The Indian Advocate

JOURNAL OF THE BAR ASSOCIATION OF INDIA

- The Cordozo of India
- Balance Between Right to Life and IPR
- Abolition of Death Penalty
- Judicial and Court Reforms
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President's Page

Indian Legal Profession is second to none. We can face the challenge and healthy competition from foreign lawyers – as and when those are allowed in India. The threat to Indian legal profession comes not from foreign lawyers but from Multinational Accountancy Firms (MAFs).

The regulatory body of Chartered Accountants and the accountancy firms are to be blamed for the unauthorised, unregulated and uncontrolled activities of these accountancy firms which have completely either taken over or destroyed the domestic firms and grabbed most of the audit work and advisory work from the domestic firms. What is indeed shocking is that their presence and activities are not regulated by any authority. The Code of Conduct for Chartered Accountants is being flouted with impunity. The real beneficiaries are the foreign owning companies of these MAFs.

There is an urgent need for government to set up a Committee of Experts to look into the entire gamut of activities of these multinational firms including revisiting the CA Act to appropriately discipline and regulate MAFs.

The Bar Association of India will move the government to ensure that a thorough investigation should be carried out inter-alia to highlight the nefarious role of these firms in encroaching upon the legal work and engaging in practice of law which is strictly prohibited under the Advocates Act. Under the said law only lawyers duly registered with the Bar Councils can engage in practice of law to the exclusion of all other persons and professions. Accountancy firms have made serious

inroads into the work of lawyers – usurping the activity of appearances before authorities and tribunals, advising on legal issues of Mergers and Acquisitions, Competition Law, drafting legal documents such as joint venture agreements, technology transfer agreements, advisory and opinion work on legal issues, conveyance of properties and in IPR related legal work.

The threat to legal profession is not from professional colleagues from overseas but from trespassers operating within the country

LALIT BHASIN

Editorial

The Bar Association of India has always acted as a window to the world for the legal profession in India. The Association represents India in all the major International bodies of legal profession like the International Bar Association, Lawasia, IPBA, UIA, POLA and others.

It was a proud spectacle to witness Mr Anil B Divan, being felicitated by the President and the Prime Minister of Sri Lanka in front of other dignitaries during the Golden Jubilee Conference of Lawasia in Colombo in August 2016 as a past President of Lawasia.

Hosting of the Third BRICS Legal Forum at New Delhi by the Association in September 2016 was another historic development. The Association in close collaboration with the China Law Society formed and conceptualised this unique organisation which is aspiring to provide thought leadership and platform for participation of the emerging economies in structuring the new world legal and economic order in a more democratic and inclusive manner. Launch of New Delhi Centre for International Dispute Resolution for BRICS and Emerging Economies during the forum signalled the beginning of a new era in this direction. Over twenty young lawyers from four BRICS countries were trained in Indian Laws and legal system as a part of BRICS Legal Talent Development Programme in collaboration with the Amity University.

As another first, December 3, the birth anniversary of india's first President Dr Rajendra Prasad, who himself belonged to the legal profession and had inaugurated the Bar Association of India in 1960, was institutionalised as 'Lawyers of India Day' by the Association. Members of the Board of Advisers of the Association, all stalwarts of the profession, were felicitated to mark the occasion. The felicitation

was carried out in a most befitting manner by the doyen of Indian legal education – Professor Madhav Menon.

The Association, under the new leadership of President Dr Lalit Bhasin has taken up the mantle of promoting grass root participation of the district bars in promoting excellence in the profession. As India is poised to remain one of the fastest growing economies of the world, the challenge for the legal profession to help sustain and accelerate India's economic growth is tremendous. At the same time, the challenges that require legal profession to be at the forefront of sustaining the rule of law, independence of judiciary and the human rights predicated on an inclusive and sustainable development have not dissipated in India and elsewhere in the world. Indian bar and the legal profession is being looked upon by the emerging world to provide leadership. The task in front of the Association is formidable. As a voluntary, completely a political, and self funded organisation of the legal profession in India, the credibility and public trust enjoyed by the Association is unique and it will take every initiative to harness this for the promotion and sustenance of the rule of law and economic development based on an inclusive and sustainable model.

There is a change of guard in the Editorial Team of the Indian Advocate. From the next issue onwards, Ms. Madhavi Divan, will helm this official journal of the Bar Association of India as its first woman Editor.

PRASHANT KUMAR

Justice K.K. Mathew– "The Cardozo of india"

Judge, High Court of Kerala: 05/06/1962 to 03/10/1971
Judge, Supreme Court of India: 04/10/1971 to 02/01/1976

F.S. Nariman[1]

A collection of addresses and essays by Justice K. K. Mathew along with excerpts from his judicial opinions (published in 1978 under the title "Democracy, Equality and Freedom") became the first work of its kind in Indian legal literature. Regrettably, it was also the last! The hope expressed by its Editor, Prof. Upendra Baxi, that it would be the pre cursor to similar literary ventures in the future remained unfulfilled.

In a practical sense, the book "Democracy, Equality and Freedom" published by the Eastern Book Company–with a foreword by Justice Y.V. Chandrachud, Chief Justice of India–is why Justice K. K. Mathew is still remembered, 40 years after he stopped sitting in India's Supreme Court. But for the illuminating and exhaustive 86-page Introduction expounding the judicial creativity and craftsmanship of the Judge, K. K. Mathew, would have been just one judge, out of a roll-call of 186 Judges who had sat in India's Supreme Court! Baxi has been moved to say that Justice Mathew's minority opinion in *Keshavananda Bharati* (one out of several in a Bench of 13 Judges) "ensures him the fame of being the Cardozo of India"![2] The reason for Baxi's spontaneous remark is Justice

1 Senior Advocate, Supreme Court of India.

2 Benjamin Nathan Cardozo, when on the New York Court of Appeals became America's most celebrated State common law Judge. In tort law he was renowned for expanding the class of persons to whom a legal duty was owed. His method of reaching decisions made him the standard bearer for a movement that came to dominate American legal thought. Whilst still serving on the Court of Appeals he was invited to deliver the Storrs Lectures at Yale, which became his classic

Mathew's masterly use of contemporary jurisprudential thinking when attempting to resolve the "fundamental puzzle" of India's Constitution. His opinion in *Keshavananda Bharati* is a mini-treatise on the use of jurisprudence in judicial law making! Justice Mathew approached the question of amendment of the Constitution as a constitutionalist, expounding a written document of governance. He refused to accept that the makers of the Constitution ever intended that Fundamental Rights should be subservient to Directive Principles of State Policy; rather (he said) they visualised a society where rights in Part-III and aspirations in Part-IV would co-exist in harmony –

> "*A succeeding generation might view the relative importance of the fundamental rights and directive principles in a different light or from a different perspective. The value judgment of the succeeding generations as regards the relative weight and importance of these rights and aspirations might be entirely different from that of the makers of the Constitution. And it is no answer to say that the relative priority value of the directive principles over fundamental rights was not apprehended or even if apprehended was not given effect to when the Constitution was framed or to insist that what the directive principles meant to the vision of that day it must mean to the vision of our time.*"

Justice Mathew concluded that 'the only limitation to the amending power in the Constitution was that the Constitution could not be repealed or abrogated in the exercise of the power of amendment

statement of the proper judicial decision-making process: *The Nature of Judicial Process* (1921). Cardozo argued for what he described as sociological jurisprudence, rooted in a sophisticated understanding of positivist jurisprudence and expressed himself with elegance and clarity. He was Associate Justice of the Supreme Court of the United States from 1932 to 1938. Cardozo's opinions, like those of Justice Holmes and Justice Brandeis, are cited for the authority of the author and the clarity of his pen. He is remembered in innumerable current opinions of members of the Supreme Court for his attention to justice, his emphasis on the purpose of law, and for his majestic description in his books and opinions of the relationship between policy and precedent.

without substituting a mechanism by which the State was constituted and organised –

> *"that limitation flows from the language of the Article (Article 368) itself".* I don't think there were or are any implied or inherent limitations upon the power of Parliament under the Article."

But whatever be the contribution of Justice Mathew to the Great Fundamental Rights Case, the more important – the more seminal – decision of his was in the immediately succeeding Case (*Indira Gandhi vs. Raj Narain*: 1975 Suppl. SCC 1); his opinion in this case illustrated what a strict self-disciplinarian the Judge was; like other dissentients in *Keshvananda Bharati* (Ray C.J., Beg J., and Chandrachund J) Justice Mathew was able to overcome the initial intellectual difficulty of reconciling his reasoning in that case with the impelling need to hold that Article 329A (challenged in *Indira Gandhi vs. Raj Narain*) was constitutionally impermissible. Unlike Chief Justice Ray he did not say (in *Indira Gandhi vs. Raj Narain*) that *Keshvananda Bharati* did not decide that there were any implied limitations (arising out of the doctrine of basic structure) to the amending power of Parliament. In fact he straightway conceded (as did Justice Y.V. Chandrachud) that there was a seven-Judge majority (in a Bench of 13 Judges) for the proposition that "the power conferred under Article 368 ..... was not absolute." Having done so, in conformity with the basic norm of judicial discipline, he then proceeded to identify *democracy* as an aspect of the basic structure doctrine! Article 329A as enacted had removed past, present and future operations of the Representation of Peoples Act, 1951, to election disputes affecting the Prime Minister and Speaker, and despite the absence of any applicable law it had (in effect) adjudicated the election dispute between Mr. Raj Narain and Mrs. Indira Gandhi! In so doing the amending body neither "ascertained the facts of the case" nor "applied any norms for determining the validity of the election", and hence this was (according to Justice Mathew) plainly an exercise of "despotic power" damaging the democratic structure of the constitution!

One of the delightful excursions noted in the judgments of Justice Mathew are his footnotes – they exhibit a vast and varied reading and learning about men and matters! As for instance where in dealing with the reason why the power to pass Bills of Attainder were taken away from the US Congress, Mathew J. quotes (in *Indira Gandhi vs. Raj Narain*: 1975 Suppl. SCC 1 at page 127) a piece from Macaulay's History of England – in a footnote. It reads:

> "Macaulay's account of the attainder of Sir John Fenwick in 1696, the last in the history of the House of Commons, is particularly vivid:
>
> > "Some hundreds of gentlemen, every one of whom had much more than half made up his mind before the case was open, performed the office both of judge and jury. They were not restrained, as a judge is restrained, by the sense of responsibility….. they were not selected, as a jury is selected, in a manner which enables a culprit to exclude his personal and political enemies. The arbiters of the prisoner's fate came in and went out as they chose. They heard a fragment here and there of what was said against him, and a fragment here and there of what was said in his favour. During the progress of the bill they were exposed to every species of influence. One member might be threatened by the electors of his borough with the loss of his seat.… In the debates arts were practiced and passions excited which are unknown to well constituted tribunals, but from which no great popular assembly divided into parties ever was or ever will be free." [IX Macaulay: History of England, p. 207 (1900)]"

So also in the same case when dealing with Chief Justice Coke's objection to the exercise of judicial power by King James the First, Mathew J. says that much of what Lord Coke said could be applied to Parliament when it seeks to exercise power in its constituent capacity, and then recites one of the most illuminating footnotes in judicial history (in *Indira Gandhi vs. Raj Narain*: 1975 Suppl. SCC 1 at page 133):

"On Sunday morning, November 10, 1607, there was a remarkable interview in Whitehall between Sir Edward Coke, Chief Justice of the Common Pleas, and James I. We have only Coke's account of the interview and not the King's, but there is no reason to doubt its essential authenticity. The question between them was whether the King, in his own person might take what causes he pleased from the determination of the judges and determine them himself. This is what Coke says happened: "Then the King said that he thought the law was founded upon reason and that he and others had reason as well as the Judges; to which it was answered by me, that true it was that God had endowed His Majesty with excellent science and great endowments of nature, but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience before that a man can attain to the cognizance of it; and that the law was the golden metwand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace: with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said: to which I said that Bracton saith, quod Rex non debet esse sub-homine sed sub Deo et lege." It would be hard to find a single paragraph in which more of the essence of English constitutional law and history could be found. The King ought not to be under a man, *non debet esse sub-homine*, but under God and the law, *sed sub Deo et lege*. (See R.F.V. Heuston: Essays in Constitutional Law, Second Edition, pp., 32-32)."

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Justice Mathew's concurring judgment in the nine-Judge Bench decision in *St. Xavier's College*[3] (interpreting Article 30 of the Constitution) is another piece of judicial statesmanship. It stands as an affirmation that some fundamental rights are more basic and more fundamental them others! In *St. Xavier's College*, Mathew J. held that only such regulations or standards could validly extend to minority Educational Institutions under Article 30 as were related to the excellence of educational institutions in respect of their educational standards. Subject to this, minority educational institutions had a right to affiliation, and to recognition as an integral part of the constitutional right to maintain and administer educational institutions of their choice. Article 30 was thus a near-absolute right. Justice Mathew's judgment in the *St. Xavier's College* case – which followed *Keshvananda Bharati* (1973) but preceded his judgment in *Indira Gandhi* (1975) – contains observations suggesting that the preservation of Article 30 rights is one aspect of democracy – he observes for example that:

> "*the parental right in education is a very pivotal point of the democratic system. It is the touchstone of difference between democratic education and monolithic system of cultural totalitarianism*."

Article 30 emerges (in Justice Mathew's view) as an aspect of pluralism – encompassed in the basic structure doctrine. And hence Article 30 cannot be amended on the ground that some moral claims necessitated by Part-IV required this to be done!

In my view however an example of *judicial creativity at its best* is Justice Mathew's judgment in *Gobind* (1975) where he writes for a Bench of three Justices. By dexterous judicial steering of the subject-matter and with mild understatement, the judge gives the right to privacy (long since held not to be part of the Fundamental Rights Chapter) a gentle judicial push so as to help establish it as a foothold in the same chapter itself! The manner in which he gives the right a new lease of life, side – stepping the ratio of larger benches, is a marvel. Before *Gobind* the right to privacy had two rounds in the Supreme

3 1974 (1) SCC 717.

Court – first before a Bench of eight-Judges (in 1954) – in *M.P. Sharma's* case[4] - and ten years later – by majority 4:2 – in a Bench decision of six-Judges in *Kharak Singh*[5]. In both (or rather in each of them) the right of privacy as a fundamental right had been plainly negatived. Justice Mathew realised that it could not have survived – head-on – a third round! Ruminating that privacy as a fundamental right had been burnt to a cinder – he made bold to assert that "the ashes of lost freedoms are ever smouldering"! In *Gobind,* by dexterous reasoning, Justice Mathew raised this cherished right "phoenix-like from the ashes[6]". The apprehension (expressed by Prof. Baxi) that the doctrine of precedent may not also rise phoenix-like from the ashes and reduce the right of privacy (once again) to smouldering ashes now stands negatived by the judgment of a three-Judge Bench in *Justice K. Puttaswamy (Retd.)* Vs. *Union of India* where the question as to whether the right of privacy is a part of fundamental rights now stands referred to, and is to be decided afresh by a larger Bench (of seven judges). In its judgment reported in (2015 (8) SCC 735): the Court (Bench of three Judges) stated:

9. *It is true that Gobind (1975 (2) SCC 148) did not make a clear declaration that there is a right to privacy flowing from any of the fundamental rights guaranteed under Part III of the Constitution of India,* but observed that: (SCC p. 157, para 28)

> *"28. … Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterise*

4 M.P. Sharma vs. Satish Chandra – AIR 1954 SC 300 (8 Judges).

5 Kharak Singh vs. State of Uttar Pradesh – AIR 1963 SC 1295 (6 Judges).

6 The Phoenix was a mythical Greek firebird which dies in flames and is then reborn from the ashes. Under India's old law of arbitration (enacted in the Arbitration Act 1940) howsoever comprehensive the terms of an arbitration clause the existence of a contract was a necessary condition for its continued operation; it perished with the contract. In 1926 AC 497 (Hirji Mulji vs. Cheong Yue Steamship Co.) Lord Summer in a sentence of beautiful imagery had said that "an arbitration clause is not a phoenix that can be raised again by one of the parties from the dead ashes of its former self".

as a fundamental right, we do not think that the right is absolute."

10. *"However, in the subsequent decisions in R. Rajagapal (1994 (6) SCC 632) and PUCL (1997 (1) SCC 301), the Benches were more categorical in asserting the existence of a "right to privacy". While R. Rajagopal case held that the "right to privacy, is implicit under Article 21 of the Constitution, the PUCL case held that the "right to privacy" insofar as it pertains to speech is part of fundamental rights under Articles 19(1)(a) and 21 of the Constitution."*

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12. *"We are of the opinion that the cases on hand raise far-reaching questions of importance involving interpretation of the Constitution. What is at stake is the amplitude of the fundamental rights including that precious and inalienable right under Article 21. If the observations made in M.P. Sharma and Kharak Singh are to be read literally and accepted as the law of this country, the fundamental rights guaranteed under the Constitution of India and more particularly right to liberty under Article 21 would be denuded of vigour and vitality. At the same time, we are also of the opinion that the institutional integrity and judicial discipline require that pronouncement made by larger Benches of this Court cannot be ignored by the smaller Benches without appropriately explaining the reasons for not following the pronouncements made by such larger Benches. With due respect to all the learned Judges who rendered the subsequent judgments – where right to privacy is asserted or referred to Their Lordships concern for the liberty of human beings, we are of the humble opinion that there appears to be certain amount of apparent unresolved contradiction in the law declared by this Court.*

13. *Therefore, in our opinion to give a quietus to the kind of controversy raised in this batch of cases once for all, it is better that the ratio decidendi of M.P. Sharma and Kharak Singh is scrutinised and the jurisprudential correctness of the subsequent decisions of this Court where the right to privacy is either asserted or referred be examined and authoritatively decided by a Bench of appropriate strength.*

14. *We, therefore, direct the Registry to place these matters before the Hon'ble the Chief Justice of India for appropriate orders.*

15. *Having regard to importance of the matter, it is desirable that the matter be heard at the earliest."*

The decision in *Gobind* (1975) has now given a new lease of life to privacy. In *Gobind* the earlier larger Bench decision of 8 Judges in *Sharma* (1954) as well as the later majority Bench decision of 6 Judges (4:2) in *Kharak Singh* (1964) – were ignored – with a conscious deliberation that could only be tolerated in the hands of a judicial master – craftsman like Justice K.K. Mathew! The Bench decision of three-Judges in *Puttuswamy* (2015) has now given a renewed opportunity to a larger Bench of the Supreme Court to rule as to whether the right-to-be-left-alone is or is not an integral part of the Fundamental Rights Chapter! Hopefully this will be decided untrammelled by the views expressed in *Sharma* (1954) and in *Kharak Singh* (1964) because, and only because, of the Justice Mathew's restrained but eloquent exposition of the law in *Gobind* (1975).

As to how dexterously Justice K. K. Mathew in the Bench decision in *Gobind* steered clear from the larger Bench decisions in *Sharma* and *Kharak Singh* is apparent from a reading of the judgment itself. In *Gobind*, the petitioner had boldly submitted before the Bench of three Judges hearing the case that the right to privacy itself was a fundamental right, that the right was invaded since Regulation 856 framed under the Police Act of 1951, had provided for domiciliary visits and other incursions into the "privacy" of citizens. The Bench in *Gobind* (led by Mathew J.) could have taken the easy way out. It could have followed the decisions in *Sharma* (1954) – a Bench decision of eight-Judges – and the majority decision in *Kharak Singh* – Bench decision of six-Judges (1964) – 4:2 – and categorically rejected the plea that the right of privacy was a guaranteed fundamental right. It did not do so on the assumption that it is sometimes wise to pay scant regard to the rule of *stare decisis* – only sometimes! – in order that the law of the constitution should be certain. In *Gobind*, Justice Mathew traced the origin of the right to privacy in the presumed intention of the framers of the Constitution.

Speaking for the Court, Mathew J. said:

> "*There can be no doubt that the makers of our Constitution wanted to ensure conditions favourable to the pursuit of happiness. They certainly realized as Brandeis J said in his dissent in Olmstead v. United States, the significance of man's spiritual nature, of his feelings and of his intellect and that only a part of the pain, pleasure, satisfaction of life can be found in material things and therefore they must be deemed to have conferred upon the individual as against the government a sphere where he should be let alone!*"

Neatly side-stepping the ratio of larger benches, the Court gave the right a new lease of life. The unifying principle underlying the concept of privacy was the assertion (accepted by the Court) that the fundamental nature of the right is implicit in the concept of ordered liberty.

> "*Rights and freedoms of citizens are set forth in the Constitution in order to guarantee that the individual, his personality and those things stamped with his personality shall be free from official interference except where a reasonable basis for intrusion exists, 'Liberty against government', a phrase coined by Professor Corwin express this idea forcefully. In this sense, many of the fundamental rights of citizens can be described as contributing to the right to privacy".*

Fortified by more recent American decisions[7] the Court laid the basis for the doctrine that "zones of privacy" were created by the various guarantees contained in Part III of India's Constitution. But apprehending problems in this sensitive field, the Court also held that the right to privacy would necessarily have to go through the process of a "case-by-case-development"! Where the Court found that a claimed right was entitled to protection as a fundamental privacy right, a law infringing it had to satisfy the *compelling state-interest test*. Witness how carefully the proposition is phrased:

> "*Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and*

7 Griswold v. Connecticut 14 Law. Ed. 2d 510 = 381 U.S. 479, Roe v. Wade 35 Law. Ed. 2d. 147 = 410 U.S. 113

> *the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute".*

Having reached this conclusion the Court felt satisfied (in *Gobind*) that drastic inroads directly into the privacy, and indirectly into the fundamental rights of a citizen, would be made if Regulations 855 and 856 were read widely. Accordingly, the Court followed the well-worn constitutional expedient of *reading down*[8]. It *read down* the impugned provisions as being applicable only to persons *suspected* to be habitual criminals or persons *determined* to lead a criminal life or whose antecedents would reasonably lead to that conclusion. Striking a balance between the liberty of the individual and the security of the many, the court held that domiciliary visits and picketing by the police would be justified *only* in the clearest cases of danger to community security. It also ended the judgment with ray of a hope and a warning:

> "*In truth, legality apart, these regulations ill-accord with the essence of personal freedoms and the State will do well to revise these old police regulations verging perilously near unconstitutionality. With these hopeful observations, we dismiss the writ petition*"!

The decision in *Gobind* will not go down as a landmark in the development of Indian constitutional law. But it has helped to "point-the way". In *Gobind*, the Supreme Court had not only given the right of privacy a foothold in the Fundamental Rights Chapter, it had also set the tone – containing the Orwellian fear of the 'knock-on-the-door-at-night. By judicial dicta, George Orwell's frightening story "1984" has been (hopefully) pushed back for decades!

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8 The "reading down" doctrine requires that, whenever possible, a statute is to be interpreted as being within the power of the enacting legislative body. What this means in practice is that general language in a statute which is literally apt to extend beyond the power of the enacting Parliament or Legislature will be construed more narrowly so as to keep it within the permissible scope of power. Reading down is simply a canon of construction (or interpretation).

Constitutional Oath, Rule of Law and Judicial Review[1]: An Alternative Approach to Basic Structure Jurisprudence[2]

Justice Datuk Dr. Haji Hamid Sultan Bin Abu Backer[3]
Judge, Court of Appeal, Malaysia

Constitutional Oath

I have advocated in a number of my judgments a jurisprudence based on 'Constitutional Oath'.[4] It employs a simple methodology

1 Based on a lecture delivered on 21-9-2016 at DSNLU.

2 The Constitution of Malaysia and India has many similarities and this has been discussed by our former Lord President, Tun Mohd Suffian bin Hashim in His Lordship's Lecture series in India. [See Tun Mohamed Suffian, Malaysia and India–Shared Experience in the Law, V.V. Chitaley Memorial Lecture, Nagpur, All India Reporter Ltd., 1980].

3 * Judge of Court of Appeal Malaysia. He is an Honorary Visiting Professor of Damodaran Sanjivayya National Law University, Visakhapatnam, India; a barrister and a fellow of the Chartered Institute of Arbitrators. He is a graduate in Economics and also an honours and master degree holder from University of London in Insurance, Shipping and Syariah Law. He also holds post graduate diplomas in Islamic Banking and Finance and also in Syariah Law and Practice from International Islamic University Malaysia. He was a member of the Malaysian Bar Council for more than 6 years and has served as Chairman in various committees. He has been invited as a visiting Scholar of University of Sheffield in United Kingdom, and had spoken on Enforcement of Foreign Arbitral Awards in England at Chartered Institute of Arbitrators, London as well as City University of London; and also participates in various other activities of Universities such as examiner of PhD thesis, external examiner, Guest Speaker, etc. He has written on various subjects, inclusive of Civil Procedure, Criminal Procedure, Evidence, Conveyancing, Islamic Banking, International and Domestic Arbitration and many more areas on commercial law. His books grace the libraries of law firms and the chamber of judges. His books are not only used as text books in all institutions of higher learning offering law, but also used by all who are involved in the practice and administration of law in Malaysia. His doctorate thesis was on Civil Procedure and Justice. He has written about one thousand judgments which cover most areas of the law.

4 See (i) *Nik Noorhafizi bin Nik Ibrahim &Ors v PP* [2014] 2 CLJ 273; (ii) *Nik Nazmi bin Nik Ahmad v PP* [2014] 4 CLJ 944; (iii) *TehGuat Hong v*

within the basic principles of the rule of law to strike down arbitrary decisions of not only the executive but also the legislature. It paves the way for an alternative approach to 'Basic Structure Jurisprudence'.

To appreciate this theory in its proper perspective, I have set out some basic principles and/or methodology that include the Oath of Office of the English judge.

First, judicial review in England which practices Parliamentary Supremacy means, a review of the decision of the executive, etc. and to a smaller extent, a review of subsidiary legislation and not legislation *per se*. The jurisprudence employed in the review process relates to the concept of illegality, irrationality, procedural impropriety and to a small extent proportionality as well as reasonableness.[5]

Judicial review in a country which is governed by a written Constitution like Malaysia (and India) means the review of: (a) executive decision(s); (b) legislation(s); (c) constitutional amendment(s); (d) policy decision(s). The jurisprudence employed in the review process is not limited to that of England.

The judges Oath of Office in England is to be subservient to the legislation. The Oath of Office of a judge as well as members of the legislature in countries which practices Constitutional Supremacy is to be subservient to the written Constitution of that country.

The English judges'Oath of Office is prescribed in the Promissory Oaths Act 1868that reads as follows:

Form of judicial oath.

"The oath in this Act referred to as the judicial oath shall be in the form following, that is to say:

I do swear that I will well and truly serve our Sovereign Lady Queen… in the office of, and I will do right to all manner of people after the laws and usages of this realm, without fear

Perbadanan Tabung Pendidikan Tinggi Nasional[2015] 3 AMR 35; (iv) *Chong Chung Moi @ Christine Chong v The Government of the State of Sabah &Ors*[2007]5 MLJ 441.

5 See *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

or favour, affection or illwill. So help me God" (emphasis added).

I do not propose to set out the Oath of Office of a judge and members of the legislature in our (the Malaysian) jurisdiction, save to say that their oath in essence is to Preserve, Protect And Defend the Constitution. What I would like to say is the Oath of Office of a judge in England which practices Parliamentary Supremacy is dissimilar and consequently the application of English principles relating to judicial review may not be the same in all cases.

I will also not articulate what the Rule of Law means, save to say that arbitrariness in the decision making process will impinge on the Rule of Law as well as the constitutional oath to make the decision ultra vires to the written Constitution. Arbitrariness in the decision making process will not pass the acid test of reasonableness which is a component of the Rule of Law.

I intend to discuss the manner in which constitutional oath jurisprudence and the right version of the rule of law can assist the executive, the legislature and the judiciary (three pillars) in the decision making process as an alternative and/or to complement the 'Basic Structure Jurisprudence' to sustain the Rule of Law in a country governed by a written Constitution. It is also my observation that 'basic structure' jurisprudence is complex in contrast to constitutional oath jurisprudence which I have advocated. Under constitutional oath jurisprudence, the courts'primary role is to ensure the public decision maker, i.e. the three pillars do not make any arbitrary decision. It is that simple and straight forward and even enables the lay person(s) to appreciate the reasoning in contrast to basic structure jurisprudence.

I have developed the jurisprudence and methodology by linking the Oath of Office of the three pillars to the concept of arbitrariness and Rule of Law in reliance of the famous quote of a renowned Malaysian judge and jurist, His Royal Highness (HRH) Raja (Sultan)Azlan Shah in the case of ***Pengarah Tanah danGalian, Wilayah Persekutuan v Sri Lempah Enterprise SdnBhd [1979] 1 MLJ 135*** and use that as the test in judicial review matters. That is to say, no public decision maker, which includes the executive, the legislature and the judiciary is allowed

to make any arbitrary decision. That quote of HRH Raja Azlan Shah reads as follows:

> "Unfettered discretion is a contradiction in terms. ……
> Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law."

The test propounded by HRH Raja Azlan Shah is simple and straight forward and in my view it applies to all public decision makers, which will include the three pillars. The failure of the courts to strictly follow this test will in my view, compromise the concept of accountability, transparency and good governance, thereby compromising the Rule of Law or worst, make it sterile.

To appreciate the constitutional oath jurisprudence, one need to note the difference between the oath of a judge in England where the judge employs Parliamentary Supremacy jurisprudence to sustain the Rule of Law and the Oath of a judge in countries like ours where the judge is required to employ Constitutional Supremacy jurisprudence to sustain the Rule of Law.

One also needs to appreciate that the Rule of Law relating to Parliamentary Supremacy is different and/or distinguishable from that of the rule of law relating to Constitutional Supremacy. When judges employ both the Parliamentary and Constitutional Supremacy jurisprudence in the decision making process, it often results in convoluted jurisprudence and/or judgments. There is no shortage of such judgments in countries which practices Constitutional Supremacy.

In my view, such judgments have arisen as a consequence of a lack of appreciation of:

(i) Concepts of Parliamentary and Constitutional Supremacy;

(ii) Rule of law relating to Parliamentary and Constitutional Supremacy;

(iii) The difference in the oaths of judges:

   a. in a country like England which practices Parliamentary Supremacy; and

   b. in countries with written Constitution which practices Constitutional Supremacy.

(iv) Courts relying on judgments which have not applied the right version of the rule of law.

Jurists Have Not Been Adequately Trained By The British To Administer The Written Constitution

An important impediment in law and jurisprudence to protect fundamental rights as embodied in a constitution like ours is that the judges and jurists are not trained to administer the constitution within the norms of Constitutional Supremacy at the time of Independence. The training received from the British which largely continues, was the rule of law related to Parliamentary Supremacy. That does not contribute to nurturing fundamental rights in colonies where the masses are 'uninformed' as opposed to informed members of the public. For example, it is doubtful whether unjust laws and unjust decisions will find a place in England where the society is largely well informed. The same may not be the case in colonies once administered by the British. In fact, there was a different set of legislation employed by the British in England as opposed to that in the colonies though the administration of the judicial principle appeared to be the same. That is to say, it is not how the English judges decide, rather it is premised on what was provided in the legislation and/or the common law and the nature of jurisprudence they employ to resolve/overcome the problem. If the legislation does not provide for fundamental rights, then the English judges by judicial activism cannot do so. That is their conventional limit. Though judicial activism is shunned in England, as the judges

are by oath of office subservient to the legislation, on the contrary 'Judicial Dynamism' is expected of judges in a country with a written Constitution to protect fundamental rights within the constitutional framework; more so when they have taken an oath to preserve, protect and defend the constitution. What is shunned in England as judicial activism is a constitutional obligation for judges in a country having a written constitution like ours to meet the legitimate public expectation as per the constitution.

The vast majority of jurists have not taken note of the difference in the Oath of Office under the constitution when they criticise judicial dynamism as judicial activism.

The distinction, concept, jurisdiction and power of courts in the regime of Parliamentary Supremacy and Constitutional Supremacy was eloquently summarised by the learned author, Peter Leyland, in his book 'The Constitution of the United Kingdom', (2nd Ed), 2012 at p 50 and I quote as follows:

> "A further crucially important point about legal sovereignty which will be relevant in relation to many issues under discussion in this book is that this principle determines the relationship between Parliament and the courts. It means that although the courts have an interpretative function in regard to the application of legislation, it is Parliament, and not the courts, which has the final word in determining the law. This is markedly different from most codified constitutions. For example, in the United States, the Supreme Court held in *Marbury v Madison* (1803) 1 Cranch 137, that it could determine whether laws passed by Congress and the President were in conformity with the constitution, permitting judicial review of constitutional powers. The situation in the United States is that ultimately there is judicial rather than legislative supremacy. (Emphasis added.)

Notwithstanding the above distinction, in my view the British failed to instruct or sufficiently distinguish this separation when the colonies were given independence with a written Constitution. India had a

problem in the early days when they applied the rule of law relating to Parliamentary Supremacy to administer the constitution. They have overcome that glitch by introducing the 'basic structure jurisprudence' as part of the Rule of Law.

India

It must be noted that the Indian courts in the early part after independence employed the jurisprudence relating to Parliamentary Supremacy to deal with constitutional issues. This is reflected in at least two decisions, namely: (i) ***Shankari Prasad Singh Deo v Union of India AIR 1951 SC 458;*** (ii) ***Sajan Singh v State of Rajasthan AIR 1965 SC 845***. That progress was arrested by the employment of Constitutional Supremacy jurisprudence, which is reflected in two cases and subsequently followed in a number of other cases. The two important cases are (i) ***I.C. Golaknath v State of Punjab AIR 1967 SC 1643***; (ii) ***KesavanandaBharathi v State of Kerala [1973] 4 SCC 225***. These two cases led to the launch of 'basic structure' jurisprudence by the Indian jurists as well as the judges, a concept which was not in vogue in the commonwealth then. Basic structure jurisprudence, which the court gave force to, was consistent with the oath of office of the judiciary and was done, notwithstanding the fact that the then distinguished, The Honourable Prime Minister of India, Jawaharlal Nehru, who was a barrister himself, was of the view that Parliamentary Supremacy jurisprudence must be employed by the courts. Though the word Parliamentary Supremacy jurisprudence was not mentioned by the renowned Prime Minister, learned author Dhanapalan (2015) at page 27 captures what he had said and that part reads as follows:

> "Speaking on the Draft Constitution, Jawaharlal Nehru had said in the Constituent Assembly' that the policy of the abolition of big estates is not a new policy but one that was laid down by the National Congress years ago. "So far as we are concerned, we, who are connected with the Congress, shall, naturally give effect to that pledge completely and no legal subtlety, no change, is going to come in our way". He had further stated that within limits, no Judge and no Supreme Court will be allowed to constitute themselves into

> a third chamber; no Supreme Court or no judiciary will sit in judgment over the sovereign will of the Parliament which represents the will of the entire community; if we go wrong here and there, they can point it out; but in the ultimate analysis, where the future of the community is concerned, no judiciary must be in the way. According to Jawaharlal Nehru, the ultimatum is that the whole Constitution is a creature of Parliament."

At this juncture, I must say that those who are involved in the study, practice and administration of constitutional and/or administrative law must take note that their research will not be complete if they have not had the opportunity to read the excellent book penned by Justice Dhanapalan, a retired judge of Madras High Court, titled 'Basic Structure Jurisprudence' which I had mentioned earlier.

I do not wish to set out what basic structure literally means, save to draw attention to what a well-known Senior Advocate in India and a constitutional law expert, K. Parasaran, in his Foreword to the book had said; and also the paragraph where Justice Dhanapalan had summarised the concept at page 30 respectively.

At page v and vi, learned Senior Advocate Parasaran says:

> "The basic structure, inter alia, comprehends supremacy of the Constitution, federalism (quasi-federal), democracy, separation of powers, judicial independence comprising of (a) adjudicatory independence, (b) institutional independence and judicial review. The basic features are inextricably intertwined forming an integral whole. No basic feature can be disturbed by the exercise of the power of amendment or by exercise of judicial power of interpretation. None of the provisions of the Constitution can be so interpreted as to conflict with any of the basic features of the Constitution. Any amendment made which conflict with any of the basic features of the Constitution will be rendered unconstitutional. When a judgment of the Supreme Court, conflicts with any basic feature of the Constitution, the amending power being a

constituent power can reverse the said judgment. The 24th Amendment reversed the law declared in Golaknath case on the interpretation of Article 13. The validity of the said amendment was upheld in KesavanandaBharati case. It is in contrast to the plenary power of the Parliament. If an Act of Parliament reverses a judgment of court and usurp the judicial power or intermeddle with it by a plenary power, it will be unconstitutional. The invalidity or any defect in the enactment pointed out in the judgment has to be removed, the Act made retrospective and a validating provision inserted, if a judgment is to be neutralized. This principle does not apply to constitutional amendments. The validity of a constitutional amendment can be tested only on the touchstone of basic features."

At page 30, Justice Dhanapalan says:

"There is no hard and fast rule for determining the basic structure of the Constitution. Different Judges keep different views regarding the theory of basic structure. But, at one point, they have similar view that Parliament has no power to destroy, alter or emasculate the 'basic structure' or 'framework' of the Constitution. If the historical background, the Preamble, the entire scheme of the Constitution and the relevant provisions thereof including Article 368 are kept in mind, then, there can be no difficulty in determining what are the basic elements of the basic structure of the Constitution. These words apply with greater force to the doctrine of basic structure, because the federal and democratic structure of the Constitution, the separation of powers and the secular character of our State are very much more definite than either negligence or natural justice. So, for the protection of welfare State, fundamental rights, unity and integrity of the nation, sovereign democratic republic and for liberty of thought, expression, belief, faith and worship, independence of judiciary are mandatory. None is above Constitution, including Parliament and Judiciary."

As I said earlier, basic structure jurisprudence which originates from India is complex as adumbrated by Senior Advocate K. Parasaran as well as Justice Dhanapalan. Constitutional oath jurisprudence which originates from Malaysia is simple but it derives its jurisprudential strength from the Indian decisions based on the basic structure jurisprudence.

Role of the Judiciary in Judicial Review

In simple terms based on the constitutional oath jurisprudence, the judiciary is only required to arrest arbitrariness and nothing more. Arresting arbitrariness does not mean interfering with the doctrine of separation of powers. The distinction is unlike comparing apples and oranges but that of marble and pumpkin. In addition, when the executive decision or legislation, or constitutional amendment is quashed or struck out, it does not mean that the executive or the legislature cannot review their decision and/or legislate to conform with the Rule of Law and the Constitution.

Different Versions of the Rule of Law

The version of the rule of law applied in Parliamentary and Constitutional Supremacy nations are not the same. Simply put:

(i) The doctrine of Parliamentary Supremacy as practiced in England takes the position that parliament in its wisdom knows what is best for the people. The Judiciary must give effect to parliament's will. Judges take an oath to be subservient to the legislation. Judicial activism is not permissible. The rule of law requires the judiciary to be subservient to the legislation and show deference to the policy of the Government. Parliament and/or executive by policy can choose not to uphold the concept of accountability, transparency and good governance. The courts cannot go against the will of parliament and must give great deference to the policy of the Government. The principles of stare decisis must be strictly followed.

(ii) The doctrine of Constitutional Supremacy takes the position that parliament must be guided by the constitution. The Judiciary must make sure that parliament legislates according to the constitutional framework and all its agencies administer the legislation according

to the rule of law related to Constitutional Supremacy. For this purpose the judiciary takes an oath to preserve, protect and defend the constitution. Judges are expected by the public to demonstrate 'judicial dynamism' to protect the Constitution as well as protect fundamental rights. Parliament as well as the executive must uphold the concept of accountability, transparency and good governance as failure to do so will breach (violate) the constitutional framework. Judges by oath of office are entrusted to ensure the constitutional framework is not breached. The rule of law requires the judiciary to be subservient to the Constitution and condone policy of the government, provided it does not breach the constitutional framework or the doctrine of accountability, transparency and good governance. The principles relating to stare decisis plays a lesser role when dealing with issues relating to the Constitution and public law relief.[6]

What Version of the Rule of Law?

The judiciary has a greater role to play and to sustain the rule of law. The argument now is which version of the rule of law? The rule of law relating to Parliamentary or Constitutional Supremacy?

It is important to appreciate the right version of the rule of law and its administration plays an important role to rest a successful nation. I will explain this in lay terms as follows:

(i) the right version of the rule of law can turn a desert into an oasis;

(ii) the wrong version of the rule of law can turn an oasis to a desert;

(iii) the role of the courts under the Constitution is to apply the right version of the rule of law to ensure that an oasis is not turned to a desert;

(iv) under the constitution, the court's role is not to turn a desert into an oasis. That role to turn a desert into an oasis

6 [5]See *DatoMenteri Othman bin Baginda& Anor v DatoOmbi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29.

> rests with the other pillars and not the courts. The courts role is limited, to that extent. These separate roles are often referred to as separation of powers. However, when the courts' decision paves the way for an oasis to be turned into a desert that may be referred to as fusion of powers. Fusion of powers is an anathema to the constitutional framework and will impinge on fundamental rights and justice.

The jurisprudence involved in administration of justice in both of these concepts namely parliamentary and Constitutional Supremacy is not one and the same. That is to say, when a judge or coram applies the rule of law relating to Parliamentary Supremacy in a country governed by a written Constitution, the decision may not be the same as that of another judge or coram who applies the rule of law relating to Constitutional Supremacy. In relation to fundamental rights, a decision based on Parliamentary Supremacy may not inspire confidence on the affected populace when there is a legitimate expectation that the judiciary by its oath of office would act to protect the fundamental rights provided under the Constitution. This dilemma was felt in India in the early post-independence days when the courts were relying on the rule of law relating to Parliamentary Supremacy in interpreting the legislation and/or the Constitution. Subsequently, the Indian judges in my view realised the shortcomings and inadequate jurisprudence to administer the Constitution and to overcome that, they came out with an innovative jurisprudence called the 'Basic Structure' jurisprudence to ensure parliament does not interfere with the constitutional framework and also to sustain fundamental rights to uphold justice. Basic structure jurisprudence is well documented by Justice V. Dhanapalan (retired), Judge of the High Court of Madras in his recent book titled 'Basic Structure of the Indian Constitution – An Overview" (2015). It is a must read for all jurists who are committed to justice and the Constitution.

Parliamentary Supremacy

The doctrine of Parliamentary Supremacy is feudalistic in nature. It vests the power of the sovereign, or the Queen as the case may be in England, in parliament. It is just one step closer to dictatorship

when the majority of the elected members of parliament become self-serving and the role of the court even in that instance is to serve self-serving legislation and not the public. In consequence, English judges cannot strike down legislation even if parliament enacts unjust laws or compromises its sovereignty by treaties and/or sells off its territory to other states or private persons, etc. by way of legislation or through executive giving out largesse to nominees. If an issue is raised in court, the judges in England there may just say it's the policy of the Government and that they are not adequately equipped to interfere. When it relates to private rights, the English judiciary would receive 'expert evidence' if necessary, on the issue which would not be the case for public law relief. It will appear that they employ double standards of reasoning in public and private law field. However, such an approach is an accepted norm and justified within the framework of Parliamentary Supremacy and the oath of office of an English judge, though such an approach may be illegal or irrational in the 'Wednesbury' sense when employed in a nation that has subscribed to Constitutional Supremacy.

Constitutional Supremacy

In the regime of Parliamentary Supremacy, the public will have no recourse when the majority of the parliamentarians abuse the system as there are no checks and balances on the might of parliament in that system. In consequence, the founding fathers of the Indian constitution as well as the Malaysian constitution, rejected the concept of Parliamentary Supremacy and accepted the doctrine of Constitutional Supremacy like that of the US, and ensured by the constitutional oath of office of the legislature, executive and the judiciary, that they are beholden to preserve, protect and defend the Constitution. The judiciary was entrusted as the supreme policeman as well as the judge of the Constitution to supervise all the constitutional functionaries to ensure that the Rule of Law which is an essential jurisprudence to protect the Constitution is maintained. The Government under the constitutional framework means all the pillars as each and every pillar has a specific role to play to preserve, protect and defend the Constitution. That is not the case in England and the judiciary is the weaker arm of the Government and has no role to play in governing

the nation *per se* save to be subservient to parliament and ensure the Rule of Law is sustained. That is not the case in countries where the Constitution is the Supreme Law of the land and the judiciary *per se* is not the weaker arm but the supreme policing arm of the Constitution.

The shortcoming of the doctrine of Constitutional Supremacy is that if the judiciary becomes a compliant judiciary and fails to uphold the jurisprudence relating to Constitutional Supremacy and leans towards Parliamentary Supremacy, then the protection to the public would be lost and it will result in a step nearer to dictatorship. Once the protection to the public is lost, then there is no 'separation of powers' which is integral to Constitutional Supremacy. The result would be 'fusion of powers' reflective of dictatorial regime and the demise of the Constitution. In my view, a 'free and independent press' stands as a check and balance to arrest the dilatory conduct of the three pillars in countries which is governed by a written Constitution. Not all countries which has subscribed to the constitution has a 'free and independent press'.

Rule of Law and Reasonableness

One of the important facets of rule of law is the keyword 'reasonableness'. This word runs through all forms of executive decisions, legislation and the constitution. The antithesis and/or anathema to rule of law is arbitrariness. Any form of arbitrariness in decision making process or legislation making process and/or constitutional amending process must not subscribe to arbitrariness.

In my view and based on authorities from respectable jurisdiction, under the jurisprudence relating to Constitutional Supremacy and oath of office:

(i) executive decision cannot be arbitrary;

(ii) formulation of legislation cannot be arbitrary and the legislation, even if made according to the provision of the law and/or the constitution, must pass the strict test of reasonableness and proportionality, failing which it will be caught by the doctrine of arbitrariness as per decided cases;

(iii) Constitutional amendment cannot be arbitrarily done. Even if the constitutional amendment is valid, it must pass the strict acid test of reasonableness and proportionality.

I do not wish to say much in respect of the jurisprudence relating to the Rule of Law save to say that any decision by the executive, legislature or judiciary must not subscribe to the concept of illegality, irrationality, procedural impropriety. The decision must also pass the test of reasonableness and proportionality as advocated in many of the English as well as the Indian cases. On my part, I have dealt with the concepts in detail in more than ten judgments in particular the jurisprudence relating to constitutional oath of office. They are as follows: (i) ***Nik Noorhafizi bin Nik Ibrahim &Ors v PP [2014] 2 CLJ 273***; (ii) ***Nik Nazmi bin Nik Ahmad v PP [2014] 4 CLJ 944***; (iii) ***TehGuat Hong v PerbadananTabungPendidikan Tinggi Nasional[2015] 3 AMR 35***; (iv) ***Chong Chung Moi @ Christine Chong v The Government of the State of Sabah &Ors[2007]5 MLJ 441.***

Judicial Review

Judicial review is the process where legislative and executive actions are reviewed by the judiciary upon a complaint of the public that his or their rights have been infringed by the legislature and/or executive or inferior tribunal, etc. The judicial review parameters of the court within the jurisprudence of Parliamentary Supremacy are limited. For example, it is trite that English judges cannot review a legislation and strike it down wholly or partly unless it is a subsidiary legislation. English judges can review any form of executive decision but will be slow in doing so if it is related to policy of the Government.

Judicial review parameters of the court under the doctrine of Constitutional Supremacy are wide. The judiciary is empowered to review (a) executive decision; (b) legislation; (c) any constitutional amendments; (d) any policy decision. The methodology they can employ in any of the review process is principally based on the jurisprudence that the executive and/or legislative decisions must be confined to the constitutional framework and the decision making process must not be arbitrary. For example, if a legislation or constitutional amendment or policy, violates the constitutional framework, it will be struck

down as of right based on the ultra vires doctrine. If the ultra vires doctrine is not applicable, the court may employ the concept relating to illegality, irrationality, procedural impropriety, reasonableness and proportionality to check the decision making process of the executive. However, where it relates to legislative decisions concerning legislature and/or constitutional amendment, the court in India applies the doctrine of basic structure jurisprudence to strike down the legislation and/or constitutional amendment. What the courts have not done is to apply the constitutional oath doctrine to strike down the legislative and/or constitutional amendment if the legislature has been found to have acted arbitrarily.

In my view, the court, to sustain the rule of law cannot allow arbitrariness to creep in any executive or legislative or constitutional amendment or policy making process. In essence, under the doctrine of constitutional oath the legislature or executive or judiciary cannot make any arbitrary decision. For example, (i) if the executive's decision is arbitrary, it ought to be quashed; (ii) if it is shown that the legislative action in enacting the legislation or the constitutional amendment was arbitrary, it ought to be struck down; (iii) if the policy formulated is arbitrary it may be struck down. That is to say, arbitrariness makes the decision of the executive and/or legislative action a nullity *ab initio*. An ultra vires act of the executive or legislature *vis-a-vis* the constitution makes the whole decision or legislation or constitutional amendment or policy illegal. On a similar tone, in consequence of the oath of office, any arbitrary decision of any of the three pillars will in my view be ultra vires the constitution.

Rule of Law and Rule by Law

Rule of Law is a generic term and in consequence no one has yet been able to define its parameters. For example, there may be presence of rule of law in a communist, socialist, democratic, Syariah regime, etc. The real question here is what version of rule of law need to be applied to administer a written Constitution. One important aspect on the selection process is that any principles of law which does not promote transparency, accountability and good governance and if also the application of that principle, leads to endemic corruption, cannot

be the rule of law envisaged in the Constitution. It is one relating to common sense approach and as Lord Denning often says if common sense is not applied in the administration of justice, it would not lead to justice or words to that effect.

I do not wish to elaborate on the parameters of the Rule of Law save to say it is now an accepted norm that law as per the constitutional framework should govern a nation, as opposed to governed by arbitrary decisions or legislation and/or constitutional amendments. Rule by law is an antithesis to the Rule of Law and is now seen as anathema in democratic country more so in countries which are subject to a constitutional framework when the decision of the executive, legislature and the judiciary is tainted with arbitrariness. The line may appear to be thin but the distinction is like that of comparing a marble to the size of a pumpkin and the distinction is not like an apple to an orange. The Rule of Law paves the way for the progress of democratic nations and nips corruption in the bud, while rule by law leads to destruction of the nation that allows corruption to set in.The ultimate result is that it will compromise fundamental rights as corruption often leads to squandering of national assets or its revenue and hits the poor the most.

In ***Nik Nazmi bin Nik Ahmad v PP [2014] 4 CLJ 944***, I have expressed my views of on the subject as follows,

> "In essence, in the name of 'security of the Federation' or 'public order' the legislature cannot enact provisions which will impinge on the constitutional framework without fulfilling the strict criteria set out in the constitution. The courts are obliged to ensure the law promulgated are not enacted on illusory threat of 'public order' or 'security of the Federation' by speculation or surmise, etc.; to change the character of rule of law to rule by law. In this respect the court has a sacrosanct role to play to ***balance the state as well as public interest*** within the framework of constitutional jurisprudence as applied in civilised nation, which are not subject to authoritarian rule. The courts' task in doing so is no easy task but when done within jurisprudence it promotes and enhances democratic values

> which will ensure peace, prosperity and harmony to the state and bring great economic success to the public. And it will also anchor public confidence in judicial determination (emphasis added)."

Conclusion

Constitutional principles in almost all countries are evolutionary in nature and may change from time to time. In jest, I like to say that 'Judges are appointed to preserve, protect and defend the constitution. And Lawyers are just not paid to talk but *inter alia* to do proper research for clients as well as the country, without fear or favour to uphold justice'. On a serious note, it is my judgment that more research need to be done on the constitutional oath jurisprudence. I have dedicated this paper to the law students of DSNLU, Visakhapatnam, India, hoping that the constitutional oath jurisprudence which I have advocated will be picked up by the students as well as Indian jurists and judges to preserve, protect and defend the Constitution. I do wish that the jurisprudence which I am attempting to export to India will be developed and refined in India to arrest arbitrary decisions and uphold the Rule of Law.

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Abatement of Criminal Appeal on Death of Accused

VASHDEVA ACHARYA[1]

1. The Supreme Court by dismissing the review petition filed by the State of Karnataka in the case of Selvi J. Jayalalitha and others missed an opportunity to settle the law regarding abatement of criminal appeal filed before the Supreme Court with leave under Article 136 of the Constitution of India on the death of the accused. Apart from the question as to whether a criminal appeal filed with leave under Article 136 of the Constitution of India will ever abate on the death of the accused, this particular case raised another equally important question regarding alleged abatement where death has taken place after conclusion of the arguments and the judgment was reserved.
2. The prosecution case in brief is that between 1991 and 1996 Selvi Jayalalitha (A1) as Chief Minister of Tamil Nadu has amassed wealth disproportionate to her known sources of income to an extent of Rs.66.65 crore, and that A2 to A4 (Sasikala, Sudhakaran and Ilavarasi) have abetted the commission of the offence pursuant to criminal conspiracy entered into between the four of them. The trial court found all the accused guilty of all the charges framed against them and sentenced each of them to undergo imprisonment for 4 years. In addition, the court imposed a fine of Rs.100 crore on A1 and Rs.10.00 crore each on other three accused.

1 The Author is a Senior Advocate at Bengaluru. He was Special Public Prosecutor in Selvi J. Jayalalitha's case both before the High Court and the Supreme Court. He was the Advocate-General of the State.

3. On appeals filed by all the accused, High Court of Karnataka set-aside the judgment of the trial court and acquitted all the accused of charges framed against them.

4. The State of Karnataka challenged the judgment of the High Court by filing SLPs before the Supreme Court. All the appeals were heard and arguments were concluded on 07.06.2016 and judgment was reserved. On 05.12.2016 A1 expired, and on 04.02.2017 the Supreme Court pronounced the judgment allowing the appeals and setting aside the judgment of the High Court. The Supreme Court agreeing with all the findings of the trial court held that the charge of acquisition of disproportionate asset as also the charge of abetment and conspiracy has been proved. In the result, it restored the judgment of the trial court in toto as against A2 to A4 observing that the appeals so far as those relate to A1 stand abated.

5. The State of Karnataka filed the review petition challenging that part of the order by which it is held that the appeal as against A1 has abated. According to the State, when the death of accused takes place long after the arguments are concluded but before judgment is pronounced, there will be no question of abatement of appeal.

6. It is settled law that there is no hiatus between the date of conclusion of arguments and the date on which the judgment is ultimately delivered. A judgment is expected to be pronounced immediately after the conclusion of the arguments and pronouncing the judgment on a later date is for the convenience of the Court. Any event occurring between the date the judgment is reserved, and actual date it was delivered could not have any effect on the judgment which is ultimately pronounced.

7. In fact, the Order XXII Rule 6 of the Code of Civil Procedure reads as follows:

> "**6. No abatement by reason of death after hearing**– Notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such case be pronounced

notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place".

This provision cannot be construed as applicable only to civil appeals and it is more appropriate to treat the principle embodied in such rule as a jurisprudential principle. It is in this context that principle that there is no hiatus between the date the judgment is reserved and the date of its pronouncement becomes relevant. The Supreme Court rules specifically provide that provisions of Order XXII Rule 6 of the Code of Civil Procedure will be applicable to civil appeals before the Supreme Court (vide Order XIX Rule 31 of the Supreme Court Rules). The above rule has been consistently applied by the Supreme Court in quite a few civil appeals by holding that there is no abatement of appeal where the death is after the judgment was reserved. Supreme Court Rules also provide that in the case of an election petition, the death of a party will not have the effect of abatement, if the death is after the conclusion of the arguments. (Order XLVI Rule 32)

8. There is no principle or authority which can be pressed into service to hold that a different view is possible in the case of criminal appeals. The Supreme Court in clear terms has held that the provisions of the Code of Criminal Procedure are not applicable to the appeals filed before the Supreme Court, by applying for Special leave under article 136 of the Constitution of India, though for the purpose of uniformity principles therein can be applied in suitable cases. The Supreme Court rules also do not provide for abatement of any criminal appeal. Thus, it can be safely concluded that there is no constitutional or statutory provision providing for abatement of appeal more so where such death has taken place after the judgment is reserved. Therefore, abrupt conclusion of the Supreme Court that the appeal as against Selvi J.Jayalalitha has abated was recorded ignoring the above said principle of law. It is also relevant to note that finding is also not preceded by any arguments at the bar, as the case was never posted for further hearing after the death of the accused. The legal implications arising out of the death of the accused after the judgment is reserved has neither been put in

issue nor debated but finding is recorded on erroneous view of law. Principle of sub-silentio is thus applicable to the facts of the present case.

9. The criminal appeals in question were heard by the Supreme Court between 23.02.2016 and 07.06.2016 on which date arguments were concluded and the judgment was reserved. The judgment was not delivered for over six months. It is on 05.12.2016 that A1 expired. Thereafter, the judgment was pronounced on 14.02.2017 in which it was stated that the appeal as against A1 has abated without any discussion on the question involved. This finding is recorded without hearing the parties. In the circumstances, it would have been appropriate for the Supreme Court atleast to afford an opportunity to the parties to address arguments on this question while considering review petition and take a suitable decision. However, the Supreme Court was pleased to dismiss the review petition on merits, rejecting the request for oral hearing.

10. It is to be noted that a case regarding acquisition of disproportionate asset by a public servant which is made penal under the Prevention of Corruption Act stands on slightly different footing than an ordinary criminal case. In the case of possessing disproportionate asset, the allegation is that a public servant amasses wealth by illegal means and the object of law is not merely to punish the offender but also to see that the offender or his legal representatives do not own or enjoy such illegally acquired assets. Therefore, in such a case though it is not possible to send offender to jail for serving sentence, he or his legal representatives cannot be allowed to enjoy the fruits arising out of the offence committed by him. The law provides for payment of fine as also confiscation of the illegally acquired property which is possible only on conviction. The finding that the criminal appeal has abated may enable the legal representatives of the deceased to place obstacles in the way of state action for confiscation. Therefore, the view that the appeal abates appears to lean heavily in favour of the accused and against public interest. The legal representatives can illegally enjoy the benefit by application of this principles even if the accused chooses to commit suicide after acquiring huge property by corrupt means. The

judgment of the Supreme Court has set a bad precedent helping the corrupt public servants. This is a retrograde step in the march towards eradication of corruption in public life.

The reason for review petition by State of Karnataka

11. In the section of media an erroneous impression is created that the State of Karnataka in its greed has filed the review petition with a view to collect fine amount of Rs.100 crore imposed on A1 by the trial court. The case in question relates to State of Tamil Nadu and the State of Karnataka had to step into the case only on account of the direction of the Supreme Court which has transferred the case to Karnataka, on a finding that the process of justice was being subverted in the State of Tamil Nadu, because the main accused held the post of Chief Minister of the State. Thus, the Supreme Court declared that the State of Karnataka is sole prosecuting agency in the case. It is only in obedience to the order of the Supreme Court that State of Karnataka has performed its role as sole prosecuting agency, so that there was fair trial of the case. The State of Karnataka has no individual interest in the matter. The fine amount collected as also the confiscated assets could only benefit the State of Tamil Nadu and the State of Karnataka is not a beneficiary. The right of the State of Karnataka is only for reimbursement of the expenses incurred in connection with the litigation as ordered by the Supreme Court. The State of Karnataka has filed the review petition, as it felt that important question of law has been erroneously decided. It has chosen to do so only to fulfill its legal obligations. Now that review petition has been dismissed, the case has ultimately reached its logical end.

12. State of Karnataka can have the satisfaction that it has effectively performed its obligations imposed on it by the Supreme Court.

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Finding a Balance between Right To Life and IPR

Pinky Anand, Senior advocate

Since time immemorial, millions of people have lost their lives to life threatening diseases. Earlier society did not have the capabilities or the technology to produce the necessary medicines to protect itself. Today, the difference is that although we have all the resources and medicines necessary to cure most diseases, the majority of the population does not have access to such essential medicines.

BRICS has 42% of the world's population, a total of 11.1 million people living with HIV and an average HIV prevalence of 2.8%. Overall, there were 11.1 million PLHIV, 739,909 new infections, and 592,786 deaths in BRICS countries in 2012. The magnitude of HIV in BRICS countries was Brazil (.5%), Russia (1.1%), India (.3%), China (.1%), and South Africa (12.2%).

New infections declined by 30% or more and overall prevalence and deaths also declined in Brazil, India, China, and South Africa. The epidemic has stabilized in Brazil at .6%. Russia has one of the world's fastest-growing HIV epidemics, India has the largest burden of HIV in Asia and South Africa has the largest number of PLHIV. During a 10 year period, Russia had a 47% increase in new HIV infections. This suggests that Russia may be losing the battle against HIV at this stage. On the other hand, India and South Africa seem to have turned the corner with declines in HIV infections of 43% and 38% respectively.

This is the current stance of the world as it stands today where the right to essential medicines is supposedly recognized as an innate part of the human right of right to health.

Human Health vs. Patent Law

Life in good health and free from disease is the foremost human right and is a constitutional fundamental right. The humbler the Indian human, the higher the state's duty to protect the person. In this perspective we have to examine the impact of IPR vis-a-vis the right to life guaranteed under Article 21 of the Constitution, read with Article 14. Public health laws, national drug policy and the patent system are intrinsically inter-related. This was explained by the Indian Prime Minister while speaking at the World Health Assembly in Geneva on May 6, 1981.

> "Affluent societies are spending vast sums of money understandably on the search for new products and processes to alleviate suffering and to prolong life. In the process, the drug manufacture has become a powerful industry."

She added:

> "My idea of a better ordered world is one in which medical discoveries would be free of patents and there would be no profiteering from life or death."

In this historic session, the participating countries unanimously adopted a resolution for "Global Strategy on Health for All".

Since then there have been laudable contributions by science and technology to tackle successfully many health problem areas. While there is a substantial unfinished agenda on the health front, new and formidable challenges have been thrown up by an unequal treaty on all-pervasive economic and social aspects by the Final Act embodying the results of the Uruguay Round negotiations. In particular, the TRIPS agreement is the most contentious part of the Final Act. The aim of this agreement is to enforce globally tough standards in respect of several forms of intellectual property, which include patents, trade marks, protection of undisclosed information, and so on, forgetting the goals of freeing of medical discoveries from the patent system.

A patent is a monopoly right granted by a state to a person to exploit and benefit from the invention patented by him for a particular period. Thereafter, it passes into the public domain. According to Justice Rajagopala Ayyangar's report submitted in 1959, which report constitutes the basis for the Indian Patents Act, 1970:

> "The theory upon which the patent system is based is that the opportunity of acquiring exclusive rights in an invention stimulates technical progress in four ways: first, that it encourages research and invention; second, that it induces an inventor to disclose his discoveries instead of keeping them as a trade secret; third, that it offers a reward for the expenses of developing inventions to the stage at which they are commercially practicable; and fourth, that it provides an inducement to invest capital in new lines of production which might not appear profitable if many competing producers embarked on them simultaneously. Manufacturers would not be prepared to develop and produce important machinery if others could get the results of their work with impunity."

Even so, in human affairs, minor adjustments, without forsaking fundamentals, may be necessary for peaceful co-existence. Even the TRIPS text partially acknowledges this aspect. It is ironic but interesting to recall Thomas Jefferson's words: "If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea… No one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me." In Jefferson's vision, there are no barriers to the acquisition of knowledge. Nobody owns it, everybody partakes of it – and the world becomes richer.

Alas, his country is the most venal violator of this value. Our cultural cornerstone, the Rigveda mandates: "Let noble thoughts come to us from every side." Patenting intellect or its products is sacrilegious and a social outrage.

The Flawed Ideology behind Patents in medicines.

a. The incorrect belief that non-patenting of essential medicines would lead to compromising of R&D Costs:

Non-granting of patents would cause unfair competition due to the negating of R&D costs of the generic manufacturers. For the generic manufacturers it may be a comparatively straightforward exercise to reverse engineer a drug product, using the existent product to find its components and thus he need not invest in any core research and development costs. Then, he would have the liberty of selling his product at a much lower cost while maintaining a similar; if not more profit margin leading to a substantial loss of market share for the patented manufacturers who cannot afford to cut their product prices without it having an adverse effect on their R&D Activities.

However this is not the real case. Available data suggests that pharmaceutical companies spend more on marketing and administration than on research and development. As percentages of sales, research and development expenses account for 10-20%, while marketing and administration range from 30-40%. For example, Research indicates that industry estimates for R&D on each new drug ranges from US$350-500 million, while independent estimates range from US$30-160 million. Using either estimate, revenues from many life-saving drugs very easily exceed their R&D costs. For example, in 1999, the sales of Bayer's ciproflaxin totaled US$1.63 billion and Pfizer's sale of fluconazale totaled US$1 billion.

b. The misconception of local innovation being promoted as a result of patenting and global IP regimes:

Now global intellectual property regimes should encourage greater technology transfer between countries, greater foreign direct investment, and greater local innovation within compliant states. It is believed that all of these outcomes would accelerate the economic development of poor countries, which should result in the alleviation of poverty in such countries. Thus, it is arguable that pharmaceutical patents are justifiable within international human rights law, as they facilitate enhancement of rights to life and health

among developing communities which would benefit from the actions of the developed nations. However the actual position is different. When a drug company sells the same product in different countries, it adopts a policy of price differentiation, setting price levels "according to what the market can bear". In a country where alternative or generic medicines are available, a company's branded product is usually priced lower due to the competition it faces from lower-priced alternatives. The same brand may be sold at higher prices in other countries where there is no competition from generic producers. A Health Action International survey on Zantac, an anti-ulcer drug manufactured by Glaxo, indicated that 100 tablets (150mg) of Zantac were sold for only US$2 in India, whereas in places where there was no competition, the prices went up to as high as $183 in Mongolia., $77 in Canada, $196 in Chile, $132 in El Salvador, $150 in South Africa and $97 in Tanzania. Thus, there is no real local market development.

c. **The flawed notion of no research and development or innovation possible without the patenting of medicines:**

The fundamental reason why pharmaceutical progress is dependent on IPR protection is the staggering cost of a New Chemical Entity (NCE) development as a potential drug molecule and high attrition rate in the development cycle. Studies indicate that 1 out of 5000 molecules synthesized during applied research, eventually reaches the market. Out of 100 drugs that enter the clinical phase 1, about 70 complete phase I, 33 complete phase II, and 25-30 clear phase III. Only two-thirds of the drugs that enter phase III are ultimately marketed. Without strong patent protection, pharmaceutical companies cannot attract the investment needed to conduct their expensive, high-risk research. In the absence of strong IP rights at each stage of innovation cycle, promise of pharmaceutical innovation could be lost. However, this seems to be flawed.

A monopoly can never reach the level of efficiency and innovativeness as a competitive market. This has been established time and again by history.

In huge markets like BRICS nations the cost of R and D and manufacturing these pharmaceutical drugs may be offset by the fact that unlike the relatively small populations of the developed nations, developing economies have large populations and a higher chance of people suffering from the diseases for which drugs are made. This should help bring down the price of the drugs and still result in a profit for the companies rather than profiteering.

Appreciating the Pro Health Right Scenario in Developing Countries

There are many reasons why it is important for courts in developing countries not to ignore the right to health when adjudicating pharmaceutical patent cases.

One, the courts have to be more vigilant when scrutinizing legislation aimed at granting stronger protection to patents. Several bilateral and regional trade agreements currently pressure developing countries to adopt legislation providing stronger patent protection, but possibly significantly impeding access to medicines. Courts should be vigilant and careful when interpreting such laws to ensure that the right to health of poor patients is not trampled upon. The Kenyan Anti-Counterfeit Act is just one example of the current expansionist trends in international patent law which, among other methods, seeks to use border and customs control measures to prevent the movement of counterfeit goods across international borders. While such measures might actually be helpful in protecting people from harmful fake products, such measures can equally restrict access to low-cost generic medicines. The failure of the Kenyan Anti-Counterfeit Act to clearly distinguish between counterfeit drugs and generic drugs demonstrates this danger. Thus, where a country has been compelled to include a similar provision in its patent law by means of a trade agreement, the provision can be held to be unconstitutional on the basis that it can potentially impede the enjoyment of the right to health. Similar arguments can also be made with respect to any other provision incorporated into the domestic patent law framework that might impede the enjoyment of the right to health. For instance, where a trade agreement requires a country to provide patent protection for new forms (or new uses) of known drugs, a court could rule that such a provision in the patent

law would impede the enjoyment of the right to health by permitting pharmaceutical companies to extend the length of their monopoly rights on essential medicines. In other words, the fundamental and critical need of providing access to essential medicines would not be served by extending the lifespan of the instrumental (monopoly) rights of pharmaceutical companies on essential drugs.

Two, incorporating a right to health perspective into pharmaceutical patent cases enables a court to properly construe and apply the flexibilities already contained in the domestic patent law such as provisions on compulsory licenses and parallel importation.

For instance, in the case of *Hoffmann-La Roche Ltd. v. Cipla Ltd.*, the Delhi High Court refused to grant an injunction sought by Roche against Cipla for the latter's production of the former's patented drug. The Delhi High Court noted:

> …The Court cannot be unmindful of the right of the general public to access life saving drugs which are available and for which such access would be denied if the injunction were granted. … The degree of harm in such eventuality is absolute; the chances of improvement of life expectancy; even chances of recovery in some cases would be snuffed out altogether, if injunction were granted. … Another way of viewing it is that if the injunction in the case of a life saving drug were to be granted, the Court would in effect be stifling Article 21 [of the Indian Constitution, which provides for the right to life and which forms the bedrock of the right to health in India] so far as those [who] would have or could have access to Erloticip are concerned.

Three, Courts in developing countries should equally be aware that courtrooms are now forums for shaping and reshaping global health diplomacy. While multinational pharmaceutical companies can successfully lobby for stronger patent protection in international trade forums, poor patients and civil society groups usually rely on domestic courts to ensure that their interests are protected at the local level. Consequently, in a situation where more courts in developing countries are adopting a right to health perspective in pharmaceutical

patent cases, it will encourage litigants in other developing countries to seek the assistance of local courts to protect their right to health. These local courts may also decide to follow the example of other countries by incorporating a right to health perspective in pharmaceutical patent cases.

Four, as the impact of non-communicable diseases such as cancer continues to increase in developing countries, it is obvious that more patients will require access to expensive but essential drugs in order to sustain a healthy lifestyle. A right to health perspective will therefore ensure that courts are mindful of the importance of the availability of cheaper generic drugs in the market. In The Bayer Corporation v. Union of India, The Controller of Patents and Natco Pharma Limited

The appeal by Bayer against the compulsory licensing of its drug Nexavar in put them in the spotlight. This was the first time in India where the Intellectual Property Appellate Board (IPAB) upheld the grant of a compulsory license. In this case, in March 2013, Justice Prabha Sridevan of the IPAB granted Natco rights to sell a generic form of Bayer AG's kidney and liver cancer drug, Nexavar.

Justice Prabha Sridevan rejected the appeal by Bayer against the grant of the compulsory license of the drug Nexavar. The learned judge dismissed the appeal on the grounds that Nexavar was neither affordable nor accessible. Bayer charged about Rs. 2,80,000/- for a monthly dose of Nexavar, whose generic form Natco was willing to supply for Rs 8800. Natco could also produce more of the generic drug than Bayer could, and could thus increase the drugs penetration, and facilitate its access to the common man. The grant of the compulsory license made the drug 97 percent cheaper. Hence, on the grounds of lack of affordability and access, Justice Sridevan upheld Natco's compulsory license—the first compulsory license to ever be upheld in India.

Finally, it is important to note that, unlike the situation in industrialized countries where there are sophisticated mechanisms such as antitrust laws that can be used to curb the excesses of pharmaceutical companies, in several developing countries the legal framework to curb anti-competitive activities is either undeveloped, underutilized, or non-existent. In several developing countries, the right to health is the only

potent weapon that can be effectively used to ensure that pharmaceutical companies do not abuse their patent rights. It is essential for developing countries to devise strategies to curtail the current expansionist trends in international patent law. In the midst of growing demands for stronger patent laws, the right to health can be utilized to reclaim some policy space for developing countries to design their national patent laws in a manner that facilitates access to medicines. Domestic courts have a major role to play in this regard: when they are adjudicating disputes involving patents on pharmaceutical products, they can recognize the tension between patent rights and the right to health and resolve this tension by distinguishing between the instrumental nature of patent rights and the fundamental nature of the right to health.

Conclusion

On June 12, 2014, the pioneer electric car manufacturer Tesla, made an announcement that henceforth, all 1400 patents amassed by them over the last 11 years would be free and that they would not initiate lawsuits against anyone who wanted to use their technology.

This seemed like a suicidal move to many, but Elon Musk, the founder of Tesla has time and again recognized that patents frequently block and hold back and limit innovation rather than promoting it.

Many economists have argued that 'the patent system is essentially anti-innovative.' According to him, it benefits the large pharmaceutical corporations most and is designed to meet their requirements. Economists also find difficulty finding adequate justification for exclusive monopoly rights granted to inventors. Historical evidence supports this view to a great extent. Zorina Khan, Professor of Economics at Bowdoin College has successfully demonstrated how early American growth was fuelled by simply ignoring European intellectual property law. There is empirical evidence to show that the patent system in fact stifles innovations because it provides incentive to patent holders to extend the life of their patents and to prevent others from developing new innovations. Patents are not necessary to create research incentives to invent treatments for global as well as neglected disease. There is also evidence to suggest that global patents have impeded innovation in the HIV/ AIDS treatment regimen.

In Novartis v. Union of India and Others the apex court rejected Novartis's demand for a patent on the cancer drug, Glivec. The court ruled that a minor modification to an existing pharmaceutical substance does not merit a 20-year patent monopoly. After all, patents were premised on the notion that an invention had to demonstrate some cognitive leap over and above what existed before and not comprise mere trial and error methods. If not, the monopoly costs through patents were ill deserved — particularly in an area like pharmaceuticals, where access to the patented product often stood between good and bad health, and sometimes, between life and death itself.

Supreme Courts refusal to protect global investments through patent monopolies, though grounded in the text of the law, also appears to stem from a national interest perspective, taking into account concerns of both public interest (where India contains a significant number of poor patients with no health coverage), and private interest (where India is home to some of the leading generic companies that might lose their competitive advantage with a rather liberal patent regime).

A recent controversy has once again brought the issue of patent pricing to the core. Martin Shkrelli, a hedge fund investor purchased Turing and overnight increased the price of a dose of the drug Daraprim in the U.S. market from US$13.50 to US$750 per pill, a 5,456-percent increase. This drug is used by AIDS patients.

While this drug was not strictly patented, Turing was the sole manufacturer of the same hence leading to a position wherein it enjoyed a monopoly. Such arbitrary and baseless increase in pricing is also done by pharmaceutical companies who patent drugs and enjoy a monopoly for 20 years. For eg A Health Action International survey on Zantac, an anti-ulcer drug manufactured by Glaxo, indicated that 100 tablets (150mg) of Zantac were sold for only US$2 in India, whereas in places where there was no competition, the prices went up to as high as $183 in Mongolia., $77 in Canada, $196 in Chile, $132 in El Salvador, $150 in South Africa and $97 in Tanzania. This is an unacceptable variation.

IP policy in BRICS vis a vis the right to life will play an increasingly important role in shaping BRICs response to the outbreaks and epidemics faced in their respective nations. In emerging economies

such as BRICS which may sometimes struggle to meet its public health goals on account of artificially high drug prices influenced by foreign pharmaceutical companies, the acquisition of cheaper drugs through Compulsory Licensings and the institution of a patent examination system to ensure high standards for innovation would allow the country to give more teeth to the right to life. The resulting support of bona fide inventions with cutting edge technology would also drive BRICs Nations forward. Each country in BRICS may learn from the IP policies of the other nations and collaborate with these countries for the exchange of resources and ideas.

One approach to overcoming the problem is offered by the global health initiative UNITAID. Along with multiple partners, it supports a Medicines Patent Pool that negotiates partial license surrenders for holders of patents for HIV/AIDS medicines. It then grants licenses to generic manufacturers for distribution of the drugs in low-income countries, where the patent-holders would have made limited profits. The Pool has obtained licenses for 12 antiretroviral medicines, has worked with generic manufacturers to distribute over 2 billion doses of the medicine in over 100 countries, and recently announced plans to expand its efforts to hepatitis and tuberculosis medicines. It can be envisaged that BRICS nations may come together in the same way to ensure right to life for their large population.

The Doha Declaration on TRIPS and Public Health has set a firm foundation upon which developing countries can protect their public health needs against the WTO's intellectual property policies. The preamble of this declaration addresses the fundamental concerns purported by developing member states, including a need for broad recognition of medical goods and diseases where the circumvention of patent protection rules for matters of public health is expected and necessary. The Declaration clarifies the right of poorer nations to act outside the market to avoid higher commodified drug prices by way of drawing on pertinent flexible mechanisms, including compulsory licensing and parallel imports. Therefore, it is concluded, in principle, that developing countries are adequately equipped with special provisions to protect their right to public health and promote access to medicines. While the TRIPS flexibilities denoted in the Doha declaration have

well-guided intent, the abilities of developing countries to utilize these flexibilities for public health concerns face onerous internal and external barriers. Many developing countries continue to lack local production capabilities and experience difficulties in achieving economies of scale. There is also a lack of efficient technical expertise to create the needed legislative reform to implement TRIPS flexibilities, as well as a lack of regulatory and registration capacity for drug patents and generics. TRIPS flexibilities and the Doha Declaration have set the stage; however, a greater effort is needed to overcome internal and external constraints. Without such an effort, the health of the developing world will continue to suffer at the hands of economic concerns.

To this effect is the decision of the Supreme Court in ***Vishwanath Prasad v. Hindustan Metal Industries*** in 1978 (Justice Jeevan Reddy)

In a cultural milieu where "knowledge is free", and is transmitted from generation to generation as a duty, it is incongruous to convert discoveries into "cash and carry" vulgarity but that is the perversion under pressure from Western Big Business. "Intellectual Property Rights" conceptually belongs to this money manic bigotry and TRIPS is the parent of this morally indefensible but virtually glorified anathema.

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A Case for Abolition of Death Penalty by Malaysia

Steven Thiru[1]

In Malaysia, the death penalty is mandatory for persons convicted of murder, trafficking in narcotics of various amounts, and discharging a firearm in the commission of various crimes (even where no one is hurt).

The Malaysian Bar has been, and remains, in the frontline of the battle to uphold and preserve the rule of law, fundamental constitutional rights, the administration of justice and law and order. In this regard, we have consistently called for the abolition of the death penalty.

For drug offences, there is a legal presumption that the accused is guilty of trafficking if found in possession of drugs in excess of the prescribed weight limit (which varies for different types of drugs). It is then left for the accused to prove his innocence. This is a reversal of the universal standard of the prosecution having to bear the burden of proof, which is described in the famous case of *Woolmington v. DPP*[2] as the golden thread in all criminal cases.

According to The Global Overview on the Death Penalty for Drug Offences 2010, conducted by the International Harm Reduction Association, Malaysia remains one of the 13 countries which imposes the mandatory death sentence for drug-related offences. And, in all Commonwealth countries, with the exception of Malaysia and Singapore, the mandatory death penalty has been declared to be a "cruel

1 President, Malaysian Bar Association

and unusual punishment". The death penalty was finally abolished in England in 1988, and the last execution was in 1964.

Moreover, the UN Declaration of Human Rights, the International Covenant on Civil and Political Rights and the European Convention on Human Rights all protect the right to life and reject inhumane punishments. Thus, the position in international law is set against the imposition of the death penalty.

It is also noteworthy that the Supreme Court of India, in a series of cases since 1980 has struck down the punishment of mandatory death penalty and has decided that judicial discretion in imposing a death sentence represented a peremptory, non-derogable norm of international law.

The death penalty is a barbaric form of punishment inflicted by the State to legitimise the deprivation of human life. It is compounded in its cruelty by the prolonged and indefinite incarceration of the convicted person in death row. The uncertainty, coupled with the fear of the inevitable, is tantamount to psychological torture. It is something that those who have not suffered the experience will fail to comprehend. It is also made worse by solitary confinement; which means that the suffering is borne all alone.

In this regard, the US Supreme Court in the 1972 case of Furman v. Georgia has observed that "*Death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual".*

While those in Malaysia who wish to retain the death penalty – the retentionists – continue to advocate for it, especially in relation to murder, rape and incest, the Malaysian Bar has always taken the view that there is no empirical evidence or data that confirms that the death penalty serves as an effective deterrent to the commission of crimes. There has been no significant reduction in the crimes for which the death penalty is currently mandatory.

This is particularly true of drug-related offences. In short, the death penalty does not work as a deterrent. Indeed, it could well have the opposite effect where courts could choose to stop convicting persons because the penalty is too severe.

Nevertheless, the Malaysian Bar's primary opposition to the death penalty is because life is sacred and every person has an inherent right to life. This is vouchsafed in Article 5(1) of the Federal Constitution of Malaysia that eschews arbitrary deprivation of life. We take the view that the right to life is a fundamental right which must be absolute, inalienable and universal, irrespective of the crime committed by the accused person.

In this regard, the Malaysian Bar at its Annual General Meetings in 1986, 2006, 2007, 2012, 2013 and 2014 has passed resolutions calling for the abolition of the death penalty. In 1985, the Malaysian Bar held an Extraordinary General Meeting and unanimously passed a resolution appealing to Seri Paduka Baginda Yang DiPertuan Agong to reprieve Mr Sim Kie Chon from the death sentence. Unfortunately he was not spared the gallows.

The Malaysian Bar had also supported the campaign by Malaysian civil society calling for a presidential pardon for Yong Vui Kong, who, at the age of 18 years, was given the mandatory death sentence for a drug-related offence in Singapore. In 2013, Yong Vui Kong's death sentence was commuted to a life sentence and 15 strokes of the cane. Two other Malaysians, Cheong Chun Yin and Pang Siew Fum also had their death sentences commuted to life sentence and 15 strokes of the cane in April 2015.

Further as part of our advocacy against the death penalty, we have since 2011, worked with European Union Delegation to Malaysia and the Human Rights Commission of Malaysia ("SUHAKAM") on a long term campaign for the abolition of the death penalty in Malaysia. Through a number of public fora, debate and pleadings competitions at university level, and seminars, the three organisations have been sensitising various groups to, and creating awareness of, the harshness of the death sentence. In 2013 and 2014, the British High Commission and Amnesty International, respectively, joined this laudable conscientisation campaign.

In July 2012, the Honourable Attorney General announced that the Attorney General's Chambers was considering proposing an amendment to the Dangerous Drugs Act 1952 to give judges the

discretion not to impose the death sentence on drug couriers, or "drug mules" as they are more commonly known. The Attorney General's Chambers was reportedly also considering a proposal that those on death row be resentenced.

The catalyst for the initiative by the Attorney General's Chambers may well have been the amendment of the law in Singapore that restricted the imposition of the mandatory death penalty for murder only to those cases where there is an intention to kill (rather than to cause injury). As regards trafficking in drugs, Singapore has abolished the mandatory death penalty where the person charged can show that he or she had played no part other than being a courier and where, in addition, the prosecutor has issued a certificate to say that the convicted person has "substantively assisted" the state in disrupting trafficking activities, and/or that he or she was acting under a mental illness sufficient to diminish responsibility.

There was then a very important development in 2013. The Malaysian Bar and "The Death Penalty" Project embarked on a Public Opinion Survey on the mandatory death penalty in Malaysia for drug trafficking, firearms offences and murder. The Death Penalty Project, a leading international human rights organisation based in United Kingdom, commissioned the very eminent and highly respected Professor Roger Hood, Professor Emeritus of Criminology at the University of Oxford to analyse and report on the finding of the public opinion survey. When faced with the reality of having to judge whether a crime merits the death penalty:-

(1) for drug trafficking and firearms offences, the conclusion was that the mandatory death penalty could be abolished without public outcry;

(2) as regards the mandatory death penalty for murder, the majority favour the exercise of discretion whether or not to sentence persons convicted of murder to death;

(3) as a whole, the findings showed that the majority of the public surveyed did not support mandatory death penalty, whether for drug trafficking, murder or firearms offences.

There is, on the evidence of the survey, no public barrier to the abolition of mandatory death penalty.

The Malaysian Bar presented the report of the survey to Members of the Parliament on 14 Nov 2014 at a dialogue on discretionary sentencing for capital punishment cases, hosted by the office of YB Puan Hajah Nancy Shukri, Minister in the Prime Minister's Department in charge of Law.

In 2013 and 2014, the Malaysian Bar had also hosted talks and a photo exhibition by Toshi Kazama, a well known photographer and anti-death penalty activist based in New York , whose work focuses on the value of human life and respect for fellow human being, as seen through the eyes of the families of the victims and of executed inmates.

There is a scarcity of information on people on death row and executions in Malaysia. This is regrettable, and certainly does not lend support to those who claim that the death penalty is a deterrent. As of November 2013, it is regretted that 975 were on death row. The last execution was possibly in 2010.

On 7 Feb 2014, the death sentence of murder convict Chandran s/o Paskaran was stayed following the intervention of His Royal Highness the Sultan of Johore following the last-minute clemency plea made by Chandran's family with the support of the Hindu Rights Action Force ("Hindraf"), media releases by Amnesty International and the Malaysian Bar.

It was then reported in the media on 23 March 2015 that Chandran was one of the 10 death row inmates whose death sentence was commuted to life imprisonment in conjunction of His Royal Highness the Sultan of Johore's coronation.

Nigerian Osariakhi Ernest Obayangbon (aka Philip Michael), convicted for murder committed 18 years ago, was scheduled to be executed on 14 Mar 2014. He too was given a last-minute reprieve following the intervention of Amnesty International's Malaysian Chapter with the assistance of YB Puan Hajah Nancy Shukri, Minister in the Prime Minister's Department, the Attorney General's Chambers and the Malaysian Bar.

Further, in May 2015, in conjunction with the installation of His Royal Highness the Sultan of Perak, the death sentence of two death row inmates were commuted to life imprisonment.

The death penalty has not yet been abolished in Malaysia. The reluctance to discard the death penalty may well be fuelled by the perception that that a large portion of Malaysian society still feel that the death penalty should remain because many (and some will say most) of the convicted persons have indeed committed heinous crimes, have gone through the legal process, and have been found guilty. The impulsive reaction is "*There can be no excuses for committing [this crime]. Everyone found guilty …. deserves to die*".

The campaign to abolish the death penalty is not meant to confer license to commit serious crimes with impunity. Person convicted of serious crimes must receive proportionate punishment. But, this does not mean that they therefore ought to die. In the case of a convicted murderer, the death penalty is a reflection of the notion that "*an eye for an eye*" provides the best form of justice.

However, today the death penalty has no place in any society that values human rights predicated on the rule of law, justice and mercy. In the wake of the collapse of the apartheid regime in South Africa, Justice Ishmael Mahomed, the former Chief Justice of Constitutional Court said, "*Death is different. The dignity of all of us, in a caring civilization, must not be compromised by the act of repeating, systematically and deliberately, albeit for a wholly different objective, what we find to be so repugnant in the conduct of the offender in the first place*".

More importantly, the death penalty, once carried out, is obviously irreversible. It is trite that no criminal justice system is fool-proof or error-free. If there is any certainty at all, it is the certainty that due to human fallibility mistakes can be made and miscarriages of justice do occur.

Thus, it was Lord Justice Sedley who presciently noted, "…. *the fact is that policemen, witnesses, judges and juries can all make ghastly mistakes. But the root of injustice is not this. It is the obsessive pretence of the law that mistakes are corrected on appeal and that what cannot be corrected on appeal is not a mistake. A just system is one which acknowledges*

that it is not proof against error even when it has carefully complied with all the rules. The trouble is that a less parsimonious use of the power to reopen old cases would raise the uncomfortable question whether our system of detection and trial may not only make mistakes but generate them."

In Malaysia, some of us will still recall the famous 1970s case of Karthigesu, who was wrongly convicted for murder and later acquitted. Needless to say, the opportunity to right a wrong would not have been available if the death sentence had been meted out. Then, we as a society would have been collectively responsible for having sent an innocent man or woman to their death. It would be cold comfort to the deceased person's loved ones for us to say that the system is not free from error and that every now and then, there are those who fall in between the stools! The burden of imposing a sentence of death is great and leaves no margin for natural human error.

The Malaysian Bar therefore reiterates its call on the Malaysian Government to abolish the death penalty, and in the meantime to put in place an immediate moratorium on its use pending its abolition.

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The Role of Law Societies in a Changing World GL Sanghi Memorial Lecture, 2016[1]

Dr Gordon Hughes[2]

LAWASIA'S Origins

Let me start by saying a few words about how and why LAWASIA came into existence.

The concept was proposed at a United Nations Human Rights Seminar in Kabul in 1964 and culminated to establish LAWASIA in the formation (and inaugural conference) of LAWASIA in Canberra in August 1966, for which one should acknowledge for posterity the contribution of LAWASIA's founding president, John Kerr QC (later Chief Justice Kerr and after that, Governor-General of Australia).

Sir John Kerr is a polarising political figure in Australia, given his role as Governor-General in the dismissal of the Australian Government in 1975, but his achievements as a lawyer and judge, and his contribution to the legal profession in a diverse number of ways, should never be underestimated or called into question.

Having said that, after 1975 Sir John was never far from controversy, rumour and innuendo, much of it unfounded, and his earlier history with LAWASIA led to an enduring urban myth – that LAWASIA is in fact a front for the CIA.

1 Based on G.L. Sanghi Memorial Lecture during LAWASIA Golden Jubilee Conference, Colombo, 15 August 2016

2 President, LAWASIA 2001-2003.

This allegation surfaces from time to time. For example, a journalist wrote in 1999 that Kerr was: "*tainted with alleged CIA connections through his association with LAWASIA, a Cold War body run from Washington*". It sounds very exotic but I can assure you there is no truth in that statement! Its origins lie in the fact that in 1966 LAWASIA received funding from the Asia Foundation, which in turn received funding from the Ford Foundation, and which in turn received funding from the CIA amongst numerous other sources.

LAWASIA's Objectives

In any event, when LAWASIA was formed in 1966, one of the objectives written into its Constitution, indeed objective 1(a), was *"to promote the administration of justice, the protection of human rights and the maintenance of the rule of law within the Region*".

This is not LAWASIA's only function or interest, but it is this aspect of LAWASIA's activities which I want to focus upon today.

Rule of law

Much of the LAWASIA thinking and policy-making revolves around the broad concept of the "rule of law".

This is a concept which can manifest itself in numerous ways although in it's purest form it involves adherence to constitutional and democratic processes of government.

Sri Lanka is of course a country which has experienced more than its fair share of constitutional unrest, but other countries have regrettably proved to be an equally fertile source of concern within LAWASIA.

Fiji is an example, with its three coups between 1987 and 2006. LAWASIA sent an observer mission there in 2007 under President Mah Weng Kwaito interview both sides and all stakeholders so as to ensure it was able to articulate the issues in a fully informed and objective fashion.

Another example is Nepal. In the early part of this century, LAWASIA issued numerous statements about its concerns involving the process by which Nepal was converting from a constitutional monarchy to a republic. It sent a fact-finding mission there in 2007,

and LAWASIA's ability to focus in its report on facts rather than politics resulted in President Mah Weng Kwai being invited to participate as an independent observer in the Nepal national elections in 2008.

These were examples of serious constitutional crises. But there are numerous other ways in which rule of law issues can manifest themselves.

Independence of the judiciary

One example, and an area in which LAWASIA has been consistently active since its inception,involves support for the independence of the judiciary.

The cornerstone of LAWASIA's formal position in relation to the independence of the judiciary lies in its so-called *Beijing Principles,* adopted by council in 1997. These principles articulate the role of the judicial system and emphasise the fundamental importance of an independent judiciary. The *Beijing Principles* were reinforced by a 2010 council resolution on the separation of powers.

As you would be aware, LAWASIA was vocal at the time of Chief Justice Bandaranayke's dismissal, and cited the *Beijing Principles* in that context. This type of controversy, however, is unfortunately not without considerable precedent. The one constant is that the legal profession consistently voices its protest, as the Bar Association of Sri Lanka did so effectively and courageously in 2013.

LAWASIA's concern for the independence of the judiciary of course both pre-dates and post-dates the Beijing Principles. Some issues span the period of both before and after.

One such example involved the removal in 1988 by the Malaysian government of the Lord President (or Chief Justice, as the position is now known) and two other Supreme Court judges on what many regarded as unsubstantiated grounds of "judicial misbehaviour".

This prompted a strong resolution at the Council meeting in 1988 in support of the independence of the judiciary. Proving that it has a long memory, LAWASIA marked the 20th anniversary of the event by participating in a Panel of Eminent Persons in 2008,chaired by former

Chief Justice Verma of India,which fully re-examined the events of 1988 and which concluded that there had been no justification for this interference with the court.

Independence of the legal profession

Of equal importance to the independence of the judiciary is, of course, the independence of the profession.

Interference with the profession may arise from government intervention, or from a breakdown in relations between the judiciary and the Bar, or from intimidation by interest groups, or from assault by disaffected clients.

Sri Lanka has had its own unfortunate experiences in this regard, such as in 2014 when LAWASIA joined with the IBA and other international legal organisations in condemning the surveillance and intimidation of Upul Jayasuria and other Sri Lankan lawyers who had been outspoken in their opposition to government policies.

Almost every year,LAWASIA has had cause to voice its concern over interferences with the profession.

Malaysia has, regrettably, been under regular scrutiny by LAWASIA in relation to its treatment of the profession, dating back at least to 1985 when Param Cumaraswamy, President of the Bar Council and a future LAWASIA President, was arrested after publicly commenting that there appeared to be one law for the rich and another for the poor. LAWASIA continues to this day to offer the strongest support to the Malaysian Bar in its dealings with government.

Human rights

LAWASIA has adopted an eclectic range of statements, resolutions and declarations on human rights over the years, with the subject matter embracing, amongst other things, asylum seekers, access to justice, terrorism, political hostages, weapons of mass destruction, child abuse, and various specific human rights violations and incidents in countries too numerous to mention.

Human Rights and Children

Eclectic and ad hoc as LAWASIA's involvement in this area has been, one constant theme is related to the rights of the child.

In 2011, council adopted the so called *LAWASIA Siem Reap Principles* and confirmed LAWASIA's commitment to the C*onvention on the Rights of the Child*.

LAWASIA's work in this area is assisted to some extent by the quite substantial LAWASIA Children's Trust which was established in 1993 and which provides funds for promoting and protecting the rights of children throughout the Asia Pacific Region.

Human Rights Committee

Much work in the human rights area has traditionally been generated by LAWASIA's Human Rights Committee.

Sri Lanka can claim credit for a direct involvement in this regard, courtesy of Mr H. W Jayewardene QC, president of LAWASIA between 1979 and 1981, who presided over the establishment of the Human Rights Committee in 1979, and who over saw the adoption of a set of Basic Human Rights Principles.

The Human Rights Committee has been an enduring part of the LAWASIA infrastructure and has now been elevated to Section status, a sure sign of the ever increasing significance of human rights in the LAWASIA agenda.

Politics

The fact is that if governments cause human rights abuses, if governments fail to respect the separation of powers, or if governments fail to appropriately respond to (or indeed facilitate) attacks on the legal profession, then the inevitable response of international legal organisations is unavoidably "political" in one sense.

LAWASIA has always been careful when treading this fine and hopefully its judgement is usually correct. Whilst there are many instances where it has refrained from speaking out because of concerns that it would appear politicised, it has from time to time felt able to involve itself in inherently political issues. For example:

- in 1983 it condemned the government of the Soviet Union over the shooting down of a Korean Airlines flight, and the government of the United States in 1988 over the downing of an Iranian airliner;
- it became involved in debate over the assassination of Senator Benigno Aguino in the Philippines in 1983, and the assassination of Indian Prime Minister Mrs Gandhi in 1984;
- it criticized the French government for its nuclear testing in the Pacific in 1995;
- it criticized the United States over conditions at Guantanamo Bay in 2003; and
- it has consistently criticised the Malaysian Government in relation to perceived irregularities in the various trials of former opposition leader Anwar Ibrahim, and indeed Mr Ibrahim attended and spoke at the LAWASIA annual conference held at the Gold Coast in 2005.

All of these initiatives could be interpreted as political activism of a sort, but all of it has involved issues directly relevant to human rights or the rule of law.

The issues of the future

So what does the past tell us about the future? And in what ways will the future differ from the past, as far as LAWASIA is concerned?

I would like to highlight 10 issues relevant to human rights and the rule of law which I anticipate will, or certainly should, dominate LAWASIA's agenda over the next few years. I am fully aware there are other issues, and also that new issues will, unfortunately, emerge that none of us has thought of yet. But these are the ones which I think we need to confront, no matter how difficult.

1. Migration and Refugees

The great humanitarian crisis facing all countries at present involves refugees and asylum seekers.

In contrast to the global response to the plight of refugees following the Second World War, governments now focus their attention on devising ways to prevent refugees crossing their borders.

This is not an easy problem to solve – governments have a legitimate sovereign interest in regulating immigration and filtering immigrants, but there are also elements of xenophobia, racism, self-interest and populism driving government policy.

The focus seems to have shifted to deterrence rather than acceptance,which in itself shows not only a lack of empathy but also a philosophical vacuum on the question of what motivates persecuted individuals to flee their country of origin in the first place.

Concern for refugees and asylum seekers is not new to LAWASIA.

In 2002, for example, the council adopted a comprehensive set of principles on asylum seekers, but unfortunately we do not appear to have progressed much since that time. Indeed, the problem is more chronic today than it was then.

The legal profession from throughout the Region has a responsibility to enter, and direct, this debate. LAWASIA should be leading that debate.

2. Response to Terrorism

Terrorism is not a new issue for LAWASIA.

Specific acts of terrorism have prompted LAWASIA to speak out on numerous occasions including:

- a resolution in New Zealand in October 2001 condemning the 9/11 terrorist attacks in New York;
- a resolution in Tokyo in 2003 condemning the bombing of the United Nations headquarters in Bagdad;
- a resolution passed in Colombo, condemning the terrorist attack in Quetta, Pakistan on 8 August 2016.

So terrorism is not new but the paradigm is shifting. The paradigm is shifting in the sense that ideologue terrorists are now having their platforms and their *modus operandi* hijacked by lone wolf terrorists who

adopt a cause without a history of commitment to it, and by ordinary criminals and sociopaths who simply have suicidal or homicidal tendencies which are acted out in a terrorist format.

The end result is of course the same. But the problem which this presents to lawyers and law enforcement agencies is that it makes potential terrorists more difficult to profile, identify and monitor.

This in turn gives rise to the question of whether, and to what extent, authorities require more invasive powers of investigation and surveillance. Do they need to start profiling and intervening on the basis of psychological characteristics of individuals, individuals who have the "potential" to become terrorists or to emulate terrorist tactics even though they have no history of association with ideological causes. At what point is the right to privacy and the right to freedom from arbitrary detention to be supplanted in this context?

The legal profession is uniquely placed to identify and articulate both sides of the argument and to guide our law makers across the Region towards an appropriate response.

3. Religion

Religion often becomes the basis for discrimination and oppression, and ultimately therefore the basis for retaliation. Some, but certainly not all, terrorist activity is clearly religiously motivated.

Religion is an emotive issue but we have to accept that it is one underlying cause of the potential breakdown in the rule of law in the world as we presently know it.

Because it is an emotive issue, there has been a traditional reluctance by lawyers and law makers to comment on religion, and by authorities to intervene, or at least to intervene early, against religious institutions and religious leaders who incite hatred and unrest.

Freedom of religion is a fundamental human right which must be upheld at all costs, yet the abuse, manipulation and misinterpretation of religious ideology can be the catalyst for the gross infringement of the human rights of others.

A balance between respect for religious beliefs and practices, and respect for those who do not share the same philosophies, has to be found.

Ultimately this becomes a legal issue, because that balance will need to be entrenched in law in one form or another. Again it is the responsibility of lawyers to guide this debate.

4. Youth unemployment

Youth unemployment is a growing problem throughout the Region, and indeed throughout the world.

According to the International Labour Organisation, half the young people in the Asia Pacific Region (that is, those aged 15 to 24) are jobless. Globally, there is 4.5% unemployment but youth unemployment is three times greater at 12.6%. Add to this the numbers of underemployed – 152 million in South East Asia and 150 million in East Asia and the Pacific – and we have a mounting problem

There is ample evidence that youth unemployment leads to a sense of restlessness, hopelessness and resentment, and from that a susceptibility of young people to indoctrination. There is a direct correlation between youth disillusionment and religious radicalisation.

It is not the role of the legal profession to solve unemployment.

It is our role, however, to address the sources of discontent in society which may in turn contribute to a breakdown not only of the social fabric but with it, the rule of law. If the profession can encourage debate about youth unemployment and the ways in which it can be addressed, we may contribute part of the solution to broader issues which pose a threat to the greater public wellbeing.

5. The Wealth gap

A recent Credit-Suisse study revealed some confronting statistics, principally that the top 1% of individuals now own 50.4% of global wealth; that is, 1% of the world's population now owns more than the remaining 99% put together.

It is not for the legal profession to address the wealth gap as such, but it must remain alert to the implications which, essentially, are twofold from a legal perspective.

First, wealth disparity is another source of discontent. As I have said, with discontent comes resentment, and ultimately rebellion. Rebellion poses a challenge to the rule of law.

Secondly, so long as wealth disparity exists, access to justice will be skewed. The rich will be able to afford better legal representation. The poor will in many situations not even bother to assert their legal rights.

Access to justice is not a new issue for LAWASIA. In 2010 it adopted a comprehensive *Statement on Principles of Access to Justice* but the problem has become worse in the years since that resolution. We are still looking for a solution.

The legal profession needs to be conscious of both cause and effect in this regard, and strive to find solutions to problems which will increasingly arise from disproportionate wealth distribution.

6. The Health gap

There is a huge disparity in the world in relation to the availability, and affordability, of essential medicines.

So what has this got to do with the legal profession? The answer is, "a lot", and it largely revolves around patent protection and the aspirations of multi-national pharmaceutical companies.

Let me provide an example.

> In a 2013 decision by the Indian Supreme Court, *Novartis AG v Union of India*, global pharmaceutical company Novartis was denied a patent on the modification of an existing leukaemia drug, Gleevec. The company claimed it was introducing a new formulation but the court determined that the new drug was virtually identical to the old one. This cleared the way for mass production of a much cheaper generic version of the drug, about 35 times cheaper than it would otherwise have been if the patent had been granted.

The case places the issue in perspective – is access to medicine a human right or an intellectual property right?

So what is the solution?

A partial solution already lies in compulsory licensing, enshrined in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), whereby a company can apply for a government licence to manufacture drugs owned by a third party at a prescribed fee under certain circumstances.

In March 2012, for example, India granted its first compulsory licence, to local generic drug manufacturer Natco Pharma, for a cancer drug patented by Bayer. This was a good example, at least for consumers, of the compulsory licensing regime at work.

TRIPS is treated with scepticism in some quarters, however. Public health advocates, including the World Health Organization, have expressed concern that overall TRIPS and related free trade agreements ultimately have the effect of simply expanding monopoly power and maximizing profits, thus deepening the health gap between the rich and poor.

Of course, there are two sides to this argument. The industry response, in broad terms, has tended to be: if we cannot obtain proper protection and an appropriate return on our investment, where is the incentive for ongoing research and development?This is a perfectly reasonable question.

Finding the right balance between these competing interests is a challenge for the legal profession as much as it is for the world's aid agencies, and LAWASIA has the intellectual resources and regional influence, as well as a responsibility, to contribute to that debate.

7. Discrimination (in all its forms)

Once again, I do not believe it is the direct role of the legal profession to stamp out discrimination against individuals, whatever form of discrimination that may be.

The profession must, however, play a part by monitoring, commenting upon and agitating for the adoption of anti-discrimination

legislation in its various forms. This has been the case for some time and there is ample evidence that, by and large, huge progress has been made in the Asia Pacific region over recent decades.

In addition, lawyers have a direct responsibility to eradicate any form of discrimination within the legal profession. This remains an ongoing issue.

Take, for example, gender equality. Great progress has been made at some levels. We have gone from a situation in which 50 years ago, some jurisdictions had zero female lawyers, to a situation in which women form the majority in a great number of jurisdictions. Look at some figures:

- 72.3% of private sector lawyers in Kuala Lumpur (not Malaysia as a whole) are female;
- 67.8% of the profession in the People's Republic of China is female;
- 61.7% of the profession in Hong Kong is female.

Inherent opposition to the training and admission to practice of women is not the burning issue any more. Rather, it is now necessary to tackle the so-called glass ceiling, with ample statistical evidence existing to the effect that women continue to be denied top jobs in private practice and as corporate counsel although, interestingly, not so glaringly (at least in some countries) in judicial ranks.

Gender is not the only form of discrimination within the legal profession which requires consideration. There are other forms which we need to consider more closely than we have to date:

- Racial and ethnic discrimination. There is evidence, for example, in a number of western countries which form part of the ESCAP region that opportunities for the advancement of Asian lawyers in those jurisdictions are limited or at least unequal;
- Disability discrimination. We need to consider whether enough is being done to accommodate lawyers with a physical disability. For example, much good work has been

done to promote accessibility to the internet for people with visual impairment, but I confess I have never heard the issue debated in the context of facilitating practice by visually impaired legal practitioners; and

- Discrimination on the basis of sexuality. The debate over LGBT has matured in many countries although it still remains an issue for some. Be that as it may, lawyers should be striving to ensure there is no discrimination against LGBT people in legal practice, and no barriers to professional advancement. Many large law firms have set up internal LGBT networks which is a start, but the issue remains taboo in other legal communities and indeed we will not have made genuine progress until LGBT networks in this context are no longer considered to be a necessity.

8. Capital punishment

I want to briefly mention the ongoing issue of capital punishment. There is no common approach to this issue – amongst individual lawyers, amongst law associations, amongst countries.

Of the 57 countries in the Asia-Pacific which are UN members or observer states:

- 21 have abolished capital punishment;
- 23 currently practise capital punishment;
- 2 retain it for extreme crimes, such as war crimes;
- 11 retain it but have not used it for over 10 years.

The global trend is largely towards abolition. This was exemplified recently in the reaction of the European Union to Turkey's proposal to re-introduce the death penalty at a time when Turkey was also seeking admission to the EU.

Then again, Turkey is not alone in contemplating the reintroduction of capital punishment. In the Philippines, which abolished the death penalty in 1987, reintroduced it in 1993 and then abolished it again in 2006, President Duterte is again proposing to reintroduce it.

Perhaps the answer is not black and white. But it should not be beyond international associations like LAWASIA to devise a set of principles which at the very least outline the issues and parameters surrounding the debate. Of course it's a difficult issue, but we should keep on debating it until consensus at some level has been reached.

9. Populism

The move towards reintroduction of capital punishment in The Philippines is seen by many as an essentially populist move, and this leads me to my next point.

The world is experiencing a resurgence of populism as a political ideology. I don't want to single out countries or names.

There's a fine line here:

- If someone is democratically elected, on the basis of polices which appeal to the majority, why should we complain?
- In an era when we increasingly bemoan a lack of principles, let alone charisma, amongst our political leaders, why should we complain when an aspiring politician expresses an extreme view and has the ability to articulate it and inspire a following?
- In an era where politicians prefer to conduct a referendum or a plebiscite to avoid making contentious decisions which may have an electoral backlash, what's wrong with a leader having the courage of his or her convictions being decisive and inflexible in implementing their policies?

To some extent, these are reasonable propositions.

But there comes a point where the pursuit of policies which challenge core values and humanitarian principles, is itself a failure – not a triumph - of leadership. Charisma is politically dangerous if used to promote values which have the potential to ultimately degrade our society.

What can lawyers do about this?

Law associations should be cautious about involving themselves gratuitously in the political process, as I have said.

Law associations can play an important role, however, if they (a) adopt and promote core values and humanitarian principles to be universally applied across all democracies, and (b) promote the fact that populism, after a point, even if reflective of the so-called democratic process, itself becomes a threat to the rule of law.

The fact is that populist rhetoric, when fuelled by charismatic politicians and not underpinned by defensible principles, can create a culture of envy, resentment, discrimination and xenophobia.

This in turn can lead to vigilantism, my tenth issue.

10. Vigilantism

We can all see the threats posed to society by terrorism. But disturbingly, the dangers of emerging vigilantism are not as apparent to some, and to some vigilantism indeed has an air of legitimacy, or at least justification.

Vigilantism is an obvious retrograde step and a direct affront to the rule of law. It is a potential consequence of the various phenomena which I have been talking about: discontent, alienation, radicalisation, populism.

Should lawyers get involved? The answer is "yes".

Where:

- influential politicians not only support the right to bear arms but also encourage people to use them "in appropriate circumstances", or
- presidents who actively encourage or facilitate the extrajudicial killing of drug dealers, or
- prime ministers say, albeit in jest, that refuges should be shot as a way of solving the migration problem;

then law associations have a serious responsibility to respond by publicly emphasising the implications of this rhetoric to the rule of law, whether or not we feel uncomfortable about straying into the political arena.

So that is my vision of where things are heading, and where our future responsibilities lie. These are all opportunities for the Regional profession to unite and lead where politicians have often failed to do so.

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The Need to evolve the Tort of Misfeasance in Public Office by Courts in India.[1]

Moksh Sharma*

Abstract

Misfeasance in public office is the common law's only public tort. It is an intentional tort that can be committed only by public officials who have unlawfully acted beyond their public power or misused their public position. This article narrates the origin, development and extensions of the tort of misfeasance beyond the familiar context of administrative law, and function as a Ombudsman in a Welfare State. The article traces the evolution of misfeasance in Australia, Canada, New Zealand, England and India and underlines the need and the scope to fulfill the need of a detailed law on misfeasance relating to public office in India for the purpose of ensuring a transparent, fair and honest exercise of power and good governance.

I. Introduction

The tort of misfeasance in public office is an intentional tort rooted in bad faith - personal to the public officer. It originated in Ashby (voting) case (1703). Historically, tort of misfeasance is an action on the case and the general rule is that there is no cause of action unless the claimant has suffered damage (Thus, not actionable per se). However, first steps to evolve this tort sprouted in Canada and Australia in 1959

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viz. Frank Roncarelli Vs. Duplessis[2] and Farrington Vs. Thomson[3], laying down the principle of "targeted malice" and the use of deliberate excess of power by a public officer, respectively. In the last three decades, the tort of misfeasance has been given a new shape by the High Court of Australia[4] which introduced the concepts of "reckless indifference" and "reckless disregards". However, it did not extend to include the concept of "ought to have known that he had no power", otherwise it would be very proximate to the law of negligence. The leading English (House of Lords) decision in theThree Rivers Case[5] crystallised the three main ingredients in the tort of misfeasance, namely a) must be a public officer, b) involvement of exercise of public power and c) the state of mind (malice) of the public officer. The Canadian Supreme Court in the Odhavji Case[6] extended the misfeasance tort from abuse of power to the breaches of statutory duties even though there was no intention to harm the claimants. This tort is further extended to cases involving personal injuries (in Akenzua's Case[7]); loss of liberty (Karagozlu Case[8]); breach of statutes (Canadian Cases[9]); corruption (Florencio Marin Jose Coye Vs. Attorney-General of Belize[10]); and grave abuses by public officials (Gregory McMaster Vs. Canada[11]; Thomas O Dwyer Vs. Ontario Cases[12]). Thus, giving the claimant a sense of psychological vindication for the mistreatment meted out to him by the public officer. It has become a powerful tort against public officials and serves the role of an Ombudsman.

In India, the Supreme Court made an innovative departure in the cases of Lucknow Development Authority[13],Common Cause[14] and

2 1959 SCR 121 (Canada)

3 1959 VR 286 (Australia)

4 Northern Territory Vs. Mengel 1995 (185) CLR 307.

5 1996 (3) AER 558-632; 2003 (2) AC 1 = 2000 (3) AER 1

6 2003 (3) SCR 263 (Canada Supreme Court)

7 2003 (1) AER 35 (CA).

8 2007 (2) AER 1055 (CA)

9 E (D) Guardian ad Liten v. BC 2005 (252) DLR (4th) 689; Somwar v. McDonalds Restaurants of Canada 2006 (79) OR (3d) 172.

10 2011 (5) Law Reports of Commonwealth 209.

11 2009 FC 937.

12 2008 (293) DLR (4th) 559 (Ontario C.A.)

13 1994 (1) SCC 243.

14 1996 (6) SCC 530.

Shiv Sagar Suri[15]cases making public servants liable to pay for their oppressive, arbitrary and unconstitutional acts of misfeasance. Later technicalities of law prevailed in the review petition of Common Cause Case (1999)[16] upsetting the earlier law. However, fortunately in another review petition of Shiv Sagar Suri[17] (2002) the Supreme Court doubted the correctness of the review judgment of Common Cause Case (1999) and did not agree with the conclusions on law and left it open for a Constitution Bench to decide the law in an appropriate case. It is necessary in the interest of clarity and certainty to coherently lay down the principles on which damages / exemplary damages can be levied upon public officials. This will be an important step to develop the law in India to fix personal liability on the public official and urgent steps needed for a transparent, fair and honest exercise of power and good governance! It would in no way dampen the initiative of the Ministers or public officials, or would inhibit them in any way from effectively discharging their functions. A responsible Government and concept of accountability are not antithetical to good governance, on the contrary they promote it – they contribute to public good. Lord Steyn in Three Rivers Case[18] stated, "that the torts rationale is that in a legal system based on the rule of law executive or administrative power may be exercised only for public good and not for ulterior or improper purposes. It bears some resemblance to the crime of misconduct in public office."

II. Origins of the tort of misfeasance.

The tort of misfeasance in public office originated (as far back as the Law Reports take us) to the electoral corruption case in 1703 (Ashby v. White)[19] (also known as eighteenth century voting rights case). The plaintiff, Mr. Ashby, was prevented from voting in an election by (the

15 1996 (6) SCC 558.

16 1999 (6) SCC 667.

17 2002 (10) SCC 667.

18 (2003 (2) AC 1 190-191.

19 1703 (2) Ld Raym 938-955; 92 E.R. 126 – it is also said to have established the principle that for every right, there must be a remedy (Latin-ubijus, ibi remedium). It is a fundamental to the Rule of Law. In Marbury Vs. Madison (1803 (5) US 137-163) applied the ubijus principle when laying the foundation of Judicial review. See Ted Sampsell Jones – The Myth of Ashby Vs. White (2010) University of St. Thomas Law Journal (Vol.-8 Issue-I p-40 to 59 at page 40). Ashby cited in India in Common Cause Cases 1996 (6) SCC 593 at page 598; AIR 1999 S.C. 2779 at para 97.

misfeasance of) a constable, Mr.White on the apparent pretext that he was not a settled inhabitant.[20] The issue that arose was, whether damages can be awarded for the violation of a civil right. Lord Holt CJ in his dissent held that the right to vote is a common law right and an obstruction of that right will give rise to a cause of action in which damages can be awarded despite there being no material loss. This dissent of Lord Holt CJ was finally upheld by the House of Lords by a vote of fifty to sixteen overruling the Court of Appeal decision and reinstated the verdict in Ashby's favour.[21] The Court based the decision on the showing of malice and the principle of *ubi jus ibi remedium*. Subsequent English (voting) cases[22] and American cases[23] affirmed the requirement of malice in suits against public officers.

For over two and a half centuries this branch of tort lay dormant and nothing happened. However, in 1908 in the case of Davis vs. Bromley Corporation[24] the Court of Appeal denied the existence of tort of misfeasance. Here the plaintiff was a builder and wanted to carry out some major improvements in his property. Necessary approvals were required and the Council withheld it. The plaintiff alleged that Council had not considered his plans according to law and was just a revenge for his earlier litigation with the Council on other aspects of building proposal. The Court of Appeal held that the Council has the discretionary power to grant necessary approvals and not the Court. The Court stated that even if the Council had been malicious, the only remedy before plaintiff was by way of mandamus.[25]

III. Gradual development of the tort of misfeasance.

The first "baby" steps were taken in Canada and Australia in 1950s in the development of the tort of misfeasance.

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20 The right to vote was then a property right

21 Edward Sugden, A Treatise of the Law of Property. As administered by the House of Lords 18 (London Hodges and Smith 1849).

22 Drewe Vs. Coulton (1787); Williams Vs. Lewis (1797) 170 ER 229; Harman Vs. Tappenden 102 ER 214; Cullen Vs. Morris (1819) 171 Eng Rep 741 (K.B. 745; Tozer Vs. Child 1857 (119) ER 1286.

23 Jenkins vs. Waldron - 11 Johns 114 (N.Y. 1812). New York Supreme Court; Swift vs. Chamberlain - 3 Conn 537 (1821 Connecticut Supreme Court; Wilkes vs. Dinsman - 48 US 89-130-131 (1849) citing Harman Vs. Tappenden 102 ER 217-219.

24 1908 (1) KB 170.

25 Ibid p-173.

The first steps in modern times were taken in Canada in the case of Frank Roncarelli vs. Maurice Duplessis[26].Roncarelli (a member of Jehovah's Witnesses) was the proprietor of a restaurant in Montreal and possessed a liquor license. He had also acted as bailsman in the cases of nearly 400 Jehovah Witnesses who had been arrested for distributing printed material related to their faith which was in violation of the Municipal by-laws. Maurice Duplessis, the then Premier of Quebec, directed (outside the limits of his power) the Quebec Liquor Commission to revoke Roncarelli's liquor licence and ban him permanently because of his support to the Jehovah's Witness campaign. The Supreme Court of Canada held that Duplessis had intentionally inflicted harm to Roncarelli and had no official power to do so. Thus, being the first classic case of "targeted malice".

Similarly, in Australia, in Farrington v. Thomson,[27] (1959) the defendants had neither any malice nor any intention to inflict harm to the plaintiff but were aware that they exceeded their power when they ordered him to cease selling liquor. The Court culled out from old cases the "deliberately harming" principle and constructed (in essence) a new tort, a second branch,namely "the deliberate excess of power."

— In the 1960's and 1970's some academic discussion by English Commentators like SA de Smith[28], HWR Wade[29], J McBride,[30] on the tort of misfeasance had Lord Diplock (speaking for the Judicial Committee of the Privy Council) to observe in Dunlop v. Woollahra Municipal Council[31],1982(without citing a single case) that the

26 1959 SCR 121; 1959 (16) DLR 689. Later in 1976, Gershman vs. Manitoba Vegetable Producer's Marketing Board 1976 (69) DLR 114 at 123) O' Sullivan JA observed that in Canada after Roncarelli's case,"it is clear that a citizen who suffers damages as a result of flagrant abuse of public power aimed at himhas the right to an award of damages in a civil actions in tort".

27 1959 VR 286; see also Tampion vs. Anderson 1973 VR 715 at 720, J. Smith indicated that "a plaintiff must not only show damage from the abuse, he must also show that he was the member of the public, or one of the members of the public to whom the holder of the office owed a duty not to commit the particular abuse complained of.", this case relied on by the Victorian Full Court in Cannon vs. TAHCHE 2002 (5) VR 317 at 328; In India followed in Shiv Sagar Tiwari Case 1996 (6) SCC 558-563.

28 SA de Smith, Judicial Review of Administrative action (2nd Edition, Published London: Stevens and Sons 1968), pages 19 and 319;

29 HWR Wade, Administrative law (4th Edition, 1977) (Published by Oxford: Clarendon Press) Pages 636-640.

30 J. McBride, "Damages as a Remedy for Unlawful Administrative Action" – 1979 (38) CLJ 323 (4).

31 1982 AC 158 at page-172 (Privy Council); 1981 (1) AER 1202-1210; See Jones Vs. Swansea City Council 1989 (3) AER 162 (CA) at p-173.

tort of misfeasance in public office is "well established", and held that torts constitute mental elements which were either "malice" or "deliberate excess of power". In 1986, the English Court of Appeal in Bourgoin SA vs. Ministry of Agriculture, Fisheries and Food[32], accepted the existence of the tort of misfeasance and for the first time applied the label "targeted malice" to the first alternative i.e. the deliberate harm.

IV. Recent contours in the making of the tort of misfeasance.

In the last two decades, four important cases shaped the contours of the misfeasance tort, giving damages on a tort scale for the harm inflicted by public officials, being guilty of "conscious maladministration". The Judges in these cases did not become Law reformers or Legal historians by imposing new duties of care or new standards of administration on public officers but however impliedly stressed the need for a tort to catch up with public officials who deliberately take the law in their own hands.[33]

1. The first important case was from the High Court of Australia (1995) in Northern Territory Vs. Mengel[34]. In this case the

32 1986 (1) QB 716=1985(3) AER 585 – here the plaintiffs were French Turkey farmers who had been banned by the Ministry from exporting turkeys to England on the ground that they would spread disease. The Ministry later conceded that it was to protect British Turkey farmers and thus committed breach of Article 30 of EEC Treaty which prohibited unjustifiable import restrictions. The Ministry denied the liability for misfeasance claiming that they were not actuated by an intent to injure the plaintiff but a need to protect British interest. The Court of Appeal held that proof of actual malice or ill-will not essential to the tort. It is enough if the plaintiff establishes that defendant has acted unlawfully in a manner foreseeable injurious to the plaintiff. See also Bennett vs. Commissioner of Police of the Metropolis 1995 (2) AER 1 at 13-14 it was held that tort of misfeasance in public office required express intent to injure. Cited in India in Shiv Sagar Tiwari case 1996 (6) SCC 558-para 11.

33 Pyrenees Shire Council v. Day (High Court of Australia – CJ Brennan, Toohey, McHugh, Gummow and Kirby JJ.) (1998) 192 CLR 330 at 376 (124) J. Gummow. See this case is followed in Neilson Vs. City of Swan (No.6) (5.3.2013) J. Allanson (2006) WASCA 94; 147 LGERA 136; Lock Vs. Australian Securities and Investments Commission (4.2.2016) J. Gleeson (2016) FCA 31; 334 ALR 250; 111 ACSR 318; MJL Vs. State of Western Australia (22-09-2015) J. Allanson (2015) WASC 348.

34 1995 (185) CLR 307 (7 Judges – leading Judgment by CJ Mason, (for Dawson, Toohey, Gaudron and Mc Hugh JJ) and Separate judgments were delivered by J. Brennan and Justice Deane)- overruling Beaudesert Shire Council Vs. Smith 1966 (120) CLR 145-155-156 – the principle in this case was that independently of trespass, negligence or nuisance, but by an action on the case (an ancient English forms of action – providing a remedy for new fact situations by English Courts from 15th to 19th Century and was done away by Judicature Acts) a person who suffers harm or loss

Government stock Inspectors suspected (wrongly, as it transpired) that Mengel's cattle had fallen prey to virulent stock disease known as "brucellosis". Both the Inspector and Mengel at the time, believed that they were validly acting under the statutory Scheme but the Scheme applied to existing agreements and Mengel's agreement had expired sometime ago. While the Inspector believed that Mengel was subject to the Scheme, the cattle was not sold and it was only much later it was found that it hadn't been infected. By then, the market price of the cattle had declined considerably due to which Mengel had suffered a loss. The Court held that though the Inspector had acted beyond the powers but since it was in good faith and this was sufficient to exclude him from the liability of misfeasance.

The High Court of Australia reformulated misfeasance by introducing the concepts of "reckless indifference" and "reckless disregard" into the tests. To establish the tort of misfeasance the main elements required were: a) there is an intention to cause harm by the public officer; b) there is reckless indifference to the harm that is likely to ensue; c) the public officer knowingly acts in excess of his powers; d) the public officer recklessly disregards the means of ascertaining the extent of his power[35]. The Court did not extend the principle to include cases where the officer "ought to have known" that he or she did not have the power. They implied that this was too close to negligence law and was not called for a separate principle. The Court further said that misfeasance in public office is a personal tort. It is personal to the officer who commits the tort and liability will "ordinarily only be personal liability".

Justice Brennan formulated misfeasance in public office as under[36]:

> *"It is the absence of an honest attempt to perform the functions of the office that constitutes the abuse of the office. Misfeasance in public office consists of a purported exercise of some power*

as the inevitableconsequence of the unlawful, intentional and positive acts of another is entitled to recover damages from that other (p-155-156). Also cited in India in Common Cause Case in AIR 1999 S.C. 2979 at paras 91 and 94.

35 Ibid page-539-541

36 Ibid page-547B (J. Brennan)

> *or authority by a public officer otherwise than in an honest attempt to perform the functions of his or her officer whereby loss is caused to a plaintiff. Malice, knowledge and reckless indifference are states of mind that stamp on a purported but invalid exercise of power the character of abuse of or misfeasance in public office. If the impugned conduct then causes injury, the cause of action is complete."* (Emphasis supplied)

Justice Deane (in summary) held that there are five essential ingredients[37] that constituted the tort, namely: (i) "an invalid or unauthorized act; (ii) done maliciously; (iii) by a public officer; (iv) in the purported discharge of his or her public duties; and; (v) which causes loss to the plaintiff.

2. The second important Case was from the New Zealand Court of Appeal (1997) – in Garrett vs. Attorney General[38]. In this case a police constable had raped the plaintiff and the police Sergeant had covered it up until the evidence had gone cold. The Sergeant's excuse was that the plaintiff had initially asked that the matter be dealt unofficially, and wanted the rapist to be far away from her. However, the Jury believed the Sergeant, otherwise, the question would have been, whether it is misfeasance to knowingly break the law at plaintiff's request or mistaken belief for plaintiff's benefit? However, the Court ruled out misfeasance for a different reason viz. as there was no evidence of the Sergeant's knowledge or even suspicion that the plaintiff would suffer such reputational loss or psychiatric harm for such a cover up! The Court brought in the concept of "reckless indifference" as an alternative to intentional harm, but however stated that "it could exist only if the sergeant had turned his mind on the consequences which he had not."[39]

37 Ibid page-554C (J. Deane)

38 1997 (2) NZLR 332 followed in Rawlinson Vs. Rice 1997 (2) NZLR 651 (C.A.); cited in Watkins Vs. Home Office; 2004 (2) AER 1158 – a case where the prison officer opened and read the protected correspondence of the prisoners. The claimant was not able to prove any material damage. Here much importance is given on the element of material damage then mental. It be noted at that time the UK Human Rights Act was not in force.

39 Ibid page-350 (J. Blanchard)

3. The third important case was from United Kingdom – the House of Lords decision (2000) in Three Rivers District Council v. Bank of England (No.3)[40] (a leading English case on the tort of misfeasance in public office). In this case the Claimants were (potential) depositors of a failed bank. They alleged that the bank was so evidently dodgy that it should never have been licensed, or at the very least its licence should have been cancelled years before it ultimately failed. A claim for negligence would have offered no hope as the regulator had statutory protection from liability for any conduct undertaken in good faith. The claimants then pursued misfeasance in public office – an intentional tort rooted in bad faith. The claim went to trial but it finally failed for want of proof of bad faith. The House of Lords relied on Mengel and Garreth cases and stated that misfeasance required either deliberate harm or knowingly illegal conduct.[41]Lord Steyn, set out the (three) main ingredients of the tort of misfeasance as under[42]:

   (a) the defendant must be a public officer. (Ingredient #1)

   (b) the defendant's conduct must involve the exercise of power as a public officer, or the exercise of public functions. (Ingredient #2)

   (c) the defendant must be shown to have one of two states of mind (Ingredient #3):

      (i) targeted malice – conduct specifically intended to injure someone. This includes "bad faith" in the sense of exercising public powers for an improper or ulterior motive; or

      (ii) acting with subjective knowledge that he has no power to do the act complained of and subjective knowledge that the act will probably injure the plaintiff; or acting with subjective

40 2003 (2) AC 1 = 2000 (3) AER 1; see Three River case reported in 1996 (3) AER 558 at 632 to 633 J. Clarke conclusions as to the ingredients of tort. Note both Court of Appeal and House of Lords upheld the essential elements of J. Clarke – see 2000 (3) AER 1; 2003 (2) A.C. 1 at 191

41 2003 (2) AC 1 at page 192 (Lord Steyn); page 229-30 (Lord Hobhouse); Page 235 (Lord Millett) page 267 (Lord Hutton)

42 2003 (2) A.C. 1 at 191 = 2000 (3) AER 1 p 8 to 11 – case came before the House of Lords a second time, giving them further opportunity to discuss the tort in the context of the plaintiffs' amended pleadings; the decision is reported in [2001] 2 All E.R. 513.

reckless indifference with respect to the illegality of the act and subjective reckless indifference to the outcome.

(d) the public officer must owe a duty to the plaintiff, which may be established by showing that the plaintiff has the right not to be damaged or injured by a deliberate abuse of power.

(e) causation – the plaintiff must show that the defendant's abuse of power caused him harm as a matter of fact.

(f) the plaintiff must show that he has suffered damages that are not "too remote" from the defendant's tortious act. The plaintiff must show not only that the defendant knew his act was beyond his powers, but also acted in the knowledge that his act would probably injure the plaintiff or a person of the class of which the plaintiff was a member.

Lord Steyn observed that as bad faith was the tort's raison d'etre, "reckless indifference" had to be real, not imputed; misfeasance had to be limited to the person who knowingly took the relevant risk, rather than the person who never gave a thought.[43] On the other hand Lord Hobhouse spoke of three limbs, namely, purpose, knowledge and consciously reckless indifference.[44]

4. The fourth and most interesting case was from the Supreme Court of Canada (2003) in Odhavji v. Woodhouse[45]which extended the tort of misfeasance against public officials for the breach of their statutory duties, even though with no intention to harm the claimants,. In this case, Mr.Odhavji was killed in a police chase and his family brought a lawsuit against various police officers and the Chief of Police for not co-operating with the Special Investigation

43 2003(2) AC 1 at page 192-193.

44 Ibid page 230-231 at page 286. The High Court of New Zealand in Trevor Philip Goodship Vs. Minister of Fisheries (http://www.fish.govt.nz/nr/rdonlyres/043519ac-f4d2-4bb4-abb2-2e2b7feff61/0/scampi_decision.pdf) Judgment dated 19-12-2006) has followed Garrett Case (1997) and Mengel Case (1995) and the Three River Case (2000) on the question whether actual knowledge is required or whether recklessness is a sufficient state of mind, is now settled by holding that recklessness is sufficient (para 134).

45 2003 (3) SCR 263 – J. Iacobucci for CJ Mclachlin, J Gonthier; J Major; J Bastarache, J. Binnie, J Arbour, J Le Bel and J. Deschamps). This case is cited in Watkins Vs. Home Office 2006 (2) AC 395 (UK).

Unit. They claimed there was misfeasance by officers and negligent supervision by the Chief of Police which caused harm to the family. The issue was, whether the police officers or the Chief of Police were liable for the tort of misfeasance? The Supreme Court of Canada held them liable for misfeasance for deliberately obstructing the investigation despite being aware of the potential harm to the family. The Court allowed the misfeasance claim to go to trial, endorsing the requirements of Three Rivers Case,[46] The Canadian Supreme Court accepted that the tort of misfeasance in public office is an intentional tort whose distinguishing elements are twofold namely (i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff.

Hence the tort of misfeasance jurisprudence has extended from abuse of power to the breaches of statutory duties of public official – even though with no intention to harm the claimant.[47]

V. Role and latest extension of Tort of Misfeasance in public office.

The tort of Misfeasance has come out from obscurity and has emerged as a powerful tort against public officials. It has evolved and has become a more successful cause of action than negligence in certain situations where official's duties are involved. It has unique procedural and psychological advantages and has extended in last decade to following categories of cases:

(i) **Extended to Personal Injury**

The UK Court of Appeal in Akenzua vs. Secretary of State for the Home Department and the Commissioner of Police[48] (2003) held that it is no longer necessary to allege that the victim was to be identifiable before the act is complained as a misfeasance. It is sufficient to aver that the person could not be identified

46 Ibid page 282, 289 (J. Iacobucci)

47 Jason Neyer, Erika Chamberlian, Stephen GA Pitel Editors; Emerging Issues in Tort Law, 2007 (Hart Publishing Portland) – Chapter 2-Breach of Statute and Tort law by Lewis N Klar – In a conference held in Ontario 9-10 June 2006 on Tort Law where Justice Ian Binnie spoke about "Tortaholics" Speakers on Misfeasance tort.

48 2003 (1) AER 35 (C.A.) On 17.2.2003 House of Lords refused leave in this case.

until the act of violence. What matters not the predictability of the person killing the deceased but the predictability of killing someone.[49] In this case the claimant sought damages for misfeasance in public office against the Secretary of State and the police for releasing from custody a person known to be violent who ended up killing a member of the Claimant's family.

(ii) Extended to loss of liberty

In 2007, the UK Court of Appeal in Karagozlu vs. Metropolitan Police Commissioner[50] allowed the claimants contention that the loss of the freedom he would have enjoyed earlier in a category D prison (open conditions) vis-à-vis later Category B prison (secure condition) was a sufficient loss of liberty. The Police Commissioner (defendant) argued that a claim for misfeasance required proof of material or special damage. The Court rejected it and Sir Anthony Clarke held[51] that if 'material damage' is defined as stated above, then loss of liberty, if not a form of physical injury, is at least akin to or analogous to physical injury" and "loss of liberty is sufficient damage to support a cause of action".

(iii) Extended to breach of Statute

The two Canadian cases, viz. one on sterilization of mental patients and other on privacy were allowed for breach of statute as under:

(a) E (D) (Guardian ad Liten of) vs. BC 2005 (252) DLR (4th) 689 (BCCA), actions of misfeasance in a public office

49 Ibid at page 42 para 21 – Sedley L.J. held: "It follows that the averment that the deceased was a member of a class – any class – is an immaterial averment. Denton killed a single person in the period of his arranged liberty. If he had predictably murdered or maimed more than one person they would form a class for present purposes. What matters is not the predictability of his killing the deceased but the predictability of his killing someone. That is my understanding of the effect of the reasoning in the Three Rivers case. It is also case B of my examples. Put another way, but again using the Three Rivers taxonomy, Denton's single known victim stands in the same situation as each of those claimants who at the time of the alleged misfeasance in the Three Rivers case were only potential depositors: that is to say, she too was a potential victim."

50 2007 (2) AER 1055 (C.A.) at para 29, 39

51 Ibid, paras 39, 40 and 42.

were brought against Superintendents of hospitals who carried out sterilizations on mental patients pursuant to the provisions of Sexual Sterilization Act 1933 C59. The allegation was that the Superintendents exceeded their authority under the Act by recommending sterilization that could not be supported by the Act's provisions. The Court of Appeal allowed the plaintiffs action.

(b) In Somwar vs. McDonalds Restaurants of Canada 2006 (79) OR (3d) 172 (SCJ) the Court considered whether a breach of Consumer Reporting Act RSO 1990, C 33, could support an action for breach of privacy. Following Odhavji case the judge held although there was no tort of breach of statutory duty, a breach of a statute can constitute an element of the tort of invasion of privacy. The action was allowed to go to trial.

(iv) Extended against corrupt Ministers.

In a very unprecedent judgment in the case of Florencio Marin Jose Coye Vs. The Attorney General of Belize[52], the Caribbean Constitution Court held by majority (3:2) that a new government can claim damages (for the country) from the allegedly corrupt former Ministers. In this case the Attorney General of Belize filed a claim against two former Ministers of previous Government alleging that they transferred 56 parcels of State land to a Company beneficially owned and controlled by them. The consideration paid by the purchasing company was $1 million below the market value and was done without lawful authority and in bad faith. The claim was premised on a single cause of action namely, the common law tort of misfeasance in public office. Justice Conteh dismissed the action. But the Court of Appeal reversed the decision and held the former Ministers liable in misfeasance for loss of public property, and held that the Attorney-General, being the guardian of public rights was entitled to institute the proceedings basing its

52 2011 (5) Law Reports of the Commonwealth 209; 2011 CCJ 9 (AJ); Caribbean Court of Justice (Appellate Jurisdiction), on appeal from the Court of Appeal of Belize.

decision on Indian and English cases.[53] The former Ministers appealed to the highest Court and the question was, whether the tort of misfeasance encompasses action by the Attorney General (acting on behalf of the State) against its own officers or former officers? The majority held that the State can sue the appellants (former Ministers) for misfeasance in public office, Justice Jacob Wit observed that tort of misfeasance and the breach of the public officer's fiduciary duty[54] are not far away when the State is involved - both give rise to compensation for damage and are parallel to each other. An overlap between tort and equity happens[55],especially in modern times, when claims are anchored on both in common law and equity.

(v) **Extended to the abusive power of public official.**

The recent trend in Canada has been to control the abusive power of public officials through the tort of misfeasance. It has provided a psychological vindication to claimants, and has served as an "Ombudsman" function, in the following cases:

(i) In 2008,in Gregory McMaster vs. Canada[56] (Federal Court), the plaintiff's counsel had stressed the need for holding public officials accountable in the tort of misfeasance as under: "if we run into situations where people at city hall, or people in the provincial government, or people of the

53 Common Cause Vs. Union of iNdia 1996 (3) SCC 530 and 1999 INSC 240; Shiv Sagar Tiwari Vs. Union of India 1996 (6) SCC 558; Gouriet vs. Union of Post Office Workers 1977 (3) AER 70.

54 Attorney General for Hong Kong Vs. Reid–1994 (1) AC 324 = Equity proscribes the fiduciary not only from accepting bribes out also from unauthorized gain. It can trace and track them. The arms of law are long. This case followed in India in Delhi Development Authority vs. Skipper Construction 1996 (4) SCC 622 paras-29 to 32 [a case of fraud by developer in connivance with public authorities.] The Supreme Court observed as follows:
"The absence of a statutory provision will not inhibit this Court while acting under the said Article [142] from making appropriate orders for doing complete justice between the parties. The fiduciary relationship may not exist in the present case nor is it a case of a holder of public office, yet if it is found that someone has acquired properties by defrauding the people and if it is found that the persons defrauded should be restored to the position in which they would have been but for the said fraud, the court can make all necessary orders. This is what equity means and in India the courts are not only courts of law but also courts of equity."

55 Lord Browne-Wilkinson in Henderson Vs. Merritt Syndicate Ltd. (No.1) 1995 (2) AC 145 at 205.

56 2008 F.C. 1158 affirmed in 2009 FC 937; 2009 FCJ No: 1071 (QL) [Mc Master Appeal]

federal government start abusing our rights, or not seeing that we are properly served ……. (the tort of misfeasance in public office) is something that the average citizen can use to effect some sort of remedy".[57]

In this case the plaintiff, McMaster a federal inmate had very wide feet. He was entitled as per the Prison Directive to receive a new pair of shoes each year and regularly requested extra wide shoes. However, for unknown reasons Ms Wherry, Acting Head of Institutional services did not provide him the appropriately sized shoes but instead, forced him to accept improperly-sized shoes and insinuated him on making frivolous requests. As a result, the plaintiff continued to wear his old worn out shoes until one day, while exercising he fell on his right knee,sustaining injuries. He sued the prison authorities for damages and brought the tort of misfeasance in a public office. This matter was heard before the Prothonotary who applied the tests of the Odhavji Estate Case (2003) and found the actions of Ms. Wherry unlawful for deliberately refusing to obey the directive to provide the plaintiff with new shoes. On malice, it was held that prison officials were aware that ill-fitting shoes could lead to foot ailments and injury and knew that it would cause harm to the plaintiff. The Prothonotary assessed the damages at $9,000 and reduced this by one-third for the plaintiff's contributory negligence in wearing the worn-out shoes. The Crown appealed[58] and argued that misfeasance in public office should be reserved only for "grave and intentional abuses of power[59], only to have the Federal Court reject the Crown's plea.

The case brought into focus the conduct of public officials for not carrying out their duties properly and helped in

57 Cristin Schmitz, "Serial Killer gets $6,000 for pain and suffering" The Lawyer's Weekly [7.11.2008] 1 at 17.

58 2009 F.C. 937; 2009 F.C.J. NO 1071 (QL) (Mc Master Appeal) Paras 55-56, 68.

59 Ibid para-57.

exacting some penalty as a psychological vindication for the mistreatment given to them and served the function of an Ombudsman.[60]However, the public officials though bookable for their unlawful actions through administrative or disciplinary proceedings,provide no compensation to mistreated individuals.

In the case of Thomas O'Dwyer vs. Ontario (Racing Commission)[61] the liability arose from a telephone call made by one of its officials to the Ridean Carlton Raceway where the Thomas O'Dwyer was employed. The Official advised that Mr. Thomas O'Dwyer should not be approved as a starter for the 2003 session. Because of the telephone call, Mr. Thomas O'Dwyer was not hired by the Raceway and suffered damages. The Court of Appeal held that the Racing Commission's conduct considered as a whole, together with the official's phone call was reckless indifference and was contrary to the provisions of the Racing Commission Act 2000 (S.O. 2000) C. 20 and held liable for the tort of misfeasance in public office.

Similarly, in 2010, an Australian Federal Court in the case of Fernando v Commonwealth of Australia[62], involving unlawful exercise of power by a Minister of State against a convicted rapist Mr. Fernando [a Sri Lankan citizen]. Fernando had arrived in Australia in 1989 on a student visa and got a permanent residency visa in 1995. He was convicted in July 1998 for sexual assault and was sentenced to 8 years imprisonment. As a result, he was at a risk of losing his permanent residency visa on character grounds under Section 510(2) of the Migration Act 1958 and would be deported. The Department officers learned that Fernando was due to be released from Acacia prison on 17-09-2003

60 Erika Chamber Lain, What is the Role of Misfeasance in public office in Modern Canadian Tort Law? 2009 (Vol.88) La Revne DuBarreau Candien 579 at 602.

61 2008 (293) DLR (4th) 559 (Ontario C.A.) [O'Dwyer]

62 2010 FCA 753 = 2010 (271) ALR 521; See also 2013 FCA 1121 cited in Rook v. State of New South Wales (No.3) – 2015 NSWDC 154 (10.6.2015) para 171

and thus, he was served a notice calling upon him to reply within 14 days as to why the Minister should not cancel his visa. Mr. Fernando,being in prison, posted his submissions within 14 days, but the submission did not arrive in Canberra until 3.10.2003. In the meantime, the Acting Minister (as the Minister being out of Australia) cancelled Fernando's Visa on 3.10.2003 (without the submissions in transit). Fernando challenged the cancellation order before the Court andthe Court ruled that the Acting Minister had engaged in misfeasance in public office and awarded a sum of $ 3,000 to Fernando.

This trend has brought the public's attention to the unfair, abusive, arbitrary or malicious actions of public officials and enhancing psychological vindication to the claimant's rights. Hence, making the government more responsible and accountable to the people.

VI. Development of law in India:

The tort of misfeasance in public office has been accepted by the Supreme Court of India. A few reported cases which came up for consideration before the Supreme Court are as follows:

Lucknow Development Authority Vs. M.K. Gupta[63]. (1994). The question before the Supreme Court was whether a statutory authority such as the Lucknow Development Authority (constituted under the Act to carry on planned development of cities) amenable to the Consumer Protection Act, 1986 for any act or omission relating to housing activity such as delay in delivery of possession, defective or faculty construction etc.? Further, whether the National Rederessal Dispute Commission under the Consumer Protection Act have the right and power to award exemplary damages and accountability of the statutory authorities? The Supreme Court relying upon the Administrative Law set by Prof. Wade and English cases awarded exemplary

63 1994 (1) SCC 243 = AIR 1994 S.C. 787; See S.P. Goel vs. Collector of Stamps 1996 (1) SCC 573 – The court observed that government officer may be held liable even in tort if he acts maliciously or with oblique motive or malafide (para 31).

damages to a consumer who had initiated proceedings under the Consumer Protection Act, 1986. The Supreme Court held that the officers of the Lucknow Development Authority were not immune from tortious liability and awarded Rs.10,000 as compensation awarded by the National Commission on the ground that the action of the Lucknow Development Authority amounted to harassment, mental torture and agony of the respondent. The Supreme Court stressed the need of tort for curing the social evil by stating as under:

"……

Harassment of a common man by public authorities is socially abhorring and legally impermissible. It may harm him personally but the injury to society is far more grievous. Crime and corruption thrive and prosper in the society due to lack of public resistance. Nothing is more damaging than the feeling of helplessness. An ordinary citizen instead of complaining and fighting succumbs to the pressure of undesirable functioning in offices instead of standing against it.**Therefore the award of compensation for harassment by public authorities not only compensates the individual, satisfies him personally but helps in curing social evil. It may result in improving the work culture and help in changing the outlook**……..."

"……

But where the duty is performed capriciously or the exercise of power results in harassment and agony then the responsibility to pay the loss determined should be whose? In a modern society no authority can arrogate to itself the power to act in a manner which is arbitrary. It is unfortunate that matters which require immediate attention linger on and the man in the street is made to run from one end to other with no result. The culture of window clearance appears to be totally dead. Even in ordinary matters a common man who has neither the political backing nor the financial strength to match the inaction in public oriented

departments gets frustrated and it erodes the credibility in the system…" (Emphasis added)

(ii) The next case was Common Cause vs. Union of India[64]. Here, a Writ Petition was filed in public interest by a registered society (Common Cause) challenging the allotments of retail outlets for petroleum products (petrol pumps) made by Capt Satish Sharma, the then Minister of State for Petroleum and Natural Gas. The Court found that the allottees were politicians, members of the Oil Selection Boards and various officials from the Petroleum Ministry. There was no advertisement nor any method for inviting applications, no guidelines prescribed for allotments and all applications were directly processed by the Minister. The Supreme Court relying on the Lucknow Development Authority Case, held that the allotments of retail outlets made by the Minister were arbitrary, discriminatory, malafide and illegal and thereby cancelled them. The Supreme Court later[65] after discussing cases on exemplary damages[66] awarded a sum of Rs. 50 Lakhs against the Minister Captain Satish Sharma to be paid to the Government exchequer for his arbitrary, mala fide and illegal action.

(iii) Similarly, in Shiv Sagar Tiwari Vs. Union of India[67] an illegal allotment of 52 shops and stalls was made by Smt. Shiela Kaul, the then Minister of Urban Development, to her own relatives, employees and domestic servants of her family and family friends. All allotments were cancelled on the ground that it was wholly arbitrary, illegal and malafide. The Supreme Court

64 1996 (6) SCC 530

65 1996 (6) SCC 593 (Nov. 1996) paras 8 to 11

66 Now Exemplary Damages may be awarded in three categories namely:

(i) Rookes Vs. Barnard1964 AC 1129 Lord Darlin "an arbitrary and outrageous use of executive power; [page 1223] and "oppressive, arbitrary or unconstitutional action by servants of government (P-1226).

(ii) AB Vs. South West Water Services Ltd. 1993 QB 507-529F, Lord Bingham – purpose is to restrain from misuse of power.

(iii) Kuddus Vs. Chief Constable of Leicestershire Constabulary – 2002 (2) AC 122 para 63 Lord Nicholls – "conscious wrongdoing by a defendant is so outrageous".

67 1996 (6) SCC 558.

relied on the Lucknow Development, Common Cause Case, Professor Wade and other English cases[68] and keeping in view the high principles of public law and transparency held that despite no injury was caused to any third person, she was liable for her arbitrary, mala fide and unconstitutional actions and imposed exemplary damages of Rs. 60 Lakhs to be paid to the Government Exchequers[69].

However, review petitions were filed against the decisions of Common Cause[70] and Shiv Sagar Suri[71] and in 1999 the review petition in Common Cause[72] case was allowed, reversing the conclusions of law and refunding Rs.50 lacs paid by Minister Capt. Satish Sharma. It was on the basis that a) the ingredients of tort of misfeasance was not made out; b) persons who suffered were not identifiable; c) no findings were recorded; and d) the rule of exemplary damages was not properly invoked. This case let off the concerned Minister and did not address the real problem of abuse / misuse of power by public officials which was a great setback to the Rule of law. Fortunately, in the other review decision in Shiv Sagar Suri[73]in 2002 by another three Judge Bench, the Court doubted the correctness of the common cause review decision and did not agree with several conclusions of law stating that in an appropriate case it should be considered by a Constitution Bench. Even today,the question is left open and the law on the tort of misfeasance has not moved. Which is why it requires the guidance of the guardian of the Constitution, the Supreme Court, to evolve the law on misfeasance against public officials in India. Recently,

68 Ibid in para 14, the Court quoted Deshpriya v. Municipal Council, Nuwara Eliya, a decision of Supreme Court of Sri Lanka 1996 (1) Commonwealth Human Rights Law Digest (CHRD p-115 - 117–awarding exemplary damages for misuse of public power; Tynes vs. Barr (28-03-1994) Supreme Court of Bahamas judgment were damages awarded for arbitrary, oppressive or unconstitutional action by State officials (quoted at p-117 to 120 of 1996 (1) CHRD).

69 1996 (6) SCC 599 (8.11.1996) para-10.

70 1996 (6) SCC 530 and 1996 (6) SCC 593.

71 Sheila Kaul Vs. Shiv Sagar Tiwari 2002 (10) SCC 667 = AIR 2002 S.C. 2868.

72 AIR 1999 SC 2979 = 1999 (6) SCC 667.

73 Sheila Kaul Vs. Shiv Sagar Tiwari 2002 (10) SCC 667 = AIR 2002 S.C. 2868.

in 2013 (without expressly mentioning the tort of misfeasance) the Supreme Court in N. Sengodan vs. State of Tamil Nadu[74] held that the State and its officers have grossly abused the legal power by remanding a person without any basis. Here, the appellant was arrested under Section 3 of Police (Incitement to Disaffection) Act, 1922 and Section 505 (1)(b) of IPC where he was remanded for 2 months to judicial custody. While undergoing the imprisonment as a remand prisoner, a preventive detention order was passed by State under the Tamil Nadu Prevention of Dangerous Activities Act, 1982[75] declaring the appellant a 'goonda'. Assertions made by the State were not based on record but it was merely to ruin the reputation of the appellant. The Supreme Court imposed Rupees two lakhs as costs on the State in favour of appellant. The Court held that the action taken by the respondents were based on the reasons of fact which did not exist and therefore, the same was held to be infected with an abuse of power.

VII. Power of the Court to evolve new tort.

Courts in Common Law countries have power to evolve a new tort if justice requires. In the first Hamlyn Lecture in 1949 titled "Freedom under the Law"[76], Lord Denning in his style stressed the need to evolve new ways and stated as under:

"No one can suppose that the executive will never be guilty of the sins that are common to all of us. You may be sure that they will sometimes do things which they ought not to do: and will not do things that they ought to do. But if and when wrongs are thereby suffered by any of us what is the remedy? Our procedure for securing our personal freedom is efficient, our procedure for preventing the abuse of power is not. Just as the pick and shovel is no longer suitable for the winning of coal,

74 2013 (8) SCC 664

75 (of Bootleggers, Drug offenders Forest offenders, Goondas, Immoral Traffic Sand offenders, Slum Grabbers and Video Pirates)

76 Denning, A. T. (1949). Freedom under the law. London: Stevens. pp. 125-126

so also the procedure of mandamus, certiorari, and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new and up-to date machinery, by declarations, injunctions and actions for negligence… This is not the task for Parliament… the courts must do this. Of all the great tasks that lie ahead this is the greatest. Properly exercised the new powers of the executive lead to the welfare state; but abused they lead to a totalitarian state. None such must ever be allowed in this country." (emphasis supplied).

In India, the Supreme Court has developed it own law and constructed new principle of liability to deal with unusual situations namely in: *State of U.P. Vs. Kishori Lal Minocha*[77]*;Bhagalpur Blinding case (Khatri (II) Vs. State of Bihar*[78]; *Rudul Sah Vs. State of Bihar*[79]*; Nilabati BeheraVs. State of Orissa*[80]; *D.K. Basu Vs. State of West Bengal*[81]; *Sube Singh Vs. State of Haryana and Others*[82] and in *Sanjay Gupta vs. State of UP*[83]*.It has ultimately strengthened the Rule of Law, promoted good governance and safeguarded public good.*

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77 1980 (3) SCC 8 (3 J) at Page 24: J. Venkataramiah (dissent) stated:
"The liability of the respondent in the instant case arises under the statute and it also arises as the result of a civil wrong or a tort committed by him, in offering the highest bid with open eyes and in not fulfilling the obligations arising therefrom. The latter source of liability in this case may appear to be novel but if justice requires, the court should not hesitate to impose it on the person who has committed the wrong and secure justice for the innocent injured party. The following observations of Denning, L.J. (as he then was) in Candler v. Crane, Christmas & Co. at page 178 (All ER p. 432 D. & E)".

78 1981 (1) SCC 627 para 4 page 630. (Blinding Case)

79 1983 (4) SCC 141 para 10 (P-147-148) (case of illegal detention)

80 1993 (2) SCC 746 (3J) paras 19 and 32 (This was a case of death of petitioners son in police custody). J. Verma at para 19 stated as under:
More recently in Union Carbide Corpn. v. Union of India (1992) Misra, CJ stated that "we have to develop our own law and if we find that it is necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in future… there is no reason why we should hesitate to evolve such principle of liability…". To the same effect are the observations of Venkatachaliah, J. (as he then was), who rendered the leading judgment in the Bhopal gas case with regard to the court's power to grant relief."

81 1997 (1) SCC 416 para 22 page-429 – (case of custodial violation)

82 2006 (3) SCC 178

83 2015 (5) SCC 283 (paras 13, 14).

Quite recently, the Supreme Court of Canada has created a new tort of "negligent investigation" is created in a land-mark decision in Hill vs. Hamilton Westworth Regional Police Services 2007 (3) SCR 129. Thus, supplementing existing civil law remedies of unlawful/false arrest, false imprisonment and malicious prosecution which the majority concluded could not provide remedies for merely negligent acts.

Conclusion

The tort of misfeasance in public office is an oddity in the tort law canon. Apart from restriction on abuses of public powers and requirement of bad faith, the outlines of tort of misfeasance are only broadly formed and many finer details are yet to be decided such as how far the tort of misfeasance extends in the outsourced State, who might be a public officer and what might be a public power in the context of privatisation and globalization?; whether legislation can serve as the basis for a claim for misfeasance in public office? (Hence it is common law's only truly public law tort.)

The function of the tort of misfeasance is [now] compensatory. The World of Jurisprudence has accepted misfeasance in public office as a species of tortious liability and different courts around the globe have awarded exemplary damages even against the government.It has been noted that akin to a judicial review litigation, it is now possible that even the Government itself can be a claimant for misfeasance damages against its (corrupt) individual officers, thereby exposing public officials to damages if they corruptly sell off public assets at an undervalue. Thus, acting like an Ombudsman and helping cure the evils of harassment and corruption via misuse of public office. Thus, the Indian Courts need to develop and evolve the tort of misfeasance so as to ensure a transparent, fair and honest exercise of public power and good governance for the public good.

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Rapid Migration and Assimilation of International Law into National Law[1]

ABSTRACT

This article highlightsthe ever-expanding elements of borrowings/ migrations of international legal norms and their assimilation into national laws of common law countries. This article seeks to focus on the trends, issues andconvergence ofinternational law in the various legal systems and calls every State to connect with the global culture.

1. INTRODUCTION

Roscoe Pound[2] said in "the Formative Era of American Law (1938), that "the history of a system of law is largely a history of borrowings of legal materials from other legal systems and of assimilation of materials from outside of the law", similarly, the development of the English common law and the advent of constitutionalism in the second half of 20th century were phenomena where the circulation of norms and ideas have not only changed the legal systems but also the course of history. Faster means of communication, travel and globalization of legal education have contributed to the intensification of constitutional borrowings and migrations of International law to national laws. As noted by Sujit Choudhury[3] that "the migration of constitutional ideas across legal systems is rapidly emerging as one of the central features of contemporary constitutional practice".

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1 By Moksh Sharma, Symbiosis Law School, NOIDA, Symbiosis International University, Pune.

2 Roscoe Pound, the Formative era of American Law , Little Brown and Co: Boston (1938) page 94.

3 Sujit Choudhry "Migration as a New Metaphor in comparative constitutional law", in Sujit Choudhry (Edition), The Migration of Constitutional Ideas, Cambridge University Press (2006) page 16.

The accelerating forces in the current phenomena is mainlydue the expansion of a global market, the triumph of rights-based discourse,[4] and most importantly the emergence of transnational networks by governments, non-governmental organizations (NGOs)[5]and technocrats or professionals.The new democracies that emerged around the globe at the end of 20th Century has seen internationalization of constitutional law by having some provisions of international human rights laws added in their new Constitutions, for instance, the Constitution of Bosnia and Herzegovina 1995, theConstitution of South Africa (1996), the Constitution of South Korea (1987). However, the national courts of various countries, have by judicial incorporation considered not only international human rights law or documents but also cited and followed other International Courts decisions[6], for instance, the decisions of the death penalty cases by the Canadian Supreme Court, the US Supreme Court and the South African Constitutional Court.[7]It has opened a new era of Judicial dialogue and engagement which was not there earlier and has brought international law and domestic Constitutions closer around the globe. Thus the process of migration of international law has become a self-reinforcing and ever-expanding force.

Treaties are like contracts between nations establishing obligations both at the national and international level. This article gives an overview of the doctrines/principles involved in cross fertilization ofinternational law at the national level by tracing their origin,and reception in the common law systems. The implementation of international law at national level varies in different countries and has produced two

4 This had begun with the United Nations Charter and Universal Declaration of Human Rights.

5 The networking of domestic and International NGO's have allowed them to ably participate in the international law making. For instance passage of the WHO Framework Convention on Tobaco Control [FCTC]

6 Knight vs. Florida (1999) 528 US 990; Hamdan vs. Rumsfeld 548 US 557 (2006). Antonin Scalia, "Outsourcing American Law; Foreign Law in Constitutional Interpretation", American Enterprise Institute, Working Paper no. 152 (2009)

7 Canadian case in US vs. Burns 2001 (1) SCR 283; American Case in Roper vs. Simmons 543 US 551 (2005); South African Case in State vs. Makwanyane. [1994] ZASCA 76; 1994 (3) SA 868 (A)

schools namely:"Monists" and "Dualists". It is likethose who warred in Gulliver's Travels over the relative merits of cracking boiled eggs at the big end and the little end, their views sometimes seem mutually exclusive.

At the little end, is theMonistSchool(Monism) (for instance countries like Netherlands and Switzerland) according to which international law and domestic law are part of a single legal order and the international law is regarded supreme and can be invoked before domestic courts without prior incorporation through a statutory instrument.

At the big end, is theDualistSchool(Dualism) which regards international law and national law into two separate and self-contained (autonomous) legal systems governing different subjects and legal relations. Mostly international law regulates the conduct of States and inter-State relations, and the national law regulates the relations between State organs and individuals, as well as, between individuals themselves. The international law ranks below the Constitution but is at par with the ordinary legislation. As per this school, the national law can apply international law only when it has been incorporated into it. This incorporation can be done by three ways, namely, by Parliament; or by Executive or by Court decisions. The dualist school originatedin the 19thcentury but after World War-II there have been fundamental changes in the modern development of international law by creating new obligations amongst States, international protection of human rights, nationality and overlapping competence of private international law. Australia, Canada, India, U.K. and other Commonwealth countries are examples of dualist systems in which theinternational law operates outside the national legal system. Indian Judiciary though not empowered to make legislations, but through "judicial activism' has played a proactive role in implementing itsinternational obligations under international treaties especially in the field of human rights and environmental law. However the difference between the two schools has always been one of degrees. Some countries with a dualist tradition, (for example, South Africa and Germany) have a monist approach to customary international law and have allowed the direct invocation of [so-called self executing] treaties before the domestic courts. In practice, most of the domestic constitutions are functioning

as hybrids-that is, incorporating both monist and dualist elements, which is due to the impact of the international judgments and close relationship between individuals and the States. An illuminating case of Yassin Abdullah Kadi[8] is to the point. Mr. Kadi, who was a Saudi resident and Al Barakaat International Foundation was registered in Sweden. They both were designated by the sanctions of the UNSC Committee as being associated with Osama bin Laden (Al-Qaeda or the Taliban). Their financial assets and funds were then frozen. The Court of first Instance of European Communities (CFI) held that the UNSC obligations would prevail over all other conflicting obligations including human rights[9]. On appeal, the European Court of Justice reversed the decision of CFI and held that the protection of the right to fair trial as a fundamental right under EU law. The European Court based its decision exclusively on EU Law and did not address the norm conflict between EU Law (domestic Constitutional Law) and UNSC resolutions. However England on the other side to overcome this problem made a domestic legislation viz. the UK Terrorist Asset-Freezing [Temporary Provisions] Act 2010 [Chapter 2] which gives defacto preference to the UNSC resolutions.

2. Brief Outline of the applicable doctrines

Whatever jurists may say about the difference between'dualism' and 'monism', there is a variations in the State practice at the level of implementation. A paradigm shift has taken place by the nationalcourts of many common law countries, for instance Australia, Canada, UK, USA, and India to look outside their own domestic legal traditions. The two main principles are the doctrine of incorporation and doctrine of transformation[10] which are at the opposite ends of the spectrum. Between (the ends of) these two basic principles are number of moderating principles/doctrines which have come into play and positioned the various legal systems along the broad spectrum. They are briefly under two heads as follows:

8 Cases C402/05 and 415/05 P. Yasin Abdullah Kadi and Al Barakaat International Foundation vs. Council of the European Union and Commission of EC [2008] ECRI 6353 (Kadi EC Case).

9 2005 ECR-II – 3649 [Kadi CFI Case]

10 Preliminary Report 75th ILA Conference held in Sofia, Bulgaria (August 2012) – Principles on the Engagement of Domestic Courts with International Law by AntoriosTzanakopoulosparas 19 to 26.

(i) Avoidance techniques (principles): It mainly moderates the impact of doctrine of incorporation and push towards the doctrine of transformation end of the spectrum. They are namely – doctrine of non-justiciability, political question doctrine, Act-of-state doctrine and doctrine of non-self-execution of treaties.

(ii) Harmonization techniques (principles): It moderates the impact of the doctrine oftransformation and push towards the doctrine of incorporation end of the spectrum. They are for instance, principles of consistent interpretation (i.e. presumption of conformity principle), and other interpretative principles like doctrine of legitimate expectation, legality etc.

3. ORIGIN AND RECEPTION OF THE DOCTRINES OF INCORPORATION AND TRANSFORMATION:

The following few nations have adopted the two main doctrines and will show how these doctrines of incorporation and transformation (conformity) have undergone revision in the last two centuries in the applicability ofinternationallaw into national law.

(A) **ENGLAND** – The doctrine of incorporation mainlysubsists in dualistic system like most common law countries whereinternational law and national law are on separate spheres. They co-exist side by side, unlike the monistic system[11]. Thisdoctrine of incorporation can be traced back to 18th Century in England and was first affirmed by Sir William Blackstone (also known as the "Blackstonian doctrine"), and was much wider in its application than it is practiced today.[12]It is limited because of the rise of independent and sovereign nations, valuing national sovereignty over International law. The first instance of doctrine of incorporation was witnessed in the case of Viveash v Becker **(1814),[13]C.J.Ellenborough stated that the law of nations as to diplomatic immunity was applicable in English Courts without the need for parliamentary intervention. In 1823,** in Novello vs Toogood[14], L.J. Abbot observed that the

11 "The Max Planck Encyclopedia of Public International Law", Edited by RudigerWolfrum, Vol.-V, Oxford University Press 2012 at page 840.

12 J.G. Starke, *Introduction to International Law* (10th Edn.), Butterworths 1994 at pg. 78

13 Viveash v Becker (1814) 105 ER 619

14 Novello v Toogood (1823) 107 ER 204

law of nations must be deemed a part of the common law. In **1824**, in the case of De Witz vs Hendricks[15], C.J. Best said the "law of nations (was) in all cases of international law… adopted into municipal code of every civilized country". In the year **1861**, in the case of The Emperor of Austria v. Day and Kossuth[16], Sir John Stuart V-C stated that "a public right recognized by the law of nations is a legal right, because the law of nations is a part of the common law of England". Blackstone's view was approved and he said that "it has so always been held in Courts…. And part of the law of the land". In **1876**, in the Queen vs Keyn[17], Lord Cockburn, C.J. stated that "customary international law is not part of English law without statutory enactment". In the 20th Century [1939], the landmark decision of the Privy Council in Chung Chi Chueng vs The King[18]- Lord Atkin stated that customary Internationallaw is not part of the law of England until made so by statute.[19]In **1997**, Trendex Trading Corporation vs Central Bank of Nigeria[20]. Lord

15 De Witz vs Hendricks (1824) 2 Bing 314

16 The Emperor of Austria vs Day and Kossuth(1861) 2 Giff 628

17 Queen v Keyn (1876) 2 Ex D 63 – Dualism received judicial sanction. The Franconia was a German ship which collided as a result of Captains negligence with British vessel from Great Britain. A passenger on British vessel drowned. The Court held that it had no jurisdiction to try the captain of the Franconia for manslaughter. The sea beyond low water mark was not part of the territory of Britain. And if international law were to the contrary there was non-evidence of assent to it by Britain. The adoption of a contrary principle of International law by Courts would amount to their exercising a Legislative function. See Brownlie, Principles of Public International law, 7th Ed. Oxford University Press, 2008 at page-3.

18 Chung Chi Chueng vs The King [1939] AC 160

19 Roger Keefe, *The Doctrine of Incorporation Revisited,* The British Yearbook of International Law 2008 pp. 18-21

20 Trendex Trading Corporation v. Central Bank of Nigeria 1977 (1) AER 881-889-890 = 1977 QB 529 at 553, 554 – Lord Denning said that in England there were two schools of thought, viz. doctrine of incorporation and doctrine of transformation and had once accepted the transformation doctrine without question, but later veered round to express a preference for the doctrine of incorporation and explained how courts were justified in applying modern rules of International law when old rules of International law changed. See also Maclaine Watson Vs. Department of Trade and Industry – 1988 (3) AER 257-324; The rules of international law, as existing from time to time to form part of our English

Denning stated that "a rule of international law is capable of being incorporated into English law if it is an established rule derived from one or more of the recognized sources of clear consensus." Shaw LJ agreed declaring that "the law of nations…. is applied in the Courts of England[21]. In the 21st century [2000] in R v. Metropolitan Stipendiary Magistrate, separate Pinochet Ugarte[22] (No.1), Lord Lloyd observed, "the requirements of customary international law, which are observed and enforced by our Courts as part of the common Law", saying later that "the common law incorporates the rules of customary International Law"[23]. Similarly, in R v. Bow Street Metropolitan Stipendiary Magistrate Ex parte Pinochet Ugarte (No.3) Lord Millet stated that customary International law is part of the common law.

(B) Australia – The Australian Constitution is statutory in origin and is an Act of English Parliament. Sir Owen Dixon in 1935 observed "It is not a supreme law purporting to obtain its force from the direct expression of a people's inherent authority to constitute a government. It is a statute of the British Parliament…..[24]. The relationship between rules of international law and scope of the legislative powers of Parliament was considered in Polites v. The Commonwealth[25]. – a case of compulsory military service for foreigners present in Australia during World War II. The Court applied the well established rule of statutory interpretation as expressed by Justice Dixon that "….unless a contrary intention appears, general words occurring in a statute are to be read subject to the established rules of International law and not as intended to apply to persons or subjects which according to those rules, a national law of the kind in question ought not to include[26]".

law, followed in Rex Vs. Prime Minister of UK 2002 (126) ILR 727 at 738, and R v. Jones 2006 (2) AER 741 at 751.

21 Ibid page 579.

22 2000 (1) A.C. 61 at 89.

23 Ibid p-90.

24 Dixon, The Law and the Constitution (1935) 51 Law Quarterly Review 590-597.

25 1945 (70) CLR 60.

26 ibid p-77.

Later in1982, C.J. Mason in Australian Capital Television Vs. Commonwealth[27] said that the Australia Act, 1986 marked the end of the legal sovereignty of the Imperial Parliament and recognized that ultimate sovereignty resided in the Australian people.

Under the Australian Constitution a treaty only becomes a 'direct source of individual rights and obligations' when it is directly incorporated by legislation.[28] This is because the making and ratification of treaties is a function of the Commonwealth Executive, whereas the making and alteration of Commonwealth laws is a function of the Commonwealth Parliament.However even when treaties have not been directly incorporated by legislation, they are an indirect source of rights. The High Court of Australia's decision in **1995**, in Minister for Immigration and Ethnic Affairs v Ah Hin Teoh, (known as Teoh's case) stated that legal provisions should be interpreted by courts in such a manner, that they are consistent with the Australia's international obligations:

> *"It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute… ""But the fact that the Convention [on the Rights of the Child] has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law. Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, prima facie, intends to give effect to Australia's obligations under international law".*[29]

27 1982 (177) CLR 106 at 138.

28 Minister for Immigration and Ethnic Affairs v Ah Hin Teoh (1995) 183 CLR 273 at 287 per Mason CJ and Deane J.

29 (1995) 183 CLR 273 at 287.

The High Court furtherstated that ratification of a treaty raised alegitimate expectation that an executive decision-maker will act consistently with its terms as under:

> *"ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as "a primary consideration". It is not necessary that a person seeking to set up such a legitimate expectation should be aware of the Convention or should personally entertain the expectation; it is enough that the expectation is reasonable in the sense that there are adequate materials to support it".*[30]

Recent comments by the High Court of Australia (in Exparte Lam's case) has indicated that the 'legitimate expectation' principle outlined in Teoh's case may be a subject for reconsideration by the High Court in the future[31]. However,Teoh's casestill holds the field in theAustralian Courts and has been followed in many cases[32].

The Australian judiciary has been hesitant towards treating international law as a legitimate and useful source of legal ideas and principles. Justice Jan Callinanof High Court of Australia in Western Australia v. Ward[33](2002)observed that, "there is no requirement for the common law to develop in accordance with International law.While International law may occasionally, perhaps very occasionally, assist in the content of the common law, ie. the limit of its use."

30 Ibid page 291.

31 Re Minister of Immigration and Multicultural Affairs: Ex parte Lam [2003] HCA 6 = (2003 (195) CLR 502 223(HCA)).

32 For instance Tavita v. Minister of Immigration ((1994) 2 NZLR 257 (NZCA); R. v. Secretary of State for the Home Department, Ex parte Ahmed (1999) Imm LR 22 (Eng. Civil Appeal); Thomas v. Baptiste (1999) 3 WLR 249 (PC).

33 2002 (213 CLR 1 at 389 High Court)

(C) Canada

Canada is a federation of ten provinces under the Canadian Constitution Act of 1867, (as amended in 1982). The Constitution is silent on the treaty making power whether it is by Federal or Provincial executive. In practice, it is left to the Federal executive. The status of International treaties in Canadian law is complex because of Canada's Constitution which is partially codified by series of laws enacted by British, especially the Canadian Constitution Acts 1867 and 1982. But they are not complete codify Canadian public law. It be noted that treaty making is an executive act like in Article 73 in the Constitution of India. Canadian Courts has declared that a treaty is not in itself a source of law for litigants to rely. The famous statement of this principle is in the judgment known as the Labour Conventions case (1937), i.e. Attorney-General for Canada Vs. Attorney-General for Ontario[34], Lord Atkin observed.

> "*Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes.*"[35]

Canada is based on the so-called dualist approach to International law: for a treaty to take direct effect in domestic law without legislative action would violate the fundamental constitutional principle that laws are made by legislatures and not by Crown. Canadian dualism is qualified, however it does not extend to rules of customary International Law. In Canada, the move towards accepting and using international law came

34 1937 AC 326 (PC)

35 1937 AC 326 at 347. Followed in Francis v. The Queen [1956] SCR 618 at 621

in 1980s. The turning point[36] came in Baker Vs. Canada[37](1999) – when the majority of Supreme Court of Canada rejected the Australian High Court's approach in Minister for Immigration and Ethnic Affairs Vs. Teoh[38] finding on the facts that the treaty at issue (the Convention on Rights of Child 1989) did not give rise to legitimate expectation of specific procedural rights. The decision purported to leave open the question whether an international instrument ratified by Canada could give rise to legitimate expectation.Even if a Canadian court was to recognize a treaty as the basis of a legitimate expectation to certain rights, those rights would likely be procedural only, not substantive.[39]Regardless, the legitimate expectations doctrine differs in theory from the presumption of conformity, but in practice the two approaches achieve similar results.

The CanadianCourtshave invoked the presumption of conformity to resolve interpretive problems in many domestic laws such as in ordinary statutes[40], the Criminal Code,[41]the Civil Code of Quebec[42]and even the constitutionally-entrenched Charter of Rights and Freedoms.[43]

36 Hugh M Kindred, "*The Use and Abuse of International Legal Sources by Canadian Courts: searching for a Principled Approach" in* Oonagh E Fitzgerald, The Globalised Rule of Law: Relationships between International and Domestic Law (2006) 5 at 17.

37 1999 (2) SCR 817 para 29

38 1994 (183) CLR 273

39 Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services) [2001] 2 S.C.R. 281, at paras. 22-38. Canada, unlike other jurisdiction, the doctrine of legitimate expectation can give rise only to procedural rights.

40 Ordon Estate v. Grail [1998] 3 SCR 437 (presumption applied to determine the applicable limitation period)

41 Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General) [2004] 1 SCR 76 (presumption applied in construing the so-called — spanking defence to child assault)

42 GreConDimter v. J.R. Normand Inc. [2005] 2 SCR 401 (presumption applied to determine whether the Quebec court had jurisdiction in light of a choice of forum clause)

43 Health Services and Support—Facilities Subsector Bargaining Association v. British Columbia 2007 SCC 27 (presumption invoked as one of four reasons for overturning previous decisions excluding collective bargaining as a right constitutionally protected by the freedom of association guarantee in Charter section 2(d)).

In 2007, R. v. Hape[44], the Canadian Supreme Court in a majority decision[under the heading "Conformity with International Law as an Interpretive Principle of Domestic law:"] "held that it is well established of statutory interpretation that legislation will be presumed to conform to international law. The presumption of conformity is based on the rule of judicial policy that, as matter of law, courts will strive to avoid constructions of domestic law pursuant to which the State would be in violation of its international obligations, unless the wording of the statute clearly compels that results."In 2009 Health Services case[45], the Supreme Court of Canada revised its interpretation of the freedom of association right established by section 2(d) of the Canadian Charter of Rights and Freedoms to conform to Canada's obligations under the 1966 International Covenant on Economic, Social and Cultural Rights[46], the 1966,International Covenant on Civil and Political Rights,[47]and ILO Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize[48]and the Court observed that it was applying the presumption of conformity of Internationallaw to the Charter.In short, international legal principles are normally applied in Canada but the problem is how to use international materials in a principled and coherent fashion.[49] which is yet to be settled.

(D) France: Under French law the ratified treaties are considered to be equivalent or even superior to domestic legislation[50]. However ratification must be approved by Parliament, especially (Article 52 of the French Constitution) where the treaty, "modifies provisions which are matters for statute". In such situation, incorporation is either redundant or little required.

44 R. v Hape 2007 SCC 26 at paras 53 and 55-56.

45 Health Services and Support—Facilities Subsector Bargaining Association v. British Columbia 2009 SCC 27 at para 20

46 [1976] CanTS no. 46

47 [1976] CanTS no. 47

48 [1973] CanTS no. 14.

49 The Common Law and International Law- A Dynamic Contemporary Dialogue (2008,London) by Hon. Justice Michael Kirby, AC CMG at p.8-9

50 Article 55, French Constitution, 1958.

(E) **USA**: The position of America is intermediate of the two extreme systems. Under Article VI Section 2 (Supremacy Clause) of the US Constitution which states that "all Treaties made or which shall be made, under the authority of the United States, shall be the Supreme Law of the land." But the term "treaty" has a restricted sense in American domestic law than in International law. Over 16,000 international agreements entered intoby USA in last 50 years, only 912 ratified [by] of the Senate under Article II 2.2 (Treaty Clause) of the Constitution[51]. The US Supreme Court has in Medellin Vs. Texas[52] limited the direct effect of ratified treaties. Thus almost all treaties in US must be incorporated into US Federal Law by Congress to have the effect on domestic law.

(F) **INDIA:**

A. Executive Power

The Central Government under Article 73 of the Constitution of India has the executive power to enter into and implement international treaties. The executive powers of Central Government are coextensive of the legislative power of the Union of India under Article 246 and 253 read with Entry 14 of List I of the seventh schedule of the Constitution. However, the executive power of the Central Government to enter intointernational treaties does not mean that international law, ipso facto, is enforceable upon ratification. This is because Indian Constitution follows the dualistic system with respect to international law andthus, international treaties do not automatically form part of national law. They must, where appropriate, be incorporated into the legal system by a legislation made by the Parliament.[53]

51 Treaties and other International Agreements: the Role of the United States Senate (Congressional Research Service 2001. (www.au.af.mil/au/awc/awcgate/congress/treaties-senate-role.pdf).

52 2008 552 US 491.

53 Jolly Jeorge vs. Bank of India - AIR 1980 SC 470: Gramophone Company of India Ltd. vs. Birendra Bahadur Pandey – AIR 1984 SC 667

B. Legislative Power

A treaty may be implemented by the executive power of Central Government, but when the implementation of a treaty requires legislation, Parliament has exclusive powers to make a statute or legislation under Article 253 of the Indian Constitution. Article 253 empowers the Parliament to make a law, for the whole or any part of the territory of India, for implementing "any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body." Article 253 provides this power to Parliament, notwithstanding, the division of legislative power between the Centre and States effected by Article 246 read with the Seventh Schedule. However, this has been criticized for subordinating the position of the States. The Constitution has assured the nations that no promise made by India are going to be backed out for want of power on the part of the Central Government. Anyhow, treaty power is not above the Constitution butis subjected to the fundamental rights and other provisions of the Constitution including the basic structure doctrine. Therefore, in the name of implementing a treaty, Parliament cannot take away the fundamental rights or change the basic structure of the Constitution".[54]

A new wave of recognition and approach was developed in February 1988 in Bangalore, [India]through what are known as the *Bangalore Principles*. [55] which inter-alia stated:

54 See the Article "Distribution of Legislative Powers between the Union of the States" by JUSTICE VENKATARAMAIAH AND PROF. M.P. SINGH, published in "CONSTITUTIONAL LAW OF INDIA" edited by M. HIDAYATHULLAH, Vol.II at pp.275-276. D.D. Basu, Constitution of India (2011) 8th Edition Vol.-8 P-9014.

55 The meeting in Bangalore was chaired by Justice P N. Bhagwati, former Chief Justice of India. Amongst the other participants were Mr Anthony Lester QC (now Lord Lester of Herne Hill), Justice RajsoomerLallah (later Chief Justice of Mauritius) and Justice Enoch Dumbutshena (then Chief Justice of Zimbabwe). Joining the Commonwealth participants was a judge of the Federal Circuit Court in the United States, Ruth Bader Ginsburg (now a Justice of the Supreme Court of the United States) and Justice Michael Kirby of Australia.

(1) International law (whether human rights norms or otherwise) is not, as such, part of domestic law in most common law countries;

(2) Such law does not become a part of domestic law until Parliament so enacts or the judges (as another source of law-making) declare now the norms thereby established are part of domestic law;

(3) The judges will not do so automatically, simply because the norm is part of international law or is mentioned in a treaty - even one ratified by their own country;

(4) But if an issue of uncertainty arises (as by a *lacuna* in the common law, obscurity in its meaning or ambiguity in a relevant statute), a judge may seek guidance in the general principles of international law, as accepted by the community of nations; and

(5) From this source material, the judge may ascertain and declare what the relevant rule of domestic law is. It is the action of the judge, incorporating the rule into domestic law, which then makes it part of domestic law[56].

C. Supreme Court decisions:

Indian Judiciary has broadened its role through PIL (Public Interest Litigation) and has changed from a positivist dispute-resolution body into a catalyst for socio economic change and protector of human rights and environment.[57]Following seven cases will depict the position thathow International law has been implemented at the national level by the Supreme Court of India.

— In Tractoroexport, Moscow v. Tarapore& Co. (1970)[58]. The Supreme Court has observed that, "there is a presumption that

56 M D Kirby, "The Australian Use of International Human Rights Norms: From Bangalore to Balliol - A View from the Antipodes" (1993) 16 *UNSW L Journal* , 363.

57 See S.P. Sathe, "Judicial Activism": The Indian Experience, "Washington University Journal of Law and Policy Vol.29, No.6, 2001.

58 AIR 1971 S.C. 1 at 8 = 1970 (3) SCR 50.

(English) Parliament does not assert or assume jurisdiction which goes beyond the limits established by the common consent of nations and statutes are to be interpreted provided that their language permits, so as not to be inconsistent with the comity of nations or with the established principles of International Law. But this principle applies only where there is an ambiguity and must give way before a clearly expressed intention. If statutory enactments are clear in meaning, they must be construed according to their meaning even though they are contrary to the comity of nations or International law".

This shows that the Court was only concerned with a principle of interpretation, but, by implication, it may be possible to say that the Court preferred the doctrine of incorporation; otherwise the question of interpretation would not come.

— In Gramphone Co. of India Ltd. v. Birendra Bahadur Pandey (1984)[59], the Supreme Court held as under:

"5. There can be no question that nations must march with the international community and the Municipal law must respect rules of International law even as nations respect international opinion. The comity of Nations requires that Rules of International law may be accommodated in the Municipal Law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves. The doctrine of incorporation also recognises the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament. Comity of nations or no Municipal Law must prevail in case of conflict. National Courts cannot say "yes" if Parliament has

59 AIR 1984 S.C. 667-671.

said no to a principle of international law. Nations Courts will endorse international law but not if it conflicts with national law. National courts being organs of the National State and not organs of international law must perforce apply national law if international law conflicts with it. But the Courts are under an obligation within legitimate limits, to so interpret the Municipal Statute as to avoid confrontation with the comity of Nations or the well-established principles of International law. But if conflict is inevitable the latter must yield. The proposition has been well stated by C.J. Latham in Polities vs. The Commonwealth.[60]" [Emphasis added]

— In Vellore Citizens Forum v. Union of India[61] (1996) – the Supreme Court has held that the precautionary and polluter pays principles are part of the environmental law of the country and further observed, "It is almost accepted proposition of law that the rule of customary international law which are not contrary to the Municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the Courts of law."

— In People's Union of Civil Liberties v. Union of India[62](1997) the Supreme Court has further re-emphasised the following observations:

"*23. It is almost accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to be incorporated in the domestic law.*

24. Article 51 of the Constitution directs that the State shall endeavour to inter alia, foster respect for international law and treaty obligations in the dealings of organised peoples with one another. Relying upon the said Article, Sikri, C.J. in

60 70. Commonwealth Law Report 60: "Every statute is to be interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations or with the established rules of International Law."

61 AIR 1996 S.C. 2715-2722.

62 AIR 1997 S.C.568

Kesavananda Bharathi v. State of Kerala, 1973 Supp SCR 1: (AIR 1973 SC 1461) observed as under:-

> *"It seems to me that, in view of Article 51 of the directive principles, this Court must interpret language of the Constitution, if not intractable, which is after all a municipal law, in the light of the United Nations Charter and the solemn declaration subscribed to by India".*

25. Article 17 of the International Covenant – quoted above – does not go contrary to any part of our Municipal law. Article 21 of the Constitution has, therefore, been interpreted in conformity with the international law." (Emphasis supplied).

— In Vishaka and Others Vs. State of Rajasthan[63], the Supreme Court while laying down sexual harassment guidelines, relied on the Australian High Court Teoh's case invoking the doctrine of legitimate expectation as under:

"*14. The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse. Independence of judiciary forms a part of our constitutional scheme. The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law. The High Court of Australia in Minister for Immigration and Ethnic Affairs v. Teoh (128 Aus LR 353) has recognised the concept of legitimate expectation of its observance in the absence of a contrary legislative provision, even in the absence of a Bill of Rights in the Constitution of Australia."*(emphasis supplied)

63 AIR 1997 S.C. 3011 = 1997 (6) SCC 241.

— In State of West Bengal Vs. Kesoram Industries Ltd.[64] (2005) the Supreme Court explained the two doctrines as under:

"*499. It is true that the doctrine of 'Monism' as prevailing in the European countries does not prevail in India. The doctrine of 'Dualism' is applicable. But, where the municipal law does not limit the extent of the statute, even if India is not a signatory to the relevant International Treaty or Covenant, the Supreme Court in a large number of cases interpreted the statutes keeping in view the same.*

500. A treaty entered into by India cannot become law of the land and it cannot be implemented unless Parliament passes a law as required under Article 253.

501. The executive in India can enter into any Treaty be it bilateral or multilateral with any other country or countries.....

503. The learned Chief Justice also relied on the observation made by Lord Denning in Corocracft v. Ram American Airways (1969 All ER 82), that it is the duty of the courts to construe our legislation so as to be in conformity with International Law and not in conflict with it. It is the one thing to say that legislation may be interpreted in conformity with international principles but is entirely a different thing to give effect to a treaty provision in the absence of Municipal Laws.....

506. In Salmon v. Commissioner of Customs and Excise (1966) 3 All ER 871, it was held that when the statute is in compliance with international conventions then it must be interpreted in conformity therewith." (emphasis supplied)

— In Entertainment Network (India) Ltd. Vs Super Cassette Industries,[65] the Supreme Court observed that the Court has extensively made use of International law inter-alia for the following purposes:

"(i) As a means of interpretation;

64 AIR 2005 S.C. 1646.

65 (2008) 13 SCC 30, 62

(ii) Justification or fortification of a stance taken;

(iii) To fulfil spirit of international obligation which India has entered into, when they are not in conflict with the existing domestic law;

(iv) To reflect international changes and reflect the wider the civilisation;

(v) To provide a relief contained in a covenant, but not in a national law;

(vi) To fill gaps in law;"

4. SOME CRITICAL COMMENTS AND CAUTION ON THE GROWTH OF THE DOCTRINE OF "UNEXPECTED EXPECTATIONS".

The Doctrine of legitimate expectation as made applicable in Teoh's case[66] (Australia) has been followed in India in Vishaka's[67] case but rejected in Baker's case (Canada). This has leadto a pertinent questions of "What can be considered a legitimate expectation?" which follows from the question "What can I expect?". The Courts have left these questions unanswered and yet remain silent on this issue, and rightly so. On the very surface itself, one can estimate the avalanche of litigation that would ensue if such expectation was backed by common law to mean something outside the purview of what has been written (as law) and what has been decided (in common law). Such an "expectation" would not only condemn the State to be answerable for actions in the light of unforeseeable duty cast upon them, but also completely override the written law of the land. The State would be subjected to frivolous litigation in light of unlimited expectations, which to the common man (but not the reasonable man) in the common usage of the term could be construed to mean anything under the sun and the burden would shift to the Courts to determine what a legitimate expectation is and what can be claimed. In fact, an even greater problem with this undefined expectation is the impact on the

66 *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353
67 Vishaka vs. State of Rajasthan AIR 1997 SC 3011

written law and the Constitution itself, for the written law would be completely disregarded and the Constitution would lose all purpose and relevance as the Judiciary would become the supreme authority to decide what can be expected and on the basis of those expectations, direct the other organs of the Government to do as it directs. Needless to say, this problem attached to expectation would be magnified in the light of International standards and agreements. Another question, namely "Who can expect?" has also not been answered, which in itself could overrun the Sovereignty of a nation. If companies or legal persons were to be afforded the same status as a person and non-citizens as citizens in the light of legitimate expectation, the day won't be far when MNCs (Multinational Corporations) from around the world would come knocking at the door "legitimately expecting" business benefits and what not in the light of International Trade Agreements between other countries.[68]

Seen in the light of the decisions in Teoh's Case and in Vishaka's casein India, one can infer that the "legitimate expectation" is limited with regard to certain human rights, which are in conformity with the principles found in their Constitution and are nothing but a mere extension or recognition of their already existing rights. The doctrine does not, in any way, confer rights upon individuals which they do not possess on their own.

5. Trends of National Constitutions incorporating International Law

The new democracies which have emerged at the end of 20th Century have incorporated a chapter of rights reflective of International human rights in their domestic Constitutions. In countries like UK, where there is no written constitution, the Human Rights Act, 1998 authorises Courts to review whether domestic legislation is compatible with the

68 Such a problem has already occurred in India, where the provisions of a BIT between India and Kuwait were "incorporated" into the treaty between India and Australia and India was made to pay a sum of 3 million Dollars for delay in Judicial decisions – White Industries Australia Ltd. vs. The Republic of India, UNCITRAL Award dated 30.11.2011 (BIT AWARD)

rights protected in the ECHR[69]. The following new Constitutions have inserted few clauses of International human rights into the domestic Constitution system:

— In the **Constitution of South Korea 1987**, Article 6(1) states that "treaties duly concluded and promulgated under the Constitution and the generally recognised rules of International law shall have the same effect as the domestic laws of the Republic of Korea.

— In the **Constitution of Bosnia and Herzegovina, 1995** [amended in 2009] (Annexure-I – Additional Human Rights Agreements to be applied in Bosnia and Herzegovina) mandates a State duty for implementation and compliance (Article II paras 4,7 and 8). The Constitution under Article II para 1 and 2 imposes a State duty to "ensure the highest level of internationally recognised human rights and fundamental freedom, and gives "rights and freedoms protected in the European Convention on Human Rights (ECHR) and its Protocols shall apply directly to Bosnia and Herzegovina. These shall have priority over all other law". That is to say, a superior status in the domestic legal system.

— The **Canadian Charter of Rights and Freedoms [1982]** incorporates both the International Covenant on Civil and Political Rights 1966 ((ICCPR) and International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) into the Act.

— In the **Constitution of South Africa, 1996**, Article 39(1)(b) and (c) – Interpretation of Bill of Rightsprovides that when interpreting, the Court, tribunal or forum must consider International law and also consider foreign law.

A further trend [which is not a new phenomena] where the national Constitutions may become a treaty like functions between the sub units of a State or between different ethnic groups within a State. For instance:

— The Articles of Confederation by 13 States of America upon Declaration of Independence in 1776 was seen as a treaty between

69 Douglas W. Vick, "The Human Rights Act and the British Constitution (2002) Vol. 37, Texas International Law Journal 329-351.

sovereign States. In 1787, the US Constitution maintained this treaty spirit and adopted federal State arrangement[70].

— The Spanish Constitution of 1978 which grants ethnic and regional groups the right to autonomy; specifically allowing bordering states with common ethnic, cultural and historical to accede to self-governing autonomous communities. These autonomous communities have wide legislative and executive power – a high-degree of autonomy!

— The Peace Accord between Republics of Bosnia and Herzegovina subsequently became part of the Constitution and for this reason the Constitution annexes so many International human rights treaties thus giving each republic a Sovereign - like status.

— The Canadian Charter of Rights and Freedoms, Section 33 permits the legislature of a province to declare certain Acts operative notwithstanding any inconsistency with the Charter. Canadian States are given a constitutional privilege to have provincial laws in defiance of the national Constitution[71]. Thus, these Constitutions are treaty like and have become more self sustaining and has kept the whole State together and united.

6. Some controversies between International law and National law

On the question of relationship between Internationallaw and nationallaw there are some extreme issues[72]which can be highlighted and are not capable of easy resolution in terms of national Constitutions which are as follows:

1. Can the rule of customary Internationallaw prevail over the National law?

70 Wen-chen Chang, "Constructing Federalism", The EU and US Models in Comparison [2005] Vol. 35 No:4 Eur America 733 to 773.

71 Peter W. Hogg and Allison A. Bushell; "Charter Dialogue between Courts and legislatures, [or perhaps the Charter of Rights is not such a Bad thing after All] [1997] 35 Osgoode Hall Law Journal 75, 75ff.

72 Malcolm D. Evans, International Law Law, 2nd Edition, Oxford University Press (2008) page-423 at page-435

Nearly all common law countries [legal system] accept customary internationallawas an integral part of domestic law. In some Constitution incorporation is specifically provided, and in others not specifically provided but the result is the same, for instance in UK: In Johnv. Donnelly and Lord Advocate's Reference No.1[73] (Greenock anti-nuclear activists) the Appeal Court of the Scottish High Court held that "a rule of customary International Law is a rule of Scots law.Lord Denning in Trendtex Trading Corporation Ltd. Vs Central Bank of Nigeria[74], said "International law does change, and the Courts have applied the changes without the aid of any Act of Parliament. Thus, when the rules of International Law were changed (by the force of public opinion) so as to condemn slavery, the English Courts were justified in applying the modern rules of International Law….".

2. Can a Treaty prevail over national law?

In UK and other common law countries the position is that an unincorporated treaty cannot prevail over a conflicting national law. But by contrast under: Article 55 of the French Constitution, a duly ratified and published treaty takes precedence over national laws [whether earlier or later]. In USA Constitution, an act of Congress supersedes an earlier rule of International law if it is clear that this was the intention of the domestic law and the two cannot fairly be reconciled. In England, Lord Denning in Saloman Vs. Commissioners of Customs and Excise[75]observed that a treaty which could not directly be relied on but which formed part of the background to the statutory provision in issue: "I think we are entitled to look at it because it is an instrument which is binding in international law and we ought always to interpret our statutes so as to be in conformity with International Law." And further in 1984 inAlcom Vs. Republic of Colombia and Others[76]a question was

73 (2000) 2001 SLT 507.

74 1977 (1) AER 881.

75 1967 (2) QB 116; See Lord Denning, Corocraft Ltd. Vs. Pan American Airways Inc. 1969 (1) QB 616.

76 1984 (2) AER 6.

raised whether attachment or execution of a judgment could take place against the ordinary bank account of a diplomatic mission. The question was not been regulated by UK State Immunity Act 1978. The House of Lords accepted on the basis of German Constitutional Court judgment of 1977 in proceedings against the Philippine Republic that International law requires such immunity from legal process. Lord Diplock observed that the position in International law at the date of passing of the Immunity Act was not sufficient to conclude the question of construction and held. "It makes it highly unlikely that Parliament intended to require UK Courts to act contrary to Internationallaw unless the clear language of the Statute compels such a conclusion; but it does not do more than that."

3. Can the Executive interfere in the National Court's determination?

The answer is not in constitutional provisions but is clear from the practice prevalent in the different legal systems. National Courts are mostly consistent and with their own constitutional mandate to avoid conflicts with international obligations. The National court recognize that on the questions of recognition, jurisdiction and immunity, the State should have one voice. For example:

(i) In USA, the Courts have general powers to determine questions of Internationallaw. Executive usually gives assistance in sensitive matters, either through amicus curiae briefs, interventions or Executive suggestions. For instance, in the case of Air France and British Airways vs. Port Authority of New York and New Jersey, both at the US District Court of New York and US Court of Appeals, the Government gave amicus curiae briefs to the Courts on its international obligations under the bilateral air services agreements with the UK and France. It was crucial to the airlines success and for Concorde's entry into commercial service.

(ii) In England, the Executive isrestrainted by the Independence of the Judiciary from offering any direction on questions of law to the Court. However in important cases the Attorney-General

may nominate counsel to act as amicus curiae as was done in the case of Alcon vs. Colombia and Pinochet Cases[77].

4. Can a National Court apply a foreign law which conflicts with International Law or what is the effect of an executive action or a foreign law which is alleged to contravene International law?

No direct answer is given by any national Constitutions. Here the national court is required not only to examine the content of international law but to decide whether it has been violated by act of another State and, if so, what will be the effect of that illegal act within its own legal order?

Comparison between the US and English cases show that they are running on parallel tracks and the approach is differentviz. US cases arebased more closely on the views of Executive, so that the whole State speaks with one voice, but the English Courts seek themselves to apply the International law as follows:

(i) In USA there is a well developed doctrine of judicial restraint and the US Supreme Court in (in 1897) Underhill Vs. Hernandez[78] held that "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory".

This rule has been applied often in the acts of expropriation cases but US Courts have adopted flexible approach so that the Executive and Legislative wing can conduct their foreign policy in one voice. This rule was reexamined and confirmed in 1983 by Federal Court of Appeals in the claims of corruption and anti-competitive practices. See Clayco Petroleum Corporation Vs. Occidental Petroleum Corporation[79]. In this case a concession was granted to exploit natural resources which was a sovereign act and no private person could do it and the Court held that "the purpose of the doctrine of judicial restraint is to prevent the

77 1998 (3) WLR 1456 and 1999 (2) AER 97. (Pincochet)
78 (1897) 168 US 250.
79 (1983) 712 F. 2d 404, 81 ILR 522.

judiciary from interfering with the political branch's conduct of foreign policy." However, in contrast, the US Court of Appeal in Republic of Philippines Vs. Marcos[80] refused to apply the doctrine of judicial restraint. Here the successor government of the Philippines sought to prevent further misappropriation of properties in New York which was illegally acquired by Marcos when he was President. The Court held that the action by the new Government is not expropriation.

(ii) In England: the House of Lords in Kuwait Airways Corporation Vs. Iraqi Airways[81] reexamined the scope of the doctrine. It was a case of Iraq's invasion of Kuwait, where 10 commercial aircraft belonging to Kuwait Airways were taken over by a decree of the Revolutionary Command Council of Iraq. Lord Nicholls (para 29) held:

> "*Enforcement or recognition of this law would be manifestly contrary to the public policy of English law….. International law, for its part, recognizes that a national Court may properly decline to give effect to legislative and other acts of foreign states which are in violation of international law…..*"

Upon a careful and close examination of the different ways of application of International Law at the national level, the national Courts ofUK, Australia, Canada and Indiahave been increasingly skeptical of the application of internationallaw in domestic law on number of considerations and the primary consideration being that the question of the common law being placed at a higher pedestal than any other law.It is only in case of ambiguity in the common law, the courts have taken recourse to International law principles to interpret the common law in its application. But where the position in common law is clear, regardless of it being in conflict withInternational law, common law will prevail.[82]

80 (1986) 806 F. 2d 344; 81 ILR 581.
81 2002 (3) AER 209 (H,L.).

CONCLUDING OBSERVATIONS

The global constitutional map looks completely different at present, what it was 50 years ago. The complex phenomenon of globalization has further converged inevitability.[83] After the Second World War, the pace of change in Internationallaw has become different both in terms of making of treaties and the ever evolving and expanding norms of customary International law.[84]The doctrine of incorporation must be understood more accurately as a source, and not as such a part, of the common law.[85]From the States' practice it emerges that neither Monism nor Dualism represents the exact position. As a matter of fact, International law does not determine which theory is to be preferred. International law only requires that its norms are respected and allows every country to decide for itself as to how this has to be achieved. Further, the interactions between International and National Courts, like the interactions between International and national legal orders, may straddle from co-operative dialogue and willingness to accommodate to outright competition with the other. Overall, it seems that there is no general theory either in constitutional law or in Court decisions on the applicability of International law into municipal law. But in practice, the common law legal system is flexible on borrowings/ migrations of elements from International law into national law - which may thus serve as a general theory! In conclusion, every nation calls for the openness of International law and the slogan for everyone at domestic level is to "connect" with the reality of global culture.[86] The need of the hour is for a development between international legal obligations and national law.

83 Mark Tushnet, "The Inevitable Globalisation of Constitutional Law" 2009 (49) Virginia Journal of International Law 985-987.

84 R. O'keefe, *The Doctrine of Incorporation Revisited*, 79 British Yearbook of International Lawat p.85 (2009)

85 Sales and Clement, 'International Law in Domestic Courts: The Developing Framework' (2008) 124 LQR388 at 393

86 Judge Rosalyn Higgins, (1991) "International law and the Avoidance, containment and resolution of disputes Recueil des cours 266-268.

Judicial Response in Establishing Egalitarian Society[1]

Justice Jagdish Singh Khehar[2]

I. Introduction

The concept of egalitarianism entails equal treatment of all in a society. It aims at equality as the focal point of justice. And as we know, all concerns of justice, should necessarily be tested on the touchstone of this concept. One of the major aims of democratic governments of today is to ensure, that resources are used and utilized in a manner, that best promotes equality in the society. The three . wings of the governance—the legislature, the executive and the judiciary, are guided by this principle. From international conventions to national constitutions and statutes, this principle has been voiced differently, but understood similarly. The Universal Declaration of Human Rights starts with the right to equality as its first Article.[3] The stress on preserving and protecting fundamental rights also follows from the need to promote egalitarianism in the society.

Keeping in mind the significance of this concept, it is concomitant that Judiciary serves as a protector and promoter of egalitarianism. Justice Dr. T.K. Thommen, a former Judge of the Supreme Court

1 Based on the Kapila & Nirmal Hingorani Memorial Lecture delivered on 11 January, 2016

2 Judge, Supreme Court of India

3 Article 1 of Universal Declaration of Human Rights—'All human beings are born free and equal in dignity and rights…'

had opined in *Indira Sawhney* v. *Union of India*[4] that 'equality is one of the magnificent cornerstones of Indian democracy'. Article 14 of the Indian Constitution is the most 'significant'[5], constitutional provision in this regard. It lays down two concepts—equality before law, and equal protection of the laws. Equality before law is a negative concept, that denies special privilege in favour of anyone person.[6] Thus it envisages, that all people are subjected to the law of the land, without any exception whatsoever. This principle ensures, the supremacy of the rule of law in the Indian democratic system. The second concept under Article 14—equal protection of the laws, is based on the principle of equality of treatment in equal circumstances. It ensures, that 'equals must not be treated unlike, and unlikes should not be treated alike.'[7] This paves. the way for affirmative action, and permits legislatures to make reasonable classification, in order to secure equality.

Egalitarianism under the Indian Constitution is not limited to Article 14, which is actually a general principle, enunciating the concept of equality. The Constitution framers in India specified their vision of equality in Articles 15 to 18. The judiciary in *Maneka Gandhi* v. *Union of India*[8] advanced this principle, by stating that even the procedure established under Article 21, has to pass the test of Article 14. The Court opined:

> "The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity *with Article* 14."

Through this judgment, the judiciary expanded the functionality of Article 14, and provided another pillar to strengthen the concept of egalitarianism in the country. The founding fathers conceived of

4 AIR 1993 SC 477.

5 M.P. Jain, Indian Constitutional Law, (6th ed., Lexis Nexis Butterworths, 2010) at 928.

6 Ibid at 930.

7 Gouri Shankar *v,* Union of India, AIR 1995 SC 55 at 58.

8 AIR 1978 SC 597.

an independent judiciary, armed with the power of judicial review, as a constitutional device to achieve this objective. The power to enforce the fundamental rights was conferred on both the Supreme Court and the…High Courts. These courts have adopted various measures to do so, amongst which Public Interest Litigation has played a special role. Modification of the traditional requirement of standing, was sine qua non for the evolution of Public Interest Litigation, and of public participation, in the administration of justice. The need is more pressing in a country like India, where a great majority of people are either ignorant of their rights, or are too poor to approach the court. Realizing this—courts felt and held, that any member of the public acting bona fide, had the right to move a court, for redressal of a legal wrong, especially when the actual party suffers from a disability, or when the infringement targeted was a collective right.

II. Public Interest Litigation

The term Public Interest Litigation (hereinafter PIL) was first used by Abraham Chayes to describe the practice of lawyers in the United States, to bring about social change through court-ordered decrees, that reform legal rules, enforce existing laws, and articulate public norms.[9] The Judiciary has innovatively invoked the *'Conscience of the Constitution'*.[10] The concept of locus standi has been diluted to enable all public spirited citizens to approach the Supreme Court and High Court directly under Article 32 and 226 of the Constitution, to enforce fundamental rights, so that they could 'rely on the legal process, and not be repelled from it, by narrow pedantry surrounding locus standi[11]. The objective behind this can be best expressed in Justice Bhagwati's word,

9 See A. Chayes, 'The Role of the Judge in Public Law Litigation', 89 Harv. L. Rev. (1976) 1281 at 1284 cited in R. Marcus, '"Looking Backward" to 1938', 162-U-Pa-L-Rev-169, available at https:llwww.pennlawreview.com/print/162-U-Pa-L-Rev-1691.pdf, (Last Visited on 30th December, 2015).

10 Austin named Part III and Part IV of the Indian Constitutian as its Conscience. See G. Austin, The Indian Constitution- Cornerstone of a Nation, (26th Reprint., Oxford University Press, 2015) at 63.

11 Justice V. Krishna Iyer in Fertilizer Corporation Kamgar v. Union ofIndia, AIR 1981 SC 149.

> *"If public duties are to be enforced and social collective diffused rights and interests are to be protected, we have to utilize the initiative and zeal of public minded persons and organizations by allowing them to move the Court and act for a general or group interest, even though they may not be directly injured in their own rights."*[12]

This strategy is a means to ensure that each and every member of society has equal opportunity of achieving judicial redressal of legal injuries. Thus the entire concept of PIL is nothing but an extension of the understanding, that ensuring egalitarianism in society IS the best possible way to achieve justice—social, economic and political.[13]

Public Interest Litigation was considered a key component of the judicial activism approach in India.[14] Numerous decisions have been rendered by the judiciary under ~he concept of PIL, that have resulted in advancing the concept of social equality. For instance, in *Hussainara Khatoon v. Home Secretary, State of Bihar*[15], the Supreme Court was informed about prisoners languishing in jails for over 10 years, for simple offences like ticket less travel. It was found, that children born to prisoners were being brought up in ja,il. Surprisingly, even victims of a , crime had been held in jail for years, in order to ensure their presence during trial. Women, who had complained of rape, were incarcerated so as to be easily available at the time of recording of the prosecution evidence. The Court found, that some girls and children had been imprisoned, because the Ashram where they lived had been closed down. They were being kept in jail as a matter of protective custody. The Hingorani couple in whose memory the Kapila and Nirmal Hingorani Memorial lectures are organized, initiated the above PIL, which triggered a chain of proceedings, resulting in the release

12 S.P. Gupta v. Union OfIndia & Am, 1981 (Supp) SCC 87.

13 See Preamble, Constitution ofIndia, 1950.

14 Justice K.G. Balakrishnan, 'Growth of Public Interest Litigation in India', Address to Singapore Academy of Law, Fifteenth Annual Lecture on October 8, 2008, available at http://supremecourtofindia.nic.in/speeches/speeches_2008/8%5B1%5D.10.08_singapore_-_growth_of_public_interest_litigation.pdf, (Last Visited on 30th December, 2015).

15 AIR 1979 SC 1369

of more than 40,000 under-trial prisoners on personal or no bond. A similar pitiable situation was discovered by the Supreme Court in *Anil Yadav* v. *State of Bihar*[16]. Directions issued by the Supreme Court resulted in discovery of 33 persons who had been blinded by the police using needles and acid. Through interim orders, proceedings against the blinded persons were quashed. The State of Bihar was directed to fund their medical treatment, and 'formulate a scheme for their rehabilitation. An unfortunate aspect of *Anil Yadav* v. *State of Bihar*[14] was that at least two of the police personnel involved were given gallantry awards for outstanding service, for having ~one a good job in containing crime. In *R.* C. *Narain* v. *State of Bihar*[17], the Supreme Court dealt with 'inhuman conditions prevailing in the Ranchi, Agra and Gwalior Mental Asylums. In *Sheela Barse* v. *State of Maharashtra*[18], the Supreme Court discovered custodial violence to five women in the Bombay city jail, whereupon guidelines were issued to the whole of the State of Maharashtra, requiring that only police women be used to guard or interrogate women suspects.

Besides the above, the issue of protection of child rights, has also remained a matter of serious concern. Through the process of public interest litigation, the Supreme Court has been instrumental in introducing various remedial measures. In *University of Kerala v. Council of Principals of College in Kerala*[19], it was held that ragging was the worst form of human rights' abuse, as it resulted in damage to a person's right to live with human dignity. Accordingly, in *Vishva Jagriti Mission v. Central Government*[20], directions were issued to all the States and Union Territories, as also, to the bodies like the MeI, Bel and UGC, to provide for appropriate provisions through regulations, alongwith express deterrents and consequences,' from acts of ragging—including the suspension of students from the institution, and their hostel, pending final action, on a prima facie satisfaction that the concerned student was involved in an act of ragging. In *Avinash Mehrotra v. Union of India*[21],

16 AIR 1982 se 1008
17 1986 (Supp) see 576
18 AIR 1983 SC 378
19 AIR 2009 SC 2223
20 (2001) 3 SCR 540
21 (2009) 6 SCC 398

a direction was issued to all government and private schools to comply with the National Building Code, 2005 and the Code of Practice of Fire Safety in Educational Institutions, as prescribed by the Bureau of Indian Standards. The above directions were issued consequent upon the Court's attention having been drawn to, an unfortunate fire accident in a privately run school building. In *People's Union of Civil Liberties v. Union of India*[22], on being confronted with the reality of malnutrition in children and pregnant women, the Supreme Court considered the revised nutritional and feeding norms, as well as, the financial norms of supplementary nutrition under the Integrated Child Development Services Scheme. A direction was issued to all the States and Union Territories, to make requisite financial allocation, and to undertake necessary arrangements for the implementation of the prescribed norms. In *Girish Vyas v. State of Maharashtra*[23], the Pune Municipal Corporation had granted permission for construction of private residences, on a plot reserved for a primary school. The . Bombay High Court had allowed the petition, it cancelled the commencement and occupation certificates, and directed the demolition of the construction made. The Supreme Courtconfirmed the order passed by the High Court. In *Bachpan Bachao Andolan v. Union of India*[24], as a first remedial action, by way of an interim order, the Supreme Court directed that a complaint with regard to any missing child made at a police station will have to be reduced into a first information report, and appropriate steps will have to be taken, to see that follow up investigation was taken up immediately. Eventually, the Court required the State authorities to arrange for adequate shelter homes or after-care homes for children who had gone missing, and wpon having been found, did not have any place to go.

Public health and related human issues have also been a subject of judicial concern. PILs filed on the subj ect, have been entertained and remedial measures were taken. In *Bandhuq Mukti Morcha* v. *Union of India*[25], held that even bonded labours should be compensated and

22 (2009) 6 SCR 812
23 AIR 2012 SC 2043
24 (2013) 7 SCALE 507
25 AIR1984 SC 802

provided adequate facilities of shelter, food and clean drinking water as Article 21 of the Constitution includes right to live life with dignity and free of exploitation. Thus without expressly invoking the right to equality, the Supreme Court through its decision, provided an enabling mechanism to the deprived, to have au equal voice in society. The court therefore recognized the right of slum dwellers to shelter, as a necessary part of Article 21 in *Olga Tellis* v. *Bombay Municipal Corporation*[26]. Similarly, in *Vikram Deo Singh Tomar* v. *State of Bihar*[27], *it was* held that care homes for women and children in Bihar, be improved in order to ensure a dignified life to its occupants. In *Mano} Rajani* v. *State of M.P.*[28], the issue before the Madhya Pradesh High Court was, for procurement of sufficient quantity of water on a regular basis, for public and private purposes in Dewas. The High Court issued directions to the Municipal Corporation of Dewas while allowing the PIL. It held that the right to life guaranteed under Article 21 of the Constitution, included the right to enjoyment of pollution-free water and .air, and accordingly required the Municipal Corporation to make arrangements for sufficient water, even during the period when water in river Dewas dried up. In *Subhash Kumar v. State of Bihar*[29], the Supreme Court opined that Article 21 includes within its ambit the right to enjoy a pollution free environment, thereby laying down a milestone in a series of landmark cases that resulted in defining environmental jurisprudence in India. In *National Campaign Committee v. Union of India*[30], the Supreme Court directed all the States and Union Territories to implement labour welfare legislation. In *People's Union for Civil Liberties v. Union of India*[31], the Supreme Court reviewed the situation regarding night shelters, and expressed its views on seriousness of the problem. Instructions were issued to the District Magistrates and the Collectors to collect information about homeless people in their districts and the States and the Union Territories concerned were required to make provisions of basic amenities and basic medical facilities. In *Bhopal*

26 AIR 1986 SC 180.
27 AIR 1988 SC 1782.
28 AIR 2009 MP 229
29 AIR 1991 SC 420.
30 (2009) 3 SCC 269
31 (2012) 11 SCC 422

Gas Peedith Mahila Udyog Sangathan v. Union of India[32], the petitioner sought free and proper medical assistance for the victims of the Bhopal gas tragedy. The Court issued detailed directions, in order to ensure proper implementation of the Relief and Rehabilitation Programme for the gas victims. The Court authorized the Empowered Monitoring Committee to oversee the proper functioning of the concerned hospital and other government hospitals dealing with gas victims. In *Mohd. Haroon v. Union of India*[33], the PIL related to communal violence in Muzzafarnagar and neighbouring areas and highlighted the deteriorating condition of victims of these riots. The Court issued directions to government agencies to take immediate charge of all persons who were stranded without food and water, and to provide all required assistance to them. The Court further directed, that all stranded persons be taken to places of safety, and be given minimum amenities of food and water. In *Ajay Bansal v. Union of India*[34], similar directions were given by the Supreme Court for providing relief to people stranded . in and around Gangotri due to floods. In *Research Foundation for Science v. Union of India*[35], directions were issued for providing fresh drinking water to the eighteen identified areas surrounding the Union Carbide factory in Bhopal.

In *Vishakha and Others* v. *State of Rajasthan*[36], the Apex Court laid down comprehensive guidelines for protection and enforcement of rights of working women. This judgment influenced the Parliament to enact the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. There are numerous cases wherein, the Judiciary has strived to establish a just society, through its power of judicial review. Though, PIL has been the overarching tool to do so, several other judicial innovations have also been tried by the judiciary, to achieve this end.

32 AIR 2012 SC 3081
33 (2013) 11 SCALE 675
34 (2013) 7 SCALE 568
35 (2013) 7 SCALE 497 & 499
36 (1997) 6 SCC 241

The Supreme Court in *Unnikrishnan* v. *State of Andhra Pradesh*[37], upheld the complimentary characteristic of fundamental rights and directive principles. It opined, that the 'right to education was implicit in the right to life and personal liberty guaranteed by Article 21, and must be construed in the light of the directive principles contained in Part IV of the Constitution'[38]. This judgment eventually led to the insertion of Article 21-A in the Indian Constitution vide 86th Constitutional Amendment in 2002. Thus the initially non enforceable principles have been integrated into Part III of the Constitution to expand the scope of Fundamental rights and thereby advance the idea of justice.

Professor Upendra Baxi considers *Social Action Litigation* (SAL)—a more appropriate term, for this development, as according to him the term PIL, which has been borrowed from American legal development, represents a distinctive historical context which according to him is not found in India.[39] He recognizes that social action litigation has been brought about by judges advocating 'active assertion of judicial power to ameliorate the miseries of the masses'[40]. He referred to the following excerpt from *Keshavananda Bharti* v. *State of Kerla*[41] which aptly explains the relevance of public interest litigation or social action litigation, as an appropriate judicial response to promoting egalitarianism in society:

> "*The Court is not chosen by the people, and is not responsible to them, in the sense in which the House of the People is. However, it will win for itself a permanent-place in the hearts of the people and augment its moral authority if it can shift the focus of judicial review from the numerical concept of minority protection to the humanitarian concept of the protection of the weaker section of the people. It is really the poor, starved and*

37 AIR 1993 SC 2178.

38 Ibid.

39 U. Baxi "Taking Suffering Seriously; Social Action Litigation in the Supreme Court ofIndia," 1985 Third World Legal Studies; Vol. 4, Article 6, available at http://clpr.org.in/wp-contentiuploads/2013/08/Taking-Suffering-Seriously-Social-Action-Litigation-in-the-Supre.pdf, (last Visited on 30th January, 2015) at 109.

40 Ibid at 111.

41 AIR 1973 SC 1461

mindless m-illions who need the Court's protection for securing to themselves the enjoyment of human rights. In the absence of an explicit mandate, the Court should abstain from striking down a constitutional amendment which makes an endeavour to wipe out every tear from every eye."

III. Expansion of Article 21 as a panacea of all wrongs.

Since Part III of the constitution does not expressly provide for all human rights that are considered a quintessential element of a democratic society, the Judiciary we all know, expanded the scope of.Article 21 to make it an instrument to ensure, that all residuary rights can find voice as part of 'Right to Life'. The Supreme Court asserted that political, social and economic changes require recognition of new rights to meet the demands of the society.[42] This activist approach gained acceptance post the decision of the court in the *Maneka Gandhi* v. Union of India[8].

In *National Legal Services Authority* v. *Union of India*[43], the court affirmed that the 'right to choose one's gender identity, is integral to the right to lead a life with dignity[44]. This decision extended the right to equality and equal protection, to trans genders under Articles 14, 15 and 16 of the Constitution. The Court also directed the Centre and the State Governments to take steps to treat them as socially and educationally backward classes of citizens, and provide all kinds of reservation in cases of admission in educational institutions, and for public appointments.[45]

IV. Synthesising Part III and IV of the Constitution The judiciary by synthesizing Fundamental Rights and Directive Principles of the State Policy, has strived to constitutionalise social and economic rights—not only as a means to effectuate fundamental rights, but also as a source of laws for a welfare state.[46] Article 37 of the Constitution expressly states

42 See M.P. Jain supr n. at 1225.

43 (2014) 5 SCC 438.

44 Ibid.

45 Ibid.

46 See Report of the National Commission to Review the Working of the Constitution, Book 1, Vol. 1, Chap 3 available at http://lawmin.nic.in/ncrwc/finalreportiv1ch3.htm, (Last Visited on 30lh December, 2015).

that Part IV of Constitution is non-enforceable, as opposed to Part III of the Constitution.[47] Courts initially adopted a strict and literal approach towards understanding Part IV of the Constitution, which led H. M. Seervai to remarked that *'Directive Principles are nothing more than political exhortations to the legislature, and can only be "enforced" at the ballot box*[48]. However, this attitude gradually underwent a change, which can be discerned from the following observation of the Supreme Court *In re Kerala Education Bill:*

> "*Nevertheless, in determining the scope and ambit of the fundamental rights relied on by or on behalf of any person or body the court may not entirely ignore these directive principles of State policy laid down in Part IV of the Constitution but should adopt the principle of harmonious construction and should attempt to give effect to both as much as possible.*"

Eventually a trend started, wherein fundamental rights came to be interpreted, in the light of directive principles. This trend was in consonance with the international understanding of Civil and Political rights and Economic and Social rights, and that, both these rights were complementary to each other."[49]

V. Criticisms of Judicial Overreach

The activist attitude of the Judiciary has often been criticized for violating the concept of separation of powers. There are scholars who have called this development a positive addition to the Indian judicial system, others have considered it as a transgression into another's domain. S.P. Sathe remarks, that judicial activism in the post emergency period,

47 Part III of the Constitution can be compared to Civil and Political Rights and Part IV can be compared to Economic and Social Rights.

48 Cited in 'Directive Principles of State Policy: An analytical approach—II: The Constituent Assembly, Article 37 and the Early Days', available at https:llindconlawphil.wordpress.coml20 15/05/1 O/directive-principles-of-state-policy-an-analytical-approach-ii-articlc-37-and-the-early-days/,(Last visited on 30th December, 2015).

49 The Vienna World Conference on Human Rights, 1993 affirmed that the Civil, Political and the Economic, Social and Cultural Rights are 'universal, interdependent and indivisible.

was inspired by the *'realization that its elitist social image would not make it strong enough to withstand the future onslaught of a powerful political establishment*[50], and this led to two positive developments, namely, easy accessibility to courts and liberal interpretation of constitutional provisions.[51] This is essential in a society that witnesses deep social and economic divides. The Supreme Court in *Bihar Legal Support Society v. The Chief Justice Of India* & *Anr*[52] reasoned, that the PIL was evolved as a judicial tool to bring justice within the reach of the disadvantaged for the *'court has always,* regarded it as its duty to come to the rescue of these deprived and vulnerable . sections of Indian humanity in order to help them realise their economic and social *entitlements, and to bring to an end their oppression and exploitation'*.

The Supreme Court has consistently dismissed the criticisms against its activist stance, and maintained that it was the duty of the judiciary to ensure that the rule of law did not end up becoming available to only a fortunate few.[53] It is necessary to note, that voices of restrain on overreach, have also arisen from within the judiciary. It would thus be wrong to assume, that the judiciary is not wary of the repercussions of judicial over reach. It has to be accepted that the activist attitude of judiciary within reasonable limits, surely contributes to the advancement of society.

VI. Conclusion

The Indian State was envisaged as a welfare state, that strove to provide justice, liberty and equality, to the people of India. The Indian Judiciary has been successful in understanding the needs and problems of the Indian society. The complexity of the Indian social setup, requires a judiciary which can step in, when required to protect the rights of the

50 S.P. Sathe, Judicial Activism: The Indian Experience, 6 Wash. U. 1. L. & Pol'y 029 (2001), available at http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article= I 443&context=law journal Jaw yolicy, (Last visited on 31" December, 20 IS) at 51.

51 Ibid.

52 AIR 1987 SC 38.

53 See People's Union For Democratic Rights *v.* Union Of India & Others, AIR 1982 SC 1473.

disadvantaged. This judicial response has increased the accountability of the government towards the people. These innovations have helped in developing a culture, that is more sensitive to rights of the people, especially those who are marginalized.[54]

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54 S. Bohra, Public Interest Litigation : Access to Justice, available at http://www.manupatra.com/roundup/379/Artic1es/Public%20Interest%20Litigation.pdf (Lst Visited on 31st December, 2015)

Judicial and Court Reforms[1]

K. K. Venugopal[2]

The huge pendency of arrears in the court system in this country at all levels and the long delays in disposal of cases has been plaguing this country for the last few decades. Any number of lectures have been given on how to remedy this sad situation and any number of law commission reports have suggested remedies. But nothing seems to have worked. There can be no single solution, which will do away with the arrears and delays as if by wave of a magical wand. There has to be seriousness on all sides. On the side of the Bar, the Executive as well as the Judiciary.

Look at the astounding figures, which face one when dealing with this problem. The pendency in the subordinate courts, is in the region of about 26 million, about 3 million in the High Courts and about 60,000 in the Supreme Court of India. In the High Courts, out of these three million, about 800,000 cases have been pending for more than 10 years. In the Supreme Court about five years, and I believe in the Trial Courts for up to ten years.

Surely, you have to be a very courageous person to enter upon litigation in this background, surrounding the justice delivery system in the country. What hopes can a person who is in his fifties have, when filing his case in the Trial Court, that he would survive the final disposal

1. Inaugral address on Judicial and Court Reforms delivered during the Ist Economic Law and Policy Conference at New Delhi on September 28, 2016
2. Senior Advocate, Supreme Court of India

of the case if it is his misfortune that the case should be taken to the Supreme Court for final adjudication.

In the short time, which is available, I would not be able to deal with each one of the levels at which litigation takes place in the country, but in view of the recent controversy, which has, been described as a face off between the Judiciary and the Executive, I believe that it would be most appropriate to address the issue arising out of Article 124 and 216 of the Constitution of India, regarding the appointment of Judges of the Higher Judiciary. Both these provisions entrust the function of appointment of judges of the higher judiciary to the President of India, and under the Westminster system of Government, which we have adopted, the President would mean the President, acting on the aid and advice of the Council of Ministers. In other words, it is the cabinet, which takes the decision as to who should be appointed as a judge of the superior judiciary. To me, it is clear, that this is an administrative or an executive function, and does not involve the judicial adjudication of rights. Innumerable considerations would come into play in arriving at a decision on who should be selected for the high office of a judge of the High Court, or which judge of a High Court should be elevated to the Supreme Court of India.

This is a power which carries with it huge responsibilities, for the simple reason, that the post of a judge of the High Court, or a judge of the Supreme Court, carries with it mind-boggling powers, of life and death, to make and unmake governments and to decide upon, the rights of persons of the humblest origin, to the most powerful in the country.

In no other country in the world, has this power of appointment excluded the Executive or conferred that power exclusively on the judicial wing of the State. However, by a process of adjudicatory decision making, to me it appears, that Articles 124 and 216, were turned on their heads, when the Supreme Court of India, in what is known as the Second Judges case, and the Third Judges Case, held, in the first instance that primacy in such appointments rested not with the Executive, but with the Chief Justice of India, and secondly, that instead of the Chief Justice being a mere consultee, the Chief Justice, through

a collegium of five judges, would decide, who should be considered for appointment to the Higher Judiciary, with the President having the right to send back such selection or nomination, only once. But if the same name is resent to him by the Collegium, he is bound to accept the same. In other words, after taking over the right to select the judges for appointment, the Government had no right to veto the nomination.

The last such judgment, was delivered in October 1998, by nine judges of the Supreme Court. The governments of the day were quiescent because of the respect that they had for the judiciary and for the Supreme Court of India. But it was clear, that the power of adjudication, had been resorted to by the Supreme Court, for taking over a function, which had been conferred on the Executive Government, and which had not been conferred on the Judiciary.

It is only recently, in 2014, that the Government decided to have a little voice in the process of appointment of judges. A Constitutional Amendment, providing for the National Judicial Appointments Commission was passed unanimously, by both House of Parliament, with only one dissenting vote. A bill to implement the Constitutional Amendment was also ready for being passed. At this stage, the Constitutional Amendment was challenged before a Constitution Bench of the Supreme Court of India.

I may be biased to a great extent, in my views on this Constitutional Amendment and the Bill, for the simple reason that I had stoutly opposed the challenge to the Amendment and the Bill, and had argued, following the excellent arguments of the Attorney General of India, for upholding the amendment passed practically unanimously by both Houses of Parliament, and ratified by not less than one half of the States in the Country. In the arguments in the Supreme Court, it was the Collegium system, which was under attack.

It is a matter of regret that the Supreme Court did not uphold the validity of the Amendment, by merely holding that the two eminent persons, should be jurists, by reading down the law, and further, by holding that the independence of the judiciary would be affected, if the three judges were not to have a majority on the NJAC. This would require invalidating the appointment of two eminent persons, and by reading

it down to one. Utter harmony would then have prevailed because, the Minister for Law and Justice would at least project the Governments point of view in his capacity as a member of the Commission.

The consequence of all of this is that today, we have a process of appointment to the highest court which is shrouded in mystery. As John Dahlberg Acton once said,

> ***"Every thing secret degenerates, even the administration of justice; nothing is safe that does not show how it can bear discussion and publicity."***

It would not be out of place to mention that criticism of the Collegium system has not come merely from outsiders, but even from those on the Bench, some of whom have even been part of the Collegium. In the NJAC Judgment, itself, two learned Judges expressed grave doubts on the efficacy of the collegium system for selection the most meritorious candidates. As the sole dissenting voice, Justice Chelameswar, spoke of Collegium appointments in the following words:

> ***"1169. No wonder, gossip and speculations gather momentum and currency in such state of affairs ... Instead of Ministers, Judges patronised.***
>
> ***1170. In the next one-and-a-half decades, this Nation has witnessed many unpleasant events connected with judicial appointments, events which lend credence to the speculation that the system established by the Second and the Third Judges cases in its operational reality is perhaps not the best system for securing an independent and efficient judiciary."***

Justice Chelameswar, placed further reliance upon the V.M. Tarkunde Memorial Lecture delivered by another judge of the Supreme Court, Justice Ruma Pal, who said:

> ***"As I have said elsewhere the process by which a Judge is appointed to a superior court is one of the best kept secrets in this country. The very secrecy of the process leads to an inadequate input of information as to the abilities and suitability of a possible candidate for appointment as a Judge. A chance remark, a rumour or even third-hand information***

> ***may be sufficient to damn a Judge's prospects. Contrariwise a personal friendship or unspoken obligation may colour a recommendation. Consensus within the Collegium is sometimes resolved through a trade-off resulting in dubious appointments with disastrous consequences for the litigants and the credibility of the judicial system. Besides, institutional independence has also been compromised by growing sycophancy and 'lobbying' within the system."***

Even more interestingly, Justice Kurian Joseph, who joined the majority in striking down the 99th Amendment and the NJAC Act, was still compelled to express his own grave doubts, in the following terms:

> ***990. All told, all was and is not well. To that extent, I agree with Chelameswar, J. that the present Collegium System lacks transparency, accountability and objectivity. The trust deficit has affected the credibility of the Collegium System, as sometimes observed by the civic society. Quite often, very serious allegations and many a time not unfounded too, have been raised that its approach has been highly subjective. Deserving persons have been ignored wholly for subjective reasons, social and other national realities were overlooked, certain appointments were purposely delayed so as either to benefit vested choices or to deny such benefits to the less patronised, selection of patronised or favoured persons were made in blatant violation of the guidelines resulting in unmerited, if not, bad appointments, the dictatorial attitude of the Collegium seriously affecting the self-respect and dignity, if not, independence of Judges, the court, particularly the Supreme Court, often being styled as the Court of the Collegium, the looking forward syndrome affecting impartial assessment, etc., have a been some of the other allegations in the air for quite some time. These allegations certainly call for a deep introspection as to whether the institutional trusteeship has kept up the expectations of the Framers of the Constitution."***

In my opinion, the criticism, coming as it does from members of the Bench itself, deserves to be viewed with utmost seriousness. We have shocking instances of a criminal investigation being launched into a sitting High Court judge because bribe money intended for that judge was wrongly delivered to another judge. We have other instances where only sustained protest by the Bar, resulted in stopping the elevation of Judges whose probity is under a cloud, to the Supreme Court.

Not only this, we have former Chief Justices of this country certifying to the fact that corruption exists. Justice J.S. Verma, speaking shortly after his retirement said,

> ***"There is no point in saying that there is no corruption in the judiciary. No one is going to say it, much less accept it. One cannot go sweeping it under the carpet and not expect it to show. It is showing now."***

Similarly, Justice Bharucha, while in office, in a speech delivered in Kerala quantified the number of judges who are corrupt at 20%, which denotes a very distressing state of affairs.

One thing seems to be clear, and that is that the Supreme Court appears to have lost its way. Yet the silver lining is that the Court has been taken certain proactive steps to set things in order. I had recently been appointed *amicus curiae,* to assist the court in a writ petition that had been filed seeking to set up National Courts of Appeal. I had submitted to the Court that the ends of justice would undoubtedly be served by setting up of such courts of appeal, which would handle the bulk of cases arising out of Article 32 and Article 136 of the Constitution of India. The Apex Court would then restrict its consideration, as in the case of the Apex Courts of other countries, to the following aspects:

(i) Constitutional issues,

(ii) Questions of national importance,

(iii) Differences of opinion between different High Courts

(iv) Death sentence cases and

(v) Matters entrusted to the Supreme Court by express provisions of the Constitution.

The matter has now been referred to a Constitution Bench for further consideration, and hopefully we may look forward to some positive developments in the near future.

If this suggestion be accepted, the Supreme Court would be divesting itself of about 80% of the pendency of cases of a routine nature, which would enable the Supreme Court with about 2500 cases a year instead of about 60000, to regain its true status as a Constitutional Court. We can only hope that there may be similar positive developments in relation to the question of appointments as well, for as former U.S. President Andrew Jackson,

> ***"All the rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous Judiciary."***

Thank you.

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Constitutional Developments

Pavani Parameswara Rao[1]

The Constituent Assembly Debates and B. Shiva Rao's *'The Framing of India's Constitution'* are helpful to understand the Constitution, its aims and objects, the overall scheme and the infrastructure designed for achieving the goals.[2] The leaders who led the freedom struggle were statesmen who had made great sacrifices for the noble cause. They ensured that eminent persons from different walks of life and leaders representing different communities and sections of society were elected to the Constituent Assembly. At the first meeting, Dr. Sachchidananda Sinha, provisional Chairman, in his address reminded the Assembly, quoting Joseph Story, the famous American Jurist: *"Republics are created by the virtue, public spirit, and intelligence of the citizens. They fall, when the wise are banished from the public councils, because they dare to be honest, and the profligate are rewarded, because they flatter the people, in order to betray them."*[3] His concluding words are *"where there is no vision, the people perish"*.[4]

Dr. S. Radhakrishnan, philosopher-statesman, in his speech quoted Ashoka, "*Samavaya eva sadhuh*" (*Concord alone is the supreme good)*.[5] He said:

1 The author is a Senior Advocate at the Supreme Court of India, Former President, Supreme Court Bar Association and Former Associate President, The Bar Association of India and is widely regarded as a Constitutional Law expert.

2 B. SHIVA RAO, FRAMING OF INDIA'S CONSTITUTION: SELECT DOCUMENTS (Universal Law Publishing Co. 2015).

3 1, CONSTITUENT ASSEMBLY DEBATES 5 (Lok Sabha Secretariat 1955).

4 *Id.* at 7.

5 *Supra* note at 2.

> *"India is a symphony where there are, as in an orchestra, different instruments, each with its particular sonority, each with its special sound, all combining to interpret one particular score. It is this kind of combination that this country has stood for. It never adopted inquisitorial methods. It never asked the Parsis or the Jews or the Christians or the Muslims who came and took shelter there to change their creeds or become absorbed in what might be called a uniform Hindu humanity. It never did this. "Live and let live' – that has been the spirit of this country."*[6]

In his concluding speech in the Constituent Assembly Dr. B.R. Ambedkar, Chairman of the Drafting Committee, voiced his apprehensions about the future. "*What would happen to India's independence? India was once independent but lost it by the infidelity and treachery of some of her own people. On the 26th January, 1950 India would be a democratic country with a Government of the people, by the people and for the people. What would happen to the democratic Constitution?....We must hold fast to constitutional methods and abandon the bloody methods of revolution. We must abandon the method of civil disobedience, non-cooperation and Satyagraha. We must not lay our liberties at the feet of even a great man, or to trust him with powers which enable him to subvert the institutions*."[7]

Dr. Ambedkar advised the people to make political democracy a social democracy as well. According to him, liberty, equality and fraternity formed a union of trinity. He asked, "*How long shall we continue to deny equality in our social and economic life?" If we continued to deny for long, we will be putting our political democracy in peril."*[8]

Dr. Rajendra Prasad, in his concluding address observed *"if the people who are elected are capable and men of character and integrity they would be able to make the best even of a defective Constitution. If they are lacking in these, the Constitution cannot help the country*." He added *"we have communal differences, caste differences, language differences, provincial*

6 *Supra* note at 2.
7 B. SHIVA, *supra* note at 1, ¶ 944-45.
8 *Id.*

differences and so forth. It requires men of strong character, men of vision, men who will not sacrifice the interests of the country at large for the sake of smaller groups and areas and who will rise over the prejudices which are born of these differences. We can only hope that the country will throw up such men in abundance."[9]

The pithily worded Preamble of the Constitution records the solemn resolve of the people to secure to all citizens justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity; and to promote among them all fraternity assuring the dignity of the individual and the unity and integrity of the Nation. The Constitution has provided for a democratically elected Parliament for the country and a Legislature for each State. The Prime Minister gets M.Ps of his choice appointed as Ministers and Chief Ministers do likewise. The Council of Ministers exercises the executive power i.e. to make policies, to initiate legislation and to implement decisions taken and the laws enacted. The Legislatures enact laws and the Judiciary interprets the Constitution and the laws. The power of judicial review has assumed vast proportions. Every Minister, every Member of Parliament or of a State Legislature and every Judge takes the prescribed oath inter alia swearing allegiance to the Constitution and promising to discharge his duties faithfully. As observed by P. B. Gajendragadkar, former Chief Justice of India, in Special Reference No. 1 of 1964:

> "*all the three wings of the State, the Executive, the Legislature and the Judiciary must function not in antinomy nor in a spirit of hostility, but rationally, harmoniously and in a spirit of understanding within their respective spheres, for such harmonious working of the three constituents of the democratic State alone will help the peaceful development, growth and stabilization of the democratic way of life in this Country."*[10]

The Constitution has been in operation for over 67 years. It has been amended over a hundred times. However, from the beginning,

9 11, CONSTITUENT ASSEMBLY DEBATES 984-85 (Lok Sabha Secretariat 1955).

10 (1965) 1 SCR 413, 447.

there was no common understanding of the scheme of the Constitution by the three wings. The Judiciary frustrated the agrarian reforms initiated enthusiastically by different States soon after Independence due to lack of appreciation of the Directive Principles of State Policy and their dynamic character. According to the Supreme Court, they were subservient to the fundamental rights. It was a serious error of interpretation. It took the Court over two decades to realise its mistake and correct it. The damage done in the meanwhile was irreversible. The framers of the Constitution, functioning as the interim Parliament till the first general election to the House of the People (Lok Sabha) was held in 1952, suffered a jolt when the Patna High Court declared the Bihar Land Reforms Act unconstitutional.[11] Parliament got over the obstacle by amending the Constitution and inserting Articles 31A, 31B and the Ninth Schedule consisting of various enactments introducing land reforms which could not be challenged on the ground of violation of any fundamental right.[12] The Supreme Court accepted and upheld this and similar amendments initially, but in *IC Golaknath v. State of Punjab*[13] a larger Bench overruled the earlier decisions and declared that Parliament cannot in exercise of its amending power, take away or abridge a fundamental right. In *Kesavananda Bharati v. State of Kerala*[14] a still larger Bench overruled *IC Golaknath* and declared that Parliament's power to amend the Constitution does not include the power to alter the basic structure or frameworkk of the Constitution.

Parliament did not accept this fetter on its power under Article 368 of the Constitution. The Union Government led by a strong Prime Minister retaliated by superseding three senior most Judges of the Supreme Court who supported the basic structure theory and appointed the fourth puisne Judge as the next Chief Justice of India. The entire Bar rose in protest, but in vain. Yet another supersession took place when the senior most puisne Judge of the Supreme Court gave a strong dissenting judgment in *ADM Jabalpur v. Shivkant Shukla*[15] rejecting

11 Maharajadhiraj Sir Kameshwar Singh v. State of Bihar, 1959 AIR 1953 Pat. 167.
12 Art. 31, amended by The Constitution (First Amendment) Act, 1951.
13 (1967) 2 SCR 762.
14 (1973) 4 SCC 225.
15 (1976) 2 SCC 521.

the contention of the Government that during the emergency when the right to move a Court for the enforcement of the fundamental right to life and personal liberty was suspended, Courts could not entertain a writ petition. The New York Times hailed the verdict. The Central Government had already announced its policy to appoint committed Judges. The Bar and the public were deeply concerned about the independence of the Judiciary. The Bar knows who is a committed Judge and who is not. These developments raised the question whether it is safe to allow the Executive to have unbridled discretion in the matter of appointment of Judges.

In the *Supreme Court Advocates-on-Record Association v. Union of India*[16], a Bench of nine Judges was persuaded by the Bar to overrule *SP Gupta v. Union of India*.[17] The Court declared that consultation with the Chief Justice of India, as required by Article 124 (2) for appointment of a judge means, in substance accepting and appointing the candidates recommended by a Collegium consisting of the CJI and his senior colleagues. If the Government has any reservation about any candidate recommended, it may put forward the same before the Collegium for reconsideration, but shall abide by the final decision of the Collegium. No Government would like to part with its power to appoint Judges in favour of the Judiciary. Ever since, there have been bottlenecks and long delays in the appointment of Judges recommended by the Collegium. Some of us who had successfully persuaded the Court to assume the responsibility of selecting candidates could not reconcile to several poor choices made by the Collegium from time to time on considerations other than merit. The assumption that Judges' selection would be infallible has turned out to be incorrect. Even the author of the majority judgment, J.S. Verma, J. was disillusioned about the outcome of the law declared. Parliament tried to get rid of the Collegium system by the Constitution (99th Amendment) Act, 2014 and the National Judicial Appointments Commission Act, 2014, but the Supreme Court declared both of them unconstitutional[18] and

16 AIR 1994 SC 268.
17 AIR 1982 SC 149.
18 Supreme Court Advocates-on-Record Association v. UOI, (2016) 5 SCC 1.

requested the Government to revise the Memorandum of Procedure so as to make the selection transparent and accountable. It is not yet finalized for want of consensus. The present stalemate and the state of affairs is not at all satisfactory. Over the decades, the Judiciary has accumulated vast powers by interpretation and reinterpretation of the Constitution which can be exercised properly only by outstanding Judges of integrity, ability and judicial acumen. The country needs the most competent, incorruptible and independent judges selected by a Selection Committee in which all stake holders, namely, the Judiciary, the Government and the Bar (on behalf of litigants) are represented. Ideally, it should consist of the CJI, two senior most Judges, the Union Law Minister and an eminent leader of the Bar. The inclusion of a Bar leader will enhance transparency. The selection shall not only be transparent, but based on objective criteria. This will be possible only when both the Executive and the Judiciary wholeheartedly agree and act in tandem.

The Constitution aims at a classless and casteless society. Secularism is a basic feature of the Constitution. Dr. Ambedkar had declared that castes are anti-national and fought all his life for annihilation of the caste system. The Constitution prohibits discrimination on the ground of caste, religion or race. All Governments including the Central Government have made lists of castes and communities describing them as backward classes and provided reservations in the matter of admissions to professional courses and public employment. Regrettably, a nine-judge bench of the Supreme Court in *Indra Sawhney v. Union of India*,[19] permitted identification of backward classes through castes. As a result, members of backward classes, some of whom have ceased to be backward, have developed a vested interest in castes and communities. Forward castes have been exerting pressure to be included in the backward classes. Governments are eager to expand the reservations far in excess of 50% limit for gaining political mileage, unmindful of the deleterious consequences to public interest. Public employment is meant for public service. As Lal Narain Sinha has pointed out, "*the community at large has to pay for and avail of the benefits of the public*

19 (1992) 3 SCC 217.

service. It is this section whose interest is sought to be safeguarded by Article 335."[20]

Efficiency of administration is essential for good governance. Reservations cannot eradicate backwardness; only upliftment through intensive quality education with economic support can create the level playing field necessary to enable the weaker sections to compete with others on equal terms with dignity. E.S. Venkataramaiah J[21] and SB Sinha J[22] have indicated the steps to be taken for upliftment of backward classes. Perpetuation of caste system will defeat the Constitutional goal of "*promoting fraternity among all citizens, assuring the dignity of the individual and the unity and integrity of the Nation*." Today the concern of political parties is more for votes than the voters or the unity of the country.

One of the daring decisions taken by the Constitution-makers was to provide for universal adult suffrage. Lord Bryce had cautioned long ago *"do not give to a people institutions for which it is unripe in the simple faith that the tool will give skill to the workman's hand."*[23] The framers were constrained to empower the poor and illiterate masses in order to make democracy meaningful. Article 326 provides that elections to the House of the People and Legislative Assembly of every State shall be conducted on the basis of adult suffrage. By the Constitution (Sixty first Amendment) Act, 1988 the minimum age for voting has been lowered from 21 years to 18 years. Successive Governments have failed to take necessary measures to equip the voters to exercise their precious right, objectively in public interest.

The Election Commission has been recommending amendments to the law to make elections free and fair. It is common knowledge that all is not well with the elections. The 170th report of the Law

20 MALHOTRA BROTHERS, INDIAN CONSTITUTION – A FRESH LOOK (1993).

21 KC Vasanth Kumar v. State of Karnatka, (1985) Supp. SCC 714, 811, at ¶ 150.

22 EV Chinnaiah v. State of AP, (2005) 1 SCC 394, 435 at ¶ 114.

23 1 VISCOUNT JAMES BRYCE, MODERN DEMOCRACIES 206 (Macmillan 1921).

Commission of India[24] noted that there has been a steady deterioration in the standards, practices and pronouncements of political class which fights the elections. Money power, muscle power, corrupt practices and unfair means are being freely employed to win elections. N.N. Vohra Committee's report[25] (1995) has disclosed the powerful nexus of the bureaucracy and politicians with mafia gangs, smugglers and the underworld. A vast section of voters are accustomed to receiving bribes from candidates and political parties. In some parts of the Country they are reportedly demanding bribes for their votes. Atal Bihari Vajpayee in the course of the 13th Desraj Chaudhary Memorial Lecture[26] in 1998 highlighted the defects of our democracy:

"i) Neither Parliament nor the State Legislatures are discharging the legislative function with competence or commitment;

ii) The elected representatives are neither trained formally or informally in law-making nor do they have an inclination to develop the necessary knowledge and competence;

iii) Serious debate has ceased to take place in the House where noisy confrontation is the norm. Elective bodies resemble akharas (arenas for fighting bouts);

iv) Individuals who are genuinely interested in serving the people find it increasingly difficult to succeed in elections because the elections are totally subverted by money power, muscle power and vote bank considerations of castes and communities;

v) The elections are not entirely free and fair;

vi) The natural inclination of today's MPs and MLAs is to get involved in executive functions without accountability and capability. According to them power is the passport to personal prosperity;

vii) Corruption in the governing structures has corroded the core of electoral democracy;

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24 LAW COMMISSION OF INDIA: ONE HUNDRED SEVENTIETH REPORT ON REFORM OF THE ELECTORAL LAWS (1999).

25 VOHRA COMMITTEE REPORT, (1993).

26 *Fifty years later: What hope for India?,* REDIFF (Aug. 8, 2017, 11:38 AM), http://www.rediff.com/news/1996/2611atal.htm.

viii) Casteism, corruption and politicization have eroded the integrity and efficacy of our civil services which were non political and impartial."

The National Commission to review the working of the Constitution (2002) in its report[27] noticed increasing concern about the decline of Parliament, falling standards of debate, erosion of its moral authority and prestige. The Commission pointed out that criminalisation of politics, political-corruption and the politician-criminal-bureaucratic nexus have reached unprecedented levels needing strong systematic changes. As Nani Palkhivala had pointed out, "*the grim irony of the situation where the one job for which you need no training or qualification whatsoever is the job of legislating for and governing the largest democracy on earth."* To the question whether the Constitution has failed, his answer was: *"It is not the Constitution which has failed the people but it is our chosen representatives who have failed the Constitution."* Long ago, the far-sighted statesman C. Rajagopalachari had anticipated the present state of affairs. He wrote in his prison diary in 1922, "*Elections and their corruption, injustice and tyranny of wealth and inefficiency of administration, will make a hell of life as soon as freedom is given to us*."

The election law prescribes a ceiling on expenditure that could be incurred by a candidate contesting for membership of a State Assembly or Parliament. In most cases, the actual expenditure incurred is far in excess of the ceiling limit. Bribing voters has become common. A substantial section of votes polled are tainted due to bribery, undue influence and extraneous factors like caste and community. As a consequence, the quality, ability and integrity of the elected representatives of the people, barring a few exceptions, is visibly poor. Whenever there is a hung assembly, horse trading takes place. Defections continue notwithstanding the provisions of the Tenth Schedule to the Constitution. At times, defecting legislators are rewarded with ministerial berths. The Speakers of Legislative Assemblies, who are vested with the power to decide questions of disqualification on the ground of defection, seldom exercise their power objectively or on

27 NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION: A CONSULTATION PAPER ON PROBITY IN GOVERNANCE (2001).

time. Due to large scale abuse of power, experts have suggested that the power needs to be exercised in accordance with the opinion of the Election Commission.[28] There are several cases in which former Chief Ministers and Ministers are accused of serious crimes and some of them have been convicted. What happens when law makers become law breakers? Unless Parliament and State Legislatures consist of capable men and women of character and integrity who are committed to the Constitutional values, there can be no good governance. It is necessary to lay down suitable conditions of eligibility for candidates contesting at any election, be it to Parliament, a State Legislature, a local body or a professional body like a Bar Council, Medical Council, Institute Chartered Accountants of India and the like. Those who catch votes by hook or crook and win elections cannot be worthy of the office they occupy.

Part XIV of the Constitution provides for Public Service Commissions for the Union and for each State but does not prescribe strict conditions of eligibility for membership. Taking advantage of this omission, several State Governments appoint party men and supporters and manipulate selection of candidates of their choice. Several cases of alleged misbehaviour of Chairmen and members of State Public Service Commissions have been referred by the President of India to the Supreme Court for inquiry under Article 317. The position is the same with other Recruitment Boards and Selection Committees. Neutrality of civil services, which is a basic postulate of the Constitution has been eroded beyond repair. Of late, public offices including Constitutional posts like Governors are being filled mostly by members, followers or sympathisers of the party in power. Public offices ought to be filled by the most deserving persons in public interest. Political interference with investigation of crimes is not uncommon. Impartial decisionmaking is becoming increasingly difficult, resulting in growing dissatisfaction among the people. Terrorist outfits are deeply entrenched in some parts of the country. They have been challenging the authority of the State day in and day out. A Parliament consisting predominantly of members who have no commitment to the values and goals of the Constitution,

28 Jagjit Singh v. State of Haryana, (2006) 11 SCC 1.

and who get elected for self advancement using money power, muscle power and relying on factors like caste and community, cannot be expected to reform the system. There is no dearth of honest, patriotic and competent citizens who can administer the State well and provide good governance, but the present system does not allow them access to public offices.

The Constitution shows great concern for women and children and permits special provisions to be made for them. What is the ground reality? Do women enjoy equal rights? Are they safe? Is the law and order situation satisfactory? What about the Universities and other educational institutions? Why the standards of education are not up to the mark in most of them? Why there is so much of white collar crime and crime indulged in by persons with political connections?

The Constitution was designed for a two-party system as in the UK, but we have too many political parties which are mostly bereft of ideology. Their object appears to be to capture power and retain it by means fair or foul. Justice Sarkaria Commission on Centre-State Relations[29] noticed that a large number of splinter groups with shifting loyalties and narrow interests tend to encourage irresponsible political behaviour. Formation of a stable government with a strong opposition has become difficult. Coalition Governments cannot provide good governance. It is not possible to check abuse of power by the ruling party, without an effective opposition party in Parliament. In the earlier days political leaders of the ruling party and of the opposition used to respect each other. Now, there is open denigration of one another. It appears that some political parties are determined to destroy one another. There is no law to effectively regulate political parties and make them accountable. To recall the words of Nani Palkhivala, "*By voting ignorant professional politicians to power, we have kept a singularly gifted and enterprising nation in the ranks of the poorest on earth. The time has come when citizens must wrest the initiative from professional politicians and from political parties, and insist upon men of knowledge, vision and character being chosen as candidates for parliamentary and state*

29 JUSTICE RANJIT SINGH SARKARIA COMMISSION ON CENTRE STATE RELATIONS, (1988).

elections. It is only such men who can give India the type of government it needs."

The situation calls for comprehensive reforms. Within the framework of the Constitution it is possible to set things right and ensure good governance to achieve the Constitutional goals speedily, provided necessary reforms are undertaken without delay. If elected representatives fail to reform the system to make the Executive, the Legislature and the Judiciary function better, the people should make them act. Otherwise, the Constitution which was drafted with great care will not survive.

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Party Autonomy & the Choice of Seat of Arbitration

MOHIT KAUSHIK[1]

1.1. Importance of the Seat in the Arbitration

> "A concept of central importance to…international arbitral process is…arbitral seat….The location of the arbitral seat is fundamental to defining the legal framework for international arbitral proceedings and can have profound legal and practical consequences in an international arbitration."[2]

It has now been universally acknowledged that the seat of arbitration plays an important role in an international commercial arbitration.[3] The seat (or place) of arbitration is the jurisdiction in which an arbitration takes place legally. The location of the arbitral seat can have profound legal consequences for the parties, and can materially alter the course and outcome of the arbitral process. Although the courts of other countries may become involved in one way or another at various stages of an arbitration,[4] the courts of the seat play the predominant

1 LL.M. in International Law (South Asian University, New Delhi) and B.A. LL.B (H) (Amity Law School, Amity University, Noida).

2 Gary Born, *International Arbitration: Law and Practice* (Kluwer Law International, 2012) at 105.

3 A. Redfern and M. Hunter, with N. Blackaby and C. Partasides, *Law and Practice of International Commercial Arbitration* (Oxford University Press, 2009), at para 3.51; Dicey, Morris and Collins, *The Conflict of Laws*, (Sweet & Maxwell, 2010), at para 16–036.

4 New York Convention 1958, art II.3; UNCITRAL Model Law 1985, art 8; Indian Arbitration and Conciliation Act 1996, s 9.

role in terms of supervision of the arbitral process.[5] As a general rule, the courts of the seat are the only judicial authority able to remove an arbitrator (for example, for lack of independence or impartiality)[6] and proceedings for the setting aside of an arbitral award on the basis of lack of jurisdiction or some procedural defect will almost invariably be brought before the courts- at the seat of arbitration.[7]

The phrases "seat of arbitration or place of arbitration"[8] are often used inter- changeably to mean the legal jurisdiction to which an arbitration is attached.[9] There is a variety of arbitration instruments that use the term 'place'[10] but 'seat' is becoming increasingly common, particularly in the Asia-Pacific region.[11] An arbitration will be conducted according to the arbitration law at the seat of arbitration (*lex arbitri*), even if

5 The legal system of the seat 'has materially greater legal significance for and control over a locally-seated arbitration than other legal systems': Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2009) at 1676-1679; ICC Case No 5029, Interim Award: *Yearbook of Commercial Arbitration*, 1987, at 3 (arbitral procedure 'is governed by the mandatory provisions of the place of arbitration'); C v. D, *Company Law Cases*, 2007, at 16 ('by choosing London as the seat of arbitration, the parties must have agreed that proceedings on the award should be only those permitted by English law').

6 UNCITRAL Model Law, art 13.3; Indian Arbitration and Conciliation Act 1996, s 12 and 13.

7 UNCITRAL Model Law, art 34; Indian Arbitration and Conciliation Act 1996, s 34.

8 As a general rule, the phrases 'seat of arbitration' and 'place of arbitration' are regarded as synonymous. Some authorities use the expression 'situs' or 'forum': (Born, n. 5, at 1676). Whereas the UNCITRAL Model Law and some of the best-known sets of arbitration rules use the word 'place' (UNCITRAL Model Law 1985, art 20; UNCITRAL Arbitration Rules, art 18; ICC Rules, art 18.), the term 'place' is employed by the Indian Arbitration and Conciliation Act 1996, s 20 and; also by some arbitral institutions (for example, SCC Rules, art 20; SIAC Arbitration Rules, art 18).

9 PT Garuda Indonesia v. Birgen Air, *Singapore Law Reports*, 2002, at 399 (Singapore Court of Appeal).

10 UNCITRAL Arbitration Rules, UNCITRAL Model Law 1985, ICC Rules and SIAC Rules (1997), KCAB International Rules, ICA Rules, PDRCI Arbitration Rules, BAC Rules, Model Law and New York Convention.

11 SIAC Rules (2007), HKIAC Rules, ACICA Rules and Swiss Rules. See also M Hwang and Fong Lee Cheng, "Relevant Considerations in Choosing the Place of Arbitration", *Asian International Arbitration Journal*, vol. 4 (2008), at 195.

hearings or other meetings are held elsewhere. Under no circumstances should the terms 'seat' or 'place' of arbitration be confused with the venue, location or place of hearings. The most national laws[12] and institutional arbitral rules[13] permit the hearings and meetings to be concluded outside the arbitral seat, for reasons of convenience. With few exceptions, the conduct of the hearings outside the arbitral seat does not affect the location of the arbitration seat or the applicability of the arbitration legislation of the arbitral seat to the arbitration.[14]

The importance accorded to the principle of party autonomy in the field of international arbitration means that parties to an arbitration agreement are able to select the arbitral seat.[15] Given the potential significance of the seat being one country rather than another, it might reasonably be expected that contracting parties would seek

12 UNCITRAL Model Law, art 20(2); Indian Arbitration and Conciliation Act 1996, s 20 (3); Japanese Arbitration Law, art 28(3); The Netherland Arbitration Act 1986, art 1037(3) is to like effect. But contrast the law in the US that requires that hearings be conducted in the place of arbitration unless the parties agree otherwise: Spring Hope Rockwool v. Industrial Clean Air Inc, *Federal Supplement*, 1985, at 1385; Snyder v. Smith, *Federal Reporter, Second Series*, 1984, at 409 (7th Cir).

13 UNCITRAL Model Law, art 16(2); LCIA Rules, art 16(2); ICC Rules, art 14(2); ICDR Rules, art 13(2).

14 The Singapore Court of Appeal in PT Garuda Indonesia v. Birgen Air, *Singapore Law Reports*, 2002, at 399: "It should be apparent from Art 20 [Model Law] there is a distinction between 'place of arbitration' and the place where the arbitral tribunal carries on hearing witnesses, experts…Where parties have agreed on the place of arbitration, it does not change…though the tribunal may…hear witnesses…in a different location. Although the choice of a 'seat' implies the geographical place for arbitration…it can't be construed that the parties have limited themselves to that place. As pointed by the Court of Appeal in Naviera Amazonia Peruana SA v. Compania Internacional de Seguros del Peru, *Lloyd's Law Reports*, 1981, at 121, it may be convenient to hold meetings in other nations. That does not mean that the 'seat' of arbitration changes with each change of country….legal place of arbitration remains the same even though physical place changes from time to time, unless of course the parties have agreed to change it" [Union of India v. McDonnell Douglas Corp, *Lloyd's Law Reports*, 1993, at 48. (The Peruvian case referred to in this citation is generally known as 'the Peruvian Insurance Case').].

15 UNCITRAL Model Law, art 20.1; Indian Arbitration and Conciliation Act 1996, s 20.

to ensure that their arbitration agreement clearly identifies the seat of arbitration.[16] In situations involving a 'pathological'[17] arbitration clause, a national court may have to decide first: "which country is the seat of arbitration?" (typically, in order to determine whether or not it has jurisdiction to entertain certain types of arbitration application). In such cases, the court faces the problem of contractual interpretation: from the words used in the agreement, as *what did the parties intend?* The different theories relating to this connection arise from the delicate interplay between a state's powers (particularly state judicial powers), an arbitral tribunal's powers and the freedom of parties to choose how their disputes are determined. At times these interests may conflict and there is potential for the law and/or the courts of the seat of arbitration to constrain the flexible and pragmatic qualities of arbitration. The purpose of the discussion which follows is to evaluate and analyze the arbitration jurisprudence- 1) How the local laws of the arbitral seat affect or guide the parties while choosing the seat of arbitration?; 2) Whether the two Indian parties can choose foreign seat for the arbitration?

1.2 Restrictions Derived from the Seat - Often the Procedural Law and Public Policy

> "The procedural law is that of the place of arbitration and, to the extent that it contains mandatory provisions (public

16 In the absence of party choice, the arbitral institution (in the case of institutional arbitration) or the arbitral tribunal, if so authorized, may determine the seat: see UNCITRAL Model Law, art 20.1; Indian Arbitration and Conciliation Act 1996, s 5, 9 and 20; see also Dubai Islamic Bank PJSC v. Paymentech Merchant Services Inc, *Lloyd's Law Reports*, 2001, at 65.

17 In HKL Group Co Ltd v Rizq International Holdings Pte Ltd, *Singapore High Court Registrar*, 2013, at 5, the Singapore High Court held that a pathological arbitration clause "may or may not be upheld depending on the nature and extent of its pathology"…However, the Singapore courts will generally give effect to such clause… it was clear that the parties had an intention to arbitrate, but somehow had referred to a non-existent institution in Singapore ("Arbitration Committee"). Similarly, in Pricol Limited v. Johnson Controls Enterprise Ltd. & Ors., Arbitration Case (Civil) No. 30 of 2014- In this case, parties have referred to a non-existent entity ("Singapore Chamber of Commerce"). The SCI have given a reasonable and meaningful construction to a pathological arbitration agreement, by holding that party actually meant SIAC.

> policy), is binding on the parties whether they like it or not. It may well be that the *lex arbitri* will govern with a very free rein, but it will govern nonetheless."[18]

As, Dr. Francis Mann has frequently reiterated that "every arbitration is a national arbitration which is subjected to the specific system of national law (public policy and procedural requirements) that is to say; the law of arbitration is the law of the country in which the tribunal has its seat."[19] Therefore, one can conclude that the parties are at liberty, to frame and regulate an arbitration, to the extent that their choices do not conflict with the law of the seat (which has mandatory application).[20]

The English judge, in 1824, illustrates the 'public policy' as "very unruly horse, and when once you get astride it you never know where it will carry you".[21] Whereas, the Swiss Federal Tribunal has depicted the notion as: "chameleon because of its changing aspect"[22] and rationally observed that: "any attempt to answer the numerous issues raised by the interpretation of this notion only raised other difficult or even polemic questions."[23]

The parties are at liberty to draft and regulate arbitration rules to the extent that their choice does not conflict with the public policy of the arbitral seat. The freedom to derogate from the *lex arbitri* is only achievable to the extent that the *lex arbitri* itself permits it. Article 19 (1) of the model law also reiterates the same principle:

> "Paragraph (1) guarantees the freedom of the parties to determine the rules on how their chosen method of dispute settlement will be implemented. This allows them to tailor

18 Redfern, n. 3, at para 3.50.

19 Born, n. 5, at 1295.

20 Redfern, n. 3, at 2-28; Born, n. 5, at 1295- These writings have also reached to similar conclusion that the arbitration law (public policy and procedural restrictions) of the arbitral seat is mandatorily applicable as a matter of territorial jurisdiction to arbitrations seated in the national territory.

21 Richardson v. Mellish, *Bingham's Common Pleas Reports,* 1824, at 252, (Burrough J.) (Eng.).

22 Tribunal Fédéral [TF] Mar. 8, 2006, 132 Arrets du Tribunal Federal Suisse [ATF] III 389, 391 (Switz.).

23 Ibid.

> the rules according to their specific needs and wishes … The freedom of the parties is subject only to the provisions of the model law, that is, to its mandatory provisions."[24]

Procedural mandatory rules have a close connection as each state has legitimate interest in guaranteeing minimum standards of adjudication.[25] The arbitrators' powers derive from the law of the seat, so will automatically apply its mandatory rules. *Lex arbitri* of most jurisdictions requires equal treatment between the parties and an opportunity for each to present its case.[26] Also most courts in arbitral jurisdictions would decline the parties' request to opt out of this basic requirement for equality and procedural fairness,[27] unless the opt-out was agreed freely, for good reason and in the clearest possible terms. In Singapore, the Court of Appeal has observed[28]:

> The Judge held that "natural justice should apply to the entire arbitration proceedings' because these are immutable principles which ought to apply to any tribunal acting in a judicial capacity…"

Most of the countries have adopted and enforced the Model Law[29] thereby, many states have same mandatory procedural rules for arbitration. If an award violates such provisions at the seat, then the

24 Alastair Henderson, "*Lex Arbitri*, Procedural Law and the Seat of Arbitration", *Singapore Academy of Law Journal*, vol. 26 (2014), at 898-899.

25 Nathalie Voser, "Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration", *American Review of International Arbitration*, vol. 7 (1996), at 346.

26 UNCITRAL Model Law 1985, art 18; Indian Arbitration and Conciliation Act, s 18.

27 Michael Pryles, "Limits to Party Autonomy in Arbitral Procedure", *Journal of International Arbitration*, vol. 24 (2007), at 327.

28 LW Infrastructure Pte Ltd v. Lim Chin San Contractors Pte Ltd, *Singapore Law Reports*, 2013, at 56. See also, Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd, *Singapore Law Reports (Reissue),* 2007, at 86. Other fundamental procedural norms might include, for example, condemnation of awards procured by corruption, or tribunals lacking necessary impartiality.

29 UNCITRAL Model Law 1985, art 34(b)(ii); Legislation based upon the Model Law has been adopted in 74 countries: see UNCITRAL, Status of the Model Law on International Commercial Arbitration (1985), <http://www.uncitral.

Nations that have enforced the Model Law (in their jurisdictions) are unlikely to grant enforcement. Moreover, almost all domestic arbitration laws and New York Convention[30] provides for non-enforcement of the arbitral awards, if such awards are set-aside in the territory where it is made. Enforceability issue gives more weight to the mandatory rules of the seat so far they reflect the relevant public policy.[31] However, one commentator argued that since the New York Convention is only discretionary, then party autonomy should be preferred where the two is in conflict.[32]

Furthermore, even where the affected party succeeded in establishing that there is a grave violation of the rule because such violation affected the outcome, but such violation will not necessarily also be a violation of public policy, thus not every denial of equal treatment is grave one.[33] Also, in *Egemental v. Fuchs*[34], it was held that a wrong or arbitrary application of the agreed arbitration rules was not egregious enough to constitute a violation of public policy.

With regard to the international commercial arbitration, public policy is a universally accepted and legitimate restriction, but it is also recognized that public policy must be interpreted and applied restrictively, as broad interpretation would jeopardize the efficacy of overall arbitration system.[35]

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org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html>, last visited on 18th April 2017.

30 New York Convention 1958, art V(1)(e) and art V(2)(b).

31 Jean-François Poudret and Sébastien Besson, Droit comparé de l'arbitrage international (2002) 647; Bernd von Hoffmann, 'Internationally Mandatory Rules of Law before Arbitral Tribunals' in Karl-Heinz Böckstiegel (ed), Acts of State and Arbitration (1997) 9.

32 Patrik Schöldström, The Arbitrator's Mandate: A Comparative Study of Relationships in Commercial Arbitration under the Laws of England, Germany, Sweden and Switzerland (1998) 290.

33 Devin Bray, Heather L Bray, *International Arbitration and Public Policy* (Juris Net LLC, 2015), at 14.

34 *Federal Supreme Court, Bundesgerichtsentscheid*, 2000, at 250.

35 Javier Garcia de Enterria, "The Role of Public Policy in International Commercial Arbitration", *Law & Policy In International Business*, vol. 21 (1989-90), at 389, 391.

1.3 Restrictions with Regard to the Choice of Seat- Can two Indian Parties Choose a Foreign Seat - The Addhar Judgment (2015)

In the absence of any clear provision under the Arbitration and Conciliation Act, 1996 and contradictory verdict of various High Courts and the Supreme Court, the issue: whether the contracting parties (all domiciled in India) have the autonomy to select a foreign seat for arbitration, has seen much debate. Recent judicial pronouncements of the Madhya Pradesh High Court in *Sasan Power*[36] and the Bombay High Court in *Addhar Mercantile*[37] have made the position murkier.

Addhar Judgment: Bombay High Court – The Indian parties made an agreement in which arbitration clause read: "Arbitration in India or Singapore and English law to be applied." A dispute arose between the parties which reached before the Bombay High Court and the Court held that two Indian parties cannot be permitted to derogate from Indian law as that would be against public policy and thus the arbitration has to be conducted in India.[38]

- **Improper Reliance on TDM Infrastructure:** While arriving at its conclusion, the court in Addhar Case, relied on the observations of the Supreme Court of India in *TDM Infrastructure Pvt Ltd v. UE Development India Ltd*[39] which held – "the legislature intended that the Indian nationals shall not be permitted to derogate from Indian law…part of the public policy of the country (para 8)." However, such blind reliance on the observations in *TDM Infrastructure* is erroneous because Indian Courts follow the doctrine of precedent (i.e. a judgment of the superior court has to be examined in the context of issues, which arose for determination before it. The issues which arose and were conclusively determined by the Superior Court are part of the ratio decidendi and binding on all

36 Sasan Power Ltd. v. North American Coal Corporation India Pvt. Ltd., First Appeal No. 310 of 2015.

37 Addhar Mercantile Private Ltd. v. Shree Jagdamba Agrico Exports Pvt. Ltd., Arbitration Application No. 197 of 2014 along with Arbitration Petition No. 910 of 2013.

38 Ibid.

39 *Supreme Court Cases,* 2008, at 271.

other lower courts in India). However, the observations in *TDM Infrastructure* were made with respect to an application under section 11 of the Arbitration and Conciliation Act, 1996 (concerning the appointment of an arbitrator). The case has never dealt with the issue: "whether two Indian parties can contract out of Indian law or can adopt a foreign law to govern their contract". Thus, the observations in *TDM Infrastructure Case,* were simply obiter dicta and therefore non-binding on the Bombay High Court in *Addhar Case*.

- **Section 28 of the Arbitration and Conciliation Act, 1996:** Generally, in the arbitration clause, there are three types of laws that are applicable, i.e.: 1) the law governing the substantive contract, 2) the law governing the arbitration agreement, and 3) the curial law governing the arbitration proceedings.[40] In *TDM Infrastructure,* Court relied on section 28 of the Act, 1996 in concluding that Indian parties are not allowed to derogate from Indian law and *Addhar* relied on the same provision. *In both TDM Infrastructure and Addhar,* the court held that the 'substantive law of contract' shall be Indian law, from which Indian parties (in an Indian seated arbitration) cannot derogate. If Indian parties select a foreign governing law for their contract then that would be a violation of public policy and therefore such contracts are void under section 23 of the Indian Contract Act, 1872.

  Arguably, *TDM Infrastructure and Addhar* judgments do not make any explicit restrictions with respect to choosing a foreign seat of arbitration or a foreign law governing the arbitration agreement. Such a inference appears to be consistent with the interpretation accorded to the section 28(1)(a) of the Act by the Supreme Court of India in *Bharat Aluminium Co v. Kaiser Aluminium Technical Services Inc* (Balco)[41]. Balco clearly established that the applicability of section 28 of the Act is restricted to the substantive law of the contract (and does not deal with determination of a foreign seat

40 Sumitomo Heavy Industries Ltd. v. ONGC Ltd. & Ors., *Supreme Court Cases*, 1998, at 305.

41 *Supreme Court Cases*, 2012, at 552 (para 118).

(curial law) or a foreign law governing the arbitration agreement). It can be implied that two Indian parties are free to select a foreign seat and a foreign governing law for the arbitration agreement. The only restriction that applies is that the substantive law of contract has to be Indian as per section 28 of the Act, 1996.

Sasan Power Judgement: Madhya Pradesh High Court setting the right precedent: This debatable issue was dealt by the Madhya Pradesh High Court in 2015, where party autonomy was held to be paramount in determining the arbitral seat, by holding that the Indian parties are free to choose a foreign seat (in this case being London). While arriving at its decision, the High Court held that the observations of *TDM Infrastructure* are non-binding as the judgment is related to the Section 11 of the Act, 1996. The Court also considered the observations made in *Atlas Exports Industries v. Kotak & Company,*[42] (which was a larger bench decision than *TDM Infrastructure*):- in which the Supreme Court considered the applicability of sections 23 and 28 of the Indian Contract Act, 1872 and held that since the arbitration is located in a foreign country that would not be sufficient to annul the arbitration agreement as the parties entered into on their own volition. Although in the case of *Reliance Industries Limited v Union of India*[43], the Supreme Court of India had upheld the award in a foreign seated arbitration between Indian parties, but the court did not reach at any specific conclusion that: whether two Indian parties could have a foreign seated arbitration. Furthermore, if we read the *Balco* and *Reliance Cases* together, then we may infer that choosing a foreign seat makes Part I inapplicable which makes section 28 of the Act, 1996 inapplicable and thereby, making the observations of *TDM Infrastructure* nugatory.

When decision of the *Sasan* (Madhya Pradesh High Court) was challenged before the Supreme Court, it was assumed that the Supreme Court would finally settle this issue. But, the Supreme Court of India did not explicitly decide upon the ability of two Indian parties to have a foreign seated arbitration, it implicitly recognized the autonomy of the Indian parties to agree on a foreign seat. However, Court upheld

42 *Supreme Court Cases*, 1997, at 61.
43 *Supreme Court Cases*, 2014, at 603.

the arbitration at foreign seat but the grounds for allowing it were altogether different. Further, the recent 2015 Arbitration Amendment Act, provided for interim reliefs by Indian courts in a foreign seated arbitration (i.e. arbitration with at least one non-Indian party) which further adds to this ambiguity as the amendment does not contemplate interim reliefs for foreign seated arbitration between two Indian parties.

In the light of such contradictory and ambiguous positions adopted by the Indian Courts, as well as the recent amendment in the Arbitration Act (on interim reliefs), the ambiguity on the position as to whether two Indian parties can have a foreign seat of arbitration continues. A conclusive ruling from the Supreme Court on this issue is, therefore, much awaited.

Conclusion

The primacy accorded to the party autonomy for determining the seat, choice of law and constitution of the arbitral tribunal, meshes neatly with the private nature of arbitration.[44] Nevertheless, arbitration can never be wholly privatized, as it has to act consistently with the legal system of the arbitral seat and international public policy. Therefore, it can be construed that the survival of international commercial arbitration as a system of dispute resolution depends not only on the principle of party autonomy but, perhaps more significantly, on its respect for vital juridical interests.

Generally, the parties have decided a seat of arbitration in their arbitration agreement thereby it can be assumed that the law of that seat is the law applicable to the arbitration. The tribunal deals with the contested issues of arbitral procedure and the courts at the arbitral seat are always available for supportive and supervisory action if the parties require while staying within the confines of the *lex arbitri*. The author tried to give the clear understanding of not only: what the seat of arbitration is but the terms that are closely related to it. The rights of

44 Okezie Chukwumerije, "Applicable Substantive Law in International Commercial Arbitration", *Anglo-Amercian Law Review*, vol. 23 (1994), at 267.

parties are significantly influenced by the seat of arbitration and hence they should choose it very cautiously.

Notwithstanding the huge volume of case law and literature addressing problems caused by badly drafted arbitration agreements, the incidence of pathological clauses does not look like abating:

> "Arbitration clauses are often 'midnight clauses', i.e. the last clauses to be considered in contract negotiation…. Insufficient thought is given as to how disputes are to be resolved…and an inappropriate and unwieldy compromise is often adopted."[45]

As a result, courts will continue to be "bedeviled by dispute-resolution clauses which are incomplete, internally inconsistent or otherwise opaque".[46] In such situations, the courts should give effect to such clauses, by assigning a reasonable and meaningful construction of the contractual words - in the belief that this will most likely reflect the parties' true intentions.

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45 Redfern, n. 3, at para 2.04.

46 Jonathan Hill, "Determining the Seat of an International Arbitration: Party Autonomy and the Interpretation of Arbitration Agreements", *International and Comparative Law Quarterly*, vol. 63 (2014), at 533.

Bar Events
Bar Association of India Activities

8th January, 2016

Opening ofthe Legal Year 2016, in Kuala Lumpur, Malaysia

Opening of the Legal Year 2016 in Kuala Lumpur, Malaysia was celebrated on 8th January, 2016. The event was Jointly organized by the Judiciary and the Malaysian Bar. Mr. Prashant Kumar, Executive Vice President, BAI, represented the Association.

11th January, 2016

Opening of Legal Year 2016 in Hong Kong

Opening of the Legal Year in Hong kong, was held on 11th January, 2016. The Law Society of Hong Kong has been invited by the Judiciary to assist in coordinating the participation of this annual event by overseas bar leaders and presidents of law societies. Mr. Prashant Kumar, Executive Vice President represented the Association.

31st January, 2016

Felicitation Function Mr. Prashant Kumar on his appointment as President of LAWASIA, the largest Bar Association in the Asian Pacific Region.

A function to felicitate Mr. Prashant Kumar on his assumption of office as President of LAWASIA, the Law Association for the Asia and the Pacific was organised by the Society of Indian Law Firms (SILF) at hotel Hyatt Regency, New Delhi on 31st January, 2016.

6th March, 2016

Seminar on Foreign direct Investment (FDI) in Indiain collaboration with Israel Bar Association& LAWASIA

A Seminar on FDI in India was organized by the Association in collaboration with Israel Bar Association and Lawasia at Hyatt Regency Hotel at New Delhi on 6th March, 2016. Eminent lawyers, judges and law professors from Israel who were part of a 100 strong delegation, attended the seminar along with local delegates from India. Mr Shyam Divan and Ms Pinky Anand made presentations on FDI.

15th – 16th April, 2016

A Seminar on Foreign Direct Investment, in Berlin, Germany.

A seminar on Foreign Direct Investment was organized by LAWASIA, in Berlin, Germany on April 15-16, 2016 for the first time in Europe. Ms. Pinky Anand, Vice President, BAI and Mr. Shyam Divan, Council Member, LAWASIA made presentations on Legal Framework in India.

16th – 18th May, 2016

50th anniversary of United Nations Commission on International Trade Law (UNCITRAL)

A Trade Law forum was held during 16-18 May, 2016 at Incheon, Republic of Korea to celebrate the 50th anniversary of United Nations commission on international trade law (UNCITRAL) regional centre for Asia Pacific , jointly with the Hague Conference on Private International Law. Mr. Mukul Rohatgi, Attorney General for India and Hony. Chairman, BAI delivered the key note address. Ms. Pinky Anand, Vice President, BAI and Mr. Prashant Kumar, Executive Vice President, BAI & President, LAWASIA, participated on behalf of The Bar Association of India.

Hon'ble Mr. T.S. Thakur, Chief Justice of India with Justice A.R. Dave and Hon'ble Mr. Justice N.V. Ramana of Supreme Court also participated, with the CJI Thakur delivering a special address.

18th – 22nd May, 2016

VIth St. Petersburg International Legal Forum in Russia

Association of lawyers of Russia invited BAI to participate in the VIth St. Petersburg international legal forum at St. Petersburg, Russia from 18-22 May, 2016. Mr. K.N. Bhat, Associate President, BAI represented the Association.

20th – 21st May, 2016

National Seminar on Current Challenges before the Legal Profession and the Judiciary at Shillong, Meghalaya

A national Seminar on "Current challenges in Legal Profession and the Judiciary" was organized by the Bar Association of India& Shillong High Court Bar Association at Shillong on May 20-21, 2016. The Seminar was inaugurated by Hon'ble Shri Dinesh Maheshwari, the Chief Justice of the Meghalaya, chaired by the Shri R.K.P. Shankardass, President, BAI in the gracious presence of Shri Rowell Lyngdoh, the Deputy Chief Minister of the State as the Guest of Honour who hosted the dinner on the inauguration day. Hon'ble Shri V. Shanmuganathan, the Governor of the State of Meghalaya was the Chief Guest at the Valedictory function of the Seminar, Dr. M. Ampareen Lyngdoh, Minister for Urban Affairs, Govt.of Meghalaya was the Guest of Honour and Shri Ram Jethmalani, the eminent jurist, delivered the Valedictory address.

Continuing sessions on the following themes helped initiate concrete discussions and generations of possible solutions :

- *ROLE OF JUDICIARY IN BRINGING UP YOUNG BAR*
- *RECENT ARBITRATION AMENDMENT AND COMMERCIAL COURTS ACT*
- *ONE BAR ONE INDIA: ROLE OF THE BAR ASSOCIATION OF INDIA TO HELP THE LOCAL BAR AND THE PROFESSION IN THE NORTH-EAST*

- *RICH LEGAL TAPESTRY OF NORTH EAST INDIA: A GLIMPSE INTO THE LOCAL CUSTOMARY LAWS AND PRACTICE IN MEGHALAYA*

Other speakers who addressed different sessions included among others eminent lawyers, Hon'ble Justice S.R. Sen, Judge, High Court of Meghalaya. Hon'ble Justice Suman Shyam, Judge, Gauhati High Court, Hon'ble Justice Michael Zothankhuma, Judge, Gauhati High Court, Mr. Rajiv Dutta, Senior Advocate, Mr. Jaideep Gupta, Senior Advocate, Mr. Raju Ramachandran, Vice President, Bar Association of India Mr. Rupinder Singh Suri, Senior Advocate, Ms. Meenakshi Arora, Senior Advocate, Mr. G.S. Massar, President, Shillong High Court Bar Association, Mr. Koka Raghava Rao, Senior Advocate, Ms. Rachana Srivastava, Hony. General Secretary, BAI, Mr. Apurba Kumar Sharma, President, Gauhati High Court Bar Association, Mr. M.N. Krishnamani, Senior Advocate, Mr. B.V. Acharya, Former Advocate General, Karnataka, . Mr. Gopinath M. Amin, Chairman, Bar Council of Gujarat, Mr. Sibashis Chakraborty, Senior Advocate, Mr. T.T. Diengdoh, Senior Advocate, Meghalaya, Mr. V.K. Jindal, Senior Advocate, Meghalaya, Mr. H.S. Thangkhiew, Senior Advocate, Meghalaya, Mr. Krishnan Nand Kumar, Advocate, Kerala Mr. Mohan Katarki. Advocate, Mr. Uday Prakash Warunjikar,Joint General Secretary, Bar Association of India, Ms. Triveni S. Poteker, Joint General Secretary, BAI, & Mr. Syed Rehan, Joint Treasurer, BAI.

Dr. B.P. Todi, Advocate General, Meghalaya & Executive Committee Member, BAI was the convenor of the Seminar.

20th – 23rd July, 2016

27th POLA Summit, Ulaanbaatar, Mongolia

The 27th Summit of the Presidents of Law Associations (POLA Summit) was hosted by the Mongolian Bar Association at Ulaanbaatar, Mongolia on 20th – 23rd July, 2016. Mr. Prashant Kumar, Executive Vice President, BAI participated as President Lawasia and co-chaired the Summit, Ms. Pinky Anand, AdditionalSolicitor General of India

and Vice President, BAI and Ms. Rachana Srivastava, Hony. General Secretary represented the Bar Association of India.

12th August, 2016

Shyam Divan Re-elected Ex-Co member of LAWASIA

Mr. Shyam Divan, Executive Committee Member of The Bar Association of India was re-elected Ex-Co member of LAWASIA 2016-2017 on 12th August, 2016 at Colombo, Sri Lanka.

12th – 15th August, 2016

LAWASIA Golden Jubilee Conference, Colombo, Sri Lanka

Golden Jubilee year of Lawasia was celebrated at the 29th annual conference under the Presidency of Mr. Prashant Kumar, from 12th – 15th August, 2016 in Colombo, Sri Lanka. The conference was inaugurated by his Excellency The President of Sri Lanka in the presence of the Prime Minister, Law Minister, Hon. the Chief Justice, Attorney General amongst many other high dignitaries. The past Presidents of Lawasia including Mr. Anil Divan, Past President, BAI who was President LAWASIA (1991-1993) were felicitated.

Hon'ble Mr. Justice Madan Lokur, Judge, Supreme Court of India also attended the conference.

GL Sanghi Memorial Lecture was delivered by Mr Gordon Hughes, Past President of LAWASIA. Justice Vipin Sanghi, Hon'ble Judge, Delhi High Court was also present.

A Plenary session was chaired by Mr Joao Ribeiro, Head of UNCITRAL Regional Centre for Asia and the Pacific on the topic "Role of UNCITRAL in trade and economic".

Over 30 delegates from India attended the conference. Mr. R.K.P. Shankardass, President, BAI, Mr. Shyam Divan, Ms. Pinky Anand, Mr. V. Shekhar, Mr. Yakesh Anand, Dr. B.P. Todi, Mr Uday P Warunjikar, Dr. Jai Prakash Gupta, Ms. Rachana Srivastava amongst many others were notable attendees.

20th August, 2016

Felicitation Dinner was hosted in the honor Mr. John Clifford Wallace, Chief Judge of the United States Court of Appeals for the Ninth Circuit

A felicitation dinner was hosted on 20th August, 2016 by Mr. A.S. Chandhiok, Vice President, BAI in the honor Mr. John Clifford Wallace, Chief Judge of the United States Court of Appeals for the Ninth Circuit, who was on a visit to India to offer assistance and share experience on establishment of Commercial Courts in India. Mr. John Clifford Wallace enthralled the audience with his eloquent speech. Mr. R.K.P. Shankardass, President, BAI, Mr. Prashant Kumar, President, LAWASIA also addressed on this occasion.

10th – 12th September, 2016

Third BRICS Legal Forum, New Delhi, India

Third BRICS Legal Forum was organised by The Bar Association of India and duly supported by SILF from 10th to 12th Sept., 2016 at New Delhi. It was a grand success. This happened due to tireless work and efforts of Mr. Prashant Kumar and members of the organizing Committee headed by Co-chairs Mr. K.K. Venugopal, and Mr. Mukul Rohatgi under the Presidency of Mr. R.K.P. Shankardass. The back up and financial support of Mr. K.K. Venugopal, Mr. Mukul Rohtagi, Mr. R.K.P. Shankardass, Mr. Gopal Subramanium, Mr. S.S. Naganand, Ms. Pinky Anand, Mr. Shyam Divan and Ms. Rachana Srivastava in the Forum was immensely appreciated. Various topics for discussion included:

Plenary Session:

Key note Speeches by Delegation heads/nominees :-

Luiz Tarcisio Teixeira Ferreira, BRA, *(President of Coordination "BRICS"),* ***Alexey A. Klishin, RUS***

(Chairman of Legal Commission of Modern Integration Processes of the Association of Lawyers of Russia), ***K.K. Venugopal, IND,*** *(Co-Chair, BRICS India and Member, Board of Advisors, BAI),* ***Chen Jiping, CHN,***

*(Executive Vice-President of China Law Society),**Mvuso Notyes, RSA,** (Co-Chairperson of the Law Society of South Africa).,*

Introduction & Orientation of the participants of"*The Indian Program for Legal Talents in BRICS Countries"*

Session I:

Financial and Legal Cooperation in BRICS, Key Issues and thrust areas: Part I

(***Christian Fernandes Gomes Da Ros, BRAZIL,*** Partner at Teixeira Ferreira E Serrano Advogados)

Topic: "Financial & Legal Cooperation in BRICS"

A.I. Savitskiy, RUS, (PhD. Researcher at the BRICS Law institute)

Topic: "Artificial Transfer of Tax Residence: CFC Implications for BRICS"

Amarjit Singh Chandhiok, IND, (Senior Advocate, Vice President, BAI)

Topic:On "Insolvency Laws"

Zaho Hngruio, CHN, (Dean of law School of Harbin Institute of Technology, Professor, Doctoral Supervisor)

Topic:"Fiscal and Monetary Overview for Sovereign Risk Control"

Wang Xinxin, CHN, (Professor oflaw School, Renmin University of China)

Topic: "Bankruptcy Law"

Session II:

Financial and Legal Cooperation in BRICS, Key Issues and thrust areas: Part II

Dr. D.V. Vinnitskiy, RUS, (Prof. Director of the BRICS Law Institute)

Topic: "BRICS and Double Tax Treaties: Prospects for the Elaboration of a Multilateral Instrument"

Du Tao, CHN, (Prof. Executive Director of the Institute of BRICS Legal studies of the East China University of Political Science and law)

Topic: "Interconnection of Securities Markets among the BRICS and the Cooperation for a Harmonized Supervision Regime"

K.N. Bhat: IND, (Senior Advocate, Associate President, BAI)

Topic: New Development Bank

Special Talk by:

LI Zhigang, CHN, (Vice Chairman of Shanghai Council for the Promotion of International Trade)

Topic:"BRICS Arbitration and Shanghai Centre for BRICS Dispute Resolution"

Departure in Coaches for International Delegates

Cocktail Dinner hosted by Mr.Mukul Rohtagi, the Attorney General for India at "The Living Rooms" at Hotel Hyatt Regency.

Session III:

Financial and Legal Cooperation in BRICS, Key Issues and thrust areas: Part III

Li Decheng, CHN, (Senior partner and lawyer of Beijing Jin Cheng Tong Da & Neal Law Firm, Deputy Director of the Intellectual Property Committee of All China Lawyers Association).

Topic: Current Status and Problems of the Judicial Protection on Technical Secret in PRC

Craig Campbell, RSA, (Africa Growth Director & Group Legal Counsel at Melbro Corporate Services)

Topic: "Lawyer - leader - lion: Emergence of the BRICS Legal Professional".

Pinky Anand, IND, (Additional Solicitor General of India, Vice President of the Bar Association of India).

Topic: Balancing IPR and Right to Life, Indian Jurisprudence Policy.

Liu Zejun, CHN, (Professor of North China University of Technology),

Topic: "Legal Construction of Local Government in China"

Shyam Divan, IND, (Senior Advocate,Vice President BAI)

Topic: "Judicial Activism and FDI in India"

Session IV:

Emerging Frameworks in International Commercial and Civil Law: Need for a Cohesive BRICS strategy and cooperation Mechanism.

Mr. James Leach, RSA, (Dept. of Commercial Law Faculty of Law, University of Cape Town South Africa)

Topic: "creation of a common corporate governance system at BRICS level"

Jia Yu, CHN, (President of Northwest University of Political Science and Law)

Topic: "The BRICS should strengthen criminal Judicial Assistance"

Lin Yanping, CHN (Vice-President of East China University of Political Science and Law)

Topic: "Ascertainment and Proof of Foreign Law: Developing a Harmonized"

Prashant Kumar, IND, (President Lawasia, Executive Vice President BAI)

Topic: "International Legal Frameworks–Coordination Mechanism for BRICS"

Fu Yulin, CHN, (Professor of Law School, Peking University)

Topic: "The Development and Theories of Environmental Public-Interest Lawsuits in China"

Session V:

International Arbitration and Dispute Resolution: Making BRICS Institutions Forum of Choice for BRICS and Emerging World.

Patrick Lane, RSA, (Advocate)

Topic: "International Arbitration and Dispute Resolution"

Leonardo Ziesemer Schmitz, BRA, (Assistant professor in graduate courses at the Autonomous Law School of São Paulo)

Topic: "International Arbitration and Dispute Resolution"

Lalit Bhasin, IND, (President Society of Indian Law Firms)

Topic: Arbitration

Closing ceremony & Signing of the New Delhi Declaration

Closing Ceremony Presided by	- ***K.K. Venugopal,*** *(Co-Chair, BRICS India and Member, Board of Advisors, BAI)*
Welcome Address	- ***Pinky Anand,*** *(Additional Solicitor General of India, Vice President of the Bar Association of India).*
Speech on Way Forward for BRICS Legal Forum	- ***Mr. Mukul Rohtagi****, Attorney General for India, Co-Chair, Third BRICS Legal Forum.*
Special Address	- ***P.P. Choudhary,*** *(Minister of State of Law & Justice Ministry, Electronics & Information Technology)*
Valedictory Address	- ***Hon'ble Mr. Justice T.S. Thakur,*** *Chief Justice of India*
Salient features of BRICS New Delhi Declaration	- ***Prashant Kumar*** *(President Lawasia, Executive Vice President BAI)*

Signing of BRICS New Delhi Declaration

Speech and Welcome by next host:	- ***Alexey A. Klishin, RUS,*** *(Chairman of Legal Commission of Modern Integration Processes of the Association of Lawyers of Russia)*

11th September, 2016

19th Governing Council Meeting

The Governing Council Meeting of the Asscition was held at New Delhi, Election of the office bearers and members of the Executive

Committee was held. Dr. Lalit Bhasin was elected as the President of the Association. Mr. Prashant Kumar was elected as the President-Elect. Mr. Yakesh Anand was elected as the Honorary General Secretary and Ms. Triveni Poteker was elected as the Treasurer.

List of office bearers and the members of the executive committee elected for the term of 2016-2018 is published on the back of the front cover of this issue.

29th September, 2016

Meeting with Law Secretary, Ministry Law & Justice, Department of Legal Affairs to discuss the draft Bar Council of India Rules for registration and regulation of foreign lawyers and law firms in India.

Dr. Lalit Bhasin, President BAI & SILF, Mr. A.S. Chandhiok, Mr. Shyam Divan, Mr. Prashant Kumar and Mr. Yakesh Anand, Honorary Secretary attended the meeting on 29.09.2016 called by the Law Secretary, Ministry Law & Justice, Department of Legal Affairs to discuss the draft Bar Council of India Rules for registration and regulation of foreign lawyers and law firms in India. A letter was written to the Law Secretary putting the views and comments on BAI against the draft Bar Council of India Rules.

30th September, 2016

SIAC Roadshow

A Roadshow was Organised by Singapore International Arbitration Centre in Association with Bar Association of India on Friday 30th September, 2016 at Mumbai & 1st October, 2016 at New Delhi. New SIAC Rules 2016 came into effect on 1st August, 2016. Many members of the BAI attended the same.

8th October, 2016

MCIA Launch Event & Conference

A launch event and conference was organised by Mumbai Centre for International Arbitration at Mumbai. The event was supported

by The Bar Association of India. Dr. Lalit Bhasin was invited for the inauguration & for the conference.

14th October 2016

Seminar on National Company Law Tribunal

A Seminar on National Company Law Tribunal – Challenges & The Way Forward was organised by PHD Chamber of Commerce and Industry in association with The Bar Association of India. Dr. Lalit Bhasin and some members of the BAI attended the said seminar.

3rd December, 2016

"The Lawyers of India Day"

The Bar Association of India celebrated "Lawyers of India Day" and Felicitatedthe following legal stalwarts who are members of Board of Advisors of Bar Association of India, on Saturday 3rd December, 2016 at New Delhi.

1. **Mr. F.S. Nariman**, President Emeritus, BAI.
2. **Mr. K. Parasaran**, Past President, BAI (Former Attorney General for India)
3. **Mr. Anil B. Divan**, Past President, BAI
4. **Mr. R.K.P. Shankardass**, Immediate Past President, BAI
5. **Mr. Soli J. Sorabjee**, Former Attorney General for India
6. **Mr. Ashok Desai**, Former Attorney General for India
7. **Mr. K.K. Venugopal**, Former Addl. Solicitor General of India
8. **Mr. Dipankar Gupta**, Former Solicitor General of India
9. **Mr. Harish N. Salve**, Former Solicitor General of India

3rd December happens to be the birthday of Dr. Rajendra Prasad, the first President of the Republic of India and Chairperson of the Constituent Assembly which formulated and adopted the Constitution of India. Dr Rajendra Prasad, himself a lawyer of eminence, who quit is thriving practice to provide exemplary national leadership for freedom movement, had inaugurated the Association on April 2, 1960 and had set out the tasks for the Association in his inaugural speech, which continues to inspire the Association.

The event was the great success. The Bar Association of India has decided to institutionalise 'Lawyers of India Day' on 3rd December every year.

16th December, 2016

2nd CHINA – SOUTH ASEAN LEGAL FORUM

Mr. Prashant Kumar, President Elect BAI, Ms. Pinky Anand, Vice President BAI, Mr. Yakesh Anand, Dr. Jai Prakash Gupta and Mr. Tapeshwar Mishra had attended the 2nd China-South Asia Legal Forum, hosted by China Law Society, from December, 14th-16th 2016 in Kunming, Yunnan Province, China. The conference dealt with creating a legal framework for investments infrastructure in the region and best practices for economic growth of the region. The conference was well attended by the delegates from various countries in South East Asia. Mr. Prashant Kumar was also invited to deliver a key note address for China-ASEAN Legal Forum on Digital Economy which took place shortly after the South Asia Legal Forum.

16th December, 2016

Interactive Session on GST Laws and their Implications

Indo American Chamber of Commerce had organized a Interactive Session on GST Laws and their Implicationson Friday, 16th December, 2016 – PHD House, New Delhi. The event was supported by The Bar Association of India. Dr. Lalit Bhasin, President, BAI and Executive Vice President, IACC gave a special address at the Inaugural Session. Mr. Aseem Chawla, Member Executive Committee, BAI and Executive Vice President, IACC gave welcome address. GST is a single tax on the supply of goods and services right from the manufacturer and/or service provider to the consumer.

The conference dealt with the new Goods and Service Tax Laws, with a view to provide an insight into the GST framework as currently envisaged and the manner in which businesses need to prepare themselves for a smooth transition to GST.

Statement about ownership and other particulars about newspaper (THE INDIAN ADVOCATE) to be published in the first issue every year

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(See Rule 8)

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6.	Name & address of individuals who own the newspaper and partners or shareholders holding more than capital	The Bar Association of India a registered society, 93, Lawyer's Chambers, Supreme Court of India, New Delhi - 110001 (Tel: 23385902)

I, SD Sharma, Office Manager, The Bar Association of India, New Delhi, hereby declare that the particulars given above are true to the best of my knowledge and belief.

Sd/- SD Sharma
Publisher

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