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CONTENTS

EDITORS' NOTE

It brings us immense pleasure to confirm that the successful completion of our pioneer issue of CALQ has earned us an overwhelming response from the students, academicians and the legal fraternity as a whole. We are grateful to our readers for this encouragement and it is with an assured confidence and a new vigour that we bring to you, our latest second issue of CALQ.

The present issue attempts to take a bold step forward from its predecessor, as it encompasses a series of diverse subjects raised by the contributors in the field of constitutional law and administrative law. Our attempt to instigate a spirit of enquiry about several constitutional issues with a comparative perspective and administrative law has been duly supported by researchers from all over the country with inputs ranging from students to academicians and even practicing lawyers in this issue. These wide varieties of contributions have indeed motivated us to work hard towards excellence and have also expanded our knowledge base for a better understanding of the nuances of public law.

The comparative approach undertaken by most of the contributors will sway your attention towards the legal regime of other countries and the legal issues faced by them. The contributors have made a commendable effort to analyse the legal provisions at the international level and apply the relevant aspects to the Indian circumstances, which has in turn enriched the understanding of our own legal system for us.

In the present times with the civil society attempting to strive for a transparent and accountable government, the legal fraternity must act as an agent to facilitate the understanding of administrative law for the public at large. The legal fraternity is the link between the masses and the administrative regime, questioning the action of the government without over-stepping the values enshrined in the Constitution. This delicate onus prescribes

that administrative law must form an important part of our legal knowledge. Some of the submissions in this issue have raised pertinent questions in this field, drawing our attention to the much-needed understanding of certain fundamental principles on administrative law in a different perspective.

It is with a heavy heart that we need to bid adieu to the journal as its editors-in-chief, since our journey is now at its end as we graduate from NLU-Jodhpur. We have had the privilege to work with a really motivated and efficient set of editors and have had the full support and encouragement of our faculty who were associated with CALQ.

With a new change in the administrative set-up of the University, we are proud to announce Ms.PoonamSaxena as our new Chief Patron of the journal. Under her support and guidance, we hope that CALQ will achieve great success.

Personally, we have had a fantastic time working on the journal and have learnt a lot from our team, teachers and the views of our readers. We hope that the next issue with some new blood will herald a new spirit in the Journal and take it to new heights in the issues to come.

Sakshi Srivastava

Saumya Kumar

Editors-in- Chief

CALQ

AGREE TO DISAGREE – THE PRACTICE OF JUDICIAL DISSENTS

Krithika Ashok

Sannoy Das*

A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed – Justice Charles Evans Hughes

1. INTRODUCTION

The worth of a dissenting opinion, the practice of delivering a dissent and the justification for such liberty have been subject to considerable critical review across jurisdictions; most often, such review having been made by judges, and often enough, by judges who have delivered such opinions. Some classic dissents have paved the way for, what may be conservatively called, better days. The dissenting opinion of a judge in a court of law bears potential of fierce revolt; one which at its crest, can shoulder the hope of many who may have been undone by the unfortunate wit of a few. And yet, caution remains the word for exercising the liberty – a note sounded by almost any scholar or judge who has reviewed this practice. Justice Louis Dembitz Brandeis of the United States Supreme Court is often described as exemplary for the exercise of caution – an entire volume has been devoted to his unpublished opinions;[1] one who often suppressed his dissent if the majority would make small concessions to his opinion. At different places in this article, the authors propose to review the worth of dissenting opinions in their full splendour and simultaneously, the worth of

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[1]A.M. Bickel, *The Unpublished Opinions of Mr. Justice Brandeis: The Supreme Court at Work*, University of Chicago Press, 1967.

discretion in choosing to deliver one. The jurisdictional focus is India, but liberal assistance has been drawn from the practice elsewhere.

2. DISSENTS ACROSS JURISDICTIONS

As in India, judicial dissents are a regular feature in nations that follow the common law tradition. However, in most civil law countries, such as France, Belgium, the Netherlands and Italy, dissents are prohibited. The highest constitutional courts of Germany and Japan, however, have departed from this practice, perhaps as a result of the influence of the post-War Allied occupation.[2] In the civil law tradition, as is followed in France, typically a unanimous judgment is issued, which does not identify the author and is drafted in concise and impersonal words.[3]

In this section of the article, the authors have examined the practice of dissent in a few common law nations outside India.

2.1. United Kingdom

In English tradition, which was poles apart from the civil law tradition, there was never a unified 'opinion of the court' and each judge delivered his decision individually one after another (known as *seriatim*) along with the grounds for the decision. This approach came under fire because often each judge presented different and possibly, irreconcilable reasons for his decision, resulting in ambiguity with respect to the position of law that flowed from a case. The practice of issuing *seriatim* opinions is seen to be waning in recent times as separate opinions are not routinely delivered (or a cursory *seriatim* opinion stating 'I concur'

[2]M. Kirby, 'Judicial Dissent - Common Law and Civil Law Traditions', *L.Q.R.*, vol. 123, July 2007, pp. 379-400.

[3]R.B. Ginsburg,'Remarks on Writing Separately', *Wash. L. Rev.*, vol. 65, 1990, p. 134.

with little or nothing more, is delivered).[4] While the Supreme Court of the United Kingdom (like its predecessor, the House of Lords) may not yet have abandoned the practice,[5] the trend is seen to be shifting towards one judge delivering the opinion with the agreement of the rest (or at least some) of the judges. The Supreme Court has in particular cases also labeled such an opinion as 'the judgment of the court'.[6]

Through the years, there have, however, been two clear exceptions to the English tradition of issuing *seriatim* opinions, one of which is the Privy Council. The Privy Council, which for centuries has heard appeals from the highest courts of the colonies and dominions of the Empire, published only unanimous, anonymous decisions till 1966. The second known exception relates to criminal cases; separate opinions may be presented in criminal appeals only when the presiding judge so authorizes.[7]

Therefore, founded in the tradition of *seriatim* opinions, dissenting voices mostly had an outlet in the courts in England. However, dissents were discouraged for weakening another antecedent of the common law heritage - the doctrine of *stare decisis.* Severely restricted by the doctrine of *stare decisis* which was strictly followed in England, the House of Lords eventually issued a practice statement on July 26, 1966[8], which stated that the House of Lords would treat former decisions of the House as normally binding but that it would depart from a

[4]W.D. Popkin, *Evolution of the Judicial Opinion: Institutional and Individual Styles*, NYU Press, 2007, p. 33 viewed on June 30, 2013, <books.google.co.in/books?isbn=0814767494>; M.T. Henderson, 'From Seriatim to Consensus and Back Again: A Theory Of Dissent', The University of Chicago: The Law School, viewed on June 25, 2013, <http://www.law.uchicago.edu/files/files/363.pdf>.

[5]In the matter of B (a Child) (FC), [2013] UKSC 33. This recent case saw each of the five members - Lord Neuberger, Lady Hale, Lord Kerr, Lord Clarke and Lord Wilson, deliver a separate opinion (including a dissent by Lady Hale).

[6]See, for example, In re B (A Child) (2009) (FC), [2009] UKSC 5; R v. Forsyth, [2011] UKSC 9 and the more recent, R (on the application of ClientEarth) v.The Secretary of State for the Environment, Food and Rural Affairs, [2013] UKSC 25.

[7]Ginsberg, supra note 3.

[8]Practice Statement (Judicial Precedent), [1996] 1 WLR 1234.

previous decision when it appeared right to do so. While the Supreme Court of the United Kingdom has not re-issued this practice statement, it has opined that it is a "*part of the established jurisprudence relating to the conduct of appeals*" and "*has as much effect in [the Supreme] Court as it did before the Appellate Committee in the House of Lords*".[9]

Thus, with the dilution of the principle of *stare decisis*, dissents in England have grown in relevance over the last five decades. However, for the purposes of this study, the authors have chosen to examine a fearless dissent from the previous era, which nevertheless found relevance across the world – the dissent of Lord Atkin in *Liversidge v Anderson.*[10] The question before the House of Lords was regarding the construction of the words 'reasonable cause to believe' under a regulation that empowered the Secretary of State to detain a person who he had reasonable cause to believe to be of hostile associations. With the Second World War raging in the backdrop and London being bombarded night after night by Germany, it did not come as a surprise when the House of Lords ruled in favour of the executive.

Lord Atkins however, dissented and said powerful and oft-quoted words thatstill find resonance across the world, "*Amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace."* He argued fervently that 'reasonable cause to believe' cannot be equated with 'thinks that he has reasonable cause to believe' and that the former is a positive fact capable of determination and should therefore, be open to judicial review. Coloured with derisive allusions to the character of Humpty Dumpty in Lewis Carroll's *Alice in Wonderland* and passionate words criticizing the judges as being 'more executive minded than the executive', his dissent did not go down well with

[9]Austin (FC) v. Mayor and Burgesses of the London Borough of Southwark [2010] UKSC 28. See also, Practice Direction 3 of the Supreme Court of the United Kingdom: Applications for Permission to Appeal, The Supreme Court of the United Kingdom, viewed on June 25, 2013, <http://www.supremecourt.gov.uk/procedures/practice-direction-03.html>.

[10][1942] A.C. 206.

his fellow law Lords. Perhaps for that very reason, Lord Chancellor Simon had suggested that the unflattering references should be removed from the dissent and by refusing to heed his advice, Atkin invited unremitting abuse and ostracism from his colleagues for the next three years, until his death.[11]

However, gradually, the tide turned in favour of Atkin's opinion and in 1964, in *Ridge v Baldwin*[12], Lord Reid described the majority decision as a 'very peculiar decision'. In 1979, Lord Diplock said, in far more decisive words, "*I think the time has come to acknowledge openly that the majority of this House in Liversidge v Anderson were expediently and, at that time, perhaps, excusably, wrong and the dissenting speech of Lord Atkin was right."*[13]Internationally, while some countries like Singapore and Malaysia have stayed with the majority's view, other commonwealth jurisdictions have generally preferred Atkin's position.[14]

While dissents have become more popular in the United Kingdom since the time of Atkin, the percentage of dissents is still significantly lower than in other jurisdictions, which, among other reasons, is attributed to the discipline of deliberations amongst the judges immediately after the hearing and the oral tradition of delivering opinions.[15]

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[11] Lord Bingham of Cornhill, 'The Case of Liversidge v. Anderson: The Rule of Law Amid the Clash of Arms', *The International Lawyer*, vol. 43, No. 1, Spring 2009, pp. 33-38.

[12][1964] A.C. 40.

[13]Inland Revenue Commissioners and Another v. Rossminster Ltd. and Others, [1980] 2 W.L.R. 1.

[14]A.C. Hutchinson, *Laughingat the Gods: Great Judges and How They Made the Common Law*,Cambridge University Press, 2012, p. 130, viewed on 16 June 2013,<*books.google.co.in/books?isbn=1107017262*>.

[15] Lord Kerr of Tonaghmore, 'Dissenting judgments - self indulgence or self sacrifice?',The Birkenhead Lecture,

October 8, 2012, viewed on 24 June 2013, <http://www.supremecourt.gov.uk/docs/speech-121008.pdf>.

2.2. United States of America

The custom of the British courts to issue *seriatim* opinions was followed by the U.S. Supreme Court during its earliest years till Chief Justice John Marshall decided to depart from this practice. He established the system of issuing a single opinion for the Court, while each member of the Court retained the prerogative to write separately.[16] Although the system drew the ire of Thomas Jefferson, who was opposed to opinions "*huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his mind, by the turn of his own reasoning*", the practice continued unabated. And, owing perhaps to his forceful personality, the tenure of Marshall witnessed few dissents from the opinion of the Court.[17]

Since then, however, the practice of issuing dissenting opinions became steadily more frequent and with the numerous gems that speck the long history of the Supreme Court,[18] the authors were faced with the dilemma of selecting but a few for the purpose of this analysis. While Justice Holmes was decidedly crowned the 'Greatest Dissenter', the authors have chosen to examine the dissents of the earliest contender for the title – Justice Harlan.

Justice John Marshall Harlan, who had nearly 316 dissenting opinions to his credit,[19] was ironically named after Chief Justice John Marshall.[20] His most famous amongst these is

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[16] R.B. Ginsburg, 'The Role of Dissenting Opinions', *Minn. L. Rev*., vol. 95, 2010-2011, p. 1.

[17] Scalia, 'The Dissenting Opinion',*J. Sup. Ct. Hist*.,vol. 33, 1994.

[18]Ginsberg, supra note 3, at p.144 - "*Classic examples include Justice Curtis' dissent in Dred Scott v. Sandford [60 U.S. (19 How.) 393 (1857)], the first Justice Harlan's dissent in Plessy v. Ferguson [163 U.S. 537, 552 (1896)], Justice Holmes' dissent in Lochner v.New York [198 U.S. 45, 74 (1905)], the Holmes dissent in Abrams v. United States [250 U.S. 616, 624 (1919)], and the Brandeis concurrence in the result in Whitney v. California [274 U.S. 357, 372 (1927)]".*

[19]ZoBell, 'Division of Opinion in the SupremeCourt: A History of Judicial Disintegration', *Cornell L.Q*., vol. 44, 1959, p.192 c.f. L.K. Ray, 'Justice Brennan and the Jurisprudence Of Dissent', *Temp. L. Rev*., vol. 61, 1988, p.307.

arguably his dissent in *Plessy v. Ferguson*[21] which held that the 'separate but equal' accommodation for white and 'coloured' persons in railway coaches was constitutional. It was irrefutable that such laws were conceived in hostility to and for humiliating, a particular race;[22] however, Harlan stood alone in his rejection of a judgment that would only serve as an added impetus for similar racial segregation laws to be passed across the nation.

In his candid and emphatic dissent, he famously said that the "*constitution is colour-blind*" and declared that "*the judgment…will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case*[23]". In his dissent, he foretold that the decision would *"stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens*" and would *"create and perpetuate a feeling of distrust between these races"*. He was also not unaware that laws of a like character may be enacted in several states; the effect of which would be in the highest degree, mischievous. But only a generation after his death, would Harlan finally be vindicated when the Supreme Court would in *Brown v. Board of Education,*[24]reject the 'separate but equal' doctrine in public education as unconstitutional.

Today, Harlan's dissent in *Plessy v. Ferguson* is remembered as one of the most remarkable in the history of the U.S. Courts, and finds place in any analysis on the importance of dissent. When Justice Scalia said "*when history demonstrates that one of the Court's decisions has*

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[20] L. Paddock, 'Harlan, John Marshall*',* American National Biography Online, February 2000, viewed on 16 June 2013, <www.anb.org/articles/11/11-00385.html>.

[21]163 U.S. 537 (1896), p.552.

[22]Plessy v. Ferguson, 163 U.S. 537 (1896), p.552 (Harlan, J., dissenting).

[23]Dred Scott v. Sandford, 60 U.S. 393 (1857). In this case, it was adjudged that the descendants of Africans who were imported into this country, and sold as slaves, were not included nor intended to be included under the word 'citizens' in the Constitution, and being the 'subordinate and inferior class of beings', they had no rights or privileges but such as those who held the power and the government might choose to grant them.

[24]347 U.S. 483 (1954).

been a truly horrendous mistake, it is comforting—and conducive of respect for the Court—to look back and realize that at least some of the Justices saw the danger clearly, and gave voice, often eloquent voice, to their concern",[25] he cited Harlan's dissent to illustrate his point. However, his earlier dissent in the *Civil Rights Cases*[26] is equally worthy of high praise.

In the *Civil Rights Cases*, while the majority held that the post-Civil War amendments did not give Congress the power to enact laws to regulate racial discrimination by private actors, Harlan was, as in *Plessy v. Ferguson*, the lone dissenter. He vehemently argued that discrimination against the African-American population in access to inns, public conveyances, and places of public amusement were 'badges of slavery and servitude', the imposition of which the Congress was empowered to prevent through appropriate legislation, under the thirteenth and the fourteenth amendments. A former slaveholder, who had originally opposed the adoption of the very same amendments, Harlan was now, in the *Civil Rights Cases*, championing the rights of the African-American population with a liberal and progressive interpretation of the Constitution. He recognized that the greater danger to their equal enjoyment of rights was to be apprehended from hostile actions of corporations and individuals and for that reason, dissented.

While the Civil Rights Act of 1964 that was introduced eight decades later to reign in the same mischief, was promptly upheld by the Supreme Court,[27] it was nothing more than a moral victory for Harlan's dissent because the Congress made the safer choice of basing the

[25]Scalia, supra note 17.

[26]109 U.S. 3 (1883).

[27]Heart of Atlanta Motel, Inc. v. United States,379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

new civil rights law on the commerce clause over the fourteenth amendment.[28] Having said that, Harlan's dissent may continue to hold relevance because there are many who believe that the commerce clause can go only so far in preventing racial discrimination.[29]

2.3. Pakistan

Closer home, when the Federal Court (the predecessor of the Supreme Court of Pakistan) firstupheld the dissolution of the Constituent Assembly by the Governor-General in 1954[30] and thereafter, invoked the 'doctrine of necessity' to resolve the constitutional crisis that consequently followed,[31] Justice A.R. Cornelius (as he was then) was the lone voice of dissent (and one would daresay, reason). These judgments had profound effect on the constitutional developments in Pakistan and went on to set the stage for the *coups d'état* that would inflict the nation in the years to come.

Cornelius' dissent in *Federation of Pakistan v. MaulviTamizuddin Khan*[32]opens with an acknowledgement of his regret on being unable to agree with the majority view on an issue of such grave importance, which serves as guidance on the degree of responsibility that accompanies dissent. Disappointing Chief Justice Munir who was hoping for a unanimous

[28]G. Silverstein, *Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics*, Cambridge University Press, New York, 2009, p. 77,viewed on 16 June 2013, <books.google.co.in/books?isbn=0521896479>.

[29]Daniel v. Paul, 395 U.S. 298 (1969) (Black, J., dissenting). Black concluded that nothing justified a holding that the operation of the club in question affected "interstate commerce" within the meaning of the Civil Rights Act, 1964 and that to apply the Act to a little 'sleepy hollow' between Arkansas hills miles away from any interstate highway would be stretching the commerce clause too far. He said "*I could and would agree with the Court's holding in this case had Congress, in the 1964 Civil Rights Act, based its power to bar racial discrimination at places of public accommodations upon § 5 of the Fourteenth Amendment. But Congress, in enacting this legislation, did not choose to invoke this broad Fourteenth Amendment power to protect against racial discrimination; instead, it tied the Act, and limited its protection, to congressional power to regulate commerce among the States.*"

[30]Federation of Pakistan v. MaulviTamizuddin Khan, PLD 1955 Federal Court 240.

[31]Reference by His Excellency the Governor General, PLD 1955 Federal Court 435.

[32] Supra note 30.

verdict[33], he reiterated the responsibility of a judge to bear true faith and allegiance to the Constitution of Pakistan before proceeding to his fearless and conscientious dissent. His opinions bear evidence of his foresight and are thus, outstanding illustrations of the importance of dissents. He was acutely aware of the disastrous consequences of the majority judgments and in *Reference by His Excellency the Governor General,*[34] he ominously said that "*...Judges who delivered the opinion favoring absolute power in the King stand for all time as a warning against absolutism…*"

His dissent finally found favour when the Supreme Court of Pakistan for the first time, in *AsmaJillani v. Government of Punjab*[35] refused to validate a *coup d'état*, deciding that Yahya Khan's regime had been unconstitutional. Justice Yaqub Khan remarked that as a result of the judgments in the aforementioned cases and the equally infamous *State* v. *Dosso,*[36] "*a perfectly good country was made into a laughing stock*" and Pakistan had degenerated into an autocracy and eventually, a military dictatorship.[37] It is therefore, not without reason that Cornelius is today, remembered as one of the greatest judges of Pakistan.

2.4. International Courts

Most international courts are not unaccustomed to the practice of issuing dissents either, because the role of dissents in the development of international law is generally recognized across the world. For instance, the judges of the International Court of Justice are entitled to

[33]Gupta, A., "Pak's new democratic heroes", The Tribune, January 31, 2000, viewed on 10 June 2013, <http://www.tribuneindia.com/2000/20000131/edit.htm>.

[34] Supra note 31.

[35]PLD 1972 SC 137.

[36]PLD 1958 SC 533; The Court validated General Ayub Khan's coup in this case.

[37]AsmaJillani v. Government of Punjab,PLD 1972 SC 139.

deliver a separate opinion, whether dissenting from the majority or not,[38] and have frequently chosen to exercise such right. A notable exception however, is the European Court of Justice, which gives primacy to the secrecy of the deliberations of the court[39] and bears allegiance to the civil law tradition followed by its founding fathers.

A controversial dissent at an international forum, which is to this date often drawn upon as an example of the longstanding friendship between India and Japan, is Justice Radhabinod Pal's opinion as a judge of the International Military Tribunal of the Far East - established to try and punish the major war criminals in Japan at the end of the Second World War - that each of the indicted Japanese leaders were 'not guilty' of war crimes and crimes against peace and humanity. A hero in Japan and in contrast, remembered by few in India, Justice Pal was deeply critical of the 'victor's justice' meted out by the Tribunal, which he described as a "*mere tool for the manifestation of power*".[40] However, while by some he was hailed as an 'authentic, independent Asian justice',[41] the possible influence of his Asian, or rather Indian and more specifically Bengali, origin did not escape comment.[42] Strongly critical of western colonialism, he was known to be a supporter of Subhash Chandra Bose and his Indian National Army, and is believed to have arrived in Tokyo with the conviction that Japan had

[38]Article 57 of the Statute of the International Court of Justice and Article 95(2) of the Rules of Court (1978).

[39]Article 2, Statute of the Court of Justice of the European Union.

[40]A. Nakamura (Ed.), 'Dissentient Judgment of Justice Pal', Kokusho-Kankokai Inc., Tokyo, 1999, viewed on 9 June 2013, <http://www.sdh-fact.com/CL02_1/65_S4.pdf>.

[41]N. Chomsky, 'If the Nuremberg laws were applied...', viewed on 9 June 2013, <http://www.chomsky.info/talks/1990----.htm>.

[42]Onishi, N.,"Decades After War Trials, Japan Still Honors a Dissenting Judge", New York Times, 31 August 2007, viewed on 9 June 2013, <http://www.nytimes.com/2007/08/31/world/asia/31memo.html?_r=0>.

waged the war to liberate Asia for Asians.[43] Subsequently, he was also criticized for accepting accolades from Japanese post-war politicians.[44]

While his judgment makes for an interesting read and the Japanese are certainly grateful for his 'sympathetic' judgment, one wonders at Justice Pal's motivation behind writing the mammoth 1,200-page dissent that was destined to be unheard - banned as it was from publication for years together, and that even today, remains virtually unknown in the western world.

This brings us to the fundamental question that is raised in the context of dissents - what does a judge hope to accomplish by dissenting. Even Justice Holmes, the 'Great Dissenter' himself, remarked that dissents are generally 'useless'[45] and that may seem all the more true for Pal's dissent. However, Justice Brennan said, in defense of dissents, that *"[w]riting [dissents], then, is not an egoistic act - it is duty"* because it adds to the integrity of the judicial decision-making process by keeping the majority accountable for the rationale and consequences of its decision.[46] And for that reason, if no other, one may laud Pal's dissent. On his dissent, he is believed to have said, "*I did not write it out of sympathy for Japan nor out of hatred for the West. I just wrote what I believed to be right and just, neither more nor less."*[47]

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[43] T. Brook (Ed.), *Documents on the Rape of Nanking*, The University of Michigan Press, 2003, p. 21, viewed on 9 June 2013, <books.google.co.in/books?isbn=0472086626>.

[44]A.G. Noorani, "The Yasukuni 'hero", Frontline, vol. 24, issue 21, Oct. 20-Nov. 02, 2007, viewed on 9 June 2013, <http://www.frontline.in/navigation/?type=static&page=flonnet&rdurl=fl2421/stories/20071102503906000.htm /> .

[45] Northern Sec. Co. v. United States, 193 U.S. 197, 400 (1904) c.f. W.J. Brennan, Jr., 'In Defense of Dissents', *Hastings L.J.*, vol. 37,1986, p. 427.

[46]W.J. Brennan, Jr., 'In Defense of Dissents', *Hastings L.J.*, vol. 37,1986, p. 427.

[47]Nakamura, supra note 40.

3. INDIA REVIEW

3.1. The High Courts:

In order to ascertain a possible pattern for judicial dissent in India, it is imperative that a brief review of the system of judging in the higher judiciary be undertaken. High Courts, some of which are continued from the pre-Independence era, derive their present authority from Chapter V of the Constitution. Such High Courts, which have been continued as "existing High Courts" under the Constitution, exercise powers as they did prior to the adoption of the Constitution. Such powers include the power to regulate procedure and the manner of sitting of judges.[48] The other High Courts function in accordance with respective legislations framed for each such court; but, as would be evident from a cursory reading of these laws, the procedures prescribed are largely uniform. Accordingly, all High Courts in India sit through Single Judges and Division Courts. In certain cases, matters are heard by larger benches, often referred to as the Full Bench (but hardly ever in full strength) of the High Court. By practice and by prescription,[49] a decision of a Division Court is binding on the Single Judge and the decision of the Full Bench is a binding precedent for the High Court, till overruled by a subsequent Full Bench. Division Courts, by reason of propriety must consider themselves bound by prior decisions of another Division Bench of the same High Court. Indeed, benches of co-equal strength cannot 'overrule' each other. When there is a disagreement between two benches of co-equal strength, the proper course is to refer to a larger bench.[50]

Dissent does not figure in the scheme of things for most Division Benches, because they usually comprise two judges. In common parlance, the Division Bench is understood to be a

[48] Article 225, Constitution of India.

[49] See AIR 1974 SC 2009; AIR 1960 SC 936; See also for example Chapter XXXIA of the Calcutta High Court (Original Side) Rules.

[50] See AIR 2007 Ker 82.

court of two judges, but *strictosensu*, a Division Court can consist of any number of judges. Whenever the High Court sits through a Bench of more than two judges, the dissenting opinion is a real possibility. Several Full Bench decisions record dissenting opinions. Many of these dissents have carried weight in judging the precedent at a later day. Classic examples are easier to locate in the pre-independence era, when without an easy scope of appeal to the Privy Council, these courts were greatly involved in evolving nuanced propositions of law. For instance, in the large back and forth over the fallouts of a minor's contract, entered into by the minor misrepresenting as a major, Harrison J.'s dissent in *Khan Gul*[51] decided by the Lahore High Court provided good fodder for Sulaiman J. of the Allahabad High Court to reject the precedent in *Ajudhia Prasad*.[52]

3.2. Supreme Court – Dissenting Opinions:

Au contraire the High Courts, the Supreme Court of India is *established* by the Constitution as the highest court of the country, empowered to do, what is gloriously called, 'complete justice'. Article 145 of the Constitution confers on the Supreme Court, the power to frame rules for its procedure, including the manner of exercising power through a Single Judge or Division Courts. The Supreme Court Rules, 1966 indicate that the Supreme Court usually sits through Division Courts of two judges; although often, to rule on conflicting views of such benches, division courts of a larger strength are formed. However, when dealing with substantial questions of law involving interpretation of the Constitution, the Supreme Court must speak through a bench of at least 5 judges, by convention called a Constitution Bench.

Article 145(5) provides that the Supreme Court must speak through a majority of judges and saves the right of a judge to state a dissenting opinion. This provision is crucial. As stated in

[51]Khan Gul v. Lakhan Singh,AIR 1928 Lah 609.

[52]Ajudhia Prasad and Anr.v. ChandanLal, AIR 1937 All 610.

other parts of this article, the process of dissent in the highest court of a country has been the focus of much discussion - whether such dissent chips away at the authority of the highest court? Article 145(5) of our Constitution is an emphatic answer. A constitutionally preserved right to dissent reflects the necessary faith in the responsibility of the judge delivering it, and underscores the philosophy that dissent is *sine qua non* to judicial independence. To this end, our common law heritage and sense of succession to the English judicial system have played a significant part. For example, as a broad general proposition, it may be stated that a dissenting opinion in India is rarely scathing, almost always couched in words like "*respectful disagreement*". As the authors will endeavour to show hereinafter, dissents have served the purpose of securing faith in the highest court rather than denting its authority.

One question that begs analysis concerns the propensity to dissent. Do our judges dissent habitually or do they attempt to preserve unanimity? While the answer cannot be formulated as a general proposition, it is worth noting that the Supreme Court hasn't quite seen a 'habitual dissenter.' Indeed, a prominent example for the bent towards showing consensus is the judge who has delivered, arguably, the most celebrated dissenting opinion in our independent legal history. In *KesavanandaBharati,*[53] H.R. Khanna fell in line with the majority decision that the amending power of the Parliament would be subject to keeping the (ambiguous) "basic structure" of the Constitution intact, though his own opinion would suggest his leaning towards a narrower restriction – a restriction that is implicit in the word 'amendment' – that anything short of dismembering the Constitution would be a valid exercise of power under Article 368. As some would comment,[54] there was an 'unbridgeable gulf' between Khanna's views and that of the judges led by Chief Justice Sikri, and yet he

[53]His Holiness KesavanandaBharatiSripadagalvaru v. State of Kerala, AIR 1973 SC 1461.

[54]T.R. Andhyarujina, *TheKesavanandaBharati Case: The Untold Story Of Struggle For Supremacy By The Supreme Court And Parliament*, Universal Law Publishing Co., 2011.

chose to sign the majority note. In *Raj Narain*,[55] with what may be called strained legal reasoning, he explained his own views to hold (with the majority) that there was nothing in *KesavanandaBharati* that ran counter to the finding that the rights under Part III form a part of the 'basic structure'.

Of course, the political events that intervened in the period between those two decisions would have dented his faith in the elected representatives of the people; a period in which his memorable dissent in *ADM Jabalpur*[56] saved the face of the Supreme Court in what has often been termed later, as its 'darkest hour'. These events provide considerable fodder to the unanimity versus dissent debate. Academic support[57] would lend itself to the proposition that it is better to strive towards consensus, to suppress minor disagreements and to dissent only when it is unavoidable – for which, Brandeis, of the United States Supreme Court, has been greatly lauded. Khanna was an embodiment of the very virtue.[58]

When counting other dissents that turned to law, a few of K. SubbaRao's judgments would find places of prominence. While parallels haven't been drawn for him with other "Great Dissenters", his judgments in *RadheshyamKhare*[59], *Devdasan*[60] and in *MSM Sharma*[61] have truly beckoned to the 'intelligence of the future day.'

In *MSM Sharma*, SubbaRao emphatically asserted the freedom of speech of the press by holding that its expression would trump any embargo placed on such expression by a House of the Legislature through exercise of its privilege. This was, one would daresay, a finding

[55] Indira Nehru Gandhi v. Raj Narain, AIR 1975 SC 2299.

[56] Additional District Magistrate, Jabalpur v.ShivakantShukla, AIR 1976 SC 1207.

[57] See Ginsburg, supra note 3; Lord Kerr, supra note 15.

[58] See Below: "Closing Remarks".

[59] RadeshyamKhare v.The State of Madhya Pradesh, AIR 1959 SC 107.

[60] T. Devadasan v. Union of India, AIR 1964 SC 179.

[61] M.S.M. Sharma v. Sri Krishna Sinha, AIR 1959 SC 395.

based on a philosophical leaning. Indeed, some of the reasons that he offered in support of his finding appear to be flawed. In the *UP Assembly* decision, where SubbaRao cast his lot with the majority, Sarkar J., in his partly dissenting view, took the pain of pointing out and analyzing these flaws.[62] Arguably though, elements of SubbaRao's views have been vindicated. A strong leaning towards the Rights is evident in the decisions in *U.P. Assembly* and in *Raja Ram Pal.*[63]Indeed, today, for a true report of proceedings of a House, the expression is immune from civil and criminal liability.[64]

Similarly, his opinion in *RadheshyamKhare* has had its underlying philosophy turned to mandate. In this case, the majority ruled that a particular act of the government was in the nature of 'administrative action' and not subject to scrutiny for an alleged violation of principles of natural justice. SubbaRao founded his dissent on the ruling that the action had judicial trappings. The underpinning, which was to insist on adherence to some hallowed principles of fair play, is the law today - the difference in the function of natural justice in administrative and quasi-judicial actions having been blurred.[65] The authors would urge readers to consider the parallel between these events and the turn in English law from *Liversidge*to *Ridge*.

Before parting on this subject, notice must be taken of his dissenting view in *Devadasan* interpreting Clause (4) of Article 16 of the Constitution as independent of Clause (1), rather

[62] In the matter of: Under Article 143 of the Constitution of India, AIR 1965 SC 745 at ¶ 179, 184-186.

[63]Raja Ram Pal v.The Hon'ble Speaker, LokSabha, (2007) 3 SCC 184.

[64] Article 361A; inserted by the Constitution (Forty Fourth) Amendment Act, 1978.

[65]A.K. Kraipak v. Union of India, AIR 1970 SC 150.

than an exception to it. This later found the direct approval of the Court in *N.M. Thomas,*[66] and was emphatically restated in *Indira Sawhney*.[67]

Across jurisdictions, dissents have the possibility of carrying political flavours. Even if absent, the possibility of a particular leaning having played a part is nonetheless subject to scrutiny. However, what a judge in an 'independent judiciary' must bear in mind is that the fear of a decision being perceived as 'political' cannot be a reason to not deliver such ruling. Two dissenting opinions in the ruling that dismissed an election petition challenging the election of the incumbent President would endorse this conviction. The dissents revolve around (a possibly well founded) disagreement over whether the term 'office of profit' in the context of Article 58 (relating to the election of the President) can be controlled by legislation made under Article 102 (relating to the election of MPs).[68] The decisions make for a compelling read, especially when viewed against the backdrop of the political events surrounding the election.

While some dissents have heralded changes in the law at later dates, their fruitlessness *in praesenti* cannot be overlooked. This is put plainly in perspective by the practice in England to ordinarily not allow a dissenting opinion in a criminal case. Article 145 does not carve any such exception, and an example of the misfortune that it can result in would be the case of Devender Pal Singh Bhullar, sentenced to death under the Terrorist and Disruptive Activities (Prevention) Act, 1985. The conviction and sentence was upheld by a majority of two judges on a bench of three judges of the Supreme Court[69] and a review petition filed before the same bench was dismissed. While dealing with the review, Justice M.B. Shah, who had dissented

[66]State of Kerala v. N.M. Thomas, AIR 1976 SC 490.

[67]Indira Sawhney v. Union of India, (2000) 1 SCC 168.

[68]PurnoAgitokSangma v. Pranab Mukherjee, (2013) 2 SCC 239.

[69]Devender Pal Singh v. State, National Capital Territory of Delhi, (2002) 5 SCC 234.

on the conviction, recorded a dissent on the sentence and noted that it stood as a fit case for alteration of the death sentence to life imprisonment.[70] As on date, the convict stands on the death row with his mercy petition having been rejected by the President. Even keeping aside the political absurdity of these events, the case speaks volumes for the difficulties that a dissent may give rise to, and how it can multiply the sense of misfortune. This case would only be a species in the death penalty genus where dissent, judicial or otherwise, seems to have made little difference – indeed in about thirty years, the weight of P.N. Bhagwati's dissent in *Bachan Singh*[71] finding the death penalty to be unconstitutional has not eroded the significance of the capital punishment in our criminal justice system.

4. CLOSING REMARKS

In India, as elsewhere, dissenting opinions have helped shape the law. Undoubtedly, our legal history is richer for many such dissenting judgments. As a feature of our common law heritage, the preserved right of a judge, even of the highest court, to record a dissenting opinion, is an invaluable piece of inheritance. And although our judges have rarely mimicked the sharpness that is common in the United State of America, and not unknown in England – a la *Liversidge*, the most noted dissents have been judgments of great conviction. Indeed, it is the conviction that makes the dissenting opinion worthwhile – a belief strong enough to cast away other cherished rules of adherence to precedent and unanimity. These sentiments have been aptly captured in the closing lines of Khanna's celebrated dissent in *ADM Jabalpur*, to which brief attention has been drawn earlier:

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[70] Ibid.

[71] Bachan Singh v. State of Punjab, (1982) 3 SCC 24. Per P.N. Bhagwati J., "*...approach of the majority judgment not only runs counter to the decision in R.C. Cooper's case and other subsequent decisions of this Court including Maneka Gandhi's case but is also fraught with grave danger inasmuch as it seeks to put the clock back and reverse the direction in which the law is moving towards realisation of the full potential of fundamental rights as laid down in R.C. Cooper's case and Maneka Gandhi's case*."

> "*I may observe that the consciousness that the view expressed by me is at variance with that of the majority of my learned brethren has not stood in the way of my expressing the same. I am aware of the desirability of unanimity, if possible. Unanimity obtained without sacrifice of conviction comments the decision to public confidence. Unanimity which is merely formal and which is recorded at the expense of strong conflicting views is not desirable in a court of last resort. As observed by Chief Justice Hughes Prophets' with Honor by Alan Earth 1974 Ed. p. 3-6 judges are not there simply to decide cases, but to decide them as they think they should be decided, and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice."*

The opinion was brought to a close with the very words of Justice Evans that are at the head of this work. Your authors beg to do likewise.

RINGING THE PANCHAYAT ELECTION BELL: DICHOTOMY OF POWER BETWEEN TWO EXECUTIVE LIMBS

Priyadarshi Banerjee[1]

When a conundrum as regards the distribution of power between two limbs of the Executive, viz. the State Election Commission and the State Government, over the Panchayat elections has been crowding public as well as academic opinion, our two professors were not spared from the heat of such a debate. On a sultry summer afternoon, Prof. A and Prof. B sat over cups of coffee, with all academic tools at their disposal, eschewing the prejudices of electoral politics to reach a conclusion for themselves on what is quintessentially a question of constitutional construction.

Prof B – It seems, at times quite absurd an exercise that a controversy should arise twentyyears after the Panchayati Raj Institutions (PRIs) has been installed through the Constitution (Seventy-third Amendment) Act, 1993. That too, pertaining to something as fundamental as the process of election to these Institutions.

Prof A – To say that it is absurd, seems a little unfair, especially, since the concern mooted is one that goes to the root of the democratic process. When the Constitution empowers the State Election Commission (SEC) with the authority and the responsibility of conducting these elections for the salutary purpose of keeping the election mechanism free from any interference by the political executive, it would seem slightly odd that any State Government's attempt to put a trammel in these matters shall be considered benign.

[1] Law clerk to hon'ble Justice TS Thakur, National Law University Jodhpur, 2006-11

Prof B – Let me then try delineating the controversy. With regard to the process of elections to the PRIs, which is the functionary that has the power to notify the elections and its dates? In answering this question we shall probably be required to look into the meaning of the phrase 'conduct of elections' as contained in Article 243K of the Constitution of India[2].

Prof A – It is undeniable that a bare reading of the provision of Article 243K gives an impression that it is the SEC which is entrusted with the duty of conducting the Panchayat Elections. Posited against the regime applicable to the Election Commission for the conduct of elections to the House of the People and the State Legislative Assemblies under Article 324 of the Constitution of India, it seems only fair to say that the power to notify the dates of an election lies with the independent body created by the Constitution for the purposes of conducting free and fair elections.

Prof B – To conclude as you just did, one needs to take a closer look at the two provisions in question. Article 324[3] contemplates the constitution of an Election Commission and the direction, superintendence and control for the preparation of electoral rolls and

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[2]**243K. Elections to the Panchayats**.- The superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Panchayats shall be vested in a State Election Commission consisting of a State Election Commissioner to be appointed by the Governor.

(2) xxx xxxxxx

(3) The Governor of a State shall, when so requested by the State Election Commission, make available to the State Election Commission such staff as may be necessary for the discharge of the functions of the conferred on the State Election Commission by clause (1)

(4) Subject to the provisions of this Constitution, the Legislature of a State may, by law, make provision with respect to all matters relating to, or in connection with, elections to the Panchayats.

[3]**324. Superintendence, direction and control of elections to be vested in an election commission.-** (1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of all elections to the offices of President and Vice-President held under this Constitution shall be vested in a Commission (referred to in this Constitution as the Election Commission)

conduct of all elections to the Parliament and State Assemblies shall be vested with the Commission. The similarity in its drafting with Article 243K is apparent. However, the power to notify dates of election is nowhere mentioned in these Articles specifically. Hence we cannot say that it is a constitutional mandate that the Election Commission or the SEC shall notify the schedule for an election. Let me also admit, at this point that the literature and precedents on this specific issue around Article 243K is scanty, thus obviating the necessity to refer to the analogous provision under Article 324 for guidance and a clearer understanding of the election mechanism.

Prof A – Indeed. But does the phrase 'conduct of elections' not adequately cover such a power? Is the power conferred by either Article 243K or 324 not plenary in nature?

Prof B – It is imperative to understand that by the mere mention of the phrase 'conduct of elections', the respective Election Commissions are not converted into legislative bodies, which are free to form their own rules and exercise unfettered powers as regards the conduct of any election. If there is a valid legislation which is enacted by a competent legislature which streamlines the exercise of power by the Commission, then it is duty bound to abide by such stipulations. Even if we look at the Constituent Assembly Debates, Vol. 8, p.905, the intention of the framers become apparent that in the Election Commission (draft Article 289) they wanted a machinery for the conduct of elections which is beyond the pale of control of the Executive of the day. Dr.Ambedkar noted in his speech on 15th June, 1949 in the Constituent Assembly that,

> *... But the House affirmed without any kind of dissent that in the interests of purity and freedom of elections to the legislative bodies, it was of the utmost importance that they should be freed from any kind of interference from the*

executive of the day. In pursuance of the decision of the House, the Drafting Committee removed this question from the category of Fundamental Rights and put it in a separate part containing Articles 289, 290 and so on, Therefore, so far as the fundamental question is concerned that the election machinery should be outside the control of the executive Government, there has been no dispute. What Article 289 does is to carry out that part of the decision of the Constituent Assembly. It transfers the superintendence, direction and control of the preparation of the electoral rolls and of all elections to Parliament and the Legislatures of States to a body outside the executive to be called the Election Commission.

Thus, the exercise of creation of an Election Commission was for the purpose of ensuring a degree of freedom of the election process from the executive – and not to keep the Commission even beyond the pale of legislative control. Thus the exercise of its power must be in accordance with any law which is in force at a given time.

Prof A – This, however, does not answer, if the power under either Article 324 or Article 243K is plenary in nature. Because, if that be so, no legislation can be deemed to be constitutional if it abridges a power granted to the Commission by the provisions of the Constitution itself.

Prof B – Let us take a look at two other provisions of the Constitution then. Both, Article 243K (4) and Article 327[4], points us to the direction that the respective legislatures are indeed made competent to enact laws to regulate elections.

[4]**327. Power of Parliament to make provision with respect to elections to Legislatures.-** Subject to the provisions of this Constitution, Parliament may from time to time by law make provision with respect to all matters relating to, or in connection with, elections to either House of Parliament or to the House or either House of the Legislature of a State including the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses.

Prof A – But both these Articles begin with the clause "subject to the provisions of this Constitution". How then would they be competent to bring about a law under these Articles which take away a power (i.e. assuming that 'conduct of elections' include the power to decide upon the schedule of elections) granted to the Election Commission under another provision!

Prof B – Dealing with the case of ***Mohinder Singh Gill*** **v.** ***The Chief Election Commissioner***[5], Justice Krishna Iyer in his inimitable style observed, while interpreting Articles 324 and 327,

> "*... We may therefore have to study the scheme of Article 324 and the provisions of the Act* [RoPA] *together since they are integral to each other. Indeed, if we may mix metaphors for emphasis, the legislation made pursuant to Article 327 and that part of the Constitution specially devoted to elections must be viewed as one whole picture, must be heard as an orchestrated piece and must be interpreted as one package of provisions regulating perhaps the most stressful and strategic aspect of democracy-in-action so dear to the nation and so essential for its survival.*"

In fact, Justice P.K. Goswami, in his concurring opinion in ***Mohinder Singh Gill***'s case, provides a complete explanation as to why Articles 327 and 328 are made subject to other provisions of the Constitution. He founds his reasoning on the sound principle that "power in any democratic setup, as is the pattern of our polity, is to be exercised in accordance with law". Therefore it is the Constitution itself which empowers the legislatures for making provisions with respect to all matters connected with elections. Once such laws are be enacted, even the Commission shall

[5] (1978) 1 SCC 405

be obliged to act in conformity with those. However mindful of the possibility that myriad hardships might come up in the administration of a huge electoral machinery, the framers deemed it fit to vest residuary power in the Election Commission for smoothening out the creases and for filling in any vacuum left behind after legislation. Justice Goswami noted,

> *"... Since the conduct of all elections to the various legislative bodies and to the offices of the President and the Vice-President is vested under Article 324(1) in the Election Commission, the framers of the Constitution took care to leaving scope for exercise of residuary power by the Commission, in its own right, as a creature of the Constitution in the infinite variety of situations that may emerge from time to time in such a large democracy as ours. Every contingency could not be foreseen, or anticipated with precision. That is why there is no hedging in Article 324. The Commission may be required to cope with some situation which may not be provided for in the enacted laws and the rules. That seems to be the raison d'etre for the opening clause in Articles 327 and 328 which leaves the exercise of powers under Article 324 operative and effective when it is reasonably called for in a vacuous area. There is however, no doubt whatsoever that, the Election Commission will have to conform to the existing laws and rules in exercising its powers and performing its manifold duties for the conduct of elections*."

Article 324 thus grants plenary power to the Commission in areas left unoccupied by legislation even if the words, 'superintendence, direction and control' as also 'conduct of all elections' are to be given the widest possible connotation.

Prof A – While construing the expression 'superintendence, direction and control' in the Article, one has to remember that every norm which lays down a rule or conduct

cannot possibly be elevated to the position of legislation or delegated legislation. A direction may also mean an order issued to a particular individual or group which, in turn, many may have to follow. It may be a specific or a general order. One has to also remember that the source of power in this case is the Constitution, the highest law of the land, which is the repository and source of all legal powers. Any power granted by the Constitution, for a specific purpose, should be construed liberally so that the object for which the power is granted is effectively achieved[6].

Prof B – Indeed. However, we cannot lose sight of the fact that the Supreme Court made this observation in ***KanhiyaLal Omar's case***[7], which pertained to the validity of the Election Symbols Order. Essentially, the controversy there surrounded around the nature of the Order in question and the corresponding competence of the Commission to issue the same. The present controversy is different however – herein we have transgressed the stage where we question the power of the Commission/SEC to issue an order in absence of a law covering some field; our present concern lies with inquiring the substantive merit of the proposition that 'conduct of elections' in Articles 243K and 324 also grants the Commission/SEC the power to issue a notification for election, setting the electoral process in motion.

The word 'conduct' used in both the Articles has two distinct senses and it is only in one of those senses that the word could be used here. The power to 'conduct' elections on the one hand might imply the complete gamut of power as would be required for holding elections, while on the other it might, in a narrower sense,

[6]KanhiyaLal Omar v. R. K. Trivedi (1985) 4 SCC 628; See also, Union of India v. Association for Democratic Reform (2002) 5 SCC 294

[7]*Id*

imply the power to actually administer the elections fairly and impartially in accordance with the provisions of law validly enacted by the Legislature.

Prof A – So are you hinting at adopting a narrower meaning of the word 'conduct' in this context, despite the Apex Court ruling that such constitutional powers are to be given a wider interpretation?

Prof B – Yes, a narrower construction of the word 'conduct' is what these Articles demand, but it shall be incorrect to state that such an interpretation militates against the expressed verdict of the Supreme Court. While indeed I am looking at a constricted meaning of 'conduct', it in no way affects the plenitude of power granted to the Election Commission/SEC by the Articles of the Constitution. If we are to give a wider sense to the word 'conduct', undesirable results shall be its sequitur. First, a number of provisions of the Constitution shall be rendered otiose. Secondly, imposing such a construction shall make the Election Commission *imperium in imperio*, throwing it beyond the pale of any check and balance from either the Legislature or the Executive.

Articles 327 and 328 read with Entry 72, List I and Entry 37, List II of the Constitution gives the Parliament and the State Legislatures the power to legislate upon elections to their respective Houses. Similarly, Article 243K (4) read with Entry 5, List II grants the State Legislatures the power to legislate upon elections to the PRIs. If 'conduct of elections' is to be assumed in the wider sense, then practically every aspect of this power shall vest with the Election Commission or SEC. Any legislation sought to be brought about either by the Parliament or a State Legislature under these provisions shall in that circumstance amount to a transgression of the powers vested in the Election Commission/SEC. The net effect of such a construction would be to render the abovementioned provisions

meaningless. Being mindful that *maledictaet exposition quae corrumpittextum* – it is bad construction which corrupts the text – we would be left with no alternative but to reject such an interpretation.

Secondly, reading 'conduct' in Articles 243K and 324 broadly would destroy the fine balance of checks and convert the SEC/Commission into an absolute despot in the field of election laws. Such a body which is not directly responsible to the electorate shall enjoy plenary power so as to give directions regarding the mode and manner of elections purporting to exercise powers under the cover of Articles 324(1) and 243K(1). The integrity and independence of the electoral process will suffer greater risks at the hands of such a despotic institution. Apprehending such disastrous consequences which might flow from granting to a Constitutional body such uncanalised power, the Supreme Court noted in ***A.C. Jose* v. *Sivan Pillai***[8], where the Election Commission had gone ahead with polling by means of electronic voting machines, purporting to exercise such power under Article 324, despite the Conduct of Election Rules, 1961, making no such provision beyond paper ballots,

> *"... such an absolute and uncanalised power given to the Commission without providing any guidelines would itself destroy the basic structure of the Rule of Law. It is manifest that such a disastrous consequence could never have been contemplated by the Constitution makers, for such an interpretation ... ... would be far from attaining the goal of purity and sanctity of the electoral process. Hence, we must construe Articles 324 to 329 as an integral part of the same scheme, collaborating rather than colliding with one another."*[9]

[8] (1984) 2 SCC 656

[9] See also, Ponnuswamyv. Returning Officer, Namakkal AIR 1952 SC 64, 68-69

Therefore, 'conduct' of elections necessarily signifies the power to administer the entire electoral process as per law while the Election Commission or SEC reserves wide exclusive power of superintendence, direction and control over the entire mechanism. Hence, the power to notify elections flow not from the Constitution itself, but actually from any legislation enacted under the relevant constitutional provisions – Articles 327/328 for Parliamentary and State Assembly Elections and Article 243K(4) for elections to the PRIs. We mistakenly assume that the Election Commission in the case of Parliamentary and State Assembly elections derives its power to set the schedule for an election from Article 324(1), while in reality that power is derived from sections 14[10] and 15[11] of the Representation of the People Act, 1951. Likewise, in the case of elections to the PRIs, it shall be the relevant State legislations which shall govern as to who shall have the power to determine the schedule for Panchayat elections.

For example, in West Bengal, section 42 of The West Bengal Panchayat Elections Act, 2003, reserves the power of notification for election to the State Government who shall appoint the date or dates of election in consultation with the SEC. The situation shall be different from State to State. In Karnataka, Section 4 of their Panchayat Act read with Rule 12 of The Karnataka Panchayat Raj (Conduct of Election) Rules, 1993, grants the power of notification to the Deputy Commissioner of the district, but however, the dates shall be determined only with the approval of

[10] **14. Notification for general election to the House of the People.-** (2) For the said purpose the President shall, by one or more notifications published in the Gazette of India on such date or dates as may be recommended by the Election Commission, call upon all parliamentary constituencies to elect members in accordance with the provisions of this Act and of the rules and orders made thereunder:

[11] **15. Notification for general election to a State Legislative Assembly.-** (2) For the said purpose, the Governor or Administrator, as the case may be, shall by one or more notifications published in the Official Gazette of the State on such date or dates as may be recommended by the Election Commission, call upon all Assembly constituencies in the State to elect members in accordance with the provisions of this Act and of the rules and orders made thereunder:

the SEC. In Tamil Nadu, the scheme is exactly the opposite of that in West Bengal. Under the Tamil Nadu Panchayats (Elections) Rules, 1995, Rule 24, grants this power to the SEC – however the same has to be exercised in consultation with the State Government.

Prof A – It is all very pleasing to hear you talk about the nature and scope of the powers of the Election Commission. However, one doubt lingers on in my head. In case such a legislation reserves the power to fix the schedule of an election to the Government, would there be not a chance to subvert the entire constitutional machinery at the hands of the executive-government by arbitrarily postponing the date of elections, or worse, by not notifying elections at all? Take for example the situation in the State of West Bengal and the 2013 – Panchayat Elections in the State[12]. It is precisely such a distribution of power which had led to an impasse between the two limbs of the Executive!

Prof B – The apprehension so expressed seems to carry some weight indeed. However, if we assume for a moment that such a power lies with the Election Commission instead, there conversely would be the risk of the Commission refusing to conduct elections even upon such a notification from the Government on a subjective ground such as prevalent law and order conditions in a State being not conducive for holding free and fair elections.

Our Constitution envisions well defined roles for the Commission and the Governments (Central or State) for ensuring free and fair elections. Multiple

[12]<http://www.business-standard.com/article/current-affairs/wb-panchayat-face-off-ambiguity-over-consultaion-staff-root-of-tussle-113040200295_1.html> as visited on July 10, 2013

decisions of the Supreme Court have touched upon this issue.[13] Pertinent observations of the Court in ***Election Commission of India* v. *State of Tamil Nadu***[14] on the problem of differences arising between the Government and the Commission should not be lost sight of,

> "*... The Election Commission of India is a high constitutional authority charged with the function and the duty of ensuring free and fair elections and of the purity of the electoral process. It has all the incidental and ancillary powers to effectuate the constitutional objective and purpose. ... In an exercise of the magnitude involved in ensuring free and fair elections in the vastness of our country, there are bound to be differences of perception as to the law and order situation in any particular constituency at any given time and as to the remedial requirements. Then again, there may be intrinsic limitations on the resources of the Central Government to meet in full the demands of the Election Commission. There may again be honest differences of opinion in the assessment of the magnitude of the security machinery. There must, in the very nature of the complexities and imponderables inherent in such situations, be a harmonious functioning of the Election Commission and the Governments, both State and Central. …… Situations* [differences] *of this kind should be resolved by mutual discussion and should not be blown up into public confrontations. This is not good for a healthy democracy. The Election Commission of India and the Union Government should find a mutually acceptable coordinating machinery for the resolution of these differences.*"

[13]Election Commission of India v. State of Haryana 1984 Supp(1) SCC 104; Election Commission of India v. Union of India1995 Supp(3) SCC 643

[14] 1995 Supp(3) SCC 379

Besides, the judiciary is empowered to deal with circumstances where any of the limbs of the executive takes a decision which is perverse, unreasonable or based on extraneous reasons and give appropriate directions for the conduct of elections[15] thereby maintaining a fine balance between the three organs of the Government.

Prof A – I see where you are coming from. Indeed an idea about distribution of power between various organs of the Government, tempered by institutional checks and balances, can be discerned from such a construction of the Constitutional provisions. However, from the line of my querying and questioning it would surely be apparent to you that this debate is not over yet. I say so, all the more, because no Article of the Constitution can be interpreted in vacuum, unmindful of the political reality of the times – after all, the Constitution merely provides the framework of governance. The meat is provided from time to time, either by aware interpretation by the judiciary or by illumined execution of the vision statement contained therein, at the hands of the executive. The general distrust of the political class prevailing at the time, cannot but shove me towards a model where, at least, the very basis of a constitutional democracy, that being elections, is entrusted to an independent Constitutional functionary, free from the control of that class whose interest is intrinsically linked to the electoral process.

Prof B – To solve this puzzle the only principle that one needs to bear in mind is a simple one – to have faith in the very system which one seeks to protect or uphold, constitutional democracy in the present case. The entire democratic system looks up to legislative guidance for its functioning; and what is a legislation but the direct

[15] See In the matter of Special Reference No.1 of 2002 (Gujarat Assembly Election Matter) (2002) 8 SCC 237 (per K.G. Balakrishnan, J.); See also, Mohinder Singh Gill v. Chief Election Commissioner (1978) 1 SCC 405 (per Krishna Iyer, J.)

reflection of the collective mandate. If we are to ever have an institution which is beyond the guidance of a benevolent legislative hand, then it would also mean that no correction in such an institution can be brought about by any amount of collective will. Hence our attempt would be to ensure the reach of popular law to every sphere of collective action lest the path of tyranny is paved.

"*But the electorate lives in the hope that a sacred power will not so flagrantly be abused and the moving finger of history warns of the consequences that inevitably flow when absolute power has corrupted absolutely. The fear of perversion is no test of power.*"[16]

[16] Indira Nehru Gandhi v. Raj Narain&Anr. 1975 (Supp) SCC 1 (per Chandrachud, J.)

RE-DEFINING THE DEFINITION OF "*STATE*" UNDER ARTICLE 12 OF THE INDIAN CONSTITUTION

Vishnu S Warrier*

The Constitution of India defines certain fundamental rights of individuals. A fundamental right, as defined in the Constitution, is unique when compared to other constitutional rights in one vital aspect. While a fundamental right is inviolable, a non-fundamental right possesses no such characteristics. It is inviolable in the sense that no ordinance, custom, usage or administrative order can abridge or take away any fundamental right.[1]

Fundamental rights are meant for promoting the ideals of a political democracy. They prevent the establishment of an authoritarian and despotic rule in a country and protect the liberties and freedom of the people against any invasion by the State. In short, they aim at establishing '*agovernment of laws and not of men'.* However, the government is constitutionally empowered to impose *reasonable* restrictions on these 'unique' rights. However, whether these restrictions are reasonable or not is a question to be decided by the constitutional courts.

To ensure that fundamental rights are appropriately sheltered, the Constitution has conferred on the Supreme Court and the High Courts the power to grant effective remedies whenever such rights are violated.[2] The courts may thus issue writs of *habeas corpus, mandamus, prohibition, quo warranto and certiorari* for preventing fundamental rights from being dishonoured. A look at the history of judicial interpretation of Article 32 and Article 226 shows us that these

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[1] Singh MP, VN Shukla's,*Constitution of India*, 11th Edition, Eastern Book Company, Lucknow, 2008, p 44

[2] Article 32 (Supreme Court) and Article 226 (High Courts) of the Constitution of India grant this power.

provisions have been liberally construed and judicial remedies for the enforcement of fundamental rights have been vividly expanded to sustain the claims of such right holders.[3]

It is pertinent to note another fundamental difference between fundamental rights and other legal rights. Unlike legal rights, which are the created by the State through legislations, fundamental rights can be claimed only against the State. Therefore, whether the Constitution says it or not, it is generally assumed that fundamental rights given in the Constitution are available only against the State, *i.e.*, against the actions of the State and its officials.[4]

For that reason, and moreover for the reason that some of the fundamental rights are expressly guaranteed against the State, a definition of 'State'was necessary. The 'State' includes the Government of India, Parliament of India, the Government and the Legislature of each state and all local or other authorities within the territory of India or under the control of the Government of India[5].

This definition has created a lot of confusion amongst judicial minds till date, especially regarding the meaning of the term 'other authorities'. However, when we peruse Article 226, there is a striking contradiction with the definition of State under Article 12. Article 226 empowers the High Courts to issue writs against '*any person or authority'*. Does this actually contradict the definition of State in Article 12 so as to make private individuals and organizations amenable to the jurisdiction under Article 226? The latest instance in which this issue came up was earlier this year in the case of *ABC v. Police Commissioner & Others*[6],before the High Court

[3]*Constitution of India,* supra note 1, at p 46

[4]*Id.* , pp 23-24

[5] Article 12 of the Constitution of India

[6] Writ Petition (C) No. 12730 of 2005; the judgment was delivered by a Single Judge on February 5, 2013.

of Delhi. The primary question was whether a fundamental right can be enforced, under Article 226, against media groups which are private organizations by their nature. In this case, the victim's mother filed a writ petition[7] before the High Court against the Commissioner of Police[8] and two media groups[9] alleging a violation of her daughter's fundamental right to privacy and confidentiality guaranteed under Article 21 of the Constitution. It was alleged in the petition that the contents of the First Information Report filed by the victim, alleging a case of sexual abuse against her father, was leaked by Respondent 1 to Respondent 2 & 3 and the same was featured in their respective newspapers as well as news channels.

Under Article 226, writs can be issued against '*any person or authority'*, and the same can be issued for enforcing fundamental rights as well as for any other purposes. It is nothing but a public law remedy available against a private body or person performing a public function or discharging a public duty.[10] The term '*authority*' in Article 226, in the context, must receive a liberal meaning unlike the same term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32.[11] The words '*any person or authority*' used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State.[12]

They may cover any other person or body performing a public duty. What is relevant is the nature of the function carried out by the impugned body. Duty must be judged in the light of

[7] Under Article 226 of the Constitution of India

[8]Respondent 1

[9] Hindustan Times (Respondent 2) House and AajTak (Respondent 3)

[10]*supra* note 6, at Para 28

[11] Remedies for enforcement of rights conferred by Part III of the Constitution of India

[12]AndiMuktaSadguru Shree MuktajeeVandas Swami SuvarnaJayantiMahotsavSamrak Trust &Ors. v. V Rudani&Ors., (1989) 2 SCC 649

positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed; if a positive obligation exists, mandamus cannot be denied.[13]

When a private body exercises public functions, even if it is not an instrumentality of the State, the aggrieved person has a remedy not only under the ordinary law, but also under the Constitution, by approaching the High Courts under Article 226.[14]

So, the pertinent issue that needs scrutiny is the test to decide whether a particular function is a public function in the context of exercise of jurisdiction under Article 226. Can a media house be treated as performing a public function?

It has to be noted that not all the activities of private bodies are subject to private law alone. When the activities of a private body are governed by the standards of public law, when its decisions are subject to duties conferred by a statute or when, by virtue of the function it is performing, it is in a dominant position in the market, the private body is under an *implied duty* to act in public interest.[15]

The test of whether a body is performing a public function or a public duty, and is hence amenable to judicial review, may not depend upon the source of its power or whether the body is ostensibly a '*public*' or a '*private*' body.[16] Principles of judicial review prima facie govern the activities of bodies performing public functions.[17]

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[13] *Id.*

[14] Zee Tele Films &Ors v. Union of India &Ors, (2005) 4 SCC 649

[15] De Smith, Woolf and Jowell, *Judicial Review of administrative action*, 5th Edn., Thomson, Sweet & Maxwell, 2012

[16] *Id.*

[17] *Id.*

A body performs a '*public function*' when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Therefore, bodies exercise public functions when they intervene or participate in socio-economic affairs in public interest.[18]

From the aforementioned observations, it can be understood that an activity of a body can be termed to be a public function for the purposes of scrutiny by a constitutional court when the same is performed under a duty to act in *public interest*. Any violation of such duty, even by a private body, would fall within the ambit of High Courts exercising jurisdiction under Article 226, especially when the same is alleged to have infringed any fundamental right.

In a democracy, where freedom of speech and expression is preserved at a very high pedestal, the media has an extremely vital role to perform in the larger public interest. The press and media are instrumentalities through which the right to freedom of speech and expression of citizens are made meaningful. They are also the repositories of public trust and faith. It is for this reason that the press became to be known as the '*Fourth Estate'*.[19]As a result, they owe a duty to the public to report news and views accurately without any prejudice or ulterior motives. Therefore, restrain and caution are two words that personnel in this industry must keep close to their hearts.

It is difficult to over-emphasise the importance of freedom of press as one of the pillars of a Government '*of the people, by the people, and for the people*'. The press, especially the newspapers, stands by common consent, the first among the organs of opinion. The conscience

[18]Binny Ltd. v. Sadasivan, (2005) 6 SCC 657

[19]MarkandeyKatju J, 'Role of Media in the 21st Century', AIR 2002 Journal 273

and the common sense of the nation, as a whole, keep down the evils which have crept into the working of the Constitution, and may in time, extinguish them.[20]

The press, as a medium of communication, is a modern phenomenon. It has immense power to advance or thwart the progress of a civil society. Its freedom can be used to create a brave new world or to bring about universal catastrophe.[21] It is the function of the press to disseminate news from as many different sources, facts and colours as possible. A citizen is entirely dependent on the press for quality, proportion and extent of his news supply.[22]

The media, be it print or electronic, is generally called the fourth pillar of a democracy. The media, in all its forms, discharges a very onerous duty of keeping the people knowledgeable and informed. The impact of the media is far reaching as it not only reaches the people physically but also influences them mentally. It creates opinions, broadcasts different viewpoints, brings all the government lapses to the forefront and is an important tool in restraining corruption and other ills of the society. The media ensures that an individual actively participates in the decision making process as well.[23]

In light of the above discussion, it can be ascertained that the press and media perform a public function and discharge a public duty of disseminating news, initiating and responding to debates, and dealing matters of current interest in the society. It cannot be said that they do not perform a

[20]Lord Bryce, *American Commonwealth (New and Revised Edition)*, pp 274 -275 and 367<which edition, publisher, place and year?>

[21] The Second Press Commission Report, Vol. I, pp 34-35

[22]*Id.*

[23]Sanjoy Narayan, Editor in Chief Hindustan &Ors. v. Honourable High Court of Allahabad, through Registrar General, 2011 (9) SCALE 532

public function or discharge a public duty, *inter alia,* when theyperform the act of reporting news.

They command immense power of making, moulding, sustaining or even drastically changing public opinion. The functions performed by the press and media are recognized by the State which consequently accords various rights and privileges to them. It is therefore clear that press and media are indispensable organs of a democracy as they play a vital role in the process of development of the State. Hence, it can be concluded that the media is amenable to writ jurisdiction under Article 226. This judgment virtually establishes media as the ‘fourth estate’ of the state.

CRITICAL ANALYSIS OF THE ROLE OF NON-INDIAN PERSUASIVE AUTHORITIES IN CONSTITUTIONAL INTERPRETATION

Hakim Yasir Abbas[1]

INTRODUCTION

The utility of the comparative method in social science studies is beyond dispute and it is an equally indispensible tool for legal science.[2] The last six to seven decades have seen a tremendous proliferation in the borrowing of foreign legal material for statutory and constitutional interpretation. This practice of cross-jurisdictional legal dialogue is a global phenomenon and reflects the observation made by Roscoe Pound that: "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."[3] This implies that the circulation of ideas, in law as well as other social sciences is 'a fact of life and a usefully enabling condition of intellectual activity'[4]. The postulate that legal science should use comparative method as the "richest source of discovery in every empirical science" was proposed by German legal philosophers at the beginning of the 19th century,[5] and since then, the use of non-domestic legal authorities as gears of interpretation has gained a lot of attention across different jurisdictions.[6]

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[2] P. John Kozyris,'Comparative Law for the Twenty-First Century: New Horizons and New Technologies', *Tulane Law Review*, vol. 69, 1994-1995, p. 167 [hereinafter Kozyris 1994].

[3] Roscoe Pound, *The Formative Era of American Law*, Gaunt Publishers, 2002, p. 94.

[4] Edward Said, 'The World, The Text, And The Critic 226 (1983) in ValdPerju, Constitutional Transplants, Borrowing, and Migrations', *Boston College Law School Research Paper*254, January 2012, p. 1. [hereinafter Research Paper 254].

[5] Roscoe Pound, 'The Place of Comparative Law in the American Law School Curriculum*',* *Tulane Law Review*, vol. 8, 1934, p. 161.

[6] Adam M. Smith, 'Making Itself at Home: Understanding Foreign Law in Domestic Jurisprudence-The Indian Case', *Berkeley Journal of International Law*, vol. 24, 2006, p. 218 [hereinafter Smith 2006]; *See also* Rebecca

Comparison today is inevitable, and it is almost impossible to be a well-informed judge or lawyer now without having impressions of law and governance in countries other than one's own.[7]

The constitutional courts in India have been at the vanguard of cross border judicial engagement. They have, in issues like right to privacy[8], freedom of press[9], restraints on foreign travel[10], constitutionality of death penalty[11], protection of women against sexual harassment at workplace[12] and prior restraints on publication,[13] incorporated or taken support of cross-border judicial decisions and international law to formulate judicial opinions.

This article is an attempt to highlight the nature and extent of the role played by non-Indian persuasive authorities in the development of Indian constitutional jurisprudence. Even though the practice of engaging in cross-jurisdictional legal discourse raises a number of philosophical and legal challenges, it does not fall within the ambit of the current article. The purpose of this article is to first, highlight the various non-Indian persuasive authorities used by the courts in constitutional interpretation; and second, to understand how these have influenced the evolution of Indian constitutional regime. The aim is to understand how cross-border judicial conversation

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Lefler, 'A Comparison of Comparison: Use of Foreign Case Law As Persuasive Authority by the United States Supreme Court, the Supreme Court of Canada, and the High Court of Australia'*Southern California Interdisciplinary Law Journal*, vol. 11, 2001, p. 165; *See also*Gérard V. La Forest, '*The Use of American Precedents in Canadian Courts*', Maine Law Review, vol. 46, 1994, p. 220 [hereinafter Forest 1994].

[7]Michael D. Kirby, 'International Law - The Impact on National Constitutions' (7th Grotius Lecture in the Australian High Court, 2006) viewed on 29 March 2013, <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_30mar05.html>.

[8]Kharak Singh v. State of Uttar Pradesh &Ors., AIR 1963 SC 1295 [hereinafter Kharak].

[9]Bennett Coleman v. Union of India, AIR 1973 SC 106.

[10]Maneka Gandhi v. Union of India, AIR 1978 SC 597 [hereinafter Maneka].

[11]Bachan Singh v. Union of India, AIR 1980 SC 898.

[12]Viskhaka v. State of Rajasthan, AIR 1997 SC 3011 [hereinafter Vishaka].

[13] R. Rajagopal v. State of Tamil Nadu, AIR 1995 SC 264.

has brought Indian constitutional law in contact with other constitutions and has eventually caused it to evolve.

Part I of the article identifies the non-Indian persuasive authorities. This part first categorises the authorities used by constitutional courts as Indian persuasive authorities and non-Indian persuasive authorities, and then critically analyses foreign decisions and international law as two important facets of non-Indian persuasive authorities. Part II then comprehensively chalks out the manner in which the constitutional courts have used these non-Indian persuasive authorities as tools of interpretation.

1. Identification Of Non-Indian Persuasive Authorities.

Indian constitutional courts primarily depend upon two kinds of authorities to interpret the constitution: (1) binding authorities, (2) persuasive authorities (non-binding authorities). As far as binding authorities are concerned, it is clear that they include the law laid down by the higher courts which is required to be followed by the lower courts. The Constitution of India clearly states that the law laid down by the Supreme Court shall be binding on all courts in India.[14] Therefore all the courts in India, including tribunals and all authorities which exercise judicial or quasi-judicial functions, consider the law laid down by the Supreme Court to be binding. Moreover, the judgment of the Supreme Court bench containing higher number of judges is binding on the Supreme Court bench with lower strength. Even though the Constitution does not expressly provide similar legitimacy to the judgments of the High Courts in regards to the courts which are subordinate to it, the Hon'ble Supreme Court has clearly stated that the binding authority of the judgments of High Courts, over the courts which are subordinate to it, is implied within its superintendence power as exercised under Article 227 read with article 215 and 226 of

[14] Art. 141, Constitution of India, 1950 (India).

the Constitution.[15] However, as far as the persuasive authorities are concerned, they can be further divided into (a) 'domestic' (Indian persuasive authorities) and (b) 'foreign' (non-Indian persuasive authorities) authorities.

1.1. Indian persuasive authorities.

As the name suggests, Indian persuasive authorities are not binding. The proper way to understand and determine the authenticity of these Indian persuasive authorities for the purpose of constitutional interpretation is to analyse them in the context of the forum where they originate. For example, though the judgment of a High Court is binding on all the lower courts which fall within the territorial jurisdiction of such High Court, it only has a persuasive effect in relation to High Courts of other states and in relation to the Indian Supreme Court. Thus, in the context of lower courts in a particular State, the decision of the High Court of such State (forum) is considered as a binding authority. And in the context of a High Court of any State, the decision of other High Courts (forums) is only persuasive. Moreover, the decision of a division bench of the High Court (where such bench becomes a forum) is binding on a single bench of the same Court. Similarly, while the decisions of the Supreme Court of India are binding on all the courts of the country, the Supreme Court itself is not bound by its own decision, except where such decision is given by a bench with higher number of judges.

Besides these, there are a number of other tools of interpretation used by courts in India to determine the intention of the law makers. Even though these tools of interpretation are found within the statutes themselves and do not qualify as judge-made jurisprudence per se, it would still be pertinent to note them here as a large portion of jurisprudence associated with these

[15]East India Commercial Co., Ltd. &Anr. v. The Collector of Customs, Calcutta, 1963 SCR (3) 338, 366; Deep Chand Jain v. Board of Revenue, AIR 1966 All 412, ¶ 24-25.

canons of interpretation has been evolved by courts. These tools, which are found within the statute itself, have been classified as internal aids of interpretation and external aids of interpretation. All of these aids or gears of interpretation fall within Indian persuasive authorities. Justice G.P. Singh has provided a comprehensive list of tools which the courts use for constitutional and statutory interpretation.[16] The internal aids of interpretation as enumerated by Justice Singh include long title[17], preamble[18], preamble of the constitution[19], headings[20], marginal notes[21], punctuation[22], illustrations[23], definition sections or interpretation clauses[24], proviso[25], explanation[26], schedules[27], and transitional provision[28]. The external aids of interpretation enumerated in the list[29] include parliamentary history[30], historical facts and circumstances[31], later socio-economic, political developments and scientific inventions[32], reference to other statutes[33], dictionaries[34] and the use of foreign decisions[35]. It is pertinent to

[16] G.P. Singh, *Principles of Statutory Interpretation*, Lexis NexisButterworthsWadhwa Nagpur, New Delhi, 2010, pp. 155-354.

[17]Ibid. at 155-58.

[18]Ibid. at 158-65.

[19]Ibid. at 165-66.

[20]Ibid. at 167-70.

[21]Ibid. at 171-72.

[22]Ibid. at 172-74.

[23]Ibid. at 175-78.

[24]Ibid. at 178-95.

[25] Ibid. at 195-212.

[26]Ibid. at 212-15.

[27]Ibid. at 215-17.

[28]Ibid. at 217.

[29] Ibid. at 219-354.

[30]Ibid. at 219-47.

[31]Ibid. at 247-49.

[32]Ibid. at 249-98.

[33]Ibid. at 298-41.

note here that Justice G.P. Singh has simply classified these gears of interpretation as internal and external aids of interpretation and not as Indian and non-Indian persuasive authorities. While as most of these tools of interpretation fall within Indian persuasive authorities, foreign decisions do not. Moreover, G.P. Singh has not dealt with international law as a tool of constitutional or statutory interpretation.

1.2. Non-Indian persuasive authorities.

Foreign law and international law fall within the category of non-Indian persuasive authorities. Even though it may seem easy to distinguish between foreign and domestic persuasive authorities on the basis of their place or forum of origin, it certainly is not so. For example, even though the Indian Constitution has given legitimacy to a number of pre-Constitution laws by virtue of Article 372, there still exists a confusion in relation to law laid down by Privy Council and the Federal Court.[36] In multi-national states, with histories of colonialism, occupation and/or influence by others, and increasing legal inter-connectedness with other countries, the line between "foreign" and "domestic" for concepts as intangible as "legal principles" has always been imprecise and is becoming more so.[37] The common law principles and the British statutes adopted by us prior to and after the commencement of our Constitution, illustrate the difficulty of determining where domestic law ends and foreign law begins. The issue is further complicated by virtue of Article 372 of our Constitution which provides for continuance of those laws which

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[34]Ibid. at 349-51.

[35]Ibid. at 351-54.

[36] In order to see the list of pre-constitutional laws which continued to stay operational by virtue of article 372 of the Indian Constitution, *see* Law Commission of India, Fifth Report on British Statutes Applicable to India, May 1957, viewed on 26 April 2013, <https://lawcommissionofindia.nic.in/1-50/Report5.pdf> [hereinafter 5th Report].

[37] Smith 2006, *supra*note 5.

were in force prior to the commencement of our Constitution.[38] Even though this provision gives constitutional legitimacy to principles of common law and decisions of the Privy Council, it certainly does create some confusion about the extent to which these principles and decisions are enforceable. The pre-constitutional law, particularly decisions of the Privy Council, has therefore been treated as non-Indian persuasive authorities for the purpose of this article.

2.1. Foreign Judgments.

Non-Indian persuasive authorities or "foreign law" includes judgments and decisions of foreign courts and international courts and tribunals. In regards to this, MadhavKhosla argues that constitutional courts should not refer to judgments from whatsoever country they desire. He argues that while using the comparative approach, the courts should limit themselves to only a few well-recognised jurisdictions.[39] An emerging consensus suggests that while there are good reasons for judges to consider foreign law, this consideration is best limited to a narrow set of nations.[40] This set typically includes Western liberal democracies. There is no doubt that the Indian constitutional courts use foreign cases for the purpose of constitutional interpretation. In this regard, Adam Smith had conducted an empirical study to determine the extent to which the Supreme Court of India has cited and used foreign law from 1950 to 2005.[41] This article provides post-2005 data. However, the methodologies and the categorization used in this article slightly differ from the one used by Smith.

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[38] Art. 372, Constitution of India, 1950 (India).

[39] MadhavKhosla, 'Inclusive Constitutional Comparison: Reflections on India's Sodomy Decision',*American Journal of Comparative Law*, vol. 59, 2011, p. 911.

[40] Rosalind Dixon, 'A Democratic Theory of Constitutional Comparison', *American Journal of Comparative Law*, vol. 56, 2008, p. 980; Eric A. Posner & Cass R. Sustein, 'The Law of Other States', *Stanford Law Review*, vol. 59, 2006, p. 160; David Fontana, 'Refined Comparativism', *UCLA Law Review*, vol. 49, 2001, p. 539.

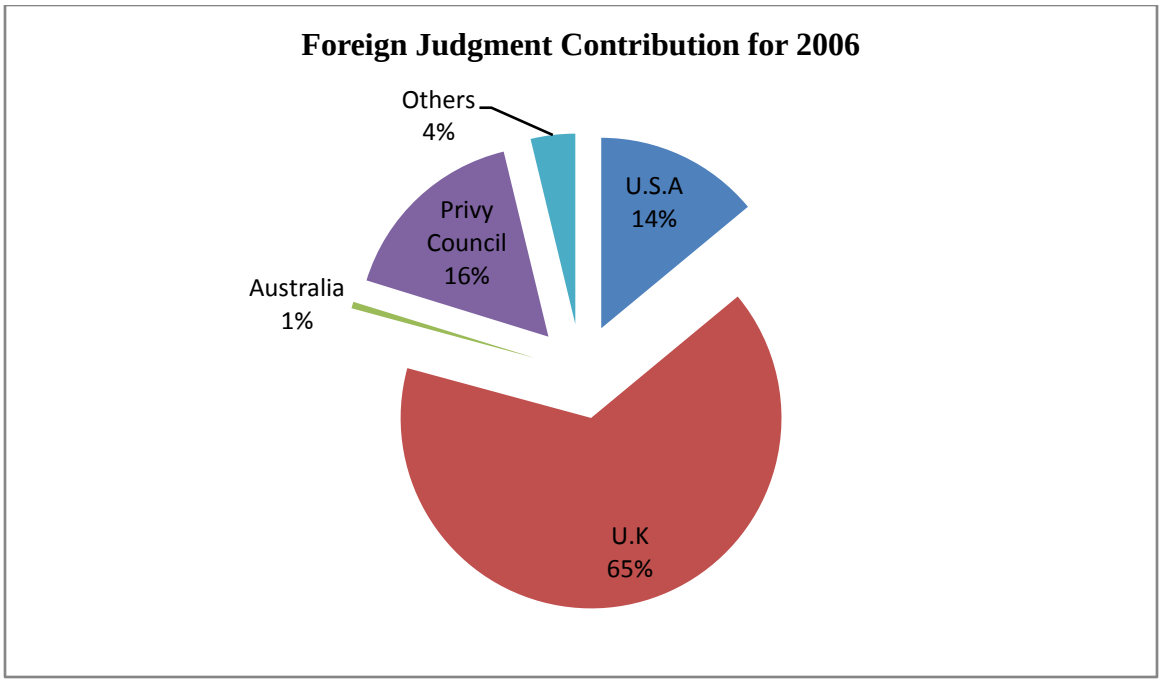
[41] Smith 2006, *supra*note 5 at p. 238-40.

In order to assess the use of foreign law, each of the Supreme Court's 21547 judgments[42] decided from 2006-2011 were examined for use of foreign cases. A total of 43407 judgments were cited in these judgments, out of which 3260 were foreign judgments amounting to 7.51%. Specific foreign jurisdictions for purposes of foreign decisions category in this article include those of the English courts, U.S. Courts, and Australian courts, whereas judgments from other foreign courts (including international courts and tribunals) have been categorised as 'others'. The judgments of the Privy Council have also been treated as foreign cases.

[42] This represents all judgments of the Indian Supreme Court from 2006 through 2011 as reported in the Supreme Court Cases (SCC) Reports.

Year	Cases decided	Cases Cited	Foreign Cases	%age of Foreign Cases.	Percentage of Country-Wise Contribution against the %age of foreign cases.				
					U.S.	U.K.	Australia	Privy Council	Others
2006	2923	5995	537	8.95%	13.7	64.2	0.55	16.20	3.72
2007	3888	7006	521	7.43%	11.9	67.3	0.95	16.69	3.07
2008	4048	7912	659	8.32%	16.8	65.0	1.36	14.11	2.57

2009	4555	8258	521	6.30%	14.0	58.9	1.72	22.64	2.68
2010	2670	6578	495	7.52%	15.5	63.0	0.60	16.16	4.64
2011	3427	7658	527	6.88%	11.7	70.2	1.38	11.38	5.50
Total	21547	43407	3260	7.51%	---	---	---	---	---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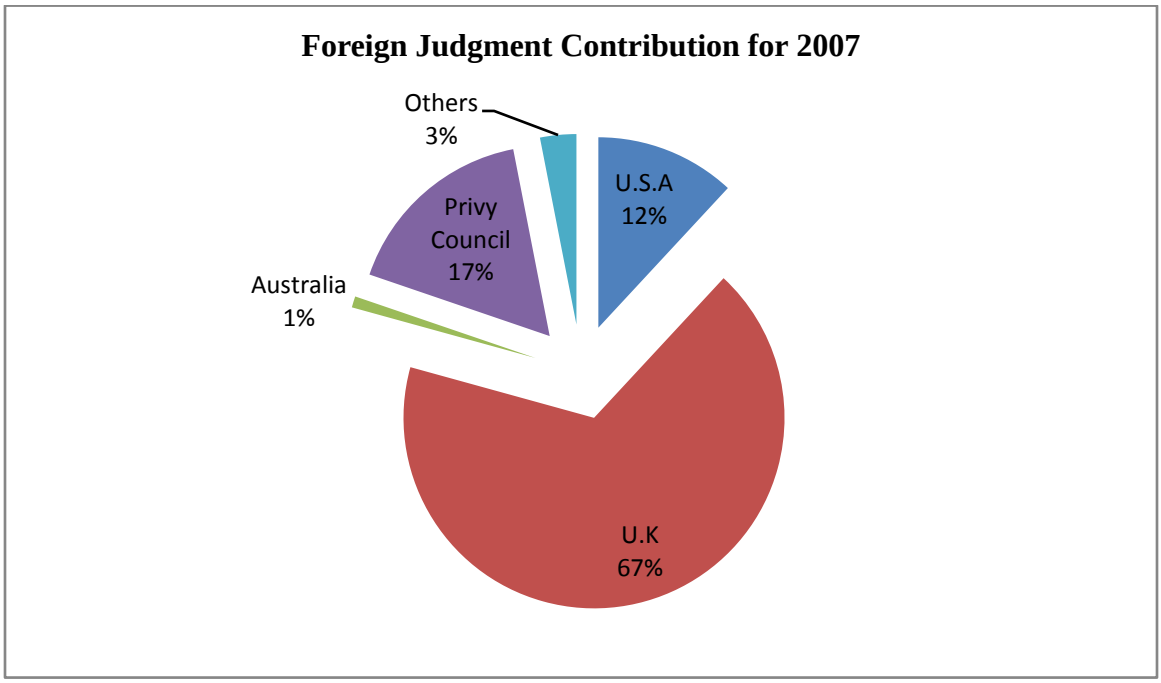
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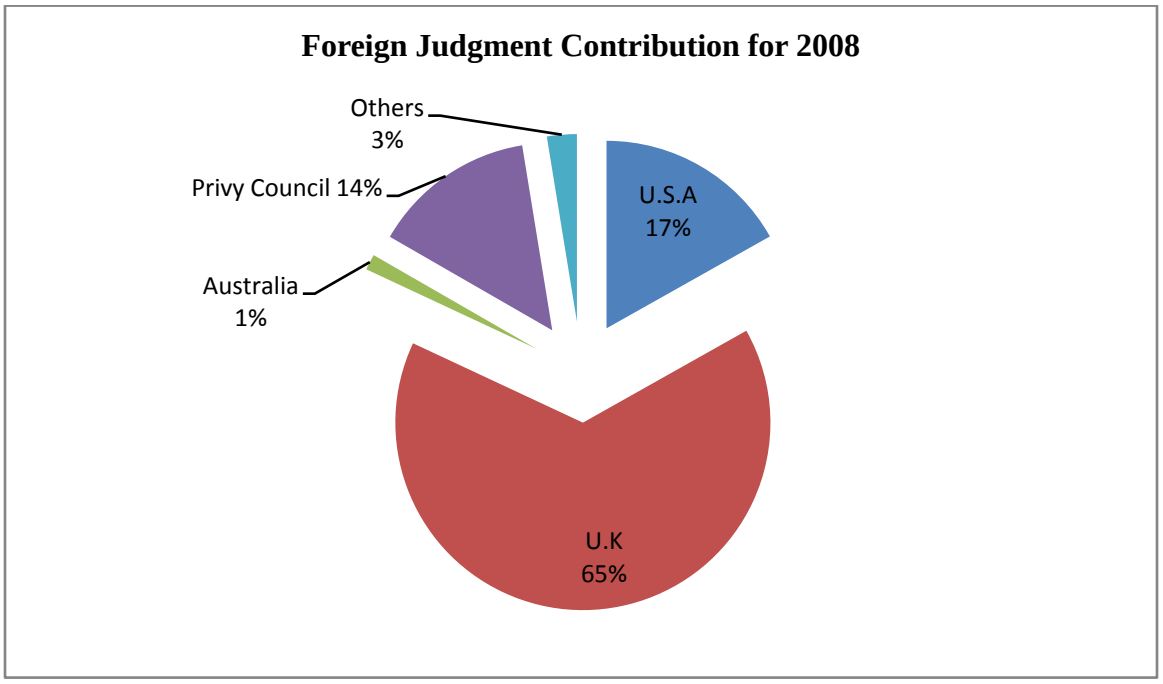
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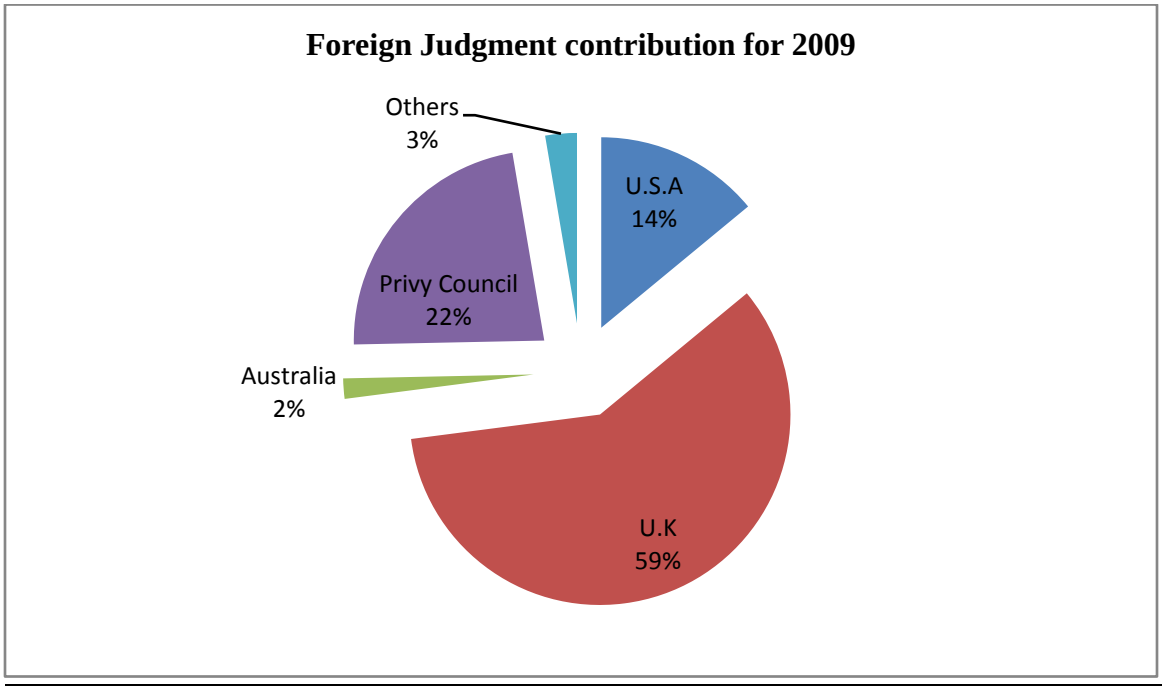
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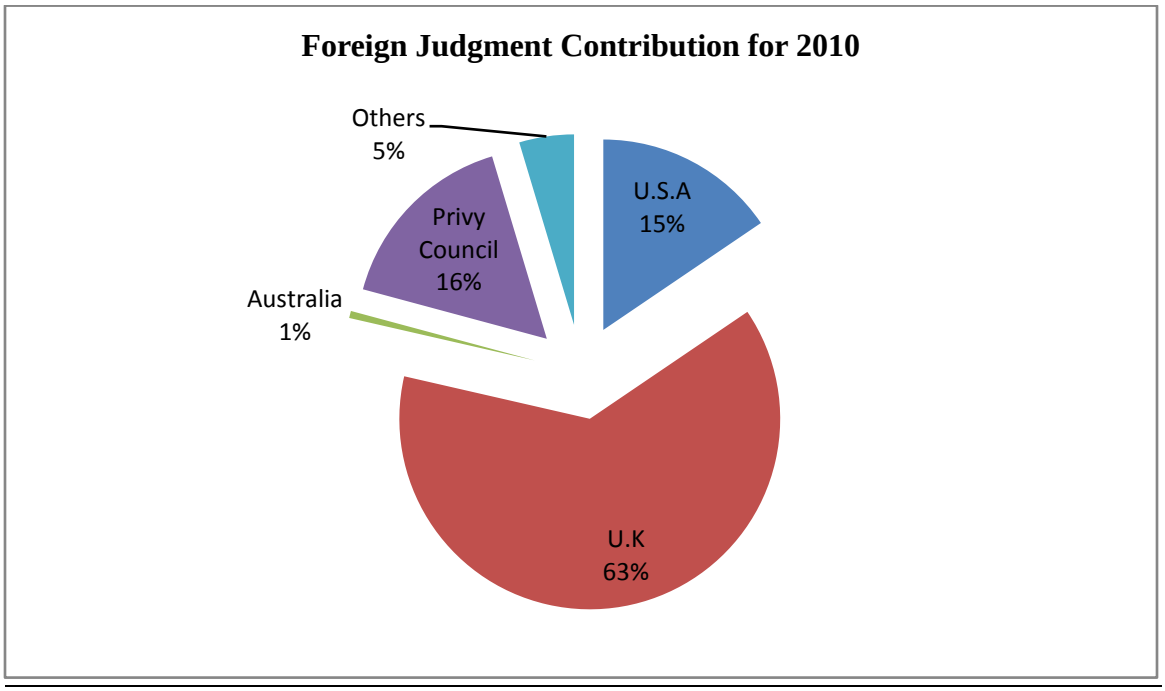
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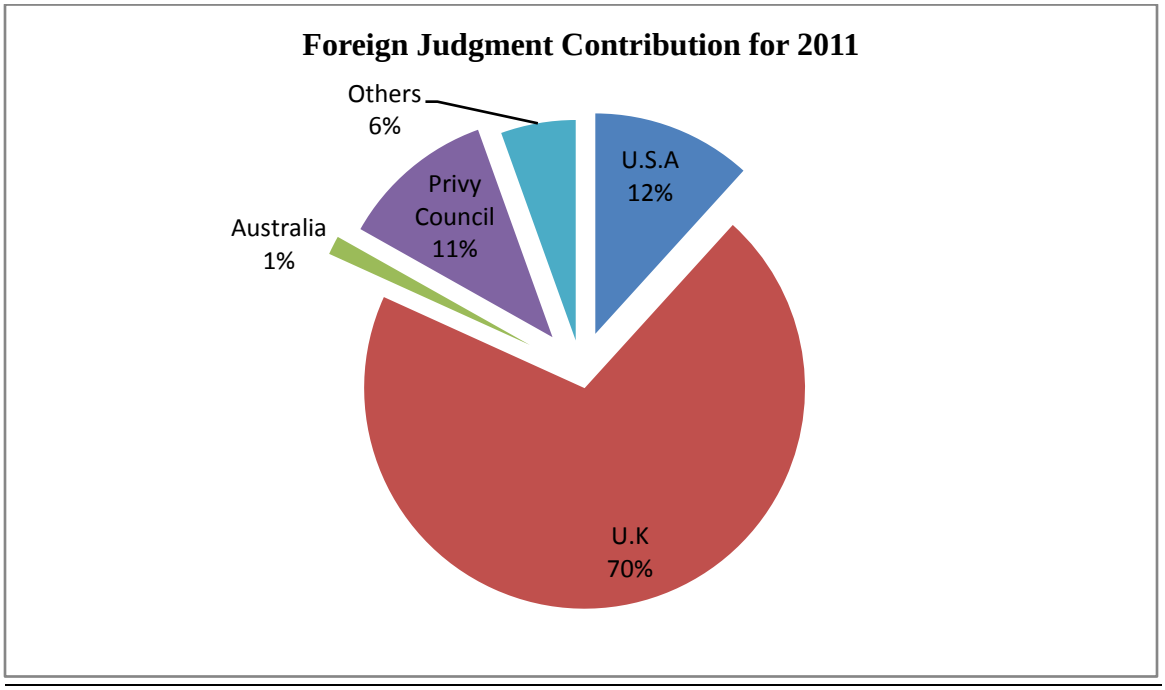
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Privy
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Australia
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U.K
70%

2.2. International Law.

The courts in India have used international law as a tool to interpret the Constitution. Article 51 (c) of the Constitution of India creates an obligation upon the state to "foster respect for international law and treaty obligations in the dealings of organised peoples with one another"[43] and subsequently provides the tool to enforce this obligation in article 253. Even though the Parliament of India has the sole authority to realize India's international obligation by enacting appropriate legislations, the Constitutional courts have exhaustively used international law to interpret the Constitution. As far as implementation of international law is concerned, the UN Environment Programme (UNEP) guidelines on compliance with, and enforcement of, multilateral environmental agreements (MEAs) provides that "implementation" encompasses, "*inter alia*, all relevant laws, regulations, policies, and other measures and initiatives, that contracting parties adopt and/or take to meet their obligations under a multilateral environmental agreement and its amendments, if any."[44] These guidelines, which primarily deal with the implementation of international law directly within the domestic legal framework, also include such implementation through courts. In this sense, international law has been used not only to create, interpret and explain new substantive laws, but also as a tool to interpret the obligations of States.[45]

[43] Art. 51(c), Constitution of India, 1950 (India).

[44]UNEP Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements, viewed on 30 March 2013,<http://www.unep.org/delc/Portals/119/UNEP.Guidelines.on.Compliance.MEA.pdf>.

[45]Kayano et al. v. Hokkaido Expropriation Committee, 127 ILR 173 [Japan, Sapporo District Court, 27 March 1997].

A perfect example of use of international law for the purpose of Constitutional interpretation is the case of *Vishaka v. State of Rajasthan*[46], where the Hon'ble Supreme Court noted that "in absence of appropriate and effective domestic law, international legal instruments can be used as tools of interpretation to find an effective alternative mechanism."[47]. The court while formulating guidelines to protect women against sexual harassment at all work places noted : "In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places…"[48] international conventions may be used.

The Supreme Court's environmental law jurisprudence is disseminated with the use of foreign law for creating an effective environmental law regime in India. In all these cases, international environmental law has been used 'substantively' to develop a unique domestic environmental jurisprudence by blending Indian environmental law with international environmental law.[49] In the *Vellorecase*[50], the court considered a public interest litigation highlighting the discharge of toxic waste and polluted water from a large number of tanneries in the State of Tamil Nadu. A three judges' bench led by Justice Kuldip Singh adopted a very strict stand against the polluting tanneries. The court reviewed the history of evolution of sustainable development under international law and referred to important legal developments such as the Stockholm Conference 1972, Burndtland Commission Report, 1987, Caring of the Earth Report, 1991, Rio Conference, 1992, Convention on Climate Change, 1992, Convention on Biological

[46]AIR 1997 SC 3011.

[47]Ibid. at 2.

[48]Ibid. at 7.

[49]Shailendra Kumar Gupta, 'Principles of International Environmental Law and Judicial Response in India', *Banaras Hindu University Law Journal*, vol. 37, Jan. 2008- Dec. 2009, p. 140 [hereinafter Gupta 2009].

[50]Vellore Citizens' Welfare Forum v. Union of India (1996) 5 SCC 647 : AIR 1996 SC 2715 [hereinafter Vellore 1996].

Diversity, 1992 and Agenda -21 (A programme of Action for Twenty-first Century) etc. to give its decision.

3. Manifestation in constitutional Interpretation.

As far as interpretation of the Constitution is concerned, "non-Indian persuasive" authorities have been used as tools of Constitutional interpretation in a 'positive' and 'negative' manner. To be used in a positive manner means that while interpreting the Constitution, the courts will directly or indirectly incorporate such authority within its decision. Using non-Indian persuasive authorities in such a manner would primarily include following situations[51].

3.1. Use of foreign law to develop already existent law.

In such situations, the Constitutional courts have used foreign law for guidance on general principles of Constitutional law which are similar across jurisdictions. For example, in *ChiranjitLal v. Union of India*[52], while highlighting the power of the State to regulate certain rights of the citizens and justifying the reasons of the court to uphold the constitutionality of a Central Statute, Justice Fazl Ali referred to the U.S. doctrine of 'police power' and explained that the expression "simply denotes that in special cases the State can step where its intervention seems necessary and impose special burdens for general benefit." He quoted from the judgment of Justice Field in *Barbier v. Connolly*[53] to elucidate this further. Justice Fazl Ali emphasised that though he was relying upon a U.S. case, "the principles underlying what is known as police

[51] It needs to be kept in mind that the categorization is not exhaustive. It is also not exclusive and in a number of cases they overlap.

[52] AIR 1951 SC 41 [hereinafter ChiranjitLal].

[53] Barbier v. Connolly 113 US 27 (1884).

power in the United States of America are not peculiar to that country but are recognized in every modern civilized State."[54]

This category includes those cases where the Supreme Court has used foreign authorities to expand the ambit of some of the fundamental rights. An example in this case would be the use of foreign authorities in the interpretation of fundamental right to freedom of speech and expression. It is interesting to note that in this regard the Supreme Court has used non-Indian persuasive authorities not only to expand the ambit of Article 19 (1) (a) of the Constitution, but also to give a narrow meaning to article 19 (2) of the Constitution which imposes reasonable restrictions on freedom of speech and expression. A detailed analysis of following case laws would elaborate the influence of non-Indian persuasive authorities in the interpretation of freedom of speech and expression.

3.1.1. RomeshThappar v. State of Madras[55].

The case involved a challenge to the constitutional validity of Section 9 (1-A) of Madras Maintenance of Public Order Act, 1949 and an executive order made under it banning the entry and circulation of petitioner's weekly journal 'CROSSROADS' within the State of Madras. It was contended that this violated the petitioner's fundamental right to free speech and expression. The Supreme Court of India referred to foreign authorities in two regards. Firstly, it referred to two U.S. cases to expand the scope of Article 19 (1) (a) so as to incorporate freedom of press

[54]CharanjitLal, *supra* note 51 at ¶17.

[55]AIR 1950 SC 124 [hereinafter Thappar].

within its ambit. Referring to *Ex parte Jackson*[56]and *Lovell v. City of Griffin*[57], PatanjaliSastri, J. (speaking for the majority) stated:

> "*Turning now to the merits, there can be no doubt that freedom of speech and expression includes freedom of propagation of ideas, and that freedom is ensured by the freedom of circulation. Liberty of circulation is as essential to that freedom as the liberty of publication. Indeed without circulation the publication would be of little value*."[58]

Secondly, the Court used the U.S. case of *Near v. Minnesotta*[59] to give strict interpretation to Article 19 (2) of our Constitution which imposes reasonable restrictions on freedom of speech and expression. Stating that the framers of our Constitution looked upon this right in the same manner as the framers of the U.S. Constitution, the Court justified its reason to declare that the impugned section and order did not satisfy the reasonable restrictions test as laid down in Article 19 (2) of our Constitution. In this regard the Court stated:

> "*[…..]. A freedom of such amplitude might involve risks of abuse. But the framers of the Constitution may well have reflected, with Madison who was 'the leading spirit in the preparation of the First Amendment of the Federal Constitution', that ' it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits"*"[60]

[56]96 U.S. 727 (1877).

[57]303 U.S. 444 (1938).

[58]Thappar, *supra* note 54 at 127.

[59]283 U.S. 697 (1931) at 717-18.

[60] Ibid.

The same line of argument was followed by the Supreme Court in *BrijBhusan v. State of Delhi*.[61] Declaring freedom from restraint on pre-publication to be part of freedom of press, the Hon'ble Supreme Court relied on *Ramesh Thappar's*case and quoted following passage from Blackstone's commentaries to declare Section 7 (1) (c) of East Punjab Public Safety Act, 1949 as unconstitutional:

> "*..the liberty of the press consists in laying no previous restraint upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press.*"[62]

3.1.2. *Express Newspaper Ltd. v. Union of India*[63]

After *RomeshThappar*and *BrijBhushan*, this case highlights the influence of foreign authorities, particularly U.S. Supreme Court, in the interpretation of Article 19 (1) (a) of our Constitution. What is unique about this case is that the Supreme Court used foreign authorities not only to expressly declare freedom of press as part of freedom of speech and expression, but also to highlight the importance of reasonable restrictions on the exercise of such right. It did so to highlight the difference between the 'reasonable restrictions' as they exist in India and in U.S.A.

The Supreme Court in this case expressly declared 'freedom of press' as a fundamental right. Declaring freedom of speech and expression under Article 19 (1) (a) of our Constitution to be based upon the First Amendment of the U.S. Constitution, the Supreme Court discussed a

[61]AIR 1950 SC 129.

[62] Ibid.

[63] AIR 1958 SC 578 [hereinafter Express].

plethora of U.S. cases to firstly, highlight the importance of the right to freedom of press as a fundamental right; and secondly, to state that this right is not absolute.[64]Further, before discussing the U.S. cases, the Supreme Court also discussed the Report of the Commission on Freedom of Press in the United States of America to highlight the scope of freedom of press vis-à-vis freedom of speech and expression.[65] An analysis of the U.S. cases discussed by the Supreme Court in *Express Newspaper* shows that the court felt it necessary to discuss these cases in order to highlight the nature and scope of freedom of press. Referring to *Grosjean v. American Press Co.*[66], the Supreme Court highlighted the fact that a free press increases the ability of citizens to exercise their rights intelligently.[67] And, in order to emphasize the importance of keeping freedom of press free from any governmental restrictions, the Supreme Court cited the case of *Schneider v. Irvingtor*[68] wherein the U.S. Supreme Court had observed as follows:

> "*This court has characterized the freedom of speech and that of press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free Government by free press. It stresses as do many opinions of this court the importance of preventing the restriction of enjoyment of these liberties."*[69]

The Supreme Court went on to cite dissenting opinions from various U.S. cases in order to further justify the express declaration of freedom of press as part of freedom of speech and

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[64]Ibid. at 614-20

[65]Ibid. at 614.

[66]297 U.S. 233 (1936).

[67] Express, *supra*note 62 at 615.

[68]308 U.S. 147 (1939).

[69] Ibid.at 164; Express, *supra*note 62 at 615.

expression. Calling such opinions to be "instructive", the court cited the following passage from the dissenting opinion in *Associated Press v. National Labour Relations Board*:[70]

> "*If the freedom of press does not include the right to adopt and pursue a policy without governmental restriction, it is a misnomer to call it freedom. And we may as well deny at once the right to the press freely to adopt a policy and pursue it, as to concede that right and deny the liberty to exercise an uncensored judgment in respect of the employment and discharge of the agents through whom the policy is to be effectuated."*[71]

The second reason for which the U.S. cases were used was to state the importance of imposing reasonable restrictions on freedom of speech and expression, and to highlight how such restrictions work differently in India and in the U.S. Even though the Constitution of the U.S.A. does not impose any restrictions on freedom of speech and expression, the U.S Supreme Court has never regarded this right to be absolute.[72] It unanimously stated in *Chaplinsky v. New Hampshire*[73] that there are "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem" and which may include within its ambit "the lewd and obscene, the profane, the libellous, and the insulting or 'fighting' words….". The Indian Supreme Court, in *Express Newspaper*, borrowed similar arguments from a number of U.S. cases to highlight the necessity of legitimately regulating free speech. Referring again to the case of *Grosjean v. American*

[70]301 U.S. 103 (1937).

[71] Ibid. at 963; Express, *supra*note 62 at 615.

[72]Russel L. Weaver, Steven I Friedlandet. el., *Constitutional Law: Cases, Materials & Problems*, Aspen Publishers, 2006, p. 776.

[73]315 U.S. 568 (1942).

Press[74], the Supreme Court of India took the following passage from it to highlight that newspapers and press are not immune from the general laws of the land:

> "*It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for the support of the Government….*"[75]

Similarly the Supreme Court referred to the case of *Murdock v. Pennsylvania*[76], *Oklahoma Press Publishing Co. v. Walling*[77], and *Mabee v. White Planis Publishing Co.*[78] to highlight that constitutional rights, specifically freedom of speech and press, are not and cannot be absolute. However, the Supreme Court impliedly pointed out to the difference between the manner in which speech is regulated in the U.S. and in India. While in the U.S., it is the Supreme Court which has from time to time highlighted the restrictions that can be imposed on freedom of speech and that of the press; in India for a law to survive as a legitimate restriction, it has to fall within the ambit of Article 19 (2).[79]

3.2. Use of foreign law to fill in the lacunae left by legislature.

The Supreme Court has in a number of cases noted the lack of the Indian legislation in certain fields and has used foreign law as a tool fill in such lacunae. The case of *D.K. Basu v. State of*

[74] *Supra* note 64.

[75] Ibid.

[76] 319 U.S. 105 (1952).

[77] 327 U.S. 186 (1945).

[78] 327 U.S. 178 (1945).

[79] Express, *supra* note 62 at 617.

West Bengal[80] serves an example. The case was a public interest litigation filed by Shri D.K. Basu praying the court to formulate effective mechanism for the protection of under-trials against deaths in lock-ups and custody. Acknowledging that custodial death and torture were an all-India problem the Court ordered all the States to present their position on the same.[81] The Court then referred to a plethora of cases from the U.S. and the U.K. to firstly point out that "custodial violence and abuse of police power is not only peculiar to [India], but it is widespread. It is the concern of the international community because the problem is universal and the challenge is almost global'[82] Referring to the Report of a Royal Commission of Criminal Procedure by Sir Cyril Philips Committee as instructive, the court discussed its recommendations in detail.[83] The court then referred to cases from America[84], Privy Council[85], Ireland[86] and New Zealand[87] to highlight the safeguards that these countries have in place to deal with the misuse of police power and to lay down similar guidelines for our criminal justice system.[88]

3.2.1. Use of foreign law to develop a new law altogether

There is a strong tendency that this category may overlap with the above category. However, in this category the extent to which the Constitutional courts rely on foreign law is much more

[80](1997) 1 SCC 416 [hereinafter Basu].

[81]Ibid. at 423.

[82]Ibid. at 424-25.

[83]Ibid. at 425-26.

[84]Miranda v. Arizona, 384 U.S. 436 (1966), Chambers v. Florida 309 U.S. 227 (1940).

[85]Maharaj v. Attorney General of Trinidad and Tobago (No. 2) (1978) 2 All ER 670 : (1978) 2 WLR 902 : 1979 AC 385, PC ; Jaundoo v. Attorney General of Guyana 1971 AC 972 : (1971) 3 WLR 13, PC.

[86]Byrne v. Ireland 1972 IR 241.

[87]Simpson v. Attorney General 1994 NZLR 667.

[88]Basu, *supra* note 79 at 435-36.

than the other two categories. Such kind of foreign law application does not only permit relying upon international laws and norms as persuasive authority for deciding domestic legal issues but encourages such practice as well.[89] The evolution of Indian environmental jurisprudence by the constitutional courts is the perfect case to fall within this category. Virtually all of the Indian legal jurisprudence in relation to environmental law has been developed by the Supreme Court through the Constitution. The Supreme Court has developed a reputation of being an activist Court[90] that has, since mid-1980s, transformed itself into a guardian of India's natural environment.

Majority of principles of environmental governance which find their origin in international law have been used by Hon'ble Supreme Court of India to build a comprehensive environmental protection in India. The sources of international law as elucidated in Article 38 of the Charter of the ICJ apply equally to international environmental law. However, being a very new area of international law, international environmental law is mostly found in international and regional conventions and treaties. The existing international environmental law principles have been enshrined in a number of international law instruments such as the Stockholm Declaration, the Rio Declaration and various framework conventions. A number of international institutions have also spelled out principles in resolutions or declarations such as the 1978 UNEP Draft Principles of Conduct on Natural Resources Shared by Two or More States (UNEP Draft Principles). The Supreme Court has referred to most of these international instruments to develop environmental jurisprudence in India. In this regard, the Supreme Court while highlighting the importance of

[89] Roper v. Simmons, 543 US 551, 575-76 (2005) (relying on international human rights law in deciding that execution of juveniles under age 18 is unconstitutional).

[90] UpendraBaxi, 'The Avatars of Indian Judicial Activism: explorations in the Geographies of [In]Justice', in S.K. Verma , et. al. eds., *Fifty Years of the Indian Supreme Court: Its Grasp and Reach*, Oxford University Press, New Delhi, 2000, p. 156-21 [hereinafter Avatars].

international environmental principles, stated in *Vellore Citizens Welfare Forum v. Union of India*[91] as follows:

> "*The traditional concept that development and ecology are opposed to each other is no longer acceptable. 'Sustainable Development' is the answer. In the international sphere 'Sustainable Development' as a concept came to be known for the first time in the Stockholm Declaration of 1972….During the two decades from Stockholm to Rio 'Sustainable Development' has come to be accepted as a viable concept to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting eco-systems. 'Sustainable Development' as defined by the Burndtland Report means 'Development that meets the need of the present without compromising the ability of the future generations to meet their own needs'*"[92]

Moreover, the Hon'ble Supreme Court has also referred to other principles of international environmental law like precautionary principle[93], polluter pays principle[94], and principle of inter-generational equity[95].

In all these three categories, engaging in comparative legal study involves direct or indirect incorporation of foreign law within domestic jurisprudence. However, it is not necessary for every comparative study to end in the incorporation of foreign law. This is where the use of

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[91](1996) 5 SCC 647:AIR 1996 SC 2715.

[92]Ibid.at 657-60.

[93] See Vellore 1996, *supra* note 49.

[94] See Indian Council for Enviro-Legal Action v. Union of India 1996 (3) SCC 212; See also Government of India, National Environmental Policy, 2006, viewed on 16 September 2013,<http://envfor.nic.in/sites/default/files/introduction-nep2006e.pdf>.

[95]T.N. GodavarmanThirumulpad v. Union of India &Ors.(1997) 2 SCC 267.

foreign law in 'negative manner' would come into picture. The use of foreign law in negative manner would involve discussing the foreign law but not incorporating or applying it. The cases where the courts in India use the foreign law to distinguish such laws from Indian law are an example of the manner in which the foreign law can be used in negative manner. In this regard the modification of the concept of "strict liability" to "absolute liability" for Indian purposes is a perfect example.[96] Moreover, sometimes where a case comes before a court which involves a question not previously decided by it, the court will refer to foreign law in order to better understand the legal questions before it. This characterisation of the use of foreign law is what has been described by SujitChoudhry as "dialogical".[97] Under this "dialogical" model, "constitutional actors engage with comparative constitutional materials" with a primary goal of "identifying the normative and factual assumptions upon which they are based which sometimes results in "sharpen[ing] [one's] awareness of constitutional difference and facilitating a greater understanding of one's own legal system."[98] Vicki Jackson has similarly observed that "[e]ven if the reasoning of a foreign court ultimately is rejected, explaining why it is inapplicable or wrong could improve the quality of the Court's reasoning, making its choices more clear to the audience of lawyers, lower courts, legislators and citizens."[99] Reflections of this model are also found in abundance within the jurisprudence of the Supreme Court of India. In *BasheshарNath v. Union of India*[100], a majority of the Supreme Court held that even a voluntary waiver of a fundamental right by an individual was impermissible, and that none of the fundamental rights in India were

[96]M.C. Mehta v. Union of India, 1987 (1) SCC 395.

[97]SujitChoudhry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation', *Indiana Law Journal*, vol 74, 1999, p. 835 [hereinafter Sujit 1999].

[98]Ibid. at 837.

[99] Vicki C. Jackson, 'Narratives of Federalism: Of Continuities and Comparative Constitutional Experience', *Duke Law Journal*, vol. 51, 2001, p. 260-61.

[100]AIR 1959 SC 149.

capable of being waived. Justice SubbaRao wrote a separate judgment focusing on this issue alone, and directed much of it towards distinguishing the Indian situation from that in America. Justice SubbaRao forcefully argued that the U.S. approach to waiver of fundamental rights was unsuitable for Indian conditions. After sounding a general warning about the dangers of transplanting constitutional norms from different societies, he analysed the manner in which the fundamental rights in India, as well as the Bill of Rights in the US had evolved, and asserted that there were fundamental differences in the two processes, requiring a different approach to the issue of waiver in India. Justice Rao asserted that in the U.S., the rights of U.S. citizens had evolved through judicial decisions, and the judiciary had a free hand to evolve both the content of rights as well as limitations upon them, whereas "in India, the fundamental rights and their limitations are crystallized and embodied in the Constitution itself."[101] Justice Rao argued that in India, courts "cannot therefore import any further limitations on the fundamental rights other than those contained in Part III by any doctrine, such as "waiver" or otherwise". He also rejected the distinction drawn by the U.S. Supreme Court between different types of rights by contending that all the rights contained in Part III of the Constitution (which sets out the "Fundamental Rights") had "been introduced in public interest, and it is not proper that the fundamental rights created under the various provisions should be dissected to ascertain whether any or which part of them is conceived in public interest and which part of them is conceived for individual benefit."[102] Therefore, it is not necessary that engaging in cross-jurisdictional constitutional dialogue would necessarily include incorporation of constitutional provisions of other nations or international law within our Constitution.

[101]Ibid. at para 115.

[102] Ibid.

CONCLUSION.

The Constitutional courts in India have engaged in comparative constitutional law since the Constitution came into being. Unlike U.S.A., where such practice is looked upon with a lot of scepticism, the Constitutional courts in India have accepted this practice more enthusiastically. The non-Indian persuasive authorities, which primarily include judgments of foreign courts and international law, have brought Indian constitutional law in contact with foreign law and in the process played a crucial role in its transformation. The role played by these authorities in the interpretation of the Constitution is many folds. The Constitutional courts have used these authorities to evolve the already existing law, to interpret laws so as to fill in the lacunae left by the legislature, to develop new jurisprudence, and to identify the normative and factual assumptions in similarly placed constitutional cases. Even though the application of these authorities is done on a case-to-case basis and the extent to which the courts use these authorities varies from case-to-case, there is a need for a concrete and systematic methodology for their use. Such methodology would prevent the abuse of these authorities by the courts and would bring about objectivity within judgments.

PRESERVING THE FAITH: SUPREME COURT IN ORISSA MINING CORPORATION V. MINISTRY OF ENVIRONMENT & FORESTS AND ORS.

NiharikaBahl[1]

CASE STUDY

The Supreme Court's ruling on the Vedanta mining controversy in *Orissa Mining Corporation v. Ministry of Environment & Forests and Ors*,[2] while not being a final determination of the dispute, is significant because, for the first time, an attempt has been made to consider the rights of the indigenous people of the country within the framework of their indigenous identity. The Vedanta dispute has attracted worldwide attention. Owning to the similarity of the parties involved which includes multinational corporations, and state agencies pitted against the native DongriaKonds tribes. This has been dubbed as the real "Avatar" struggle.[3]

The present ruling comes from a petition filed by the OMC challenging the cancellation of the 'in-principle' approval granted by the respondent Ministry for the diversion of 660.749 hectares of forest land for mining of bauxite ore in Lanjigarh Bauxite Mines in Kalahandi and Rayagada Districts of Orissa. This was allegedly, contrary to the earlier orders passed by the Apex Court wherein the Court had granted clearance for the same upon the acceptance of a rehabilitation package by M/s Vedanta and M/s Sterlite and the state government. Subsequently, it had directed the Ministry to grant approval in accordance with law.[4] The Ministry's cancellation came in the wake of the Forest Advisory Committee's recommendations based on the reports of the Site

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[2]Writ Petition (Civil) 180 of 2011, dated 18.4.13, available at <http://judis.nic.in/supremecourt/>.

[3]*See* 'Avatar', (2009), viewed on 19 July 2013, <http://www.imdb.com/title/tt0499549/>

[4]*See* T,N. GodavarmanThirumalpad v. Union of India (2008) 9 SCC 711.

Inspection Committee and the Dr.NareshSaxena Committee which had raised concerns about the 'blatant disregard for the rights of the tribals'.[5]

The Supreme Court has sought to consider this issue keeping in mind that "tribes have great emotional attachments to their lands".[6] This is a huge step forward in acknowledging the indigenous identity of the tribes in India. The term 'indigenous' being used uninhibitedly by the Court is another significant departure from the norm. Despite having the highest concentration of indigenous people in the world, with a population of nearly a hundred million comprising of 8.2% of the total population of the country,[7] the term 'indigenous' is missing from the official lexicon. Tribes in India are designated by various names ranging from tribes or scheduled tribes to *vanvasi* (forest dwellers) or *adivasi* (original inhabitants), the last conforming most closely to the term 'indigenous people'. India has hitherto strongly resisted the application of the term 'indigenous' to its tribal populace.[8] The reason for this lies in the understanding of the term and the internationalising of the rights and privileges associated with it.[9]

The celebrated Martinez Cobo Study commissioned by the United Nations defined 'indigenous people' as 'communities, peoples and nations having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories'.[10]This historical continuity is borne out by any of the following factors:

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[5]*Supra* 1, para 15.

[6]*Id.*, at para 33.

[7]Census of India 2001,<http://www.censusindia.net/>.

[8]While India is a signatory of the ILO Convention No.107 of 1957 and has voted in favour of the non-obligatory UN Declaration of 2007 it has steadfastly refused to ratify the ILO 169 convention of 1989.

[9]See VirginiusXaxa , Tribes as Indigenous People of India, *Economic and Political Weekly*, Vol 34, December 18th 1999, p. 3589.

[10]Martinez Cobo report Para 378-379 as cited in United Nations State of World Indigenous People Report, 2009, p. 27, <www.un.org/esa/socdev/unpfii/documents/SOWIP_web.pdf>.

a. Occupation of ancestral lands, or at least of a part of them
b. Common ancestry with the original occupants of these lands
c. Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.)
d. Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language)
e. Residence in certain parts of the country, or in certain regions of the world
f. Other relevant factors.[11]

Apart from the distinctive cultural traits of language, customs, social traditions, institutions and affinity to the lands occupied by the indigenous people or their ancestors, what distinguishes or marks out the indigenous people from the rest of the society is their marginalisation from the mainstream of national life which leaves them vulnerable to discrimination and exploitation. Despite occupying territories that are rich in natural resources, the indigenous people constitute the poorest of the poor across the world,[12]and happen to be the most marginalised and disenfranchised. It is the recognition of these characteristics of the indigenous people which has made them entities in their own right in the international field. The most singularly critical component of their identity is their deeply symbiotic relationship with land.[13]'Land is the

[11]*Ibid*.

[12] See United Nations State of World Indigenous People Report, 2009, <www.un.org/esa/socdev/unpfii/documents/SOWIP_web.pdf>.

[13]See ILO Convention of 1989, No. 169, Article 13.

foundation of the lives and cultures of indigenous peoples all over the world.'[14] Therefore, Article 26 of the UN Declaration on the Rights of Indigenous Peoples, 2007 emphatically states that "*indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.*"[15]

The Supreme Court in its judgement has acknowledged the deep affinity of the tribes to their land. The Court also took note of the various constitutional provisions pertaining to tribal rights and lands- the Fifth Schedule (for protection of the tribal lands) and Articles 25 and 26 (which safeguards the right to worship) as well as those of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 [better known as the Forest Rights Act (FRA), 2006], which recognizes the customary rights of the Schedules Tribes and other forest tribes. It then concluded that the *GramSabha*s, functioning under the FRA read with Section 4(d) of Panchayat (Extension to Scheduled Areas) Act, 1996 (PESA Act), have "an obligation to safeguard and preserve the traditions and customs of the STs and other forest dwellers, their cultural identity, community resources etc."[16] Therefore, the *Gram Sabha*must examine the questions as to whether STs and other traditional forest dwellers (TFD), like DongariaKondh, KutiaKandha and others, have any religious rights i.e. rights of worship over the Niyamgiri hills, known as Nimagiri, and the hill top known as Niyam-Raja and whether the proposed mining area Niyama Danger, 10 km away from the peak, would in any way affect the abode of Niyam-Raja. If it does affect the Niyam Raja, then the tribes' right to worship has to be preserved and

[14]*Supra* 9 at 54.

[15] United Nations Declaration on the Rights of the Indigenoues Peoples, 2007, <http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf>.

[16]*Supra* 1 at para 58.

protected.[17] The Supreme Court has noted that this aspect of the matter has not been considered by the *GramSabha*s and only the individual and community claims have been settled.

The Court, however, has not given full currency to the land rights of the tribal people as developed in their indigenous legal system. This can be contrasted with the notable judgment delivered by the Australian High Court in *Mabo* v. *Queensland (II)*,[18] wherein it reversed more than a century of Australian jurisprudence and official policy and recognized the 'native title,' i.e. a right of property based on indigenouspeople's customary land tenure. In the leading opinion, Justice Brennan characterized as "unjust and discriminatory" the past failure of the Australian legal system to embrace and protect native title. Justice Brennan explained the basis for aboriginal land and resource rights, particularly native title, as follows:

"Native title has its origins in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs. (...) Native title (...) may be protected by such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence (...) whether possessed by a community, a group or an individual. (...) Of course in time the laws and customs of any people will change and the rights and interests of the members of the people among themselves will change too. But so long as the peopleremain as an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, the communal

[17] *Ibid.*

[18] Mabo v. Queensland (II)[1992] HCA 2.

native title survives to be enjoyed by the members according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs, as currently acknowledged and observed".[19]

Disregarding the government's pleas of the applicability of the doctrine of *terra nullis*i.e. acquisition by settlement of unoccupied territory, and the doctrine of absolute crown ownership, the Court held that the failure to afford such protection to the property rights of the indigenouspeoples would accord illegitimate discriminatory treatment to their customary land tenure, in violation of the principle of equality under the law, specifically the Racial Discrimination Act.[20] This further provoked a debate on the need of a coordinated effort for the recognition of customary law and eventually led to the passing of the Native Title Act in 1993 which contained a statutory scheme for the recognition and protection of native title as provided under Aboriginal law.

In the instant case, the Supreme Court has ascribed the *vanvasi*'s affinity to his land as a mark of his faith and identity and guaranteed constitutional protection beyond the ambit of the FRA yet not in the manner of a right which he enjoyed under indigenous laws. The danger in this lies in the fact that it may eventually lead to an enquiry as to what constitutes the essential component of this faith, a dilution of the same and eventual management of the same by the government.[21]A scenario which may look like this-restriction of the right to worship to a limited stretch of the Niyamgiri hills and to limited duration and consequent erosion of tribal identity. Exercise of the

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[19]*Ibid.*

[20] Ian McDougall Ed., '*Cases that Changed Our Lives'*, LexisNexis,Great Britain, 2010, p. 74

[21]Sri Venkataramma v. State of Mysore, (1958) SCR 895; HanifQuerishi v State of Bihar, (1959) SCR 629; Durgah Committee, Ajmer v. Syed Hussain, (1962) 1 SCR 383. For a critique of the doctrine see Dhavan R. and Nariman F. "The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantaged Communities" in B. N.Kirpal et al Ed., 'Supreme but not Infallible: Essays in Honour of the Supreme Court of India' (OUP, New Delhi, 2001)

native rights under the indigenous laws would help maintain the integrity and sanctity of tribal affinity to land.

However, the fundamental difference between the Australian and Indian scenario lies in the fact that Australia, till *Mabo*, had never acknowledged or recognized indigenous laws. It had adopted a kind of abolitionist or exclusionary model of non-recognition of non-state legal regime.[22] From the time of the establishment of the British colony in Australia, the courts have treated Aborigines as British subjects who are subject to British law, in spite of fact that there has been no official abolition of Aboriginal law or Aboriginal Judicial System. In India, this has clearly not been the case. Right from the time of the framing of the Constitution, there was an understanding that the tribal communities, particularly those in the North-East, are self-regulatory with their own laws and be granted sufficient autonomy in their governance as is reflected in the Sixth Schedule and in later insertions like Articles 371A and 371G.[23] Even otherwise, the rights of the indigenous communities to have their own indigenous laws, customs and institutions as an integral part of their identity and culture finds protection under Article 29.

Drawing from *Mabo*, it can also be argued that a refusal to recognise the indigenous law and its consequent rights would run afoul of the cornerstone of our Constitution, especially Article 14, which guarantees equality before law and equal protection of the lawsin India. The term 'laws' as used in Article 14 has to be used in the context spelt out in Article 13,[24] and as such would cover customary indigenous laws. The failure to accept the same would amount to unfair discrimination. Applying such a rights based perspective would help enlarge the scope of

[22]Brynna Connolly, 'Non-State Justice Systems and the State: Proposals for a Recognition Typology', *38 Conn. L. Rev*. 239, December 2005.

[23]See Constituent Assembly Debates(CAD), Vol IX, See also B. Shiva Rao, 'The Framing of India's Constitution', Vol. 3, New Delhi: IIPA, 1968.

[24]See Sant Ram v. Labh Singh,(1964) 7 SCR 756, 759

indigenous rights from limited constitutional privileges to integral and essential rights. Applying this rights based perspective, the Forest Rights Act, in effect, only declares the rights already recognised by the Constitution.

The Forest Rights Act, 2006, enacted to redress the 'historic injustice' caused to the forest dwelling Scheduled Tribes on account of inadequate recognition of their 'forest rights on ancestral lands during the colonial period as well as in independent India',[25]vests a bundle of forest rights upon forest dwelling STs and other traditional forest dwellers. These are grouped as land rights, user rights, conservation rights and rehabilitation rights. Land rights include, *inter alia*, the right to hold forest land and live there as an individual or as a community and also to cultivate land for a livelihood.[26] Community rights included tenures of habitat for primitive tribal and pre-agricultural groups,[27] right to reclaim any disputed land over which forest dwellers earlier had user rights.[28] Community rights such as the right to graze cattle on forest land,[29] to fish and collect other products from water bodies,[30] right to collect, own, use and dispose of minor forest produce that has been traditionally collected within or outside village boundaries by forest dwellers commonly fall under user rights of the forest dwellers.[31] FRA allows for modification of these rights subject to 'free informed consent' of the *gram sabhas* of affected areas.[32]

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[25]The Scheduled Tribes & Other Forest Dwellers (Recognition of Forest Rights) Act 2006,(India)

[26]*Id.*, Section 3(1) (a).

[27]*Id.*, Section 3(1) (b).

[28]*Id.*, Section 3(1) (f).

[29]*Id.*, Section 3(1) (b).

[30]*Id.*, Section 3(1) (d).

[31]*Id.*, Section 3(1) (c).

[32]*Id.*, Section 4(2).

Despite the constitutional and legislative protection afforded to them, the sanctity of *adivasi* lands has systematically been eroded and has led to massive tribal displacement on account of the development agenda of the State. In *Manchegowda* v. *State of Karnataka*,[33]the validity of an enactment passed in Karnataka nullifying transfers of lands granted to Scheduled Tribes to non-tribal people was upheld by both the High Court and the Supreme Court. Yet, the Supreme Court was careful to read down the effect of the Act to transfers occurring prior to the passage of the Act. According to the Court, to hold otherwise would be a violation of the constitutional guarantee of the transferees.

In *Samatha* v. *State of Andhra Pradesh*,[34] the question before the Supreme Court was whether the prohibition on transfer of tribal land to a non-tribal contained in a state legislation would apply to the Government. The Supreme Court, by a majority, held that the prohibition applied in respect of government transfers too as any other interpretation would render the constitutional mandate under the Fifth Schedule ineffective. However, even here, the Court left a window for the State. Justice K. Ramaswamy wrote:

> "*The object of the Fifth and Sixth Schedules to the Constitution, as seen earlier, is not only to prevent acquisition, holding or disposal of the land in Scheduled Areas by the non-tribals from the tribals or alienation of such land among non-tribals inter se but also to ensure that the tribals remain in possession and enjoyment of the lands in Scheduled Areas for their economic empowerment, social status and dignity of their person. Equally, exploitation of mineral resources constituting the national wealth undoubtedly*

[33]Manchegowda v. State of Karnataka(1984) 3 SCC 301.

[34]Samatha v. State of Andhra Pradesh (1997) 8 SCC 191.

is for the development of the nation. The competing rights of tribals and the State are required to be adjusted without defeating the rights of either".[35]

In *Narmada BachaoAndolan* v. *Union of India*,[36] the Court held:

"*The displacement of the tribals and other persons would not per se result in the violation of their fundamental or other rights. The effect is to see that on their rehabilitation at new locations they are better off than what they were. At the rehabilitation sites they will have more and better amenities than those they enjoyed in their tribal hamlets. The gradual assimilation in the mainstream of the society will lead to betterment and progress*".

This theme was continued in *BalcoEmployees' Union (Regd.)* v. *Union of India*,[37] and *State of Kerala* v. *PUCL*.[38] In the *PUCL* case, the Court took the view that tribes did not have a 'vested right' to the lands under the Constitution or under Common Law. The right of the tribal people to the land was conferred under a statute and the same could be altered, amended or restricted. The Court asked whether Article 21 of the Constitution, which deals with the right to life and liberty, would include a right of the tribal people to be rehabilitated in their own habitat and stated that 'If the answer is to be rendered in the affirmative, then, for no reason whatsoever even an inch of land belonging to a member of Scheduled Tribe can ever be acquired'.[39]An inconceivable scenario according to the court.[40]

[35]*Id.*, para 110, per Ramaswamy J.

[36]Narmada BachaoAndolan v. Union of India(2000) 10 SCC 664.

[37]BalcoEmployees' Union (Regd.) v. Union of India (2002) 2 SCC 333, at page 374.

[38]State of Kerala v. PUCL(2009) 8 SCC 46.

[39]*Id*., para 103

[40]*Ibid*.

Faced as it has been with this considerable jurisprudence which does not even recognise a tribesman right of survival and livelihood through his land, the Supreme Court has still managed to adroitly craft a space for protecting the sanctity of *adivasi* land and life and located the same in the framework of fundamental rights which are to be implemented through the mechanism of the FRA. The final outcome of the dispute will be hard to predict but its consequences will be far-reaching. The case will serve as a test for the effective implementation of the FRA, for the reinforcement of constitutional guarantees towards tribal culture and life and for reclaiming the trust of the tribal communities in the Republic.

IS RIGHT TO ORAL HEARING A MANDATORY REQUIREMENT OF NATURAL JUSTICE?

A CASE-LAW ANALYSIS

AyushiSutaria[1]

INTRODUCTION

Hearing is an opportunity given to a person against whom an adverse action is proposed to be taken, in order to explain as to why it should not be undertaken.[2] It is trite law that the hearing ought to be 'fair'. The criteria of 'fairness' in administrative processes is described by the rules or principles of natural justice.[3] Such principles have been ingrained into the system of administration of justice. While the courts follow them through formal laws of evidence and procedure,[4] administrative authorities such as tribunals, disciplinary committees and statutorily designated authorities adhere to rules of natural justice to guarantee minimum norms of procedural fairness.

The principle of natural justice has two main limbs: *nemojudex in causasua* (the rule against bias) and *audialterampartem* (that no one ought to be condemned unheard). The underlying concepts are those of 'impartiality' and 'fairness'.[5] Though jurists may differ on the semantic question as to whether both concepts are to be put under the head of 'fair hearing' or discussed

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[2] S.P. Sathe, *Administrative Law*,Butterworths India, New Delhi, 1999, p. 187.

[3] *Ibid*, at p. 161.

[4] For instance, Code of Civil Procedure, Code of Criminal Procedure, The Indian Evidence Act.

[5] M.P. Jain, *Principles of Administrative Law*, Vol. 1, Wadhwa and Company, Nagpur, 2011, p. 425.

separately,[6] it has been widely accepted in administrative law jurisprudence that the right to a fair hearing cannot be dispensed with when an administrative decision leads to 'civil consequences' for a party.[7] The courts have built a kind of code of fair administrative procedure around this concept, an aspect of which is explored in the instant article.

The precise content of the *audialterampartem* principle is difficult to determine. What natural justice requires alters with time and circumstances. However, there are two main requirements to it: *firstly*, an opportunity of being heard must be given and *secondly*, such an opportunity must be adequate and reasonable.[8] Both these requirements are justiciable. Litigation under this head is generally for the issuance of a writ quashing the administrative authority's decision or directing some form of action to be taken.

In this article, the author explores one such claim falling under the latter category: as to when the standards of adequacy and reasonability require that an oral or personal hearing be given to the affected person. Given the widespread presence and diversity of administrative bodies, the question arises frequently in practice.

It is important to understand the judicially-evolved criterion that shape the content of an individual's hearing right in order to make sense of the plethora of cases over the topic. The intrinsic and instrumental utility,[9] of an adequate hearing procedure imparts the much desired credibility to administrative mechanisms, ensuring public faith and trust in the machinery.

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[6] Prof. Sathe discusses both the principles under the concept of fair hearing. On the other hand, Prof. M.P. Jain discusses them separately. Prof. Wade and Forsyth also refer to the traditional dichotomy between the two rules; Refer H.W.R. Wade and C.F. Forsyth, *Administrative Law*, Oxford University Press, New York , 2009, p. 402.

[7] *M.S. Gill* v *Chief Election Commissioner* AIR 1978 SC 851.

[8] S.P. Sathe, *supra* note 1, at p. 181.

[9] It serves manifold purposes of putting a check on arbitrariness, ensuring objective and impartial decision making, respecting the right to information, or dignity of the affected party. Its intrinsic value also consists in giving opportunity to individuals or groups for participating in the decision making process. Such a two-pronged purpose

PART I: THE TYPE OF HEARING: DETERMINING THE CONTENT OF PROCEDURAL PROTECTION

Having accepted the premise that a fair hearing procedure is a part of the legal system, the legal machinery will now have to decide the content of procedural protection. There are a number of options. At one end of the spectrum is an all-embracing procedural code; and at the other end are *ad hoc* judicial decisions. In between, there are various options. Either the courts may develop a general formula or the legislature may stipulate the content of process rights for certain type of hearings.[10] Alternatively, the content of hearing rights can be ascertained by a mixture of *ad hoc* case law combined with sector-specific legislation to apply the court's precepts.

The components of a fair hearing such as notice, disclosure of preliminary report, opportunity to a party to present one's case, legal representation, etc. have a flexible tenor in their scope. Their application varies from case to case. The underlying logic is that the concept of natural justice itself is a flexible one.[11] While the components of a 'fair hearing' are contextual, the manner in which the different stages can be adhered to also vary. Thus, a hearing may be through oral presentation or written representation.

In India, there is no general procedural code to determine the detailed content of procedural rights. Though sector-specific legislations do operate in particular areas, they themselves are not specific as to the type of hearing, whether oral or written. Though the position in U.K. is also similar, the courts therein have culled out some specific areas for operation of oral hearings, such as parole hearings. This kind of specificity is lacking in the Indian scenario, as the case-law illustrated in this paper will demonstrate. However, this paper will demonstrate how certain

was recognised by the Supreme Court in *Olga Tellis* v. *Bombay Transport Corporation*[1985] 2 Supp SCR 51.A fair hearing procedure is also conducive in assuring that substantive justice in the final outcome is done, and also "*manifestly appears to be done*". This often quoted aphorism is from the judgment of Lord Chief Justice Hewart in *R* v. *Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256.

[10] P. Craig, *Administrative Law*, Sweet and Maxwell, London, 2008, p. 388.

[11] M.P. Jain, *supra* note 4 at p. 429.

standards can be deduced from what initially appears as extremely diverse and fragmented case-law.

PART II: ADVANTAGES OF AN ORAL FORM OF HEARING

The term 'oral hearing' or 'personal hearing' has not been defined. However, the following observations made by J.M. Evans in the context of Canadian Administrative law do offer an insight: "*the phrase 'oral hearing' like many of the terms in administrative law can have different meanings or no clear meaning at all. (…) The most useful meaning of oral hearing is a proceeding that includes a minimum of face to face meeting with the other parties and the agency (officer who will hear) and an opportunity to make representations orally*".[12]

A spurge of litigation over the topic of personal hearing can be explained by taking into account the advantages of a personal or oral hearing over other forms. First of all, a two-pronged purpose (intrinsic and instrumental),[13] of a fair hearing procedure was recognised by the Supreme Court (SC) in the *Olga Tellis*case. It serves manifold purposes of putting a check on arbitrariness,[14]ensuring objective and impartial decision making, respecting the right to information, and dignity,[15] of the affected party. Its intrinsic value also consists in giving opportunity to individuals or groups for participating in the decision making process.[16] The resultant transparency imparts the much desired credibility to administrative mechanisms, ensuring public faith in the government machinery. It is also conducive in assuring that

[12] Evans *et al*, *Administrative Law: Cases Text and Mateirals* as cited in David P. Jones and Anne S. de Villars ,*Principles of Administrative Law,* Carswell Publications, Toronto, 1999, p. 253.

[13]P. Craig, *supra* note 9, at p. 372.

[14]This also confirms to the constitutional guarantee of non-arbitrariness which has been regarded as a facet of Article 14. (Refer *Delhi Transport Corporation* v. *D.T.C Mazdoor Congress* AIR 1991 SC 101).

[15]*Olga Tellis* v. *Bombay Transport Corporation*[1985] 2 Supp SCR 51.

[16]*Id.*

substantive justice in the final outcome,[17] is not only done but also "*manifestly appears to be done"*.[18]

In a recent 2011 decision,[19] the SC had explained the advantages of an oral hearing over other forms of representation. It was observed that "*Even written arguments are no substitute for an oral hearing. A personal hearing enables the authority concerned to watch the demeanour of the witnesses etc. and also clear up his doubts during the course of the arguments*".[20]

R (Smith) v. *Parole Board*,[21] is an authoritative decision of the House of Lords concerning oral hearings.[22] Speaking for the majority, Lord Bingham observed that it might often be very difficult to make effective representations without knowing the key points troubling the decision maker. Hence, the procedure should be reflective of the importance of what is at stake for the affected person and for the society.

Although in a different legal context, the importance of oral hearing vis-a-vis written representations was also expressed by Brennan, J. of the United States of America (USA) SC in *Goldberg* v. *Kelly*.[23] The advantages highlighted were as follows:

1. *Flexibility:* Written submissions do not permit the affected person to mould arguments as per the issues that the decision-maker appears (to him) to regard as most important.

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[17] All rules are designed to achieve a goal; for example, an office must be occupied only by a person of good character. Hence, a hearing before dismissal on grounds of professional misconduct can help ensure that this goal is correctly applied. This is the instrumental role that procedural fairness plays.

[18] This often quoted aphorism is from the judgment of Lord Chief Justice Hewart in *R* v. *Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256.

[19]*Automotive Tyre Manufacturers' Association* v. *Designated Authority* (2011) 2 SCC 258. Facts of the case have been discussed in detail in later part of the paper.

[20]*Per* D.K. Jain, J., *Automotive Tyre Manufacturers' Association* v. *Designated Authority*, (2011) 2 SCC 258.

[21]*R* v. *Parole Board* [2005] UKHL 1.

[22]Refer H.W.R. Wade and C.F. Forsyth, *Administrative Law*, Oxford University Press, UK, 2009, p. 432

[23]*Goldberg* v. *Kelly* (1970) 397 US 254.

2. To solve the issues of *credibility and veracity*.
3. *Possibility of a second hand presentation* to the decision maker may fail to emphasise the points that a party wants to raise.

Even though oral hearings offer manifold advantages, practicalities also need to be taken into account. The various case laws discussed in the subsequent chapters are illustrative of such a balancing function performed by the courts.

PART III: ORAL HEARINGS NOT A MANDATORY REQUIREMENT OF NATURAL JUSTICE

Courts have recognised that it is not possible for the administration to give such a hearing in all cases because it is time consuming, expensive,[24] and may lead to chaotic conditions.[25] A Constitutional Bench of the SC clarified the same in *Union of India* v. *JyotiPrakashMitter*.[26] In that case, the dispute related to the respondent's (judge) age and materials were forwarded by the Ministry of Home Affairs to the President. The respondent was asked to make written representations and forward the necessary evidence. Though requests for oral hearings were made, all his communications to the President happened only via the Ministry.[27] The respondent moved a writ petition in the High Court (HC) which was allowed *inter alia* on the ground that President, while exercising his quasi-judicial function, had not given a personal hearing to the petitioner. The court observed that the right to a fair hearing does necessarily include a right to personal or oral hearing. Since no personal hearing was mandated in Article 217, the question would be left to the discretion of the President and he may do so in appropriate cases.

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[24]M.P. Jain, *supra* note 4, at p. 490.

[25]*Jesus Sales Corporation* v. *Union of India* AIR 1996 SC 1509.

[26]*Union of India* v. *J. P. Mitter* AIR 1971 SC 1093.

[27] Art. 217(3) of the Indian Constitution (incorporated by 19th amendment but given a retrospective application) empowered the President to decide all disputes in relation to age of a judge in the High Court, in consultation with Chief Justice of India.

Although the judgment did not lay down the parameters for exercising such discretion, it is clear that the discretion had to be exercised fairly and reasonably. On the facts of the case, the court concluded that non exercise of discretion did not compromise on the standards of fairness as "*There were no complicated questions to be decided by the President*".[28] Moreover, the President had given ample opportunities at diverse stages to the respondent to make his representation.[29]

Later on, a similar stance was taken in *Union of India* v. *Jesus Sales Corporation*,[30] wherein the issue was whether an oral hearing needs to be given to the respondent under the Imports and Exports Control Act, 1950. The appellate authority was given the discretion to dispense with the pre-appeal deposit requirement of the payable duty and a question of the need for an oral hearing arose. The court held that "*If this principle of affording a personal hearing is extended whenever statutory authorities are vested with the power to exercise discretion in connection with statutory appeals, it shall lead to chaotic conditions*".[31] Thus, the opportunity to be heard does not necessarily mean a personal hearing. Even though special facts may warrant the use of discretion by the authority to decide the application or appeal only after affording a personal hearing, merely on the ground that no personal hearing has been afforded, an order is not rendered invalid.

Oral Hearings: When Required by Statute

The scope of the power granted to an administrative authority always being subject to the parent statute, the Court's approach in the aforementioned cases has been to first examine the content of

[28]*Per* J.C. Shah, J., *Union of India* v. *J.P. Mitter*, AIR 1971 SC 1093.

[29]The respondent had been given a show cause notice, was disclosed all the evidence and was given an opportunity to make a written representation thereon.

[30]*Union of India* v. *Jesus Sales Corporation* AIR 1996 SC 1509.

[31]*Per* N.P. Singh, J., AIR 1996 SC 1509.

the governing provision. Hence, an oral hearing is mandatory if provided in a statute expressly or by necessary implication.

The case of *Farid Ahmed Abdul Samad* v. *Municipal Corporation,*[32] is illustrative on the point. With respect to a compulsory land acquisition order, the provisions of Land Acquisition Act, 1894 being consistent, were held to be applicable. Hence, in accordance with section 5A of the Act, a personal hearing had to be mandatorily given.

However, when a statute uses terms such as "*an opportunity of making a representation against the order proposed*" must be given to the concerned party, as per the ruling in *Ondal Coal Co*. v. *Sonepur Coalfields,*[33] it does not necessarily imply anything more than a written representation. In *Ondal Coal Co*, the Coal Board issued a show cause notice to the affected party to adduce evidence in favour of their case; the material relied on by the Board was supplied to them. It was held that procedural fairness contemplated by natural justice principles was met. The central principle is whether a 'real' or 'adequate' opportunity to put forward a case was afforded.

A similar phrase also used in the Motor Vehicles Act, 1988 to provide for the cancellation of a stage carriage permit on account of the breach of any of its conditions was interpreted by the Madras HC to not mandate a personal hearing.[34]

PART IV: WHEN IS THERE A RIGHT TO ORAL HEARING? : A CASE LAW DETERMINATION

If a statute is silent as to the form of hearing, the next question to be explored is whether the matter is to be left to the subjective satisfaction of the administrative mechanism or whether there is a principle or yardstick to determine when procedural fairness mandates oral hearing. To

[32]*Farid Ahmed Abdul Samad* v. *Municipal Corporation* AIR 1976 SC 2095.

[33]*Ondal Coal Co*. v. *Sonepur Coalfields* AIR 1970 Cal 391.

[34]*GKT Bus Service, Palani* v. *State Transport Appellate Tribunal,* AIR 1988 Mad 127.

answer this question, the author analyses various judgments of the HCs and the SC on the point. At the outset, it is to be clarified that natural justice is a procedural concept and does not impose substantive restrictions on the decision reached by the administrative authority as such. Indeed, the gamut of administrative law deals with the nature and scope of powers of the administration and the manner in which such power is exercised but it does not examine the content of those exercised powers.[35]

Hence, when the writ jurisdiction of the courts is invoked, a judicial probe is made into the decision making process and not on the merits of the decision.[36] Upon judicial review of the decision making process, if non-compliance with natural justice principles is found, the matter is remanded back to the administrative authority to reach a decision after adopting the procedure upheld by the courts.

A landmark decision in this regard has been *Travancore Rayons* v. *Union of India*.[37]In this case, the appellant company was assessed to pay excise duty on the consumption of a substance 'nitro-cellulose lacquer' produced by it. The company's contention had throughout been that the proportion of compound in its product meant that it could not be considered 'nitro-cellulose lacquer' within the meaning of the relevant Act. Although the Collector of Customs gave a personal hearing and rejected the company's claim passing a detailed order, the Central Government while sitting in appeal denied a personal hearing.

The manner in which the company's petition was handled by the government came to be criticised by the SC as the matter raised complex and technical questions of fact. Even though

[35]S.P Sathe, *supra* note 1, at p. 5.

[36]*Chief Constable of the North Wales Police* v. *Evans* [1982] 1 WLR 1155 (Refer statements of Lord Hailsham and Lord Bingham).

[37]*Travancore Rayons* v. *Union of India* AIR 1971 SC 862.

the central government order was ultimately quashed on the ground that it was not a speaking order, yet, a significant principle with regard to personal hearings emerged from the instant case - "*where complex and difficult questions requiring familiarity with technical problems (...) are raised, it would conduce better administration and mote satisfactory disposal of the grievances of the citizens if personal hearing is given*".[38] A remarkable feature of this case is that the lack of a personal hearing by the government was criticised even though the Collector, from whom the appeal had gone to the government, had given a personal hearing to the company. The issue was of a complicated nature requiring familiarity with the chemical composition of the substances which necessitated an oral hearing.

Complexity of facts is not the only consideration that weighs with the Court's decision in favour of oral hearings. This was clarified by the SC in the case of *State of UP* v. *Maharaja Dharmander Prasad Singh*.[39]The license of the lessee had been cancelled on the grounds of an alleged breach of the license agreement. To prove the breach, it was necessary to ascertain whether a 'building' had been erected by him on the premises. The HC quashed the cancellation of the license ordered by the Development Authority (hereinafter 'DA') on the ground of lack of reasonable opportunity to present the case. Agreeing partly with the HC's decision,[40] the SC observed that where the stakes are heavy for the lessees (as they had made large financial investments) and a number of grounds would require ascertainment of factually complex matters, the authority should have afforded a personal hearing and an opportunity to adduce evidence.

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[38] Per J.C. Shah, J., *Travancore Rayons* v. *Union of India*, AIR 1971 SC 862.

[39]*State of UP* v. *Maharaja Dharmander Prasad Singh* AIR 1989 SC 997.

[40]The Supreme Court had to an extent disagree with the High Court's reasoning as the latter had looked into the grounds which should have been taken into consideration by the authority, thereby transgressing the merits-legality distinction.

Earlier, in another case involving cancellation of a license, *Bhagat Singh* v. *State of Punjab*[41], the Punjab and Haryana HC had held that similar considerations were to apply. It was held that before a *drastic action* is taken which leads to *far-reaching consequences involving a pretty heavy financial loss*, an adequate opportunity must be granted. Also, if a licensee raises *controversial issues*,[42] and asks for an oral hearing, then it has to be granted.

Over the years, the criterion of far-reaching adverse consequences has been consistently adhered to, as is evident by the recent 2011 decision in the *Automotive Tyre Manufacturers* case which considered an application for imposition of anti-dumping duty. It was held that a public hearing under the rules ought to be understood as an oral hearing, particularly as the order could have adverse civil consequences which would also cover infraction of poverty. For personal hearings to be effective and not just an empty formality, the DA who hears must also be the one who conducts the investigation. Accordingly, the government order on the recommendation of the new DA was quashed.

Thus, a right to an oral hearing is dependent on the severity of consequences to the affected party. These consequences are not limited only to heavy financial repercussions. Indeed, when fundamental rights are at stake the courts have been even more categorical in insisting on a right to a personal hearing.

[41] *Bhagat Singh* v. *State of Punjab* AIR 1975 P&H 236.

[42] The complicated factual scenario was that innocence of the petitioner had been contingent on a factual enquiry as to how many pints of liquor he had been handed over by the previous licensee and whether there was an over-writing. The Collector had failed to examine the previous licensee to determine the issue.

Fundamental Rights at Stake:

In *Union of India* v. *Smt. Chand Putli*,[43] a woman made an application under section 9 of the Citizenship Act, 1955 to the Central Government for determination of her status as an Indian citizen and thereby to avoid deportation. She was denied a personal hearing despite many specific requests. Since her freedom of moving freely in the country was sought to be curtailed, her claim for a personal hearing was upheld by the Court. However, the fact that some evidence was withheld also weighed with the Court.

Moreover, remarks made by several justices in the landmark case of *Maneka Gandhi* v. *Union of India*,[44] also elaborate upon the same point. On the issue of whether a passport holder is to be given a hearing at the time of impounding, the Court first concluded that the action *prima facie* curtailed right to personal liberty under Article 21. Having elevated the status of appellant's right to that of a fundamental constitutional right, the court then commented upon the application of principles of natural justice as 'fair play in action'. It is important to note that the emphasis was placed upon the nature of right in peril, and not upon the nature of authority.

Practical Considerations

Maneka Gandhi case brings the discussion to a very significant point of the *purpose* of the legislation or that of the administrative action. In no situation is the interpretation by the judiciary done in a manner in which the scheme of the Act or the purpose of the administrative action itself is defeated. In impounding of passports (*Maneka Gandhi),* a pre-decisional hearing would have defeated the purpose of impounding as the person could flee upon the giving of a notice. Hence, in exigent or urgent situations, the courts have reconciled conflicting issues of the

[43]*Union of India* v. *Smt. Chand Putli* AIR 1973 All 362.

[44]*Maneka Gandhi* v. *Union of India* AIR 1978 SC 597.

right to an oral hearing and public purpose by providing for a post-decisional hearing. The idea is to mitigate injustice caused by the absence of a pre-decisional hearing.[45]

Prof. Wade also observes that practicalities also justify the need for dispensing with oral hearings.[46] In *Mohammed Ibrahim Khan,*[47]the Act gave an opportunity to file objections only at the stage when a person applies for the grant of a no-objection certificate to the site of a cinema house. No such opportunity was provided at the stage of the application for renewal of the license. Though the court expressed a doubt over whether a complete absence of hearing of objections was according to the principles of natural justice, it was categorical that in any case, no personal hearing was envisaged by the statute.[48] The rationale is that the number of objectors may be large and hence, it may not be possible to personally hear each of them whenever a license is sought to be reviewed.[49]

Conflicting Evidence

In *Ranjit Singh* v. *Union of India,*[50] the SC suggested an oral hearing while directing the matter back to the Disciplinary Authority. The charge against the employee was the finding of assets owned disproportionate to his income. In the author's opinion, an important factor was that there were two conflicting reports – the enquiry by CBI exonerated him but the Disciplinary Authority indicted him.

[45] S.P. Sathe, *supra* note 1, at p. 203.

[46] H.W.R. Wade and C.F. Forsyth, *supra* note 21, at p. 433.

[47]*Mohammed Ibraham Khan* v. *State of MP* AIR 1980 SC 517.

[48]MP Jain, *supra* note 4, at p. 491.

[49]*Id.*

[50]*Ranjit Singh* v. *Union of India* AIR 2006 SC 3685.

Why is the severity of consequences a relevant factor in determining the right to an oral hearing?

This question assumes even more importance after the SC's view in *Jain Exports (P) Ltd* v. *Union of India*,[51] to the effect that "*the standard of an opportunity of being heard does not depend on the extent of loss or injury the person concerned might suffer*".

Indeed, the explanation may be found in Lord Bingham's opinion in *R* v. *Parole Board*: "*Even if important facts are not in dispute, they may be open to explanation or mitigation, or may lose some of their significance in the light of other new facts*".[52] In *Ram Chander* v. *Union of India*,[53] the Apex Court had observed that one of the objectives is to promote public confidence in the administrative process. In the United Kingdom as well, the courts have been strongly influenced by the fact that liberty,[54] or livelihood,[55] of an individual is involved. The author's view is that when consequences are severe, courts want to ensure least dissatisfaction with the decision or the punishment and hence insist on giving the most effective form of hearing even if the facts are not that complicated. The judicial opinion seems to be that even if a written representation may be consistent with natural justice principles, it may not be satisfactory in all purposes.[56]

From the case law discussed in this chapter, the author concludes that the right to an oral hearing is contingent upon (a) factual complexity and (b) severity of consequences for the affected party. Practical considerations and presentation of conflicting evidence have also been relevant factors

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[51] *Jain Exports (P) Ltd* v. *Union of India* (1988) 3 SCC 579.

[52] Per Lord Bingham, C J., *R* v. *Parole Board*, [2005] UKHL 1.

[53] *Ram Chander* v. *Union of India* AIR 1986 SC 1173.

[54] *R* v. *Parole Board ex. P Wilson* [1992] 1 Q.B. 740. Also Refer *R (Smith*) v. *Parole Board* (2005).

[55] Refer *R* v. *Wear Valley DC ex p. Binks* [1985] 2 All ER 699 (licensing being a drastic power, affecting the rights and in particular livelihoods of citizens, fair hearing is insisted upon).

[56] *Per* Madame Wilson, J.,*Singh*v. *Canada*, (1985) 12 Admin L.R. 137.

in inferring a right to an oral hearing. Apart from these, the broad subject matter being dealt with has also influenced the court's opinion on personal hearings, although the same largely coincides with parameter regarding the severity of consequences.

PART V: SECTOR SPECIFIC CASE-LAW ON ORAL HEARINGS: SERVICE, LABOUR AND EDUCATION

Owing to a plethora of decisions cutting across various sectors, the author in this chapter explores sector specific case-law so as to cull out the standards for determination of oral hearings. While it is not possible to comprehensively deal with each subject matter in detail, the author specially emphasises matters involving educational institutions.

a) Service

In cases of dismissal from service of civil servants, generally courts have taken a liberal view and allowed a right to an oral hearing[57]. Moreover, the courts have also gone beyond the facade of an enquiry to find out whether the termination of service was for reasons undisclosed to the concerned person.[58] The rationale for the same was explained in *Ram Chander*. Considering a case of removal from service on the grounds of misconduct, the SC held that since the 42nd Amendment to Article 311(2) of the Indian Constitution expressly takes away the right to representation for civil servants at the stage of penalty imposition, the only stage at which effective representation can be made is appeal and hence, a personal hearing ought to be given. This would provide a chance to satisfy the authority before final orders. However, when the delinquent employee himself *fails to appear for oral hearings* despite several reminders, as was

[57] Refer *Town Area Committee, Jaladabad*v.*Jagdish Prasad*AIR 1978 SC 1407; discussed later in the paper.

[58]S.P. Sathe, *supra* note 1, at p. 200.

the situation in *Nagar Palika* v. *UP Public Service Commission*,[59] the enquiry officer's order against him was held not violative of natural justice principles.

b) Labour- Matters

An important case on the topic is *Central Bank of India* v. *Karunamoy*,[60] wherein a workman was subjected to domestic enquiry for giving overdrafts to certain customers without the bank's sanction. The court emphasised that ordinarily, in domestic enquiries against a workman, an oral hearing ought to be insisted upon. However, on the facts of the case, the court held that no prejudice was caused as the workman had already been consistently admitting his guilt. Hence, though ordinarily, the delinquent is not to be cross examined first, in this case it was justified as there was no prejudice. This case offers insights into several important principles. *Firstly*, under the area of labour-management relations in cases of dismissal of workers by management, a comprehensive oral hearing procedure is often insisted upon by the courts. *Secondly*, the order of events within an oral hearing procedure is not invariable. This flows from the norm that principles of natural justice are not mere technicalities and that strict rules of procedure do not apply to Administrative Tribunals.[61]

c) Education

This is a controversial area where the courts have taken an inconsistent stand. The cases hereinafter noted, shall illustrate this point.

[59] *Nagar Palika* v. *UP Public Service Commission* (1998) 2 SCC 400.

[60] *Central Bank of India* v. *Karunamoy* AIR 1968 SC 266.

[61] I.P. Massey, *Administrative Law*, Eastern Book Company, Lucknow, 2003, p. 149.

In *C.R. Rao* v. *Registrar, Andhra University*,[62] a student was caught with a piece of paper in the examination by the invigilator. He admitted the malpractice and wrote a letter of confession to the Chief Superintendent. The domestic tribunal cancelled his examination and debarred him for 2 years. He was denied a personal hearing. The Andhra Pradesh High Court held that there had been no violation of natural justice. Many factors seemed to have influenced the decision. *First*, the penalty was inflicted on the basis of a confession letter whose voluntary nature was not contested. *Secondly*, the opportunity to explain his stance existed at the time of incident. It was recognised that when breaches of discipline are discovered by invigilators or examination officers, question of enquiry may also not arise. What also weighed with the court's decision was that enquiry was conducted by an academic body consisting of persons of integrity, experience and expertise into the problems of academic bodies.

In another case, *B.S. Jose* v. *Madurai Kamaraj University and Anr*,[63] the fact situation was similar to the aforementioned case except that the student had denied the malpractice. In that case also, the denial of a personal hearing to the student was held to be not violative of natural justice. In this case as well, on the ground that a rigid insistence of *full-fledged enquiry of examination and cross-examination of witnesses in educational matters may not be "conducive for the effective functioning and preservation of the structure of our educational institution*".[64]Moreover, the student had not insisted on the invigilator's examination in his presence at an earlier stage and it appeared to be an after-thought.[65]

[62]*Chinni Ramakrishna Rao* v. *Registrar, Andhra University* AIR 1972 AP 127.

[63]*Bright Son Jose* v. *Madurai Kamaraj University* AIR 1982 Mad 79.

[64]*Per*Venugopal, J., *Bright Son Jose* v. *Madurai Kamaraj University* AIR 1982 Mad 79.

[65]*Per*Venugopal, J. , AIR 1982 Mad 79, ¶2

That the courts ought to be slow in interfering with decisions of educational institutions owing to the large frequency of cheating cases regularly coming before them, was opined by Ganjendragadkar, J. in *Board of High School and Intermediate Education U.P*. v. *Bagleshwar Prasad and Ors.*[66]In his opinion, the scrutiny level for such tribunals must be reduced to only examining whether decision was mala fide, manifestly arbitrary or capricious.

However, the courts have been inconsistent on this point. For instance, in *N.N Mishra* v. *Vice-Chancellor, Gorakhpur University*,[67] it was held that for educational matters, a three-fold consideration should be that the student should know the nature of the accusation being made; he should be given an opportunity to state his case and the tribunal should act in good faith. Whereas, in *Ram Narayan Kishori* v. *Calcutta University*,[68] where students' results were withheld, the court held that procedure adopted by the Board of Discipline was violative of natural justice rules predominantly because the examiner had not been examined in their presence and no opportunity to cross examine him was given.[69]

Another instance where personal hearing was granted is *JB Parikh* v. *Bombay University*,[70]which reaffirmed the 'good faith' requirement.The court conceded that as a facet of public interest, the privilege of a lower level of interference is granted to the university, but the criteria of 'fairness' cannot be vitiated. Since the charge was vague and conduct of the Commission members appeared to be hostile,[71] the Court insisted on a personal hearing.

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[66]*Board of High School and Intermediate Education U.P*. v. *Bagleshwar Prasad and Ors.*AIR 1966 SC 875.

[67]*N.N Mishra* v. *V. C. Gorakhpur University,*AIR 1975 All 290.

[68]*Ram Narayan Kishori* v. *Calcutta University* AIR 1982 Cal 1.

[69]Also see *S.P. Paul* v. *Calcutta University* AIR 1970 Cal 282. (Refer M.P. Jain, *supra* note 4, at p. 495).

[70]*JB Parikh* v. *Bombay University* AIR 1987 Bom 332.

[71] The Committee had asked the petitioner about his father's income; reached an opinion that the fact that petitioner had hired a lawyer meant he was guilty and insulting words were used towards him.

This ambiguity as to the right to a personal hearing vis-a-vis educational matters ought to be resolved soon. This is because the inconsistency creates scope for further litigation in this area. This defeats the whole purpose of swiftness in administrative decisions. Moreover, the consequences are also serious for the student who has significant interests at stake.

PART VI: TRACING THE EVOLUTION OF CONCEPT THROUGH CASE-LAW

Even before the *J.P. Mitter* case, the SC had expressed the view that oral or personal hearings are not an essential requirement of natural justice. The author refers to two cases to elaborate the point – *M.P. Industries* v. *Union of India,*[72] (1966) and *State of Assam* v. *Gauhati Municipal Board, Gauhati,*[73] (1967). In each case, the reasoning of the court was to first determine the nature of power exercised i.e. whether it was quasi-judicial or administrative. Thereafter, the court would then proceed to consider whether a personal hearing was necessary. To quote Wanchoo, J. in the *Gauhati* case, "*Assuming that (...) the proceedings are quasi-judicial proceedings, the question is whether there was any violation of the principles of natural justice in this case*".[74] In the later decisions, the distinction hardly holds practical significance for the purpose of determining applicability of principle of natural justice.[75] Hence, the courts have dispensed with such an enquiry before ascertaining whether a personal hearing is necessary on the facts of the case.

[72]*M.P. Industries* v. *Union of India* AIR 1966 SC 671.

[73]*State of Assam* v. *Gauhati Municipal Board, Gauhati* AIR 1967 SCC 1398.

[74]*Per*Wanchoo J. *State of Assam* v. *Gauhati Municipal Board, Gauhati,* AIR 1967 SCC 1398.

[75]The author uses the term "hardly" as even as late as in 1990, it was observed by the Court in one case that Chancellor's function of appointing teachers being administrative and not quasi-judicial, natural justice can be excluded. [Refer S. Jha, 'Chartering the Course of Natural Justice post Maneka Gandhi', *Central IndiaLaw Quarterly,* Vol. 14, Issue 2, 2001, pp.245-250].

In *M.P. Industries*, SubbaRao, J. (dissenting on some points) had stated that the same would depend on "*facts of each case and ordinarily it is the discretion of the Tribunal*."[76] In the later cases, the scope of this 'discretion' element as existing on an independent footing has been substantially whittled down. The minimum emphasis on unbridled discretion can be understood in light of parallel developments in Article 14 jurisprudence along the lines of the concept of 'fairness' and 'non-arbitrariness'. For instance, the *J.B. Parikh* case shows how the 'good faith' requirement is to be applied to tribunals.

From looking into the nature of the power exercised, whether quasi-judicial or administrative, the courts now enquire into the (adverse) effect of the exercise of power. Admittedly, the pioneering basis for this shift was witnessed in the late 1960s with cases such as *Binapani*,[77] and *A.K. Kraipak*.[78] However, the author's view is that not only the applicability of natural justice principles but its content too is now being analysed from the point of view of the affected party. Hence, issues at stake have become a major factor to determine whether or not to allow oral hearings.

Moreover, in a large number of service and labour matters, an oral hearing is usually insisted upon. In the author's opinion, this development in administrative law has been, to a large extent, influenced by constitutional law jurisprudence. This becomes clear if one looks at the decision of courts in *Olga Tellis* and the *DTC Mazdoor case*. Having evolved the concept of the 'right to livelihood' from Article 21, the Court had simultaneously insisted upon a proper hearing when livelihood is at stake. Hence, assuming the current approach of courts to be constant, with Article

[76] *Per* SubbaRao, J., *M.P. Industries* v. *Union of India*, AIR 1966 SC 671.

[77] *State of Orissa* v. *Binapani Dei* AIR 1967 SC 1269.

[78] *A.K. Kraipak&Ors.* v. *Union of India* AIR 1970 SC 150

21 becoming the source for elucidation of a number of rights, the right to an oral hearing is also likely to apply to new subject matters.

PART VII: A COMPARATIVE PERSPECTIVE

Position in USA:

An analysis of the position in USA can help us in answering the question as to whether codification can be made to determine when an oral hearing can be granted. In USA, the Fifth Amendment guarantees due process rights to those deprived of life liberty or property; which entails a hearing.[79] The Administrative Procedure Act, 1946 (APA) has further standardised this requirement for federal administrative agencies.[80] In every case of "*hearing on the record*", the APA mandates that a full evidentiary (oral/personal) hearing must be granted.[81] However, the APA does not directly apply to an agency and the agency creating statute must expressly incorporate the same.[82] Hence, in effect, the governing statute is also the determining factor in USA.

In absence of statutory provisions, a personal hearing is not mandatory.[83] In *Mathew* v.*Elridge*,[84] it was noted that the type of hearing procedure, with regard to the specific circumstances of each case must provide a '*meaningful opportunity'* for representation. This is dictated by three factors: (a) the private interest affected; (b) risk of erroneous deprivation of such interest; and (c) government interest in reducing the fiscal and administrative burdens.

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[79]*Goldberg* v. *Kelly* 397 U.S. 254 (1970).

[80]A. Ruqaiijah, 'A Right to No Meaningful Review Under the Due Process Clause: The Aftermath of Judicial Deference to Federal Administrative Agencies', *Journal of Law and Medicine*, Vol. 16, 2006, p. 723.

[81]*Ibid.*

[82] W. Funk *et al*, *Administrative Law*, Aspen Publishers, Boston, 2009, p. 9.

[83] C.K. Takwani,*Lectures on Administrative Law*, Eastern Book Company, Lucknow, 2010, p.198.

[84]*Mathews, Secretary of Health, Education andWelfare* v. *Elridge*424 U.S. 319.

It is very difficult to codify when personal hearing ought to be granted. Under the USA law as well, the flexibility for ascertainment of this question has been recognised. Even if codified, terms such as "facts and circumstances", "issues at stake" etc. hold a very wide and vague import; in which case substantial litigation would still continue. For instance, despite there being a statutory requirement of 'notice' under the APA, litigation did continue over determining its adequacy in a fact situation.[85]

The cost-benefit analysis mentioned in the*Elridge* case has not found an unequivocal endorsement under the Indian law, as can be inferred from the inconsistent decisions on educational matters.[86] However, the author proposes that the analytically different structure of USA law in the Model State Administrative Procedure Act,[87] ought to be looked into for incorporating mediation, conferences, negotiation as alternative decisional forms in cases not involving extreme consequences since the expanding scope of administrative activities may make oral hearings difficult in all cases.

The Canadian Position

In Canada as well, the right to a hearing does not necessarily involve the right to an oral hearing, unless there is a statutory requirement for the same.[88] In *Mobil Oil Canada Ltd* v. *Canada Newfoundland*,[89] it was clarified that an exchange of written materials may suffice.

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[85] W. Funk et al, *supra* note 80, at p. 17.

[86]Refer "Educational Matters" under Part V.

[87]The Act provides for conference adjudicative procedure in matters such as where there is no dispute of material facts, disciplinary sanction against students which does not involve expulsion or suspension for more than 10 days, disciplinary sanction against a licensee which does not result in revocation, annulment or suspension thereof. 'Informal adjudication' viewed on January 13, 2013,

<http://www.administrativelaw.uslegal.com/administrative-agency-adjudications/informal-adjudication>.

[88] David P. Jones and Anne S. de Villars, *Principles of Administrative Law*, Carswell Publications, 1999, p. 250.

[89]*Mobil Oil Canada Ltd* v. *Canada Newfoundland* (1994) 21 Admin L.R. (2d) 248 (S.C.C.).

As to the circumstances in which an oral hearing ought to be given, an authoritative decision is *Singh* v. *Canada (Minister of Employment and Immigration).*[90] In that case, the refugee status of 7 persons was refused by both the Minister and the Appeal Board and deportation and removal orders were passed. In this context, a provision of the Immigration Act[91] was challenged as infringing the Canadian Bill of Rights.[92]

Beetz, J. held that there was no fair hearing because of the lack *of oral hearing at a single stage of the proceeding.* It was held that if "*life or liberty depends on findings of fact or credibility*", written representation may not suffice.[93] The other judge reached the same conclusion from an analysis of section 7 of the Canadian Charter.[94] Thus, the involvement of "*life, liberty and security*" of the affected person would makeoral hearing an inevitable condition for procedural fairness. It was observed that even if written submissions *may be consistent* with principles of fundamental justice, it *will not be satisfactory* for all purposes. Furthermore, serious issues of credibility must be determined by oral hearings.[95]

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[90]*Singh* v. *Canada* (1985) 12 Admin L.R. 137.

[91]S.C. 1976-77, c. 52 (at that time).

[92]Under Immigration Act, a person claiming to be a refugee was entitled to apply to Minister for such designation. A redetermination could be sought under the Immigration Appeal Board. The Board could allow the matter to go to a hearing if "*there was reasonable ground to believe that a claim would, upon the hearing of the provision, be established*" as per s. 71(1) Immigration Act S.C. 1976-77. The issue was whether s. 71(1) of the Act infringed the fundamental rights and freedoms recognised by Canadian Bill of Rights.

[93](1985) 12 Admin L.R. 137, at 157.Beetz, J. drew an interesting distinction stating that threats to life and liberty are relevant, not for the purpose of concluding whether Bill of Rights applies, but for the purpose determining *the type of hearing* appropriate in the circumstances.

[94] S. 7 of the Charter reads thus: "*Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice*". The other judge, namely Madame Justice Wilson, held that the limitations on hearing provided in the Act are incompatible with principles of natural justice and therefore, infringed the basic Charter of Rights. *See*(1985) 12 Admin L.R. 137 at 190.

[95](1985) 12 Admin L.R. 137 at 190.

Thus, in this case, more emphasis was laid on the nature of legal rights involved than on the nature of factual complexity. Nevertheless, the flexibility of natural justice principles has been recognised in Canada as well.[96]

CONCLUSION:

Although there is no universal rule as to when oral hearings are mandated by the concept of procedural fairness, the decisions of the courts provide us with certain principles in this direction. It is true that whether oral hearing is necessary or not depends on the nature of facts involved, the nature of enquiry (for instance, complexity of facts criterion), circumstances of the case (*HiraNath* case), and the nature of the deciding authority (educational institutions). The often quoted dictum of Tucker LJ in *Russell* v. *Duke of Norfolk*,[97] that "*The requirements of natural justice depend on the circumstances of the case, nature of enquiry, rules under which Tribunal is acting, subject matter to be dealt with and so forth*" continues to hold acceptance across jurisdictions.

From an analysis of the case-law on the issue, it can be said that the courts take into account a variety of factors and balance them. However, the more important the individual interest, greater the procedural protection which is afforded. Thus, as in the UK, it has been more of a 'dignitarian' approach rather than a pure utilitarian one.[98] Though this is a welcome development, since the content of natural justice rules is being determined at the "rights" level, it remains to be seen how the same will play out with expansive interpretation of rights under the constitutional law and parallel expansion in the activities of the modern day government. Insights

[96]Jones & de Villars, *supra* note 86, at p. 252.

[97]*Russell* v. *Duke of Norfolk* [1949] All ER 109.

[98] P. Craig, *supra* note 8, at p. 414.

can be taken from USA administrative law to resort to other decisional forms such as mediation and conferences that may be more effective and practical in some contexts.