other States in the EEZ of the coastal States); (iii) violated the freedom and right of navigation of India under Article 87 (freedom of the high seas) and Article 90 (right of navigation on high seas); and (iv) infringed right of India to have her EEZ reserved for peaceful purposes under Article 88 (high seas to be reserved for peaceful purposes).

The Tribunal did not agree with the submission of Italy that by asserting and continuing to exercise its criminal jurisdiction over Italian marines, India has violated her obligation regarding the immunity of marines as the marines were exercising official functions as State officials of Italy. The Tribunal however, found that it had jurisdiction to decide as to whether the Italian marines had immunity.

The Tribunal unanimously decided that it would not go into the question of the compatibility of India's Maritime Zones Act, 1976 and her 1981 Notification with UNCLOS, as there was no need of doing that. By making this finding, the Tribunal did not think it proper to make scrutiny of the Maritime Zones Act, 1976 and the Notification of 1981.

Before proceeding to the arbitral award on merits, it will be appropriate to discuss briefly the contiguous zone under UNCLOS, 1982 and Indian Maritime Zones, Act, 1976 as the incident took place in the Indian contiguous zone.

The UNCLOS fixes the limits of contiguous zone at '24 nautical miles from the baselines from which the breadth of the territorial sea is measured'.[10] The Indian Maritimes Zones Act, 1976[11] complies with UNCLOS with respect to limits of contiguous zone and fixes the limits of Indian contiguous zone to 24 n.m.[12] However, it varies from UNCLOS in respect of powers to be exercised in contiguous zone.

The UNCLOS enables the coastal State to 'exercise the control necessary to: (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; (b) punish infringement of the above laws and regulations committed within its territory or territorial sea'.[13] The Indian

[10] Article 33, para 2, United Nations Convention on Law of the Sea, 1982.
[11] Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976
[12] Section 5(1), Maritime Zones Act, 1976.
[13] Article 33, para 1, UNCLOS, 1982.

Maritime Zones Act enables the Indian Government to exercise necessary powers and to take necessary measures in the contiguous zone with respect to: '(a) The *security of India*, and (b) immigration, sanitation, customs and other fiscal matters'.[14]

The powers relating to the *security of India* in the Indian Maritime Zones Act is a significant deviation from UNCLOS. In other words, the Act provides additional power to the Indian Government to exercise powers with respect to the security matters in the contiguous zone. It is noteworthy that Maritime Zones Act was adopted prior to the adoption of UNCLOS, 1982. The UNCLOS resulted from the negotiations under Third United Nations Conference on the Law of the Sea which started in 1973. *Security* as such was not proposed to be included in contiguous zone in the Convention. India however continued with the same provision even after becoming a party to the UNCLOS. The aforesaid provision never came in scrutiny by any international tribunal or court.

In *Italian Marine Case*, the Arbitral Tribunal stated that Italy did not establish that Indian conduct was based on the Maritime Zones Act, 1976 and 1981 Notification. The 1981 Notification of Home Ministry of India extends the IPC and the CrPC to the EEZ.[15] It further stated that even if there arose a question with respect to compatibility of the Maritime Zones Act, 1976 with UNCLOS, it did not see a need to address the issue in the present context.[16] Thus, the Arbitral Tribunal also refused to test the compatibility of the Maritime Zones Act, 1976 with UNCLOS, stating that it was not required in the given context.

It was good for India that the aforesaid provision of the Maritime Zones Act, 1976 as well as the Notification of 1981 were not put to scrutiny by the Tribunal. The reason is that once international obligations have been undertaken by a country under any treaty by becoming a party to it, the provisions of the treaty will be applicable in a dispute before any international court/tribunal. It is a well-settled principle that a party to the treaty will have to bring its domestic laws in conformity with the provisions of the treaty. Had the Tribunal considered the compatibility

[14] Section 5(4), Maritime Zones Act, 1976.
[15] The 1981 Notification is quoted in *Massimilano Latorre* v. *Union of India*, W.P.(C) No. 4542 of 2012 (High Court of Kerala).
[16] *Italian Marine Case*, para 361.

between UNCLOS and Maritime Zones Act, 1976 and the Notification of 1981, the matter, in all probabilities, could have been decided against India. The issue of compatibility of Maritime Zones Act, 1976 as well as the Notification of 1981 with UNCLOS, therefore, remains open.

IV. ARBITRAL AWARD ON THE MERITS OF THE CASE

On merits, the Tribunal unanimously found that India did not act in breach of Article 87(1)(a) of the UNCLOS, which provides for *freedom of navigation*. It was also of the opinion that India did not violate Article 92(1), which provides that ships on high seas are subject to the exclusive jurisdiction of flag State. The reason for giving this ruling was that the Tribunal could not decide in a conclusive manner whether the Italian ship was forced by the Indian Coast Guard to move to Kochi. It was also of the view that Italy failed to prove that the Indian Coast Guard, by 'interdicting' and 'escorting' the Italian ship, exercised 'enforcement jurisdiction'. It further stated that when the Italian ship was in Indian EEZ, the conduct of the Indian authorities 'did not amount to an exercise of jurisdiction'.[17]

The Tribunal also held that Article 97(1) and (3) were not applicable in that case. Article 97 deals with 'penal jurisdiction in matters of collision or any other incident of navigation'. It provides that in case of any incident on high seas, '[N]o penal or disciplinary proceedings may be instituted' against any person on the ship 'except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national'.[18] Further, 'no arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag State'.[19] This was a significant finding by the Tribunal in favour of India as the claim of Italy that India violated Article 97(1), was rejected.[20]

The Tribunal made some important observations on the genesis of Article 97 of UNCLOS. The Tribunal referred to the 'ILC Draft Articles Concerning the Law of the Sea'. Article 35 of the aforesaid Draft Articles is the 'precursor to Article 97' of the

[17] *Italian Marine Case*, paras 534-36.
[18] Article 97(1), UNCLOS.
[19] *Id*., Article 97(3).
[20] *Italian Marine Case*, para 657.

UNCLOS. In the commentary to Article 35, the ILC stated that it intended to reverse the *S.S. Lotus Case* Judgment of Permanent Court of International Justice (PCIJ).

In the *Lotus Case*, there was a collision between *Lotus* (French ship) and *Boz-Kourt* (Turkish ship) on the High Seas. As a consequence, eight people aboard the Boz-Kourt died and there was severe damage to the ship as it was broken down into two pieces and sank. When the *Lotus* arrived at Constantinople, criminal proceedings were initiated against the captain of *Lotus* and he was sentenced to imprisonment. France moved the PCIJ, which held that the prosecution of the French captain by Turkey was in accordance with international law, as the collision brought effect on Turkey and Turkey could exercise criminal jurisdiction on the French captain. According to PCIJ, the jurisdiction lay both with France and Turkey in that case. The *Lotus* judgment was criticized widely.

The *Lotus* judgment was reversed in the Geneva Convention on High Seas, 1958[21] and in Article 97 of the UNCLOS. The *Lotus* judgment was reversed with 'the object of protecting ships and their crews from the risk of penal proceedings before foreign courts in the event of collision on the high seas, since such proceedings may constitute an intolerable interference with international navigation'.[22]

According to the Arbitral Tribunal in the *Italian Marine Case*, in order to be a part of an 'incident of navigation' as provided in Article 97(1), the incident must have caused by 'the movement or manoeuvring' of both the ships.[23] Since the incident cannot be called as an 'incident of navigation', therefore in view of the Arbitral Tribunal, Article 97 was not applicable.[24]

The Tribunal has appropriately explained the scope of Article 97 and rightly made it inapplicable in the present case. Article 97 can be invoked only in the *incident of navigation*, such as collision between the two ships, etc. The killing by marines on board a ship of persons on board another ship is not to be called as *incident of navigation*. Any misinterpretation of Article 97 by Tribunal could have conferred exclusive jurisdiction on Italy in this case. Therefore, the decision of the Tribunal of

[21] Article 11, Geneva Convention on High Seas, 1958.
[22] ILC, 'Articles Concerning the Law of the Sea with Commentaries' in Vol. II *Yearbook of the International Law Commission* (1956), p. 265, at p. 281.
[23] *Italian Marine Case*, para 655.
[24] *Id.*, para 656.

making Article 97 inapplicable in the present case went in favour of India.

The Tribunal also found that India did not violate Article 100, which lays down obligations for States to 'cooperate in the repression of piracy', due to which Article 300, which obligates States Parties to observe their obligations in good faith and not abuse their rights, could not be invoked. Regarding Article 100, the Tribunal stated that for the repression of piracy, the Article 'does not stipulate the forms or modalities of cooperation' which the States are obligated to undertake. It further stated that the duty to cooperate 'does not necessarily imply a duty to capture and prosecute pirates'. It suffices if the States include certain mechanisms in their national legislations which may provide for 'mutual assistance in criminal matters, extradition and transfer of suspected, detained and convicted pirates'; or conclude 'bilateral and multilateral agreements or arrangements in order to facilitate such cooperation'.[25] Since India is quite active in the prevention of piracy and also provided information regarding the steps taken by her, it is found that there is no violation of Article 100 on her part.

Italy submitted before the Tribunal that, 'by asserting and continuing to exercise its criminal jurisdiction' over its marines, India violated her obligations under UNCLOS to respect their immunity as they were exercising official functions as Italian State officials. In this regard, the Tribunal decided by three votes to two, that immunity was available to marines with respect to their acts. It further stated that India was precluded from exercising her jurisdiction over them. This decision of the Tribunal went against India.

Before giving the aforesaid ruling, the Tribunal elaborated that pursuant to Articles 58(2) (applicability of Articles 88 to 115 and other pertinent rules of international law to the EEZ) and 92 (status of ship), both India and Italy had exclusive jurisdiction on their ships, i.e., on *St. Antony* and *Enrica Lexie* respectively. They had 'concurrent jurisdiction over the incident'. The Tribunal also stated that in accordance with a well settled principle of international law, i.e., the 'principle of objective territoriality', a State is empowered to assert its jurisdiction with respect to those offences which were committed outside its territory but 'consummated within

[25] *Id.*, paras 722-23.

its territory'.[26] The Tribunal also referred to *Lotus Case* in which it was stated that a State was empowered to exercise jurisdiction 'if one of the constituent elements of the offence, and more especially its effects, have taken place [in its territory]'.[27]

The Tribunal stated that the killing of two Indian fishermen by Italian marines brought effects on India being the flag State of the ship *St. Antony*. However, the Tribunal also stated that an issue has to be decided regarding whether India can exercise jurisdiction over the Italian Marines or whether her jurisdiction is precluded because the Italian marines enjoy immunity under customary international law, as the UNCLOS is silent on that issue. Citing customary international law, the Tribunal stated that State officials are given immunity from foreign criminal jurisdiction with respect to their official activities.[28]

The Tribunal also referred to the *Prosecutor* v. *Tihomir Blaškic* case, in which the International Criminal Tribunal for the Former Yugoslavia (ICTY) recognised the State officials' immunity as 'a well-established rule of customary international law' going back to the 18th -19th centuries.[29] This principle is also reflected in Articles 5 and 6(1) of the ILC Draft Articles on Immunity of State Officials.

The Tribunal decided that being members of the Italian Navy, the two Italian marines were also officers and agents of the judicial police who were entrusted with the task of guaranteeing the maritime defence of Italy, and therefore they were entitled to immunity *ratione materiae*. Referring to Article 7 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, the Tribunal decided that even if the acts of Italian marines were *ultra vires* or unlawful, they were still entitled to immunity.[30] Article 7 of the ILC Draft Articles provides that 'the conduct of [a person] empowered to exercise elements of the governmental authority shall be considered an act of the State … if the [person] acts in that capacity, even if it exceeds its authority or contravenes instructions'. The ILC Draft Articles on State

[26] *Id*., paras 839-40.
[27] *S.S. 'Lotus' (France* v. *Turkey)*, Judgment of 7 September 1927, P.C.I.J. Series A, No. 10, p. 23.
[28] *Italian Marine Case*, para 843.
[29] *Prosecutor* v. *Tihomir Blaškic*, ICTY, Appeal Chamber, IT-95-14-AR108 bis, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 38. See also *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)*, Judgment, I.C.J. Reports 2008, p. 177 at p. 243, para. 191.
[30] *Italian Marine Case*, paras 855, 862.

Responsibilities proposes to fix the responsibility of States. The Tribunal, however, used Article 7 of ILC Draft Articles for exonerating the Italian marines from the Indian criminal jurisdiction. The purpose of Article 7 is to fix the responsibilities of a State in a situation where its officials go beyond their authority and commit a wrong. The purpose should not be to give them benefits of their lapses for the wrongs committed by them.

Dr. P.S. Rao, one of the arbitrators, did not agree with the majority opinion and gave his dissenting opinion. Dr. Rao stated that it is beyond any doubt that marines did not perform their duties on a ship which was operated exclusively for a 'government non-commercial purpose'. They were present on a merchant/cargo vessel. Therefore, they were not performing sovereign functions of Italy. It is undisputed in international law that only 'government non-commercial service' would qualify for 'immunity from foreign State jurisdiction'. Dr. Rao further stated that government officials who perform official acts can enjoy immunity from foreign jurisdiction, whereas the Italian marines rendered services as a part of an agreement which amounted to a 'commercial contract'.[31] The marines, in his opinion, were not entitled to any immunity from Indian criminal jurisdiction.

Judge Patrick Robinson also disagreed with the majority on this point and stated that marines were not entitled to immunity *ratione materiae* from the India's criminal jurisdiction. Judge Robinson was of the opinion that they could be 'assimilated to the status of visiting forces'. Generally speaking, immunity is not provided to the visiting forces for their acts under *customary international law*. Usually the agreements between the receiving and sending States decide on the visiting forces' immunity.[32] Judge Robinson concluded that the Tribunal did not have jurisdiction with respect to the marines' immunity as the issue did not relate to the 'interpretation or application' of the UNCLOS.[33] Further, according to Judge Robinson, the immunity issue was a 'core element of the dispute' and not merely an 'incidental question'. The immunity issue was in fact the 'real issue' in this dispute. The real issue was required to be separated from the incidental question.

[31] Dissenting Opinion of Dr. P.S. Rao, *Italian Marine Case*, paras 79-80.
[32] See the Dissenting Opinion of Patrick Robinson, *Italian Marine Case*, para 72.
[33] *Id.*, para 81 (i).

Judge Robinson went on to state that even if it is presumed that the Tribunal had jurisdiction to decide the issue of marines' immunity, the claim of Italy would fail because 'in order to emplace the marines on board the *Enrica Lexie*' for the purpose of protecting the ship from pirates, it engaged in a transaction which was essentially commercial in nature. The immunity claim therefore is not attracted under customary international law in such cases. Alternatively, Judge Robinson stated that the two marines could be 'assimilated to the status of visiting forces' who do not have immunity for 'acts carried out in the receiving State', i.e., India under customary international law in absence of any agreement between India and Italy giving such immunity to Italian marines. Since there was no such agreement between the parties, India, therefore had the jurisdiction either as the 'flag State' or on 'the basis of the principle of objective territoriality'.[34] Judge Robinson finally concluded that the claim of Italy regarding the immunity of marines failed and that the criminal jurisdiction to prosecute the two marines lay with India.[35]

The very well-reasoned dissenting opinion of Judge Robinson on the issue of immunity of marines, is extremely valuable. Unfortunately, the matter was decided by three votes to two. It is a fractured finding and by no means can be termed as a sound finding. Immunity to government officials can only be given when they are performing sovereign functions of the State. If their actions are not strictly government actions but commercial actions, they are not entitled to any immunity from the foreign criminal jurisdiction if their activities have caused injury to another country. Stretching the meaning of the term *government purpose* beyond reasonableness for the purpose of giving immunity to Italian marines from criminal jurisdiction of India does not seem to be logical.

It is also imperative for International Law Commission (ILC) to look into this aspect and suggest that immunity to government officials from the criminal jurisdiction of the foreign countries should be available only in those cases where the government officials were discharging sovereign functions only and not otherwise.

Once it was found by the Tribunal that the Italian marines were acting in their

[34] *Id.*, para 81 (ii)-(iv).
[35] *Id.*, para 82.

official capacity at the time of incident, the Tribunal also went on to consider whether they could still be precluded from the immunity on the basis of exception of 'territorial tort'. According to India, the 'legal fiction [of] assimilating ship and territory for the specific purpose of criminal law is well accepted and logical, especially since criminal jurisdiction can only be either territorial or personal, and for crimes committed on board a ship, India contends, territorial jurisdiction is the only possibility'.[36]

The Tribunal was of the opinion that there was no doubt about the nature of the exception of 'territorial tort' as a customary rule of international law. The Tribunal, however, denied the applicability of the exception in this case as the Italian marines were not present on the Indian territory at the time of killing Indian fishermen.[37] India was therefore, precluded from exercising her jurisdiction over the Italian Marines.

Italy requested the Tribunal to hold that India must cease continuing breaches of the provisions of UNCLOS. Italy also submitted that India must 'cease to apply' the provisions of her domestic laws, i.e., the Maritime Zones Act, 1976 and the Notification of 1981 'insofar as they are incompatible' with UNCLOS. India must also cease to exercise all form of criminal jurisdiction over its marines. Not only that, Italy also demanded compensation from India for 'the non-material damage suffered' by its marines due to unlawful exercise by India of her jurisdiction over them. Italy also demanded compensation for the material damages suffered by it due to the detention of its ship *Enrica Lexie* by India.

The Tribunal noted that Italy has expressed commitment that it would resume criminal investigation against the marines. It decided that necessary steps should be taken by India to cease to exercise her criminal jurisdiction over Italian Marines. It also stated that no further remedies were required in this behalf.[38]

This decision of the Tribunal was against India's interest as India was obligated to cease exercising her criminal jurisdictions over those two marines. However, Italy made commitment 'to resume its criminal investigation' into the incident. Now, it is

[36] *Italian Marine Case*, para 836.
[37] *Id*., para 873.
[38] *Id*., para 1094 B(3).

for Italy to fulfill its aforesaid commitment. At the same time, it is for India to ensure that the commitment is fulfilled by Italy honestly and effectively and not just for name sake.

The Tribunal dismissed India's submission that Italy, by its act of killing Indian fishermen, has: (i) violated sovereign rights of India in the EEZ under Article 56; (ii) 'breached its obligation to have due regard to India's rights in its EEZ under Article 58(3)'; and (iii) infringed the right of India to have her EEZ reserved for peaceful purposes as per Article 88 of the UNCLOS. The Tribunal did not find Italy to have violated or breached India's aforesaid rights.

Regarding Article 88, the Tribunal stated that the Italian marines were under the apprehension that their ship was under pirate attack, and under this apprehension only, they fired and killed the Indian fishermen. Therefore, there was no breach on behalf of Italy of Article 88 which states that the high seas is to be reserved for 'peaceful purposes'.[39]

The Tribunal however, found unanimously that Italy has breached Article 87(1)(a) and Article 90 by interfering with the navigation of Indian ship *St. Antony*. Accordingly, the Tribunal decided unanimously that: (i) the breach by Italy of Article 87(1)(a) and Article 90 of the UNCLOS constitute 'adequate satisfaction for the injury' to the non-material interests of India; (ii) as a result of the aforesaid breach by Italy, India is entitled to compensation with respect to the 'loss of life, physical harm, material damage to property (including to the *St. Antony*) and moral harm suffered by the captain and other crew members of the *St. Antony*, which by its nature cannot be made good through restitution'; (iii) an agreement is to be reached out between the parties with respect to the aforesaid amount of compensation; and (iv) parties may approach the Arbitral Tribunal within one year for a ruling regarding the 'quantification' of aforesaid compensation.

The Tribunal while holding Italy liable for breach of Articles 87(1)(a) and 90 of the UNCLOS, stated that Italy caused injury to India by the acts of its marines. However, there was no specific material damage associated with that injury. In this regard, the Tribunal referred to the *'Rainbow Warrior Affair'* award in which the

[39] *Id.*, para 1077.

Arbitral Tribunal observed that '… unlawful action against non-material interests, such as acts affecting the honor, dignity or prestige of a State, entitle the victim State to receive adequate reparation, even if those acts have not resulted in a pecuniary or material loss for the claimant State'.[40] The Tribunal also referred to the *Corfu Channel Case*, where the ICJ regarded a declaration by the Court 'that the action of the British Navy constituted a violation of Albanian sovereignty' to be 'in itself appropriate satisfaction'.[41]

The Tribunal in the present case was of the opinion that injury made by Italy to India could not be made good by restitution or compensation. Reparation could only take the form of satisfaction. Therefore, in view of the Tribunal, the finding that Italy breached Articles 87(1)(a) and 90 constituted 'adequate satisfaction' for India.[42]

The Tribunal has applied the principles of State responsibility while giving its aforesaid ruling in favour of India. Regarding the amount of compensation, the Tribunal stated that if the amount is not agreed upon by both the parties by mutual understanding, the Tribunal will quantify the same, provided an application in this regard is made within 1 year from the date of the Award.[43]

With respect to costs, the Arbitral Tribunal was of the opinion that in absence of any 'particular circumstances' there will be no order as to cost and both the parties are to bear their own costs.[44]

The arbitral award is accepted by the Indian Government. The Supreme Court proceedings however, remained pending, as the Court earlier stayed/deferred pending proceedings till further orders in pursuance of the provisional measures of ITLOS. After the award, the Government approached the Supreme Court for withdrawal of proceedings on the ground that India has accepted the arbitral award and the award was not appealable. The Court refused to pass an order until the

---

[40] *'Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair'*, Decision of 30 April 1990, RIAA Vol. XX, p. 215 at p. 267, para. 109.
[41] *Corfu Channel case,* I.C.J. Reports 1949, p. 4 at p. 35.
[42] *Italian Marine Case*, para 1087.
[43] *Id.*, para 1090.
[44] *Id.*, para 1093.

families of fishermen were heard.[45] The Court also stated that the Government should ensure that the families of the deceased fishermen get the adequate compensation.

V. CONCLUSION

The Arbitral Tribunal ruled that both India and Italy had the jurisdiction on the incident. India, however was precluded to exercise the jurisdiction with respect to the incident on the ground that Italian marines enjoyed immunity under customary international law being officials of the Italy. This ruling of Tribunal was made by three votes to two, which means that the arbitrators were not unanimous on the issue of whether Italian marines were in fact performing official duties while serving at *Enrica Lexie*. Being a majority verdict, it went against India. As a matter of principle, when a matter is brought before an international body, be it a court, tribunal or arbitral tribunal, that matter is to be decided in accordance with international law only. The applicability of domestic laws is confined to domestic courts. India therefore, cannot proceed further in this matter under Indian laws. Italy however, in this case, agreed to continue criminal investigations against its marines in Italy for the killing of Indian fishermen. The Tribunal has also directed Italy to pay adequate compensation to India for the loss of lives of two fishermen. It is for India now to ensure that Italy takes criminal actions against the marines and pays adequate compensation. Once the compensation is paid which is mutually agreed between India and Italy, the matter in Indian courts will also come to an end.

The Indian Maritime Zones Act, 1976 which is at variance from UNCLOS so far as contiguous zone is concerned, did not come for scrutiny by the Tribunal. It is however clear that once it comes in scrutiny, it will be difficult to prove its compatibility to UNCLOS to which India is a party.

[45] *Massimilano Latorre & Ors.* v. *Union of India & Ors*. IA No. 58644/2020 dated 07-08-2020.

A BIT ON INDIA'S REFORM OF LEGAL FRAMEWORK FOR FOREIGN INVESTMENTS

Siddhartha Misra and Katarzyna Kaszubska***

I. INTRODUCTION

In recent years, India has emerged as one of the most attractive destinations for foreign investment. The United Nations Conference on Trade and Development's World Investment Report 2018 ranked India in the top ten favoured host countries for foreign capital with over USD 40 bn. of FDI inflow in 2016.[1] Amidst this spectacular growth, India's regime for foreign investment, both through domestic policy and international agreements, has undergone a significant transformation. In parallel with the progressive liberalisation of the domestic FDI policy, India has recently proposed significant changes in its framework of international protection of FDI under BITs. In December 2015, the Cabinet approved the Model BIT, which lowers the required standard of treatment of investors. In response to India's first defeat in the investor-state arbitration in the White Industries v. India case,[2] and an increased number of cases brought against government measures by foreign investors under investment treaties, the new approach attempts to shield the government from further challenges in Investor-State Dispute Settlement ('ISDS') system. Following the analysis of the rationale behind BITs and the overview of the arbitration disputes initiated by the investors against India, this article discusses the basic features of the new Model BIT and its potential impact on India's future FDI.

* Senior Assistant Professor at Law Centre-I, Faculty of Law, University of Delhi.
** Ph.D. scholar at the Faculty of Law, University of Delhi.
[1] World Investment Report 2018 - Investment and New Industrial Policies, UNCTAD, *available at*: https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=2130 (last visited on May 10, 2019).
[2] *White Industries Australia Limited* v. *The Republic of India*, *Final Award*, IIC 529 (2011).

II. THE RATIONALE AND PUSHBACK AGAINST BITS

BITs are agreements signed between two countries to provide for reciprocal protection and promotion of investments in their territories. The concept of special rules to protect foreign entities initially operated under the umbrella of diplomatic protection, which a home country extends over its citizens abroad, deriving from the principles of customary international law.[3] In current times, the legal framework for the treatment of foreign investors is predominantly based on international investment treaties. The real expansion of the modern type of treaty-based international investment law took place in the post-colonial era, in response to the nationalisation of foreign investments by the newly independent countries as well as large-scale expropriation of private property, which took place in the Soviet Union. The first BIT was signed between Germany and Pakistan in 1959.[4] However, the number accelerated rapidly in the 90s. In 2016, there were 3324 concluded International Investment Agreements ('IIA').[5]

By concluding a treaty, a country commits itself to guarantee specific standards of treatment to foreign investors in its territory. Traditionally, those included substantive obligations to provide foreign businesses with national treatment, non-discrimination, physical security, fair and equitable treatment, and liberal financial transfer procedures. Reaffirming the host state's right to expropriate investments, the investment agreements established that any taking must be conducted in the public interests, follow due process and entail payment of market value as prompt and effective compensation.

The most important procedural innovation incorporated in BITs entailed investors' right to directly challenge host states before international arbitration tribunals. The ISDS provision was included for the first time in 1968 in a BIT signed by the

[3] Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press, Cambridge, 1st edn., 2013).
[4] Jeswald W. Salacuse, "BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries" 24 *The International Lawyer* 655 (1990). *Supra* note 3 at 19.
[5] World Investment Report 2017 - Investment and the Digital Economy, UNCTAD, *available at*: http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf. (last visited on May 10, 2019).

Netherlands with its former colony - Indonesia.[6] It was intended to provide investors with a neutral forum to raise their grievances. It originally stemmed from the assumption that domestic judicial systems in developing host countries would not guarantee an independent, fair, and reliable forum to adjudicate upon the complaints brought by foreigners. ISDS has gradually become a standard clause in the majority of investment treaties.

The growing number of the IIAs were primarily attributed to the collapse of the Soviet bloc and a triumph of the free-market ideology. A large number of developing countries started entering into BITs with a desire to attract investment flows. In the Guidelines on the Treatment of Foreign Direct Investment, the World Bank argued that 'a greater flow of foreign direct investment brings substantial benefits to bear … on the economies of developing countries in particular',[7] and encouraged reforms to create a favourable and secure environment for such investments. Although both parties to the treaty formally assumed reciprocal commitments, in practice, due to the traditional unidirectional flows of FDI, the obligations of host states fell primarily on the developing economies. However, despite various studies, there is no conclusive evidence that IIAs actually stimulate FDIs.[8] This is particularly visible in the case of India, where a substantial amount of inward investments come from the United States of America ('USA'), yet no BIT has been concluded between the two countries. On the other hand, an empirical study measuring the relationship between BITs and FDI inflows in India in the period between 2001 and 2012 confirmed a positive role of the agreements in attracting FDI inflows.[9] In particular, the research suggested that BITs signal protection and commitment to foreign investors.

At the initial stage, BITs were viewed as instruments providing minimum guarantees against host governments' unfair treatment; with the ISDS mechanism as investors' last resort in ascertaining their rights. However, with several arbitral

---

[6] Andrew Paul Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* 44 (Kluwer Law International, AH Alphen aan den Rijn, 2009).

[7] Guidelines on the Treatment of Foreign Direct Investment (1992), World Bank, *available at*: http://www.italaw.com/documents/WorldBank.pdf (last visited on May 10, 2019).

[8] Mark S. Manger, "A quantitative perspective on trends in IIA rules" in Armand de Mestral and Celine Levesque, (eds.), *Improving International Investment Agreements* 76 (Routledge, 2013).

[9] Niti Bhasin and Rinku Manocha, "Do Bilateral Investment Treaties Promote FDI Inflows? Evidence from India" 41 *VIKALPA* 275 (2016).

awards rendered in recent years, it appears that what was intended to constitute a minimum level of protection against outrageous or discriminatory treatment by host states has turned out to provide far-reaching concessions to foreign investors. ISDS is characterised as a system that prioritises the speed and finality of disputes over the process of legal reasoning.[10] Consequently, it has been argued that international investment arbitration, which derives from commercial arbitration, does not constitute a proper forum to adjudicate upon issues involving the state's regulatory powers. It has also been criticised for permitting a broad interpretation of the investors' rights enshrined in the treaties, such as fair and equitable treatment or indirect expropriation, which as a consequence, limits governments' right to legislate on sensitive matters of public concern. This has induced a lively debate about BITs' economic and social effects and limits on countries' policy space as well as search for eventual solutions to remedy the most pressing challenges of the current system.

BITs constitute at present the most important source of international investment law, considering the lack of a complex multilateral agreement covering all investment-related issues. Since the economic liberalisation in the early 90s, India entered into over eighty BITs. Most of the treaties represent the old-generation BITs, which provide for strong investment protection. Several of these agreements have been invoked by foreign investors against India in the investor-state arbitration.

III. INVESTOR-STATE DISPUTES AGAINST INDIA

With over 20 ISDS cases initiated by foreign investors, India became one of the most frequently sued host states, according to UNCTAD.[11] The initial series of cases brought against India, under various European agreements, including BITs with the United Kingdom ('UK'), France, the Netherlands, and Austria in 2004 after the government's repudiation of the power purchase agreement between the Maharashtra State Electricity Board and Dabhol Power Company, were settled without reaching

[10] J. Kurtz, "The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents" 20 *European Journal of International Law* 749 (2009).
[11] *Supra* note 5. *Supra* note 5 at 115. India, Investment Dispute Settlement Navigator, Investment Policy Hub, UNCTAD, *available at*: https://investmentpolicy.unctad.org/investment-dispute-settlement/country/96/india (last visited May 10, 2019).

the award stage.[12]

However, the first dispute which reached the final award was *White Industries* v. *India*.[13] The Government was required to pay over USD 4 million in damages, after the investment tribunal found that India was unable to provide the investor, an Australian mining company, with effective means to assert its rights. The case concerned an arbitral award granted in favour of White Industries in a contractual dispute with Coal India, the state-owned mining entity. The investor tried to enforce the award through the Indian courts but was unable to obtain a final decision for more than nine years. The investment tribunal concluded that the judicial delays led to the breach of India's obligations towards the foreign company. The decision was particularly controversial because the claimant was allowed to rely on the Most-Favoured Nation ('MFN') clause in India-Australia BIT in order to claim a breach of the obligation to provide investors with effective means of asserting claims and enforcing rights guaranteed in a separate BIT concluded by India with Kuwait. This practice was criticised in India for ignoring the carefully negotiated balance of individual agreements. The operation of MFN treatment was regarded as defeating the objective of bilateral treaties.[14]

The second investment case, recently decided in favour of foreign shareholders, is that of Devas Multimedia.[15] It concerns the cancellation of a telecommunications contract concluded by Devas Multimedia with Antrix Corporation, the Indian State entity controlled by the Indian Space Research Organisation ('ISRO'). Under the contract, Antrix agreed to provide Devas with a segment of the S-Band spectrum, which it was supposed to use to offer digital multimedia services to remote areas in India. Following allegations of irregularities in the allocation of the spectrum and

---

[12] *Standard Chartered Bank* v. *Republic of India,* UNCITRAL; *Offshore Power Production C.V., Travamark Two B.V., EFS India-Energy B.V., Enron B.V., and Indian Power Investments B.V.* v. *Republic of India*, UNCITRAL; *Erste Bank Der Oesterreichischen Sparkassen AG* v. *Republic of India; Credit Lyonnais S.A. (now Calyon S.A.)* v. *Republic of India*, UNCITRAL; *BNP Paribas* v. *Republic of India*, UNCITRAL; *ANZEF Ltd.* v. *Republic of India*, UNCITRAL; *ABN Amro N.V.* v. *Republic of India*, UNCITRAL.

[13] *Supra* note 2.

[14] Saurabh Garg, Ishita G. Tripathy, *et.al.*, "The Indian Model Bilateral Investment Treaty: Continuity and Change", in K. Singh and B. Ilge (eds.), *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices* 69 (Madhyam, New Delhi, 2016).

[15] *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telecom Devas Mauritius Limited* v. *Republic of India*, PCA Case No. 2013-09.

claims that the deal endangered national security, the government cancelled it in 2011. The claimant complained that the state measure constituted an indirect expropriation and breach of the fair and equitable treatment obligation. In addition to the dispute initiated by Devas shareholder based on the India - Mauritius BIT a separate claim against the same government measure was brought under the India – Germany BIT by Deutsche Telekom, an indirect shareholder of Devas.[16]

Apart from these, various other investment claims were initiated in the so-called 2G scandal by foreign investors. Following the Indian Supreme Court's finding that the allotment of the spectrum was arbitrary, all 122 2G telecom licences issued in 2008 were cancelled. Although Norwegian telecom company, Telenor, dropped its claim against India,[17] other foreign shareholders of Indian telecom companies, such as ByCell India,[18] and Loop Telecom,[19] have brought arbitration cases which are currently pending resolution under the United Nations Commission on International Trade Laws ('UNCITRAL') rules. Arguing that the withdrawal of their licences constituted a breach of investors' right to fair and equitable treatment which amounted to a denial of justice as well as an arbitrary and discriminatory measure, the shareholders of ByCell and Loop Telecom demanded compensation of USD 400 million and 1.4 billion, respectively. The 2G scandal also constituted as a basis for the claims of Mauritius and UK investors in a recently initiated case of *Astro and South Asia Entertainment* v. *India*.[20]

Another pending case was brought under the BIT with France by Louis Dreyfus Armateurs SAS.[21] The French investor was a shareholder in a joint venture with an Indian port operator formulated in order to implement a modernization project at Haldia Port in West Bengal. Arguing that the host government's measure prevented an effective implementation of the project, the investor claimed USD 11 million as compensation.

---

[16] *Deutsche Telekom* v. *India*, PCA Case No. 2014-10.
[17] Pankaj Doval, "Telenor drops arbitration notice against Centre" *Times of India*, May 13, 2014.
[18] *Maxim Naumchenko, Andrey Poluektov and Tenoch Holdings Limited* v. *Republic of India*, PCA Case No. 2013-23.
[19] *Khaitan Holdings (Mauritius) Limited* v. *Republic of India*, PCA Case No 2018-50.
[20] *Astro All Asia Networks and South Asia Entertainment Holdings Limited* v. *India*, UNCITRAL, 2016.
[21] *Louis Dreyfus Armateurs SAS* v. *The Republic of India*, PCA Case No. 2014-26.

Further, India was dragged by Vodafone into arbitration over its retroactive taxation measure,[22] under the India – Netherlands BIT and India – UK BIT, and Cairn Energy,[23] and Vedanta,[24] under BIT with the UK. In the first case, the tax authorities argued that Vodafone was liable to pay India's exchequer over USD 2 billion for its 2007 takeover of the Indian telecom operations of Hutchison Whampoa. In 2012, the Supreme Court ruled that the deal was exempted from tax, yet the Parliament responded by amending the Income Tax Act allowing the authorities to retroactively tax overseas M&A transactions involving the transfer of Indian assets. However, recently the Permanent Court of Arbitration in The Hague found a decision in Vodafone's favour and held that any attempt by India to enforce the tax demand would be a violation of the country's international law obligations. The tribunal ruled that the Indian Income Tax department's tax demand from Vodafone is in breach of the BIT between India and the Netherlands. The tribunal, in the order, held that the Indian tax department was in breach of the 'fair and equitable treatment' under the BIT.[25]

The retrospective taxation amendment by India led to additional cases brought by Cairn Energy and Vedanta. The UK investors demand USD 1 and 3 billion, respectively, as compensation from India. The two most recent cases were initiated by the investors from the United Arab Emirates engaged in the real estate project, arguing *inter alia* that the government improperly confiscated its assets,[26] and an aluminium refinery, claiming a breach of the investment contract,[27] respectively.

The award in the White Industries case woke up Indian policymakers and provoked a debate about the potential risks behind BITs. Various critics argued that

---

[22] *Vodafone International Holdings BV* v. *Government of India (I),* PCA Case No. 2016-35 (Dutch BIT Claim). *Vodafone Group Plc and Vodafone Consolidated Holdings Limited* v. *Government of India (II)*, UNCITRAL (UK BIT Claim).
[23] *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL)* v. *Government of India*, PCA Case No. 2016-7.
[24] *Vedanta Resources plc* v. *India*, PCA Case No. 2016-05 (UK BIT Claim).
[25] Ishita Guha and Jayshree P. Upadhyay, "Vodafone wins international arbitration against India in retrospective tax case", *Mint,* 25 Sep 2020, *available at*: https://www.livemint.com/companies/news/vodafone-wins-international-arbitration-against-india-in-tax-dispute-case-11601033151999.html.
[26] *Strategic Infrasol Foodstuff LLC and The Joint Venture of Thakur Family Trust, UAE with Ace Hospitality Management DMCC, UAE* v. *India*, UNCITRAL.
[27] *Ras aI-Khaimah Investment Authority* v. *India,* UNCITRAL.

the case represented an attack on judicial sovereignty and advocated termination of all investment agreements as 'damaging the country's interests'.[28] They also contested the need for a separate dispute resolution mechanism for foreign investors, while Indian citizens have to wait several decades for their grievances to be addressed by overburdened courts without any compensation for the delays, arguing that it was inconsistent with India's constitutional guarantee of equality.[29] However, it appears important to note that none of the ISDS cases initiated against India so far concerns general regulatory measures adopted in the public interest, which is internationally considered as the most controversial use of the ISDS system.

Following the flood of claims brought by foreign investors in the last few years, the Government decided to rethink its existing investment obligations. As a result, India's new Model BIT was adopted in December 2015.[30] The next section analyses the most relevant features of India's recently approved Model BIT.

IV. INDIA'S MODEL BIT, 2015

Model investment treaties are developed by countries in order to operate as templates for the negotiations of actual BITs as well as investment chapters of trade agreements. The text of the Model BIT also serves as an important signalling role – it indicates the host country's approach to foreign investments. India's first Model BIT of 2003 was based on the text of the agreement concluded by India with the UK in 1994.[31] It was short and reflected standards of treatment of investments developed by the Western economies. This approach complied with India's economic transition towards a liberal and open market and as a strategy to encourage foreign capital inflows into the country.

The new Model BIT is an effect of consultations conducted on the basis of public comments on the draft model treaty which was circulated to the public at the

[28] PTI, "BIPAs damage India's interest; end them gradually, says official" *The Economic Times*, May 21, 2014.
[29] Shruti Iyer, "Redefining Investment Regime in India: Post White Industries" 14 *Journal of World Investment & Trade* 603 (2013).
[30] Government of India, "India's Model Bilateral Investment Treaty" (Ministry of Finance, 2015) https://dea.gov.in/sites/default/files/ModelTextIndia_BIT_0.pdf (last visited May 10, 2019).
[31] Agreement Between Government of Republic of India and Government of United Kingdom, 1994, *available at*: https://dea.gov.in/sites/default/files/United%20Kingdom.pdf.

beginning of 2015. The most relevant commentary of the draft model was elaborated by the Law Commission of India in its Report No. 260 'Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty' released in August 2015.[32] Recognising the need to review certain aspects of the existing investment framework, the Law Commission found that the draft failed to adequately strike a balance between the rights of investors and the host state's regulatory powers. It suggested various amendments to the draft text in order to bring it more in line with the Government's agenda to increase investment flows into the country, reflected *inter alia* by the 'Make in India' project. With several modifications in comparison to the initial draft, the Model BIT was approved by the Cabinet in December 2015.

The Model is intended to serve as the basis for India's negotiations of future investment agreements as well as re-negotiations of the existing ones. It indicates that the Government still believes that BITs send a positive signal to foreign investors. However, it simultaneously attempts to ensure that investment protection does not impair the state's regulatory powers.

The desire to redefine the balance between the protection of investors' rights and the state's regulatory powers is already reflected in the Preamble of the Model text. The short introduction indicates that BITs should lead to the promotion of sustainable development and it reaffirms 'the right of parties to regulate investments in their territory in accordance with their law and policy objectives'.[33]

Major features of the new Model BIT are discussed below:

A. Definition of protected investment

The first manifest difference between India's previous Model treaty as well as the majority of concluded BITs and the newly adopted Model BIT concerns the range of investments protected under the agreement. The text of India's Model BIT limits its coverage by embracing a narrow enterprise-based definition of an investment. As a result, only companies duly 'constituted, organised and operated in good faith by the

[32] Law Commission of India, "Report No.260 Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty" (August, 2015).
[33] *Supra* note 30, preamble.

investor' under Indian law can benefit from the treaty protection.[34] Further, it also excludes the so-called mailbox companies from their scope by requiring an investor to have 'substantial business activities' in a host country.[35] However, it contains an undefined condition that an investment must contribute to the development of the host country's economy, without specifying whether this requirement refers to the investment as a whole or to any single asset.[36] By doing away with the predominant practice of industrial countries, which favour an asset-based definition of an investment, it also excludes portfolio investments or goodwill from the scope of the treaty.

Acknowledging that an open-ended asset-based definition may impose excessive strains on the regulatory space of a state, the Law Commission welcomed the enterprise-based approach as 'more appropriate for the current Indian context, as it is both a capital-exporting and capital-importing State'.[37]

B. Lack of MFN treatment

Another salient feature of the approved Model is the absence of the MFN clause, which is intended to counter discrimination and level the playing field among foreign investors. MFN requires a host state to automatically extend to a foreign investor from the BIT partner country any benefits it has granted to investors from a third country. Although the predominant controversy over the MFN clause concerns potential recourses of foreign investors to treaties concluded with third countries in order to borrow more beneficial procedural rules, India was also concerned about investors relying on MFN provisions to borrow substantial rights specified in agreements with third countries. The rejection of the MFN provision clearly reflects India's experience from its first lost arbitration dispute – *White Industries* v. *India* (*supra*).

Nevertheless, both the Law Commission in its report as well as certain scholars point that the lack of any MFN obligation creates the risk of discrimination between

---

[34] *Id.*, art. 1.4.
[35] *Id.*, art. 1.5.
[36] Prabhash Ranjan and Pushkar Anand, "The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction" 38 *Northwestern Journal of International Law & Business* 20 (2017).
[37] *Supra* note 32 at 9.

foreign investors from different states under the host state's domestic legislation.[38] Therefore, in view of recognition of India's concerns over potential treaty-shopping among different BITs, the preferred solution is to introduce an MFN clause limited in scope to the application of the host state's domestic regulations.

C. Absence of fair and equitable treatment

The Model also does away with the obligation to provide foreign investors with fair and equitable treatment, which is one of the most frequently invoked standards of treatment in the ISDS. The majority of successful cases brought by the investors against states were based on the claims of infringement of this provision.[39] Despite its recognised popularity, the exact meaning of the standard is still far from clear.[40] The controversy surrounds the diverging jurisprudence with some tribunals arguing that fair and equitable treatment reflects the minimum standard prescribed under the international customary law, while others prefer to see it as setting up a separate and more expansive standard of treatment.[41]

The Model text appears to substitute the controversial fair and equitable treatment, with a prohibition of subjecting foreign investors to measures inconsistent with international customary law, i.e., denial of justice and due process, discrimination, or manifestly abusive treatment. The provision reads as follows:

> Article 3. Treatment of investments
>
> 1. No Party shall subject investments made by investors of the other Party to measures, which constitute a violation of customary international law through:
>
> (i) denial of justice in any judicial or administrative proceedings; or
>
> (ii) fundamental breach of due process; or
>
> (iii) targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief; or

[38] *Supra* note 36 at 24. *Supra* note 32 at 24.
[39] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* 119 (Oxford University Press, Oxford, 2008). Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investments* 246 (Cambridge University Press, Cambridge, 2015).
[40] Jeswald W. Salacuse, *The law of investment treaties* 244 (Oxford University Press, New York, 2015).
[41] UNCTAD, "Fair and Equitable Treatment: A Sequel, UNCTAD Series on International Investment Agreements II" (2012).

(iv) manifestly abusive treatment, such as coercion, duress and harassment.[42]

The clause includes a footnote which provides that 'For greater certainty, it is clarified that "customary international law" only results from a general and consistent practice of States that they follow from a sense of legal obligation'.[43] Yet, given the evolving nature of customary international law, the attempt to limit arbitral discretion in expanding the interpretation of this standard of investment protection may appear counterproductive in the long run. Also, it is not clear whether the four instances mentioned as violations of customary international law constitute a closed list of prohibited treatment of investments or they are merely examples of what is included in the customary international law standards of treatment of foreign businessmen.[44] The absence of fair and equitable treatment, viewed as 'a catch-all provision capable of sanctioning many legislative, regulatory and administrative actions of the host state' has been welcomed by the Law Commission.[45]

D. Full protection and security

The Model also clarifies the meaning of full protection and security standard of treatment by explicitly limiting the scope of the host state's obligation to the physical security of foreign investors. Article 3.2 of the text stipulates:

> Each Party shall accord in its territory to investments of the other Party and to investors with respect to their investments full protection and security. For greater certainty, "full protection and security" only refers to a Party's obligations relating to physical security of investors and to investments made by the investors of the other Party and not to any other obligation whatsoever.[46]

This is particularly important in the light of several arbitral decisions that expanded the standard to also encompass other types of protection. Some panels stretched the meaning of the provision to also include legal and regulatory security of investors,

[42] *Supra* note 30, art. 30.
[43] *Id.*, footnote 1 to art. 3.2.
[44] Grant Hanessian and Kabir Duggal, "The 2015 Indian Model BIT: Is This Change the World Wishes to See?" 30 *ICSID REVIEW* 729 (2015), 736. *Supra* note 36 at 30.
[45] *Supra* note 32 at 15.
[46] *Supra* note 32, art. 3.2.

reading into the standard investors' right to a stable legal environment in the host state.[47] This trend has been criticised as excessively privileging foreign investors at the expense of countries' regulatory powers.

Thus, the Model's text is a desired move to limit arbitral discretion in the interpretation of full protection and security standard of treatment of investors. It clarifies the scope of investors' rights and preserves the regulatory rights of host states.

E. Expropriation

The Model also contains elaborated rules concerning expropriation. Article 5 prohibits both direct as well as indirect expropriation unless conducted for reasons of public purpose, through due process, and against adequate, i.e., fair market value, compensation.[48] It explains that land-related expropriation measures shall be evaluated from the perspective of public purpose and adequate compensation requirements taking into account the procedures and compensation rules specified in the domestic law.

Referring to indirect expropriation, the Model maintains a substantial deprivation test, providing that it occurs when a measure has an effect equivalent to direct expropriation. Moreover, it requires that the taking has to be 'substantial or permanent' and affect fundamental attributes of property in its investment including the right to use, enjoy, and dispute. In order to determine whether the expropriation took place, the Model prescribes a case-by-case approach taking into account various elements. It requires considering the economic impact of the host state's measure, its duration, and character, i.e., object, context, or intent, as well as possible breaches of state's prior binding commitments. In particular, it specifies that the sole adverse effect on the economic value of the investment does not in itself establish that the expropriation occurred.

Further, the Model preserves a required regulatory space for the host government to enact legislation. Thus, it explicitly provides that non-discriminatory, public

[47] *Técnicas Medioambientales Tecmed, S.A.* v. *The United Mexican States*, ICSID Case No. ARB (AF)/00/2.
[48] *Supra* note 30, art. 5.

interest regulatory measures do not amount to expropriation. Article 5.5 stipulates that 'non-discriminatory regulatory measures by a Party or measures or awards by judicial bodies of a Party that are designed and applied to protect legitimate public interest or public purpose objectives such as public health, safety and the environment shall not constitute expropriation'.[49] Moreover, it specifies that the measures which are taken by the State in its commercial capacity do not amount to expropriation. Thus, it generally excludes from the expropriation claims actions of state-owned enterprises, such as a breach of a contract concluded with an investor.

F. Investors' obligations

Another innovative element of India's new Model treaty is the chapter on investors' obligations. It regulates the conduct of the foreign investors in the host country.

Article 11 obliges investors to comply with the domestic laws, regulations, policies concerning the establishment, acquisition, management, operation, and disposition of investments. In particular, it explicitly provides that the investors must comply with the taxation laws, including 'timely payment of their tax liabilities'.[50] It also includes a separate provision, which prohibits the investors from paying bribes to public servants.[51] The Model also encourages investors to voluntarily adopt corporate social responsibility standards on issues relating to labour, environment, human rights, community relations, and anti-corruption.[52]

Although this chapter constitutes an interesting innovation, its legal value remains questionable. Firstly, the approved Model dropped the proposition put forth in the initial draft regarding the host state's right to initiate a counterclaim against an investor for a breach of its obligations during the arbitral proceedings. Secondly, the requirement to comply with domestic laws is already included in the Article 1.4 of the Model, which requires that investment is constituted, organised, and operated in accordance with the laws in the host country. In addition, the Law Commission in its Report indicated that the non-corruption obligation is 'toothless without

[49] *Supra* note 30, art. 5.5.
[50] *Id.*, art. 11(iii).
[51] *Id.*, art. 11(ii).
[52] *Id.*, art. 12.

complementary obligations upon the Host State, such as the requirement of transparency and competition in public procurement and decision-making'.[53]

G. Exceptions

Apart from clarifying the meaning of investors' standards of treatment, India's Model BIT excludes a variety of governmental measures from the scope of the agreement. It guarantees flexibility to a host state to regulate in the public interest without incurring liability under the investment treaty. The general exception clause contains an elaborated list of economic, social, and environmental exceptions intended to ensure governments' right to pursue public welfare objectives.[54] The general exception clause further requires that the measures taken in pursuit of one of the justifiable objectives need to be non-discriminatory, of general applicability, and necessary. Footnote 6 of the Model specifies that in assessing the necessity of a measure, it must be taken into account 'whether there was no less restrictive alternative measure reasonably available'.[55]

It also provides that no treaty obligations preclude a state from taking measures to protect its essential security interests. The Model introduced a self-judging nature of the security exceptions which refers to both measures taken to preserve national and international security. It states that an investment treaty cannot be interpreted to require a state to furnish any information which it considers contrary to its security, neither a treaty can prevent a state from taking any action necessary for its essential security interests or any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.[56] Consequently, any measure adopted by the host state for the protection of its 'essential security interests', including the country's decision that a measure constitutes a security measure, is exempted from any judicial review.[57] The self-judging nature of this provision appears to constitute a reaction to the Antrix-Devas dispute, where India's argument that revocation of the contract was essential for the

[53] *Supra* note 32 at 30.
[54] *Supra* note 30, art. 32.
[55] *Supra* note 6.
[56] *Id.*, art. 33.1.
[57] *Id.*, annex 1.

national security was rejected by the arbitration tribunal. Such non-justiciable exceptions, although increase the regulatory powers, also creates the risk of abusive interpretation and misuse by the governments.

H. Carve-outs

Finally, the Model provides that certain measures, including taxation, government procurement, measures taken by local government, and compulsory licenses to a certain extent, remain out of the ambit of the BIT and the arbitration tribunals.[58]

The exclusion of government procurements was criticised by the Law Commission. In its report, it pointed out that various foreign investors are engaged in the infrastructure projects conducted in India, which greatly contribute to the development of the country. It stressed that eliminating legal projection in such an important area of business activities can lead to the exodus of foreign investors from this field in the future.[59]

Furthermore, the Model stipulates that the laws and decisions related to taxation are non-justiciable. Consequently, if a host state argues that a contested measure constitutes a taxation-related measure, the investment tribunal will not be able to review such a decision. This carve-out constitutes a clear response to the pending arbitration cases filed by foreign investors in response to the retroactive amendment of the Income Tax Law. It also goes against the jurisprudence of investment tribunals which established that, in extraordinary circumstances, the host government's actions taken under the guise of taxation may actually amount to indirect expropriation.[60]

I. Dispute resolution mechanism

Despite substantial criticism of investor–state arbitration in India, the Model maintains it as the mechanism for settlement of disputes. Yet, in order to address some of the concerns, it introduces various conditions that make it difficult for an investor to initiate the lawsuit.

---

[58] *Id.*, art. 2.4.
[59] *Supra* note 32 at 13.
[60] *Yukos Universal Limited (Isle of Man)* v. *The Russian Federation*, PCA Case No. 2005-04/AA227.

Most importantly, it requires the foreign investors to exhaust domestic remedies before taking recourse to international arbitration. An investor is obliged to pursue local remedies for at least five years before the commencement of ISDS proceedings. Given India's infamous backlog of cases in the judicial system,[61] which is reflected by a poor score in the World Bank's ease of enforcement of contracts ranking,[62] such a requirement will almost certainly be difficult to swallow for foreign businesses.

Ensuring transparency of arbitration procedure, it provides that written submissions, tribunal orders as well as hearings will be accessible to the public. It permits third parties to submit interventions – *amicus curiae*. The abovementioned rules are particularly relevant in cases where a tribunal adjudicates upon issues of public concern, allowing civil society to voice their concerns.

The Model explicitly bars from pursuing claims against the State, investors involved in corruption, although it does not specify what is required to prove corruption, and also includes rules for early dismissal of frivolous claims.

In reference to the award of monetary compensation, it explicitly provides that the damages cannot be higher than the loss suffered by the investor, reduced by any prior damages or compensation already provided by a host state. The tribunal cannot award punitive or moral damages or injunctive relief against any party.

Interestingly, the Model includes a provision stipulating that in the future the parties to the BIT can develop an appellate mechanism to review awards rendered by the tribunals. It provides that it may take the form of an institutional mechanism which would provide coherence to the interpretation of the treaty provisions. The text also suggests that such an instrument could be established under a separate multilateral agreement.[63]

---

[61] Victor Mallet, "India's top judge Thakur pleads for help with avalanche of cases" *Financial Times*, Apr. 25, 2016.
[62] Doing business – India, (2017) World Bank, *available at*: https://www.doingbusiness.org/en/data/exploreeconomies/india#DB_ec (last visited on May 10, 2019).
[63] *Supra* note 30, footnote 5.

V. CONCLUSION

The Model text constitutes a clear reaction to India's first lost dispute and several pending cases in the investment arbitration. By narrowing the scope of protected foreign investments and standards of treatment, including fair and equitable treatment and protection against expropriation, eliminating the MFN clause, expanding the list of exceptions, and adding additional hurdles for investors to launch an ISDS case, the Model BIT differs significantly from the old-generation agreements.

The primary objective of the new text is to ensure sufficient regulatory space and shield the government from future investors' claims. Despite numerous creative innovations of the new Model text, which constitutes an important step towards a much-required reform of the current investment regime, its practical implications remain questionable. Following its adoption, the Finance Ministry served notices to over 50 countries, including 20 European states, informing them about the government's intention to terminate their existing BITs and re-negotiate new ones on the basis of the approved Model.[64] Despite survival clauses in the terminated agreements, in the absence of the new treaties, any new investments will no longer be protected under international investment law.

Moreover, it is not clear as to what extent India will be able to incorporate the provisions of the Model BIT into investment agreements with other countries. The Model BIT quite significantly departs from the treaty practice of India's major trading partners, i.e., the USA, Canada, and the European Union ('EU').[65] Depending on the level of flexibility that India will exercise during the negotiations of future investment treaties, it appears likely that due to these disparities, other countries may prefer to refrain from concluding any agreement, rather than entering into a treaty that lowers the level of investment protection. Although it appears that the latest BITs concluded by India with Cambodia,[66] Belarus,[67] Taiwan,[68] and Kyrgyz Republic,[69] complies with

[64] Prabhash Ranjan and Pushkar Anand, "More than a BIT of protectionism" *The Hindu*, Dec. 14, 2016.
[65] Following the changes introduced by the Lisbon Treaty, protection of foreign investments falls under the exclusive EU competence. Consequently, the old BITs concluded by India with the individual EU Member States will have to be substituted by a new investment agreement negotiated with the EU.
[66] Press Information Bureau, "Cabinet approves Bilateral Investment Treaty between India and Cambodia to boost investment", *Press Information Bureau*, July 27, 2016, MANU/PIBU/0586/2016.

the new Model, there has been a stalemate in the negotiations of investment treaties with other countries.

Moreover, the Model text was clearly drafted with the objective of securing the rights of the government vis-à-vis foreign investors; however, India is no longer solely a capital-importing country. In recent years, it has become an important exporter of capital, with the stock of its investment outflow amounting to almost half its inward FDI. India's outward stocks accounted for over USD 144 billion in 2015.[70] Moreover, in the 2018-19 Budget speech, the Finance Minister announced that the government is preparing an Outward Direct Investment Policy to simplify transnational operations of Indian firms.[71] Indian investors abroad are also increasingly referring to the ISDS mechanism against other countries.[72] So far, only one dispute has been concluded with the award publicly available - *Flemingo* v. *Poland*.[73] In this case, an Indian investor successfully invoked the BIT against a host state for the first time. The tribunal found that the Polish state-owned entity infringed the fair and equitable treatment clause and was responsible for the indirect expropriation of the claimant by unduly terminating lease agreements of a retail company with the majority stake held by the foreign investor. Another case was initiated by the India Metals & Ferro Alloys ('IMFA') against Indonesia.[74] The mining company acquired a concession to develop a coal mine in Central Kalimantan, Indonesia, for over USD 8.7 million in 2010. However, following Indonesia's decentralisation reform, which provided local administration with powers to issue permits for mining activities in their jurisdictions, it turned out that the Central authorities had been granting overlapping mining concessions in the same areas. As a result of conflicting licences, IMFA argued that it was unable to pursue its mining operations. Relying on the provisions of the India-

[67] Treaty Between the Republic of Belarus and The Republic of India on Investments, *available at*: https://dea.gov.in/sites/default/files/BIT%20with%20Belarus.pdf (last visited on May 10, 2019).
[68] Bilateral Investment Agreement Between India Taipei Association in Taipei and Taipei Economic and Cultural Center in India, (2018) *available at*: https://dea.gov.in/sites/default/files/BIA%20between%20ITA%20and%20TECC.pdf.
[69] ANI, "India and Kyrgyzstan ink 15 agreements" *Business Standard*, 14 June 2019, *available at*: https://www.business-standard.com/article/news-ani/india-and-kyrgyzstan-ink-15-agreements-119061401297_1.html.
[70] *Supra* note 5.
[71] Arun S., "Easier norms may help Indian firms go global" *The Hindu*, Feb. 4, 2018.
[72] *Supra* note 11.
[73] *Flemingo DutyFree Shop Private Limited* v. *the Republic of Poland*, PCA Case No. 2014-11.
[74] *Indian Metals & Ferro Alloys Ltd* v. *Republic of Indonesia*, PCA Case No. 2015-40.

Indonesia investment protection agreement concluded in 1999, IMFA demanded almost USD 560 million as compensation from Indonesia. Despite India's outward FDI flow being projected to accelerate in the future, it seems that the interests of Indian investors abroad are not duly reflected in the approved text of the Model IIA.

Simultaneously with the reform of the BIT regime, the Government of India has been progressively liberalising its internal FDI Policy by opening new sectors to foreign presence. It appears that the Government does not consider BITs to have a predominant role in attracting investors; rather it prefers to offer incentives to foreign companies through domestic legislation. This gives the authorities more flexibility to regulate or unilaterally withdraw any measures without the risk of international litigation. Moreover, in the short term, foreign investors are expected to take into account India's spectacular economic growth and increasing domestic consumption capacity when making decisions to locate their operations in India. These positive economic indicators give India an advantageous position to decide on the conditions under which foreign investors can enter the market.

THE EMPTY COURT: A QUANTITATIVE ANALYSIS OF VACANCIES IN THE SUPREME COURT OF INDIA

*Rahul Hemrajani**

I. INTRODUCTION

Judicial pendency is one of the most crippling problems that the Indian legal system faces today. Official sources estimate that more than 37 million cases are pending in all courts in India.[1] The Supreme Court of India (SCI) is itself heavily burdened by this problem, recording a pendency of more than 50,000 cases, many of them more than five-years old.[2] Many Chief Justices of India have expressed their concern about the increasing pendency in courts, with one stating that 'it brings a lot of disrepute to the judicial system'.[3]

Several judicial committees and law commission reports have been dedicated to address the problem of judicial pendency.[4] The problem of pendency has also received a fair share of scholarly attention, with recent focus being on the use of

* Ph.D. Student at the University of South Carolina, USA. He can be reached at rahulh@email.sc.edu. The author would like to thank Gauri Balagopal, Tanvi Raina and Sanjitha Umapthy for their assistance with data collection and tabulation. The author would also like to thank the two anonymous peer reviewers for their helpful comments.

[1] National Judicial Data Grid, *available at:* https://njdg.ecourts.gov.in/njdgnew/index.php (last visited on Jan. 18, 2021).

[2] Supreme Court of India – Monthly Pending Cases as on 01.01.2021, *available at*: https://main.sci.gov.in/statistics (last visited on Jan. 18, 2021).

[3] PTI, "Pendency of cases bring disrepute to system, says Justice Ranjan Gogoi" *The Economic Times*, Sep. 30, 2018, *available at*: https://economictimes.indiatimes.com/articleshow/66016711.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (last visited on Jan. 8, 2019); Legal Correspondent, "Disposed of over 83,000 cases in 2014: CJI Dattu" *The Hindu*, Nov. 27, 2015, *available at*: https://www.thehindu.com/news/national/disposed-of-over-83000-cases-in-2014-cji-dattu/article7920028.ece (last visited on Jan. 8, 2019).

[4] See for e.g., Law Commission of India, "14th Report on 'Reform of Judicial Administration" (1958); Law Commission of India, "77th Report on Delay & Arrears in Trial Courts" (1978); Law Commission of India, "79th Report on Delay and Arrears in High Courts and other Appellate Courts" (1979); Law Commission of India, "245th Report on Arrears and Backlog: Creating Additional Judicial (wo) manpower" (2014); High Courts Arrears Committee, "Report of The Arrears Committee" (1990); Department Related Parliamentary Standing Committee on Home Affairs, "85th Report on Law's Delays: Arrears in Courts" (2002).

quantitative methods to understand the court's workload.[5] Several reasons have been posited for case arrears- including excessive appeals, multiple adjournments and complicated legislation.[6] Many have come to the conclusion that a major reason for continued pendency, inter alia, is that judicial vacancies are not filled expeditiously.[7] With seats on the bench lying vacant, courts are not able to utilise their full capacity to hear and dispose of cases. The SCI has, recognising this link, come down heavily on the authorities for not filling the vacancies in the subordinate judiciary.[8]

This paper, using appointment and retirement data from the SCI, shows that in the past few years, on an average, the SCI itself has had more vacancies than in any other comparable period in history. Further, using published minutes of collegium meetings as well as department of justice appointment orders, the paper shows that the SCI itself is partly to be blamed for the delay in judicial appointments. Based on this, the paper argues that the current 'collegium system' of judicial appointments is flawed and suggest reforms to expedite the appointment process, which in turn would lead to increased judicial capacity to deal with case arrears.

This paper runs as follows. Part II briefly describes the 'collegium system' of appointments to the Supreme Court of India and literature surrounding judicial appointments in India. Part III deals with the methods used in the paper including a

---

[5] See for e.g. Rajeev Dhawan, *The Supreme Court under Strain: The Challenge of Arrears* (ILI, 1978); Rajeev Dhawan, *Litigation Explosion in India* (ILI, New Delhi, 1986); Upendra Baxi, *The Crisis of the Indian Legal System. Alternatives in Development: Law* (Stranger Journalism, 1982); K.L. Bhatia, G. Singh, and J. Singh, "Delay: A riddle wrapped in a Mystery inside an Enigma" 37 *JILI*1 42-72 (1995); V.K. Gupta, *Decision Making in the Supreme Court of India: A Jurimetric Study* (Kaveri Books, 1995); K.G. Balakrishnan, "Judiciary in India: Problems and Prospects" 50 *JILI* 4 (2008); N. Robinson, "A quantitative analysis of the Indian Supreme Court's workload" 10 *Journal of Empirical Legal Studies* 570-601 (2013); N. Rehn, A. Naik, et al. *Justice Without Delay: Recommendations for Legal and Institutional Reforms in the Indian Courts*. Jindal Global Legal Research Paper No. 4/2011, *available at*: https://ssrn.com/abstract=1679350 (last visited on Jan. 8, 2019); Vidhi Centre for Legal Policy, *Towards an Efficient and Effective Supreme Court* (2016); R. Hemrajani, A. Himanshu, "A temporal analysis of the Supreme Court of India's workload" *Indian Law Review*, 3:2, 125-158 (2019).

[6] N. Rehn, A. Naik, et al. *Justice Without Delay: Recommendations for Legal and Institutional Reforms in the Indian Courts*, Jindal Global Legal Research Paper No. 4/2011, *available at:* https://ssrn.com/abstract=1679350 (last visited on Jan. 8, 2019).

[7] See, for e.g., Law Commission of India, "121st Report on A New Forum for Judicial Appointments" (1987); Law Commission of India, "125th Report on The Supreme Court – A Fresh Look" (1988); Law Commission of India, "127th Report on Resource allocation for infrastructural services in judicial administration" (1988); Law Commission of India, "230th Report on Reforms in the Judiciary – Some Suggestions" (2009).

[8] P. Thakur, "Vacancies in lower courts at all-time high" *The Times of India*, Jan., 1, 2018, *available at*: https://timesofindia.indiatimes.com/india/vacancies-in-lower-courts-at-all-time-high/articleshow/62320296.cms (last visited on Jan. 8, 2019).

description of the dataset it will be using. Part IV examines the historical data regarding vacancies in the SCI and shows that while the court has almost never functioned at full strength, recent trends point to a larger problem. It also examines data regarding delay in appointments in the SCI, and again points to the particularly slow pace of appointments in recent years. Part V explains the possible effects of the delay in filling vacancies on court pendency. Part VI, using collegium meeting data, deals with possible reasons for the delay in appointments and argues that it is attributable, in part, to the collegium process. Lastly, in Part VII, the paper concludes with recommendations for improving the judicial appointment process of the SCI, in order to better address its increasing case docket.

II. VACANCIES AND APPOINTMENTS IN THE SUPREME COURT OF INDIA

The SCI's predecessor, the Federal Court, had a sanctioned strength of 7 judges including the Chief Justice, although not more than 3 were appointed at any given time before independence.[9] Article 121 of the Indian Constitution increased this sanctioned strength to 8 for the SCI of independent India.[10] Further, it gave the legislature power to increase the sanctioned strength of the SCI as and when required. Accordingly, the sanctioned strength of the SCI has been increased 5 times since the commencement of the Constitution—to 11 in 1956, 14 in 1960, 18 in 1977, 26 in 1986, 31 in 2009 and 34 in 2019.[11] The SCI can thus currently accommodate the Chief Justice of India and 33 puisne judges, who then sit in smaller panels to decide cases.

The Constitution of India specifies that the SCI judges must be appointed by the president after consultation with judges of the SCI or the High Court, as deemed

[9] G.H. Gadbois, "The Federal Court of India: 1937-1950" 6 *JILI* 2/3 253-315, 254 (1964).
[10] The Constitution of India, art. 121.
[11] The parliamentary acts which made these increases are in seriatim: The Supreme Court (Number of Judges) Act, 1956 (Act 55/1956); Supreme Court (Number of Judges) Amendment Act, 1960 (Act 17/1960); Supreme Court (Number of Judges) Amendment Act, 1977 (Act 48/1974); Supreme Court (Number of Judges) Amendment Act, 1986 (Act 22/1986); Supreme Court (Number of Judges) Amendment Act, 2008 (Act 11/2009); Supreme Court (Number of Judges) Amendment Act, 2019 (Act 37/2019).

necessary.[12] However, in case of appointment of a puisne judge of the SCI, the constitution under Article 124(2) mandates that the Chief Justice of India shall always be consulted. The scope and extent of such consultation has been the subject of significant controversy.[13] Till 1993, as per judicial interpretation, the Union executive branch had a dominant role in appointments, and the Chief Justice's opinion was not binding.[14] In 1993, SCI in *S.P. Gupta* v. *Union of India*[15] (Second Judges Case) held that the 'consultation' had to be substantive and a judge could only be appointed to the Supreme Court with the concurrence of the Chief Justice of India. It further held that in case of a dispute, the Chief Justice of India will have primacy over judicial appointments. Subsequent judgements have now clarified that while coming to a decision about appointments in the SCI, the Chief Justice of India must consult the four senior-most puisne judges in the SCI.[16] Thus, appointments to SCI can be roughly divided into two periods. The 'pre-collegium period', where judges were appointed by the government of the day, and the 'post-collegium period', where judges are appointed by a 'collegium' of the Chief Justice of India and the four senior-most puisne judges of the SCI.

The Memorandum of Procedure (MOP) is the official document of the Department of Justice that lays down the current procedure for the appointment of SCI judges in the post-collegium period.[17] Whenever a vacancy arises in the SCI, the collegium recommends a potential SCI nominee to the law minister. The Union Law Minister will then put up the recommendation to the Prime Minister, who will advise the President to appoint the nominee as a judge. The union law minister can also return the recommendation to the Chief Justice along with reasons for reconsideration. If

[12] *Supra* note 10, art. 124(2).
[13] See for e.g. Lord Cooke of Thorndon, "Where Angels Fear to Tread", in B. N. Kirpal (ed.) *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press, 2004); Upendra Baxi, "The Myth and Reality of Judicial Independence: The Judges Case and All That" in Upendra Baxi, *Courage, craft, and contention: the Indian Supreme Court in the eighties* (NM Tripathi, 1985); A. Datar, "Judicial Appointments: The Indian Perspective. Conference on 'Judicial Reform: Function, Appointment and Structure (2003). P.B. Mehta, "India's Unlikely Democracy: Rise of Judicial Sovereignty" 2 *Journal of Democracy* 70 (2007).
[14] *S.P. Gupta* v. *Union of India,* AIR 1982 SC 149; See also, J. Cottrell, "The Indian Judges' Transfer Case" 33 *ICLQ* 1032 (1984).
[15] *Supreme Court Advocates-on- Record Association* v. *Union of India* (1993) 4 *SCC* 441.
[16] *Special Reference No.1 of 1998*, 1998 (7) SCC 739.
[17] Department of Justice, "The Memorandum Showing the Procedure for Appointment of The Chief Justice of India and Judges of The Supreme Court of India" *available at*: http://doj.gov.in/sites/default/files/memohc_0.pdf (last visited on Jan. 8, 2019).

the collegium recommends the same nominee again, it is incumbent upon the government to appoint them.

Constitutionally, any citizen of India under the age of 65 who has either been a judge of a High Court for five years, an advocate for ten years, or a 'distinguished jurist' can be appointed as a judge of the SC. In practice, however the court has usually appointed Chief Justices of High Courts, though in rare cases a few senior advocates and senior High Court judges have been appointed to the court.[18] While there is no fixed term limits for the judges, the tenure of an appointed Judge ends at the age of 65, when they retire. A vacancy in the SCI may thus be due to the death, retirement, resignation or impeachment of a sitting judge.[19]

Studies on the appointment procedure for judges to the SCI have been rare. Existing work mostly describes and comments on the constitutional controversy behind judicial appointments in India or focuses on the lack of transparency in judicial appointments.[20] Until recently, there was no information on potential candidates, and therefore no method to study the criteria for appointment or nature of collegium consultations for appointment as an SCI Judge. George Gadbois, through extensive interviews with judges and their families, was the first person to be able to construct short biographies of Judges in the SCI from 1950-1989 and build a portrait of an average judge in the SCI.[21] Gadbois showed that while the official criteria for the appointment of SCI judges was broad, the average SCI judge was likely to be selected based on region, experience, and socio-economic characteristics.

Expanding Gadbois' study to judges appointed till 2013, Dr. Abhinav Chandrachud was also able to map the informal factors which affect and lead to the appointment of judges.[22] Dr. Chandrachud argued that the most important criteria for appointment as an SCI judge was experience as a High Court Chief Justice as well as at their parent

---

[18] Abhinav Chandrachud, *The Informal Constitution: Unwritten Criteria in Selecting Judges for the Supreme Court of India* (Oxford University Press, 2020).
[19] *Supra* note 10, art. 124.
[20] See for example S. Paul, *Choosing Hammurabi-debates On Judicial Appointments* (LexisNexis, 2013); See also, M. Mate, "The Rise of Judicial Governance in the Supreme Court of India" *BU Int'l LJ33*, 169 (2015).
[21] G.H. Gadbois, *Judges of the Supreme Court of India: 1950–1989* (Oxford University Press, 2011); See also, G.H. Gadbois, "Indian Supreme Court Judges: A Portrait" *Law and Society Review*, 317-336 (1968).
[22] *Supra* note 18.

high court. In a recent article, Chandra, Hubbard and Kalantry show that the advent of the collegium system led to a very little change in the biographical characteristics of judges appointed to the SCI. The only significant change is that post-collegium SCI judges are more likely to be from private practice and spend more time as high court judges than judges appointed before the advent of the collegium system.

The rest of the literature on judicial appointments is largely focused on alternatives to the collegium system. Many have critiqued the collegium system, arguing that it gives absolute powers to the judiciary, and leads to a SCI which is non-accountable.[23] The government too has tried to change the appointment procedure through constitutional amendment, giving the power of judicial appointments in the higher judiciary to the National Judicial Appointments Commission (NJAC), which would have had both, judges of the Supreme Court as well as members from the executive.[24] The amendment was however declared unconstitutional in *Supreme Court Advocates-on-Record Assn.* v. *Union of India* (NJAC case), and appointments continue to be made through the collegium system.[25]

One question which has escaped academic scrutiny then is the timing of appointments and whether the collegium system has been efficient in filling judicial vacancies. The right to speedy justice is, by the SCI's own account, a fundamental right.[26] The court has also recognised that non-appointment of judges hampers this right. As the court held in *Malik Mazhar Sultan* v. *U.P. Public Service Commission* in the context of appointment of district court judges:

> It has been noticed that an independent and efficient judicial system is one of the basic structure of our Constitution. If sufficient number of Judges are not appointed, justice would not be available to the people thereby undermining the basic structure. The judicial system has been facing the problem arising

[23] A. Sengupta, (ed.) *Appointment of Judges to the Supreme Court of India: Transparency, Accountability, and Independence* (Oxford University Press, 2017); D. Kadri, *Judicial Appointments Mechanism in India and Independence of Judiciary-a Critical Analysis*, (2017).; A. Deep, S. Mishra, "Judicial Appointments In India and The Njac Judgement: Formal Victory Or Real Defeat" 3 *Jamia Law Journal* 49-76 (2018); I. Jaising, "National Judicial Appointments Commission – A Critique", 49 *EPW* 6 (2014).

[24]The National Judicial Appointments Commission Act, 2014. For more details on the controversy, see Deep and Mishra (2018).

[25] *Supreme Court Advocates-on-Record Assn.* v. *Union of India* (2016) 5 *SCC* 1.

[26] *Imtiyaz Ahmad* v. *State of U.P.* (2012) 2 SCC 688; See also, *Anita Kushwaha* v. *Pushap Sudan*, (2016) 8 SCC 509.

> out of delay in dispensation of justice for which one of the major causes is insufficient number of Judges when compared to either the large number of cases pending or in relation to the average Judge-population ratio going by the number of Judges available in various other democracies in the world. In this light, it becomes all the more necessary to take all possible steps to ensure that vacancies in the courts are timely filled.[27]

Despite this push for appointment of lower-court judges, however, the SCI has been slow to respond to similar vacancies in constitutional courts. For instance, four years after the NJAC case, a new MOP for the appointment of judges has still not been finalised by the SCI. In fact, an order of the division bench of the SCI to speed up the process of amending the MOP for appointments was 'recalled' by a three judge bench led by Chief Justice Deepak Misra.[28]

One impediment in the push for reform has been the lack of data on vacancies and appointments in the constitutional courts. Factors such as the number of appointments made by the court every year, the time taken to fill judicial vacancies and the effect these vacancies have on the pendency docket are important to evaluate the efficacy of any appointment system. In the following sections, we attempt to present this data in the context of the SCI.

III. METHODS OF INVESTIGATION

To analyse vacancies in the SCI, we use a dataset called the Supreme Court Biographies Dataset (SCBD). The SCI website contains information about all current and former judges of the Supreme Court including their date of swearing in and their date of retirement. These attributes of judges were hand-coded into the SCDB.[29] For

[27] *Malik Mazhar Sultan (3)* v. *U.P. Public Service Commission* (2008) 17 SCC 703.
[28] *Krishnakant Tamrakar* v. *State of M.P.* (2018) 17 SCC 27.
[29] The dataset has the following columns: S.No, Name, Sex, Bar, Bar State, Lower Court Judge, High Court Judge, High Court Judge List, Federal Court Judge, High Court Chief High Court, Chief List, Highest Degree, Place of Education, Educational Institute, Year of entering practice, Year of entering District Court, Number of Years at Lower Courts, Year of Appointment into HC, Date(s) of Appointment into HC as Additional Judge, Date(s) of Appointment into HC as Permanent Judge, Date(s) of Appointment as HC Chief, Year of Appointment as HC Chief, Year Appointed as SC Judge, SC Date of Swearing-in, Date of Retirement/Death/Resignation, Date of Appointment as Chief Justice of India, Economic Background, Religion, Caste, Place of Birth, Date of Birth, Government Advocate/ Officer? Prime Minister when Appointed, Political Party When Appointed and Chief Justice when appointed.

the purpose of this paper, two columns namely seat number and delay in filling the seat were added for each judge. Each newly appointed judge was assigned a seat number on the SCI depending on their seniority. Therefore, the first Chief Justice of the SCI, Chief Justice Kania, was assigned seat number 1, the second judge appointed to the SCI, Justice Syed Fazl Ali, was assigned seat number 2 and so on till we reached the sanctioned capacity of the SCI. If any judge sitting on a seat retired, the next judge appointed to the SCI was assigned that seat. If there was more than one seat vacant at the time, then the newly appointed judge was assigned the seat which became vacant earlier. The time taken to fill a vacancy is the number of days between the date of retirement of the judge that vacated the seat and the date of swearing-in of the judge who was appointed to that seat. If the judge is appointed to a newly created seat, the time taken to fill a vacancy is the number of days between the date that seat was created and the date of swearing-in of the judge who was appointed to that seat.

It is important to mention that this pigeon-hole method is purely notional and the seat number has no informative value. In fact, in recent times, there has been a notion of a Muslim seat, the Scheduled Caste seat and the woman seat in the SCI. While there are no formal quotas for these groups on the SCI, the SCI in recent times has inevitably had a woman, a Scheduled Caste and a Muslim judge on the bench. Regional representation of High Courts has also been important, and the court usually has at least one judge from the Allahabad, Bombay, Delhi, Madras and Calcutta High courts. Informal interviews with collegium members have revealed that the court indeed tries to have one person from these groups on the bench.[30] For example, when one-woman judge retires, usually another is appointed to take her place. The model used in this paper however does not track these reserved seats.

In another table in the SCBD, we also map out each day from 26th January 1950, when the SCI was inaugurated till 30th April 2020, the end of our study period. For each day, drawing from the SCDB we add as a column 'the number of sitting judges'. This is the count the number of filled seats on that given date. Also, from public data, we add for each date columns for the total sanctioned strength, the prime minister,

[30] Abhinav Chandrachud, *Supreme Whispers: Conversations with Judges of the Supreme Court of India 1980-89* (Penguin Random House India Private Limited, 2018).

the ruling party in the Central Government and the Chief Justice on that date. Finally, we add a column for number of vacancies, which is the difference between total sanctioned strength and number of filled seats.

At least until October 2017, we can only map the consolidated delay in appointment of judges. Since no public data was available before this, we do not know how much time was taken in each part of the appointment process. The process of confirmation of a judge was remarkably opaque both in the pre-collegium as well as the post-collegium era. We do not have data, for example, for when a particular person was first considered for the SCI or when their name had been recommended to the government. This means that while we can map overall time taken to fill each vacancy in the SCI, we do not know which part of the process took the most time.

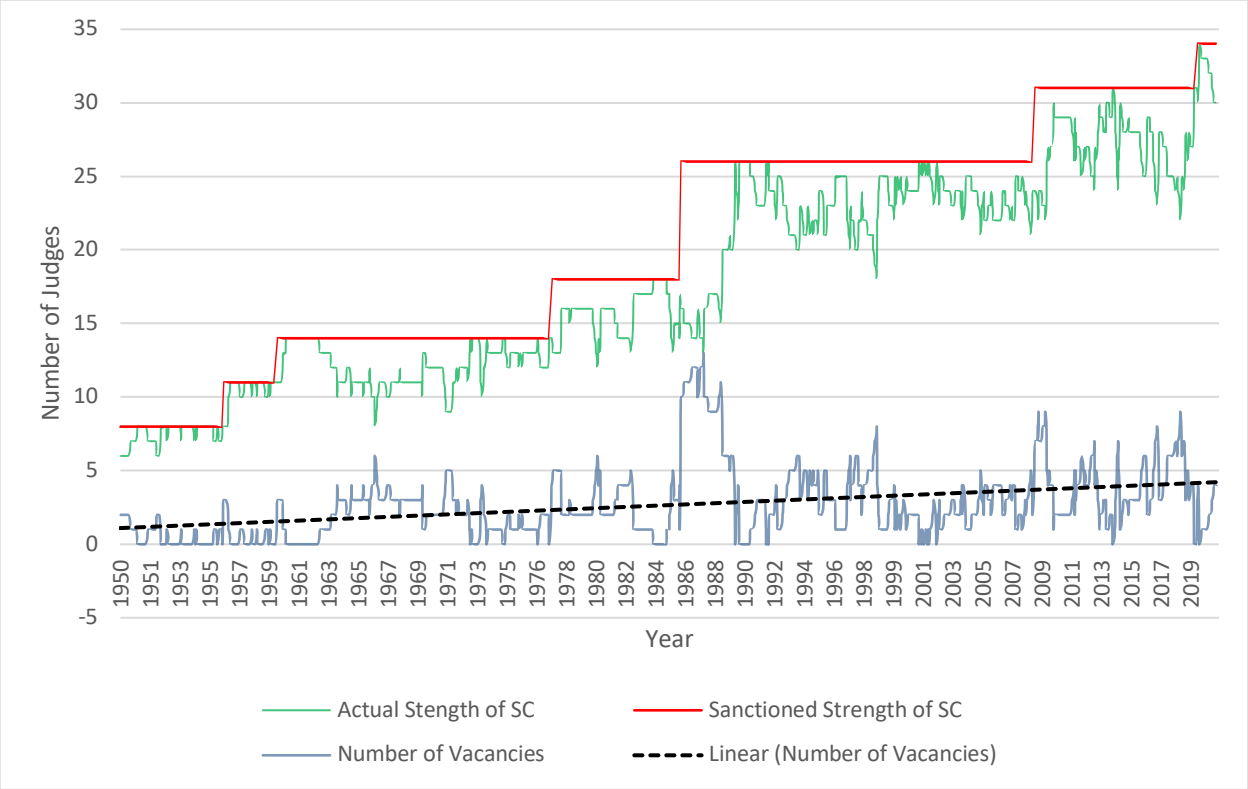
On 3rd October 2017, the Supreme Court Collegium for the first time resolved to put up its minutes on the SCI website. Since then, the SCI website has uploaded the recommendations of all nominees who were recommended to the government for appointment to the SCI. The recommendations contain little substantive information about the criteria for appointment but do tell us a little bit about the timeline of appointments. Through these resolutions, we add two more columns to the SCBD for each appointment after October 2017, one a column for the date of first consideration by collegium and another for the date of recommendation of the person's name to the government.

IV. AN ANALYSIS OF VACANCIES IN THE SUPREME COURT OF INDIA

As Figure 1 shows, throughout its history, the SCI has rarely worked at full strength. In fact, it has functioned on full capacity for only 17.5% of its existence, with only 338 days of these coming in the post-collegium period. Two further trends are clear from the figure. First, there is always a lag in filling vacancies after an increase in sanctioned strength. This was particularly the case in both 1977 and 1986, when the newly created vacancies remained unfilled for more than a year. Barring the vacancies brought about due to an increase in sanctioned strength, where there is this

lag, the SCI functions with, on an average, 2.2 vacancies and at 87% of its sanctioned strength.

Figure 1: Average Number of Vacancies in the SCI from 1950 till 2020



Source: Supreme Court Biographies Dataset (2020)

Second, the trend line demonstrates that the average number of vacancies has been steadily increasing and has been particularly high in recent years. Table 1 shows the average number of vacancies in the SCI disaggregated by period. The period before the judiciary got involved in appointments has the least average number of vacancies.[31] Vacancies in the period after the controversial NJAC case, where the SCI invalidated the attempt of the executive to get more control on judicial appointments, have been particularly high in both absolute as well as percentage terms.

[31] The data from the First Judges case (1982-1993) is skewed because the SCI had its largest increase in sanctioned strength in 1986.

Table 1: Average Number of Vacancies by Period

Period	*Average Number of Vacancies*	*Vacancies as Percentage of Sanctioned Strength*
Pre-Collegium (1950-1993)	2.29	13.05
Post-Collegium (1993-2020)	3.24	11.38
Pre-Judges Case (1950-1982)	1.56	11.34
First Judges Case (1982-1993)	4.24	17.64
Second Judges Case (1993-1999)	3.72	14.33
Third Judges Case (1999 - 2015)	2.84	10.04
NJAC Case (2015 - 2020)	4.03	12.86
Total	2.2	12.7

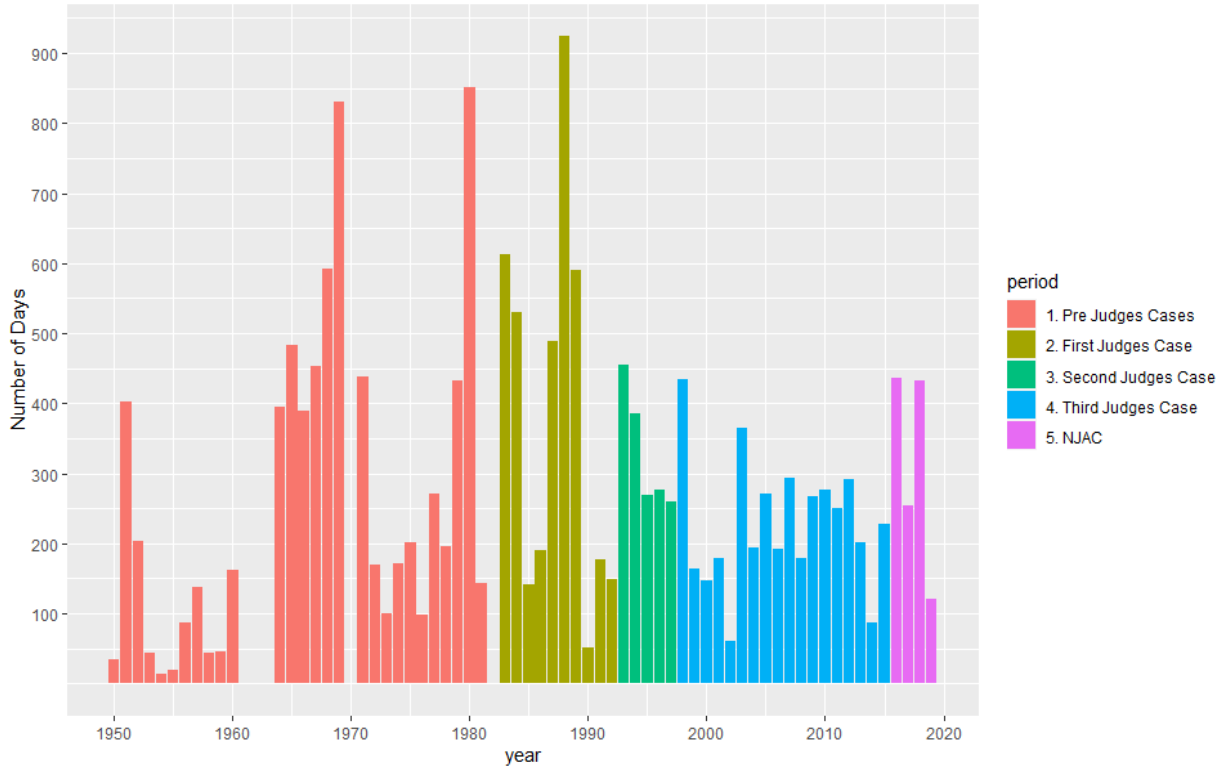
Source: Supreme Court Biographies Dataset (2020)

The years since the passing of the National Judicial Appointment Commissions (NJAC) Act and decision of the SCI holding the Act unconstitutional (2015-2020) have also been some of the worst in recent history in terms of number judicial appointments. Despite the increase in sanctioned capacity, there have been only 28 appointments to the SCI in the last five years compared to 30 appointments in the five years preceding the NJAC case(2010-2015). Before 2015 and since the increase in sanctioned strength in 2008, the court saw an average of 5.9 appointments per year. There were no appointments made to the SCI while the constitutionality of the NJAC was being heard. Thus, 2015 saw only one appointment. The years 2016-2018 saw 18 appointments against vacancies created by 20 judges who left the SCI during this period. There was thus, for the first time since 2005, a net loss of judges in the SCI. There was however some recovery in 2019, with the appointment of 10 new SCI judges.

In the collegium system, the process of filling a vacancy begins when the Chief Justice calls for a collegium meeting and discusses possible candidates. In this process, the time-taken for the short listing of candidates should be minimal. While the court can recommend the appointment of practicing advocates and eminent jurists to the SC, this seldom happens in practice. Ordinarily, the choice is limited to

the Chief Justices and other senior judges of various High Courts.[32] The collegium consultation itself does not seem to take too much time. The decision to propose the names of Justice Indu Malhotra and Justice K.M. Joseph, for example, was made in just one meeting.[33] Nonetheless, on average, it has taken 274 days for any given SCI vacancy till now to be filled. Again, appointments after the NJAC judgement have been particularly delayed, with an average of 285 days between vacancy and appointment (Figure 2).[34]

Figure 2: Average Number of Days required in filling any given SCI Vacancy (1950-2020)



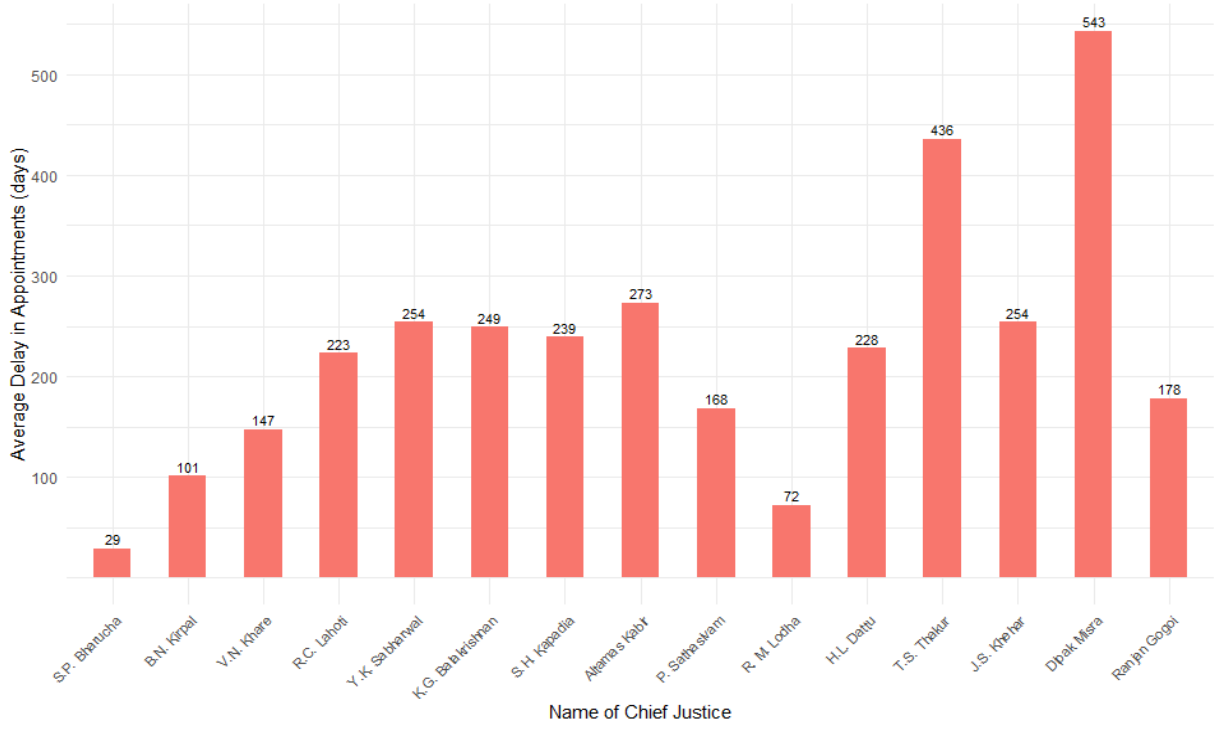
Source: Supreme Court Biographies Dataset (2020)

Many commentators have argued that after the NJAC case, the executive pushed back on the judiciary through interfering and delaying with judicial appointments.[35] While we do not have data to establish a causal link, these trends in Table 1 and Figure 2 both point to increased inefficiencies in judicial appointments after the NJAC case.

[32] *Supra* note 30.
[33] We cannot however know if informal discussions happened for choosing nominees outside the regular collegium meetings.
[34] Calculated by tallying the number of days between the date of retirement of a judge who left a SCI seat, and the date another judge was appointed to the seat.
[35] A. Dev, "Balancing Act: Chief Justice Khehar and the tussle between the executive nad the judiciary" *The Caravan*, June 1, 2017, *available at*: https://caravanmagazine.in/reportage/chief-justice-khehar-executive-judiciary (last visited on Jan. 8, 2019).

Chief Justices have significant influence over the appointment process. They have the sole authority to convene collegium meetings, resend recommendations and generally put pressure on the government to expedite its review process. Past Chief Justices have used this power, in some cases by taking judicial cognizance of non-appointment of judges.[36] What is clear, however, is that the ability of each Chief Justice to do this differs. As Figure 3 shows, even amongst the last 15 Chief Justices, the average number of days to fill a vacancy varied widely. Justice Dipak Misra, the former Chief Justice of India, whose tenure coincides with the period after the NJAC judgement, has the worst record. Appointments to the SCI under his tenure took an average of 543 days from when the vacancy first arose. Justice Misra's tenure also had on average 6.6 vacancies, the highest number after the sanctioned strength was increased. In fact, Justice Misra oversaw the highest number of average vacancies amongst any Chief Justice in history, if we ignore vacancies created by increases in sanctioned strength.

Figure 3: Average Delay in Filling Vacancies in the SCI under the last 15 Chief Justices



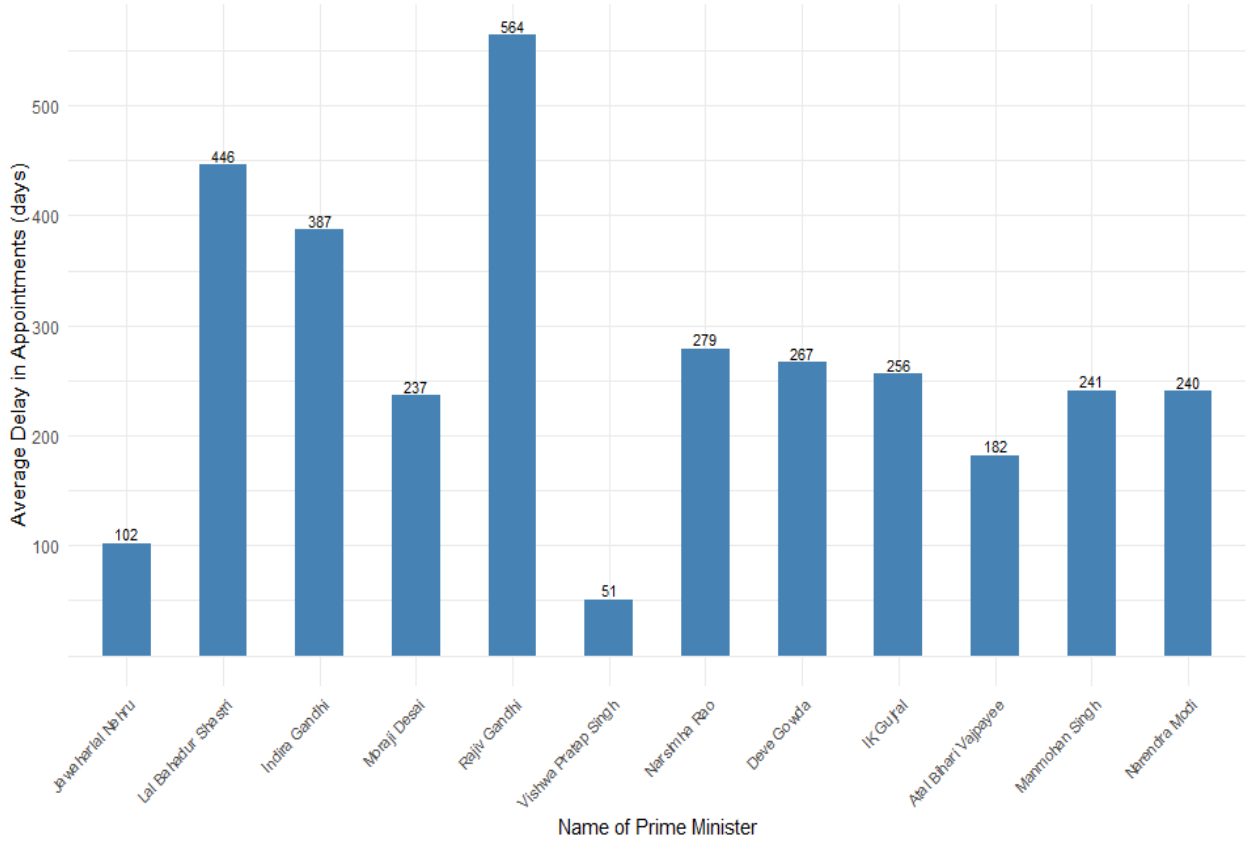
Note: Justice Pattanaik and Justice S. Rajendra Babu did not make any appointments.

Source: Supreme Court Biographies Dataset (2020)

[36] U. Anand, "Appointment of Judges: Break logjam Soon or We Will Step In, CJI tells govt" *Indian Express*, Aug. 13, 2016, *available at*: https://indianexpress.com/article/india/india-news-india/break-logjam-soon-or-we-will-step-in-cji-tells-govt-2971431/ (last visited on Jan. 8, 2019).

The power of governments to limit appointments, on the other hand, is limited. As has been mentioned, if the collegium reiterates a nominee to the government, it is bound to appoint them. However, the government can delay recommendations by taking an inordinate time to review them. While no recommendation for the Supreme Court has been kept in abeyance, for the last 19 SCI appointments since October 2017, the government has taken an average of 32 days to issue orders of appointment after a nominee had been recommended by the collegium.[37] As Figure 4 shows, however, the average time to fill vacancies has remained relatively constant with recent Prime Ministers, and there does not seem to be a causal relationship between delays and any particular kind of government, at least in the post-collegium era.

Figure 4: Average Delay in Filling Vacancies in the SCI by Prime Minister



Source: Supreme Court Biographies Dataset (2020)

[37] In one of these instances, the appointment orders for four Supreme Court judges were issued 2 days after the collegium's recommendation. This was an anomaly, and the speed of these appointments surprised even the Chief Justice of India. See, S. Prakash, "CJI surprised at Centre's speed in clearing 4 SC judges' appointments" *The Tribune*, Nov. 2, 2018, *available at*: https://www.tribuneindia.com/news/nation/cji-surprised-at-centre-s-speed-in-clearing-4-sc-judges-appointments/677789.html (last visited on Jan. 8, 2019).

V. EFFECT OF SCI VACANCIES ON CASE DISPOSAL

As one would expect, there is a high positive correlation between the disposal rate of the court and the average number of judges in the court in any given year.[38] With each missing judge, the court loses a part of its capacity to deal with its incoming cases and that adds to its already unsustainable pendency load. The 121st Law Commission report, which looked at judicial appointments, posited that if vacancies in the SCI between 1965 and 1986 had been filled immediately, the court could have cleared 67% of its pendency docket).[39] Since then, several law commissions reports have pointed out the link between delay in filling vacancies and mounting case arrears in the SC.[40] The SCI itself has recognised that non-appointment of judges hampers access to speedy justice.[41]

The exact number of cases that each judge disposes in a year is difficult to predict due to the large number of variables affecting this number. The 121st Report of the Law Commission of India, based on inputs by two Chief Justices, assumed this number to be 650 'regular' cases.[42] However, as Hemrajani and Agarwal have pointed out, the scarce resource in the Supreme Court of India is oral hearing time, and the capacity of the court should be measured by the amount of judge time that it can cumulatively allocate to cases.[43] As per this model, each judge contributes 707 judge hours per year, which can on average be used to hear and dispose 1212 cases. Using this model, the SCI in 2018 lost the capacity to hear dispose 7671 cases or around 15% of its incoming docket, due to vacancies.

VI. REASONS FOR DELAY IN SCI APPOINTMENTS

One possible reason for the delay in SCI appointments is that selecting the correct candidate for the SCI takes time. For example, during his interviews with several SCI

[38] Applying Pearson's correlation, the value of R is 0.8902. This indicates a strong positive correlation. The value of R^2, the coefficient of determination, is 0.7925. In the years that the Supreme Court has lesser number of Judges, it inevitably has a lesser number of disposals.
[39] *Supra* note 7, 121st Law Commission Report, 64.
[40] *Supra* note 7, 127th Law Commission Report, 230th Law Commission Report.
[41] *Malik Mazhar Sultan* v. *U.P. Public Service Commission* (2011): *Supreme Court Cases*, Vol. 3, Pg. 122.
[42] *Supra* note 7, 121st Law Commission Report.
[43] *Supra* note 5, Hemrajani and Agarwal.

and High Court judges, Gadbois' noted that many High Court judges declined the offer to be elevated to the SCI as they did not wish to move to Delhi, either due to family reasons, due to prestige attached to the office of the Chief Justice of a High Court or due to ill-health.[44] He had also noted that sometimes, despite vacancy, judges were not found worthy enough to be elevated. However, this is unlikely to apply to current appointments to the SCI for two reasons. First, there are a higher number of candidates for the SCI —more than 100 senior High Court judges with over 10 years of experience as well as other senior members of the bar. Second, the judges eventually appointed to the SCI, in most cases, held similar positions and were as qualified at the time when the vacancy arose.

A more likely reason for the delay is that the collegium meets too infrequently. Collegium meetings can only take place when the Chief Justice of India and four senior-most puisne judges of SCI are available and willing. This may not always be possible. For example, in 2016, Justice J. Chelameswar refused to attend the collegium meetings until its proceedings were made public.[45] There are also instances when the collegium cannot meet because a change is being contemplated in the appointment process, such as when the case concerning the constitutionality of NJAC was being heard. Since October 2017, when the collegium minutes started being published on the website, the Collegium has met only twelve times to discuss appointments to the SCI. Three of these dealt with the reiteration of Justice K.M. Joseph's name. In each of the other three, the collegium acknowledged the high number of vacancies, but recommended names to fill only a few of them.

The collegium also seems to meet too long after any given SCI vacancy arises. Barring death and resignation of a Judge, which are rare events in the SCI's history, all SCI vacancies are foreseeable. The collegium should thus ideally plan for vacancies such that a new judge can take oath as soon as the old judge retires. Despite this, since 1977, no judge of the SCI has been appointed immediately after the vacancy arose. The meeting to recommend Justice Indu Malhotra and Justice K.M. Joseph to

[44] *Supra* note 21.

[45] K. Rajagopal, "Justice Chelameswar opts out of collegium" *The Hindu*, Sept. 2, 2016, *available at*: https://www.thehindu.com/news/national/Justice-Chelameswar-opts-out-of-collegium/article14621813.ece (last visited on Jan. 8, 2019). Justice Chelameswar continued to give his opinion on potential nominees 'by circulation'.

the SCI, for example, was held more than a year after the vacancies they were being nominated to fill arose.

Another problem is the SCI's practice of batch recommendations. The collegium, perhaps to save consultation time, tends to send recommendations in batches rather than fill individual vacancies. 81 of the last 100 SCI judges have been appointed in batches of 2-5. In fact, the stated reason for deferring Justice K.M. Joseph's recommendation to the SCI was that they wanted his recommendation to go in another batch, along with other High Court Chief Justices. Apart from the fact that this leads to the accumulation of vacancies, there is also a structural problem with batch appointments. Since judges are usually of a similar age when they are appointed, this process essentially ensures that vacancies will arise close to each other. Moreover, the process also schedules vacancies in a block, due to which several potential candidates for appointment as judges the SCI will be ineligible simply because they were too old or too young at the time a given batch of vacancies arose.

The government is also equally if not more culpable in the non-fulfilment of vacancies. Since there is no time limit given in the MOP to process any proposal of the collegium, the government can and often has unduly delayed the appointment process.[46] Justice Malhotra's appointment order to the SCI, for example, was passed on 26th April 2018, more than 3 months after her name was first proposed to the government by the collegium. While we do not have data for previous appointments to the SCI, since October 2017, the government has taken an average of 67 days to appoint High Court judges after the Collegiums' recommendation. What is more troubling however, is that in some cases, appointment orders for High Court judges have not been published for collegium proposals made as early as 1st November, 2017. This 'pocket veto', where the government delays any decision on the collegium proposals till they become infructuous or forgotten, has been used time and again by the government for nominees to the High Court.[47] While this has never been used for

[46] Livelaw News Network, "Judges Appointment-A Ping Pong Game? Is Indefinite Sitting Over The Files Choking The Judicial System?" *Livelaw,* Mar. 14, 2018, *available at*: http://www.livelaw.in/exclusive-judges-appointment-a-ping-pong-gameis-indefinite-sitting-over-the-files-choking-the-judicial-system/ (last visited on Jan. 8, 2019).

[47] Krishnan, Murali, "How the Centre Has Been Arm-Twisting the Judiciary Since 2014" *The Quint,* April 26, 2018, *available at*: https://www.thequint.com/voices/opinion/centre-blocks-appointment-of-judges-while-saying-its-for-independence-of-judiciary (last visited on Jan. 8, 2019).

a SCI nominee, the fact that it exists presents a structural problem for judicial appointments.

VII. CONCLUSION AND RECOMMENDATIONS

There are many possible suggestions to improve the current system of judicial appointments and to fill vacancies in the SCI more efficiently. First, the collegium should meet with some regularity, perhaps once a month, to exclusively discuss SCI nominations. This will ensure that there are no sustained periods of vacancies lying unfilled. In 2018, for example, the collegium did not meet even once during the summer vacation period, even though they were faced with 7 vacancies. Second, apart from non-planned vacancies due to death or resignation, the collegium should consider the proposal for appointments before the vacancy arises, so that a new SCI judge can be appointed immediately after the old one retires. The 121st Law Commission Report had in 1980 recommended that that the SCI should plan for vacancies such that a new judge can take oath as soon as the old judge retires. In fact, the MOP itself uses the phrase 'whenever a vacancy is expected to arise', implying that the collegium should recommend new judges based on anticipated and not actual vacancies. Third, the appointments must be made for each individual vacancy in the SCI, and delays to accommodate batch recommendations must be eliminated.

There is also no permanent administrative assistance available to the collegium, which is an informal body at best. Many have thus suggested that permanent Supreme Court Secretariat must be built, to help the judges with evaluating possible candidates and to reduce any time spent in administrative or logistical activity by the collegium.[48] Finally, the MOP must be amended to remedy the structural flaws inherent in it. It must mention strict time limits for the government, both for the consideration of appointments as well as for appointing a judge whose nomination has been accepted.

The SCI recently reprimanded the states as well as the High Courts for their failure to fill vacancies in the subordinate judiciary. The Chief Justice of India told the

[48] K.M. Ashok, "Improving Collegium; K.K Venugopal advocates Permanent Secretariat" *LiveLaw*, Nov. 4, 2015, *available at*: https://www.livelaw.in/improving-collegium-k-k-venugopal-advocates-permanent-secretariat/ (last visited on Jan. 8, 2019).

states that, 'If the vacancies cannot be filled by you, we will take over and do what is needed'.[49] As the already unsustainable pendency figures of the SCI continue to rise, the court must make sure that it gets its own house in order. Every day that a vacancy in SCI remains unfulfilled is a loss in judicial capacity and access to justice. Ensuring that there are sufficient numbers of judges in the SCI to hear matters is critical in this regard.

[49] M. Jain, "SC Seeks Personal Presence of Registrar Generals (HCs) and Rep. of States" *LiveLaw*, Nov. 1, 2018, *available at*: https://www.livelaw.in/breaking-judicial-vacancies-if-you-cant-fill-vacancies-we-will-take-over-and-do-what-is-needed-sc-seeks-personal-presence-of-registrar-generalshcs-and-rep-of-states-on-nov-15/ (last visited on Jan. 8, 2019).

INDIAN COMPETITION LAW 2.0: A CRITICAL COMMENTARY ON THE DRAFT COMPETITION (AMENDMENT) BILL, 2020

*Reuben Philip Abraham**

"*If it ain't broke, don't fix it*"

– Thomas Lance Bert

(The general approach followed by the Competition Law Review Committee ('CLRC') as stated in Annexure IVB of the CLRC Report[1]- Observations of Mrs. Pallavi Shroff, Member, CLRC)

I. INTRODUCTION

A landmark legislation was passed by the Parliament in 2002 known as the Competition Act ('the Act') which replaced the Monopolies and Restrictive Trade Practices Act, 1969 ('MRTP'). The Act had established CCI which started functioning from May 20, 2009. After 10 years of successful operation of the CCI for the furtherance of fair competition in the markets through the Competition Act, 2002, it was time to relook at the Act to fix many loopholes, and provide more teeth to the CCI to tackle modern evolving market problems. Hence, the Competition Law Review Committee ('CLRC') was set up by the Ministry of Corporate Affairs in October 2018 to review the existing framework, and provide recommendations for amendment. In pursuance of the report submitted by the Committee, the Central Government introduced the Bill.[2] Indeed, the CLRC did a brilliant job in analysing all the issues at hand and presenting the best possible solutions for a strong future of Indian Competition Law. The author intends to critically analyse the changes that have finally been proposed in the Bill in comparison with the original recommendations

* Advocate at the High Court of Kerala and currently a Technology Law and Policy fellow at Daksha Fellowship by SAI University, Chennai. He is an alumnus of the Tamil Nadu National Law University, Trichy.

[1] Report of the Competition Law Review Committee, July 2019, *available at:* http://www.mca.gov.in/Ministry/pdf/ReportCLRC_14082019.pdf (last visited on Nov. 14, 2020).

[2] Draft Competition (Amendment) Bill 2020, India, *available at:* https://www.taxmanagementindia.com/file_folder/folder_5/Draft_Competition_Amendment_Bill_2020.pdf (last visited on Nov. 14, 2020).

made by the CLRC. The amendments will be studied keeping in mind the basic rationale of various competition laws, and also if such changes can actually serve the intended purpose or not. The changes proposed can be broadly divided into four categories: (a) the structure of CCI, (b) Procedural mechanisms, (c) Enforcement mechanisms, and (d) the Merger Control Regime.

II. STRUCTURAL CHANGES

Needless to say, these amendments have to be introduced in the most careful manner so that they do not hamper the effective functioning and independence of the CCI which could otherwise prove to be counter-productive in the long run.

A. Introduction of the Governing Board

The Amendment Bill aims to bring into existence a Governing Board having roles of general superintendence, direction and management of affairs of the Commission. In such a scenario, the Commission's role would be restricted to the adjudication of disputes. The Governing Board constituted under section 8(1A) of the Bill,[3] will consist of the Chairperson, 6 other Whole-Time Members ('WTMs') of the Commission, Secretary of Dept. Eco. Affairs, Ministry of Finance or his nominee, Secretary of Ministry of Corporate Affairs or his nominee and 4 other Part-Time Members ('PTMs'), to be appointed directly by the Central Government.

This change seems to be unnecessary and completely misinterpreted by the CLRC itself, going against the international accepted structures of competition authorities for the purposes of limiting governmental interference hampering the independent functioning of a competition authority.[4] They have drawn inspiration from other domestic regulators such as the Securities and Exchange Board of India ('SEBI') instead of comparing the situation with competition authorities in international

[3] *Id.* at 11.
[4] Independence of Competition Authorities -From designs To practices, *OECD*, *available at*: https://one.oecd.org/document/DAF/COMP/GF/WD(2016)21/en/pdf (last visited on Nov. 14, 2020); Frederic Jenny, The Institutional design of Competition Authorities: Debates and Trends, January 2016, *available at*: https://www.europarl.europa.eu/cmsdata/100755/Frederic Jenny The institutional design of Competition Authorities.pdf (last visited on Nov. 15, 2020).

mature jurisdictions like the European Union ('EU') and the United States of America ('US').

The CLRC completely misinterpreted the Delhi High Court case of *Mahindra & Mahindra Ltd.* v. *CCI & Anr.*,[5] to put CCI on the same footing as SEBI. SEBI dealing with issuing licenses and constantly drawing regulations that govern the functioning of markets and stakeholders is a pure regulator of the market unlike CCI who also has to undertake adjudicatory rules, where in such a scenario independence of functioning especially from governmental interference is of utmost importance. Hence, in the current situation of non-existence of a structural gap, it is not advisable to copy the institutional framework of a regulator of a different nature.[6] However, the CLRC stated that this measure would help to inject 'external perspective', 'objectivity' and more 'transparency' into the functioning of CCI, but it failed to clarify the definitions of those terms and show any existing flaws. Moreover, those objectives can be achieved through appointment of expert advisors or professionals as per section 17 of the Act within the already existing structure of the CCI. An overseeing body consisting of 13 members out of which 2 part time members and 2 ex-officio whole time members being appointed by the Central Government would potentially increase unwarranted governmental interference, seriously hampering the independent functioning of the CCI.

This is also unlike the Competition and Markets Authority ('CMA') Board in the United Kingdom ('UK') from where the CLRC drew inspiration, wherein other than the 4 official executive directors of the CMA, the rest 6 persons are non-executive directors who are not essentially working for the Government.[7] One of the three institutional challenges that a competition regulator faces is to preserve the degree of independence needed to perform core policy making functions without destructive

[5] *Mahindra & Mahindra Ltd.* v. *CCI & Anr.* (2019) SCCOnline Del 8032.
[6] *Supra* note 1 at 196, 197.
[7] Corporate Information, *CMA, available at*: https://www.gov.uk/government/organisations/competition-and-markets-authority/about/our-governance (last visited on Nov. 14, 2020).

political interference. The proposed amendment can prove to be a threat to the regulator's autonomy.[8]

B. Merging of Director General's office with Competition Commission of India

The Amendment Bill seeks to change the structure of the CCI to an integrated agency model by merging the Director General's (DG) office as the investigative division of the CCI. Such a system has been followed in various sophisticated jurisdictions such as the EU, the UK, Germany, China, Brazil etc.[9] Currently, the DG is directly appointed by the Central Government on deputation, but now it has been proposed that such power should be transferred to the Chairman of the CCI. This could increase the chances of appointment of a person who is more capable to investigate competition law matters.

Such a change could potentially lead to administrative efficiency with respect to smooth functioning of the CCI through better communication between investigative and adjudicatory divisions of the Commission. Nevertheless, the CLRC rightfully pointed out the issue of 'confirmational bias' that could persist with the final decisions of the Commission as they themselves are essentially carrying out the investigation.[10] Hence, along with such integration, adherence to best due process practices is imperative to tackle any allegations of non-transparency and unfairness with respect to investigations carried out.

C. Exclusive bench to hear competition law appeals

Since the original Competition Appellate Tribunal ('COMPAT') was scrapped by Finance Act, 2017, the efficacy of National Company Law Appellate Tribunal ('NCLAT') to deal with competition law appeal matters has come into question.[11]

---

[8] The CMA in the 2020s: a dynamic regulator for a dynamic environment, *CMA & William Kovacic, available at:* https://www.gov.uk/government/speeches/the-cma-in-the-2020s-a-dynamic-regulator-for-a-dynamic-environment (last visited on Nov. 13, 2020).

[9] Model Law on Competition (2019), revised chapter IX, *UNCTAD, available at:* https://unctad.org/system/files/official-document/ciclpL11_en.pdf (last visited on Nov. 14, 2020).

[10] *Supra* note 1 at 25.

[11] Sayan Ghosal & Veena Mani, "Can NCLAT cope with competition?", *Business Standard,* May 29, 2017, *available at:* https://www.business-standard.com/article/opinion/can-nclat-cope-with-competition-117052900025_1.html (last visited on Nov. 14, 2020).

Nevertheless, the situation could have been rectified to a large extent with the introduction of a dedicated bench as rightly recommended by the CLRC, but unfortunately it has been left unaddressed in the Bill.[12] As per the last annual report (2018-19) of the CCI, there are 163 competition law appeal cases pending before the NCLAT, wherein the previous year disposal rate of the appellate tribunal was merely a staggering 15%.[13] It is the lowest ever compared to previous disposal rates of COMPAT which clearly highlights NCLAT's current situation of being overburdened with appeals from different legislations. Moreover, the requirement for a technical member in NCLAT to have expertise in competition law is missing as per the mandate for qualifications given in section 411(3) of the Companies Act, 2013. The non-addressal of this important issue in the Bill exemplifies the neglect and lack of understanding shown by the Government to acknowledge the importance of expertise required in adjudicating competition law cases.

III. PROCEDURAL AMENDMENTS

These amendments are the most important for the benefit of the stakeholders in Indian Competition Law, to navigate their way through competition law investigations without hampering their economic activities completely, and also to foster the best relationship with the CCI in terms of co-operation and understanding. Some of the significant changes are as follows:

A. Settlement and Commitment mechanism

This is a landmark welcome change in the course of Indian Competition Law as it is in line with many of the mature competition law jurisdictions around the world. This definitely serves the aim and objective to fasten the resolution of cases, optimizing the usage of investigative resources of the CCI and also the costs of litigation for the parties. As per the last annual report (2018-19) of the CCI, there is a huge backlog of cases wherein 83 cases were pending before the DG at the investigation stage.[14]

[12] *Id.* at 31.
[13] Annual Report 2018-19, *CCI, available at:* https://www.cci.gov.in/sites/default/files/annual%20reports/ENGANNUALREPORTCCI.pdf (last visited on Nov. 13, 2020).
[14] *Supra* note 13 at 20.

Moreover, it is observed that the CCI takes an average of 2 years to arrive at a final decision from the date of passing of direction for investigation.[15]

The proposed section 48A for settlement is with respect to allegations pertaining to section 3(4) and section 4 of the Act.[16] The parties can move an application proposing for settlement at any stage after the report of Director General ('DG') is submitted and before the final order is passed by the CCI. As this option of settlement comes with the baggage of prejudice as to wrong-doing, the parties can be required to deposit a reduced fine for their co-operation as instructed by the CCI. On the other hand, with the help of the newly proposed section 48B providing for a commitment mechanism, parties can move an application to offer commitments after passing of order directing investigation by the CCI to the DG and before the submission of the investigation report by the DG.[17] Unlike the concept of settlement, there is no prejudice attached to this as it is availed for at the *prima facie* stage and no sort of monetary fine will be required to be paid.

Unfortunately, both settlement and commitment mechanism envisaged in the Bill is not extended to cartels but restricted only to vertical agreements under section 3(4) of the Act and abuse of dominance cases under section 4 of the Act, unlike in the US or EU. In the EU, it is reported that since 2008 when this mechanism was introduced, about half of the cartel decisions concluded were through the settlement procedure whereas in the US for settlement of cartel cases, the parties need to enter into a plea agreement with the authorities.[18] In India, the leniency programme has proven to be an effective investigative tool for the CCI in exposing more cartels. Combining leniency programme with settlement mechanism can do wonders as such an alliance can help the CCI to induce procedural efficiency and speed up the procedure for adoption of a cartel decision. Moreover, the Bill follows the practice adopted by the US with regard to mandating the waiver of right of appeal by the

[15] Karan Singh Chandiok and Salman Qureshi, "Settlement of cases under Indian competition law", *Indian Business Law Journal*, June 20, 2019*, available at:* https://law.asia/settlement-cases-indian-competition-law/ (last visited on Nov. 14, 2020).
[16]*Supra* note 2 at 31.
[17]*Id.* at 32.
[18] Cartel case settlement, *European Commission, available at:* https://ec.europa.eu/competition/cartels/legislation/cartels_settlements/settlements_en.html (last visited on Nov. 13, 2020).

defendants when opting for such a mechanism which justifies the objective of eliminating additional litigation and costs attached to it for a quick redressal of cases.[19]

B. Leniency Plus system

This proposed change is in line with mature jurisdictions like the UK, the US, Singapore and Brazil. It aims to upgrade the current existing leniency regime.[20] The newly proposed section 46(3) gives an extra option to the implicated party to make another full, true and vital disclosure regarding another undisclosed cartel enabling the CCI to form a *prima facie* opinion under section 26(1) of the Act.[21] Hence for such extra disclosure, the CCI can grant for lesser penalty with respect to cartel already under investigation without prejudice to avail the same in the new disclosed one as well. Another important addition is that under section 46(2), the CCI will now allow for withdrawal of lesser penalty application by the implicated party though power has been given to the DG and CCI to use the evidence that was submitted in the application for investigation. [22]

Leniency provisions have acted as a double-edged sword in obtaining success for the CCI in tracking down cartel cases in India and also spreading awareness regarding such benefit. In many cases, the CCI took an extremely lenient stance, however, 100% leniency has been granted in only 4 cases till date.[23] Due to the existence of the marker system of granting 100% leniency to the first priority applicant, 50% to the second and 30% to the third depending on the stage at which such disclosure is made (unfortunately which the parties won't be made aware of), including whether it helps the CCI in forming a *prima facie* opinion and also the "significant value added" to the

---

[19] Plea Bargaining and Settlement of Cartel Cases, *OECD, available at:* http://www.oecd.org/regreform/sectors/41255395.pdf (last visited on Nov. 14, 2020).

[20] Summary of Key Changes in The (Draft) Competition (Amendment) Bill, 2020, *AZB & Partners*, *available at*: https://www.azbpartners.com/bank/summary-of-key-changes-in-the-competition-amendment-bill-2020/ (last visited on Nov. 14, 2020).

[21] *Supra* note 1 at 30.

[22] *Id.* at 29.

[23] *Re: Cartelization in respect of zinc carbon dry cell batteries market in India* Suo Moto Case No. 02 of 2016, Order dated 19.04.2018; *Re: Anticompetitive conduct in the Dry-Cell Batteries Market in India(2 cases)* Suo Moto Case No. 02 of 2017, Order dated 30.08.2018, Suo Moto Case No. 03 of 2017; Order dated 15.01.2019; *Re: Cartelization by broadcasting service providers by rigging the bids submitted in response to the tenders floated by Sports Broadcasters* Suo Moto Case No. 02 of 2013, Order dated 11.07.2018.

investigation, the leniency plus regime provides for another system for the disclosing parties to guarantee themselves a larger reduction in fines than in the normal course.[24]

C. Inter-Regulatory Consultation

This is one area of clarification and a much-needed codification that the Amendment Bill completely failed to bring about. There have been numerous inter regulatory conflicts due to overlapping of jurisdictions as to regulating anti-competitive behaviour and merger control between the CCI and other regulators especially the Telecom Regulatory Authority of India ('TRAI') and Securities and Exchange Board of India ('SEBI'), respectively. This was finally settled by the Supreme Court of India ('SC') in the case of *CCI* v. *Bharati Airtel & Ors*.,[25] that TRAI being a sector specific regulator will have ex-ante application to determine jurisdictional facts and technical aspects and then the CCI being a market regulator across all sectors will have an ex-post or a 'follow-on' jurisdiction. Now even though the SC judgment was commendable in spirit calling for a cordial relationship between the two regulators, it does in fact undermine the authority of CCI essentially putting it on a backfoot.[26]

This Amendment Bill was indeed the best chance to institutionalise and crystallise the co-ordination mechanism between the two regulators which best works in such situations of conflict to provide effective decisions through a collaborative process of utilizing each other's knowledge and regulatory expertise. The CLRC report also failed to make a strong case for this change by not recognising the need for mandatory consultation like in the EU, France etc., for a change in reference as provided under sections 21 and 21A of the Act by replacing the word 'may' with 'shall'.[27] Additionally, entering into any Memorandum of Understanding ('MoU') or Co-operation/Collaboration Agreements with other sectoral regulators would have helped avoid confusions with regard to overlapping jurisdictions. In Canada, the Competition Bureau has entered into multiple MoUs such as with the Radio-

[24] India: Cartels & Leniency, *ICLG*, *available at*: https://iclg.com/practice-areas/cartels-and-leniency-laws-and-regulations/india (last visited on Nov. 14, 2020).
[25] *CCI* v. *Bharti Airtel* Ltd. and Ors. (2019) 2 SCC 521.
[26] Analysis of Competition cases in India, October-December 18, *CUTS, available at*: https://cuts-ccier.org/pdf/Edition-11-Analysis_of_Competition_Cases_in_India.pdf (last visited on Nov. 15, 2020)
[27] *Supra* note 2 at 40.

Telecommunications Regulator and Ontario Securities Exchange Commission just like in Finland wherein the competition regulator signed an MoU in 2003 with the telecom regulator to eliminate possible overlaps.[28,29] In Ireland, co-operation agreements between the competition authority and sectoral regulators are very common to enforce mandatory consultation mechanism.[30]

Moreover, in tackling many issues especially in this new age digital markets with respect to competition law and privacy issues, the CCI could benefit a lot by collaborating with the upcoming Data Protection Agency as proposed in the Personal Data Protection Bill, 2019. An earlier proposal by the Ministry to create a forum of regulators to resolve issues of jurisdictional overlap or conflict arising between various regulators didn't come to fruition.[31]

D. Penalty Guidelines & Show Cause Notice ('SCN')

The SC in *Excel Corp Care Ltd.* v. *CCI & Ors*.[32] had introduced the concept of 'relevant turnover' with respect to imposition of penalty. Nevertheless, the CLRC has recommended against explicit mention of the same, as it would be counterproductive implying that in various cases the opposite parties would be left without any penalty leviable if they do not have any 'relevant turnover'.[33] Hence, the CCI took the recommendation of the CLRC to issue penalty guidance such as in the UK, South Africa and Singapore, as per the new clause 64(B) of the Bill, which will definitely be beneficial for the parties to understand the imposition and computation of the penalty levied. [34]

---

[28] Relationship between Competition authority and sectoral regulator, *CCI, available at:* https://www.cci.gov.in/sites/default/files/presentation_document/11lahore_25_26march06_20080410175442.pdf (last visited on Nov. 15, 2020).

[29] Memorandum of Understanding for cooperation, coordination and information sharing, *Government of Canada, available at:* https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03643.html (last visited on Nov. 14, 2020).

[30] Session on "The Relationship between Competition Authorities and Sectoral Regulations", *OECD, Global Forum on Competition, available at*: http://www.oecd.org/dataoecd/58/7/34375749.pdf (last visited on Nov. 14, 2020).

[31] Rishi Ranjan Kala, "MCA to create forum of regulators to resolve issues of jurisdictional overlap", *Financial Express*, Jan. 23, 2019, *available at*: https://www.financialexpress.com/economy/mca-to-create-forum-of-regulators-to-resolve-issues-of-jurisdictional-overlap/1451981/ (last visited on Nov. 14, 2020)

[32] *Excel Corp Care Ltd.* v. *CCI & Ors* (2017) 8 SCC 47.

[33] *Supra* note 2 at 79,80.

[34] *Id.* at 39.

As per the proviso proposed to be inserted in section 26 of the Act, the CCI is mandated to issue an SCN to the concerned parties providing them with a reasonable opportunity to be heard before passing of any order in line with natural justice principles.[35] Recently, the Karnataka High Court in the case of *Delhi Vyapar Mahasangh* v. *Flipkart Internet Private Limited and Another*[36] had ordered a stay on the *prima facie* order of CCI as the order for investigation was passed without giving reasonable opportunity to the opposite party to be heard.[37] Hence, codification of such natural justice procedures would ensure smoother functioning of the CCI, and also reduce further appeals for stay of orders based on such issues.

E. Introduction of the 'Res judicata' principle

This is envisaged in a newly proposed section 26(2A), which gives CCI the liberty to not inquire into an allegation under section 3 or 4 of the Act, 'if the same or substantially the same facts and issues raised in the information or in reference from Central Government or State Government or a statutory authority has already been decided by the CCI in previous orders'.[38] In fact, the Amendment Bill has completely misinterpreted the intent of the CLRC in their recommendation to introduce such a clause with the aim to avoid repetition in inquiry and investigation by the CCI and DG. The Committee had actually recommended this clause to provide such a power to the CCI to close cases in which a 'final order' has been passed as given under section 27 of the Act. But the proposed clause has provided a much wider scope as it covers all the previous orders passed by the CCI, which would include closure of cases before passing an investigation or a final order as per section 26(2) of the Act. Hence, the clause should essentially insert the phrase 'final orders' instead of 'previous orders'.

Such a large application of the *res judicata* principle could have a significant negative impact. The prime example of this is the case of *Federation of Hotels and*

---

[35] *Id.* at 20.
[36] *Delhi Vyapar Mahasangh* v. *Flipkart Internet Private Limited and Another*, *available at*: https://www.cci.gov.in/sites/default/files/40-of-2019.pdf.
[37] Karantaka High Court stays CCI's order for a detailed investigation into abuse of Dominance by Flipkart and Amazon, *AZB & Partners, available at:* https://www.azbpartners.com/bank/karnataka-high-court-stays-ccis-order-for-a-detailed-investigation-into-abuse-of-dominance-by-flipkart-and-amazon/ (last visited on Nov. 15, 2020).
[38] *Supra* note 2 at 19.

Restaurant Associations of India v. *MakeMyTrip Pvt. Ltd. & Ors.*,[39] wherein the CCI had previously held that the online and offline modes must be under a single umbrella while delineating relevant market. However, in the present case, the CCI opined that the market realities and competition dynamics have changed and held that both online and offline modes must be separate relevant markets. Moreover, such a clause should be applied very cautiously in competition cases which are *in rem* rather than *in lis* between two parties.[40]

IV. ENFORCEMENT AMENDMENTS

These proposed amendments are most important to provide the CCI with more teeth and power to tackle anti-competitive behaviour leading to Appreciable Adverse Effects on Competition ('AAEC') as per sections 3 and 4 of the Act leaving behind no regulatory gaps to face emerging and changing markets.

A. Inclusion of 'hub and spoke cartels' & 'buyer cartels'

A definite welcome move as advised by the CLRC Report[41] to cover more types of emerging new age cartels that CCI has to deal with. A Hub and spoke cartel, which has dominantly existed in jurisdictions such as the USA and UK, essentially refers to a unique arrangement of cartel wherein there is a third party which is the 'hub' that organises or facilitates cartelization between various competitors which are the 'spokes'. Hence, it is proposed to insert a proviso to section 3(3) of the Act,[42] referring to any other entities that though not engaged in identical or similar trade but if it actively participates in the furtherance of such an agreement will also be presumed to be liable under this section.

The CCI had to primarily deal with such cases in the context of distribution agreements on a vertical scale of production ladder guilty of committing Resale Price Maintenance ('RPM'). For example, CCI first acknowledged this issue in the case of *Fx*

---

[39] *Federation of Hotels and Restaurant Associations of India* v. *MakeMyTrip Pvt. Ltd. & Ors*, Case No. 14 of 2019.

[40] Draft Competition Amendment Bill, 2020- Key Insights, *Sarvada Legal*, *available at*: https://www.linkedin.com/posts/abir-roy-16706018_sl-newsletter-on-changes-proposed-in-amendment-activity-6640473744911495168-_FDC (last visited on Nov. 14, 2020).

[41] *Supra* note 1 at 62.

[42] *Supra* Note 2 at 4.

Enterprise Solutions India Pvt. Ltd v. *Hyundai Motor India Limited,*[43] wherein Hyundai played a major role as a 'hub' in bringing about bilateral vertical agreements between the supplier and dealer and also horizontal agreements between the dealers acting as 'spokes'. Finally, the CCI observed (*prima facie)* that Hyundai was guilty of contravening the provisions of RPM. However, the Commission didn't comment on hub and spoke cartel.[44] Recently, hub and spoke cartel was alleged in the case of *Samir Agrawal* v. *ANI Technologies Pvt. Ltd. (Ola), Uber India Systems Pvt. Ltd. (Uber) and others,*[45] wherein the CCI opined that such allegations could not sustain due to lack of collision or any agreement between the drivers or 'spokes' in this case. The same was later reaffirmed by the NCLAT in appeal.[46] Nevertheless, in digital markets where usage of algorithms is on the rise, the conventional meaning of 'hub and spoke' cartel in itself could potentially see a change in future within the wide contours of section 3(3) of the Act.

'Buyer Cartels' have been recognised by widening the definition of 'cartel' under clause 2(b) of the Bill.[47] This will be greatly helpful in fixing an enforcement gap so as to track down such buyer cartels which are common in oligopolistic markets.

B. Widening the scope of section 3(4) of the Act and the explanation clauses therein

This proposed amendment stems from the case of *Shri Ramakant Kini* v. *Hiranandani Hospital*[48] as mentioned in the CLRC Report as well, wherein the CCI dealt with an agreement between a hospital and stem cell bank that did not fall squarely within the contours of horizontal/vertical agreements as per section 3 of the Act.[49] Hence, after considering various other jurisdictions such as that of the US, the UK, the EU, Brazil

[43] *Fx Enterprise Solutions India Pvt. Ltd.* v. *Hyundai Motor India Limited*, Case No. 36 of 2014.
[44] Tanaya Sethi, "Competition Commission of India develops jurisprudence on Resale Price Maintenance" *Kluwer Competition Law Blog*, June 26, 2017, *available at*: http://competitionlawblog.kluwercompetitionlaw.com/2017/06/26/competition-commission-india-develops-jurisprudence-resale-price-maintenance/?doing_wp_cron=1587203925.5905001163482666015625 (last visited on Nov. 14, 2020)
[45] *Samir Agrawal* v. *ANI Technologies Pvt. Ltd. (Ola), Uber India Systems Pvt. Ltd. (Uber) and others*, case no. 37/2018.
[46] *Samir Agarwal* v. *CCI & Ors.,* Competition Appeal (AT)No.11 OF 2019
[47] *Supra* Note 2 at 2.
[48] *Shri Ramakant Kini* v. *Hiranandani Hospital, Case No. 39 of 2012.*
[49] *Supra* note 1 at 63.

and Singapore where the agreements are not expressly classified, amendment has been made to section 3(4) of the Act by broadening its scope so that it is not only restricted to vertical agreements.[50] In many previous cases, the CCI had opted for the standalone applicability or the omnibus nature of section 3(1) of the Act for agreements that do not strictly conform to the nature of section 3(3) or section 3(4) of the Act.[51] Therefore, section 3(4) must be given its widest amplitude to avoid discrepancies associated with the interpretation and application of section 3(1) of the Act.[52]

The ambit of definition of Resale Price Maintenance is widened to include indirect restrictions as well to tackle 'discount control mechanisms' such as that seen in the case of *Fx Enterprise Solutions India Pvt. Ltd* v. *Hyundai Motor India Limited.*[53] 'Exclusive dealing agreement' is inserted instead of 'exclusive supply agreement' to recognise the imposition of exclusivity from both sellers' and buyers' side in an agreement that could cause AAEC in the market.[54]

C. Extension of Intellectual Property Rights (IPR) Exemption to Abusive Practices by Dominant Enterprises under Section 4 of the Act

Inserting section 4A is a significant amendment proposed by the CLRC[55] as it aims to bring about parity and certainty for the IPR defence so that IPR exemption is not only limited to section 3 but can also be extended to section 4 of the Act.[56] Well, it definitely opens up many different lines of defence with regard to protection of IPRs in abuse of dominance cases but the true good or bad effects of such an extension can only be determined when put into practice. The 'effects based' or 'rule of reason'

---

[50] *Supra* note 2 at 4.
[51] *Neeraj Malhotra v. Deutsche Post Bank Home Finance¸* Case No. 5 of 2009; *Savitri Leasing and Finance Ltd* v. *Punjab National Bank and Others¸* Case No. 45 of 2011; *V. Ramachandra Reddy and Others* v. *M/s HDFC Bank Ltd. and M/s ICICI Bank Ltd.*, Case Nos.7 of 28, 25 of 28, 8 of 28, 9 of 28 & 10 of 28, order dated 31 May, 2011, and *M/s Metalrod Ltd.* v. *M/s Religare Finvest Ltd*, Case No. 28 of 2010.
[52] Tripti Malhotra, "Anomalies of Section 3(1) of The Indian Competition Act" *Mondaq¸* July 2, 2015, *available at:* https://www.mondaq.com/india/antitrust-eu-competition-/409188/anomalies-of-section-31-of-the-indian-competition-act (last visited on Nov. 14, 2020).
[53] *Supra* note 20.
[54] *Id.* at 5.
[55] *Supra* note 1 at 114,115.
[56] *Supra* note 2 at 5.

approach is not statutorily envisaged in section 4 of the Act. Such an approach basically requires a pre-evaluation of AAEC in the market after which abuse of dominance is determined. Moreover, clause 5 of the Bill which seeks to insert section 4A[57] expressly mentions that this exemption is for 'reasonable' conditions which may be 'necessary' to protect the rights of the IPR holder. Hence, we can interpret that the proposed amendment adopts the 'rule of reason' approach weighing in whether the condition is 'reasonable' and 'necessary' or could potentially cause AAEC in the market. Such an interpretation is vital as it could help achieve a balance between IPR and Competition law.

This proposed change definitely draws inspiration from an old case of *Automobile Spare Parts Case*,[58] wherein the implicated party was denied the benefit of IPR protection when assessing abuse of dominance by the CCI as this exemption was only limited to cases under section 3 of the Act.

D. Omission of Collective Dominance Concept

The Amendment Bill has failed to incorporate the concept of Collective Dominance in section 4 of the Act which is an established concept as per Article 102 of the Treaty of the Functioning of the European Union ('TFEU') that applies to 'any abuse by one or more undertakings of a dominant position'.[59] Previously, the Competition Law (Amendment Bill) 2012 made an attempt to introduce this concept,[60] wherein the phrase 'jointly or singly' was sought to be inserted in section 4(1) of the Act, but unfortunately the Competition Law (Amendment) Bill, 2012 never saw the light of day. Moreover, the CLRC also decided to not recommend the introduction of this concept on the basis of an illogical argument that the conduct captured by collective dominance cases may already be covered by section 3 of the Act, which deals with a completely different concept, i.e., anti-competitive agreements. [61]

---

[57] *Supra* Note 2 at 4.
[58] *Shamsher Kataria* v. *Honda Siel Cars India Ltd. and Others, Case No. 3 of 2011*.
[59] Article 102 of TFEU, *available at:* https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E102&from=ES (last visited on Nov. 14, 2020).
[60] The Competition (Amendment) Bill, 2012, Bill No. 136 of 2012, *available at:* http://164.100.24.219/BillsTexts/LSBillTexts/asintroduced/136_2012_ENG_LS.pdf (last visited on Nov. 14, 2020).
[61] *Supra* note 1 at 100.

In India, starting with *Niraj Malhotra* v. *Deutsche Post Bank Home Finance*,[62] wherein the DG in its investigation had found that there was collective dominance in the banking industry as inferred from the defence put forth by the opposite parties.[63] Further, there have been numerous cases where the allegation of collective dominance was put forth, but merely because of legislative incompetence to deal with this pertinent issue, the CCI never went forward to investigate the same to establish a case of abuse of dominant position under section 4 of the Act.[64] Most recently, in the case of *Meru Travel Solutions (P) Ltd.* v. *ANI Technologies (P) Ltd.*,[65] the CCI was legally constrained from initiating an investigation into collective dominance of Ola and Uber in the relevant market due to lack of conceptual coverage of collective dominance by the Act. Such a clause will specifically help the CCI in dealing with abuse of dominance by few strong players showing structural links in oligopolistic markets as tackled in the EU jurisdiction.[66]

V. MERGER CONTROL AMENDMENTS

These changes are the most essential to further ease of doing business in India for industry stakeholders, but at the same time balance the powers to acquire ex-ante assessment of combinations that could result in AAEC in the market.

A. Reduction in deemed approval timeline and other deadlines

This is one of the most unnecessary changes with respect to merger control regime, mainly because such a reduction of timeline and deadlines was never proposed by the CLRC report but in fact they even recommended to increase the previous 210-day timeline to 270 days inclusive of exclusions and time spent of litigation.[67] The amendment seeks to reduce the deemed approval timeline as provided under clause 7

[62] *Niraj Malhotra* v. *Deutsche Post Bank Home Finance*, Case No. 5 of 2009.
[63] *Id*. at 17, 18.
[64] *Sanjeev Rao* v. *Andhra Pradesh Hire Purchase Association*, Case no 49/ 2012; *Royal Energy Ltd.* v. *IOCL*, C-97/2009/3IR; *Ashok Kumar Vallabhaneni* v. *Geetha SP Entertainment LLP*, Case No. 17 of 2019.
[65] *Meru Travel Solutions (P) Ltd.* v. *ANI Technologies (P) Ltd*., 2018 SCC OnLine CCI 46.
[66] Hearing On Oligopoly Markets, *OECD, available at:* http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2015)52&docLanguage=En (last visited on Nov. 14, 2020).
[67] *Supra* note 1 at 147.

of the Bill[68] to 150 calendar days with a provision to extend it by 30 more calendar days if parties request additional time to file relevant information or remove defects in the notice. Starting with the important deadlines such as the time period for parties to respond to show cause notice issued by the CCI to prove as to why a full-blown investigation should not be initiated has been reduced from 30 days to 15 *calendar* days from date of receipt of notice and the time period to publish details of the combination if requested by the CCI has been reduced from 10 working days to staggering 7 *calendar* days.[69,70] Additionally, with respect to modifications, clause 29 of the Bill provides for insertion of section 29A to allow parties to propose their own modifications to the CCI to eliminate AAEC. However, if the CCI does not accept the same, then the parties have only staggering 12 *calendar* days to come up with a new modification proposal.[71]

Now in spite of such very tight timelines, the Bill failed to consider the proposal of the CLRC Report[72] to codify all the permissible exclusions of the activities outside the timeline, which will provide for more certainty and transparency in the process. In this situation, it is highly possible that parties will request the CCI for formal notices of time exclusions to enforce clock stops. Clock stops could most likely be utilised by case teams of CCI to request further information from parties as timeline for delivering a *prime facie* order by the CCI has been reduced from 30 working days to 20 calendar days.

The proposed changes are likely to put heavy pressure on the parties and case teams of CCI to function within very tight deadlines. Many of the merger/acquisition deals that are very highly valued can also be extremely complicated. Even though such shorter timelines can be very appealing to the stakeholders, it could prove to be counter-productive in the long run as it can compromise proper extensive review of complicated transactions for quicker approvals.[73]

---

[68] *Supra* note 2 at 24.
[69] *Id.* at 21.
[70] *Ibid.*
[71] *Id.* at 22.
[72] *Supra* note 1 at 147.
[73] Competition Amendment Bill, 2020, *CAM*, *available at*: http://www.cyrilshroff.com/wp-content/uploads/2020/02/Competition-Amendment-Bill-2502.pdf (last visited on Nov. 14, 2020).

B. New thresholds for merger notification

Clause 6 of the Bill proposes to insert an 'empowering' provision which will allow the Central Government to prescribe new criteria with regard to merger notification. Such criteria may be prescribed in the public interest and post consultation with the CCI.[74]This is completely drawn from CLRC's recommendation[75] underscoring the need for introduction of 'deal/transaction-value thresholds' as one of the major steps to tackle the combinations taking place in digital markets, in line with jurisdictions such as Germany and Austria.[76]

This was in response to the fact that major combinations in the digital industry such as Facebook/Whatsapp merger or Myntra/Flipkart merger or Freecharge/Snapdeal merger, escaped the scrutiny of the CCI as they did not cross the asset and turnover based thresholds prescribed in the Competition Act, 2002. Unlike US regulators who are empowered to scrutinize 'non-notifiable transactions' and EU regulators who have the 'referral system' vis-a-vis member states, CCI does not possess any residual powers to avoid such a situation.[77,78] The 'deal/transaction-value thresholds' could be subjective as this value varies significantly across sectors with a possibility that the parties could work around the transaction so as to structure it in such a way that the deal/transaction value remains below the prescribed thresholds. [79] Considering the fact that the EU had considered introducing the same but then decided against it, and also the International Competition Network ('ICN') recommended that the best practice is always the asset and turnover threshold

[74] *Supra* note 2 at 6.
[75] *Supra* note 1 at 128.
[76] *Ibid.*
[77] Investigations of Consummated and Non-Notifiable Mergers (United States), *OECD, Working Party No. 3 on Co-operation and Enforcement, available at:* https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/consummated_mergers_us_oecd.pdf (last visited on Nov. 15, 2020)
[78] Juan Rodriguez, Merger referrals under the EU merger regulation, *available at:* https://www.sullcrom.com/siteFiles/Publications/Rodriguez_EAR_Merger_Referrals3.pdf (last visited on Nov. 14, 2020)
[79] Introduction of alternative merger control thresholds- is it the way forward?, *AZB & Partners*, *available at*: https://www.azbpartners.com/bank/introduction-of-alternative-merger-control-thresholds-is-it-the-way-forward/ (last visited on Nov. 15, 2020)

notification criteria, one can only whether this change will ultimately harm the emerging Indian digital markets or not. [80,81,82]

C. Widening the ambit of 'control'

This could be another harmful amendment proposed, where the test of 'material influence' is introduced instead of the 'decisive influence' test, defining control to be the ability to exercise material influence, in any manner whatsoever, over the management or affairs or strategic commercial decisions under clause (a) of the Explanation to section 5.[83] The 'material influence' test is widely recognised as one of the lowest thresholds for deciding 'control' which could place a large regulatory burden on companies. Until now, the CCI has applied 'material influence' only in two cases — *Ultratech-Jaiprakash Associates Limited*[84] and *Agrium Inc.-Potash Corporation.*[85] In the *Ultratech-Jaiprakash Associates Limited,* the CCI defined the term material influence to be 'the lowest level of control, implies presence of factors which give an enterprise ability to influence affairs and management of the other enterprise including factors such as shareholding, special rights, status and expertise of an enterprise or person, Board representation, structural/financial arrangements etc.[86]

Codifying 'material influence' could introduce unnecessary regulatory costs in the early stages of a company, completely defeating the purpose of the amendments which is to further the ease of doing business in India. It would be beneficial if CCI would update its current guidance notes to Form I wherein the aspect of 'control' is enumerated in three situations of direct or indirect shareholding of 10% or more, right or ability to exercise any right that is not available to an ordinary shareholder and right or ability to nominate a director or observer in another enterprise.[87]

---

[80] Competition Policy for the Digital Era, *European Commission*, *available at*: https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf (last visited on Nov. 15, 2020)
[81] The 2008 ICN Recommended practises for Merger Notification and Review Procedure.
[82] *Supra* note 50.
[83] *Supra* note 2 at 6.
[84] *UltraTech Cement Limited*: Combination Regn. No. C-2015/02/246, *available at:* https://www.cci.gov.in/sites/default/files/246_44_PublicV.pdf (last visited on Nov. 14, 2020).
[85] Combination Regn. No. C-2016/10/443.
[86] *Supra* note 80 at 14.
[87] Notes to Form I, *Competition Commission of India, available at:* https://www.cci.gov.in/sites/default/files/page_document/Form1.pdf (last visited on Nov. 14, 2020).

D. Green Channel Route

The CLRC had recommended the introduction of an automatic route for approval of combinations which would significantly reduce time and costs of notifiable transactions and also ensure optimum usage of CCI's resources on mergers with genuine competition concerns.[88] This faster process called the Green Channel route was implemented on 15 August 2019 (brought by the *2019 Amendment Regulations)*[89] requiring the parties to the combination to carry out a self-assessment to check if they will qualify for the Green Channel Route or not and make sure that they do not have any horizontal, vertical or complementary overlaps between them.[90] Such qualifying transactions will be considered approved on the date of the receipt of the acknowledgment of filing of the notice in Form I of CCI along with a declaration under the Green Channel Route by the parties, allowing them to consummate the transaction immediately eliminating the statutory 210 days' time waiting period after such a filing. Moreover, if the CCI subsequently holds that such a combination does not qualify for the Green Channel Route, it shall provide the party a reasonable opportunity to be heard before declaring the automatic approval *void ab initio* and making the parties liable for fines under section 44 of the Act (for making a false statement or omitting material information) and/or section 43A of the Act (for consummating a transaction before CCI approval).[91] Also, recently on 28 March 2020, the CCI provided a revised update on its guidance notes to Form I which cleared all confusion regarding 'complementary overlaps' as mentioned in the green route channel.[92]

---

[88] *Supra* note 1 at 126.

[89] Regulation 5A, The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2019.

[90] MM Sharma, "CCI-"Green Channel"–automatic approval route for certain combinations- A Primer", *Antitrust and Competition Law Blog,* April 11, 2020, *available at:* https://www.competitionlawyer.in/green-channel-automatic-approval-route-for-certain-combinations-a-primer/ (last visited on Nov. 14, 2020).

[91] *Ibid.*

[92] Anshuman Sakle, Smita Andrews & Nandini Pahar, "Notes to Form I: A brief look at the changes to CCI's explanatory notes", *A Cyril Amarchand Mangaldas Blog*, April 7, 2020, *available at:* https://competition.cyrilamarchandblogs.com/2020/04/notes-to-form-i-a-brief-look-at-the-changes-to-ccis-explanatory-notes/ (last visited on Nov. 15,2020).

VI. CONCLUSION

The Draft Competition (Amendment) Bill, 2020 is definitely a heavily mixed bag of positives and negatives. The Bill has brought in some great changes. It gives more powers to the CCI to tackle anti-competitive behaviour which could have AAEC. Introduction of the 'Settlements and Commitments' and 'Leniency Plus' systems is a great welcome change towards a progressive and mature future of competition law. Meanwhile, the merger control amendments could essentially prove to be more burdensome for the industry stakeholders and disrupt the ease of doing business. Though the Green channel route of automatic approval system has largely benefitted the industry, but the present amendments with regard to merger control can do more harm than good as they place unnecessary regulatory burden on the companies. The most worrying of all changes is with respect to the structure of the CCI. With the introduction of the Governing Board, institutional independence of the CCI can be threatened. It needs to be made completely certain that there would be absolutely no governmental interference in the functioning of the CCI after the constitution of a Governing Board.

Now looking at whether the general approach followed by the CLRC of 'If it ain't broke, don't fix it' holds true, we can see that changes in the regulatory structure of the CCI are completely against that motto considering that the current situation is in an apple pie order. Nevertheless, it is evident that the CCI will learn things the hard way and actually it is the only way to understand and study the true effect of these changes proposed, be it positive or negative. But, a toast to the glorious first decade of functioning of the CCI is definitely due.

TERRORISM, ANTI-TERROR LAW AND HUMAN RIGHTS IN JAMMU AND KASHMIR

Suman[*]

I. INTRODUCTION

Terrorism, which of late has acquired global dimensions, is not a new phenomenon. In fact, it has been a recurring theme in the history of mankind as '[t]errorism, in various forms, has been practiced throughout history and across a wide variety of political ideologies'.[1] However, in the ancient world, it did not demonstrate all aspects that go to make up the phenomenon of modern terrorism. Modern weapons and rapid developments in the field of communication or information technology provided a major impetus to terrorist groups. Consequently, by the end of the twentieth century, terrorism had become a global phenomenon and took a new shape in which suicide bombers emerged as a dominant feature, causing a major threat to human societies all over the world. This can be illustrated by the ruthless suicide attacks on the World Trade Center on September 11, 2001, followed by string of powerful blasts by suicide bombers that tore through three churches and a luxury hotel in Sri Lanka on April 21, 2019, killing as many as 253 people and similar attacks in several other parts of the world.[2] The Islamic State in Iraq and Syria ('ISIS') apparently claimed responsibility for the latter attacks.[3] The attack was consistent with the recent pattern of terrorist attacks on mosques in Christchurch, New Zealand. Likewise, the lone wolf attackers inspired by ISIS have also launched deadly attacks in Paris, Brussels, Berlin, New York, Manchester, London, Stockholm, and Barcelona in 2016 and 2017. This apart, attacks with vehicles have become a new and effective mechanism for causing fatalities that demonstrate the continuing threat that

* Associate Professor at the Faculty of law, University of Delhi. Her areas of interest include the study of anti-terrorist laws and issues relating to human rights.

[1] Harvey W. Kushner, *Encyclopaedia of Terrorism*, p. 359 (Sage Publications 2003).

[2] "Sri Lanka lifts social media ban imposed after Easter blasts" *The Hindu*, May 1, 2019, *available at:* https://www.thehindu.com/topic/sri-lanka-easter-bombings/ (last visited on Dec. 1, 2020).

[3] Editorials, "Terrorist Attacks in Sri Lanka", 54 (17) *EPW* 7 (Apr. 27, 2019).

terrorism can pose.[4] In India, the Pulwama attack on February 14, 2019 on a Central Reserve Police Force ('CRPF') convoy carried out by a Jaish-e-Mohammed ('JeM') suicide bomber – who rammed his explosive laden vehicle into the convoy, killing 40 CRPF personnel – was one such incident. A similar incident occurred in Iran on February 13, 2019 when a lone suicide bomber attacked a bus carrying soldiers, killing 27 of them.[5] According to one study at the University of Maryland's National Consortium for the Study of Terrorism, during 2012, just three countries – Pakistan, Iran and Afghanistan – accounted for 54 per cent of the fatalities. India and regions of Africa reported most of the other incidents.[6]

To counter the menace, the United Nations Security Council adopted Resolution 1373 on September 28, 2001 which made it obligatory for states to take appropriate measures and to co-operate in the fight against terrorism.[7] In addition, a global war on terrorism was also declared. However, keeping in view the implications of the resolution, the UN Human Rights Committee stressed that 'fear of terrorism does not become a source of abuse of human rights'. As has rightly been said: 'Respect for human rights, fundamental freedoms and the rule of law are essential tools in the effort to combat terrorism'.[8] Further, the United Nation Commission on Human Rights asserted that terrorism, whenever and by whoever committed, can never be justified in any instance, including as a means to promote and protect human rights. According to some, the counter-terrorism measures resulting in 'extra-judicial executions of suspected 'terrorists', indefinite preventive detention, custodial torture, degrading treatment, secret trials and the like horrors thus also pose 'severe challenge to democracy, civil society and the rule of law' and enhance the 'environment that destroys the freedom from fear of the people'.[9]

---

[4] Brenda Lutz and James Lutz, "Terrorism", in Allan Collins (ed.), *Contemporary Security Studies*, 318 (2016).
[5] John Cherian, "Terror next door" *Frontline*, March 15, 2019.
[6] R.K. Raghavan, "The rising curve of terrorist violence" *The Tribune*, Jan. 28, 2014.
[7] The resolution requested countries to 'implement a number of measures intended to enhance their legal and institutional ability to counter terrorist activities at home, in their region and around the world'. George Andreopoulos, "Whither accountability? Counter-terrorism and human rights at the United Nations Security Council", in Alison Brysk and Michael Stohl (eds.), *Contracting Human Rights: Crisis, Accountability, and Opportunity*, 144 (2018).
[8] Adam Mcbeth, Justine Nolan and Simon Rice (eds.), *The International Law of Human Rights*, 369 (2017).
[9] Upendra Baxi, *Human Rights in a Posthuman World*, 170 (2007).

India has also suffered a heavy toll of life and property due to terrorism, particularly in a sensitive Union Territory like Jammu and Kashmir. However, the terrorist violence in Kashmir, which developed into an 'invisible war' by the end of 1989, was not a sudden outburst but the cumulative result of various factors that has shaped the contours of Kashmir crisis ever since 1947. Pakistan's vow to 'bleed India through a thousand cuts' and its effort to add fuel to any fire raging in the Valley further complicated the situation. Pakistan has not only exploited the local situation but also vitiated it further.[10] The external factor of Pakistan, of course, acted as a catalyst but the internal situation has been equally responsible giving rise to terrorism and subversive violence which inflicted all sorts of brutalities on the people. More recently, a 12-year-old child was held hostage and killed by the terrorists. The terrorists were not moved even by the appeal of child's mother seeking the release of her minor child.[11] The child was held hostage as he had an elder sister whom his captors wanted to assault sexually. The incident revealed the imminent threat of assault on the dignity of the young girls.

To contain terrorist violence, the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990 ('AFSPA') was enacted. However, AFSPA has also contributed to the acts of atrocities and excesses on the people and has ended up being a vehicle of state oppression. The present paper focuses on debates surrounding AFSPA. It is divided into two parts. The first part attempts to critically examine the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990 and the approach of the judiciary towards the law. The second part analyses two incidents of killings viz. the Pathribal and the Machil encounters to understand the violation of human rights of innocent civilians. These killings were followed by massive protests resulting in more killing and demand for repeal of AFSPA. However, with the terrorist attack at Pulwama and killing of police and security personnel by the militants in Jammu and Kashmir, the Army favoured retention of AFSPA. The last part of the paper debates the issue of repeal or retention of AFSPA and the developments following the constitutional changes resulting in abrogation of Article 370.

---

[10] P.S. Verma, *Jammu and Kashmir At The Political Crossroads*, (1994).

[11] Arun Joshi, "In Kashmir, child killers are called 'mujahideen' *The Tribune*, March 25, 2019, *available at*: https://www.tribuneindia.com/news/archive/j-k/in-kashmir-child-killers-are-called-%E2%80%98mujahideen%E2%80%99-747820. (last visited on Dec. 1, 2020).

II. ARMED FORCES (JAMMU AND KASHMIR) SPECIAL POWERS ACT, 1990 & THE SUPREME COURT

The Armed Forces Special Powers Act is one of the earliest extraordinary laws in post-Independence India. It was initially enacted to deal with rebellious armed assertions in north-eastern region in 1958.[12] When the Bill was introduced on August 11, 1958 by the then Home Minister G.B. Pant in the Lok Sabha, he stated that it 'provides for the protection of the Army when it has to deal with hostile Nagas'.[13] Against the backdrop of growing terrorist violence in Jammu and Kashmir, the Central Government issued a similar enactment as the Armed Forces (Jammu and Kashmir) Powers Act, 1990. The Act draws its legitimacy from Article 355 of the Constitution which bestows a duty upon the Union to protect every state against external aggression and internal disturbance. As per the existing legal framework, AFSPA empowers the Central Government and the Governor of a State to declare any area as 'disturbed' under Section 3 of AFSPA, warranting use of armed forces. Upon such a declaration, special powers are conferred upon members of the armed forces operating 'in aid of the civil power' in the disturbed areas.[14] According to Section 4, any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may 'arrest without warrant, any person who has committed a cognizable offence or against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offence and may use such force as may be necessary to effect the arrest'.[15]

Section 4(d) of AFSPA empowers the armed forces to 'enter and search, without warrant, any premises to make such arrest'. Section 6 explicitly lays down that 'any person arrested and taken into custody under the Act and every property, arms,

---

[12] After 32 years, the Act is partially removed from three of the nine districts of Arunachal Pradesh but would remain in force in the areas bordering Myanmar. Press Trust of India, "AFSPA scaled back in Arunachal" *The Hindu*, April 23, 2019, *available at:* https://www.thehindu.com/news/national/other-states/afspa-scaled-back-in-arunachal/article26715760.ece (last visited on Dec. 1, 2020).

[13] A.G. Noorani, "AFSPA: Licence to Kill" *Frontline*, April, 2015, available at: https://frontline.thehindu.com/the-nation/afspa-licence-to-kill/article7048801.ece (last visited on Dec. 1, 2020).

[14] The Act was invoked in two stages in July 1990 and August 2000 by the Parliament under Article 246 of the Constitution. See, Arun Joshi, "AFSPA withdrawal: Omar's journey full of hurdles" *The Tribune*, Oct. 23, 2012.

[15] The Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, s. 4.

ammunition or explosive substances or any vehicle or vessel shall be made over to the office in-charge of the nearest police station with the least possible delay together with a report occasioning the arrest and seizure of property etc.'.[16]

The most controversial aspect is that AFSPA forbids prosecution of Army personnel for killing and other violations 'except with the previous sanction of the Central Government'. Section 7 of AFSPA states that 'no prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act'.[17] Amnesty International, in its report, sought removal of all 'requirements of sanction or prior sanctions' and has held section 7 of AFSPA as 'the primary facilitators of impunity'.[18] Earlier, the UN Human Rights Committee in 1997 had also expressed concern about the continuation of AFSPA and recommended that immunity provisions in AFSPA were incompatible 'with the right to effective remedy under international human rights law and the concomitant duty to investigate and prosecute gross human rights violations, such as torture'.[19] Further, the Committee pointed out that the provision of sanction of the Central Government 'contributes to a climate of impunity and deprive people of remedies to which they may be entitled in accordance with article 2, paragraph 3, of the Covenant'.[20]

The general impression in Kashmir is that AFSPA confers extraordinary powers on the men in uniform who have often abused it but cannot be prosecuted without the prior sanction of the Central Government. Given the restriction imposed by Section 7 of AFSPA, most cases of alleged excesses and use of force have never been investigated or prosecuted. In February 2018, the Union Ministry of Home Affairs informed the Parliament that since 1990, out of the 50 requests sought for sanction

[16] *Id.*, s. 6.
[17] *Id.*, s. 7.
[18] Amnesty International, Denied: Failures in Accountability for Human Rights Violations by Security Force Personnel in Jammu and Kashmir (June, 2015), available at: https://www.amnesty.org/download/Documents/ASA2018742015ENGLISH.PDF (last visited on Nov. 29, 2019).
[19] Redress, Asian Human Rights Commission and Human Rights Alert, The Armed Forces (Special Powers) Act, 1958 in Manipur and other States of the North-East of India: Sanctioning Repression in Violation of India's Human Rights Obligations (August, 2011) 14, *available at:* https://www.refworld.org/pdfid/4e5630622.pdf (last visited on Nov. 30, 2020).
[20] *Ibid.*

for prosecution from the Jammu and Kashmir government, 47 were rejected and three others are pending.[21] The judiciary however, has upheld the provision of sanction by the Central government. The Supreme Court, in Pathribal encounter case[22] ruled that Army men accused of encounter killing could not be prosecuted without the Centre's sanction as they had enjoyed immunity under AFSPA. According to the bench: 'If the law requires sanction, and the court proceeds against a public servant without sanction, the public servant has a right to raise the issue of jurisdiction as the entire action may be rendered void ab-initio for want of sanction'.

However, the presence of AFSPA has evoked criticism and scorn among the academicians and human rights activists. According to an observer, AFSPA, like the colonial ordinances, is designed 'to legalise extraordinary military methods to repress political movements among sections of the population at its peripheries'.[23] The Justice Santosh Hegde Commission set up by the Supreme Court to investigate cases of fake encounters in Manipur described the law as 'a symbol of oppression'.[24] Some have characterized it as one of the earliest 'repressive laws'.[25] Similarly some, while criticizing Section 4(a) of AFSPA, said that the Act 'contains a carte blanche unheard of in any other statutes in any other democracy – even to the causing of death'.[26] Section 4 is considered to be in contravention of U.N. Code of Conduct for Law Enforcement Officials and the U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement officials, which requires law enforcement officials to use firearms only as a last resort, and to use them with lethal intent only when 'strictly unavoidable in order to protect life'.[27]

---

[21] A.G. Noorani, "The Wrongs in Kashmir" *Frontline*, August, 2018, *available at:* https://frontline.thehindu.com/the-nation/article24561017.ece (last visited on Dec. 1, 2020).
[22] *General Officer Commanding* v. *CBI & Anr.* (2012) 5 SCR 599 at 614. Also see, Bhadra Sinha, "Let Army decide how to try personnel in fake encounter cases: SC" *The Hindustan Times*, May 2, 2012.
[23] Suvir Kaul, "Indian Empire (and the case of Kashmir), 46(13) EPW 73 (March, 2011).
[24] "Amnesty for repeal of AFSPA in N-E" *The Tribune*, July 13, 2015.
[25] G. Hargopal and B. Jagannatham, "Terrorism and Human Rights : Indian Experience with Repressive Laws", 44 (28) *EPW* 79 (July, 2009).
[26] A.G. Noorani and South Asia Human Rights Documentation Centre, *Challenges to Civil Rights Guarantees in India*, 270 (Oxford University Press, 2012).
[27] *Supra* note 21.

The Delhi High Court in *Indrajit Barua* v. *State of Assam*[28] held that AFSPA provided sufficient safeguards and the power conferred upon the executive cannot be arbitrary. The Court held:

> If to save hundreds of lives one life is put in peril, or if a law ensures and protects the greater social interest, then such law will be wholesome and beneficial law although it may infringe the liberty of some individuals and it will ensure for the liberty of greater number of members of the society at the cost of one or few.

The validity of AFSPA was challenged before the Supreme Court by means of a writ petition in *Naga People's Movement for Human Rights* v. *Union of India*.[29] A five-judge bench, while upholding the validity of the law, ruled that its various sections are compatible with the pertinent provisions of the Indian Constitution. The Court further emphasized that the military forces had been deployed in the disturbed areas to assist the civilian authorities. However, in view of the potential abuse of human rights, the Court laid down detailed guidelines for its use and furnished a list of 'Do's and Don'ts' for the armed forces, which have been incorporated in the judgment. The do's encompassed: power to open fire using force or arrest to be exercised only by an officer/JCO/WO and NCO; open fire only after due warning; arrest only those who have committed cognizable offence or against whom reasonable suspicion exists that they have committed or is about to commit cognizable offence; ensure that troops do not harass innocent people, destroy property of the public or unnecessarily enter into the house of people and; hand over all arms, ammunition etc. and the arrested persons to the nearest police station with least possible delay. This apart, ensure medical aid to any person injured during the encounter, and if any person dies in the encounter, his dead body be handed over immediately to the police. Similarly, the don'ts included: forbid use of excessive force; do not keep a person under custody for any period longer than the bare necessity; no harassment of civilians; and no torture and indiscriminate firing. The Court further said that the instructions in the list of do's and don'ts are binding and any disregard to the said instructions would entail action under the Army Act, 1950. It also observed that a complaint against misuse or

[28] AIR 1983 Delhi 513.
[29] AIR 1998 SC 431.

abuse of the powers should be thoroughly enquired into and if it is found that there is substance in the allegation, the victim should be suitably compensated by the state and the requisite sanction should be granted for institution of prosecution against the person responsible for such violations.

Nonetheless, despite the Court's guidelines and the order, the people in 'disturbed areas' have experienced abuse at the hands of the police and security forces. The application of AFSPA over the years has led to violation of human rights. It is the experience of the people in the Jammu and Kashmir that most of these do's and don'ts have been observed in breach only. The Justice Santosh Hegde Committee found that the do's and don'ts had no significance in the field and the Army has not been following them.[30] In a major development in July 2016, the Supreme Court in *Extra Judicial Execution Victim Families Association (EEVFAM)* v. *Union of India,*[31] ordered the Central Bureau of Investigation to investigate alleged extrajudicial killings by the security forces in the State of Manipur. While reiterating the importance of accountability for human rights violations by the police and security forces, the Court held that armed forces cannot use excessive force in the course of the discharge of their duties as AFSPA 'does not allow blanket immunity for perpetrators of unjustified deaths or offences'. For any excesses beyond the call of duty, those members of the armed forces would be liable to be proceeded against in a court of law and not necessarily by the Army in court martial proceedings.[32] The bench comprising Justices Madan B. Lokur and U.U. Lalit said that no one can act with impunity, particularly when there is a loss of an innocent life. The judges upheld the view of the Constitutional Bench in *Naga People's Movement for Human Rights (supra)* that an allegation of excess force or retaliatory form by the uniformed personnel that resulted in death necessitates a thorough inquiry into the incident. The Court's judgment was in response to a petition filed by an NGO Extra Judicial Execution Victim Families (EEVFAM). However, the Central Government

[30] Mustafa Haji, "Killing One Colonial Law at a time - It's Time to Repeal AFSPA" *The Wire*, October 3, 2018, *available at:* https://thewire.in/law/repealing-afspa-colonial-law-northeast-jammu-kashmir (last visited on Dec. 1, 2020).
[31] Writ Petition (Criminal) No.129/2012.
[32] *Id.*, at para 173.

filed a curative petition on April 12, 2017 asking for review of the verdict which was rejected. The Supreme Court upheld its 2016 judgment on April 28, 2017.[33]

The judgement thus is in stark contrast to its earlier ruling in *Naga People's Movement for Human Rights* (*supra*) which had, while upholding the constitutional validity of AFSPA, only specified an essential list of do's and don'ts to be followed by security forces without any accountability of armed forces for human rights violations. The verdict in *EEVFAM (supra)*, however, was criticised as it was against the earlier Supreme Court's Constitution Bench decision in *Naga People's Movement for Human* (*supra*). A petition was filed by 350 Army personnel challenging the decision arguing that the verdict has had a 'demoralising effect on soldiers fighting terrorism'. The Supreme Court, however, dismissed the petition and said that the issue should be 'debated' and 'discussed'.[34]

The Apex Court, thus, in *EEVFAM* (*supra*) ordered investigation of extrajudicial killings by security forces in the State of Manipur. However, as far as Jammu and Kashmir is concerned, there has not been any such initiative by the Court in cases of violation of human rights. In *Lt. Col. Karamveer* v. *State of Jammu and Kashmir & Ors*.,[35] the father of Major Aditya Kumar approached the Supreme Court seeking to quash the FIR filed by the Jammu and Kashmir government against his son. The case relates to the killing of three civilians in firing by the Army. The Army had said they opened fire in self-defence to prevent "lynching" of junior commissioned officer and burning of vehicles by a mob. The Attorney General, appearing for the Centre, sought stay of investigation as under Section 7 of AFSPA prior sanction of the Central Government was necessary in such matters. Acting on the petition, the Supreme Court stayed the investigation into the case after the Centre's submission that the case cannot move without its prior sanction.[36]

---

[33] Sangeeta Barooah Pisharoty, "When the Supreme Court gave Hope To Those Fighting Against AFSPA" *The Wire*, Dec. 31, 2017, *available at:* https://thewire.in/government/afspa-2017-supreme-court-irom-sharmila (last visited on Dec. 1, 2020).

[34] HT Correspondent, "Supreme Court dismisses pleas of 350 Army men challenging FIR against armed forces members" *Hindustan Times*, May 4, 2019.

[35] Writ Petition (Criminal) No.42/2018.

[36] Anoop Bhuyan, "356 officers Petition Supreme Court to Stop Prosecuting the Army for the Encounter" *The Wire*, Aug. 14, 2018, *available at:* https://thewire.in/rights/army-officers-petition-supreme-court-fake-encounters-manipur. See also: Express News Service, "Supreme Court Stays Probe into Civilian Deaths in Army Firing" *The Indian Express*, Mar. 6, 2018, *available at*:

It follows from the above discussion that despite criticism of AFSPA, the Supreme Court had upheld the constitutional validity of the Act. Although its decision in in *EEVFAM* (*supra*) is seen by the expert as judicial precedent upholding civilian and human rights in disturbed areas, to expect the same in case of human rights violations in the Jammu and Kashmir appears to be somewhat unrealistic. A study of two cases below that have been widely covered by the national and international media highlights how AFSPA has often been misused resulting in excesses and violation of human rights. The violations have led to a momentous build up and mobilization of the masses in the Kashmir valley demanding a repeal of the law.

III. THE ENCOUNTER CASES

A. Pathribal Encounter Case

The Supreme Court in *General Officer Commanding* v. *CBI & Anr.*[37] dealt with incident of killing of five persons in Pathribal on March 25, 2000, in a joint operation by the Army and the Jammu and Kashmir Police. The Army said that these five killed foreign terrorists belonging to Lashkar-e-Toiba had killed 36 Sikhs in Chattisinghpora on March 20, 2000.[38] The local people however, claimed that the victims were abducted and thereafter killed by the security forces to prove that the killers of 36 Sikhs were eliminated.[39] Their elimination triggered protests and demand that the bodies be exhumed, and an independent investigation be conducted. Amid protests and demonstrations, an inquiry was conducted. The bodies of five persons were exhumed and doctors conducted an autopsy.[40] When the final report was released, it was established that the deceased were not foreign terrorists but were innocent

---

https://indianexpress.com/article/india/supreme-court-stays-probe-into-civilian-deaths-in-army-firing-5087423/ (last visited on Dec. 2, 2020).

[37] (2012) 5 SCR 599.

[38] For details see, *The Tribune*, Oct. 22, 2005.

[39] Ravi Krishnan Khajuria, "Pathribal case: Army's clean chit to 5 officers", *The Tribune*, January 14, 2014, available at: https://www.tribuneindia.com/2014/20140124/main4.htm.

[40] Muzamil Jaleel, "Why Justice Eludes The Victims of Pathribal Fake Encounter", *The Indian Express*, August 20, 2017, *available at:* https://indianexpress.com/article/india/why-justice-eludes-the-victims-of-pathribal-fake-encounter-4804985/ (last visited on Dec. 1, 2020).

civilians.[41] On account of public pressure, the Government of India issued a notification asking for the Central Bureau of Investigation to investigate into the matter.[42] The CBI, after a thorough investigation, indicted five Army personnel for staging the 'fake encounter' and filed chargesheet against five Army personnel before the Court of the Srinagar Chief Judicial Magistrate (CJM).[43] It was alleged that the Pathribal incident was a case of a fake encounter, an outcome of a criminal conspiracy by these armed personnel.[44] Further the CBI argued that since these cases involved murder, the Court could try the accused Army officials without sanction from the Government of India as the acts cannot be said to be done in the course of performing official duty.[45] Killing innocent persons in a fake encounter in a conspiracy cannot be called discharge of official duty carried out in good faith.[46] The Army, on the other hand, argued that filing the chargesheet by the CBI against the Army without sanction from the Central Government was not legal. According to the Army, for trying Army personnel before court martial or before a regular criminal court sanction was required. It was pleaded before the Court that the CBI should apply for a sanction from the Government of India before filing the chargesheet.[47] CBI however, contended that mere filing of the chargesheet does not amount to institution.[48]

The Supreme Court, in its order, held that prior sanction was a condition precedent before institution of any legal proceedings. The Court further said that whether the act complained of was done in performance of duty, 'it is to be determined by the competent authority. The competent authority is the Government of India'. The Court held that the Government has absolute power to withhold or

---

[41] Nazir Masoodi, "DNA nails Pathribal lie but Farooq Touches Raw Nerve", *The Indian Express*, Jul. 17, 2002, *available at:* http://chittisinghpora.blogspot.com/2017/01/dna-nails-pathribal-lie-but-farooq.html?m=0 (last visited on Dec. 1, 2020).
[42] Gazala, "In pursuit of Justice: Pathribal Fake Encounter Case", 47 (30) *EPW* 29(July 28, 2012)
[43] Ishfaq Tantry, "Pathribal closure shocks victims' families", *The Tribune*, Jan. 25, 2014. In September 2005, the CBI exonerated Senior Superintendent of police. Quoted in *Everyone Lives in fear : Pattern of Impunity in Jammu and Kashmir,* Human Rights Watch, 57 (2006), *available at:* https://www.hrw.org/sites/default/files/reports/india0906web.pdf (last visited on Dec. 1, 2020).
[44] *General Officer Commanding* v. *CBI & Anr.* (2012) 5 SCR 599 at 623.
[45] "Everyone Lives in fear: Pattern of Impunity in Jammu and Kashmir" *Human Rights Watch*, 57 (2006), *available at:* https://www.hrw.org/sites/default/files/reports/india0906web.pdf (last visited on Dec. 1, 2020).
[46] *Supra* note 44 at 627, para 7.
[47] *Id*. at para 6.
[48] *Id.* at para 7.

grant sanction and it is not the duty of the Court to inquire into the matter. Furthermore, the Court held:

> The question of sanction is of paramount importance for protecting a public servant who has acted in good faith while performing his duty. In order that the public servant may not be unnecessarily harassed on a complaint of an unscrupulous person, it is obligatory on the part of the executive authority to protect him.[49]

The Court, however, rejected the contention of the Army on the issue of filing of the chargesheet and held that filing of the charge sheet does not amount to institution of a prosecution or filing of a suit or initiating legal proceedings. The Court further held that under Section 125 of the Army Act 1950, the Army had the option of choosing a court martial or a regular criminal court. Following the order of the Supreme Court, which gave the Army the option to choose between a civil trial of the Pathribal accused or court martial proceedings, the Army took over the case from the Court. When the General Court Martial was convened, its verdict gave a clean chit to the five Army officers, stating that the evidence recorded could not establish prima facie charges against them.[50] The Court was told that no criminal culpability was established against the five Army officials indicted by the CBI.[51] The closure of the case by the Army court invoked resentment and protests in Kashmir. The family members of the slain civilians said: 'In our case, the Army is both the killer and the judge'.[52] The then Chief Minister, Mr. Omar Abdullah emphasised: 'If Army has not killed them, then who is the killer of those five innocent villagers. Their family members also want to know'.[53]

The inference that one can draw from the above discussion is that the local people including family members of the victims and the civil liberty groups have felt

---

[49] *Id.* at 654.
[50] Ishfaq Tantry, "Pathribal case: J&K Govt. to seek retrial in civilian court" *The Tribune*, Jan. 30, 2014.
[51] Ahmad Ali Fayyaz, "J&K Police info used to conduct Pathribal op: Army" *The Hindu*, Jan. 26, 2014, *available at:* https://www.thehindu.com/news/national/other-states/jk-police-info-used-to-conduct-pathribal-op-army/article5618071.ece (last visited on Dec. 1, 2020).
[52] Ishfaq Tantry, "Pathribal case closure shocks victims' families" *The Tribune*, Jan.25, 2014, *available at:* https://www.tribuneindia.com/2014/20140125/main8.htm. (last visited on Dec. 1, 2020).
[53] Ashwani Kumar, "Pathribal Fake Encounter Case Needs Revisiting, Says Omar" *India Today*, Feb. 12, 2014, *available at:* https://www.indiatoday.in/india/north/story/pathribal-fake-encounter-case-needs-revisiting-says-omar-180832-2014-02-12 (last visited on Dec. 1, 2020).

disappointment at the Army court's verdict, whereas the Army, which opted for court martial, claimed that it was a fair decision based on very thorough investigation devoid of any bias or partiality. Section 7 of AFSPA, dealing with prior sanction of the Central Government, thus became highly controversial, agitating relatives, locals and human rights activists in Kashmir.

B. Machil Encounter Case

The High Court of Jammu and Kashmir v. *Special Judicial Magistrate*[54] was another major case of an alleged fake encounter in which three Kashmiri youths were killed at Machil, in the border belt of Kupwara district in north Kashmir. They were allegedly killed on April 30, 2010 by the Army men in a 'staged encounter'.[55] The Army claimed that it had killed three militants in an encounter at Machil when they were trying to infiltrate the Indian side from Pakistan. However, the event triggered protests when the family members recognized them from photographs of the slain youth that had appeared in the local media.[56] The police ordered an investigation. The bodies were exhumed, and an autopsy concluded that the three slain youths had been shot at point blank range. The state police called it 'a clear case of murder for medal and reward. The three youths were innocent civilians, who were labelled as militants and killed by the Army'.[57] It was alleged that there was a mechanism of reward of cash and promotions for those killing terrorists in the counter-terrorist operations. According to some, '[t]he whole operation in this case was conducted for the sake of three reasons: money, promotions and appeasing superiors'.[58] A chargesheet against the Army personnel was filed by the police on murder charges in a criminal court.[59] However, the Army opted for a court of inquiry[60] and filed a petition in the High Court challenging the jurisdiction of the civil court to try the accused Army men in

[54] CMP No. 243 of 2012.
[55] *Ibid*.
[56] Ashish Gupta, Moushumi Basu,"The disappeared of Kashmir", 45(25) *EPW* 5 (June, 2010).
[57] Ravi Krishan Khajuria, "No Army man involved in fake encounter in 20 yrs" *The Tribune*, May 30, 2010, *available at:* https://www.tribuneindia.com/2010/20100530/j&k.htm (last visited on Dec. 1, 2020).
[58] Arun Joshi, "Machil verdict : Army proves all doubters wrong" *The Tribune*, Dec. 27, 2013, *available at*: https://www.tribuneindia.com/2013/20131227/j&k.htm (last visited on Dec. 1, 2020).
[59] Peerzada Ashiq, "Six Army men sentenced to life in Machil fake encounter case" *The Hindu*, Sep. 7, 2015, *available at:* https://www.thehindu.com/news/national/other-states/court-martial-sentence-in-machil-fake-encounter-confirmed/article7625081.ece (last visited on Dec. 1, 2020).
[60] *Ibid*.

the case. Consequently, the High Court permitted the Army personnel to be tried under the court martial proceedings.[61] Thereafter, the military court, after thorough inquiry and investigation, sentenced the six soldiers, including two officers, to life imprisonment in November 2014. The Court found that the men were lured to Kupwara district with promises of jobs and money but shot dead by the troops in the staged encounter.

The verdict of the military court sentencing them to life imprisonment was widely welcomed as it had imparted justice to the victims and their families. It was also the first time in Kashmir that Army personnel, including a Colonel, were given life term in court martial proceedings for extra-judicial killings. This was in sharp contrast to the Pathribal encounter. The Army also lauded the verdict and claimed that the Army court had given exemplary punishment to its soldiers. However, after the verdict, the six convicts approached the Armed Forces Tribunal (AFT), New Delhi, challenging the verdict of the Summary General Court Martial (SGCM). Surprisingly on July 26, 2017, it suspended the sentences given to five personnel and also granted them bail. The Armed Forces Tribunal verdict to suspend and free the accused has turned out to be a major setback for the families of victims and created fear for safety and a demand for justice.

In brief, the judgment awarded by the Army court has hardly comforted local people or relatives of victims in Kashmir. The reversal of the verdict by the AFT came as a jolt which outraged the locals and relatives of victims. In terms of the background, the three victims belonged to humble origins residing in rural areas. They used to earn their livelihood by selling fruits, working as a repairer of automobiles at a workshop and as a daily wage labourer. Such verdicts, protecting the rights of killers, undeniably disrupt the fight against militancy. Some, while pointing out that AFSPA is inherently an act against natural justice as it gives the armed forces the authority to kill anybody in disturbed areas on suspicion, said:

> It has been providing a wider recruiting base for the insurgents. This is because some armed men, in recent years, have been tempted to stage fake

[61] Tribune News Service, "Government Asked to File Reply on Review Petition by Army" *The Tribune*, Nov. 18, 2012, *available at*: https://www.tribuneindia.com/2012/20121119/j&k.htm (last visited on Dec. 1, 2020).

> encounters and kill innocent civilians, possibly in the hope of promotions or cash rewards…. Such incidents spur hostilities among the local people and undermine the armed forces' rear base and make the armed personnel vulnerable. This is exactly what has been happening in the North-East region and Kashmir.[62]

More recently, the killing of three missing labourers in a 'staged encounter' by the Army at Shopian on July 18, 2020 has resulted in protest by their families. The families claimed the three men were their missing wards and not militants.[63] This incident has again evoked the memories of the Pathribal and Machil encounter.

On the basis of the above two incidents, one can guess the fate of rights of the people in these disturbed areas. Such incidents of human rights violations led to the demand for repeal of AFSPA. Irom Sharmila, who sat on indefinite fast demanding repeal of AFSPA,[64] stated: 'I am against a government that uses violence as a means to govern'.[65] In addition, the social activist Medha Patkar, while demanding revocation of AFSPA, termed the Act as a blot on democracy.[66] Some have demanded a review of AFSPA. Regarding this, the report of the three interlocutors appointed by the Central Ministry of Home Affairs to study the situation in Jammu and Kashmir had suggested a review or re-appraisal of AFSPA and other Central Acts in Jammu and Kashmir.[67] In like manner, a high-level committee comprising former Chief Justice of India, Justice J.S. Verma, also called for a review of AFSPA.[68] According to some, '[t]he Act is a display of hard power. There is a need to replace it with soft power generated by democracy'.[69]

---

[62] Sailendra Nath Ghosh, "Questions and Answers on Kashmir Issue" *Mainstream*, 37 (2010).
[63] "Bodies of trio exhumed, laid to rest in Rajouri", *The Sunday Tribune* Oct. 4, 2020, *available at*: https://www.tribuneindia.com/news/j-k/bodies-of-trio-exhumed-laid-to-rest-in-rajouri-150725.
[64] "Sharmila completes 12 years of fast", *The Tribune*, Nov. 6, 2012, *available at:* http://www.assamtribune.com/scripts/detailsnew.asp?id=nov0612/oth06. She went on fast on November 5, 2000 after 10 persons were shot dead in an encounter with Assam Rifles personnel at Malon, on November 2, 2000.
[65] S.G. Vombatkere, "Misconceptions and Ground Realities" *Mainstream*, 11 (2013).
[66] Shikh Saleem, "In Irom Sharmila's support, march begins from Srinagar" *The Indian Express*, October 17, 2011.
[67] Dileep Padgaonkar, Radha Kumar and M.M. Ansari, *A New Compact With the People of Jammu and Kashmir Final Report*, 150 (2012).
[68] Nitya Rao, "Rights, Recognition and Rape" 48(7) *EPW* 19 (Feb. 16, 2013).
[69] Arun Joshi, "AFSPA in J&K will remain a bone of contention" *The Tribune*, July 6, 2015, *available at*: http://strategicstudyindia.blogspot.com/2015/07/afspa-in-j-will-remain-bone-of.html (last visited on Dec. 1, 2020).

The National Human Rights Commission (NHRC) of India also holds that AFSPA confers impunity which has often led to the violation of human rights.[70] More than that, Justice BP Jeevan Reddy Committee, which was set up by the Union Home Minister to review the provisions of AFSPA in the North-East, also recommended repeal of the Act in its report submitted on June 6, 2005. The report said, '[i]t is highly desirable and advisable to repeal the Act altogether', further noting that 'recommending the continuation of the present Act, with or without amendments, does not arise'.[71] In the case of violations or abuse of power by armed forces, the Committee proposed an independent 'grievances cell' constituted by the Union Government. Similarly, the Second Administrative Reforms Commission (2007) also favoured the repeal of AFSPA by inserting its appropriate provisions in chapter-VIA of the UAPA.[72] Altogether, the aforesaid description shows that a variety of groups including certain Kashmir based organizations, human rights bodies, committees etc. have perceived that AFSPA is incompatible with human rights and democratic norms.

The topic of repeal of AFSPA again surfaced at the United Nation's Universal Periodic Review Cycle in 2016. India defended the Act by stating that aberrations are 'dealt with our independent judiciary, autonomous Human Rights Commission at both national and State levels, vigilant and vocal media and a vibrant civil society'.[73] Likewise, the United Nations Office of the High Commissioner for Human Rights (OHCHR) in its first ever report on Kashmir emphasised 'the urgent need to address past and ongoing human rights violations and to deliver justice for all people in Kashmir who have been suffering from seven decades of conflict'.[74] The report titled '*Report on the Situation of Human Rights in Kashmir: Developments in the Indian State of Jammu and Kashmir from June 2016 to April 2018 and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit Baltistan'* was published on July 14,

---

[70] Aditi Tandon, "NHRC calls for AFSPA's repeal", *The Tribune*, Chandigarh, Dec. 5, 2011, *available at*: https://www.tribuneindia.com/2011/20111205/nation.htm#4 (last visited on Dec. 1, 2020).

[71] Government of India, Ministry of Home Affairs, *Report of the Committee to Review The Armed Forces Special Powers Act, 1958*, 74 (2005). 'UAPA' stands for Unlawful Activities (Prevention) Act, 1967.

[72] Government of India, *Second Administrative Reforms Commission-Public Order (Fifth Report)*, 242 (June 2007).

[73] Devirupa Mitra, "India Comes in the Line of Fire at UNHRC Over Rights Record, Racism" *The Wire.* https://thewire.in/diplomacy/india-unhrc-universal-periodic-review (last visited on Apr. 30, 2019).

[74] Report of United Nations Office of the High Commissioner for Human Rights, *available at:* https://www.ohchr.org/Documents/Countries/IN/DevelopmentsInKashmirJune2016ToApril2018.pdf. (last visited on Apr. 30, 2019).

2018. The Government, however, has dismissed the Report as 'fallacious, tendentious and motivated', violating 'India's sovereignty and territorial integrity'. Since 1990, several reports depicting human rights violations in Jammu and Kashmir have been published by Amnesty International and Human Rights Watch.[75] Regarding reporting by Amnesty International, Mr. K.P.S. Gill, former DGP, Punjab said: 'If they were fair and balanced, one could accept their views. But they are biased and support the terrorists'.[76] The Kashmiri migrants (Pandits, Sikhs etc.) have also criticized the civil liberty groups for opposing AFSPA and opposed the idea of revocation of AFSPA till the ongoing violence has ended. The migrants, among others, have also accused Amnesty International of refusing to entertain their plea of human rights abuses and brutality at the hands of the militants.[77]

The Army holds that AFSPA is merely a legal cover and does not give sweeping protection to the forces being used in aid of the civil administration. Further, to counter the charge of misuse of powers, it is claimed that strict action has been taken against the guilty or errant official under the Army Act, 1950. It is illustrated by facts, that '[t]he Army has punished 104 of its men, some of them held guilty of rape, including a major. They were dismissed from the service and also sentenced to rigorous imprisonment ranging from 7 to 10 years. Since 2008, there has not been a single case of rape charge against any of the soldiers posted in Jammu and Kashmir'.[78] According to the Ministry of Defence, 'there have been 1013 allegations of human rights violations by the Army officials in Jammu and Kashmir between 1994 and

---

[75] Premila Lewis Sequira Hasan, Nandita Haskar and Suhasini Mulay , *Kashmir Imprisoned: A Report¸ Committee for Initiative for Kashmir*, (1990); Asia Watch, Human Rights Watch and Physicians for Human Rights, *The Human Rights Crisis in Kashmir: A Pattern of Impunity*, (1993). It was preceded by *Rape in Kashmir: A Crime of War¸ The Crackdown in Kashmir*; *Kashmir Under Siege*. Similar reports such as *Human Rights in Kashmir: Report of a Mission*, International Commission of Jurists, Geneva, (1995); *Everyone Lives in Fear": Patterns of Impunity in Jammu and Kashmir*, Human Rights Watch, (2006); *Kashmir: Will the Pain Never End?* By a team comprising K. Balagopal and 10 others in Andhra Pradesh and Karnataka,(2007); *Widows and Half-Widows: Saga of Extra-judicial Arrests & Killings in Kashmir* by Afsana Rashid, (2011); *Alleged Perpetrators: Stories of Impunity in Jammu and Kashmir*, (2012); *Structures of Violence: The Indian State in Jammu & Kashmir*, (2015) and *Failures in accountability for human rights violations by security force personnel in Jammu and Kashmir*, Amnesty International, (2015). Quoted in A.G. Noorani, "The Wrongs in Kashmir", *Frontline*, 58(August 17, 2018)

[76] Kanwar Sandhu, "Confessions of a killer cop" *Outlook*, Dec. 2015, *available at:* https://magazine.outlookindia.com/story/confessions-of-a-killer-cop/296046.

[77] Sabina Sehgal, "How green was our valley" *The Times of India*, Jan. 24, 1993.

[78] "By commenting on AFSPA, panel has overstepped its brief" *The Tribune*, Jan. 25, 2013, *available at:* https://www.tribuneindia.com/2013/20130125/main2.htm.

2014. After enquiry, only 61 of these cases were found to have any truth in them and in these cases, action was taken against the guilty'.[79] The Army, thus, maintains that lifting of AFSPA may prove counter-productive in the present scenario. It was further stated that militants want the Army to withdraw and are inciting people to bring in such allegations against soldiers.[80] According to the Army, militant groups over the years have evolved a pattern of provoking Army into overreaction and then exploiting local media and the attention of international human rights agencies. Two or three incidents are enough to wipe out all the good work done by the armed personnel. It is believed that it would be impossible for the Army to operate in J&K without the cover of AFSPA as the force would get bogged down in legal battles. It is observed:

> The provocation for a move to abrogate the AFSPA is due to alleged serious violations of human rights by the security forces. Counter-insurgency operations are complex in nature and are carried out under difficult and trying circumstances. Often it is a situation where you kill or get killed. In many encounters, collateral damage in the form of casualties to innocent civilians takes place. During such encounters, invariably it is the insurgents who target innocent civilians knowing fully well that it is the security forces who will be blamed. In a virulent insurgency, security forces just cannot operate without the cover of the AFSPA.[81]

Above all, intermittent attacks, causing death and injury to security personnel, political leaders, panchayat members and civilians have contributed more than any other factor to keep the issue of revocation or partial withdrawal of AFSPA hanging. Several Sarpanches and Panches have also lost their lives. The brutal killing of sarpanch Ajay Pandita Bharti on June 8, 2020 in South Kashmir has again set off a debate over the security vulnerability of elected panchayat members.[82] This apart,

---

[79] Poulomi Banerjee, "Kashmir's Festering Wounds" *Sunday Hindustan Times*, Aug. 2, 2015, *available at*: https://www.pressreader.com/india/hindustan-times-lucknow/20150802/282029030940186. (last visited on Dec. 1, 2020).

[80] *Ibid.*

[81] Harwant Singh, "AFSPA in J and K : Selective withdrawal may be harmful" *The Tribune*, Jan. 8, 2013, *available at:* https://www.tribuneindia.com/2013/20130108/edit.htm (last visited on Dec. 1, 2020).

[82] Arteev Sharma, "Killing 'exposes' vulnerability of panchayat members" *The Tribune*, June 11, 2020, *available at:* https://www.tribuneindia.com/news/j-k/killing-exposes-vulnerability-of-panchayat-members-97370 (last visited on Dec. 1, 2020).

incidents of kidnapping of relatives of policemen made it evident that terrorists have the capacity to strike anywhere. In August 2018, in retaliation for the arrest of their relatives, militants kidnapped eleven relatives of several policemen. The militants released all relatives of police personnel after authorities released the family members of the militants.[83]

The demand, therefore, for the withdrawal of AFSPA seems to be extremely difficult to accept in the existing conditions when members of the armed forces themselves are target of recurrent terrorist attacks. As a matter of fact, terrorists have made several attacks on the Army. A serious rise in the number of casualties of officers and soldiers of armed forces has taken place in recent years. Colonel Santosh Mahadik was killed in a fire fight with militants in Kupwara on November 17, 2015.[84] The killing of soldier Aurangzeb by militants in Pulwama evoked widespread outrage. This apart, the return of incidents of suicide bombing to the Kashmir Valley has posed a new challenge to security apparatus. The Jaish-e-Mohammed (JeM) militant outfit has carried out many suicide attacks in Jammu and Kashmir. On February 14, 2019, a SUV driven by suicide bomber packed with RDX rammed into a CRPF bus in Pulwama. At least 38 CRPF personnel were killed.[85] A video was released claiming credit for the attack. They identified the attacker as Adil Ahmed Dar, a resident of Kakapora in Pulwama, who joined the outfit last year. In the video, Dar, who was seen sitting with sophisticated weapons in front of a backdrop of a black and white flag, was heard saying that by the time the video was released, he would be in heaven.[86] The attack is the second *fidayeen* attack in Pulwama. The first was on November 3, 1999, when a Srinagar boy, along with another militant, drove an improvised explosive device-laden car into the Badamibagh Cantonment in Srinagar,

[83] Human Rights Watch Report 2018, *available at:* https://www.hrw.org/world-report/2018/country-chapters/india (last visited on Dec. 1, 2020).
[84] Majid Jahangir, "*Colonel killed in Kupwara gunfight*" *The Tribune,* Nov. 18, 2015, *available at:* https://www.tribuneindia.com/news/archive/j-k/colonel-killed-in-kupwara-gunfight-159366 (last visited on Dec. 1, 2020).
[85] Vijaita Singh, "Pulwama attack: Suicide car bombing returns to the Valley after 18 years" *The Hindu*, Feb. 15, 2019, *available at:* https://www.thehindu.com/news/national/other-states/suicide-car-bombing-returns-to-the-valley-after-18-years/article26273207.ece (last visited on Dec. 1, 2020).
[86] *Ibid*.

killing six security personnel.[87] Army personnel viewed such attacks as vindication of their stand on AFSPA.[88]

The Army has also resisted any scrapping or dilution of AFSPA under the pretext that it would fritter away the gains made in curbing the militancy in Jammu and Kashmir and may prove counter-productive in the present scenario. The example of Imphal, which has seen a spurt in militant activities since the lifting of 'disturbed area' status, is cited as proof by the Army. In addition, Pakistan has used terrorism as a substitute for war. The Army is fighting a proxy war in this region, and AFSPA only enables the security forces to fight both externally and internally. It is evident from the above discussion that the issue over the years has acquired political overtones, casting a cloud over its revocation. The ruling party at the Centre, the Bhartiya Janata Party (BJP), has unequivocally opposed the premise of revocation because it would, apart from affecting operational effectiveness in Jammu and Kashmir, also weaken the fight against terrorism sponsored from across the border. AFSPA, according to BJP, has served as a protective mechanism for the armed forces.[89] On August 5, 2019, the Central Government revoked the special status of Jammu and Kashmir guaranteed under Article 370 of the constitution of India and bifurcated the erstwhile State into two union territories. According to government, this 'implemented constitutional transformation' was done to pave the way for better administration, good governance and economic development of the region. The government also said that Article 370 was the root cause of corruption and militancy in Jammu and Kashmir.[90]

However, even after revocation and retention of AFSPA, militancy is not over. Local youth are still picking up guns despite knowing the inevitability of death at the

[87] Peerzada Ashiq, "Resurgent Jaish poses new challenge to security apparatus" *The Hindu,* Feb. 15, 2019, *available at:* https://www.thehindu.com/news/national/other-states/resurgent-jaish-poses-new-challenge-to-security-apparatus/article26273226.ece (last visited on Dec. 1, 2020).

[88] Ravi Krishnan, "Jammu grenade attack may upset Omar's AFSPA plan" *The Tribune,* Nov. 20, 2012, *available at:* https://www.tribuneindia.com/2012/20121120/j&k.htm#11 (last visited on Dec. 1, 2020).

[89] Ravi Krishanan Khajuria, "Our stand against AFSPA rollback vindicated: BJP" *The Tribune*, Dec. 13, 2011, *available at:* https://www.tribuneindia.com/2011/20111213/j&k.htm (last visited on Dec. 1, 2020).

[90] Rakesh Mohan Chaturvedi, "Article 370 cause of corruption and Terrorism" *The Economic Times*, Aug. 6, 2019, *available at:* https://economictimes.indiatimes.com/news/politics-and-nation/article-370-cause-of-corruption-and-terrorism-amit-shah/articleshow/70546744.cms (last visited on Dec. 1, 2020).

hands of security forces. According to a recent report on Jammu and Kashmir, while the clampdown after abrogation resulted in decline in terrorist related incidents, overall fatalities and employment of improvised explosive devices (IED), instances of attempted and net infiltration increased. Ceasefire violations rose from 449 in 2016 to 3,168 in 2019.[91] According to South Asia Terrorism Portal (SATP), incidents of terrorist violence rose from 84 incidents in 2013 to 205 in 2018, 135 in 2019 and 80 in the first six-and-a-half months of 2020.[92]

IV. CONCLUSION

In brief, the application of AFSPA and the two incidents of counter insurgency operations in the Kashmir valley reveal that the misuse of power by the soldiers equipped with stringent laws has alienated a large number of the local Kashmiri people for whom AFSPA has become a metaphor for the denial of human rights. It is alleged that pecuniary gains of money, promotion or awards have also tempted them to commit such crimes. It may not be true in all cases. The judgments awarded by the courts in the Pathribal and Machil cases came as a jolt, outraging the locals and relatives of victims. There are hardly any prosecutions and convictions of Army personnel accused of human rights violations. Sections 4 and 7 of AFSPA have become constant irritants in the disturbed areas of Jammu and Kashmir. The Court's decision has also ended up shielding them by upholding denial of sanction for prosecution under section 7 of AFSPA.

As a result, the demand for repeal of AFSPA has gained traction in the Kashmir Valley. The Supreme Court's judgement in *EEVFAM (supra)* can be read in line with the long-held demand for repealing AFSPA. By questioning the impunity to the armed personnel, the Court in some ways questioned AFSPA itself. The Army maintains that the Act has served as a protective mechanism enabling them to perform their duties fearlessly. Revocation of AFSPA, according to them, would prove counter-productive, diminishing the gains made in curbing militancy in Jammu and Kashmir. According to

[91] Forum For Human Rights In Jammu and Kashmir, *Jammu & Kashmir: The Impact of Lockdown on Human Rights*, 16 (Aug. 3, 2020), *available at*: https://kashmirscholars.files.wordpress.com/2020/07/jammu-and-kashmir-impact-of-lockdown-on-human-rights-report-july-23-2020.pdf (last visited on Dec. 1, 2020).
[92] *Id. at 15.*

recent estimates of the Multi-Agency Centre (MAC) headed by Intelligence Bureau, 400 militants are active in Valley.[93] The indiscriminate killing of security personnel together with the pangs of cross-border terrorism hardly allows authorities to initiate the process of partial or complete revocation of AFSPA. Terrorists are well funded and trained by foreign powers to inflict huge casualties on the security forces and civilians. Undoubtedly, Jammu and Kashmir is facing militancy which cannot be fought without soldiers. AFSPA is essential both for operating and also to protect against long drawn legal battles for action taken in good faith to restore normalcy. Protection to security personnel is undoubtedly required in order to fight militancy. This does not mean that any human rights violations should be condoned. The legitimacy of the state stands questioned when innocent people are the ultimate victims. Killing innocent people in fake encounter cannot be called 'discharge of official duty carried out in good faith'.

It is imperative to have a review AFSPA, more so after the August 2019 political changes in Jammu and Kashmir. The abrogation of autonomy, according to some, has raised doubts among the people of the valley. Proactive measures are needed to regain the trust of the people. The absence of a critical review of AFSPA would further alienate the people in Jammu and Kashmir and bolster recruitment, 'thereby raising the graph of the total number of militants'.[94] When the Supreme Court had upheld the constitutional validity of AFSPA in 1997, the complaints about fake encounters had not emerged by then. Later, the government appointed the Justice Jeevan Reddy Committee to find out if AFSPA had outlived its utility. The Committee unanimously recommended that the Act should be abolished. Incidentally, the Pulwama attack has brought forth the fluid situation which has strongly impacted the discourse on the withdrawal of AFSPA in Jammu and Kashmir. Keeping in mind the existing situation in the Union Territories, revocation appears to be risky, yet AFSPA

[93] Sudhi Ranjan Sen, "Government warned of spike in violence in Jammu and Kashmir" *Hindustan Times*, Jan.11, 2020, *available at:* https://www.hindustantimes.com/india-news/government-warned-of-spike-in-violence-in-jammu-and-kashmir-no-troop-withdrawal/story-Gu0T5V1H2Rj4weaRdytrMN.html (last visited on Dec. 1, 2020).

[94] Sameer Lalwani and Gillian Gayner, *India's Kashmir Conundrum: Before and After the Abrogation of Article 370*, 11 (United States Institute of Peace, August 5, 2020), *available at*: https://www.usip.org/publications/2020/08/indias-kashmir-conundrum-and-after-abrogation-article-370 (last visited on Dec. 1, 2020).

needs to be debated and discussed without waiting for the region to return to normalcy.

UNDERSTANDING RUSSIAN AND INDIAN SECULARISM

*Puranjay K. Vedi**

I. INTRODUCTION

If we go by the dictionary meaning, the term secularism implies '*the belief that religion should not be involved with the ordinary social and political activities of a country*'.[1] However, as a political ideology, a different meaning has been assigned to secularism. To begin with, it is pertinent to understand how Akeel Bilgrami, in *Secularism, Identity and Enchantment*, differentiates secularism from secular and secularization. According to Akeel Bilgrami, secularism is '*a stance to be taken about religion*'[2] whereas secularization is '[t]*he increase in a society of loss of personal belief in God…*',[3] and lastly secular implies "*all things that are 'worldly' in the sense of being outside the reach of religious institutions and concerns*".[4] However, if we take the definition provided by Akeel Bilgrami that secularism is "*a stance to be taken about religion*"[5] it also implies that a secular state could be indifferent, tolerant or even hostile towards religion. Of these three, the hostile stance towards religion is a distorted model of secularism which manifests in the form of extensive State intervention in religious affairs ('SIRA') designed to marginalize religion to the brim of extinction. In fact, SIRA is contradictory to the conventional meaning of secularism for the simple reason that secularism as a practice involves building of a wall of separation between State and religion, thereby prohibiting intervention from either side. The wall of separation indoctrinates certain principles, that: (a) State should not be influenced by religious ideologies; (b) State should treat all religions equally; and (c) State should neither establish nor promote any religion. Besides these, there is another principle, i.e., tolerance towards intra/inter-religion divergence of opinion(s). Intolerance often

* Guest Faculty at Campus Law Centre, Faculty of Law, University of Delhi, he holds a Ph.D. in Law.

[1] Elizabeth Walter, Kate Woodford et.al., *Cambridge Advanced Learner's Dictionary* (Cambridge University Press, UK, 2008).

[2] Akeel Bilgrami, *Secularism, Identity, and Enchantment* 4 (Permanent Black, India, 2014).

[3] *Id*. at 5.

[4] *Ibid.*

[5] *Id.* at 4.

leads to religious conflicts and hampers the natural growth of religion. As a principle of practice, the idea of tolerance is not limited to the State but extends to the society at large. However, to indoctrinate the idea of tolerance, SIRA may become necessary so as to dilute religious orthodoxy. The necessity of SIRA can be appreciated, e.g. when a religious ideology is such that it seeks to establish totalitarianism or hierarchical order whereby a particular class is subjected to discrimination.[6] This particular class can be a section of society, e.g. people belonging to a particular religion or a caste.

It is, however, pertinent to note that orthodoxy, contrary to popular belief, is not limited to religion in its neutral sense. It is a state of mind which makes the orthodox functionally fixed to certain ideologies. Therefore, orthodoxy can also be in the form of a political ideology, such as atheistic ideology, which is actively hostile towards religion. The dictionary meaning of the term orthodox also substantiates this claim, Cambridge dictionary provides, '*orthodoxy* [is] *the degree to which someone believes in traditional religious or political ideas*'.[7] Therefore, if a religious ideology is not the cause of problem but SIRA is still carried out, then it could be said that the SIRA was unjustified, which for obvious reasons cannot be a facet of secularism. An unjustified SIRA also places an obligation on the State to help the particular religion (subjected to unjustified SIRA) to re-establish and in doing so, such State might have to bend some rules of secularism and even alter its distance with the particular religion.

II. OBJECTIVES OF RESEARCH

The broad objective of this research is to determine the stance towards religion as held by Russia and India, respectively, and introduce secularism from two different contextualist points of views, i.e., Russian secularism and Indian secularism. By contextualist interpretation of secularism, it means understanding secularism under the context wherein it operates. By referring to India, this research seeks to show that SIRA has become an essential facet of secularism, and by referring to Soviet Russia, this research seeks to show that SIRA may also be exercised in the disguise of

[6] This is not an exhaustive list of examples to justify SIRA.
[7] *Supra* note 1.

practicing secularism – to promote atheistic ideology and suppress religion. This can help in distinguishing a justified SIRA from an unjustified SIRA.

Besides this, the research will also project how a Secular State alters its distance and bends some rules of secularism, essentially, to re-establish a particular religion which had a difficult past. In doing so, this research has made a special reference to two religions, *viz.* Russian Orthodox Church (Russia) and Sikh religion (India), respectively, and as we will see both have had a difficult past and both have received protectionist measures, in one form or another, in the respective countries.

Before moving further, it is important to satisfy some elementary steps of research. Therefore, at the cost of making some tentative statements, which will be duly proved in the Discussion Part of this article, the following sections, *viz.* Rationale of study and Hypothesizing the proposition, will introduce and float some propositions into perspective.

III. RATIONALE OF STUDY

As explained in the introductory part, SIRA has become an integral part of secularism, however, at times SIRA is carried out in disguise of practicing a hostile stance towards religion. The hostile stance towards religion manifests in the form of extensive SIRA drives carried out to suppress religion and marginalize it to the brim of extinction. A good example of hostile stance towards religion is the anti-religious agenda propagated by the Communist Party of Soviet Russia ('CPSR'). Whereas Indian secularism is a good example of SIRA carried out with sincere regard to dilute Hindu religious orthodoxy and not to suppress Hindu religion. This difference, in stance towards religion, explains the reason for understanding Russian and Indian secularism, since, the two are good examples to introduce secularism from two different contextualist point of views.

We will also see, in the later part of this research, that Russia and India, both, have adopted certain protectionist measures to help re-establish religions which had a difficult past, especially the Russian Orthodox Church and the Sikh religion, respectively. Another reason, or we may call it a proposition, for choosing Russia and India is the fact that although both the countries have carried out numerous SIRAs,

they both differ as far as justifiability is concerned; the following section, i.e., hypothesizing the proposition, places this proposition into perspective.

IV. HYPOTHESIZING THE PROPOSITION

The historiography of ancient India's political construct projects that there did not appear any need to depersonalize the Hindu King, reason being that the ancient Indian text Manusmriti categorically earmarked the jurisdictions of the four classes (*varnas*), *viz*. the Priestly, Warrior, Commerce, and Service Class. There was no overlapping of jurisdictions. Moreover, Manusmriti was considered as the supreme guiding force, which even the King could not violate. Therefore, the King was not free to act on his own discretion. It is, however, pertinent to note that in ancient India, religion had an upper hand, since, the spiritual authorities (Priestly Class) exercised great influence with respect to interpretation of ancient texts, such as Manusmriti, and mandated that the King should protect *dharma* (law, duty, morality, religion) at every cost. This explains how religious orthodoxy fostered in India. However, with the passage of time, certain aspects of Hindu religious ideologies became overbearing particularly for the Service Class and created a class-divide in India. Resultantly, it became necessary and even *justified* for the modern Indian State to carry out SIRA in Hindu religious affairs and dilute Hindu religious orthodoxy.

In fact, a similar form of class-divide, particularly between the rich elites and the poor peasant class, was the area of concern that the CPSR focused upon and wanted to eliminate. This became the sole reason which influenced CPSR to adopt Marxist ideology. However, Marxist ideology, *inter alia*, was positively hostile towards religion, therefore, although Marxist ideology helped in eliminating the class-divide but it also led to mass religious persecution and forced religion to the brim of extinction. Finally, in 1991, CPSR fell down and left a religious-void which became a fertile ground for foreign missionaries. After the fall of CPSR, the Russian Federation had to bend some rules of secularism; adopt sincere measures to help re-establish Russian Orthodox Church ('ROC'); place limitations on unbridled growth of foreign missionaries in Russian Federation; and even alter its distance with ROC.

In this regard, it is pertinent to observe that Indian secularism could not prevent the political turmoil and religious conflicts which infested the State of Punjab, India, more particularly during 1947-1984. Perhaps, India could learn from Russian Federation's stance towards ROC and appreciate what measures it could have adopted to help re-establish Sikh religion.

To put in brief, this article places two propositions into perspective:

i) That SIRA has become an essential facet of secularism; and

ii) That if a particular religion had a difficult past, the secular State must adopt sincere measures to help re-establish that particular religion.

V. SCOPE AND LIMITATIONS

This article is sourced from a larger research carried out by the author, which for obvious reasons is beyond the word limit assigned to this journal, therefore, the scope of this article had to be narrowed and, in this respect, the following limitations need to be appreciated at the outset.

This research introduces SIRA as an essential part of secularism from a particular angle, i.e., SIRA carried out to dilute such religious orthodoxy which seeks to institutionalize a class-divide, however, that does not mean that SIRA cannot be justified on other grounds.

This research has also made a special reference to two particular religions, viz. Russian Orthodox Church (Russia) and Sikh religion (India), since, both have had a difficult past in the respective countries and both have been, *relatively*, subjected to somewhat similar protectionist measures adopted by the respective countries; and again that does not mean that other religions in the respective countries cannot be made a subject matter of study.

Nevertheless, in both the parts, i.e., Russian secularism and Indian secularism, reference is also made to other religious minorities so as to achieve a holistic understanding and determine the stance towards religion *in general*; e.g. in part pertaining to Russian Secularism, besides ROC, reference is also made to Jehovah Witnesses' organizations, Islamic religious groups, and Protestant Christians and

similarly, in part pertaining to Indian secularism, besides Hindu, Muslim and Sikh religion, reference is also made to Jain, Protestant Christians and Jehovah Witnesses'.

To duly prove the propositions of this research, and that too within the bounds of word limit assigned to this journal, a focal point was important. Therefore, the author has reserved other view points and religions for a subsequent article.

VI. FRAMEWORK

Stance towards religion is not formed overnight it is rather a long process filled with numerous instances which influence the relationship between State and religion. Therefore, following a chronological order, through which Russian and Indian secularism developed, the following Discussion is divided into two parts, *viz.* Part I: Russian secularism and Part II: Indian secularism. Both the parts will address some of the major instances which influenced the relationship between State and religion; trace some noticeable instances of SIRA; and some protectionist measures adopted by the respective countries to re-establish religions which had a difficult past. This will help in drawing a contextualist interpretation of Russian and Indian secularism, and also help in understanding how the concept operates in the respective countries. Both the parts end with a sub-part titled '*stance towards religion determined*' which seeks to determine the current secular model practiced by the respective countries.

VII. DISCUSSION

C. Part I: Russian Secularism

1. Pre-Soviet Russia: Birth of class-divide

The first instance which disturbed the relationship between Tsarist Russia and ROC is aligned with the enactment of the Council Code of Tsar Alexei Mikhailovich (Sobornoye Ulozhenie), 1649 ('Law Code of 1649'),[8] which was a lengthy document having several articles.[9] To establish a fiscal-military State the Law Code of 1649 converted most of the labor into serfs (a form of slave) and created a noble elite class

[8] Adopted on January 29, 1649.
[9] For English translation of the Law Code of 1649, see R. Hellie, *The Muscovite Law Code (Ulozhenie) of 1649: Text and translation* (C. Schlacks Jr., California, 1988).

who were awarded Pomest'e (estate) along with serfs to toil the land. The serfs could live on the estate and grow farm produce; however, they were restricted to leave the land or indulge in any non-agricultural activity.[10] The serfs were also taxed by the noble class and in return the noble class served as a stationed militia for the Tsar. It is pertinent to note that the Law Code of 1649 made serfdom a secular (civil) matter and relegated Church's powers to meddle in secular (civil) affairs. Resultantly, the Church could not entertain any complaint made by a serf against an abusive master.[11]

It was only in 1861 that Tsar Alexander II passed the decree of Emancipation of Serfs. As per the decree, the serfs were awarded land but its acquisition was not free of cost, since, a redemption cost was attached.[12] It must be noted that the decree of emancipation along with the redemption cost did not solve the issue of serfdom and nor did it eliminate the class-divide in Russia and even after the passing of the decree of emancipation, some 85 % of Russia's population still comprised of peasant class.[13] This could be one of the reasons which might have led to the Russian Revolution in 1917, with Vladimir Lenin in the forefront advocating the following propositions, *viz.* elimination of all kinds of class-divide; transforming Russia into a working-class society; and spreading of Marxist philosophy which was actively hostile towards religion.

2. Soviet Russia: Difficult past of ROC

The attitude of Communist Party of Soviet Russia ('CPSR') towards religion is well manifested in the Constitution of Russian Socialist Federated Soviet Republic, 1918, which declared '[f]*or the purpose of securing to the toilers real freedom of conscience, the church is to be separated from the state and school from the church, and the right of religious and anti-religious propaganda is accorded to every citizen*'[14] The provision essentially secured the right to be free from religious influence. However, CPSR, headed by Vladimir Lenin, admired Marxist philosophy and propagated an ideology

[10] J. Bromley, *Russia 1848-1917* 7 (Heinemann Education Publishers, Oxford, 2002).
[11] G. L. Freeze, "The Orthodox Church and Serfdom in Pre-reform Russia" 48(3) *Slavic Review* (1989).
[12] S.G. Pushkarev, "The Russian Peasants' Reaction to the Emancipation of 1861" 27(2) *The Russian Review* (1968).
[13] M.D. Steinberg, "Russia's fin de siecke, 1990-1914", in Ronal D. Grigor Suny (ed.) *Cambridge History of Russia: The Twentieth Century* 86 (Cambridge University Press, Cambridge, UK, 2006).
[14] *See* Constitution of Russian Socialist Federated Soviet Republic, 1918, article 2, chapter 5, section 13.

which supported '[dialectical] *materialism which is absolutely atheistic and positively hostile to all religion* [and projected religion as] *instruments of bourgeois reaction that serve to defend exploitation and to befuddle the working class*',[15] therefore, religious persecution began right after the Russian Revolution, 1917, and became more systematic in 1930s.[16] The ROC was substituted with communist rituals and atheistic ideologies,[17] which Paul Froese has coined as 'Atheist Church'.[18] From 1920 to 1985, Russia experienced a fall in Church attendance and by 1970 only 4% of Russia's population was attending Church.[19]

Besides this, confiscation of Church property also gained momentum and by 1928 some 15,000 ROCs were seized and converted into State property.[20] The CPSR even went to the extent of preventing Russian population from celebrating religious holidays or attending Sunday Church. To achieve this end, CPSR created a new work schedule according to which work duties would always conflict with a religious holiday. CPSR even altered the week-end and replaced Sunday holiday with Saturday so that the public would find it difficult to attend Sunday Church.[21]

However, nearing the fall of CPSR in 1991, some formidable developments started to take place. For instance, in June, 1988, a new concordat took place between State and Church when Mikhail Gorbachev permitted the celebration of millennium of ROC; in the election of 1990 priests of various denominations were elected to the Soviet level; on 25th October, 1990, the Russian Soviet Federative Socialist Republic Law on Freedom of Worship, 1990 ('Law on Freedom of Worship, 1990'), got passed which sought to re-establish freedom of religious worship in Russia; and by 1991, the USSR Council of Religious Affairs (CRA), which laid a heavy and harsh hand over the ROC, was disbanded.[22]

---

[15] Andrew Rothstein and Bernard Isaacs (eds.), *The attitude of the workers' party to religion: V.I. Lenin, Collected Works* 402–413 (Progress Publisher, Moscow, Russia, 1963).
[16] P. Froese, "Forced secularization in Soviet Russia: Why an atheistic monopoly failed" 43(1) *Journal for the Scientific Study of Religion* 46 (2004).
[17] *Ibid*.
[18] *Ibid*.
[19] *Id.* at 41.
[20] *Id.* at 41–42.
[21] *Id.* at 43.
[22] R. Sakwa, *Russian Politics and Society* 337 (Routledge, Taylor & Francis Group, London & New York, 1993).

3. Russian federation: Protectionist measures

Few years, after the fall of CPSR, the Constitution of the Russian Federation came into force (on December 25, 1993) and declared Russia to be a secular State. It is pertinent to note that the Russian Federation retained the Soviet era law, i.e., Law on Freedom of Worship, 1990, even after the fall of CPSR. However, the religious freedom instituted by the Law on Freedom of Worship, 1990, also attracted foreign missionaries. Therefore, the Russian Federation had to pass several other laws to control their unbridled growth.

Firstly, Russian Federation enacted the Law on Freedom of conscience and on religious association, 1997 ('LFCRA'),[23] which replaced the Law on Freedom of Worship, 1990. The LFCRA, 1997, conferred a special recognition to Russian Orthodoxy in the history of Russia and its culture and provided that all religious organizations/associations must get themselves re-registered before December, 1999.[24] The LFCRA, 1997, also provided that only a citizen of Russian Federation can become a member of a religious organization thereby curtailing the rising strength of foreign missionaries in Russia. The LFCRA, 1997, also provided that to become eligible for registration the religious association must prove at least 15 years of existence, which proved to be a fatal blow to such foreign missionary organizations which were of recent origin.

Later, the Russian Federation enacted the Law on Combatting Extremist Activity, 2002 ('Law on Extremism').[25] As per the Law on Extremism, 2002, any individual, group or religious association advocating extremism can be arrested without court orders.[26] It is contended that the Law on Extremism, 2002, is put to use by the Federal Government to especially target nontraditional/non-indigenous minority religious organizations in Russia. In this respect, reference can be made to the United States Department of State, International Religious Freedom Report, 2017, according

[23] Law on Freedom of Conscience and on Religious Association, 1997 (Federal Law No. 125-FZ of 1997).
[24] Later, the deadline was extended to December, 2000.
[25] Law on Combatting Extremist Activity, 2002 (Federal Law No. 114–FZ of 2002).
[26] J.B. Gross, "Russia's War on Political and Religious Extremism: An Appraisal of the Law On Counteracting Extremist Activity" *BYU Law Review* (2003).

to which many religious minorities and their religious associations, more particularly that of Jehovah's Witnesses and Muslims, have been banned by Russian Federation.[27]

The latest addition by the Russian Federation are the pack of amendments passed in 2016 (Federal Laws 374-FZof 2016) and 2017 (Federal Law 375-FZ of 2017), referred to as 'Yarovaya package'. The amendments have brought changes to a band of 21 other laws, including the LFCRA, 1997, and now missionary activities can only be carried out in premises designed and recognized by the Russian Federation as religious institutions. This adversely affects unregistered religious organization and prohibits them from carrying out religious or missionary activities in public places.[28] It is pertinent to note that it was only in 1990, after a long spell of religious persecution, that Russia instituted freedom of religion, and as already stated, influx of foreign missionaries started after the enactment of Law on Freedom of Worship, 1990. Therefore, all such foreign religious organization which entered Russian soil post-1990 will be adversely affected by the LFCRA, 1997.

Numerous applications, filed by minority religious organizations, have reached the European Court of Human Rights ('ECtHR') complaining about violations of Freedom of thought, conscience and religion as envisaged under Article 9 of the European Convention of Human Rights, 1950. In fact, the Jehovah's witnesses' organizations have been declared as extremist in Russian Federation, under Law on Extremism, 2002, on the ground that the organization's direction to its members to refuse blood-transfusion, to sever ties with family, to be financially dependent upon the organization, etc. are threats to society and public health; resultantly, their assets have been liquidated and their organization is banned.[29] In fact, the State Duma of Russian Federation has even declared that the Constitutional Court of Russia has powers '*to review international human rights rulings to decide if they violate the Russian*

---

[27] United States Department of State, "International Religious Freedom Report, 2017", *available at:* https://www.state.gov/reports/2017-report-on-international-religious-freedom/ (last visited on July 02, 2020).

[28] See also, The International Centre for Not-for-Profit Law, *Overview of the Package of Changes into a Number of Laws of the Russian Federation Designed to Provide for Additional Measures to Counteract Terrorism*, (July 21, 2016), *available at:* http://www.icnl.org/research/library/files/Russia/Yarovaya.pdf. (last visited on May 23, 2019).

[29] *Administrative Centre of Jehovah's Witnesses in Russia and Kalin* v. *Russia,* application no. 10188/17, ECtHR. See also, C. Wallace, "The Jehovah Witnesses Case: Testing the 1997 Law 'On Freedom of Conscience and Religious Associations' and the Russian Legal Process" *32*(1) *California Western International Law Journal* 39–48 (2001).

Constitution and are therefore 'non-executable'.[30] It was this decision by the State Duma Council that enabled Russian Federation to ban Jehovah's witnesses' organizations.

Besides this, there are some cluster of applications filed to ECtHR, the facts of which state banning of numerous Islamic organizations in Russian Federation on the ground of spreading extremism.[31]

Similarly, other branches of Christianity, such as Protestant Christians, have also been subjected to numerous restrictions in Russian Federation, e.g. Evangelical meeting which is a common religious practice of protestant Christians is challenged by many local authorities in Russia on the ground that they are using psychological approach (neuro-linguistic hypnosis), which the local authorities claim is a threat to public health and amounts to unlicensed practice of medicine.[32]

Similarly, the facts in the 2017 case of *Ossewaarde* v. *Russia*[33] were that the applicant, who had been organizing meetings for people to gather for prayer and Bible reading, was arrested by the police after the police received a complaint from nearby residents who complained against the foreign religious group pasting Gospel tracts to a bulletin board at her apartment block. The applicant was arrested on the charge of spreading information among non-member group.

4. Summation and Analysis of Russian secularism: *Determining stance towards religion*

It does not require much deliberation that Tsarist Russia by enacting the Law of 1649 (*Ulozhenie*), institutionalized a class-divide in Russia. Therefore, it was not ROC which institutionalized the class-divide, it was rather the Tsarist Russia itself implying that the SIRAs carried out by CPSR against ROC were unjustified.

---

[30] R.M. Fleig-Goldstein, "The Russian Constitutional Court versus the European Court of Human Rights: How the Strasbourg Court Should Respond to Russia's Refusal to Execute ECtHR Judgements" *56 Columbia Journal of Transnational Law* 199 (2017).

[31] Some of the applications filed to ECtHR stating facts pertaining to the banning of Islamic religious organizations in Russian Federation are: *Zikrullokhodzha Askarovich Mansurov* v. *Russia,* application no. 37874/11, ECtHR; *Velitov* v. *Russia*, Application number 73328/17, ECtHR; *Fatikh Gayazovich Basyrov* v. *Russia,* application no. 2841/10 and another connected application no. 79469/13, ECtHR; *OooIzdatelEzhayev A.K.* v. *Russia,* application no. 25051/11 ECtHR.

[32] *Evangelical Christian Church New Generation in Blagoveshchensk* v. *Russia,* application no. 73458/11, ECtHR.

[33] *Donald Jay Ossewaarde* v. *Russia*, application no. 27227/17, ECtHR.

The freedom of religion instituted by the Soviet era Law on Freedom of Worship, 1990, and the following influx of foreign missionaries made ROC apprehensive of being marginalized once again. As a protectionist measure, Russian Federation had to replace the Law on Freedom of Worship, 1990, with LFCRA, 1997, and enact several other legislations to place limits on the unbridled growth of foreign missionaries and religious organizations, thereby creating a conducive environment for the indigenous religious organization of Russia, i.e., ROC, to gain strength.

However, such an unconventional model of secularism has gained much attention. In this regard, reference can be made to the United States Commission on International Religious Freedom (USCIRF), Annual Report, 2019, which provides that '[d]*uring 2018, Russia accelerated the repressive behavior that led USCIRF to recommend its designation as a country of particular concern, or CPC, for the first time in 2017. The government continued to target nontraditional religious minorities with fines, detentions, and criminal charges under the pretext of combating extremism'*.[34] In the Report, reference of the word 'nontraditional' needs to be emphasized, which manifests a division of religions into traditional, i.e., Russian Orthodox Christianity, and nontraditional religions, which are not indigenous to Russia.

A cursory perusal of Russian Federation's stance towards religion projects that Russian Federation leans in favour of Russian Orthodox Christianity which is not a hallmark of a secular State. If we connect all the noticeable phases of Russian historiography and make a prediction, it appears that Russian Federation will make a full circle and reinstate Russian Orthodox Christianity as State religion. Although, it is too early, ungrounded and unreasonable to make such a prediction. It is pertinent to note that after the fall of CPSR, the ROC was not in a position to support itself. In fact, Russian Federation even procured funds on behalf of ROC to help them re-establish themselves[35] Therefore, it is quite possible that Russian Federation's stance towards religion, which leans in favour of Russian Orthodox Christianity is transitory

[34] United States Commission on International Religious Freedom (USCIRF) "Annual Report, 2019", *available at:* https://www.uscirf.gov/reports-brief/annual-report-chapters-and-summaries/russia-chapter-2019-annual-report (last visited on June 12, 2019).

[35] Katja Richters, *The Post-Soviet Russian Orthodox Church: Politics, Culture and Greater Russia* 1 (Routledge, Taylor & Francis Group, Oxfordshire, 2013).

and channelized, essentially to help ROC gain strength. This proposition will gain further strength once we move to the next Part, i.e., Indian secularism.

As we will see in the next Part, the peculiarity of Russian secularism is not unusual. India has also received some attention for practicing an unconventional model of secularism. In fact, leaning in favour of a particular religion is quite normal if that particular religion has been through a difficult phase. In the case of India, its [initial] stance towards Muslim and especially, towards Sikh religions is quite similar to that of the Russian Federation towards ROC. In the next Part, we will see that India's protectionist stance was also transitory. However, when to do away with the protectionist stance is a prerogative of the concerned State and it is often retained if the particular religion continues to experience a difficult time.

D. Part II: Indian Secularism

1. Ancient India: Birth of class-divide

The class-divide (caste-system) in India owes its origin to the ancient Indian text Manusmriti, which proposes that '*the Lord, who is self-existent…created the priest…the ruler…the commoner, and…the servant*'.[36] The four classes and their generations to come were assigned functionally fixed duties. Although Manusmriti describes that all the four classes have a divine and equal origin, however, the division became the basis of caste-system (*varna-vyavastha*) in India, which somehow in coming centuries got so twisted and abusive that it led to a class-divide. A publication by Human Rights Watch, titled Broken People: Caste Violence Against India's Untouchables, very well describes the caste-based discrimination in India. According to the Report, numerous restrictions are placed on the Service Class; they are restricted to access public places, such as Hindu temples, water-wells, etc.; they are made to do jobs which no human would wish to carry out, such as dig graves, dispose dead animals, etc.; they are deemed polluted (Untouchables) and detested upon; they are placed on the lowest rung of the society and any defiance of this social-order is met with punishment.[37]

[36] W. Doniger, B.K. Smith, (1991) The Law of Manu 1-7 (Penguin Books India, India, 2000).
[37] See also, Human Rights Watch, "Broken People: Caste Violence Against India's Untouchables" *available at:*
https://www.hrw.org/reports/1999/india/ (last visited on June 29, 2020).

2. Muslim and British India: Pre-independence difficult past of Sikhs

It is pertinent to note that during Muslim rule a new religion, Sikhism came into existence. The birth of Sikh religion is aligned with the birth of Guru Nanak (1st Guru of Sikhs) in 1469. In 1519, Guru Nanak found the village of Kartarpur, which became the centre of Nanak Panth, a community of followers of Guru Nanak and his path to liberation. Originally a pacific religion, Sikhism soon got in conflict with the Muslim rulers and was at the receiving end of severe persecution; some Sikh Gurus were even tortured to death. Resultantly, in 1699, Guru Gobind Singh (10th Guru of Sikhs) laid the foundation of a warrior-class called the Khalsa Panth; to fight against injustice. The Khalsa Code of Conduct mandated that a Khalsa Sikh shall not cut bodily hair, shall not smoke tobacco, and shall always wear a ceremonial sword/dagger called Kirpan. However, as the conflict between Muslim rulers and the Khalsa Sikhs continued for long, many Khalsa Sikhs had to take refuge in the hilly areas of northern India and temporarily leave their Gurdwaras (Sikh temples) in the hands of Mahants, who did not adhere to the essential facets of Khalsa Code of Conduct.

During the same period, in early 1600s, the British came to India and D.E. Smith has rightly observed that the religious policy of British was a combination of three roles, *viz,* traders, rulers and professors of Christian faith. D.E. Smith contends that the British, as traders, so as to protect their economic interest refrained intervention in the religious affairs of native Indians. However, the British non-interference policy was not motivated by the idea of tolerance or by the idea of separation of State and religion, it was rather a simple policy directed towards securing ulterior motives.[38] To substantiate this further, it is important to refer the relationship that existed between the British and the Sikhs.

After Punjab got annexed to British India, in mid-19th century, an Army recruitment policy was adopted by the British which favored the Khalsas.[39] When Khalsas joined the Army, the British employed the same non-interference policy, so as to gain their confidence and secure their continued service in the Army. The British

[38] D.E. Smith, *India as a Secular State* 68 (Princeton University Press, New Jersey, 1963).
[39] P. Singh and L.E. Fenech (eds.), *The Oxford Handbook of Sikh Studies* 71 (Oxford University Press, UK, 2014).

permitted the Sikhs to carry Kirpans while on duty and also permitted them to carry their holy scripture, the Guru Granth Sahib, in the battle field.[40]

However, the equation between the British and the native Indians changed after the Mutiny of 1857, which was a revolt against the British. Surprisingly, it also changed the equation between the British and the Sikhs. After the Mutiny of 1857, the British enacted the Indian Arms Act, 1878.[41] Section 4 of this Act, provided a definition of arms which also included sword and daggers within itself and Section 13 prohibited any person from going armed in public without a license. As this law prohibited Sikhs from carrying Kirpans, the Chief Khalsa Diwan initiated the Kirpan movement. Finally, on 17th July 1911, by the combined efforts of Chief Khalsa Diwan and Sardar Sundar Singh Majithia, the Kirpan was conferred an exemption from the purview of the Indian Arms Act, 1878. However, the Government Notification No. 7228 dated August 2, 1920, placed a limitation that only such Kirpan which was less than 9 inches in length got exempted from licensing requirement.[42]

Another instance which disturbed the equation between the British and the Sikhs is aligned with the creation of Land Settlement Records. When the British started the process of making land settlement records, many land record entries stated Mahants as holders of Gurdwaras.[43] This led to a Gurdwara Reform Movement (1920-25) to liberate the Gurdwaras from the control of Mahants.[44] After a long struggle, the British took cognizance of the demands made by the Sikhs and passed the Sikh Gurdwara Act, 1925,[45] whereby control of Gurdwaras went to Sikhs.[46]

Mention must also be made of the Partition of India (1947), which was essentially a partition of two provinces, *viz.* Punjab and Bengal. It was the largest exchange of population in world history and an unprecedented trail of violence and communal

[40] D. Omissi, *The Sepoy and the Raj: The Indian Army, 1860-1940* 95 (Palgrave Macmillan, UK, 2016).
[41] Indian Arms Act, 1878 (Act 11 of 1878).
[42] *Supra* note 40 at 128.
[43] *Supra* note 38 at 57.
[44] J.S. Grewal, *The New Cambridge History of India, The Sikhs of the Punjab, II.3* 159 (Cambridge University Press, UK, 1990).
[45] Sikh Gurdwara Act, 1925 (Punjab Act 8 of 1925).
[46] Nearing the fall of British rule, in 1944, the British introduced an amendment to the Sikh Gurdwara Act, 1925, through the Sikh Gurdwara (Amendment) Act 1944 (Act 11 of 1944). As per the amendment an exemption was conferred upon the Sehajdhari community to cast vote in Gurdwara elections. Sehajdharis are those who trim or shave their beard or kesh which according to Khalsa Code of Conduct is against the essential tenets of Sikhism.

riots, during which many died. Communal riots surfaced as a Partition wound, which affected everyone, more particularly the Sikh and the Muslim communities.

3. Independent India: Secularism left undefined

Section 8 of the Indian Independence Act, 1947, recognized the Constituent Assembly and conferred upon it the power to frame a new Constitution for independent India. It is pertinent to note that the term 'Secular' did not appear in the original Constitution of India. In fact, Prof. K. T. Shah (member of the Constituent Assembly) during the Assembly debates proposed to include the term (secular) and contended that having regard of '*the tragic results of communalism in India, it would be well to emphasize the security of the state in the most explicit terms* [and include the term secular in the Constitution]'.[47] However, the proposal did not receive support and was rejected.

At this point, it is necessary to expend with the chronology of events and make a passing reference. It was in 1976, through the Constitution of India (42nd amendment) Act, 1976, that the term secular was added to the Constitution of India, however, it was left undefined. Although the term 'secular' was added to the Constitution only after 1976, however, that does not mean that India was not secular prior to 1976. In reaching this conclusion, analysis of D.E. Smith's work is imperative who divides the essential elements of secularism into three broad heads, *viz.* (i) freedom of religion; (ii) citizenship; and (iii) separation of State and religion, and traces them in the Constitution of India as it existed prior to 1976.

According to D.E. Smith, Article 25 of the Constitution of India, 1950 acts as an embodiment of Freedom of Religion; Articles 26 and 30 act as an embodiment of collective Freedom of Religion; Articles 15(1), 16 (1) to (4) and 29(2), 325, 330(1) and 332(2) act as an embodiment of equality of Citizenship rights; Articles 27, 28(1) to 28(3) act as an embodiment of wall of separation between State and religion. D.E. Smith explains it further that in a secular State, the three elements are inter-related in such a manner that only two elements could form a legitimate relationship at a time and whenever a relationship is formed the third element cannot interfere.[48]

[47] *Supra* note 38 at 101.
[48] *Id*. at 4–8.

Therefore, when State and individual enter into a relationship, e.g. at the time of conferring citizenship, the third element (i.e., religion of the individual) is irrelevant; and when individual and religion form a relationship, the State cannot intervene.

The analysis done by D.E. Smith very well proves that India was a secular State even before 1976. Besides this, there is another observable point that although the term (secular) is not defined in the Constitution of India, however, according to Akeel Bilgrami such terms should not be given a rigid definition. Akeel Bilgrami contends that a rigid definition would functionally fix a concept and make it difficult to re-conceptualize. In fact, India's decision to leave the term (secular) undefined is very much in line with Akeel Bilgrami's observation that: '*…in order to maintain both theoretical and institutional flexibility…allow the ideals…liberty, equality, and fraternity…to determine what is need rather than slogans [i.e. separation of state and church]*'.[49]

In fact, the proposition made at the outset of this article, that although SIRA is contradictory to the conventional meaning of secularism, it is necessary to dilute religious orthodoxy, is also in line with the argument made by Akeel Bilgrami. Therefore, it is reasonable that India has left the term (secular) undefined, which makes it more flexible and susceptible to re-conceptualization. Reading the analysis done by D.E. Smith and Akeel Bilgrami together, it appears that India is and has been a secular State, though the term Secular got added in 1976 and is left undefined.

4. India's stance towards Hindu religion: Systematic SIRAs to eliminate class-divide

Coming back to the chronology of events, it is pertinent to note that during 1940-50s India started a gradual process of diluting and de-circumscribing the limits of Hindu religious orthodoxy. To begin with, the Madras Temple Entry Authorization Act, 1947 (Act 5 of 1947),[50] came into force, which threw open Hindu temples to all classes of Hindus, regardless of the caste. The Madras Temple Entry Authorization Act, 1947,

[49] *Supra* note 2 at 11.
[50] Madras Temple Entry Authorization Act, 1947 (Act 5 of 1947).

inspired other Indian States to come up with similar legislations.[51] In addition to this, a central legislation was also passed, i.e., the Untouchability (Offences) Act, 1955,[52] which provided: *'any attempt to prevent Harijans from exercising their right of temple entry is punishable with imprisonment, fine or both'*. Besides this, Article 17 of the Constitution of India abolished Untouchability and made its practice a punishable offence. Simultaneously, India passed the Hindu Code Bills, 1950s,[53] to amend and codify Hindu laws governing marriage and divorce, minority, guardianship and adoption, maintenance and succession.

The Hindu Code Bills, 1950's, received severe opposition for they introduced reforms, such as monogamy and divorce, which according to D.E. Smith *'represented revolutionary departures from the principles of traditional Hindu law*'.[54] N.C. Chatterjee, Hindu Mahasabha President, and Acharya Kripalani passionately opposed the divorce provision under the Hindu Code Bills, 1950s, and appealed that Hindu marriage is sacramental which cannot be annulled and charged the Hindu Code Bills, 1950s, as a communal legislation.[55]

It is pertinent to note that, in contrast to Hindu personal laws, Muslim personal laws were left intact. Reflecting upon India's non-intervention stance towards Muslim personal laws, it was contended that if India wants to bring religious reforms then it should bring a Uniform Civil Code (UCC), however, Jawaharlal Nehru contended that having regard of the communal violence which infested India during the Partition (1947), and the symbolic Partition wounds which are still fresh, the slightest intervention in Muslim personal laws might trigger violence.[56] Therefore, [initially] no SIRA was carried out in Muslim personal laws.

---

[51] A latest addition to India's repertoire to dilute Hindu religious orthodoxy, is the Sabrimala judgement, which threw open a Hindu temple in Kerala to female devotees, who were earlier prohibited from entering the temple. See *Indian Young Lawyers Association & Ors.* v. *State of Kerala*, W.P. (C) No. 373 of 2006.

[52] Untouchability (Offences) Act, 1955 (Act 22 of 1955).

[53] Hindu Code Bills, 1950s, led to the passing of Hindu Marriage Act, 1955 (Act 25 of 1955); Hindu Succession Act, 1956 (Act 30 of 1956); Hindu Minority & Guardianship Act, 1956 (Act 32 of 1956); Hindu Adoption & Maintenance Act, 1956 (Act 78 of 1956).

[54] *Supra* note 38 at 283.

[55] *Id*. at 287.

[56] *Id*. at 290.

5. Sikhs and their discontent: Post-independence difficulties faced by Sikhs

Even after Independence, numerous instances of political turmoil and violence in Punjab did not allow Sikh religion to have a peaceful growth, e.g. the Punjabi language movement initiated by the Sikhs with an objective to re-organize the State of Punjab on linguistic lines and have Punjabi language (in sacred Gurmukhi script)[57] declared as its official language, is a struggle which continued from 1947 to 1966. Soon thereafter, in 1970s, the State of Punjab witnessed an alleged separatist movement, known as the Khalistan Movement. During the same period, 1970-80s, Punjab experienced a rise in religious extremism with an objective to spread Khalsa-Raj and witnessed mushrooming of rightist groups, such as Jarnail Singh Bhindranwale, Dal Khalsa, Panth Khalsa, Babbar Khalsa, etc. Most notably, Punjab witnessed Operation Blue Star, 1984, carried out by the then Prime Minister of India, Mrs. Indira Gandhi, to remove Jarnail Singh Bhindranwale and his armed supporters from the holy Golden Temple (a Sikh Gurdwara). Besides Bhindranwale and his armed supporters, many innocent people died during Operation blue star and the holy Golden Temple also received some serious damage. Following Operation Blue Star, , Mrs. Indira Gandhi, was assassinated by her Sikh bodyguard on 31st October, 1984. The death of Mrs. Gandhi led to over-generation and triggered massive anti-Sikh riots, in and around Delhi, which continued from 31st October to 5th November. It was only on 3rd November, 1984, that Army was deployed to control the mob, however, by then much damage was already done.

6. India's stance towards Sikh religions: *Protectionist measures*

India made extensive provisions to preserve Sikh religious identity markers, e.g. the Constitution of India, through Article 25, Explanation I, expressly recognized the practice of carrying Kirpan as an integral part of Sikh religion; the Arms Act, 1959[58] exempted a Kirpan (less than 9 inches in length) from licensing requirements; the Religious Institutions (Prevention of Misuse) Act, 1988,[59] conferred a statutory

[57] The term Gurmukhi is derived from Gurmukh, which means, "*the one who obeys the commands of Guru*" therefore, whoever would use the script is reminded to obey the Guru; See *Id.* at 439.
[58] Arms Act, 1959 (Act 54 of 1959).
[59] Religious Institutions (Prevention of Misuse) Act, 1988 (Act 41 of 1988).

protection upon Kirpans and protected a Sikh's right to carry Kirpan even inside a religious institution. Moreover, section 129 of the Motor Vehicles Act, 1988,[60] provided that a turban-clad Sikhs is exempted from wearing protective headgears while driving or riding a vehicle.[61]

Furthermore, India also retained a British era legislation called the Anand Marriage Act, 1909,[62] and recognized the Sikh marriage ceremony called 'Anand Karaj' and recently, also permitted Sikhs to have their marriage registered under a separate register. In this regard, it is pertinent to note that when the Hindu Marriage Act, 1955, came into force it was made applicable to Sikhs as well, therefore, whenever a Sikh marriage was registered, it was entered in a register maintained for Hindu Marriages. It was only with the passing of Anand Marriage (Amendment) Bill, 2012, that Sikhs are now entitled to have their marriages entered under a separate register maintained especially for Sikh marriages.[63]

In addition to this, the latest amendment to the Sikh Gurdwara (Amendment)Act, 2016,[64] has amended section 49 and section 92 of the Sikh Gurdwara Act, 1925, and has withdrawn the earlier exception (introduced by the British in 1944) conferred upon the Sehajdhari community. It is pertinent to note that in 2003, the Central Government of India in exercise of the powers vested in it under section 72 of the Punjab Re-organization, Act, 1966, passed a notification (No. S.O. 1190(E) dated 08th October, 2003) and modified the provisos to section 49 and section 92 of the Sikh Gurdwara Act, 1925, to disenfranchise Sehajdhari Sikhs from voting in Gurdwara elections. In 2011, Gurdwara elections were held in the light of this notification, however, the notification was later quashed by a judgment delivered by the honorable High Court of Punjab and Haryana, dated 20th December, 2011,[65] on the ground that the Sikh Gurdwara Act, 1925, cannot be amended by an executive order passed by the Central Government and that, if required, the appropriate legislature

[60] Motor Vehicles Act, 1988 (Act 59 of 1988).
[61] This exemption has been retained even after the Motor Vehicles (Amendment) Act, 2019 (Act 32 of 2019) which recently amended the Motor Vehicles Act, 1988.
[62] Anand Marriage Act, 1909 (Act 7 of 1909).
[63] Anand Marriage (Amendment) Act, 2012 (Act 29 of 2012), s. 2.
[64] Sikh Gurdwara Act (Amendment) Act, 2016 (Act 21 of 2016).
[65] *Sehajdhari Sikh Federation* v. *Union of India*, CWP No. 17771 of 2003 (O&M), High Court of Punjab and Haryana.

should come up with an amendment to amend the Sikh Gurdwara Act, 1925. The verdict was challenged before the Supreme Court of India and the court, as an interim relief, allowed the Shiromani Gurdwara Prabandhak Committee ('SGPC') to function as per 2011 election result. Recently, the SGPC even requested the Supreme Court of India to extend their tenure till 2021. However, the plea was dismissed. It was also contended that the term of occupants of current SGPC office has already ended and that they should vacate the office for fresh elections which are long overdue.[66]

7. Change in India's stance towards Muslim religion: *From conservative to reformist*

Speaking of India's stance towards Muslim religion, it is important to note that the initial non-interventionist stance towards Muslim community did not continue for long. Some of the inceptive interventions in Muslim personal laws were at the hands of Indian Judiciary. For instance, in the *Mohd. Ahmed Khan* v. *Shah Bano Begum*[67] case, the court sought to harmonize a conflict between Muslim personal law, according to which a wife is entitled to maintenance only during the period of *iddat*, and a secular law, i.e., section 125, Criminal Procedure Code, 1973,[68] according to which liability of a husband to provide maintenance is not limited to a specific period. The court held that section 125 is a secular law and thus applicable to every citizen of India, be it Hindu or Muslim. However, the judgement received severe opposition from orthodox Muslims and forced India to reverse the effect of the judgment and reinstate the original position of Muslim personal law. Resultantly, India enacted a specific legislation, i.e., the Muslim Women (Protection of Rights on Divorce) Act, 1986.[69]

However, Indian judiciary did not submit to the resistance raised by orthodox Muslims and few years later, the Indian judiciary started to reflect upon the essential tenets of Islam with great ease. For instance, in *M. Ismail Faruqui Mohd.* v. *Union of*

[66] Navjeevan Gopal, "In Quest to Wrest SGCP from Badals, Taksalis Quote a Badal" *The Indian Express*, Jan. 4, 2020, *available at:* https://indianexpress.com/article/india/in-quest-to-wrest-sgpc-from-badals-taksalis-quote-a-badal-6215065/ (last visited on Sept. 30, 2020).
[67] AIR 1985 SC 945.
[68] Criminal Procedure Code, 1973 (Act 2 of 1974).
[69] Muslim Women (Protection of Rights on Divorce) Act, 1986 (Act 25 of 1986).

India[70] the court held that *namaz* (prayer) can be offered anywhere, even in the open, therefore, offering of *namaz* at a particular Mosque is not an essential tenet of Indian Mahomedan Law; Later, in *M. Ajmal Khan* v. *the Election Commission of India*[71] the court held that *Purdah* (veiling of face) is not an integral part of Islam. Similarly, in *Noorjehan Safia Niaz* v. *State of Maharashtra*[72] the court held that prohibition on entry of women in Dargah is not an integral part of Islam; and recently, in *Shayara Bano* v. *Union of India,*[73] the court banned the practice of triple talaq.

Triple talaq is a unilateral, abrupt and irrevocable form of divorce, which a Muslim husband can exercise against his wife by pronouncing the word talaq thrice and upon the third pronouncement the marriage stands dissolved right away. It could be possible that the need to ban triple talaq was felt after referring to corresponding banning of triple talaq in other countries, e.g. in Egypt, as early as in 1929, triple talaq was abolished; similarly, a commission was set up in Pakistan to submit a report on Muslim marriage and family law. The report was published, on 20th June, 1956,[74] which led to the passing of Muslim Family Law Ordinance, 1961 ('MFLO, 1961'). One of the recommendations by the commission was that: *'talaq pronounced thrice in one session equals to one pronouncement and for a divorce to be effective, two further pronouncements in two subsequent tuhrs would be necessary'*.[75] Muhammad Munir reflecting on MFLO, 1961, explains that: *'under Islamic law a third divorce becomes effective as soon as it is pronounced but under section 7 a third divorce will be effective after ninety days are passed…(…from the date of pronouncement* [of first] *talaq)'*.[76]

Besides this, several other Muslim practices, such as polygamy, Nikah halala,[77] Nikah Mutah and Nikah Misyar (a temporary marriage), are also under consideration in the case of *Moullin Mohsin Bin Hussain Bin Abdad Al Kathiri* v. *Union of India*.[78]

---

[70] AIR 1995 SC 605A.
[71] Writ Petition No. 26841 of 2006, High Court of Judicature at Madras.
[72] PIL number 106 of 2014, High Court of Judicature at Bombay, Ordinary Original Civil Jurisdiction.
[73] W.P. (C) No. 118 of 2016.
[74] The Gazette of Pakistan, Report on Commission on Marriage and Family Law (1956).
[75] *Id.* at 1213.
[76] Muhammad Munir, "Talaq and The Muslim Family Law Ordinance, 1961 in Pakistan: An Analysis" 1 *Spectrum of International Law* (2011)
[77] According to Nikah Halala, in case a divorced Muslim couple wish to re-marry then the divorced Muslim woman has to first marry another man, consummate the marriage and get divorce and only thereafter she can marry her previous husband.
[78] W.P.(C) No. 235 of 2018, Supreme Court of India.

8. Summation and analysis of Indian secularism: *Determining stance* towards religion

India's stance towards religion owes much to the inceptive efforts made by Indian judiciary, particularly in the cases of the case of *Ratilal* v. *State of Bombay*[79] and *Commissioner Hindu Religious Endowments, Madras* v. *Lakshmindra Swamiar*,[80] to divide religion into purely religious and secular aspects. In doing so, it appears that Indian secularism has managed to justify SIRA in the secular aspect of religion. To explain it further, purely religious aspect of religion can be in form of ceremonial rituals, e.g. rituals to be performed at the time of marriage, whereas secular aspect of religion can be in form of marriageable age and to a great extent the cluster of Hindu Laws,[81] while carrying out SIRA in Hindu religious affairs, have secured purely religious aspect of Hindu religion from SIRA.

It is also pertinent to note that the Constitution of India, 1950, provides that term Hindu shall be construed so as to include reference to persons professing Sikh, Jain, and Buddhist religion.[82] Similarly, the Hindu Marriage Act, 1955, also gives a wide definition to the term Hindu and thus it is applicable to Sikhs, Jains and Buddhists as well.[83] Therefore, the SIRAs introduced through the Hindu Code Bills, 1950s, were equally made applicable to Sikhs, Jains and Buddhists.

At few instances India has tried to carry out SIRA in purely religious aspect of Jain religion, however, it could not survive, e.g. in the case of *Nikhil Soni* v. *Union of India*,[84] the Hon'ble High Court of Rajasthan declared the practice of *Santhara* as a method of attempting suicide and thus in violation of Article 21 of the Constitution of India which includes right to life but not right to die.[85] However, soon afterwards there was protest from Jain community objecting SIRA in purely religious aspect of Jainism as a violation of Article 25 of the Constitution of India and thus the Supreme Court of India ordered a stay on the Rajasthan High Court judgment.

---

[79] AIR 1953 Bom 242.
[80] 1954 (1) SCR 1005.
[81] Introduced through Hindu Code Bills, 1950s; See, *Supra* note 53.
[82] The Constitution of India, 1950, art. 25 (2).
[83] The Hindu Marriage Act, 1955, sec. 2(b).
[84] AIR 2006 Raj. 7414.
[85] AIR 1996 SC 946.

A recent development in India's stance towards Jain religion is its decision to grant minority status to Jain community (*vide* Ministry of Welfare Notification No. S.O. 267 (E), dated 27th January, 2014). Resultantly, the Jain community will get numerous benefits, to name a few, share in Centre's Welfare Funds; will be able to invoke Article 30 to the Constitution of India and establish and administer educational institutions, etc. However, it warrants introspection whether minority status confers complete immunity from SIRA in Jain temples. Recently in 2019, an issue pertaining to entry of members belonging to Samrat Samprati Sansthan sect into Jain temples for worship reached the Bombay High Court.[86] The members belonging to aforementioned sect were finding it difficult to enter Jain temples and in response to the PIL, the Bombay High Court passed an interim relief and directed the State to ensure entry of aforementioned sect into Jain temples. It is also contended that directions are needed for implementation of Hindu Places of Worship Act, 1956.[87]

It appears that, more often than not the State or the judiciary, as the case may be, has to act as an arbiter of conflicting interest. For example, in the *Sabrimala* judgment[88] the judiciary acted as an arbiter to uphold the right of female devotees to enter the Kerala temple. However, a similar issue still remains to be addressed, e.g. entry of Zoroastrian Women in fire temple during menstruation period is also prohibited.[89]

In contrast to Russia's stance towards Jehovah Witnesses', India's stance is quite tolerant, e.g. in the case of *Bijoe Emanuel*[90] the court protected the freedom of conscience of three school children, belonging to Jehovah's Witnesses faith, who were expelled from school for not singing India's National Anthem, and held that their

---

[86] See *Nitin Shantilal Vora, Trustee of Shri Navjivan* v. *The State of Maharashtra* Application, CR. PIL NO. 3 of 2019 in PIL Stamp No. 56 of 2018.

[87] Maharashtra Hindu Places of Public Worship (Entry Authorization) Act, 1956 (Act 31 of 1956). See also, Swati Deshpande, "*Mumbai: Two sects oppose, one supports PIL on Jain temple entry*" *The Times of India,* Nov. 28, 2019, *available at:* https://timesofindia.indiatimes.com/city/mumbai/mumbai-two-sects-oppose-one-supports-pil-on-jain-temple-entry/articleshow/72270979.cms (last visited on Oct. 01, 2020).

[88] *Indian Young Lawyers Association & Ors.* v. *State of Kerala*, W.P. (C) No. 373 of 2006.

[89] Pritam Pal Singh, "Parsi body defends 'right' to keep people out of fire temple" *The Indian Express,* Apr. 11, 2019, *available at:* https://indianexpress.com/article/cities/delhi/parsi-body-defends-right-to-keep-people-out-of-fire-temple-5669556/ (last visited on Oct. 01, 2020).

[90] *Bijoe Emanuel & Ors.* v. *State of Kerala & Ors.*, AIR 1987 SC 748.

expulsion from the school on the ground that they did not join in singing the National Anthem is a violation of their fundamental rights of freedom of religion.[91]

The Court, in the aforesaid case, also held that:

> …the question is not whether a particular religious belief or practice appeals to our reason or sentiment but whether the belief is genuinely and conscientiously held as part of the profession or practice of religion. Our personal views and reactions are irrelevant. If the belief is genuinely and conscientiously held it attracts the protection of Article 25 [freedom of religion] but subject, of course, to the inhibitions contained therein.

However, the issue surfaced once again when the Supreme Court of India, in year 2016, made it mandatory to play National Anthem in cinema theatres, however, the order was challenged and soon modified.

Similarly, as far as, issue relating to blood transfusion is concerned, there is one interesting medical case of India the facts of which state that the parents of a 4-and-a-half-year-old child, a professor of Jehovah's Witness faith, consented for blood transfusion so as to save their child from Burkitt Lymphoma.[92] However, this medical case categorically projects that there is no law in India which can help if the patient is a minor, professor of Jehovah's Witnesses faith, and the parents refuse to give consent for blood transfusion.

As far as India's stance towards Christian Missionary activities is concerned, it is again quite tolerant. A very recent decision of the Delhi High Court, in *Dr. Christo Thomas Philip* v. *Union of India*[93] is relevant is in this respect. The facts of the case are such that the petitioner, an Overseas Citizen of India ('OCI') card holder, was engaged in missionary activity in India. Petitioner's OCI card was cancelled on the account of carrying '*evangelical and subversive activities*' and in response the petitioner filed a petition in the court. Hearing the petition, the Delhi High reiterated the decision of *Ratilal (supra)* and held that freedom of conscience in India extends to

---

[91] See also, M.P. Singh, *V.N. Shukla's The Constitution of India* 362 (Eastern Book Company, India, 1950)

[92] K.G. Gopakumar, T. Priyakumari, *et.al.,* "Jehovah's Witness and consent for blood transfusion in a child: The Indian scenario" *12*(1) *Asian Journal of Transfusion Science* 78-80 (2018), *available at:* https://doi.org/10.4103/ajts.AJTS_50_17 (last visited on Oct. 01, 2020).

[93] *Dr. Christo Thomas Philip* v. *Union of India,* W.P. (C) 1775/2018 & CM Nos. 27041/2018.

every person, not just citizens of India, and every person has a right to profess, propagate and practice his religion. Therefore, Dr. Christo Thomas Philip, a Protestant Christian by faith, was permitted to profess and propagate his faith by carrying out missionary activities in India and directions were given to restore petitioner's OCI card.

To put in brief and summarize this part, and having regard of the fact that the term Hindu includes Buddhists, Sikhs and Jains, manifests that India's stance towards religion, in general, is that of a reformist which brings extensive religious reforms to keep high regards for Hindu religion on international scale.

As far as India's stance towards Muslim religion is concerned, it pertinent to note that it was only during the initial decades that India refrained to carry out SIRA in Muslim personal laws, however, as India grew older its protectionist stance started to wither away and systematic SIRAs were carried out in Muslim personal laws.

In the light of expressed constitutional and statutory safe guards employed to preserve Sikh religious identity markers and the 2016 amendment to the Sikh Gurdwara Act, 1925, it appears that India's stance towards Sikh religion is quite conservative. Perhaps, once the proximity with difficult past weakens and the memories become a distant past, India will try to reconcile the differences of opinions(s), between Khalsas and Sehajdharis, and indoctrinate the idea of tolerance amongst the larger Sikh Panth.

With respect to the difficult past that Sikhs have been through, India can learn from Russian Federation's stance towards ROC and appreciate that a religion which had a difficult past needs a geo-political construct where the particular religion can feel safe and free from external/foreign religious identity markers. It is true that making such a geo-political construct is difficult to appreciate when India advocates national unity and not the palatable form of religious or linguistic regionalization. However, if such measures can help in maintaining peace and order, it is worth considering foreign solutions.

VIII. CONCLUSION

To conclude this article and determine the stance towards religion as held by Russia and India, respectively, it is pertinent to note that the constitutional regime of Russian Federation is relatively new and its stance towards religion is in a state of transition (trying to re-establish ROC) which makes it difficult to determine the nature of Russian secularism with exactitude, however, reference to India can help us make a reasonable prediction of Russian Federation's stance towards religion in coming future.

Speaking of India, it is pertinent to note that India's constitutional regime, which is now more than 70 years old, is a good example of a secular-cum-reformist State which modulates its stance towards religion to suit the particular construct. Therefore, at the cost of dispensing the conventional meaning of secularism, India installs temporary scaffolds to support such religion(s) which had a difficult past and gradually removes the scaffolds once the religion has gained strength. However from a holistic point of view, India's stance towards religion is fairly tolerant but on the same hand India is a reformist and it carries out sincere SIRAs to dilute religious orthodoxy. The scaffolds that India installed to gain faith of Muslim and Sikh religions, can also be seen in Russian Federation which provide a conducive environment for ROC to gain strength. However, as already stated such protectionist measures are temporary and once ROC gains strength, Russian Federation's protectionist stance will hopefully wither away.

EVOLUTION OF THE CONSTITUTION OF NEPAL

*Suresh Kumar Dhungana**

I. INTRODUCTION

The process of Constitution making of a nation and its implementation is an amalgamation of both history and the day-to-day affairs it has to face for creating a better structure for all of its people. Nepal is one of the few countries that has not just modified and amended its Constitution multiple times but has rewritten, implemented, and adopted the rewritten Constitution multiple times in a short span of seven decades.[1] The article tries to analyze the same question of why Nepal's Constitutions have been so short-lived in the past.[2] This article discusses the history behind the drafting of the Constitution of Nepal which came into force in 2015.

The article will also analyze the Constitution commissions models as well as the people representative models. Most of the constitutions in Nepal have been promulgated through the process of a written Constitution which was a step towards political modernization and democratization. Before beginning the analysis of the history of the constitutional developments, it is very important to have a basic understanding of Nepal's history. Thus, in order to contextualize the analysis, the article at first addresses the historical and geographical overview of Nepal.

II. POLITICAL HISTORY OF NEPAL

Nepal is a country which stretches over some 54,000 square miles, south of the Himalaya as landlocked between China in the North and India in the South.[3] It was only after 1769 that the petty Kingdom of Nepal was united and brought together as a single empire by a strong Gurkha King Prithvi Narayan Shah who followed a

* Associate Professor at Tribhuvan University Faculty of Law, Kathmandu, Nepal where he has served as a law teacher since 1992. He did his LL.M. at the University of Delhi in 1992 and was awarded a Ph.D. by the University of Delhi in 2020.

[1] Bishal Khanal, "Pre-Making, Making and Remaking: A Nepalese Analogue" *Nyadoot English Special Issues* 17 (2007).

[2] *Ibid.*

[3] Yuba Raj Ghimire, "Limits of Democracy" *Indian Express*, Nov. 13, 2017.

modern approach and introduced the concept of equidistance in Nepal's foreign policy describing it as 'yam between two boulders'.[4]

The political history of Nepal can be generally divided into broad sections: the first one is the period before the written Constitution and the second one is the period after the written Constitution, that is, after 1948.[5] This period before the written Constitution can also be further divided into the period before the first written law, and the period after the Civil Code, 1854.[6]

A. Period before the first Written Law

The history of Nepal seems to have started from the Gopalan and Abhiraj in the second half of the second millennium B.C. After the Gopalan, (900 B.C. to 300 A.D.). In the first quarter, the history of Nepal starts with the Kirats. The Kirat period formed the first of many milestones along the road of the political and cultural history of Nepal and Nepalese people, because of its republican form of Government. The Lichchhavis, immigrants from Baishali of India, overthrew the Kirats and established their own rule in Nepal which is marked as the golden era of Nepal. The Lichchhavi kings adopted Hindu polity and their judicial system was rooted in the Hindu religious teachings of the Dharmashastras.[7] They changed the Kirats' elective monarchy into a hereditary monarchy. Mandeva (464-491 A.D) was the 20th Lichchhavi King according to vansvalis, the first instances of the promulgations of a written law made on the recommendation of the people or chief officers are found in the inscription of King Mandeva praises him as the adherent of Vedas and other Dharmasshastra. Mandeva was recognized as the sovereign Hindu ruler of Nepal.[8]

King Ansu Verma 595 CE-621) rose to the position of a King when King Sivadev was ruling in Licchivi Kingdom of Nepal, during the sixth century A.D. In the period of King Ansu Varma Nepal and Tibet developed a close relationship and he is the one who established the trade routes between these two nations. He also married one of

[4] Editorial, "Left Sweeps Nepal" *The Tribune*, Dec. 13, 2017.
[5] Jana Kalyan Parajuli, *Constitutional Law: Nepalese Perspective* 14 (Manab Kalyan Pokhara, 2014).
[6] *Ibid.*
[7] Narayan Prasad Sharma, *Rudiments of Constitutional Law* 40-41 (Lumbini Prakashan, Kathmandu, 2016).
[8] Asad Husain, *British India's Relations with The Kingdom of Nepal* 25 (George Allen and Unwin Ltd., London, 1970).

his daughter Bhikuti to the Tibetan king Tsrongtsong Gompo. Moreover, he married his sister Bhaga Devi to an Indian King Sur Sen which also helped him strengthen the ties with India King Ansu Verma, a national hero who developed Nepal in many ways. Ansu Verma is considered a great king and the Licchavi dynasty is known as a golden period. King Ansu Verma adults him as great lawgiver of the contemporary period.[9] The nature and duration of the Gupta suzerainty in Nepal cannot be exactly determined, but the fact that the Licchavi of Nepal came into prominence only after the decline of the Gupta Empire is not perhaps merely a coincidence.[10]

The Khus Malla rulers would also issue Sanads to meet any unforeseen eventualities.[11] King Jayasthiti Malla is credited with providing the first codified law of Nepal known as the Nyayavikasini. Enacted in 1379 (1436 B.S.) and also known as the Manav Nyaya Shastra, it was mainly influenced by the Naradismirti. Shah period (1559-1846). The Gurkha rulers' originally came from a few families of the Rajput Kshatriyas who were driven out of Chitor, India, in 1303 by Sultan Alou-d-din.[12] Ram Shah was the forerunner of Prithvi Narayan Shah. It was he who opened the eyes of the Gorkahalis for the future. Gorkha made its history under its qualified ruler like Prithvi Narayan Shah.[13]

B. Period after Civil Code (1846-1948)

Jung Bahadur Rana who was in-charge of a royal armed troops successfully engineered a bloody coup, and what ensued was the Kot (Palace) Massacre, one of the most barbarous and ghastly affairs in the history of Nepal.[14] After the massacre, Jung Bahadur Kunwar was bestowed the honorific title of Ranaji.[15] In the autumn of

[9] *Supra* note 7 at 41.
[10] R.C. Majumdar, *The History and Culture of the Indian People, The Classical Age* 83-84 (Bharatiya Vidya Bhavan, Bombay, vol. iii, 1962).
[11] *Supra* note 7 at 41.
[12] *Supra* note 8 at 29.
[13] T. R. Vaidya, *Advanced History of Nepal* 194 (Anmol Publications, New Delhi, 1994).
[14] *Supra* note 8 at 29.
[15] Jung Bahadur, a member of a minor noble family of Kshatriya status, was raised to the rank of Kazi. Taking advantage of the anarchic state of court politics, he established virtually dictatorial control over the government. His place in the history of Nepal is assured not merely as the protagonist of the Rana regime, but as a man of great personal courage and political astuteness. later he became commanding General His Highness. Shree shree shree Maharaja Sir Jung Bahadur Kunwar Ranaji, popularly known as Jung Bahadur Rana was a Khas Rajput ruler of Nepal an initiator of the Rana regime in Nepal and initiator of the Rana regime in Nepal. In 1858 king Surendra bestowed upon Jung Bahadur Kunwar the honorific title of Rana, and old title denoting martial glory used by Rajput princes in Northern India,

1850, he undertook a journey to England and France as the ambassador of the King, and the power and wealth of the European countries made a lasting impression on him.[16] After he returned from Europe, in his role as a Prime Minister, he promulgated the National Code of 1854.[17] In this regard, the Nepali Historian Mahesh C. Regmi maintains that the Code has a constitutional value.[18] The National Code of 1854 was amended numerous times during its lifespan. Much later, the General code of 1963 repealed and replaced this code but not before including some provisions of its predecessor.[19]

III. PROCESS OF CONSTITUTION DRAFTING IN NEPAL

A. The Government of Nepal Act, 1948 (First Constitution of Nepal)

After the succession of Dev Shamsher as the Prime Minister of Nepal, he approached the British Government and demanded Constitutional experts to frame the modern constitution of Nepal. These efforts lagged behind due to a lack of proper support. Later, Prime Minister Padma Shamsher requested the Indian Prime Minister Jawahar Lal Nehru, to send some Constitutional experts from India in order to assist with the process of writing a Constitution in Nepal. In this regard, he sent a close friend and also Constitutional expert Shree Prakash Gupta, a law graduate from Cambridge University who was a freedom fighter and a member of the Indian Constituent Assembly, along with Ran Ugra Singh, Professor of Law of Lucknow University, and Raghu Nath Singh, a member of the Uttar Pradesh Legislative Assembly, to draft a Constitution for Nepal. This was the first written Constitution in Nepalese history.[20] It

---

he then becomes Jung Bahadur Rana, and the later prime minister descended from his family added his name to their own in honor of his accomplishments. Jung Bahadur Rana was the Rana dynasty that rules the country from 1846AD-1951AD. Reducing the Shah monarch to a figurehead and making prime minister and other government positions held by the Ranas hereditary.

[16] Mara Malagodi, "Constitutional Development in a Himalayan Kingdom: The Experience of Nepal", in Sunil Khilani *et.al. (*eds.), *Comparative Constitutionalism in South Asia* 88 (Oxford University Press, New Delhi, 2013).

[17] Jung Bahadur Muluki Ain, 1854.

[18] Mahesh C. Regmi, *Preliminary Notes on the Nature of Rana Law and Government* 103-15 (Contribution of Nepalese Studies, 1975).

[19] *Supra* note 7 at 44.

[20] Chandra Kant Gyawali, *Constitutional Law of Nepal* 15 (Pairavi Publication, Kathmandu, 2016).

was promulgated on 26 January 1948 and was known as the Nepali Government Act of 1948.[21]

In his address marking the inauguration of the Constitution, the Prime Minister Padma Shamsher stated that the powers and functions of the legislature are generally of the nature conferred by the Government of India Act, 1935.[22] It was not made under the authority of the people. The Rana Prime Minister Padma Shamsher Rana was not authorized by the people to make such a Constitution, the king as a ceremonial head has no role to play in active politics in the country. The Constitution (Government of Nepal Act,) 1948 was promulgated by the P.M. Padma Shamsher as per the authority obtain under the Royal seal. The introduction of a written Constitution was a step towards political modernization and democratization.[23] It began with a short preamble and consisted of 6 parts and 68 Articles and 1 Schedule and mentioned the Fundamental Rights of the Nepalese citizens (Article 4, 5) and the Government of Nepal Act, 1948 accepted the right to succession of the Rana to the prime minister as 'for all time inalienable and unalterable'. It provides for the establishment of a council of monsters headed by Rana as a prime minister. The Act, 1948 accepted the council of ministers of at least five members, two of whom were to be chosen from among elected members of the legislature (Article 7b).[24]

The council of minister was to transact all executive business and to lay down the general policy of the state, scrutinize the budget of the various departments, to give final consideration to the government bills to be placed before the legislature, and to bring about coordination and cooperation between the various departments of administration (Article 11a). Further, the prime minister was empowered to promulgate emergency regulations which were to have the force of law for six months (Article 46). The entire powers vested in Rana Prime Minister, Bills to be approved by the prime minister, the establishment of elected municipalities and district boards in various districts; the establishment of an independent judiciary

[21] The Government of Nepal Act, 1948.
[22] Mara Malagodi, *Constitutional and Legal Exclusion* 82 (Oxford University Press, New Delhi, 2013).
[23] Dilli Raman Regmi, *A Century of Family Autocracy in Nepal* 206 (Nepal National Congress, Banaras, 1958).
[24] Shree Krishna Jha, *India and Nepal in the Post-Colonial Era* 123 (Manas Publication, New Delhi, 1975).

separate from the executive; and publication of an annual budget for the country. Part V of the Act relating to the administration of justice stated that 'justice shall be cheap and speedy'. (Article 48) Article 53 provided for an establishment of a Pradhan Nyayalaya (High Court). The Constitution of 1948 prima facie resembled the Government of India Act, 1935.

The reason for the failure of the Constitution was that firstly, the Ranas were not happy with the promulgation of the Constitution as they did not want to share the power with the people and secondly, the people were not happy as it did not meet their minimum expectations.[25] Jung Bahadur's successor was not satisfied with the role of succession designed by him for the office of the Prime Minister being limited. With the highly stratified political system of the Ranas, the people were separated from the political process. Many measures were taken by the Ranas to make the people apolitical.[26]

B. Interim Government of Nepal Act, 1951 (Second Constitution of Nepal)

The Nepali Congress conducted the 1950 movement against the Rana rule. King Tribhuvan and the Nepali Congress leaders, with the encouragement of the Indian Prime Minister Nehru, agreed to the Delhi Settlement of 1951, which led to the termination of the 1950 movement. King Tribhuvan returned to Kathmandu amidst scenes of great popular festivity. The long family rule of the Ranas came to an end that day.[27] After the end of the Ranas regime, following the 1951 revolution, Tribhuvan promulgated the Second Constitution on March 30, 1951, based on the advice from the Council of Ministers.[28] It had 7 Parts and 73 Articles along with 3 Schedules. It was a compromised document between the king, the Ranas, and the Nepali Congress.[29]

---

[25] Laxmi P. Kharel, *Constitutional Law& Comparative Nepalese Constitution* 168 (Pairavi Prakashan, Kathmandu, 2016).
[26] Lok Raj Baral (ed.), *Nepal Quest for Participatory Democracy* 20-21 (Androit Publisher, New Delhi, 2006).
[27] Anirudha Gupta, *Politics in Nepal 1950-60* 49 (Kalinga Publications, Delhi, 1993).
[28] Art. 1(2) of the Interim Government of Nepal Act, 1951 provides, "It shall came into force from April 11, 1951".
[29] Surendra Bhandari, *Constitutional Design and Implementation, Dynamics* 54-55 (Himal Innovative Development and Research, Kathmandu, 2016).

The salient features of the Constitution are (1) King to be the source of the Constitution and authority. (2) Directive Principles and Policies of the State were introduced. (3) Sound provisions on the executive and the judiciary. Lesser focus on the legislature. (4) The Apex Court as the highest echelon of the judiciary. Apex Court is recognized as the court of record equipped with the extraordinary jurisdiction. (5) The Legislature and Privy Council to be headed by the King. (6) Provision of Public Service Commission, Auditor General, and Election Commission. (7) The Council of Ministers to be accountable to the king. (8) Provision of modern fundamental rights. (9) The exercise of the power of the three-state organs by the king himself. (9) The exercise of the power of the three-state organs by the king himself. (10) The government set up was democratic in the form and was a parliamentary government. (11) Initially, the Interim Act did not provide for the creation of a legislative boy. Advisory Assembly established to aid the king and the Council of Ministers came into existence in June 1951.[30]

The aim of Interim Constitution was to hold an election for the Constituent Assembly as early as possible in order to frame a Constitution for Nepal.[31] It recognized the supremacy of the king and restored to him his lost sovereignty powers, prerogative and position. It replaced the 1948 Constitution.[32] This opened the gate for the modern Constitution. Although the Interim Constitution was merely termed as a fundamental law for regulating the conduct of the Government pending the framing of a new Constitution by the duly elected constituent assembly, it proved to be the most progressive of all Constitutional documents in Nepal history to date from the viewpoint of the rights granted to the people.[33]

The Constitution began with a long series of Articles containing the Directive Principles of State Policy. It was in this part that one could see almost a direct transference of parts III and IV of the Indian Constitution dealing with the Fundamental Rights and Directive Principles of State Policy.[34] The Constitution also

---

[30] Surya Dhungel *et.al.*, *Commentary on the Nepalese Constitution* 23 (Delf, Kathmandu, 1998).
[31] Grisma Bahadur Devkota, *Nepal Political Mirror* 73 (D.B. Devkota Pub., Kathmandu, 1979).
[32] Hem Narayan Agrawal, *Nepal: A Study in Constitutional Change* 23(Oxford IBH Publishing Co., New Delhi,1980).
[33] Rishi Kesh Shah, *Modern Nepal: A Political History* 253 (Manohar Publication, New Delhi, 1990) as quoted by *Supra* note 30 at 25.
[34] *Supra* note 30 at 73.

established a Supreme Court, made the king supreme commander of the armed forces, and proclaimed numerous social and economic objectives of the government.[35]

The reason for the failure of the Constitution was that it clearly stated: 'The aim of Interim Constitution as early as possible, for holding an election for the Constituent Assembly which will frame a Constitution for Nepal'.[36] B.P. Koirala, the first democratically elected Prime Minister of Nepal, even filed a case in the Supreme Court demanding that the Constitution ought to be written through a Constituent Assembly, but the court did not accede to his demand and allowed the king to wield and sustain powers.[37]

C. Making of the Constitution of the Kingdom of Nepal, 1959 (Third Constitution of Nepal)

In March 1958, King Mahendra invited the British constitutional expert, Sir Ivor Jennings, to guide the impending Constitutional-making process and independently appointed a commission to draft the new Constitution. Jennings was convinced that a modified Westminster model would be easy to transplant in Nepal assuming that the Nepali Constitutional edifice would revolve around the principle of Constitutional monarchy as expounded in the United Kingdom.[38] The king promulgated the new Constitution on 12 February 1959.[39] The monarch enjoyed wide discretionary power and was granted residuary and emergency powers. Executive powers were vested in the king as well, although the Constitution created a cabinet of ministers responsible for Parliament to aid His Majesty the King in performing the executive functions.[40]

The Preamble of the Constitution pointed out clearly that political stability through the establishment of an ancient monarchial form of government responsive

[35] Dr. Saurabh, *Constitution-Making in Nepal* 2 (Summit Enterprises, New Delhi, 2016).
[36] *Supra* note 31 at 73.
[37] Kashi Raj Dahal, *Constituent Assembly: An Introductory Book* 17 (Fridrich –Elbert Stiffung-Nepal, Kathmandu, 2007).
[38] *Supra* note 1 at 25.
[39] The Constitution of Kingdom of Nepal, 1959.
[40] *Supra* note 16 at 93. Also, see Niranjan Bhakta Paudel, *History of Constitutional Development in Nepal: 1948-1980*, 89 (Niranjan Bhakta Paudel, Lalitpur, 1981). Also, see Rakesh Kumar et.al., "Constitutional Development of Nepal", in Promod Jaiswal (ed.), *Constitution of Nepal*, 21 (G.B. Book Publisher and Distributors, New Delhi, 2016).

to the wishes of the people was the aim.[41] King Mahendra advocated a more assertive and proactive role for the monarchy in Nepal's political arena.[42] By accepting the Constitution as the supreme law of the kingdom, the parties which were represented in the Council of Ministers automatically surrendered whatever views they held in regard to the right of the people to frame their own Constitution. The right to move the court for enforcement of these fundamental liberties was guaranteed by Article 9 which empowered the Supreme Court to issue direction and orders, including writs in the nature of Habeas Corpus, Mandamus, Quo warranto, and Certiorari etc. Like the Interim Constitution 1951, the 1959 Constitution also guaranteed equal protection of law to all citizens without discrimination.[43] The most significant aspect of the Constitution of 1959 was that it was granted by the King rather than drawn up by elected representatives of the people as had been specified in the 1951 Constitution. Although the Constitution formally brought into being a democratically elected parliamentary system under a Constitutional monarchy, the King retained ultimate sovereignty, even though the document itself did not explicitly grant this power.[44] The third Constitution, known as the first democratic Constitution, was one of the shortest-lived Constitutions in Nepal; it had a lifespan of less than three years.[45] Article 73 and Article 75 of this Constitution shall come into operation at once, and the other provision of this Constitution shall come into operation, and such day as hereinafter referred to as appointed day'.[46] Part 4 of the Constitution laid down certain objectives and principles of social policy 'for general guidance and they shall not be enforceable by any court' (Article 18). This principle of State policy is incorporated in the Indian Constitution in Part (Article 36 to 51). Both in India and Nepal, these principles are non-justiciable and are in the nature of socio-economic rights and duties.[47]

[41] See the Preamble, The Constitution of the Kingdom of Nepal, 1959, 1 (HMG, Kathmandu, 1959).
[42] *Supra* note 22 at 85.
[43] *Supra* note 27 at 130.
[44] Susil K. Naidu, *Constitutional Building in Nepal* 37 (Gaurav Book Centre, Delhi, 2016). Also, see *Supra* note 35, at 49.
[45] *Supra* note 29 at 49.
[46] Constitution of the Kingdom of Nepal, 1959, art. 2.
[47] *Supra* note 33 at 62.

King Mahendra, on May 16, 1959, requested Bisheswor Prasad Koirala, the leader of the Nepali Congress Parliamentary party to render his services to the country as the leader of the cabinet and Prime Minister. Persistent contentions between the Cabinet and King Mahendra led the King to dismiss the Nepali Congress government in December 1960 and to imprison most of the party's leaders, including the Prime Minister. Subsequently, the Constitution of 1959 was abolished in 1962, and a new Constitution was promulgated that denied any role to the political parties.[48] The Constitution, made with the help of Sir Ivor Jennings was praised by B.P. Koirala who was of view that the constitution of the Kingdom of Nepal, 1959 is such a means that can lend a helping hand in the blooming of democracy. It also has the potential of being successfully used against the very democracy itself. The Constitution was also praised by B.P. Koirala as an extraordinary Constitution where the powers of both the king and parliament were maintained and the Constitution was balanced.[49]

The reason for the failure of the Constitution is that there was the unfortunate conflict between the two seats of power viz. the palace and the Prime Minister which made it difficult for the Constitution to function. The two powerful divergent political forces, representing 'traditional', and the other 'modernity'.[50] The foreign policy options which became available to him, following the changed geopolitical context in which India and China were in an adversarial relationship meant that he could balance the pressures likely to emanate from India. The fragmentation of political parties within the country also prompted him to devise a political model befitting his ambition.[51]

D. Constitution-making Process of Nepal,1962 (Fourth Constitution of Nepal)

The Constitution of Nepal, 1962 was the fourth Constitution in fifteen years. It was divided into twenty parts, with ninety-seven Articles and six Schedules. Article 10 guaranteed equality before the law without discrimination on the grounds of religion,

[48] Bipin Adhikari, *Nepal: Design Options for the New Constitution*, III (Nepal Constitution Foundation, Kathmandu, 2010).
[49] Ganesh Raj Sharma (ed.), *Autobiography of Bisheshwor Prasad Koirala* 204 (Jagadamba Prakashan, Kathmandu, 1998).
[50] *Supra* note 32 at 130-31.
[51] Ganesh Raj Sharma, "Nepal's in Representation" XIX *Essays on Constitutional Law* 66 (1995).

sex, race, caste or tribe, and Article 14 the right to religion. The Constitution created a central legislative body, the National Panchayat. This enjoyed only advisory powers. The members of the National Panchayat was partly nominated directly by the king and partly elected indirectly. The Panchayat system was constituted by four tiers of representative institutions elected at different levels. Direct popular elections with universal adult suffrage took place only at the village (Gaum) and town (Narar) levels. The constitution of 1962 sought to vest in the king every kind of political power that could be obtainable in a despotic order. Article 82(5) lays out that under his emergency powers the king can suspend all or any of the Articles of the Constitution for any length of time, in his own discretion (Article 82 (1a)).[52]

The outbreak of the student agitation in 1979, with the tacit support of banned political parties and allegedly of some foreign powers, impelled King Birendra to declare a referendum on May 24, 1979, giving the people an option to vote either for the existing Panchayat system with suitable reforms or for a multiparty system.[53] Those supporting the multiparty system lost. On May 21, 1980, the king appointed an eleven-member Constitution reforms commission to be chaired by the acting Chief Justice of the Supreme Court. On December 15, 1980, the King promulgated three Constitutional amendments:

a. direct election to the Rashtriya Panchayat seats filled by the king's personal nomination;

b. the Prime Minister would be elected by the Rastriya Panchayat;

c. The Cabinet would be appointed by the king on the recommendation of the Prime Minister and would be accountable to the Rashtriya Panchayat.[54]

This survived for almost 28 years.[55] The failure of the Panchayat Constitution can be attributed to a number of factors. But its main failure was its inability to cope with political opposition.[56] On 13 April 1990, the democracy movement leaders presented eight demands to the King, which included the dissolution of all the panchayat

[52] *Supra* note 27 at 261.
[53] H.M. King Birendra, *Proclamations messages and speeches* 224 (1982).
[54] *Supra* note 30 at 40.
[55] *Supra* note 29 at 49.
[56] Lok Raj Baral, "Political Culture and Political Process in Nepal", in K.P. Malla, (ed.), *Nepal: Perspectives on Continuity and Change* 317 (CNAS, Kathmandu, 1989).

institutions, the immediate release of all political prisoners, and the annulment of the Articles and clauses of the 1962 Constitution that ran counter to the multiparty system.[57]

E. Making of the Constitution of the Kingdom of Nepal,1990 (Fifth Constitution of Nepal)

Finally, on 31 May 1990, King Birendra issued a communiqué through the palace Secretariat to constitute a nine –member CRC upon the advice of the Council of Monsters to prepare a draft of the new Constitution of the Kingdom of Nepal.[58] The 1990 Constitution-making process was divided into two phases: the drafting of the document by the nine-member Constitution Recommendation Commission (CRC) between 31 May and 10 September 1990, and finalization of the draft by a three-member cabinet committee leading to the promulgation of the document by the King Birendra on 9 November 1990.[59] Hence it was claimed the best and most democratic Constitution of the world. There was also a chapter called 'Powers of the King', and it was unclear whether these powers were also to be exercised on the recommendation of the government.[60] It expanded personal freedoms, ended the ban on political parties, and established a Council of Ministers, led by a Prime Minister, to aid and advise the King. According to the Constitution of the kingdom of Nepal, 1990, all the political parties were united in their commitment to a Constitutional monarchy, to multi-party democracy to the holding of elections on the basis of universal adult franchise, to the establishment and operation of a bicameral legislature and to the sovereignty of the people.[61]

The Constitution of India was also a great influence on the 1990 Nepali Constitution-making process.[62] The British style system of constitutional monarchy represented the point compromise between the three main political forces involved in

---

[57] Krishna Hachhethu, "Transition to Democracy in Nepal: Negotiation behind Constitution-Making 1990" *Contribution to the Nepalese Studies* 116 (1994). Also, see *Supra* note 22 at 106.
[58] Mukunda Regmi, *Constitutional Development and the Constitution of the Kingdom of Nepal 1990*, Vol. 1, 134-135 (Sita Devi Regmi Pub., Kathmandu, 2004).
[59] *Supra* note 22 at 104.
[60] *Supra* note 18 at 34.
[61] Kusum Shrestha, "Framing the Constitution Some Important Issues" 1 *Essays on Constitutional Law* 1 (1991).
[62] *Supra* note 22 at 115-116.

the 1990 Constitution-making process.[63] Notwithstanding the limited success enjoyed by Westminster based Constitutional arrangement around the globe and the short-lived 1959 Constitution in Nepal, the Nepali Constitution-makers opted once again to follow the example of the British system of government.[64]

The reason for failure was firstly attributable to the dissolution of House of Representatives by Prime Minister Girija Prasad Koirala and the resulting of midterm elections in 1994 and eight governments in five years. Secondly, in 1996, a communist Maoist guerrilla movement began in the countryside, which destabilized the political system. Thirdly, the five years of conflict and the (apparently unrelated) massacre of King Birendra and his family. Fourth, King Gyanendra legitimized his second takeover on 1st February 2005 by making use of the 1990 Constitution which made the document increasingly embattled. Fifth, in addition, not a single amendment was proposed to the Constitution during the 15-years application. Sixth, the twelve-point Agreement concluded in November 2005 in India, the Maoists and the seven main parliamentary political parties united against King Gyanendra's autocratic rule and committed to 'establish permanent peace in the country through Constituent Assembly elections and forward-looking political outlet'.

F. Making of the Interim Constitution of Nepal, 2007 (Sixth Constitution of Nepal)

An Interim Constitution Drafting Committee was formed in June 2006, chaired by retired Supreme Court Justice Laxman Aryal. Members were put forward by the various parties including the Maoists.[65] Although about 5000 submissions was made to the Interim Constitution Drafting Committee from various civil society groups, it is not known whether they were even read. Some new Fundamental Rights are now a part of the Constitution, some of which were formerly in the chapter of Directive Principles. It also mentions that the State has not to be secular and no longer the Hindu Kingdom. This directly threatened the position of the monarchy. Previously all

[63] *Id.* at 116.
[64] *Supra* note 58, vol. 2 at 1771-1846.
[65] Krishnal Khanal, "Participatory Constitution Making Process In Nepal: An Assessment of the CA Process (2008-2012)", in Buddhi Karki and Rohan Edirsinha (eds.), *Participatory Constitution Making in Nepal* 10 (United Nations Development Programme (UNDP), Kathmandu, 2014).

kingly functions were given to the Speaker or to the Prime Minister for some time.[66] Now the Constituent Assembly will act as the legislature, i.e., the Parliament. There has also been inclusion of new provisions related to the Human Right Commission, Local Self Government in the Constitution and also some new provisions about the Army has been added.[67]

The Interim Constitution is the sixth in Nepal's history. The third amendment to the Interim Constitution, in December 2007, took the further step of saying that Nepal is to be a republic, and this is to be implemented by the first sitting of the Constituent Assembly. The fourth amendment declared Nepal to be a federal democratic republic, and created the post of President as head of State, a vice–president.[68] Deadlocks over important issues can sometimes be resolved, such as the contentious issues of the future of the monarchy, by referendum (on option canvassed in Nepal in 2006, but effectively vetoed by the Maoists).[69] The Interim Constitution provides an interesting example, when an issue cannot be resolved by the Constituent Assembly through consensus, the matter is referred to the leaders of all parties for resolution. They are given fourteen days to form a consensus, to put a vote in the assembly, and if there is still no unanimity, another vote is taken for which the support of at least two-thirds of the members is necessary.[70] This political document was ultimately amended 12 times in its 8 year lifetime. It has 25 parts, 167 Articles, and 4 Schedules.

After the success of the People's Movement II in 2006, Nepal's Constitution-making process was broadly based on the bottom-up approach since there was no 'immutable principle' as was the case in South Africa, nor guiding 'objective resolution' as in India.[71] However, looking at the agreement reached between the

---

[66] *Ibid.*
[67] *Id.* at 12.
[68] *Id.* at 10.
[69] Michel Brandt, Jill Cottrell, *et.al.*, *Constitution-Making and Reform: Option for the Process* 204 (Inter peace publish, UNO, 2013).
[70] *Id.* at 207.
[71] The objective resolution (the resolution that defines the aims of the assembly) was moved on Dec. 13, 1946, by Jawahar Lal Nehru, which provided the philosophy and guiding principles for framing the Constitution and later took the frame of Preamble of the Constitution of India. The resolution was unanimously adopted by the Constituent Assembly on Jan. 22 1947. The South African Constitution of 1996 has accepted some immutable principles before drafting of the Constitution. The guiding principles of the South African Constitution are popular sovereignty, limited government, separation of

different political parties, especially the comprehensive Peace Accord, the Interim Constitution of 2007, the 2008 election manifestoes of the political parties, as well as key decisions made following the first meeting of the Constituent Assembly it could be said that almost all the political parties had agreed to certain broad principles to be followed while framing the new Constitution through the Constituent Assembly, it could be said that almost all political parties had agreed to certain principles to be followed while framing the new Constitution through the Constituent Assembly.

The Nepali Constituent Assembly while drafting a Constitution looked upon some reformed version of the parliamentary system of Westminster model – Republican form of government, inclusiveness in all sphere of the society, full-fledged democracy, secularism – to eradicate insurgency from the country. Media was heavily involved in the campaign and civilians are given education regarding the Constitution-making process, and called the people for their advice for framing Constitution. The Drafting Committee of Constituent Assembly was open, transparent for public opinion or suggestion.

G. People's Constitution (Constitution of Nepal, 2015, Seventh Constitution)

In the past, all six Constitutional documents were made following a top-down approach and were all, one way or another were 'expert' Constitutions. Drawing lessons from the past, the Constituent Assembly elected in 2008 decided to start the Constitution drafting process with a zero draft.[72] This time, experts would not be engaged to create a starting draft. Instead, the Constituent Assembly would go to the people at the grassroots and not from the power elites in Kathmandu. This was the idea behind the bottom-up approach; it was idealistic and highly ambitious and had

---

powers, check and balance, judicial review, and federalism. The South African Constituent Assembly drafted a new Constitution within the parameters attached to the 1994 Interim Constitution, a first working draft was published leaving aside 68 issues for further work, the Constitutional court reviewed the text; the court then returned the text to the assembly for amendments, and the court gave its final certification, President Mandela signed the Constitution into law. Nepal Constituent Assembly has no guideline before framing of the Constitution. It creates a problem for the framers in the Constitution-making and it realized them the objective resolution of India's Constituent Assembly and guiding principle of South Africa.

[72] Pruna Man Shakya, "Review of the Past Constitution-Making Process and Lesson for the Future", in Buddhi Karki, Rohan Edrisinha (eds.), *Participatory Constitution-Making in Nepal* Vol. 1, 91 (United Nation Development Programme (UNDP), Kathmandu, 2014).

never been tried before in Nepal or the rest of the world.[73] The proportional representative's seats assured inclusive quotas for various population groups including women.[74] When the draft report came out it soon became clear that there were large differences of opinion. Most of the committees had begun their drafts from the preamble and included provisions of inclusion for women, indigenous people, and other marginalized groups that actually fell under the scope of other committees. In this way, the Constitutional Committee deliberated on the contentious issues and in February 2012 eventually formed a five-member Dispute Resolution Sub-Committee (DRSC) for resolving the remaining disputes.[75]

The tenure of the Constituent Assembly expired without the promulgation of the new Constitution at midnight on 27th May 2012.[76] The Interim Constitution does not give the Prime Minister the power to declare fresh Constituent Assembly polls again.[77] When an 11 points agreement was reached between the four major political forces NC, UML, Maoists, Madheshi Morcha which was followed by a 25 point order issued by the President to remove Constitutional difficulties as the Interim Constitution of Nepal 2007 has been amended using the power in Article 158 to remove difficulties clause. Constitutional norms and values do not allow amending the Constitution itself.[78] There was an election government[79] headed by the Chief Justice of the Supreme Court of Nepal, which was formed with the objective of conducting a free and fair election of the second Constituent Assembly. The Interim Constitution of 2007 does not envisage such a situation.[80]

The official declaration of making Constitution through the Constituent Assembly in Nepal was made by then King Tribhuvan in 1950. However, it could not be

---

[73] *Ibid.*
[74] *Supra* note 65 at 11-12.
[75] *Id.* at 21.
[76] Bipin Adhikari, *Constitutional Crisis in Nepal* 17 (Nepal Constitution Foundation, Kathmandu, 2013).
[77] *Id.* at 20-21.
[78] Mohan Lal Achraya, "Constitution-Making Process in Nepal: As Assessment and Lessons for the Future", Buddhi Karki, Rohan Edrisinha (eds.), *Participatory Constitution-Making in Nepal* 45 (United Nation Development Project (UNDP) Kathmandu, 2014).
[79] The tenure of constituent assembly finally expired without the promulgation of the new Constitution at midnight on May 27 2012. There was a government headed by the Chief Justice of the Supreme Court of Nepal, which was formed to conduct a freed and fair election of the second constituent assembly. Almost all political Parties were unanimous to form an election government led by the sitting chief justice and second Constituent Assembly election was held in Nepal on Nov. 19, 2013.
[80] *Supra* note 78 at 46.

materialized due to the political situation of Nepal then. In 2001, the same issue was raised again by the Maoist incumbents. In September 2001 the Maoists put forward the constituent assembly as the bottom line for negotiation with other political forces. With the new Constitution, the mission of political change reached its conclusion and the Nepalese were bestowed upon with a whole new destination that it of peace, security development, and social transformation. It was a promise of King Tribhuvan and a dream for the Nepalese people to make a Constitution through a constituent assembly. In the end, it was the Nepalese people who turned out victorious in a battle that started 70 years ago. With the promulgation of the new Constitution, the nation set a new way for economic and social transformation which the nation and its people had dreamed for long. It had ended the prolonged political transaction and marked the era of peace, stability, and economic prosperity.

A new Constitution for a new Nepal was drafted and adopted by an elected and inclusive Constituent Assembly. It included 197 women and representatives of Nepal's marginalized groups and diverse population. The election result of the second Constituent Assembly changed the setting of the political parties represented on the constituent assembly, the Nepali Congress, United Marxist Leninist, gained substantial strength on the first and second and the Maoist came down to the size of a third largest party. The Madhesi Party also lost many seats.[81] The 2015 Constitution was promulgated by the Second Constituent Assembly. After a year of debate on Nepal, a new Constitution was framed, out of the 598 members of the CA, 507 voted for the new Constitution, 25 voted against, and 66 abstained in a vote on September 16, 2015.[82]

The Constitution has 35 parts, 308 Articles and 9 Schedules. This Constitution was amended once and the second amendment bill was defeated in Parliament as it fell short of 48 votes of the required two-thirds majority. The Bill seeks to partially address the grievances of the Rastriya Janta Party of Nepal, a coalition of six Madhes based parties that have been boycotting the Constitution.[83] The Constitution has arrived as a truckload of rights without any corresponding responsibilities thereof

[81] *Supra* note 29 at 91.
[82] Rakesh Kumar Meena *et.al.*, "Constitutional Development of Nepal", in Pramod Jaiswal (ed.), *Constitution of Nepal* 25 (G.B. Book, Delhi, 2016).
[83] The Indian Express, Aug. 22, 2017.

which raises the question: can rights be claimed as Fundamental Rights if such rights are embodied in the Constitution as the expression of commitment like Directive Principles of the State?

Previous attempts to write the Constitution through the Constituent Assembly were unsuccessful. But the Constituent Assembly got a landmark success as a historical task due to continuous efforts over eight years. If there was two-thirds or coalition between different parties on a common political agenda in Constituent Assembly, the Constitution-making process goes towards right direction and if the Constituent Assembly is divided on the basis of political ideology in Constituent Assembly there is a lack of two-thirds majority of a single party in the Constituent Assembly, Constitution-making becomes difficult. The reality shows that the composition of a Constituent Assembly of Nepal is a hurdle in the process of Constitution-making. The above–mentioned assessment of the activities of Constituent Assembly has already concluded that the Constituent Assembly model of Constitution-making is a failure here.

IV. THE BASIC FEATURES OF CONSTITUTION OF NEPAL, 2015

(1) Victory of Republican: With promulgation of the new Constitution, the federal democratic republican set up of the Nation has been institutionalized.[84]

(2) Sovereignty vested in the People: The New Constitution had made the proclamation that the sovereignty vests in the people. The Constitution of Nepal ensured that the state is responsible for adopting a political system which fully abides by the concept of multi-partly Republican democratic system.[85]

(3) Secularism with Interpretation: Secularism is vital for democracy. The neutrality of the state towards religious matters clarifies the fact that religion is a personal matter and not a matter of the state. It ensures equality of all the citizens, at least in the religious paradigm. Reflecting this reality, an overwhelming majority of Constitutions provide explicitly for protecting freedom of religions. Nepalese

[84] *Supra* note 35 at 168-172.
[85] Constitution of Nepal, 2015 art. 56(6).

Constitution provision states that Nepal is an independent, indivisible, sovereign, secular state. The explanation: for the purposes of this Article, 'Secular' means religious, cultural freedoms, including protection of religion, culture handed down from the time immemorial.[86]

(4) Power to grant non-resident Nepalese citizenship: The person, who has acquired the citizenship of a foreign country and residing in a country other than the SAARC(South Asian Association of Regional Cooperation) country and who or whose father or mother grandfather and grandmother was a citizen of Nepal by descent or birth and, later on, acquired the citizenship of a foreign country, may be conferred with the non-residential citizenship of Nepal, entitling him/ her to the economic social and cultural rights as provided for in a federal law.[87]

(5) A long list of Fundamental Rights that include judicially enforceable socio-economic rights: The new Constitution consists of 31 fundamental rights. Taking inspiration from the Constitutions of the world. Nepal introduced the ideals of socio-economic justice in the Nepalese Constitution. Men and women were given equal rights and discrimination on the ground of religion, race, caste, sex, place of birth was abolished. The list of fundamental rights has also been extended.

(6) Referendum: As per Article 275 of the Constitution, 'If a decision is made by two-thirds majority of the total number of the then member of the federal parliament that is the necessary to hold a referendum with respect to any matter of national of national importance, decision on that matter may be taken by way of referendum'.[88] A reference to Dicey would show how the use of direct democratic devices like the referendum was incompatible with parliamentary sovereignty.[89]

(7) Independent and competent judiciary: Like the Indian Constitution, the new Constitution of Nepal also idealizes an independent Supreme Court; Nepalese Constitution declared Supreme Court as a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.[90] The jurisdiction of Supreme Court exercises wide powers of judicial review over

[86] *Id.*, art. 4.
[87] Constitution of Nepal, 2015, art. 14.
[88] *Id.*, art. 275.
[89] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 39-40 (Universal Law Publishing, New Delhi, 10th edn., 1959).
[90] Constitution of Nepal, 2015, arts. 128(2), 128(4).

legislation, especially in the field of fundamental rights.[91] The Supreme Court can issue necessary orders for the enforcement of such legal rights for which the law does not provide any remedy. Similarly, where provided remedies are ineffective or inadequate; it can pass an appropriate remedy.[92]

(8) Inclusive Proportional Representation: In a modern democracy, along with the participation of individuals in the decision-making process through a balance between the direct and indirect engagements, the issues of a respectful space to minority groups and local communities have also drawn considerable potential attention. Similarly, under Article 77 any Nepalese citizen above 25 years can be a candidate for the membership of the House of Representative whereas membership to the National Assembly requires that the candidate is aged 35 or above. Under Article 176 and 178, a Nepalese citizen aged 18 years or older, and having a domicile in a province can be a candidate in the Province on attaining 25 years of age. Under Article 222, a Nepalese citizen aged 18 years has the right to vote at 21 can be a candidate for the local elections. As for as local bodies are concerned, the Constitution provides unprecedented executive, legislative and judicial power to the village and urban units. Besides the national parliament, the Constitution has empowered representative government in the provinces, cities town, and village level.

Despite these shortcomings, the 2015 Constitution has incorporated a number of provisions to enhance political participation of different groups, ethnic communities, minorities, Dalits, differently-able (disabled) persons and women. The National Council (Upper House) is composed of 59 members. 56 of whom are elected by an electoral assembly and the President nominates 3 members. Article 86 authorizes each province to elect eight members to the Upper House of who at least three should be women, one should be Dalit, and one member should be from the differently-abled (disabled individuals) or member of a minority group. In addition, at least one of the candidates nominated by the President should be women.

(9) Multiparty System of Government.

[91] *Id*., art.133 (6).
[92] *Id*., art. 133(2) and (3).

(10) Republican form of democratic government is to foster democratic socialism in the country.
(11) Nepal is now a Multilingual, multi-ethnic country.
(12) Provision of Federalism with seven provinces.
(13) Rule of Law
(14) There are also extensive policies of the state as a non-justifiable principle of governance.

V. PROBLEMS SOLVED BY THE CONSTITUTION OF NEPAL, 2015

A. Making a new Constitution by the elected Constituent Assembly

A constituent assembly is a body of representatives that are elected to create or change their country's constitution. The constituent assembly is still the most common mode of making a Constitution. Unlike past times, a Constitution is no longer accepted as an imposition by a victor or dominant groups over others (or a grant by a monarch of a president), or even that the military would promulgate the Constitution of 1979 and 1989 was promulgated by the military. There are many Constitutions all around the world that were made, updated, or amended by the Constituent Assembly. About 17 percent of the Countries of the world opted Constituent Assembly model.[93] After a long exercise on November 22, 2005, a twelve-point understanding was reached between the seven political parties and CPN (Maoist). This understanding was the bedrock for settlement of the issue of the constituent assembly in Nepal. Constitution by constituent assembly will ensure lasting peace, political stability, and bring in new hopes of prosperity.

The process of making a new Constitution for a federal democratic Republic of Nepal had stated under the auspices of the Constituent Assembly.[94] Article 63 of the Interim Constitution was amended several times and more seats were allotted to the Proportional Representation contest to champion inclusion and participation in the

[93] Dr. Ram Krishna Timilsena, "Constituent Assembly and Model of Constitution-Making" 1 *NALC* 28 (2016).
[94] *Supra* note 29 at 67.

Constituent Assembly. In the post-2006 era, the election system was revised by introducing a system of proportional representation, along with the first-past-the-post ('FPTP') system. As it is an assembly of people's representatives elected by the people through direct FPTP and proportional representation ('PR') election and the members nominated by the decisions of the cabinet. Following the success of the democratic movement in 2006 and the assumption of power by the leading political parties, the reinstated House of Representative formally decided to hold the election of the constituent Assembly at its first meeting. Therefore, it became a national priority.[95] 240 members were elected by FPTP 335 elected on party-list system; 26 nominated through party-based consensus. Assembly size was 601 (including 197 women).[96]

The process of making the 7th Constitution for the federal, democratic republic of Nepal has stated under the auspices of the Constituent Assembly. The Constitution-making body works autonomously and exercises the supreme power in developing Constitutionalism and designing a Constitution independently of any intervention. The Constituent Assembly Rules require the Constituent Assembly to ensure public participation in Constitution-making process. Only then it must go ahead since the vast majority of Constituent Assembly members (over two thirds) have clearly expressed their desire to take contentious issues of voting.[97]

B. The Participatory Approach of Constitution-making

In the context of Constitution- making, it is likely to involve a process of informing the public about the process, conducting civic education and consulting the public on their views related to key constitutional decisions.[98] The processes in which the greatest efforts are made to consult the people and receive and analyze their views tend to be in countries with large rural populations, where there are no well-established ways in which the people's views can rapidly be aggregated by broadly representative bodies. The participatory and inclusive approach in the Constitution-making process is to ensure that everyone will participate and no one will be

[95] *Supra* note 93 at 28.
[96] *Supra* note 69 at 238.
[97] Suresh Kumar Dhungana, "Political Parties 'betray' People over Constitution-making," 213 *Nyayadoot* 165 (2014).
[98] *Supra* note 69 at 358.

excluded.[99] In a democracy a citizen enjoys not only the right of running the government of his country but also the privilege of framing its Constitution.[100]

The electoral system finally agreed to the Interim Constitution and the election of the members according to the Constituent Assembly Act called for 40% of the Constituent Assembly members to be elected through a FPTP contest and for the remaining 60% of the members to be chosen through the PR contest of close candidacy lists prepared by the political parties in line with Schedules set out by the Election to members of the Constituent Assembly Act (2007). Finally, Lawyers Association for Human Rights of Nepalese Indigenous People (LAHURNIP), argued that under Interim Constitution Article 21, the Right to social justice, which guarantees all oppressed groups the right to participate in state structure on the basis of principle of proportional inclusion; indigenous people should have been given the right to directly elect their representatives on a proportional basis instead of simply being 'passively' represented by the parties' candidates who were of indigenous descent.[101]

C. Inclusive Approach in Constitution-making

Only a Constitution which is drafted in an inclusive manner and with public engagement in Constitution drafting will be able to command greater legitimacy. The Constitution makers of Nepal adopted a PR electoral system to give marginalized groups, including women, ethnic minority groups and low caste groups, more opportunities to participate in the Constitution drafting process.[102] Article 25 of the International Covenant on Civil and Political Rights has now accepted and included the right to participate in Constitution-making.[103] An inclusive approach of Constitution-making will be made to reach out to marginal segments of society, such as the disabled, women, youth, indigenous populations and the poorest of the poor.[104] When Constitution-making process begins, it is important to identify all the sections

[99] *Id.* at 20-21.
[100] R.N. Agrawal, *National Movement and Constitutional Development of India* 271 (Metropolitan Book Company, Delhi, 8th edn., 1973).
[101] *Supra* note 65 at 313.
[102] Susil K. Naidu, *Supra* note 44 at 241.
[103] *Supra* note 69 at 81.
[104] *Id.* at 10.

of society that need to be involved-to create a sort of picture of a society with all its divisions and institutions, to ensure that the Constitution-making is a truly national event and everyone has a voice. Inclusive Constitutions are particularly important during paced Constitutional transitions.[105] An Inclusive and well-designed process is a critical ingredient for a successful Constitution.[106] Nepal learned many things about South African Constitution-making process and follows this process in the new Constitution. An inclusive process will attempt to draw in all key stakeholders to the Constitutional negotiations. Special efforts will be made to reach out to marginal segments of the society, such as the disabled, women, youths, indigenous populations and the poorest of the poor.[107]

D. Two Third Majority is a Priority for Constitution-making

The mandate of the earlier Constituent Assembly-1 consensus was ignored. It could not undo the previous agreement. After the Constituent Assembly election, majority of Constituent Assembly members over two –third had clearly expressed their desire to take contentious issues of voting. After the 1st Constituent Assembly election the major political parties agreed for consensus Constitution document. In the 2nd Constituent Assembly election, the ruling parties of the 1st Constituent Assembly were in opposition and those who were in opposition in the 1st Constituent Assembly were in majority of the government and two-thirds members in Constituent Assembly, those who are in opposition were demanding for consensus document of the Constitution. All the major decisions taken since the commencement of the peace process has been made through consensus. Article 70 of Interim Constitution stated that the Constituent Assembly shall pass Constitution bill by consensus, failing which the bill shall be passed by two-third majority. After the election of Constituent Assembly II; 2/ 3 majority is a priority for Constitution-making.

---

[105] Zachary Elkins, Tom Ginsburg, *et.al.*, *The Endurance of National Constitutions* 111 (Cambridge University Press, New York, 2009).
[106] Mila Versteeg and Emily Zackin, "American Exceptionalism Revisited," 81 *University of Columbia Law Review* 1678 (2017).
[107] *Supra* note 69 at 10.

E. Constitution approval Process

The draft Constitution was endorsed by the Constituent Assembly with 507 votes which is significantly more than the required two-thirds majority. The majority of the votes in favor of the draft Constitution belonged to the members of the Nepalese Congress and the Communist Party of Nepal.[108] Each and every part and Article of the Constitution was discussed. The process has been defined below.

For the formation of various Committees, the following were discussed:

(1) The National Assembly and the House of Representative as stipulated by the federal law, may form committees.

(2) If either House of Parliament in a resolution claim that a joint Committee of both the House be constituted for the purpose of taking care of the working procedures between the two House of the Federal Parliament; then such a joint Committee shall be formed for resolving disagreement on any Bill or for any other function as stated. Maximum of 25 members in the ratio of five members from the House of Representative to one member from the National Assembly shall be constituted on the basis of inclusion.

In Nepalese Constitution-making process the following process has been followed:

(1) Openness in the Proceedings,
(2) Setting up of an agenda and broad foundational principles of the Constitution,
(3) Expert support,
(4) Division of work to be performed through Committee (Drafting Committee),
(5) Committee reports to be presented and discussed in the Assembly,
(6) Preparation of draft Constitution,
(7) Circulation of draft for inviting individuals, groups and different sections of the society,
(8) Taking into account all the views received and modification of the draft,
(9) Presentation of the final draft in the Constituent Assembly and its thread-bear discussion on its different clauses and their adoption.

The Constitution has been finally adopted by 601 members and a strong Constituent Assembly with over, 92% of members taking part in the final adoption

[108] Susil K. Naidu, *Supra* note 44 at 240.

process. Every word and every sentence of the Constitution was discussed, debated, cross-referenced and improved to the best possible outcomes and public hearing.

F. Endurance of the Constitution

Constitutional endurance is an important and engaging subject of analysis, mostly because Constitutional designers have the ability to extend the lifespan of their Constitution with careful attention to some key factors. These factors yield the benefit of redirecting the attention of scholars and Constitution practitioners to the art and science of Constitutional design.[109] The Constitution of Nepal has accepted three design formulas of the Constitution, i.e., specificity, flexibility and inclusiveness.

1. Specificity

A clear and more specified document will more easily general shared understandings of what it entails. It will also solve issues related to hidden information at the time of bargaining. Specific documents are costlier than less specific ones which is not indisputable. Specificity whether in terms of detail or scope helps Constitutional endurance for three reasons. First, to the extent that specificity at the time of Constitutional drafting anticipates and address relevant sources of downstream pressure on the Constitutional text and it may be particularly helpful with regard to solving problems of hidden information among the bargainers. Secondly, specificity facilitates endurance precisely because it is costly; interest groups may seek to embed their preferred policies in the Constitution-making. Thirdly, specificity provides an incentive for parties to invest in resources in keeping the Constitutional text current. The Nepalese new Constitution documents specify many detailed provisions in it. Specific documents are more likely to generate a common knowledge and agreement on when a constitutional violation has occurred. Article 70 mentioned that the President and Vice President to be from different gender or community. A Constitution need not specify, for example, the complete line of presidential succession, but may content itself with simply providing that a Vice President succeeds the President in the event of death. A bill of Constitution amendment should be published through Nepalese Gazette within 30 days of its tabling at the parliament

[109] *Supra* note 105 at 214.

to inform the general people about it.[110] These are some of the specific provisions of the Constitution of Nepal, 2015.

2. Flexibility

There should be certain flexibility in the Constitution for amendment. If anything is made rigid and permanent, it stops a Nation's growth and the growth of the living vital organic people. Constitutions made by some great countries are so rigid that they do not and cannot be adapted easily to changing conditions. While arguing that the Constitution's designs are more likely to endure when they are flexible, it should also be detailed and able to induce interest groups to invest in their processes.[111]

A more flexible document, in turn, induces further participation because of the lower threshold of Constitutional change. If a country makes anything rigid and permanent, this cannot be changed. While we make a Constitution which is sound and as basic as we can, it should also be flexible and for a period we should be in a position to change it with relative flexibility (e.g. Indian Parliament, 1948). The present Constitution of Nepal is flexible considering the fact that besides sovereignty and national integrity, all other provisions or articles are open to amendment via, two-third majority of the parliament.[112] Every kind of change is brought in the Constitution by the process of amendment. When the amending provisions fail to work adjusting the Constitutional document to altered needs, revolution may be the

---

[110] Constitution of Nepal, 2015, art. 274(3).

[111] Flexibility allows the Constitution to adjust to the emergence of new social and political forces, a rigid Constitution may not allow the inclusion of new social forces or readjustment of the bargain between founding forces as time goes on. Thomas Jefferson, the principal author of the United States Declaration of Independence, espoused a populist view of the Constitution by advocating that the Constitution should be amended by each generation. However, Jefferson also endorsed the ideas of immutable natural rights. In contrast, James Madison argued that a Constitution subject to the frequent amendment would promote factionalism and provide no firm basis for republican self-government (Alexander Hamilton, John Jay and James Madison, Federalist no 49(1788) reprinted with an introduction and commentary by G. Wills, New York, Bantam, (1982). Also, see S. Levinson, "Veneration and constitutional change: James Madison, confronts the possibility of a constitutional amendment" 21 *Texas Tech. Law Review* 2443-61 (1990). As Jawahar Lal Nehru remarks in the Indian constituent assembly; while making a Constitution which is sound and as basic as we can, it should also be flexible and for a period we should be in a position to change it with relative facility (Indian Parliament 1948).

[112] Birendra Prasad Mishra, "First Draft of Constitution Confusing and Vague," *The Himalayan Times*, Sept. 22, 2015.

end result.[113] Part 31, Article 274 of the Constitution of Nepal, 2015 has a flexible provision regarding its amendment.

3. Inclusion

When Constitution are prepared and adopted in secret with little fanfare, they would seem to be unlikely to generate enforcement action. When they are passed with great public involvement, there is likely to be more common knowledge about the content of the Constitution. Inclusive drafting process and inclusive Constitutional provisions increase the possibility of enforcement in two ways: (1) by increasing the visibility of the document and demonstrating social consent; and (2) by increasing the stake of the citizens in the document and their attachment to it.[114] Inclusive Constitution making processes are those that are highly open and inclusionary (or at least appear to be so) to increase citizen's awareness and regard for the document as well as build their confidence that other citizens have developed the same awareness and respect.

G. Constitutional Provisions and Inclusion

The Constitution adopted a proportional representation electoral system to give marginalized groups, including women, ethnic minority groups and low caste groups, more opportunities to participate in government.[115]

1. Preamble and Inclusion

The preamble declared that the Nepalese people have promulgated the 2015 Constitution. It mentions that 'we the sovereign Nepalese people…promulgated this Constitution'. The preamble also makes a commitment to end discrimination based on class, race, region, language, religion, gender and caste. It ensures economic equality, inclusive and participatory principles of nation-building. However, the Preamble also makes a commitment to end discrimination based on class, race, region, language, religion, gender and cast. Nepal favors socialism through a transitional period of capitalism is reflected in Nepal's new Constitution as the Preamble itself specifies that

[113] Carl J. Fredrich, *Constitutional Government and Democracy* 143(Oxford and IBH Publishing, New Delhi, 4th edn., 1974).
[114] *Supra* note 105 at 81.
[115] Susil K. Naidu, *Supra* note 44 at 241.

Nepal is a socialism-oriented republic.[116] The Preamble expresses ending all forms of discrimination and oppression created by the feudalistic, autocratic, centralized, unitary system of governance. The Preamble also declares Nepal as a multi-ethnic, multilingual, multicultural, and multi-religious state. It expresses the commitment to equitable Nepalese society by ending discrimination and exploitation created by such a system in the past. It also underscores the importance of unity in diversity. The Preamble also makes a commitment to end discrimination based on race, region, language, religion, gender, and caste.[117] Overall, the ideas reflected in the Preamble highlights the legal and social design of an inclusive Nepal society.

2. Fundamental Rights and Inclusion

Articles 16 to 48 of the Constitution clearly uphold the idea of equal citizens, universal social protection, market and rule of law. Most importantly, the rights are guaranteed equally to all individuals, even though some rights are specifically designated to citizens only. Therefore, with the exception of giving application to the affirmative provisions (positive discrimination), it helps in creating a level playing field in promoting inclusiveness in society.[118] Article 24 and 40 of the 2015 Constitution have guaranteed profound provisions in ending the problem of untouchability and ensuring equality to Dalits by providing affirmative protection (positive discrimination). These rights are equally important to enhance the mechanism of social protection. For example, under Article 40(6), the State has the responsibility to ensure the right to residence and under Article 40(5), the state to provide land to the landless Dalit in accordance with law.

A number of rights related to social protection have been guaranteed by the 2015 Constitution. For example, the Right against exploitation (Article 29), Right to clean environment (Article 30), Right to education (Article 31), Right to language (Article 32), Right to employment (Article 33), Right to work (Article 34), Right to health (Article 35), Right to food (Article 36), Right to housing (Article37), Right of senior citizens (Article 41), Right to social justice (Article 42), Right of consumers (Article 44), Right to social protection (Article 43) are instrumental in designing a system of

[116] Pramod Jaiswal (ed.), *Constitution of Nepal* 162 (G.B. Books, New Delhi, 2016).
[117] *Supra* note 29 at 277.
[118] *Ibid.*

universal protection. The term 'proportionally inclusive' we added to Article 42 by its first amendment on January 23, 2016, even though it already existed in the preamble.

Similarly, it has further ensured the right to religious freedom (Article 26), Right to information (Article 27), right to privacy (Article 28), Right of the women (Article 38), Right of the children (Article 39), Right against exile (Article 45) and Right to Constitutional remedy (Article 46), these rights are uniquely important for a number of reasons, including promoting gender equality and equity that is key for equal citizens.

3. Directive Principles and Inclusiveness

The Directive Principles contain the philosophy of governance. They provide basic guidelines for State organs and agencies. The Directive Principles provided in Article 49 to Article 55 of the 2015 Constitution incorporate the idea that these principles shall give direction to the government for governing the country. Article 50(1) in particular, incorporates the ideas of proportional inclusiveness.[119] Article 50(2) aims to end discrimination based on religion, culture, custom, tradition, or any other grounds, Article 50(3) aims to create an economy directed towards socialism. Article 54 requires the Government of Nepal to submit an annual progress report and parliamentary oversight provides essential succor in translating the Directive Principles into reality.[120]

4. Power-Sharing and Inclusion

The federal structure of power-sharing in Nepal is unique in its scope and breadth. Not only the executive power but also the legislative and judicial powers have been shared at three different levels of government. Despite federalism being the mainstay of power-sharing in Nepal, the mechanisms envisaged by the 2015 Constitution in settling disputes between the three levels of government seem efficient. The 2015 Constitution a seven provinces federal model and leaves the naming of the Provinces to the provincial legislatures to be constituted in the future, sharing power among

[119] *Supra* note 29 at 284.
[120] *Id*. at 284.

Centre, (federal governance), Provinces (provincial government) and local agencies (local government) are taken as the synonym of power sharing.

Despite the three levels of State structures provided under Article 56 of the 2015 Constitution, the recognition of District Councils and District Coordination Committees under Article 220 demonstrates the executive power as four levels: federal, provincial, district, and local.[121] Schedules 5 to 9 of the 2015 Constitution define the powers of the Centre, Provinces and Local bodies. Each level of government has distinct power, as designated in the schedules. Similarly, concurrent powers of the Centre, Provinces, and Local bodies are listed respectively in Schedules 7 and 9 where Schedule 5 list of Federal power, 5 lists 35 different headings in defining the power of the central or federal government. These powers are related to defense, military, war, arms and ammunitions, peace and security etc.

Schedule 6 provides significant power to the states. In state list State police administration, and peace and order, Operation Banks, and financial institutions in accordance with the political of Nepal Rastra Bank, Cooperative institution, State Civil Service, State statistics, State Universities, Health services, Intra–State trade, State highways, Provinces are authored to exercise important powers, and these powers are related to security, financial matters, communication, civil service, statistics, water resources, education, health services etc. The concurrent list under Schedule 7 shares a number of powers between the Centre, and Provinces. Civil and Criminal procedure, Drugs and pesticides, Social security and employment, trade unions, significant powers include; law and justice market, contracts and property, etc. Schedule 8 provides significant powers to the local bodies, pertaining to town police, cooperatives institutions, the operation of Frequency modulation (F.M.), local taxes, management of local services, collection of local statistics and records, local level development plans and projects, basic and secondary education, basic health and sanitation local road, rural road, irrigation, etc. Schedule 9 shares power among Centre, Provinces and Local bodies. Article 57(6) of the Constitution ensures the

[121] Though, the power of the District councils and municipalities within the districts. Art. 56(5) also envisions special protected or autonomous regions as provided by federal law for social and cultural protection and economic development. Art. 56(6) specifically requires the exercise of the state powers by federal, provincial and local bodies for the protection of Nepal's sovereignty, territorial integrity, independence, and national interests.

supremacy of the federal laws by invalidating any lower tier laws to the extent to such inconsistency. Under Article 231(1), federal laws 'apply to the whole of or any part of Nepal' or per Article 231(2), 'provincial laws apply within the jurisdiction of Provinces'. Article 232 further identifies 'cooperation, coexistence and coordination as the basic principles of the inter-relationships among the federal, provincial and local entities'. The 2015 Constitution also includes a provision on harmonizing the relations among Provinces. The Provincial Council is headed by the Prime Minister. Article 235(1) authorizes the federal legislature to enact necessary laws. Similarly, 'the provincial legislature is authorized to coordinate local government and settle political disputes at the local levels'. The mechanism of harmonization among the three levels of government and their power seems well designed under the 2015 Constitution and can be expected to be proficient in resolving possible conflicts.

5. Constitutional Bodies and an Idea of Inclusion

The 2015 Constitution has legitimized a number of Constitutional bodies that aim to promote the idea of inclusiveness in the Nepalese society. The Constitution provision of the provincial public service commission (Article 244) to be constituted on the basis of provincial law empowers provision to increase the participation and inclusion in public services. The new Constitution mandates the formation of Constitutional organs. Auditor General, Election Commission, Public Service Commission for the Investigation of Abuse of Authority and seven different commissions or bodies to address the grievances of marginalized communities, including the Tharus, Madhesi, Muslims, Women, Janajati, and Dalit. Article 283 states the 'appointment to offices of Constitutional organs and bodies shall be made in accordance with the inclusive principles'. As per Article 265, 'The Federal Parliament shall, after ten years of the commencement of this Constitution review the Commission formed under this Article'.[122]

6. Political Parties and Inclusion

As a representative institution, they have to act as the crucial agents for encouraging and strengthening the participation of maximum number of people from all sectors of

[122] Constitution of Nepal, 2015, art. 265.

life in the political system.[123] With respect to realizing inclusion, the 2015 Constitution assigns a profoundly important role to political parties. Under Article 269(4)(C), political parties are required to ensure proportional inclusion in their executive committees at all levels of the party so as to reflect the diversity of Nepal.[124] In a Constitutional democracy, political parties are expected to align their ideologies with the Constitution, a genuine inclusion, participation and deliberation becomes a reality when the Constitution is the only ideology of political parties which has desolately transfixed democracy in Nepal.[125] Similarly, efforts have been made to make political parties inclusive and a system of proportional representative more scientific.

7. Constitutionalism

Constitutionalism connotes, in essence, 'limited government'. It is the antithesis of arbitrary power. Constitutionalism recognizes the need for government but insists upon limitations being placed upon governmental powers. Constitutionalism stands with the philosophical aspects of the Constitution based on the values of the state. The Constitution of Nepal 2015 under Constitutionalism impinges two types of limitations on the government, i.e., power is prescribed and the procedure is prescribed.[126] As such Constitutionalism signifies the principles that 'the exercise of political power shall be bound by rules which lays down the procedure and determine the validity of action of different organs'.[127]

8. Separation of Powers and Check and Balance

The value of the doctrine lies in the fact that it seeks to preserve human liberty by avoiding the concentration of powers in one person or a body of persons. It also emphasizes that the persons entrusted with power in any one of the three branches, i.e., executive, legislative and judiciary shall not be permitted to encroach upon the powers confided to the others. In achieving this object, the Nepalese Constitution had

[123] *Supra* note 26 at 57.
[124] *Supra* note 29 at 294.
[125] *Id.* at 298-99.
[126] Surendra Man Shrestha, "Constitutional Sources and Constitutionalism in Nepal" IX *ECL* 60-61 (1991).
[127] De Smith, "Constitutionalism in the Commonwealth Today" IV *Malaysian Law Review* 205 (1962).

particularly relied on the American Constitution while rejecting the British pattern of conventions.[128] The system of separation of powers between the main organs of the government and checks and balances are important in every Constitutional system which is based on the foundations of liberty and freedom and which is mentioned in the new Constitution.[129]

The Nepalese Constitution manifests in practice the theory of separation of powers and advocated by Montesquieu, the three branches of government, i.e., legislative, executive, and the judiciary are separate from each other. The legislature and judiciary were trying to become supreme over each other due to the confrontation that existed at that time. The separation between the legislature and executive does not exist in Nepal the way it exists in the Constitution of the United States or other Constitution having the presidential form of government. The judiciary stands between the citizen and the state as a bulwark against the executive excess and misuse or abuse of power by the executive and therefore it is essential that the judiciary must be free from executive presser or influence and this has been secured by the Constitution-makers by making elaborate provisions in the Constitution.

The Nepalese Constitution 2015 has made no such provision as to the separation of functions among the three organs of the state. A survey of various provisions of the Nepalese Constitution would reveal that what Constitution has done is to effect no separation of powers as such but superstation of judicial and executive functions. The Constitution of Nepal has given more leverage to the judicial branch with the provisions of checks and balances. The executive power of Nepal shall, under the Constitution and other laws, be vested in the council of minister.[130] The law making power is vested to the federal Parliament.[131] The judiciary has the power to review the law-making of the legislature in the Constitution of Nepal.[132] History proves that, if there is a complete separation of powers the government can't run smoothly and

[128] P. Dwivedi, "Doctrine of Separation of power" XXIX *Journal of Constitutional and Parliamentary Exercise* 257 (1995).
[129] Annanta Raj Luitel, "Government Under Chief Justice and Principle of Separation of Power" 5-6 *Nepal Bar Council Law Journal* 93 (2011/2012). Also, see *Supra* note 7 at 7-74.
[130] Constitution of Nepal, 2015, art. 75(1).
[131] *Id*., art. 110(1).
[132] *Id*., art. 133(1).

effectively, the smooth running of the three organs of the state is possible by the check and balance and cooperation between the state organs.

9. Rule of Law

The late judge of India Justice Krishna Iyer, a great justice and a judge, in 1978 described the legal profession as 'the rule of law cannot be built on the ruin of democracy, for where law ends tyranny begins and if such is the keynote thought for the very survival of Indian republic, the integral bond between the lawyers and the public is unbreakable'.[133] A.V. Dicey, who for the first time in 1885 gave a systematic analysis of the rule of law in the context of the British Constitution, and the same kind of approach which follows the three principles of the rule of law, can be seen in this Constitution.[134]

10. The Doctrine of Judicial Review

The concept of rule of law and the idea of liberal Constitutionalism can only be maintained through judicial review. Provisions of Article 133(1) of the Constitution of Nepal, 2015 provided the power of judicial review to the Supreme Court. Similarly, Article 133(2) provided the power of extraordinary jurisdiction to the Supreme Court. In the Constitution there were liberal provisions of *locus standi* in which any Nepali citizen could file a petition in case of inconsistency with the Constitutional provisions, for judicial review to get it declared invalid. Besides entertaining jurisdiction over the issues on Constitutional interpretation and judicial review under Article 137. the Supreme Court is also authorized to settle disputes between the Centre and Provinces, between Provinces and Local bodies and between provinces and the local bodes.[135]

VI. CONCLUSION

Once a Constitution is drafted and promulgated, it does not mean the Constitution-making process is completed. It needs to be furnished with other related functions,

[133] Dushyant Dave, "An agent of Justice" *The Indian Express*, Mar. 2, 2017.
[134] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 202-3 (Universal Law Publishing, New Delhi, 10th edn., 1959).
[135] *Supra* note 29 at 339.

i.e., Constitutional practice, interpretation and amendment. First, once the Constitutional issues are agreed upon and adopted within the Constitution, it must be implemented properly, because the provisions of the Constitution can be properly developed only through good Constitutional practice. Second, Constitutional weakness can be best improved by means of Constitutional interpretation for that court must play an important activist role. Third, formal amendment of the Constitution is also a way of Constitution-making. It alters the provisions to meet the need of the time.

An existing Constitution is also not static but a continuous process. It is false to regard a country's Constitutions as an inert document, for a Constitution is not only what is calligraphy in the text of the Constitution, but a Constitution is also a breathing organism of functioning institutions that are constantly emerging and developing. This new Seventh Constitution, 2015, had attempted to provide wider Constitutional provisions. It had included various new provisions needed for the evolving society in Nepal. The Indian Constitutional experts had provided their valuable contribution in framing this Constitution. In the Constitutional provisions an attempt was made to incorporate the best available provisions of the modern Constitution suitable to Nepal. The concept of responsible government was duly, applied. Some of the provisions of this Nepalese Constitution are similar to that of the Indian Constitution.

Nepal has gone through lots of revolutions and many Constitutions in the past to keep it alive. The Constitution of Nepal, 2015 though made by the Constituent Assembly and for the people of the country, is not being accepted in its fullness. Though a path has been laid for development, some amendments and referendum are needed to make it universal and everlasting and to achieve the goal of socio-economic welfare. The new Constitution of Nepal 2015 is expected to usher the country into the new era of political development embracing the ideals of Rule of Law and Constitutionalism. It is also expected to reflect the aspiration of the people so that they will not feel alienated from the process of the Constitutional development of the country.

The Constitution adopted a proportional representation electoral system to give marginalized groups, including women, ethnic, minority groups and low caste groups, more opportunities to participate in government. All in all despite all measures the ultimate means for the success of any Constitution resides in the recognition by the citizens of the nation, and undoubtedly the present Constitution is in fact a progressive and democratic one which if implemented full-fledged and precisely, can lead the country to a new era.

NECESSITY FOR THE STANDARDIZATION OF PATENTABILITY CONDITIONS IN IP LAW OF VIETNAM FOR INNOVATION

*Phan Quoc Nguyen**

I. INTRODUCTION

In the actual context of free trade development, intellectual property rights play a very important role not only for business persons but also for consumer and the entire social community. The set-up of legal system ensuring the rapid and favourable operation of intellectual property (IP) objects as the 'goods' in the market is very imperative. The effective protection of inventions helps to pave the broad way for technology market and to promote the technology transfer and innovation.[1]

In order to reach the objectives, the reasonable legal system of patentability protection conditions needs to be established. Through experience, the establishment of very high or very low patentability standards can deter the patent filing, reduce the invention application number, lead to the commercial distortion, and not encourage the innovation.

There are many reasons why the number of patent application is very different for different countries. One of the biggest issues is the different understanding practices of the examiners of each patent office in different countries. Each patent is not examined or searched in the same way in each country, which depends on the national sovereignty. Therefore, the standardization of patentability conditions is very necessary in IP Law of Vietnam. The paper will firstly study the current Vietnamese laws on patentability conditions in comparison with some other countries' legal rules and international standards. Then, it will review the current situation of patent filing in Vietnam. Finally, this papers proposes to improve Vietnam's laws on these patentability conditions for more patent filing, which encourage innovation.

* Intellectual Property Attorney, School of Law, Vietnam National University, Hanoi. He can be reached at pqnguyen77@yahoo.com.

[1] Government of Vietnam, Strategy for socio-economic development from 2011 to 2020.

II. VIETNAM'S LEGAL RULES ON PATENTABILITY CONDITIONS

According to regulations by most of the countries and by the international conventions, invention will be patentable if it satisfies the following conditions:

1. Novelty;
2. Inventive step or non-obviousness;
3. Industrial application or utility.

As per Vietnam's current IP Law,[2] Article 58 — general conditions for inventions to be eligible for protection — stipulates clearly in clause 1 that one invention shall be eligible for protection in the form of grant of an invention patent when it satisfies the conditions of being novel, involves an inventive step, and is susceptible of industrial application.

The current law on patent in India also requires the patentability of one invention to consist of novelty, inventive step, and capability of industrial application. Pursuant to the Patents Act of India,[3] Article 2 (1) (j), 'invention' means a new product or process involving an inventive step and capable of industrial application.

Different from many other countries, the current IP law of Vietnam launches the notion of utility solution (which is considered as petty patent) for the inventions with low inventive step in clause 2 of Article 58. In detail, unless an invention is common knowledge, it shall be protected in the form of grant of a utility solution patent when it satisfies the following conditions: novel and susceptible of industrial application.

Other countries like Japan, China, and some European countries also have the legal rules on utility solution, utility model, or petty patent. Japan has relevant legal rules on utility model to protect some small technical solutions. China and some other European countries have the relevant law to protect inventions with low level of inventiveness. This means that Vietnamese laws on patent have the trend to widely

[2] Law on Intellectual Property Law, Socialist Republic of Vietnam, 2005, art. 58.
[3] The Patents Act, 1970 (Act 39 of 1970), s. 2(1)(j).

protect inventions to raise the number of patentable inventions by using lower legal patentability conditions for utility solutions than that for patent.[4]

However, in fact, not all inventions are patentable even though they have novelty, inventive step, and industrial application or utility because the understanding practice is different for each examiner from different patent offices. The following comments and practical analyses with experience of a patent lawyer about the patentability conditions show the differences:

A. Novelty

A technical solution that wants to be patented is required to satisfy the novelty condition. This condition of novelty is one of the most basic, traditional, long lasting in the history of establishment, and development of legal rules on patentability conditions.

Requirement for being new originated from the policy to encourage and facilitate the development of new technologies in society. By this approach, patent is one award for new technical solutions which have been known in the society till the time a new technical solution is filed for patent.

In brief, a technical solution is patentable if it satisfies the novelty condition. Thus, what is this *novelty*?

According to Article 60 of Vietnam's IP Law, the novelty of inventions is not defined clearly and directly. Instead of direct determination, the notion of novelty of an invention is explained and understood in an exclusion manner as follows:

> (1) An invention shall be deemed novel if it has not yet been publicly disclosed by use or by means of a written description or any other form either inside or outside Vietnam before the filing date or the priority date, as applicable, of the invention registration application;
>
> (2) An invention shall be deemed not yet publicly disclosed if it is known to only a limited number of persons who are obliged to keep it secret.

[4] Phan Quoc Nguyen, "Intellectual Property Teaching in Vietnam" *WIPO-WTO Intellectual Property Review* (2017).

> (3) An invention shall not be deemed to have lost its novelty if it is published in the following cases, provided that the invention registration application is filed within six (6) months from the date of publication:
>
> (a) It is published by another person without permission from the person having the right to register it as defined in article 86 of this Law;
>
> (b) It is published in the form of a scientific presentation by the person having the right to register it as defined in article 86 of this Law;
>
> (c) It is displayed at a national exhibition of Vietnam or at an official or officially recognized international exhibition by the person having the right to register it as defined in article 86 of this Law.[5]

According to the patent language and pursuant to the legal systems of all countries in the world, novelty is considered as 'absolutely new' in the world. Inventions will not be patented if inventions are new only in the territory of one country. This is the most strict patentability condition. This condition is a prerequisite and necessary for an invention to be patented.

It can be noted that novelty is qualitative so it is very difficult to be determined in a document and fixed by a language. Therefore, like most countries, laws on industrial property of Vietnam set up novelty condition for patentability based its vice versa.

For this reason, pursuant to Article 60, clause 1, invention is considered as novel if it is not revealed publicly under any form such as usage, document, or other in Vietnam or abroad before its filing or its priority date in the case that it has priority right. According to this clause, Vietnam's laws on patentability conditions have classified two different times as the milestones to determine the prior art scope of the technical solution which asks for being patented: Firstly, the patent filing date. This filing date is explained in clause 2, Article 108, as the date when competent authorities of Vietnam for patent filing, in particular the National Office of Intellectual Property of Vietnam, officially receives the application for patent filing of invention owner. Secondly, the priority date of the application for patent filing.

[5] *Supra* note 2, art. 60.

According to the current laws, the priority date could be the first patent filing date of the invention in the country who is the member of Paris Convention or other Agreements. The priority date is also the date when the subject matter of technical solution which is filed for patent is showed or displayed or presented in the domestic or foreign exhibitions. According to the laws of all countries, including Vietnam, all knowledge belongs to the related technical fields which are revealed under any method such as by using, by text, or any other form, are used as the prior art for patent search to study the capacity satisfying the novelty requirement of the technical solution applied to be patented.

According to the current IP laws of Vietnam, if any form of publication reveals publicly the invention contents of the technical solution prior to the filing date or to the priority date of patent application in the case that the patent application has priority rights, this invention is considered as loosing novelty. The problem is to what extent is the invention contents of a patent application that is published be considered as public? Article 60 only mentions on the space of scope, domestic or foreign, where the technical solution is revealed and on the forms of patent reveal, under using or descripting by text or by any other forms, and does not mention in detailed the revealing degree of invention. For this reason, building of legal rules on patentability conditions is really difficult for Vietnam and other countries.

In brief, novelty is satisfied if invention is not 'published' under the following ways: usage, description by text, or other ways before the filing date or priority date. The problem is at what degree will the content of the invention that is published be considered as published?

According to some countries' patent laws, for example the USA, EU, and Japan, the invention is 'published' totally before the priority date when a skilful person in the relevant field can conduct and do the technical solution through his/her assumption or analysis from the publication. The published information is not necessarily similar to all contents which are mentioned in the patent description but if the revealed information is similar enough to the contents or the information is revealed so much that a skilful person in the relevant field could analyse and conduct easily, the invention will not satisfy the novelty requirement.

Actually, the patent reveal is legally made by text, papers, oral publications, or by the application of patent into production, business, expositions, marketing, etc. The importance is that the patent reveal depends on the degree of information dissemination and on the capacity of examiner to search for patent information.

It is found out that this novelty condition is determined with a high degree of abstraction, which is appropriate to the continental European countries' legal regulations under Civil Law System.[6] However, this principle has disadvantages that make it difficult for patent's substantive examination. In fact, it is really a challenge for the examiners! In many cases, there are many strong discussions between inventors and examiners about the invention's novelty. These strong arguments and discussions objectively bring about the aversion for patent filing and application amendment. Thus, the patent application is abandoned. The problem is that, because the current legal rules do not drastically resolve these discussions, inventors do not want to discuss more with the examiners so they decide not to file a patent. This results in reducing the patent application number in Vietnam.

Furthermore, one of the legal rules which is complicated and controversial about the invention novelty is clause 2 of Article 60. According to this clause, invention is not revealed publicly if it is known to only a limited number of persons who are obliged to keep it secret.

The problem is that the degree of publication depends on the situation where there are a limited number of persons to know and to have the duty to keep secret. In fact, it is very difficult to determine what is 'the limited number of persons' and who is the person 'to know and to have the duty to keep secret'. Vietnam's laws on industrial property and its sub laws do not currently define these matters clearly. It is deemed that the present legal rules come from the desire to reduce the standard of absolute novelty in comparison with the world in order to raise the patented invention numbers. If we agree with and understand this approach, the current legal rules of Vietnam on patentability conditions are very positive.

However, this is reason and problem to make much more controversy. Objectively, the determination of 'the limited number of persons to know and to have the duty to

[6] *Supra* note 4.

keep secret' according to clause 2 of Article 60, depends subjectively on the cognition and point of view of each examiner.

It is also very tough, complicated, and different to determine who is the person 'to know and to have the duty to keep secret' for each invention under various contexts. For this reason, many inventions are rejected to be patented by National Office of Intellectual Property of Vietnam even though the examiners are not determined about the technical solution, whether it is published clearly or not.

Different from Vietnam and other Civil Law countries, Common Law countries such as the USA and the UK have a different perspective. In the USA, an invention is not new if the technical solution is known as patent or is used or sold or described by text publicly at the USA territory.[7] In the UK, an invention is still new even if it is described by text but it is not popular in the UK territory. According to the Muchen Convention on Patent (1973),[8] an invention is not new if it is public in any cases in any territories before priority date. The case of India is similar because of its Common Law system. Pursuant to the patent law of India, Section 2 (1) (l) stipulates that 'new invention':

> means any invention or technology which has not been anticipated by publication in any document or used in the country or elsewhere in the world before the date of filing of patent application with complete specification, i.e., the subject matter has not fallen in public domain or that it does not form part of the state of the art.[9]

Moreover, according to laws of some countries such as Japan, the USA, Canada, Russia, etc., an invention is still new even if it is published before priority date. The reason is that inventions come from universities or research institutes. In fact, the publicity of the research results is so often and initial. The research results are filed for patent if they are applied in practice and manufactured in mass production. So, the countries allow a grace duration up to 12 months while Vietnam's grace duration is only under 06 months. Vietnam's laws need to have more improvement in this case

[7] United States Patent and Trademark Office, "General Information Concerning Patents" 3 (Jan., 2000).
[8] European Patent Convention, 1973 *available at*: https://www.epo.org/law-practice/legal-texts/html/epc/1973/e/ma1.html (last visited on Aug. 06, 2020).
[9] *Supra* note 3, s. 2(1)(l).

by extending the grace duration. In addition, Vietnam's IP Law needs to be amended one more time to extend the period up to 12 months for the international engagements stipulated in CPTPP (The Comprehensive and Progressive Agreement for Trans-Pacific Partnership)[10] and EVFTA (The European-Vietnam Free Trade Agreement).[11]

From these legal rules, one question which is raised is that to what extent are the contents of technical solutions that are revealed make an invention not new? Once again, the current IP Law of Vietnam on patentability conditions is quite abstract and it is deemed that these regulations are suitable with the approaches of the countries under Civil Law System. With the various forms of invention revealing, orally, by text, or by usage, the revealing is very made in a complicated manner. Moreover, each form of revealing has its own characteristics and attributes. Therefore, the feasibility of these rules is not high and difficult to apply. In short, it can conclude that the current laws on novelty conditions of Vietnam have a new development step, are rather positive, and appropriate with international practices. However, these legal rules are not concrete and not detailed well enough for the novelty examination, which needs to be more detailed by the sub laws in near future.

B. Inventive Step or Non-obviousness

An invention, if new only, i.e., at least new for substance, method, from family patents, is not enough to be patented. Novelty requirement is only a 'quantity' condition, which is not higher enough for technical level of invention — the 'quality' condition. Therefore, an invention is not patentable if it only satisfies the novelty because it needs to satisfy the 'quality' condition — the inventive step or non-obviousness.

Article 61, the current IP Law of Vietnam, specifies the inventive nature of inventions. Pursuant to this Article, an invention shall be deemed to be of an inventive nature if, based on technical solutions already publicly disclosed by use or

[10] Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 2018 *available at*: https://www.mfat.govt.nz/assets/Trade-agreements/CPTPP/Comprehensive-and-Progressive-Agreement-for-Trans-Pacific-Partnership-CPTPP-English.pdf (last visited on Aug. 06, 2020).

[11] EVFTA-European-Vietnam Free Trade Agreement, *available at*: http://www.trungtamwto.vn/download/18787/2%20EVFTA.pdf (last visited on Aug. 06, 2020).

by means of a written description or any other form either inside or outside Vietnam prior to the filing date or the priority date as applicable of the application for registration of the invention, the invention constitutes inventive progress and cannot be easily created by a skilful person in the relevant field.

According to Article 61, it could understand that an invention is considered as inventive if based on the publicly revealed inventions under any form such as usage, text, or other in Vietnam or abroad before its filing or priority date in the case that it has priority right, this invention is one inventive step, which is not easy to be created by a person with average knowledge in the art.[12]

Therefore, an invention is deemed as inventive if it is the result from intellectual effort so that it is not an obvious creation by a person with average knowledge in the art and in the comparison with common technical level of the world to the priority date of invention application. It means that the patent/invention creates a new thing and is different from discovery. For example, the invention of mixture between drugs against stomach ache and drugs against migraine does not satisfy the inventiveness condition because it is obvious for any skilful person in the relevant field.

Inventive step or non-obviousness is considered as the most important protection condition to be determined during the substantive examination because if there is a difference between the technical solution which is filed for patent and the prior art, and the invention satisfies the novelty requirement, then to satisfy the inventiveness requirement, the invention must have two characteristics simultaneously: the invention is newly created and is one inventive step in comparison with the prior art.

From the above analyse, it can be noted that the invention which filed for patent first satisfies the novelty requirement to satisfy the inventiveness requirement. However, the main basic difference between the evaluation of inventiveness or non-obviousness and that of novelty is that the claims of invention which is filed for patent need to be compared and contrasted with not only each searched published patent document but also with the combination of all relevant published patent and non-patent documents. If the claims of the technical solution which is filed for patent are not the obvious combination of published searched patent information and

[12] *Supra* note 2, art. 61.

documents or they are not the pure combination of known technical factors according to the normal analyses of persons with average knowledge in the relevant technical field, the invention application satisfies inventiveness requirement. For example, the creation of a new drug that could treat both diseases of stomach ache and migraine (by the logical combination between known stomach ache drug and migraine drug), is not considered as inventive according to the patent language.

In nature, the notion of inventive step in patent law of India is quite similar to that of the Vietnamese law on Intellectual Property. However, one of the different things is that the economic feature has become one of the criteria to evaluate the inventive step of an invention. Pursuant to Section 2 (1) (ja), 'inventive step':

> means a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art.[13]

Like the novelty conditions, inventiveness condition is very well qualitative. However, the big difference between determining novelty and inventive step is that the requirement level for inventiveness condition is very strict and much higher than that for the novelty condition although both conditions are based on the technical base that is determined prior to the filing date or prior to priority. Therefore, to be protected as patent, the technical solution is not only different from officially published knowledge (novelty condition) but also has an inventive step in comparison with common knowledge (inventiveness condition).

The problem that needs to be discussed more often is about the inventiveness condition in understanding the technical term 'skilful person in the relevant field'. In particular, who is this skilful person in the relevant field? The legal regulation stipulates and considers skilful person in the relevant field as the common standard to discard the excellent experts in this field. It can be understood that a person with average knowledge in the relevant technical field here is the skilful person having general knowledge in all the related patent technical fields, having capacity of logical analyses from his/her own knowledge to resolve technical problem of invention, and having the capacity level enough to update the newest knowledge relating to relevant

[13] *Supra* note 3, s. 2(1)(ja).

technical field till the filing date or priority date of the invention application. However, IP law of Vietnam and its sub laws do not clearly explain who is a person with average knowledge in the relevant technical field. With my experiences, there are some opinions that a person with average knowledge in the relevant technical field has graduated in some technical field, i.e., mechanical engineering, electronics engineering, chemical engineering, etc. In my experience, the evaluation of the satisfaction for inventiveness requirement is very hard and depends mainly on the examiners' subjective point of view because each examiner has different skills and is educated at different levels and in different fields so they examine subjectively. In fact, for many reasons, an examiner who is a biological engineer has to examine the chemical inventions, an examiner who is an electronic engineer has to examine the mechanical inventions. Moreover, the patent application numbers have increased significantly while the capacity of each examiner is quite different. In addition, the personnel of examiners is limited. For these reasons, the duration for substantive examination is prolonged. It is this important reason why potential inventors are reluctant to file for patent. It can be noted that the procedures for substantive examination are complicated and prolonged by some years more than the normal legal rules, which is the crucial reason why the number of patent applications and granted certificates is very limited in the recent years.

In brief, the current legal rules of Vietnam on the inventiveness condition for patentability are appropriate with international laws. However, the examination and evaluation of inventive step or non-obviousness is hard, which depends mainly on the professional level of the examiners.

C. Industrial Application or Utility

Like many countries in the world, in particular the continental European countries, Vietnamese laws on IP also stipulate that the technical solution which is filed for patent must satisfy the industrial application requirement for granted certificate. In fact, Article 62 of Vietnam's current IP Law relating to inventions which are susceptible of industrial application states that an invention shall be deemed to be susceptible of industrial application if it is possible to realize mass manufacture or production of products or repeated application of the process which is the subject

matter of the invention, and to achieve stable results. But what is the technical term of 'industrial'?

According to Article 62, an invention is considered to have industrial application if it can be applied continuously to manufacture in mass production with stable results.[14] The notion 'industrial' in this Article is used to show the implementation capacity of a technical solution which is filed for patent by any technical means at some scale. Therefore, the capacity of industrial application here signifies a technical term used to show the capacity of manufacture, production of applied invention, or the capacity of implementation or usage of applied invention in practice. With this approach of understanding, if the subject matter of invention is filed for patent under a form of product (device, composition or structure), it could be ensured that this product has to be manufactured in mass with attributes and characteristics as described in the invention claims. If the subject matter of invention is filed patent under a form of process (method or process), it could be ensured that the process is applied repeatedly many times with stable results. For example, the following product or process could not be patented due to them being unsusceptible of industrial application, which does not satisfy the industrial application requirement: the method engraving animal's picture on one rice seed is made only by few persons with specific skills and is not manufactured in mass production by handicraft workers; a microbiological cell having a capacity to make more rapidly fermented yoghurt at the laboratory scale only but this cell could not make more rapidly fermented yoghurt at a larger scale. Vice versa, in the pharmaceutical field, a new drug is patented if it satisfies the industrial production requirement with highly stable results.

Moreover, the technical term 'industrial' stipulated in Article 62 of Vietnam's IP Law does not mean a limitation of patent application capacity in some specific industry but means the capacity of wide patent application in all technical fields in society. With this legal rule, the patentability condition of industrial application could be widely understood in reality as a requirement for patent implementation capacity in real life.

[14] *Supra* note 2, art. 62.

In comparison with legal rules of some other countries and with international laws, the third patentability condition of 'susceptible of industrial application' in Vietnam's current IP Law is appropriate with that of some countries and that of the standards of international laws. In fact, this patentability condition comes from and is stated in Article 27.1, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[15] Moreover, regarding the 'susceptible of industrial application' condition, the European Patent Office (EPO) states that 'an invention shall be considered as susceptible of industrial application if it can be made or used in any kind of industry, including agriculture'. 'Industry' should be understood in its broad sense as including any physical activity of technical character, i.e., an activity which belongs to the useful or practical arts as distinct from the aesthetic arts. 'Industry' does not necessarily imply the use of a machine or the manufacture of an article and could cover, for example, a process for dispersing fog or for converting energy from one form to another.[16] PCT International Search and Preliminary Examination Guidelines[17] also state that the technical term 'industry' should be understood in its broad sense as including all practical activities of the society, excluding activities with art and spirit activities.

The current Indian patent law also defines capability of industrial application in that way. Pursuant to section 2 (1) (ac), 'capable of industrial application', 'in relation to an invention, means that the invention is capable of being made or used in an industry'.[18]

However, some countries in the world replace the technical term of 'industrial application' with 'utility' but the two notions are not the same. Article 27 of TRIPS stipulates that each country can use either 'Industrial Application' or 'Utility' requirement as patentability condition. These terms are synonymous but not identical, as will be discussed.[19]

---

[15] Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 27.1, *available at*: https://www.wipo.int/export/sites/www/treaties/en/agreement/pdf/trips.pdf (last visited on Aug. 06, 2020).
[16] WIPO, *Patent Drafting Manual* 110-111 (WIPO Publication, 2010).
[17] WIPO, "PCT International Search and Preliminary Examination Guidelines", *available at*: https://www.wipo.int/export/sites/www/pct/en/texts/pdf/ispe.pdf (last visited on Aug. 06, 2020).
[18] Supra note 3, s. 2(1)(ac).
[19] *Supra* note 16 at 7.

The problem which needs to be discussed more here is that there are many technical solutions which satisfy the requirements of novelty, inventiveness, and utility or have big impacts on social-economic effectiveness, but do not get patented because they do not satisfy the requirement of being susceptible of industrial application as understood above. For example, the application of being susceptible of industrial application pursuant to the current IP Law of Vietnam makes computer softwares non-patentable in Vietnam while these computer softwares might be patented in the USA and in other countries applying the requirement of utility.

The big difference is that the current Vietnamese IP law does not mention anything on the social-economic and commercial impact of the invention while laws of some countries such as the USA, New Zealand, Canada, Australia, etc. focus only on the utility condition. For example, Section 101, Patent Act of the USA requires only the novelty, non-obviousness, and utility conditions for patentability.[20]

In brief, it can be noted that the requirement of 'susceptible of industrial application' in the current IP Law of Vietnam partly meets the demand of life, having the advantage of being appropriate with international practices. However, the legal rules have the disadvantage that they focus only on practical application of the invention which is filed for patent but not on the utility and commercial exploitation of the invention. It can be noted that if an examiner focuses only on industrial production character of the invention which is filed for patent, he/she will ignore the commercial exploitation capacity of this invention, which brings about the rejection of patentability for inventions which have huge socio-economic impacts, wastes scientific-technological researches, and does not encourage innovation. For example, some recent studies of National Hospital of Paediatrics, Vietnam, are conducted to find out the causes and origins of brain ischemic stroke and risk factors such as arteriovenous malformation (AVM) of children at the National Paediatrics Hospital in order to create a method of veins intervention. In fact, the study's results and methods of veins intervention are patentable because it is very useful and satisfies the utility condition. However, the Vietnamese laws do not accept the patentability of these kind of research results and methods. The inappropriateness of the legal rules

[20] *Supra* note 7.

could be considered as the main reason why the number of patent filing and granted certificates is very limited in many recent years.

III. CONCLUSION

Due to the difference of understanding of patentability conditions, there are many discussions between the examiner and inventor about the novelty, inventive step, or industrial application. The strong discussion between them leads to a longer substantive examination, which deters the patent filing and reduces the application number. Moreover, as the utility of invention is not a patentability condition according the current IP Law of Vietnam, many useful inventions which lack industrial application requirement are not filed for patent. For these reasons, the number of patent/utility solution application and granted certificates have been limited during the recent years.[21] According to official statistics from Intellectual Property Office of Vietnam, Ministry of Science and Technology, from 2008 to 2018 (the latest annual report that was made in 2019 by Intellectual Property Office of Vietnam updated data till the end of 2018), the number of patent granted certificates by the Vietnamese is 730 while the number of patent granted certificates by the foreigners is 12,879. It means that the number of granted certificates of patent by the Vietnamese is much smaller than that by of foreigners. Vice versa, the number of utility solution granted certificates by the Vietnamese is higher than that by of foreigners. During the same period, the number of utility solution granted certificates by the Vietnamese is 981 while the number of utility solution granted certificates by the foreigners is 321.[22]

Moreover, the focus on the industrial application by the examiner will reject the utility inventions with big socio-economic values, which trigger huge waste, and do not promote innovation.

In conclusion, the modification and amendment for the standardization of patentability conditions in the current IP Law of Vietnam and if any, the unification of

[21] Phan Quoc Nguyen and Nguyen Vinh Hung, "Commercialization of invention policy for green growth target" 7(3) *Archives of Business Research* 218-223 (2019).
[22] Intellectual Property Office of Vietnam, "Intellectual Property Activities Annual Report" (2019), *available at*: http://www.noip.gov.vn/en_US/web/english/annual-report (last visited on Aug. 07, 2020).

relevant legal regulations at the international level is very necessary and imperative in the near future to promote innovation.

BOOK REVIEWS

THE FUTURE OF INDIAN UNIVERSITIES – COMPARATIVE AND INTERNATIONAL PERSPECTIVES, Edited by C. Raj Kumar, Oxford University Press, New Delhi (2018), Pp. 480, Rs. 1495/-

*Reviewed by P.B. Pankaja**

Great universities like Nalanda and Takshashila in India had a glorious reputation as seats of wisdom and learning, and attracted scholars from across the world. In the wilderness of time, they were forgotten with the introduction of the colonial education system. Withstanding the challenges of time, India's higher education sector is the largest and the third-largest in the world in terms of its size and enrolment respectively. With the ushering in of globalization of education with cross-cultural and world-class perspectives, higher education has undoubtedly become a commodity, whose price is fixed according to market forces operating in the education sector. The need for Indian universities to compete with other world-class universities has become indispensable, triggering debates and discourses. It is a matter of concern that none of the Indian universities figure in the top rankings of world-class universities. The two popular committees on higher education from a decade ago, the Narayana Murthy committee and the Yashpal committee, had reported the maladies plaguing higher education in India: an inadequate number of institutions to educate eligible students, poor employability of the graduates produced by the universities, decline in standards of academic research, an unwieldy affiliating system, an inflexible academic structure, an archaic regulatory environment, eroding autonomy, and low levels of public funding. It is still a subject of debate as to how we can bring in quality and efficiency in the functioning of higher educational institutions in India, given the socio-economic and demographic diversity, and low rate of Gross Enrolment Ratio. In this scenario, the book under review edited by Prof. (Dr.) Raj Kumar, a founding member of the O.P. Jindal Global

* Former Professor of Law at Law Centre-I, Faculty of Law, University of Delhi.

University, is a timely move to address the various issues relating to higher education in India with a global perspective.

This work is a prompt follow-up to an international conference on 'The Future of Indian Universities: Comparative Perspectives on Higher Education Reforms for a Knowledge Society' held at O.P. Jindal Global University in 2013. The present imprint is appended by the 'Sonipat Declaration on World-Class Universities in BRICS and Emerging Economies' on the occasion of BRICS and Emerging Economies Universities Summit held from 2-4 December 2015 on the theme 'Why Emerging Economies need World-Class Universities?' hosted by the O.P. Jindal Global University, Sonipat.

The collection of eighteen essays is a comprehensive discourse on the 'is' and 'ought to be' status of higher education in India vis-a-vis the structure and functioning of universities in different countries of the world. The editor's passion for bringing in a world-class higher education system in India gets endorsement from great minds through their contributions to this work. Widely commended by Indian and foreign academicians and administrators, the editor sets up a grand vision for future higher education in India and suggests recommendations to move forward by breaking the existing bottlenecks choking the universities, impairing their process of becoming centres of excellence.

Eminent national and international educators and mentors come from a variety of institutions and give different perspectives based on their work experiences. Francis Julian, Y.S.R. Murthy, Sreeram Chaulia, Kanti Bajpai, Alice Prochaska, Sital Kalantry, and others follow suit.

Divided into three sections, the themes cover 'Imaginations, Aspirations and Expectations of Indian Universities', 'Policy, Regulation and Management of Indian Higher Education in a Comparative Perspective' and 'Pedagogy of Inter-disciplinarily between Law, Humanities and Global Studies in India'. Prof. (Dr.) Raj Kumar in the opening essay lists out the various challenges faced by Indian higher education, such as cramped institutional vision, lack of innovation, indifference to research, lop-sided funding, conflicting regulatory mechanisms, and lack of resources with the State, and draws a road map for building world-class universities in India. Citing examples of Japan, Singapore, China, and other Asian countries, where remarkable

transformation has taken place, the author makes a convincing argument that the higher education sector in India cannot be reformed and refined unless there is due participation of strong private universities that are truly non-profit, philanthropic, and committed to promoting academic freedom in building world-class universities.

Shiv Viswanathan, N.R. Madhav Menon, Indira J. Parikh, Pawan Agarwal, and P.R. Sinha, through their experiences, agree with Dr. Kumar's narrative and opine as discussed. Shiv Viswanathan strikes a different note by saying that education in India, especially in IITs, is embedded in wrong discourses. Institutions are never read as a culture of knowledge but essentially as instruments for employment generation and as a relevance-generating machine. Economistic evaluation of knowledge turned counter-productive for old definitions of quality. Narrating policy changes underway, Prof. N.R. Madhav Menon opined that in the sea of mediocrity, there are few islands of excellence. India can borrow some of the features of foreign universities, but it is neither possible nor practical to subordinate the demands for access and equity for the sake of quality. The other dialogues in the segment covered the experiences of building the Indian Institute of Management, the Indian School of Business, Ashoka University, and Jindal University.

A synthesis of ideas in the second section contributed by Francis Julian, Kanta Bajpai, Stephen Marks, Barbara-White, S.R. Mehta, Y.S.R. Murthy, and Anamika Srivastava throws light on the need for a liberalized legal regime, curriculum reforms in tune with public policy studies, challenges of knowledge creation in Indian universities, science policy interface in the era of global commodification, the role of culture in building and sustenance of an institute of higher education, challenges of creating a world-class global private university in India, and deconstructing the discourse on University Social Responsibility.

The thought-provoking essays on an interdisciplinary approach in higher education by distinguished educators viz., Yugank Goyal, Alice, Carol M. Bresnahan, R. Sudarsan, Sreeram Chaulia, and Sital Kalantry, formed the central theme for the pedagogy of interdisciplinarity in the third section. Deriving examples from various countries, the authors identify various shortcomings in the Indian higher education system for India's low ranking among global universities. Some of these shortcomings

include the absence of sound Social Science research in global studies, fading importance of Liberal Arts and Humanities, and the need to strengthen global connectivity and Clinical Legal Education along with an absence of philanthropists from the social sectors. The reforms suggested are the need of the hour and carry the readers to the vision put forth by the editor in his initial discourse.

The project book is full of information with empirical data reflected through tables and figures and is a must-read for all academicians of Indian universities. It is a road map for policymakers and legislators. It rewards the reader and is a real service to the cause of higher education. It projects a strong vision for a barrier-free environment for global world-class universities to come up in India. It is a precious ornament to be adorned on the shelves of all libraries of higher education institutions.

HUMAN RIGHTS CONTEMPORARY ISSUES – FESTSCHRIFT IN THE HONOUR OF PROFESSOR UPENDRA BAXI by Dr. V.K. Ahuja, Eastern Book Company, Lucknow (2019), Pp. lvi+679, Rs. 1850/-

*Reviewed by Vageshwari Deswal**

Despite completing a century of existence, the study of human rights refuses to go stale. Human rights, an evergreen subject, is a dynamic discipline with an ever-expanding expanse of related issues. It is imperative for the fountain of human rights to be perennially progressive for the full realization of quality of human life. The profoundness and universality of human rights is a categorical imperative beyond any mortal challenge. Human rights, like divinity, are a fundamental truth that dwell universally. The higher ideals that form the basis for all human rights are too lofty for ordinary beings to discern, where the locus is the human being and not the material manifestations of human life.

Prof. Upendra Baxi, the relentless crusader for human rights, is a living legend. He is an internationally acclaimed legal luminary. His ideological strength resonates in his impeccable writings that have a common chord of human rights permeating throughout. The book under review is a collection of articles on the subject closest to Prof. Baxi. It is a fitting tribute to the harbinger of human rights jurisprudence in India. The festschrift is a compilation of thirty articles covering issues as diverse as transgender rights, animal rights, privacy, triple talaq, intellectual property rights, rights of people with disabilities and right to access for visually impaired persons, rights of women, beggars, indigenous people, victims of terrorism, acid attacks, the Sabarimala verdict, and various other issues touching upon the domain of human rights.

The book begins with a foreword by Justice Ranjan Gogoi, the former Chief Justice of India, who has emphasized upon the need to direct our attention and resources towards bridging the gap between human rights and the right to be human in order to achieve the mission of human rights as envisaged by Prof. Baxi. – to give voice to human suffering, to make it visible, and to ameliorate it. The first article is by

* An academician, feminist and activist working as Professor at Faculty of Law, University of Delhi.

Justice A.K. Sikri. In this scholarly masterpiece, he has outlined the significance of the concept of 'dignity' as propounded by Prof. Baxi, which is towards the expansion of human rights jurisprudence, providing the justification behind the very concept of human rights. The linkages drawn between the Constitution, Fundamental Rights, and dignity jurisprudence makes for a fascinatingly compelling read.

A tribute to Prof. Baxi by Prof. A.P. Singh and Zubair Ahmed Khan highlights Prof. Baxi's lifelong obsession with human rights and refers to him as 'a perpetual rebel and a dissident for the purpose of exposing the unexposed'. Starting from the open letter written to the then Chief Justice of India, stating the agonies faced by a rape victim, to theorizing human rights and the right to be human. The article concludes that the originality of ideas, elevating nature of the thought process, and vigorous nature of the arguments in Prof. Baxi's work is simply an energizing and thrilling experience.

'Human Rights of Muslim Women in the Garb of Muslim Law,' an article by Prof. Furqan Ahmad, is based upon Prof. Baxi's analysis that the impulse for reform of Muslim law is based upon one fundamental perception of injustice: injustice to women. He cautions that mere enactment of legislation without creating conducive social conditions would be mere politics of reform and not reforms in the real sense.

Prof. Moolchand Sharma's veneration for Prof. Baxi is highlighted when he humbly mentions that credit for all his meaningful work goes to the learning he acquired from the great persona of Prof. Baxi. He has applauded Prof. Baxi's contribution to development of the concept of social action litigation and responsible activism by citing numerous instances including the Narmada Bachao Andolan and the Agra protective home case.

Sam Adelman in his article titled 'Upendra Baxi on the Imperatives of Human Rights and Climate Justice' quotes him as the champion of Climate Justice and refers to his article 'The Future of Human Rights' wherein Prof. Baxi maintains that the 'tasks of human rights, in terms of making the state ethical, governance just, and power accountable, are tasks that ought to continue to define the agendum of activism'. He also states that for Prof. Baxi, law and human rights are not abstractions. He distinguishes between legisprudence, jurisprudence, and

demosprudence and understands their interconnections for an understanding of law in late modern society.

There are several articles on emerging human rights issues. The editor of this book, Dr. V.K. Ahuja, has written an extremely insightful article on the 'Human Rights Approach to Intellectual Property Rights'. He concludes that the States are duty bound to protect the IPR in accordance with the international human rights obligations. An article titled, 'Human Rights and Inclusive Responsibility of Corporate Entities,' points out the responsibility of business houses to not only safeguard against infringement of human rights but also be proactive to adverse human rights impacts. An article on 'Protection of Human Rights of Sexual Minorities' is an enthusiastic attempt by two young contributors, highlighting the need for social acceptance of this marginalized group. There is another piece on the 'New Dimensions of Human Rights to Privacy'. The article on 'Right to Dignified Death: A New Human Right' analyses the euthanasia discourse across various countries and the Indian legislative as well as judicial stance on the same.

Prof. Amber Prasad Pant in his article makes a case for 'UNCLOS 1982' to be used for promoting rights of the people living in landlocked countries. Dr. Gargi Chakrabarty raises her concerns relating to various aspects of human rights associated with the evolution, nurture, transformation, transfer, practice, maintenance, and protection of traditional knowledge and traditional cultural expressions by traditional people and the duty of the State to recognize these rights and safeguard them from misappropriation. Prof. Vijender Kumar has presented a poignant picture of the victims of acid attacks and described this crime as the grossest violation of such victim's human rights. Prof. Manoj Sinha's article, 'Right to Development as Human Right in African Perspectives,' explains that several of the African countries are still facing problems pertaining to governance, democracy, poverty, and ethnicism. Development is ordinarily seen as the use of social, economic and legal mechanisms to effect change and achieve a higher standard of living in developing or underdeveloped states. As a discipline, it now encompasses broader areas, viz. human rights, infrastructure and planning, economics, political governance, health, a sustainable exploitation of the natural environment, and international aid.

The editor of this festschrift, Dr. V.K. Ahuja, has done a commendable job by ensuring contributions from well renowned academicians and judges. He has collated so many articles on the singular theme of human rights without repetition of any topic. Relating human rights with contemporary issues indicates the thought process behind this book to ensure that the work remains relevant for a long time to come. However, an article by Prof. Baxi, in whose honour the book is written, is conspicuous by its absence. This leaves the reader slightly disappointed as the work would have gone a few notches higher by the inclusion of something penned by Prof. Baxi. This is somewhat assuaged by articles dedicated to his writings such as those by Prof. Moolchand Sharma, Sam Adelman, Prof. Furqan Ahmed and Prof. Amar Pal Singh. They have all highlighted his passionate commitment to the cause of human rights, ubiquitous by his writings.

The charismatic influence of Prof. Baxi is unparalleled in recent legal and social history. The indelibly etched memories have influenced millions of law students, teachers, judges, and others who had a chance to interact with him. While some contributors have recalled their personal as well as professional interactions with him, others have used this opportunity to expound their linkages of human rights with various fields of study. The festschrift has an attractive cover with a picture of Prof. Baxi. The printing is flawless and the editing is impeccably consummate, indicative of the copious hours spent by the editor as well as the publishers, EBC, in accomplishing this momentous task. Overall, this is an excellent value addition to any library and is strongly recommended for students, lawyers, researchers, and judges for a deeper insightful understanding of human rights and related issues.

LEGAL RESEARCH METHODOLOGY, **Edited by Manoj Kumar Sinha and Deepa Kharb**, LexisNexis, Gurugram (2017), Pp. 452, Rs. 450/-

*Reviewed by K. Ratnabali**

'Legal Research Methodology' is an edited book contributed by twenty-three academicians and edited by Prof. Manoj Kumar Sinha and Dr. Deepa Kharb, jointly published by Indian Law Institute and Lexis Nexis. It is a standard textbook for law students on research methodology.

The book is divided into five parts to deal with the varied aspects of the subject. The first part deals with *Legal Research Methods* wherein six eminent academicians, viz. Prof. Upendra Baxi, Prof. S.K. Verma, Prof. Ishwara Bhat, Prof. Ranbir Singh, Prof. Rajkumari Agrawal and Prof. K.V. Bhanumurthy have contributed.

The book commences with the article of Prof. S.K. Verma titled 'Doctrinal Legal Research: methods and Methodology', which is apt, keeping in view the fact that Prof. Verma's article sets the stage by succinctly explaining the basic concepts of research, starting from what 'research' and 'legal research' mean to what doctrinal research is, its pros and cons and the research models and tools that may be used in doctrinal research.

It is a fact that legal researches in the past were purely doctrinal researches. However, the black letter law and law in action do not coincide, and there is gap between the two. Further, as law operates in society, which itself is dynamic, dynamism in law is therefore inherent. This dynamism is reflected in the constant interaction between what law is and what law ought to be, resulting into gradual conversion of the latter into the former. This dynamism is discussed by Prof. Verma in her article and concludes that a strong foundation based on doctrinal research is required for every research, whether it is empirical or non-empirical research, and holds the view that doctrinal research backed or supplemented by empirical research will be a more comprehensive study in the field of inquiry.

---

* Professor of Law at Law Centre I, Faculty of Law, University of Delhi. She has been teaching for more than sixteen years.

Prof. P Ishwara Bhat's article, 'Analytical Legal Research for Expounding the Legal Wor(l)d', is a treat to read. He beautifully weaves with interesting examples the connection of meanings (plain, legal, expressed and implied meanings), silences (hidden ideas beneath and beyond the text, viewpoints between the lines) and relations (patterns of relations such as Hohfeldian relation, inter-norm relation, organs of government relations, interrelationship of fundamental rights etc.) with legal concepts and propositions, their importance in bringing out the legal implications of those words and concepts as an exercise of analytical legal research. The article emphasises on the necessity to identify the relevant law for conducting an analytical study and puts forth the techniques involved in understanding the status and meaning of legal norms. The article is a must read for any researcher intending to do legal research in general and analytical legal research in particular.

The article titled 'Socio Legal Research in India – A Programschrift', written by Prof. Upendra Baxi, is an engaging and thought provoking article. The first part of the article is an exposition of real time situation of legal education which, I suppose, almost every law teacher can relate to. The reasons for the decline of law teaching and law teachers have been explicitly dealt with. Prof. Baxi also points out what ails the legal research in India, and therefore, any attempt to bring renaissance in legal research must address all the concerns listed therein. Prof. Baxi highlights the necessity of conducting interdisciplinary research, particularly by academicians from law and sociology disciplines. He draws home this point by quoting French Sociological jurist Maurice Hariou and Georges Gurvitch that, 'too little sociology leads away from law, but much sociology leads back to it'[1] and 'a little law leads away from sociology but much law leads to it'.[2]

Prof. Baxi also expounds the need to map the legal system [which is made up of the Formal Legal Systems (FLS) and the Informal Social Control System (ICS)] to understand comprehensively what the relevant law is for a particular inquiry. He

[1] Cited by Upendra Baxi, Socio-Legal Research in India – A Programschrift, in Manoj Kumar Sinha and Deepa Kharb (ed.), *Legal Research Methodology* 66 (Lexis Nexis and Indian Law Institute, New Delhi, 2017).

[2] G. Gurvitch, *Sociology of Law,* 2 (Routlege, London, 1947*)* in Upendra Baxi, Socio-Legal Research in India – A Programschrift, in Manoj Kumar Sinha and Deepa Kharb (ed.), *Legal Research Methodology*, 66 (Lexis Nexis and Indian Law Institute, New Delhi, 2017).

concludes by advocating the need to generate and diffuse the consciousness of the conceptions of *anomie, alienation, legitimacy, violence* and *direct action* to understand the dynamics of legal and political order. While looking at violence and social change through law, Prof. Baxi beautifully dissects the concept of direct action and argues why it is necessary to examine in detail and study its outcome.

This article must be compulsorily read before commencing any serious socio-legal research by academicians in law or sociology, or if one wishes to increase one's lists of jargons used in research. It should also be read by sponsors of research such ICSR, ICSSR, UGC etc. in order to set forth apposite list of priority areas of research as well as criteria for selection of research proposal. It will also give insights to the policy makers for improving sponsored research and orient focus of the same. Further, it will benefit the society in the long run if the article is made a compulsory reading for Research Methodology courses in social science.

Prof. Rajkumari Agrawala's article, 'Indian Legal Research: An Evolutionary and Perspective Analysis' traces the evolution of legal education and profession in India. Prof. Agrawala also examines in detail the lacunae in Indian legal research and self-imposed limitations of Indian researchers. Knowing these will help in overcoming those weaknesses through conscious effort by every researcher.

The article titled 'Basic Research' written by Prof. (Dr.) K.V. Bhanumurthy focuses on the difference between basic research and applied research, their significance and methodology, variants of research in law and how 'fact' is different from 'truth'. The article will be useful for young beginners in research.

The second part of the book is a collection of three articles by Prof. Rattan Singh & Dr. Arvindeka Chaudhary, Prof. Furqan Ahmad and Dr. Lisa P. Lukose on the theme 'Ethics in Legal Research'. Prof. Rattan Singh & Dr. Arvindeka Chaudhary's in their article titled 'Protection of Intellectual Research from Plagiarism in the Era of Copyright Law' espouse that ethics should be maintained in research, and that is possible only if the researcher adheres to 'the code of conduct that has evolved over

the years for an acceptable professional practice'.[3] They discuss the meaning, origin and development of the concept of plagiarism, its types, and lists down the software available for checking plagiarism. As many plagiarisms are copyright infringements, the authors discussed the safeguards available against plagiarism under copyright law. These articles may be read to understand ethics in research. Dr. Lisa P. Lukose's article discusses in detail the scope and limitation of copyright law and explains clearly the concept of 'fair dealing and fair use' which enables a user or a researcher to use copyrighted work of an author, as envisaged under section 52(1) of the Indian Copyright Act, 1957.

Prof. Furqan Ahmad in his article, 'The Researcher as the Central Figure in Legal Research: Qualities of a Good Researcher and Challenges in Creating One', endorses the view of P. Sarvanavel that 'a good research should be systematic and logical'.[4] He lists down the qualities of a good researchers as having capability to diagnose the problem, sound knowledge of jurisprudence and the subject, maintenance of value neutrality and non-manipulation of data in research so that the outcome is unbiased, following of ethical norms, use of observational, analytical and logical skills and to carry on research with dedication, patience and hard work. This article is relevant for understanding the qualities of a good researcher so that one can strive to become one.

Part C of the book is focused on 'Legal Research and Law Reforms' and contains three articles. Prof. Upendra Baxi's article titled 'Dimensions of Impact Analysis' focuses on the significance of impact analysis research and various aspects and perspectives that need to be covered while doing the same. He observes that 'most legal academicians are too court-centric and do not study the legislatures, the

[3] Prof. Rattan Singh & Dr. Arvindeka Chaudhary, Protection of Intellectual Research from Plagiarism in the Era of Copyright Law, in Manoj Kumar Sinha and Deepa Kharb (ed.), *Legal Research Methodology* 135 (Lexis Nexis and Indian Law Institute, New Delhi, 2017).

[4] P. Sarvanavel, *Research Methodology*, 5 (Kitab Mahal, Allahbad, 12th edn., 2001)cited in Prof. Furqan Ahmad, The Researcher as the Central Figure in Legal Research: Qualities of a Good Researcher and Challenges in Creating One, in Manoj Kumar Sinha and Deepa Kharb (ed.), *Legal Research Methodology* 147 (Lexis Nexis and Indian Law Institute, New Delhi, 2017).

political executive, and the bureaucracy, although studying not 'what the judges say but what judges do with what they say'[5] offers a plateful!'[6]

Prof. Baxi opines that, 'most Indian law academics study solely judicial decisions as if the discourse on ratio of a case has a *single invariant legal meaning*'.[7] He also advises to be wary about placing uncritically courts at the centre of social movements. A perusal of the most of the course material provided for LL.B. students in the Faculty of Law, University of Delhi shows that the content of these study materials are prominent judgments relating to the topic/sub-topic of that subject/paper, presuming that there is a single *ratio decidendi* which is to be culled out and a single meaning to be interpreted therefrom.

Prof. Baxi also discusses in details how a judgment may be read by different individuals and communities, intersectionality between social movements and courts, to conduct the impact analysis of judicial decisions by conducting empirical study to understand the minds or consciousness of the affected people. He explains the same by using social action litigation (SAL) as an example.

Dr. L. Pushpa Kumar and Shachi Singh's article titled, 'Encouraging Socially Significant Legal Research' is a kind of corollary to the articles of Prof. Baxi in this book, in the sense that it reiterates one of Prof. Baxi's recommendations to conduct research which is socially relevant. The authors try to draw home their point by giving apt illustrations. They also put forth several reforms required to strengthen legal research.

Dr. Sushmitha Mallaya's article titled, 'Reforms in Legal Sector: Need to Focus on Development of Research Skill' talks about deteriorated state of legal sector in country and accounts it to the lack of research aptitude. Stating that law reforms in a country derive its strengths not only form lawmakers such as parliamentarians but also from judges and jurists, she analyses the role played by different stakeholders and concludes by looking at the kind of research suitable for law reforms in India.

---

[5] Upendra Baxi, Dimensions of Impact Analysis, in Manoj Kumar Sinha and Deepa Kharb (ed.), *Legal Research Methodology* 182 (Lexis Nexis and Indian Law Institute, New Delhi, 2017).
[6] Upendra Baxi, Dimensions of Impact Analysis, in Manoj Kumar Sinha and Deepa Kharb (ed.), *Legal Research Methodology* 182 (Lexis Nexis and Indian Law Institute, New Delhi, 2017).
[7] *Ibid.*

The last part, i.e., Part D of the book focuses on 'Research Process: Design, Tools and Techniques' and consists of nine articles. Dr. P.B. Pankaja's article on how to start and finish a Legal Research paper is a very basic writing on the topic, and is simple and communicative. She has highlighted on how to choose a topic, importance of review of literature, formulation of hypothesis, drafting, proof reading and publishing. Dr. P.B. Pankaja has also briefly touched upon how to write different parts of an article. The article is brief and quite superficial. Giving examples or illustrations could have made it more vivid.

Anurag Deep in his article[8] focuses much on the formulation of hypothesis, however, the basics of the same is lacking in the article. It does not deal with clarity the concept of 'variables', types of variables and how variables are used while framing a hypothesis. The concept of anti-thesis and thesis could have been explained with an example. There are many illustrative hypotheses that have been mentioned in the article, and the dependent and independent variables could have been indicated. Further, it lacks a discussion on testable and non-testable hypotheses and the need to use quantifiable elements or indicators.

The article on 'The Art of Developing a Questionnaire' presents a systematic way of preparing a questionnaire and testing its reliability. While drafting the possible responses to the questions in a questionnaire, one may also resort to focus group discussion to come up with all possible responses to a question. The Questionnaire Design should have included the discussion on the preferred number of questions in a questionnaire, the sequencing of questions and the length of questions. Further, it may be added in 'Pilot Testing' that respondents should be those who have the same characteristics as that of the members of the study population but who are not a part of the study population itself.

For understanding the case study method of research, Prof. Rupam Jagota's article title, 'Interpretative Case Study Method of Research: Relevancy in the Modern Era' may be read.

Dr. Uday Shankar's article, 'Significance of Case Law in Legal Research', is on a very relevant topic in legal research, particularly more so in the case of doctrinal

[8] Research Problems, Research Questions and Hypothesis in Legal Research.

research. Dr. Shankar has also explained through examples of how to go about conducting case study.

The article on 'Sampling – An Effective Tool of Non Doctrinal Legal Research' by Dr. Varun Chhachhar discusses the meaning and methods of sampling, its significance and advantages. Sampling is an important part of scientific non-doctrinal research when the universe/population is large and it is not practically possible to include all of them in the study. Moreover, inclusion of the whole population in the study may not result in higher precision in the result if the sample selected for the study is a good representation of the whole population.

With respect to the methods of sampling, it may be mentioned that there are two broad categories of sampling, i.e., probability sampling and non-probability sampling. There are at least two more sampling methods other than those discussed viz. snow ball sampling and convenience sampling.

Prof. (Dr.) K.V. Bhanumurthy provides an insight into how to write Literature Review, organize and its layout, what key questions should be asked and how actually one should go about writing the review. Prof. Bhanumurthy also discusses how to write a good Ph.D. proposal by listing down the elements to be covered in a proposal. It may be pointed out that 'Limitations of the proposed research' should be covered in the proposal as it is not possible to cover every aspect of a problem under study, and there are certain situations and factors which are beyond the control of the researcher but may nonetheless affect the outcome of a research.

Once the research problem/topic is identified for non-doctrinal research, it is pertinent to frame a research design. Research design is the blue print of the problem under study, aims/objective of the study, research questions, hypothesis, operationalization, methodology to be followed, i.e., what is the type of research, universe of the study, study population selected for the study, the sampling technique to be adopted, the tools to be used for data collection, the method of data tabulation and analysis, along with proper justification for each of the choices/decision made in framing the design. The article by Ms. Mallika Ramchandran titled, 'Research design: Its Relevance, Types and Components' systematically discusses the various aspects of framing a research design with the help of illustrations.

Ms. Latika Vashist in her article, 'Feminist Methodology and Legal Education: Some Reflections' argues for 'evolving a thorough methodological framework of doing feminism in a law school'.[9] She raises pertinent questions about feminism itself and states that there are multiple feminist methodologies.

Ms. Vashist has cogently argued why and how gender as a methodology should be adopted in legal research. She explains succinctly by taking relevant case laws on the interpretation of *mens rea*, how the facts of the cases also gendered the *mens rea* element in each case. She concludes by stating that any project of critical legal education that seeks to achieve universal justice must include a feminist perspective.

The last article of the book is an informative article on the various sources available which one may access in order to widen the scope of research to enable the conduct, at the outset, of a thorough review of literature so that a sound foundation is made for the research.

Few suggestions that may be made include avoiding repetitions of lines/paragraph in some articles which could have been avoided with effective editing. The article on 'Development of Legal Education in India' written by Prof. Ranbir Singh does not connect with the theme of the book and could have been excluded. It seems that the Figure 1 on page 128 was supposed to be coloured (the second para on page 129 indicates so) though it is not, however, the illustration given in the image by using different shades of grey serves the purpose.

Legal research methodology, as a course/paper, was not part of the LL.B. course curriculum in traditional law institutes/departments imparting three years LL.B. degree course, though it is a part of the LL.M. course curriculum. However, it figures in the curriculum of National Law Schools/five-year B.A. LL.B. programmes. Though there are ample books on research methodology on social sciences, yet there are not many comprehensive books on legal research methodology. A basic book on legal research methodology is the need of the hour for the law students (LL.B./LL.M./Ph.D.) which will not only guide them on the basic concepts of doing

[9] Latika Vashisht, 'Feminist Methodology and Legal Education: Some Reflections' in Manoj Kumar Sinha and Deepa Kharb (ed.), *Legal Research Methodology* 364 (Lexis Nexis and Indian Law Institute, New Delhi, 2017).

research but also in understanding the nuances of conducting legal research and adopting a methodology that will best suit the field of inquiry they choose to work upon. This book is, therefore, timely and tries to add on to the knowledge in this genre.

THE TRANSFORMATIVE CONSTITUTION: A RADICAL BIOGRAPHY IN NINE ACTS by Gautam Bhatia, HarperCollins India, Noida (2019), Pp. xliv+499, Rs. 699/-

*Reviewed by Anjay Kumar**

> *Words are magic things…but even the magic of words sometimes cannot convey the magic of the human spirit.*
>
> – Jawaharlal Nehru, speech on the Objectives Resolution (December 1946)

Transformative constitutionalism intends to achieve social and political transformation through the law. It focuses on attaining social justice, equality and embedding egalitarianism in social and political relationships. To attain this, the judiciary enjoys the central position owing to its constitutional mandate to interpret the constitution. The contours of this 'new' judicial attitude that transformative constitutionalism requires is bound to be difficult to define. However, this is an inevitable shift that must be made and is likely to occupy the judges. This requires a judicial consciousness of the historical background that informs the present social and political situations it seeks to redress. In addition, it necessarily demands less insistence on legal and procedural technicalities that quite often defeat the enforcement of substantive rights.

A transformative constitution is a long term process of constitutional enactment,[1] interpretation and enforcement committed to transforming the social and political institutions in a democratic, participatory, and egalitarian direction, therefore facilitating change in non-violent ways.[2] The Indian Constitution is a conservative document, aimed at facilitating transference of power as opposed to a fundamental transformation of the social and legal structures prevalent at the time.

---

* Assistant Professor at Law Centre-II, Faculty of Law, University of Delhi. He holds a B.Sc. from HPU Shimla, and an LL.B., LL.M. and Ph.D. from Panjab University Chandigarh.

[1] Sir B.N. Rau, *India's Constitution in the Making* (Orient Longmans, Bombay, 1960). In his book, Sir B.N. Rau classifies the moment of Independence as 'transfer of Power' for the reason that the Constituent Assembly itself was no revolutionary body and that it is borrowed from Government of India Act, 1935.

[2] Karl E. Klare, "Legal Culture and Transformative Constitutionalism" 14 South African Journal on Human Rights 146, 150 (1998).

This book review looks at 'The Transformative Constitution: A Radical Biography in Nine Acts' written by Mr. Gautam Bhatia. The author of this book is a young and inquisitive advocate practicing in the Supreme Court of India. He represented parties in the *Privacy Case*[3] in the Supreme Court. He takes advantage of his personal experience of representing the case in the court and brings forth a clear understanding of the issues in this book. The book is divided into three parts viz., Equality, Fraternity and Liberty. Each part is further divided into three subparts: 'Sex discrimination', 'Equality before Law', and 'Equality of Opportunity' under the part on 'Equality', 'Civil rights', 'Religious Freedom and Group Identity', and 'the Freedom to Work' under the part on 'Fraternity'. The Third part of the book, on 'Liberty', discusses 'Privacy beyond the public/private divide', 'Speech, Association, Personal Liberty', and 'the State of Exception and Privacy and Criminal Process'.

The author discusses the concept of constitutional transformation through nine judgments.[4] These judgments indicate how the purpose of the Constitution is to transform a culture of justification in a free open and democratic society. When read together, these judgments shine bright as the integral elements of constitutional trinity viz. liberty, equality, and fraternity, mutually reinforcing and creating the necessary foundation for a free and egalitarian politic. 'The Transformative Constitution' examines the historical roots of the fundamental rights in the liberation struggle. The author uses the term 'contrapuntal' from Edward Said, who stressed on reading any textual tradition with an effort to draw out, extend, give emphasis and voice to what is silent or marginally present.

In the first segment of the book, the author focuses on developments within the sphere of equality by critically analyzing the supreme court judgment in *Anuj Garg* v. *Hotel Association of India,*[5] wherein the apex court struck down a law that barred women from working in a bar or a liquor shop and seriously engaged with the meaning of the constitutional imperatives contained in Article 15(1), observing that

[3] *Justice K. S. Puttaswamy (Retd.) and Anr.* v. *Union of India and Ors.* (2017) 10 SCC 1.
[4] *Anuj Garg* v. *Hotel Association of India* (2008) 3 SCC 1; *Suresh Kumar Koushal* v. *Naz Foundation* (2014) 1 SCC 1; *Common Cause* v. *UOI* (2018) 5 SCC 1; *Selvi* v. *State of Karnataka* (2010) 7 SCC 263; *PUDR* v. *Union of India* (1982) 3 SCC 235; *Indian Medical Association* v. *Union of India* (2011) 7 SCC 179; *Jyoti Babasaheb Chorge* v. *State of Maharashtra* (2012) 6 AIR Bom R 706; *T. Sareetha* v. *T. Venkatasubbaiah*, AIR 1983 AP 356; *State of Kerala* v. *N.M. Thomas* (1976) 2 SCC 310.
[5] *Anuj Garg* v. *Hotel Association of India*, *Supra* note 4.

the law accepts a transformative view rejecting the notion of natural differences between men and women. The author traces the roots of gendered stereotypes to a social and political consensus that divided the colonial Indian society into two 'separate spheres': a public sphere to be occupied by men, and a private sphere representing the 'community' that was the domain of women. The 'special provisions' under Article 15(3) can be justified only if they bear some connection with Article 15(1). In particular, 'special provisions' that simply perpetuate precisely the kinds of stereotypes, roles, and conceptions that Article 15(1) was designed to eliminate cannot withstand the test of constitutional scrutiny. It is the duty of the Court to break these stereotypes and promote a society which regards women as equal citizens in all spheres of life.[6]

Equality before Law: Equal Moral Membership

While discussing equal moral membership the author focuses on opinions in *Navtej Singh Johar* v. *Union of India*[7] and *Suresh Kumar Koushal* v. *Naz Foundation*,[8] wherein the Hon'ble Supreme Court marshalled comparative jurisprudence while analyzing theory of proportionality and legitimate state purpose in interpreting Article 14 of the Constitution while interpreting the validity of Section 377 of the India Penal Code. Justice Chandrachud's vision of the Constitution as being of transformative in character in terms of rights of marginalized, depressed, and neglected classes was found particularly inspiring by the author. The author has also deeply discussed the *Sabarimala temple entry case*,[9] the *NALSA case*[10] and the *N.M. Thomas case*[11] highlighting the organic nature of the Constitution of India.

In part II of the book, the author discusses the development of transformational constitutionalism while elaborating on horizontal discrimination faced in the housing sector, invoking and evaluating the judgments in cases viz. *Shelly* v. *Kraemer*,[12] *Re*

[6] Justice Chandrachud observed in *Joseph Shine* v. *UOI*, 2018 SCC OnLine SC 1676.
[7] (2018) 1 SCC 791.
[8] *Suresh Kumar Koushal* v. *Naz Foundation*, *Supra* note 4.
[9] *Indian Young Lawyers' Association* v. *Union of India*, W.P. (Civ.) 373/2006.
[10] *National Legal Services Authority* v. *Union of India* (2014) 5 SCC 438.
[11] *State of Kerala* v. *N.M. Thomas*, *Supra* note 4.
[12] 334 U.S 1 (1948).

Drummond Wren,[13] *Noble* v. *Alley*,[14] and *the Curatores* v. *University of Kwa-Zulu Natal.*[15]

The Supreme Court in *Indian Medical Association* v. *Union of India*[16] held that housing discrimination is unconstitutional on an expansive reading of Article 15(2) and ruled that under Article 15(2), educational institutions were covered under the term 'shops'. The Court rejected the standard use of the word 'shop'. This is a transformative judgment because it allows us a glimpse of how one day the constitution may be invoked to bridge the chasm between dream and reality.

The author has also discussed the contentious topic of religious freedom and group identity as enshrined in Articles 25 and 26 of the Constitution, which is yet ignored in wider decision making and legislative drafting. The author, while invoking Dr. B.R. Ambedkar, has very succinctly introduced the issue of equality within the religious domain, a debate unlikely to die down anytime in the near future. Through this, the author elaborates on the transformational character of the Indian Constitution.

In the final part, the author discusses the aspect of liberty, community and individual, and liberty of speech and association. According to Mr. Bhatia, it is the idea and notion of liberty that has undergone humungous transformation brought about by a liberal interpretation of the Indian Constitution in various cases viz. *T. Sareetha* v. *T. Venkatasubbaiah*,[17] *Dadaji Bhikaji* v. *Rukhmadai*,[18] *Gobind* v. *State of MP*,[19] from *Griswold*[20] to *Roe,*[21] *Shreya Singhal* v. *Union of India*,[22] *Anup Bhuyan*,[23] *Indra Das*[24] *and Raneef*[25] *and Jyoti Chorge* v. *State of Maharashtra*[26] have been discussed to emphasize the role of the courts in bringing about such transformation.

---

[13] [1945] OR 778 (Ont HC).
[14] [1951] S.C.R.64.
[15] 2011(1) BCLR 40 (SCA).
[16] *Indian Medical Association* v. *Union of India*, *Supra* note 4.
[17] *T. Sareetha* v. *T. Venkatasubbaiah, Supra* note 4.
[18] (1886) 10 I.L.R. (Bom) 301.
[19] AIR 1975 SC 1378.
[20] *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).
[21] *Roe* v. *Wade*, 410 U.S. 113 (1973).
[22] (2015) 6 SCC 1.
[23] (2011) 3 SCC 377.
[24] (2011) 3 SCC 380.
[25] (2011) 1 SCC 784.

The author concluded the chapter by examining the impact of Justice Thipsay's approach[27] upon other restrictive legal regimes such as the Goonda Acts and the Public Safety Acts that exist in various states to argue that its transformative vocabulary provides us with the language and resources to think afresh about these laws, and to challenge their continued existence on the statute books on grounds of personal liberty.

At the time of independence, India was a society characterized by authoritarian political power, legal and social inequalities, and unaccountable private regimes of domination. The constitution acknowledged both this legacy and reality, and sought to transform it. But, today, Transformative Constitutionalism is at risk in a world where the relationship between individuals, and sometimes even enemies, is defined by technological systems. Like most other things, this is not a problem that can be solved in a courtroom, but it does require a constitutional and judicial response. The Supreme Court took the first step towards articulating such a response in *Common Cause* v. *UOI*.[28] The technological Self-Determination must form the basis of how we understand the relationship between technological systems and the constitutional trinity of liberty, equality and fraternity. Technological Self-Determination must be at the heart of the transformative constitutional order of twenty-first century. The dissenting opinion of Justice D.Y. Chandrachud grasped the beginnings of this principle in the *Aadhaar case*.[29] A transformative constitutionalism is a rebuke to illusions of infallibility.

The Indian Constitution is a fundamental legal document, representing the transformation from being ruled to becoming a nation of free and equal citizenship. The book draws on pre-independence legal and political history to argue that the Constitution was intended to transform not merely the political status of Indians from subjects to citizens, but also the social relationships on which legal and political structures rested. He puts forth a novel vision of the Constitution, and of constitutional interpretation, which is faithful to its text, structure and history, and

---

[26] *Jyoti Babasaheb Chorge* v. *State of Maharashtra, Supra* note 4.
[27] *Ibid.*
[28] *Common Cause* v. *UOI, Supra* note 4.
[29] *K.S. Puttaswamy* v. *Union of India* (2019) 1 SCC 1.

above all, to its overarching commitment to political and social transformation. The author studied Indian judgments in light of American jurisprudence, and has brought to the fore interesting arguments and analysis while discussing the evolution of Constitutional principles. This book contains a well-thought-out collection of cases which have, over the years, enriched the jurisprudence pertaining to rights and liberties, and supplemented the organic growth of the Constitution of India, which every student of law must imbibe, every practitioner of constitutional law must read, and every legal researcher must ponder upon.

JUDICIAL DISSENT AND INDIAN SUPREME COURT: ENRICHING CONSTITUTIONAL DISCOURSE By Dr. Yogesh Pratap Singh, Thomson Reuters, Gurugram (2018), Pp. xix+507, Rs. 975/-

*Reviewed by Amrendra Kumar Ajit**

A statement that must be made before anything else is said about this book is that it is the very first book on an unexplored field of legal research, i.e., judicial dissent in India. Judicial dissent is an inherent quality of an independent judiciary which has never before been analysed in such depth by Indian legal academia. It offers a very broad analysis of judicial dissent exercised by the Indian Supreme Court from 1950 - 2010. The book is based on comprehensive empirical studies of dissent given by the Supreme Court Judges in the last sixty years.

This book is an exceptional contribution on the subject. Dr. Justice D.Y. Chandrachud wrote its emphatic and compendious 'Foreword', emphasizing the plurality of thought and dissent as core elements of democracy, and the importance of dissent in a judicial system in promoting constitutional dialogue which is helpful in introspecting the working of our democracy. In the preface, the author recounts the historical importance of dissent in different societies and religions of the world, and how later it became the part and parcel of common law judicial system followed by its adoption in the Indian judicial system. The work starts with a philosophical foundation of dissent and its acceptance across the comparative judicial spectrum and goes up to the modern trend of dissent in the apex court. It is divided into seven chapters which are elaborated in four hundred ninety pages. It's a well and empirically researched book that provides data through nine figures, twenty seven tables and two appendices.

The first chapter of the book is the 'Introduction'. It focuses on the basic understanding of Indian Judicial system and judgment writing approach, and its applicability as judicial precedents. The author analyses the functional aspects of *ratio decidendi* and *obiter dictum* and their application as well as acceptance in judicial

* Assistant Professor at Law Centre-I, Faculty of Law, University of Delhi. He served at NLUO, Cuttack and HNLU, Raipur prior to joining the University of Delhi.

hierarchical structure. The importance of precedential mechanism and its effect on judicial decision making process has been emphasized. The chapter recounts the acceptance of dissent in the diverse legal culture of decision making and judgment writing in different legal systems of the world including India.

The second chapter 'Genealogy of Judicial Dissent' illustrates philosophical and comparative historical foundation of dissent and judicial dissent in different societies *vis-a-vis* legal systems of the world. It describes the importance of dissent in the development of societies, religious and spiritual beliefs, and constitutionalism. The author has well-articulated the acceptance of dissent in the last two centuries by different types of court system in the major legal systems of the world. Initial part of this chapter is very helpful to understand the development of judgment delivery system in Britain. The middle part of the chapter talks about the importance of dissent in Scandinavian, Latin American and Asian countries and the latter part mainly focuses on American and Indian dissent. The United States tradition of dissent is well analysed in this chapter. The chapter unfolds the historical narrative of judicial dissent in USA from 'seriatim' to 'consensus' and from 'consensus' to 'collegiality'. Lastly, the historical trend of judicial dissent in India is covered. Colonial Indian judiciary, based on common law system, starts its journey from the establishment of the Supreme Court at Calcutta. The judges of the Court laid down the foundation of writing dissenting opinions, but due to lack of good reporting, proper records of the cases are not available. Dissenting opinions of the Privy Council, the Federal Court of India and the Supreme Court of India are briefly discussed by tracing the historical developments. The practice of dissent is not only an essential constituent of judicial determination of truth but an inbuilt intra-organ control which keeps a constant check on the deliberations of majority. This chapter emphasizes the two roles carried out by dissent in the two different phases of history. First, dissent was used to limit the power of court and second, sometimes it increased the power of court.

The third chapter of the book 'Constitutionalism, Judicial Independence and Judicial Dissent' mainly prepares the background for upcoming chapters and starts with the historical evolution of constitutionalism in different periods. The author deals with Indian experience of constitutionalism and explains three different types

on control mechanisms to maintain constitutionalism, i.e., vertical control device, horizontal control device and intra-organ control device within judiciary. The chapter is very informative and well explained. The intra-organ control mechanism part provides the internal functions and checks and balances within the system itself. There is a challenging role of the judiciary, especially in maintaining constitutionalism as well as its independence.

This chapter deals with a comparative study of judicial independence of USA, UK and India. The principle of judicial independence is designed to protect the system of justice and rule of law and thus maintain public trust and confidence in the court. The author suggests three basic elements of judicial independence, i.e., insularity, impartiality and authority. These three elements are examined in detail with the use of comparative analysis, to suggest how the countries tried to protect the independence of judiciary by adopting different mechanisms at different levels, such as process of appointment of judges, tenure, removal, practice of recusal and building public confidence etc. Dissent plays an important role in maintaining impartiality and authority.

In this chapter, the author has tried to build the argument of setting judicial independence as one of the main functionaries of constitutionalism, which can only be imagined in an impartial judicial structure with dissent being its basic component. When a judge dissents in a multi member bench, he communicates that he is not under the influence of external or internal factors. In addition to this, the author also enlightens the reader on the practice of post retirement appointments and sees it as threat to impartiality of the judiciary, backing it with some empirical data. This chapter talks very little about dissent except at the end, but the chapter as a whole builds a strong foundation to understand the role of judicial dissent.

The chapter four on 'Why do Judges Dissent? Theoretical Underpinnings' is the author's next stage of argument to advance the conceptual understanding about dissent jurisprudence. It covers the different ambits of dissent in judicial pronouncements. Dissent is not only rejecting the disposition reached by the majority, but also covers dissent in concurring opinion.

Dr. Yogesh has meticulously examined the basis of dissent and its functionality with different aspects. He starts the discussion describing the four types of dissents, i.e., reargued action, reconnaissance dissent, caution dissent, and exploratory dissent as propounded by Roscoe Pound. The functional aspect of dissent is discussed in great detail including its negative implications like impediments to rule of law, doubt creation on court's opinion, affecting future carrier of judges etc. The legitimacy of dissent is tested with various theories, and it is believed that many dissenting opinions are a testament of various belief systems of the Justice's. The main emphasis of the chapter is on its discussion on 'determinacy or indeterminacy of legal text and materials' and in this context, the author has critically analysed the jurisprudential investigation of different foreign scholars including Hart, Dworkin, Benditt etc. on the issue. The same issue of determinacy and indeterminacy is well correlated to the Indian context. This correlation is highly appreciable on the part of author, who provides an opportunity to the reader to understand judicial realism in Indian context.

In the later part of this chapter, behavioural realism is explained and discussed. The importance of understanding behavioural perspective in the judicial decision making process is an aspect that cannot be neglected in the study of dissent. The study reflects the analysis of Prof. Glendon Schubet's research on American Supreme Court's jurists and the same method of behavioural jurisprudence is applied to the Indian context to the judges of the Indian Supreme Court. This main perspective of the chapter is not to defend legal realism, but to analyse the element of belief system and other non-doctrinal factors in the process of judicial decision making including dissent.

The fifth chapter is 'Leading Dissenting Opinions' which analyses thirteen important Supreme Court Judgements, categorized into three parts, having notable dissenting opinions. First, dissenting opinion received legislative recognition, second, dissenting opinion received judicial approval and third, dissenting opinion received administrative approval. The author has tried to select at least one leading case from each decade of the history of Supreme Court.

ADM Jabalpur v. *Shivakant Sukla*[1] is an important case, and its dissenting opinion received legislative recognition. The dissenting opinion of Justice H.R. Khanna in this case is one of the most powerful dissents in Indian judicial history. He held that Article 21 could not be considered to be sole repository of the right to life and personal liberty. The right to life and personal liberty is most precious right of human beings governed by rule of law and cannot be taken away under any circumstances without the authority of law. The content of Justice H. R. Khanna's dissenting opinion was explicitly recognised by the Constitution (Forty-fourth Amendment) Act, 1978. Another leading dissenting opinion was given by Justice Fazl Ali in the *A.K. Gopalan* v. *State of Madras*[2] case. His minority opinion extended the notion of personal liberty under Part III of the Constitution. The author has analysed all thirteen cases and the impact of their dissenting opinion on Indian constitutional jurisprudence in detail.

This chapter covers various dissenting opinions of the Supreme Court which have received wide academic recognition, and come under the category of progressive dissenting opinions. The author has carried out an empirical study of these decisions which includes seven judgments, presented in a tabular form in Table no. 5.3 on page 295. This chapter includes both types of dissenting opinions: minority and concurring opinions. It also highlights the possibility of disagreements due to lack of collegiality in a bench or political differences between presiding judges.

The penultimate chapter 'Ontological Survey of Decision Making in the Supreme Court' is completely based on empirical study of sixty years' data from 1950 to 2010. It empirically analyses the practice of dissent, its various trends, and its impact on the legal and judicial system. It is based on qualitative and quantitative methods. The initial part of the chapter focuses on classical and hybrid modes of expressing opinion and styles of writing. Empirical data of supplementing opinion and supplementing concurrent opinion suggest the judicial writing process of our judges of the Apex Court. An interesting data-set (Table 6.3, page no 425) has been provided by the author about the judges who didn't express any opinion – neither dissent not concurrence – but rather remained silent on the issue at hand. The author has done stupendous work and analysed the rate of dissent in a wide spectrum of cases

[1] AIR 1976 SC 1207.
[2] AIR 1950 SC 27.

including dissent in different types of benches for last sixty years, subject wise dissent, judges not writing dissent, decade wise dissenting opinion, dissent in Chief Justice's bench, etc. The empirical data deals with both institutional and individual rates of unanimity and dissent in six decades. The author argues that dissent was more likely when the court was dealing with constitutional matters, and some of the dissents have made a significant impact on legal reform through legislative enactment or judicial interpretation.

All these empirical studies are supported by extensive data. This study shows that there is a decline fine dissent which started due to impact and influence of Ms. Indira Gandhi, who was in favour of 'committed judiciary' in the third decade of the Apex Court and is still in continuation. This chapter poses several questions on judges' opinion writing and provides a solid background for further research on issues relating to dissent.

In Chapter seven, the author concludes that the practice of dissent represents, inimitably and even paradoxically, an institution within an institution. Some of the most important contributions made by the apex court are the result of nothing but disagreement in the bench. Institutional structure plays important role in dissent. Size of the bench is directly related to the likelihood of dissent. Another conclusive finding of the author is that 'rate of dissent is inversely proportional to the power of the court'. If the rate of dissent is very high it reflects the fractured authority of the court. Judicial dissent also has a direct bearing upon judicial independence. In another words whenever judicial independence is threatened by external or internal differences, it would affect the practice of judicial dissent. Decline of judicial dissent raises several and severe apprehensions on the institution of judiciary.

The author has suggested various recommendations on the issues concerned. Some important suggestions include constitution of larger benches which may ensure better accountability amongst the judges because of opportunity of dissent, which act as an intra-organ control. The author also sees the collegium system as being against the separation of power doctrine, and finds that the lack of transparency in the appointment and transfer of judges by the collegium has created a question mark on

the independence and authority of the apex court. It has also been emphasized that expression of opinion should be mandatory for all the judges on the bench.

This book makes for an interesting reading as it forays into a unique area of unexplored legal knowledge. It extensively traverses from historical comparative study to analysis of empirical findings. It provides a golden opportunity for the reader to know about the development of dissent jurisprudence in India and other part of the world. The author also provides wonderful insights on judicial dissent, and has made several arguments and observations on its different aspects. The extent of research, effort and quality of critical evaluation of the landmark dissenting judgment is laudable. Extensive use of data, table and figures make this book more authentic and authoritative. The book is exceptionally well written with lot of references and provides quality insight into the dynamics of dissent in the Indian apex judicial system. Author has started a new debate in the Indian subcontinent on the issue which will incentivize other researchers to carry similar and further studies for different high courts. This book is a value addition to the understanding of judicial dissent in India.

COMMENTARY ON THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005, RESEARCH AND PRACTICE by Dr. Rajesh Gupta and Dr. Gunjan Gupta, Vinod Publications Pvt. Ltd., New Delhi (2019), Pp. 882, Rs. 1530/-

*Reviewed by Belu Gupta Arora**

The empowerment of women has become one of the most laudable slogans in every society but the violence to which women are subjected within their own households has hardly caught the eyes of the public. The time has come for the position and condition of a woman within her family to be strengthened and respected. The issue of domestic violence is undoubtedly a violation of human rights and thus it has always attracted attention at a national and international level. The Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1995) have very well acknowledged this evil. It has also been recommended by the United Nations Committee on Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) that every effort should be made by State parties to ensure that no woman is subjected to any kind of violence, especially within her family. The practice of domestic violence is rampant in India but has hardly ever been reported sufficiently. Till 2005, any kind of cruel act against a woman was dealt only under Section 498A of Indian Penal Code as an offence and there was no remedy for the same in civil law. Thus in order to provide a remedy in civil law to the victims of domestic violence and to prevent such further happenings, Protection of Women From Domestic Violence Act, 2005 (hereinafter referred to as D.V. Act, 2005) was passed.

The book under review has very successfully dealt with explaining the meaning of domestic violence and giving a clear insight into the different forms in which this evil manifests itself deep in society. The authors have conducted detailed research and have discussed and analyzed various recent judgements for the better understanding and appreciation of the subject. The book consists of 5 chapters and 26 annexures. Every chapter contains a detailed synopsis of the contents contained

* Assistant Professor at Law Centre-II, Faculty of Law, University of Delhi.

therein and also the headings and sub-headings to help the reader to locate the specific area. The very uniqueness of the book lies in the fact that authors have shared their observations either in between or at the end of every chapter and have raised poignant questions which will necessarily become part of further research.

The first chapter titled 'Preliminary' deals extensively with the meanings of various important expressions used in D.V. Act, 2005 to establish a basic understanding of the subject and grips the attention of the readers by bringing clarity through detailed comments and explanations. The authors herein discuss that though the D.V. Act, 2005 has been passed keeping in view the rights guaranteed under Articles 14, 15 and 21 of the Constitution of India, the rights given to women under D.V. Act, 2005 are better rights and will prove to be more beneficial in redressal of their plight. The chapter also touches upon Bangladesh Domestic Violence (Prevention and Protection) Act, 2010 and Pakistan Domestic Violence (Prevention and Protection) Act, 2012, both of which have drawn inspiration from our D.V. Act, 2005. Elaborating the meanings of various terms such as 'protection', 'women', 'human being', 'female', 'adult', 'violence' etc., and the authors criticises the approach of the Supreme Court in *Dipanwita Roy* v. *Ronobroto Roy*[1] wherein the court allowed the DNA test to prove paternity and thus made Section 112 of Indian Evidence Act, 1872 redundant. The authors express their grief that this judgement of the honourable court is a kind of violence on the dignity of women and it would help the husband to file for divorce against wife on charges of infidelity by avoiding the rigours of Section 112 of the Evidence Act, 1872. The authors also observe that conducting tests in the nature of DNA will have wider implications with respect to right to privacy, right against self-incrimination, law of adverse presumption, law of legitimacy of child and so on.

The chapter then provides a detailed discussion on 'Transgenders and their Gender Identity' wherein the authors raise a very pertinent question as to whether a 'third gender' would be entitled to derive benefits from the D.V. Act, 2005 with respect to the right to residence, the right to maintenance, the right to custody of children or *stridhana* etc. and so on and whether the complainant would be termed to be a 'woman' for the said purpose. The authors then explain various definitions

[1] AIR 2015 SC 418.

contained in Section 2 of the D.V. Act, 2005. Some pertinent questions have been raised and answered in this portion giving more clarity to the meaning of these definitions. The authors have answered the position of a wife who never lived with her husband even for a day,[2] or of a wife who lived prior to the coming into force of the D.V. Act, 2005,[3] or the retrospective effect of D.V. Act, 2005.[4] The meaning of the expression 'shared household' has been discussed extensively through various judgements as *S. R. Batra* v. *Taruna Batra*,[5] *Navneet Arora* v. *Surender Kaur*,[6] *Sunita Gangwal* v. *Chottey Lal*.[7] This chapter closes with the opinion of the authors that compensation in lieu of alternate accommodation can answer all remaining issues between the parties.

The next chapter deals with the widest definition of 'domestic violence' as defined in Section 3 of the D.V. Act, 2005. The authors explain every facet of this definition by elaborating upon the concepts of economic abuse, emotional abuse, verbal abuse, physical abuse or sexual abuse. This is a brief chapter covering the elaborate definition of 'domestic violence'.

The third chapter discusses the roles and responsibilities of the officers created by the D.V. Act, 2005 for providing relief to the victims of domestic violence. The uniqueness and significance of the chapter lies in the fact that along with every section its relevant rules[8] are also mentioned hand in hand. The chapter proceeds to explain how the redressal machinery is set into motion after a Domestic Incident Report (DIR) is prepared by the Protection Officer on receiving a complaint of domestic violence. The chapter then explains the duties of police officers, service providers and Magistrates. Also mentioned are the duties of the shelter homes, duties of medical facilities and duties of the government.

The fourth chapter deals with the procedure for obtaining orders of relief from the officers discussed in Chapter III. These orders could be the right to reside in a shared

[2] *Angshuman Chakraborty* v. *Arpita Bannerjee*, 2016 CRI. L.J (1052) Calcutta.
[3] *Amit Agarwal* v. *Sanjay Agarwal*, 2017 CRI. L. J. 3570 (P& H).
[4] *Indra Sarna* v. *V.K.V. Sarna* (2014) 2 AD (SC) 447.
[5] AIR 2007 SC 1118.
[6] 213 (2014) DLT 611 (DB).
[7] (2018) 248 DLT 22.
[8] Protection of Women from Domestic Violence Rules, 2006.

household,[9] protection orders,[10] residence orders,[11] monetary reliefs,[12] custody orders[13] or compensation orders.[14] The authors bring clarity to the distinction between Sections 12 and 26 of D.V. Act, 2005. It is mentioned that when a Magistrate passes an order, he shall receive the report (DIR) from the Protection Officer, but such a report is not contemplated when an order is passed by the Civil Court or by the Family Court.[15] It also highlights the importance of the procedure laid down in Section 28 of the D.V. Act, 2005. Essentially the provisions of Code of Criminal Procedure, 1973 (CrPC) have been made applicable to the D.V. Act, 2005 by virtue of Section 28(1) of the D.V. Act, 2005, barring a few exceptions laid down in the section itself. This chapter closes with a discussion on the topic of appeals as mentioned under Section 29 of the Act. Herein the authors discuss the important judgements in the *Shalu Ojha* case[16] and the *Rajeev Preenja* case[17] throwing light upon the possibilities of filing a revision before the High Court under Sections 397, 401, and 482 CrPC over and above the Appeal as provided in Section 29 of D.V. Act, 2005.

The last chapter deals with miscellaneous provisions wherein the authors unfold the chapter by noting that the D.V. Act does not itself make any act, omission or conduct constituting violence, punishable with any imprisonment, fine or other penalty, it is only the non-compliance of the orders passed under Sections 18 and 23 of the Act, which have been made punishable under Section 31 of the Act. The three essential elements of Section 31 of the Act, namely 'breach', 'protection order' and 'respondent' have been discussed in detail to throw light upon the penalty for breach of protection order by respondent. The authors express their view that any order passed under the Act is a protection order including maintenance order and in case of a breach whereof, Section 31 of the Act would be attracted.

There are 26 annexures at the end of the book which prove to be really helpful and useful for the readers to do a comparative study between the law on domestic

[9] Domestic Violence Act, 2005, s. 17.
[10] *Id.,* sec. 18.
[11] *Id.,* sec. 19.
[12] *Id.,* sec. 20.
[13] *Id.,* sec. 21.
[14] *Id.,* sec. 22.
[15] *M. Palani* v. *Meenakshi*, AIR 2008 Mad 162 (165).
[16] *Shalu Ojha* v. *Prashant Ojha,* AIR 2015 SC 170.
[17] *Rajeev Preenja* v. *Sarika* (2009) 5 AD (Delhi) 497.

violence in India and various other countries. To name a few, the authors have included the law on domestic violence in countries like Australia, Bangladesh, Japan, Malaysia, Mauritius, Nepal, Pakistan, etc. in this book which facilitate an understanding and appreciation of the nuances of this evil for readers and researchers alike, and to give a meaningful redressal to the victims of domestic violence.

The book has been written in a very lucid manner and connects well with the readers. The authors have made every effort to cover the latest judgments on the issue and have also consistently given their observations which shows their long experience, vast knowledge and understanding of the subject.

FORM IV

Statement of Ownership and other particulars about the
Delhi Law Review

Place of publication	Faculty of Law University of Delhi Delhi – 110007
Language	English
Periodicity	Annual
Printer's Name, Address and Nationality	Faculty of Law University of Delhi Delhi – 110007
Publisher's Name, Address and Nationality	Prof. (Dr.) Vandana. Indian Acting Head and Dean, Faculty of Law University of Delhi Delhi – 110007
Editor's Name, Address and Nationality	Prof. (Dr.) Vandana, Indian Acting Head and Dean Faculty of Law University of Delhi Delhi – 110007
Owner's Name	Faculty of Law University of Delhi Delhi – 110007

I, Vandana, hereby declare that the particulars given above are true to the best of my knowledge and belief.

Sd/-

Date: 21 June 2021 Vandana

FACULTY OF LAW
UNIVERSITY OF DELHI
DELHI - 110007