

# NLUJ Law Review

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**TARGETED KILLINGS AND INTERNATIONAL LAW**

DR. CURTIS F. J. DOEBBLER\*

*Targeted killings are increasingly the manner in which some of the militarily most powerful States in the world project violence around the globe. This article examines whether such actions are consistent with international law using the well-established parameters of State responsibility and the obligations found under international humanitarian and human rights law. The appraisal of targeted killings is based on principles of international law that are rarely disputed, but often ignored in the consideration of targeted killings due to reasons of political convenience. In the process of considering this central issue, the article also examines the intricate and sometimes misunderstood relationship between these two areas of law as well as the legal justifications that States have or may put forward in defense of their actions. This evaluation concludes that rarely, if ever, are States that conduct targeted killings acting with respect for international law. Moreover, these States, which often base their justifications on political interests related to the national security of their people, may even be jeopardizing the very security of their populations that they are think they are protecting.*

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## I. INTRODUCTION

*When killing takes precedence over targeting, the anti-terrorists look too much like the terrorists.”*

- Micheal Waltzer<sup>1</sup>

Targeted killings are the use of force expressly intended to take the life of a specific person because of the perceived threat that person poses to national security. These killings are the consequence of a State's conscious decision to kill a particular individual. Such actions are controversial and have been condemned by most international lawyers, but some governments continue to use them as a means of conducting foreign relations.

In recent years several countries, most notably Israel and the United States, have significantly enhanced their use of targeted killings.<sup>2</sup> In doing so they exposed

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<sup>1</sup> Walzer, M., *Terrorism and Just War*, 34 PHILOSOPHIA 11 (2006).

themselves to State responsibility under international law for an internationally wrongful act.<sup>3</sup> These States often seek to justify targeted killings based on reasons of political expediency<sup>4</sup> ignoring international law even though it is the lowest common denominator among States for evaluating such actions. Disregarding international law – the ultimate foundation of the international community, can plunge the international community into a downward spiral of inhumanity. This can further lead to a situation where carnage and disorder replace peace and stability. Conversely, international law can help us avoid such a fate by providing rules that, if observed, allow us all to co-exist with a certain degree of peace and security.

Even the supporters of targeted killings do not want us to slip back into an international community where the powerful enslave and oppress the weak and where the use of force becomes a means of conducting foreign policy as it was less than a century ago.<sup>5</sup> The supporters of targeted killings just don't believe that this will be the consequence of their actions<sup>6</sup> or sometimes, perhaps more often, they merely don't seem to care.<sup>7</sup> This ignorance or intentional lack of concern for international law is dangerous. When we elevate the expediency of short-term geopolitical concerns above the rule of international law we create a vacuum in international relations in which our most cherished values, such as human rights, come under attack. Respect for the rule of law is essential to securing an international community in which current and future generations can live peacefully and without fear for their basic human rights. This is especially the case when the most basic human rights, especially the right to life, is threatened by actions of States — the entities that are supposed to be the principle guarantors of our most fundamental human rights.

This Article describes the application of international law in regards to targeted killings. The key question that this Article attempts to answer is whether

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<sup>2</sup> See Special Rapporteur on *Extrajudicial, Summary or Arbitrary Executions*, UN Doc. A/HRC/14/24/Add.6 (28 May 2010) (by Philip Alston) [hereinafter the “Alston Report”], at 8-9, ¶¶23-26, pointing out that Russia has also adopted the practice “emulating Israeli and US actions”; *Id.* at 9, ¶25.

<sup>3</sup> Many other States have used targeted killings including Russia, the United Kingdom, Switzerland, Pakistan, and Iraq. See MELZER, N., *TARGETED KILLING IN INTERNATIONAL LAW*, 463-444 (2008).

<sup>4</sup> *Id.* Based on the author's doctoral thesis, this book considers targeted killings in light of international law and arrives at the nuanced conclusion that targeted killings are usually illegal, but might sometimes be legal. This conclusion invokes reminiscences of the International Court of Justice's *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (8 July), a decision which Judge Rosalyn Higgins termed a *non liquet* opinion due to its inconsistencies. *Id.* at 583.

<sup>5</sup> See, for e.g., J. Paust, *Self-Defense Targeting of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19(2) J. OF TRANSNAT'L L. & POL'Y 237, 280 (2010).

<sup>6</sup> See, for e.g., A. D. Sofaer, *Terrorism, the Law, and the National Defense: 6<sup>th</sup> Annual Waldemar A. Solf Lecture in International Law*, 126 Mil. L. Rev. 89 (1989); S. R. David, *Israel's Policy of Targeted Killing*, 17(1) ETHICS & INT'L AFFAIRS 111 (2003).

<sup>7</sup> See, for e.g., A. Dershowitz, *US Attack on bin Laden validates targeted killing*, 15(16) JEWISH REPORT (2011).

or not targeted killings are generally prohibited by international law. To answer this question the Article is divided into seven Parts, including this Introduction. First, a targeted killing is defined based on several non-exhaustive, but instructive, criteria (Part II). Second, the State responsibility for targeted killings is examined generally with special attention to issues of attribution, one of the principle elements of State responsibility (Part III). Third, specific legal obligations, the other element of State responsibility, relevant to targeted killings, are examined under both international human rights law and international humanitarian law (Part IV). The relationships between these two corpus of law, as well as *jus ad bellum*, are important for determining the legal obligations that apply to targeted killings, these relationships are examined (Part V). Having determined how State responsibility applies to targeted killings, the possible justifications that States might put forward for their otherwise internationally wrongful acts are also considered (Part VI). And finally, some conclusions are drawn about the consequences of targeted killings under international law (Part VII). Rather than providing an evaluation of individual cases of targeted killings, this Article provides a general legal framework for how targeted killings should be evaluated when applying international law.

## II. WHAT CONSTITUTES A TARGETED KILLING?

Although States have long targeted and killed those who they did not like,<sup>8</sup> the phrase 'targeted killing' only emerged as a term of art in international law in the 21st Century.<sup>9</sup> It is used to describe the intentional killing of a human being by a government. It was sometimes used without legal import<sup>10</sup> and is sometimes used to describe such killings as illegal or as contrary to international law.<sup>11</sup> In 2010, UN Special Rapporteur Philip Alston still considered that “[d]espite the frequency with which it is invoked, “targeted killing” is not a term defined under international law.”<sup>12</sup>

Although there is no agreed definition of what constitutes a targeted killing, efforts have been made to describe some relevant characteristics. A recent effort was made by the United Nations Human Rights Council's Special Rapporteur on extrajudicial, summary or arbitrary executions, Professor Philip Alston, that states “[a] targeted killing is the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law,

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<sup>8</sup> See, for e.g., M. M. Maxwell, *Rebutting the Civilian Presumption: Playing Whack-A-Mole Without a Mallet?*, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 31, 34-36 (C. Finkelstein et al. eds., 2012) describing the recent history of targeted killings.

<sup>9</sup> See Alston Report, *supra* note , at 4, ¶7.

<sup>10</sup> See, for e.g., F. Allhoff, *The War on Terror and the Ethics of Exceptionalism*, 8(4) J. MIL. ETHICS 265-288 (2009), arguing that targeted killings are morally acceptable.

<sup>11</sup> See, for e.g., Stein, Y., *Response to Israel's Policy of Targeted Killings: By Any Name Illegal and Immoral*, 17(1) ETHICS & INT'L AFFAIRS 127-137 (2003).

<sup>12</sup> Alston Report, *supra* note , at 4, ¶7.

or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator.”<sup>13</sup> The Alston Report does not elaborate on the meaning of this definition.

A few years before Alston concluded his study, academic Nils Melzer had suggested criteria for determining what constitutes a targeted killing. He identified five distinct characteristics. Although the characteristics used by Melzer are very similar to Alston's, the former's more extended discussion of each characteristic provides for a better point of comparison. The consideration of these characteristics is a useful starting point for understanding what types of actions are being dealt with when applying international law to targeted killings.

#### A. FIVE CHARACTERISTICS OF TARGETED KILLINGS

Nils Melzer, using a definition of targeted killings similar to Alston's, identifies five characteristics of the term 'targeted killing' under international law in his book entitled *Targeted Killing in International Law*.<sup>14</sup> Despite the book's title, it is questionable whether all the characteristics are relevant to the application of international law. As will be argued below, some may not be applicable. Nevertheless, the five characteristics provide some insight into what action is generally understood to be a targeted killing.

The first characteristic is the use of deadly force to kill a human being.<sup>15</sup> This characteristic is self-evident and has implications for both the right to life under international human rights law, as well as the prohibition of willful killing of non-combatants under international humanitarian law. There is no need for there to be an intention to kill, but merely that the use of force may be reasonably expected to kill a human being keeping in mind the sensitivities of that particular person. Thus, what constitutes a deadly force against one person might not constitute a use of deadly force against another. Nevertheless, an effort to kill a human being or take action that might reasonably be expected to kill a human being is an important characteristic of targeted killing that is relevant to international law. The means by which the deadly force might be conveyed are many and the Alston Report enumerates a few that have been used as “sniper fire, shooting at close range, missiles from helicopters, gunships, drones, the use of car bombs, and poison.”<sup>16</sup>

The second characteristic is the intention to kill.<sup>17</sup> Roland Otto, like Melzer, points out that “the main aim and purpose [of a targeted killing] is the death of the targeted person.”<sup>18</sup> Thus, “[t]he death of the targeted person is

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<sup>13</sup> *Id.* at 3, ¶1.

<sup>14</sup> MELZER, *supra* note , at 3, 4.

<sup>15</sup> *Id.* at 3.

<sup>16</sup> Alston Report, *supra* note 2, at 4, ¶8.

<sup>17</sup> *Id.* at 4.

<sup>18</sup> OTTO, R., TARGETED KILLINGS AND INTERNATIONAL LAW: WITH SPECIAL REGARD TO HUMAN



directly intended, with *dolus directus* of the first degree ....”<sup>19</sup> The intention of the State to kill a particular person is something that sets targeted killings apart from some, but not all, other forms of State violence. The death penalty, for example, is an intentional killing by a State, but is not generally considered a 'targeted killing' under international law.<sup>20</sup> While intention may be a characteristic of targeted killings, as will later be explained, it is not a necessary condition of State responsibility under international law.

The third characteristic is the targeting of a specific person.<sup>21</sup> While this is often a constituent of targeted killings, it is not a necessary condition of State responsibility. For instance, even the killing of persons, that a State did not know were present, where it ordered a bomb to be detonated in a civilian area, or provided support to an armed group carrying out targeted killings of its enemies without concern for whether or not they were civilians may give rise to State responsibility if, for example, the State did not take reasonable precautions to ensure that killings did not take place.

The fourth characteristic is the lack of physical custody.<sup>22</sup> The question of physical custody may be a characteristic of a targeted killing, but more important for determining questions of State responsibility is the State's control over the instruments that commit the willful killing. The killing of people, not in the physical custody of the State, will incur State responsibility if it is carried out through instrumentalities over which the State has control or should have control.

Melzer identifies as a last characteristic the attribution of an act to a State.<sup>23</sup> As is described below,<sup>24</sup> State responsibility for an internationally wrongful act requires an act attributable to a State. Indeed attribution is very important to the application of international law as it is one of the two constituent elements of State responsibility. Despite its important legal relevance, this characteristic is usually not difficult to establish as States frequently admit that they have carried out targeted killings.

As is evident from Melzer's five characteristics, not all the characteristics of a targeted killing are relevant to international law. This is perhaps one reason why governments often appear to make decisions about targeted killings based on political considerations. It is not, however, a reason to exclude the application of international law. The application of this law provides safeguards for every individual, which are essential to an international society based on the rule of law and respect for basic human rights. The basic framework for applying international

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RIGHTS AND INTERNATIONAL HUMANITARIAN LAW 22 (2012).

<sup>19</sup> *Id.*

<sup>20</sup> The legality of the death penalty, however, has been challenged under both international human rights law and international humanitarian law.

<sup>21</sup> OTTO, *supra* note .

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *See, infra*, Part III(i), discussing the requirement of attribution of State responsibility.

law to targeted killings is the law of State responsibility which provides a widely accepted standard of accountability for all States.

### III. STATE RESPONSIBILITY FOR TARGETED KILLINGS

Although, it is often portrayed as a very complicated affair, State responsibility under international law is a long considered concept for which the basic principles have been widely agreed upon by States and leading international lawyers around the world.<sup>25</sup> The two elements of State responsibility are (i) an act attributable to a State, and (ii) that the act is inconsistent with a legal obligation that the State has undertaken.<sup>26</sup> When these two requirements are present a State is responsible for an internationally act.<sup>27</sup>

#### A. ATTRIBUTABILITY

Refers to the fact that an act is attributable to a State, i.e. the act has been carried out in such a way that the State is responsible for its consequences. The requirement of attributability is satisfied when an act or omission has been carried out or ordered by a person representing a State.<sup>28</sup> An act may also be attributable when the State could have acted but did not (an omission) or when a State controlled or should have controlled the entity carrying out the act. In the oft-cited Trail Smelter arbitration between the US and Canada, the act causing harm was carried out by a private company, the Consolidated Mining and Smelting Company of Canada Limited, which had obtained a charter of incorporation from Canada, nevertheless, Canada did not contest its responsibility.<sup>29</sup> Similarly in the Nicaragua Case, some of the acts for which the United States was responsible, were carried out by rebels operating out of Honduras.<sup>30</sup> Because international law is based on State sovereignty, and despite the fact that all actions must be initiated by individual human beings, it is the State that is recognized as the “real organized entity, a legal person with full authority to act under international law.”<sup>31</sup> Thus for

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<sup>25</sup> *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, [2001], Y.B. INT'L L. COMM'N, Vol. II. Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document UN Doc. A/56/49(Vol. I)/Corr.4.

<sup>26</sup> *Id.* at art. 3. Also see *Phosphates in Morocco, (It. V. Fr.)*, 1938 P.C.I.J., (ser. A/B) No. 74, 10, 28 (June 14); *United States Diplomatic and Consular Staff in Tehran, (U.S. v. Iran)* 1980 I.C.J., 3, 29, ¶56 (May 24); and *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 117–118, ¶226 (June 28).

<sup>27</sup> The issue of justification for an internationally wrongful act is dealt with in Part IV below.

<sup>28</sup> See I. BROWNLIE, *SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY* 132– 166 (Pt.1, 1983).

<sup>29</sup> *Trail Smelter Arbitration (U.S. v. Can.)* 3 R.L.A.A. 1908, 1917 (Trail Smelter Arb. Trib. 1938). The Smelter had originally been established by the United States in 1896, but sold to the Canadian company in 1906, but importantly, between 1925 and 1927 two smoke stacks were built that greatly increased the pollution coming from the plant.

<sup>30</sup> See Nicaragua Case *supra*, note , at 21, ¶20; 51, 86.

<sup>31</sup> ILC Draft Articles, *supra* note 25, at 35, ¶5.

the application of international law it is essential that an act be attributable to a State.<sup>32</sup>

At the same time it makes no difference whether the State actor or actors knew the attributable act was wrong or illegal or even intended to act as they did.<sup>33</sup> A soldier who falls asleep at the control panel and thereby accidentally launches a drone attack commits an act that is attributable to the State. Similarly, a soldier who is following orders in launching an attack resulting in a targeted killing, commits an act that is attributable to the State. Moreover, for the purpose of attribution the “State is treated as a unity” and any “event that is sufficiently connected to conduct” by any person acting under the control of the State is attributable to the State.<sup>34</sup>

Slightly more complicated might be attacks carried out by private contractors or civilians acting on behalf of a State and either physically confronting the person or acting at a distance through the operation of a drone or other such weapon. In such cases the actor is not formally a State organ, but has some authorization to exercise State authority. The crucial test is whether the entity carrying out the targeted killing has been “empowered by internal law to exercise governmental authority.”<sup>35</sup> Such cases are considered in article 5 of the ILC Draft Articles.

What is perhaps more complicated is when a government instrumentality is used (such as an aerial drone or any other type of government military equipment) it is unlikely that a private person could have had access to such deadly equipment without government approval. As targeted killings are serious matters and often require complex equipment, it is unlikely that such acts are done without State approval. Moreover, often a targeted killing also serves a government interest and not a private interest.<sup>36</sup> In any event, targeted killings whether carried out by State or non-State actors on behalf of the State have usually been explicitly—although not always publicly—authorized by the State.<sup>37</sup> In many cases, States have acknowledged that they carried out a targeted killing.<sup>38</sup> When a State acknowledges its actions, attribution can usually be proven based on this acknowledgment. Such

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<sup>32</sup> *Id.* at 38, ¶1.

<sup>33</sup> *Id.* at 42, ¶13, pointing out that as concerns a State actor, “[i]t is irrelevant for this purpose that the person concerned may have had ulterior or improper motives or may be abusing public power. Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the State.”

<sup>34</sup> *Id.* at 35, ¶6.

<sup>35</sup> *Id.* at 42, ¶1.

<sup>36</sup> An act of targeted killing or assassination carried out by a private individual not acting on behalf of a State would, of course, be murder or another similar offense punishable under domestic penal law. However, a States' failure to punish a private actor carrying out a targeted killing raises an issue of international law.

<sup>37</sup> See Blum G. & Heymann P., *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SECURITY J. 145, 149-154 (2010), describing US and Israeli practice and policy concerning targeted killings.

<sup>38</sup> *Id.*

an admission by a State is a statement against that State's interest and thus, strong evidence of attributability. Other proof of attributability may include the means used. For example, when military weapons or poisons that are under the control of the State are used, this will indicate prima facie that the act is attributable to the State.

Attribution is relevant to obligations under both international human rights law and international humanitarian law. As concerns international human rights law, Professor James Crawford, the last UN International Law Commission Rapporteur on State Responsibility before the Draft Articles were finalized, has eloquently described how the rules of State responsibility apply to human rights.<sup>39</sup> Human rights tribunals have also applied the general rules of state responsibility.<sup>40</sup> As concerns international humanitarian law the International Committee of the Red Cross, in its noted review of the rules of customary international humanitarian law, concludes that:

*“[i]t is a long-standing rule of customary international law” that:*

*[a] State is responsible for violations of international humanitarian law attributable to it, including:*

*(a) violations committed by its organs, including its armed forces;*

*(b) violations committed by persons or entities it empowered to exercise elements of governmental authority;*

*(c) violations committed by persons or groups acting in fact on its instructions, or under its direction or control; and*

*(d) violations committed by private persons or groups, that it acknowledges and adopts as its own conduct.”<sup>41</sup>*

It is not significantly disputed that conduct attributable to a State may incur the responsibility of a State for an internationally wrongful act if it is contrary to a legal obligation of the State under either international human rights or international humanitarian law.<sup>42</sup>

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<sup>39</sup> Crawford, J., *Human Rights and State Responsibility*, 12th Raymond & Beverly Sackler Distinguished Lecture Series at the Thomas J. Dodd Research Centre of the University of Connecticut delivered on 12 June 2012. Also see Odello M., *Fundamental Standards of Humanity: A Common Language of International Humanitarian Law and Human Rights Law*, in Arnold, R. and Quéniwet, N., *INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW TOWARDS A NEW MERGER IN INTERNATIONAL LAW* 15, 47 (2008).

<sup>40</sup> See, for example, *Loizidou v. Turkey*, 23 E.H.R.R. 513, Appl. No. 15318/89 (1997) at ¶49.

<sup>41</sup> HENCKAERTS, J-M & DOSWALD-BECK, L., *CUSTOMARY INTERNATIONAL LAW* 1-24 (Vol. I, 2005).

<sup>42</sup> Although only these two areas of law are considered, the principle is equally applicable to all other State obligations under international law. For example, the targeted killing of a refugee may violate international refugee law as well and the targeted killing of an aircraft or ship passenger may violate international law concerning air or sea passage.

## B. LEGAL OBLIGATION

The legal obligations of a State may emanate from any treaty that a State has signed or from customary international law. Every State possesses capacity to conclude treaties.<sup>43</sup> A treaty is binding upon the parties to it and must be performed by them in good faith.<sup>44</sup> On the other hand, customary international law may bind a State even without its express consent. When an overwhelming majority of States agrees that there is a legal obligation incumbent upon all States, and no State has objected from the time of the very creation of the rule, customary international law may be created if this opinion of States is supported by their general practice. Customary international law is perhaps harder to determine than treaty law, but as has been noted by a United Nations publication, “[c]ustomary international law is as legally binding as treaty law.”<sup>45</sup>

Furthermore, relevant legal obligations may emanate from different fields of law that may be applicable depending on the circumstances in which a targeted killing takes place. As the Alston Report notes, “[w]hether or not a specific targeted killing is legal depends on the context in which it is conducted: whether in armed conflict, outside armed conflict, or in relation to the inter-state use of force.”<sup>46</sup> Two of the most relevant fields of law that apply to the situations described by Alston are international humanitarian law and international human rights law. Each of these provide for similar, sometimes even overlapping obligations. It is therefore necessary to explore the obligations that both international humanitarian law and international human rights law provide to determine whether a targeted killing is illegal. This task is undertaken in the next Part in which the legal obligations under international human rights law and under international humanitarian law are considered using a set of four questions that are asked concerning each corpus of law.

## IV. LEGAL OBLIGATIONS CONCERNING TARGETED KILLINGS

As noted above, legal obligations concerning targeted killing may emanate from any source of international law, especially treaties or customary international law, and further, may be found in any field of international law that is relevant to targeted killings. Also, in this contribution, the discussion focuses on international human rights law and international humanitarian law. Within these two fields of law the primary concern is with the many treaties that have been widely ratified.

Below the inquiry proceeds by asking four questions, namely:

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<sup>43</sup> See Vienna Convention on the Law of Treaties, art. 6, Jan. 27, 1980, 1155 U.N.T.S. 331. (*entered into force* 27 January)

<sup>44</sup> *Id.* at art. 26.

<sup>45</sup> United Nations Environmental Programmer, *Training Manual on International Environmental Law*, 8, ¶36.

<sup>46</sup> Alston Report, *supra* note , at 9, ¶28.

- a. When does the law apply?
- b. How does the law apply?
- c. To whom does the law apply?
- d. What rules of law apply?

Each of these questions is discussed in relation to these two specific areas of law.

### **A. INTERNATIONAL HUMAN RIGHTS LAW**

The application of international human rights law can be examined by responding to four questions:

- a. When does international human rights law apply?
- b. How does international human rights law apply?
- c. To whom does international human rights law apply?
- d. What rules of international human rights law apply?

Each of these questions is addressed below in the context of human rights focusing on several internationally protected human rights that may be implicated in situations of targeted killings. These rights include principally, the right to life, but also the prohibition of cruel or inhumane treatment or punishment, the right to the security of person, and the right to a fair trial.

#### 1. WHEN DOES INTERNATIONAL HUMAN RIGHTS LAW APPLY?

In general international human rights law applies all the time, in both peacetime and during an armed conflict to protect individuals against targeted killings.<sup>47</sup> Although States, may under limited circumstances, derogate from some human rights in a case of “public emergency that threatens the life of the nation,”<sup>48</sup> States have rarely done so. Moreover, more recent treaties, such as the most widely ratified human rights treaty, the Convention on the Rights of the Child<sup>49</sup> and the regional African Charter on Human and Peoples' Rights<sup>50</sup> do not allow any derogation for any reasons from any of the rights contained therein.<sup>51</sup> In

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<sup>47</sup> See *Legal Consequences of the Construction of a Wall in the Occupied Territory*, Advisory Opinion, 2004 I.C.J. 136, 178, ¶106 (2004); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 240, ¶25 (8 July).

<sup>48</sup> See, for example, art. 4 of the International Covenant of Civil and Political Rights, 999 U.N.T.S. 171 (1976) (hereinafter *ICCPR*); art. 27(1) of the American Convention on Human Rights, 1144 U.N.T.S. 123 (1978) (hereinafter *ACHR*); and art. 15(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 (1953) (hereinafter *ECHR*).

<sup>49</sup> Convention on the Rights of the Child, 1577 U.N.T.S. 3 (1990).

<sup>50</sup> African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5 (1982).

<sup>51</sup> The Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States, Council of Europe Doc. H(95) 7 rev. (1998), also does not contain a general derogation provision although, in accordance with article 2(4), the “[d]eprivation of life shall not

any event, the right to life,<sup>52</sup> the focus of attention here, is exempt from derogation,<sup>53</sup> as is the prohibition of cruel or inhumane treatment or punishment<sup>54</sup> in the International Covenant on Civil and Political Rights. A State party to the ICCPR may derogate from the rights to a fair trial<sup>55</sup> and security of person,<sup>56</sup> but not the right to life. Moreover, in the case of fair trial, the core elements of the right remain non-derogable, according to the UN Human Rights Committee.<sup>57</sup>

The conclusion may be drawn that international human rights law will usually apply to all targeted killings carried out in peacetime or wartime. Thus, the restrictions that this law imposes will almost always have to be taken into account by States carrying out a targeted killing and the failure of a State to do so may lead to State responsibility of an internationally wrongful act.

## 2. HOW DOES INTERNATIONAL HUMAN RIGHTS LAW APPLY?

International human rights law is largely based on treaties that provide for the means of the implementation of their provisions. International human rights law, especially as compared to international humanitarian law, has much more developed forums for ensuring its implementation. These forums are also often accessible to both States and non-state actors. Regional human rights treaties in Africa,<sup>58</sup> the Americas,<sup>59</sup> and Europe<sup>60</sup> all provide potential forums that both States

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be regarded as inflicted in contravention of the provisions of this Article when it results from the use of force solely in such cases of extreme necessity and necessary defenses are provided for in national legislation.”

<sup>52</sup> ICCPR, *supra* note 48, at art. 6.

<sup>53</sup> *See, for e.g.*, ICCPR, *supra* note 48, at art. 4(2), *Also see* ACHR, *supra* note 48, at art. 27(2), and ECHR, *supra* note 48, at art. 15(2) (“except in respect of deaths resulting from lawful acts of war”) in respect of the right to life and the prohibition of torture in the Inter-American and European human rights treaties.

<sup>54</sup> ICCPR, *supra* note 48, at art.7.

<sup>55</sup> *Id.* at art. 14.

<sup>56</sup> *Id.* at art. 9.

<sup>57</sup> *See, for example*, *M. González del Río v. Peru*, U.N. Human Rights Committee Communication No. 263/1987, (28 October 1992), U.N. GAOR, Doc. A/48/40 (vol. II), at 20, ¶5.2 (holding that core fair trial right to a competent, independent and impartial tribunal is “an absolute right that may suffer no exception”). *Also see* *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights)*, Advisory Opinion No. OC9/87, 6 October 1987, Inter-American Ct. H.R. (Ser. A) No. 9 (1987); ¶70 of the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1984/4, Annex (1984), stating that the basic procedural guarantees of article 14 of the ICCPR are non-derogable, General Comment No. 32, U.N. Doc. CCPR/C/GC/32 on Article 14, (23 August 2007) stating that fair trial guarantees “may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights,” *id.*, and ¶14 of United Nations Human Rights Committee, General Comment No. 29 of the Human Rights Committee on States of Emergency, General Comment on Article 4, U.N. Doc. CCPR/C/21/Rev.1/Add.11, adopted at the 1950th meeting (24 July 2001), stating that fair trial guarantees must be observed when a non-derogable right is at stake.

<sup>58</sup> *See* ACHPR, *supra* note 50, and Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (9 June 1998), OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III). Article 30 of the Protocol reads: “The States Parties to the present Protocol undertake to comply with the judgment in any case to which they

and non-State actors—usually individuals, but in some cases non-governmental organizations—can use to ensure respect for human rights. In each of these forums there is a Court that can make legally binding determinations as to a State's responsibility for a violation of international human rights law.

In addition to the regional legally binding mechanisms in the Americas,<sup>61</sup> Africa,<sup>62</sup> Asia,<sup>63</sup> the Arab world,<sup>64</sup> and among Islamic States,<sup>65</sup> instruments also exist whereby bodies with non-legally-binding authority may review cases and make recommendations concerning the application of international human rights law. Similarly, the United Nations has an extensive network of non-legally binding, but still authoritative human rights mechanisms that can be used to promote the protection of human rights.<sup>66</sup> Within the United Nations, examples of human

are parties within the time stipulated by the Court and to guarantee its execution.”

<sup>59</sup> See ACHR, *supra* note 48, creating the Inter-American Court of Human Rights (art. 33) and whereby States agree to abide by its decisions (art. 68).

<sup>60</sup> See ECHR, *supra*, note 48. The European Court of Human Rights' jurisdiction is compulsory for all States of the Council of Europe that are required to ratify this treaty to join the Council of Europe. The Court, was created by article 19 and States “undertake to abide by the final judgment of the Court in any case to which they are parties” in article 46.

<sup>61</sup> See art. 106 of the Charter of the Organization of American States, 119 U.N.T.S. 3, *entered into force* 13 December 1951; *amended by* Protocol of Buenos Aires, 721 U.N.T.S. 324, O.A.S. Treaty Series, No. 1-A, *entered into force* 27 February 1970; *amended by* Protocol of Cartagena, O.A.S. Treaty Series, No. 66, *reprinted in* 25 I.L.M. 527, *entered into force* 16 November 1988; *amended by* Protocol of Washington, 1-E Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add. 3 (SEPF), 33 I.L.M. 1005, *entered into force* 25 September 1997; *amended by* Protocol of Managua, 1-F Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add.4 (SEPF), 33 I.L.M. 1009, *entered into force* 29 January 1996 (creating Inter-American Commission on Human Rights of the Organization of American States.). *Also see* the American Convention on Human Rights, *supra* note 48, and the American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992) (both creating legal obligations that the Commission may apply to relevant Members States).

<sup>62</sup> See article 30 of the African Charter on Human and Peoples' Rights, *supra* note 50 (creating the African Commission on Human and Peoples' Rights of the African Union).

<sup>63</sup> See Cha-Am Hua Hin Declaration on the Inter-Governmental Commission on Human Rights of the Association of Southeast Asian Nations (ASEAN), adopted at the 15th ASEAN Summit held in Hua Hin, Thailand, (23 October 2009), *available at*: <http://www.aseansec.org/documents/Declaration-AICHR.pdf> (creating the Intergovernmental Commission on Human Rights of Asian and South East Asian Nations). *Also see* ASEAN Human Rights Declaration of the Association of Southeast Asian Nations (ASEAN), Human Rights Declaration, adopted at the 21st ASEAN Summit held in Phnom Penh, Cambodia on 18 November 2012, *available at*: <http://www.asean.org/news/asean-statement-communications/item/asean-human-rights-declaration>.

<sup>64</sup> See art. 45 of the Arab Charter on Human Rights, adopted 22 May 2004, *reprinted in* 12 *Int'l Hum. Rts. Rep.* 893 (2005), *entered into force* 15 March 2008 (creating the Arab Commission Human Rights of the League of Arab States).

<sup>65</sup> See arts. 5 and 15 of the new Charter of the Organization of Islamic Cooperation, adopted at the 11th Summit of the OIC held from 13-15 March 2008 in Dakar, Senegal, *available at* <http://www.oicun.org> (creating the Independent Permanent Commission on Human Rights of the Organization of Islamic Cooperation). *Also see* the Statute of the OIC Independent Permanent Commission on Human Rights *available at* <http://www.oicun.org>

<sup>66</sup> See, for example, the Standard Minimum Rules for the Treatment of Prisoners, adopted 30 August 1955, by the First United Nations Congress on the Prevention of Crime and the Treatment of



rights mechanisms that have dealt with targeted killings include the special mandate holders of the Human Rights Council,<sup>67</sup> the Human Rights Council itself during the Universal Periodic Reviews of countries using targeted killings, and the treaty bodies. The expert and authoritative recommendations, conclusions, and views of these bodies contribute to interpreting the law. They also offer a more independent and impartial interpretation of the law than that of the States that have carried out targeted killings. The majority of these international expert bodies have determined that targeted killings violate international human rights law.

While some of these international human rights bodies have been timid in applying these protections, others have been quite outspoken. And while most of these bodies—but not all—provide non-legally-binding outcomes, both their individual authority and the cumulative effect of their determinations can have a significant influence on how international law is applied and whether targeted killings are contrary to this law.

### 3. TO WHOM DOES INTERNATIONAL HUMAN RIGHTS LAW APPLY?

International human rights law applies to all persons under the jurisdiction of a State.<sup>68</sup> This may include persons outside the territory of the State concerned when that State exercises jurisdiction and/or control over the instrumentality of the violation of the human rights of others.<sup>69</sup> While some regional human rights bodies have suggested that such responsibility is only owed to people within the specific region to which a human rights treaty applies,<sup>70</sup> such an interpretation of international human rights law runs contrary to the fundamental principle of non-discrimination on the basis of nationality and other similar grounds and has been

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Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. Res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), *amended by* E.S.C. Res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977) and the Basic Principles for the Treatment of Prisoners, G.A. Res. 45/111, annex, 45 U.N. GAOR Supp. (No. 49A) at 200, U.N. Doc. A/45/49 (1990).

<sup>67</sup> See, for example, UN Press Statement, *UN Counter-Terrorism Expert to launch inquiry into the civilian impact of drones and other forms of targeted killing*, dated 22 January 2013 (stating that “[t]he United Nations Special Rapporteur on human rights and counter-terrorism, Ben Emmerson, will formally launch on Thursday 24 January 2013 an inquiry into the civilian impact of the use of drones and other forms of targeted killing, focusing on the applicable legal framework, a critical examination of the factual evidence concerning civilian casualties, with a view to making recommendations to the UN General Assembly”).

<sup>68</sup> See N. JAYAWICKRAMA, *THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW: NATIONAL, REGIONAL AND INTERNATIONAL JURISPRUDENCE* 47, 48 (2002) (discussing the early jurisprudence of European human rights bodies and the texts of the several treaties).

<sup>69</sup> See, for example, *Loizidou v. Turkey*, supra note 40; *Lopez v. Uruguay*, UN Human Rights Committee, Comm. No.52/1979, *UN Human Rights Committee Report*, Annex XIX (1981); and *Armando Alejandro Jr., Carlos Costa, Mario de la Peña, and Pablo Morales v. Cuba*, Int-AMComm. Rep. No. 86/99, Case 11.589 (29 September 1999). See also, United Nations Human Rights Committee, Report of the Human Rights Committee, 31 January to 11 March 1994, at ¶284, U.N. Doc. A/50/40; GAOR 50th Sess., Supp. No. 40 (1995) (wherein the Committee, commenting on the United States' initial report, makes it clear that the human rights obligations in the ICCPR may apply extra-territorially).

<sup>70</sup> See, for example, *Banković and Others v. Belgium and 16 Other Contracting States*, Grand Chamber, Appl. No. 52207/99, at ¶¶54-82 (19 December 2001).

explicitly rejected by both regional<sup>71</sup> and universal human rights bodies.<sup>72</sup> Such a restrictive interpretation of international human rights law would also be contrary to the object and purpose of international human rights law, which is to provide as much protection to individuals' human rights as possible and to not encourage the violation of human rights anywhere in the world. If States were allowed to violate with impunity the human rights of individuals in regions outside their own, when they could not do so in their own regions, this would contribute to dividing the world into individuals of different worth. The basis of international human rights law is the equal value of all individuals. Thus, such a limitation to the application of international human rights law must be rejected, as it is incompatible with the law. The view that a State is responsible for instrumentalities over which it exercises effective control is also good policy because it encourages States to ensure that their instrumentalities do not contribute to breaches of international law. It is also consistent with State responsibility for internationally wrongful acts where the effective control standard has been repeatedly articulated as the standard for attributing responsibility to a State.<sup>73</sup>

It is therefore, reasonable to conclude that international human rights law applies to targeted killing undertaken by States both within the country concerned, as well as to those who are abroad and who are targeted using an instrumentality that is under the control of a specific State concerned.

#### 4. WHAT RULES OF INTERNATIONAL HUMAN RIGHTS LAW APPLY?

The principle human right protecting individuals from targeted killings is the right to life. The right to life is found in numerous human rights treaties,<sup>74</sup> and

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<sup>71</sup> See, for example, *Saldano v. Argentina*, Report No. 38/99 in *Annual Report of the IACHR* at ¶¶15-20 (1998); *Coard et al. v. United States*, Case No. 10.951, Report No. 109/99 in *Annual Report of the IACHR* at ¶37 (1999) citing, *inter alia*, Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66, doc. 17 (1985) and the *Second Report on the Situation of Human Rights in Suriname*, OAS Doc. OEA/Ser.L/V/II.66, doc. 21, rev. 1 (1985); the former European Commission on Human Rights in *Cyprus v. Turkey*, 18 Y.B. *Eur. Conv. Hum. Rgts.* 83 at 118 (1975); *Loizidou v. Turkey*, Preliminary Objections, Ser. A, No. 310 at ¶¶59-64 (23 March 1995), and *Öcalan v. Turkey*, Appl. No. 46221/99 ¶93 (12 March 2003) and ¶91 (12 May 2005). Also see OPPENHEIM'S INTERNATIONAL LAW 136-137 (R. Jennings and A. Watts eds., Vol.1, 1992); I. BROWNIE, PRINCIPLES OF INTERNATIONAL LAW 298, 311 (1990); and M. BYERS, CUSTOM, POWER AND THE POWER OF RULES 53 (1999).

<sup>72</sup> See, for example, *Burgos v. Uruguay*, Communication No. 52/1979 (29 July 1981), U.N. Doc. CCPR/C/OP/1 at 88 (1984), ¶12.3 (stating "...it would be unconscionable to so interpret the responsibility under article 2 of the Covenant [of Civil and Political Rights] as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.").

<sup>73</sup> See *Nicaragua Case*, *supra* note 26, at 65, ¶115 and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Reports 208, ¶400 (2007).

<sup>74</sup> See, for example, *supra* note 48; art. 6, ICCPR, *supra* note 48; art. 4, ACHR, *supra* note 48; art. 4, ACHPR, *supra* note 50; art. 2, ECHR, *supra* note 48. Also see art. 2 of the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States, Council of Europe Doc. H(95) 7 rev. (1998); and art. 6 of the Convention on the Rights of the Child, *supra*

is part of customary international law. While there are some differences in how the right is stated, it is always considered a fundamental and inherent human right.<sup>75</sup> The UN Human Rights Committee, which has been entrusted by the 167 States party to the International Covenant on Civil and Political Rights, in interpreting the right to life contain in this treaty, has stated that it is “the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation.”<sup>76</sup> The Committee has further noted that “the law must strictly control and limit the circumstances in which a person may be deprived of his life” by State authorities.<sup>77</sup> Based on its appreciation of the importance of the right to life, the Committee drew the conclusion that it “is a right that should not be interpreted narrowly.”<sup>78</sup> Other international bodies and writers have also lauded the essential nature of the right to life.<sup>79</sup> For example, after the International Court of Justice confirmed that the right to life applies even to consideration of nuclear weapons, Judge Christopher Weeramantry referred to the right to life as the “irreducible core of human rights.”<sup>80</sup> And Nihal Jayawickrama calls it “the most fundamental of all rights”<sup>81</sup> a right that cannot be “taken away by the state or waived, surrendered or renounced” by a person.<sup>82</sup>

Three UN Special Rapporteurs, including two successive UN Special Rapporteurs on extrajudicial, summary or arbitrary executions, have concluded that targeted killings generally violate the right to life under international law.<sup>83</sup>

The differences in the quality of the right to life in different treaties are important to the extent that it has been the subject of dispute. The Universal Declaration of Human Rights<sup>84</sup> and the American Declaration of the Rights and Duties of Man,<sup>85</sup> both, which reflect customary international law,<sup>86</sup> consider all life

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note 49.

<sup>75</sup> An example of the differences are that the both Universal Declaration of Human Rights and the American Declaration of the Rights and Duties of Man, which reflect customary international law, consider all life sacrosanct without qualification and the ECHR, *supra* note 48, considers all “intentional” killings prohibited and the ACHR considers, while the ICCPR, *supra* note 48, and the ACHR, *supra* note 48, consider all “arbitrary” killings prohibited.

<sup>76</sup> ¶1 of the UN Human Rights Committee, General Comment 6, Article 6 (Sixteenth session, 1982), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 127 (2003).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> See generally, *THE RIGHT TO LIFE IN INTERNATIONAL LAW* (B. G. Ramcharan ed., 1985).

<sup>80</sup> *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, *supra* note , at 506 (Dissenting Opinion of Judge Christopher Weeramantry).

<sup>81</sup> Jayawickrama, *supra* note 68, at 243.

<sup>82</sup> *Id.* at 256.

<sup>83</sup> Alston, *supra* note , at 11, ¶33; Heyns, C., *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc. No. A/68/382 at 8, ¶35 (13 September 2013); and Emmerson, B., *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, UN Doc. No. A/68/389 at 17, ¶60 (18 September 2013).

<sup>84</sup> UNGA Res. 217, UN Doc. A/810 at 71 (1948), at art. 3.

<sup>85</sup> OAS Res. XXX, adopted by the 9<sup>th</sup> International Conference of American States (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OAS Doc.

sacrosanct without qualification. In fact, in the process of adopting the Universal Declaration of Human Rights when each article was voted upon the article containing the right to life received unanimous approval.<sup>87</sup> The European Convention for the Protection of Human Rights and Fundamental Freedoms, on the other hand, considers all “intentional” killings prohibited.<sup>88</sup> The American Convention on Human Rights and the International Covenant on Civil and Political Rights interpret the right to life to prohibit all “arbitrary” taking of life.<sup>89</sup> The term 'arbitrary', however, has been understood broadly to encompass the taking of life without a fair trial.

International human rights bodies have had to apply the right to life to cases of targeted killings. In one of the most frequently cited cases concerning the right to life the European Court of Human Rights had to consider whether targeted killing of three suspected terrorists by British special police violated the right to life.<sup>90</sup> The Court found that the summary executions were due to a United Kingdom government policy of instructing its police forces to shoot to kill.<sup>91</sup> As a consequence, the Court found for the first time, State responsibility for a violation of the right to life in article 2 of the European Convention on Human Rights. The Court held that the act of ordering the killings was attributable to the United Kingdom and that this State had a legal obligation to ensure the right to life in article 2 of the European Convention on Human Rights, which it had violated. Furthermore, the UK government's alleged justification, namely that it believed the three persons were terrorists about to carry out an attack, was not found to be adequate.

The right to life “also implies a positive obligation incumbent on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual,”<sup>92</sup> although this does not require the State to take extraordinary measures in most circumstances.<sup>93</sup> Where a

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OEA/Ser.L.V/II.82 doc.6 rev.1, 17 (1992), at art. 1.

<sup>86</sup> See, for example, Jayawickrama, *supra*, note 68, at ¶¶25-43 and *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, Inter-American Court, Advisory Opinion OC-10/89 (14 July 1989).

<sup>87</sup> See Jayawickrama, *supra*, note 68, at ¶36. Also see Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, I.C.J. Reports ¶23 (1951) where the Court appears to refer to the right to life, by implication as a principle underlying the Genocide Convention as customary international law.

<sup>88</sup> See, art. 2, ECHR, *supra* note 48.

<sup>89</sup> See art. 6, ICCPR, *supra* note 48.

<sup>90</sup> *McCann and Other v. United Kingdom*, E.Ct.H.R., Ser. A, No. 324 (March 1996) at ¶¶213-214.

<sup>91</sup> *Id.* at ¶¶202-214.

<sup>92</sup> Jayawickrama, *supra* note 48, at 261.

<sup>93</sup> See, for example, *X v. United Kingdom and Ireland*, (1985) 8 E.H.H.R. 49 where the European Commission held that ordinary police measures were sufficient and that the UK did not have to take extraordinary measures to protect its citizens from alleged threats of terrorism and *X v. Ireland*, Appl. No. 6040/73, 44 *Collection of Decisions of the European Commission* 121 (1973) where the provision of a body guard for an extended period of time was not required.

person announces his intention to kill, the State is obliged to at least take usual police actions needed to protect the public.<sup>94</sup> But while the State must protect its citizens, it has no duty to take extraordinary steps such as targeted killings. When the State does take extraordinary actions against a person suspected of an intention to violate the right to life, it may violate that person's human rights unless, it can adequately explain why it was necessary to take the actions. Indeed, because of the inherent and non-derogable human right to life that all people enjoy, including terrorists, the State is absolutely prohibited from taking life in the arbitrary manner that targeted killings imply, even if it is protecting others, unless the threat to others' lives or the fundamental well-being is serious and imminent. In other words, the prohibition against 'arbitrary' killing prohibits any killing by State actors, which is not in self-defense to a direct attack or an immediate threat of attack or subsequent to a judicial process.<sup>95</sup>

When a State undertakes a targeted killing outside the strict limitations imposed by international law, it may also violate the right to life if it does not adequately investigate the killing.<sup>96</sup> Such an investigation must be public and impartial.<sup>97</sup> Till date, most targeted killings have either not been investigated or any such investigation has not been made public. As the investigations have often been undertaken by the same branch of government that carried out the targeted killing, they are often not impartial. Both inadequate investigations and investigations which are not impartial create situations wherein the State may be violating a person's right to life.

From the above description of obligations concerning the right to life under international human rights law, it may be concluded that targeted killings are prima facie prohibited by international law as violations of the right to life. Whether they can still be justified will be considered in Part IV below. Finally, it is

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<sup>94</sup> *Osman v. United Kingdom*, 29 E.H.R.R. 245 (1998).

<sup>95</sup> In cases where a State has under taken to abolish the death penalty, for example, by signing or ratifying the Second Optional Protocol to the ICCPR, the death penalty is absolutely prohibited. See Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, U.N. G.A. Res. 44/128, annex, 44 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/44/49 (1989), entered into force 11 July 1991.

<sup>96</sup> See, e.g., *McKerr v. United Kingdom*, European Court of Human Rights Appl. No. 28883/95 (4 May 2001); *Kelly and Others v. United Kingdom*, European Court of Human Rights Appl. No. 30054/96 (4 May 2001); *Shanaghan v. United Kingdom*, European Court of Human Rights Appl. No. 37715/97 (4 May 2001); *Hugh Jordan v. United Kingdom*, European Court of Human Rights Appl. No. 24746/94 (4 May 2001) and *Funicane v. United Kingdom*, European Court of Human Rights Appl. No. 29178/95 (1 July 2003), all cited at 23, 30, nn. 20-24, D. Laferrière, *Fighting Terrorism and Respecting Human Rights, A Case Study of International Human Rights Jurisprudence*, in EXPANDING THE HORIZONS OF HUMAN RIGHTS LAW (I. Ziemele ed., 2005).

<sup>97</sup> See, e.g., UN Human Rights Committee, General Comment No. 6, UN Doc. CCPR/C/21/Rev.1 (1982); *Neira Alegria v. Peru*, Inter-Am.Ct.H.R., Ser. C, No. 20 (1995); *McCann and others v. UK*, European Court of Human Rights, Ser. A, No. 324 (27 September 1995); *Kaya v. Turkey*, European Court of Human Rights, 1998-I R.J.D. 297 (19 February 1998); *Guerrero v. Colombia*, UN Human Rights Committee, Comm. No. R.11/45 (5 February 1979), UN Doc. E/CN.4/2006/53, and *Lopez v. Uruguay*, Comm. No. 52/1979, UN Doc. CCPR/C/OP/1 (1984).

important to recognize that other human rights are relevant to targeted killings. Among these are the prohibition of inhumane treatment,<sup>98</sup> the human rights to security of person<sup>99</sup> and to a fair trial.<sup>100</sup>

## B. INTERNATIONAL HUMANITARIAN LAW

While international humanitarian law is often claimed to be applicable to targeted killings,<sup>101</sup> substantiating this claim is more difficult than it might appear at first glance and the conclusion is not so evident when one carries out a legal examination of the law. To determine the relevance of international humanitarian law to targeted killings, the same four questions as asked about international human rights law are relevant, namely;

- a. When does international humanitarian law apply?
- b. How does international humanitarian law apply?
- c. To whom does international humanitarian law apply?
- d. What rules of international humanitarian law apply?

Each of these questions is addressed in the four subsections below. It should be noted that the fourth question is only relevant if in the specific circumstances the first three responses support the application of international humanitarian law to a situation of targeted killing.

### 1. WHEN DOES INTERNATIONAL HUMANITARIAN LAW APPLY?

The right to life under international human rights law applies at all times; in contrast, international humanitarian law applies only during an armed conflict with a few exceptions.<sup>102</sup> Thus, a preliminary consideration for the application of international humanitarian law is, whether an 'armed conflict' exists in the situation in which a targeted killing takes place.

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<sup>98</sup> See, for example, *supra* note 48; art. 7, ICCPR, *supra* note 48; art. 3, ECHR, *supra* note 48; art. 5, ACHR *supra* note 50; art. 5 ACHPR. Also see generally the Convention against Torture and other Cruel and Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85 (1987); the Inter-American Convention to Prevent and Punish Torture, O.A.S.T.S. No. 65 (1985), and the European Convention for the Prevention Torture and Inhuman or Degrading Treatment or Punishment, E.T.S. No. 126 (1987).

<sup>99</sup> See, for example, *supra* note 48 (art. 9, ICCPR, art. 5, ECHR, art. 7, ACHR), and, the ACHPR, *supra*, note 50, art. 6.

<sup>100</sup> See, for example, *supra* note ; art. 14, ICCPR, art. 6, ECHR, art. 8, ACHR, and, *supra*, note , art. 7 ACHPR.

<sup>101</sup> See, e.g., United States Department of Justice, *White Paper: Memorandum on the Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or an Associated Force*, at 2 (Nov. 8, 2011) (claiming that the US is engaged in an armed conflict—the war against terrorism—everywhere in the world and that thus international humanitarian law applies to its targeted killings in this context).

<sup>102</sup> The exceptions relate to the protection of the Red Cross and Red Crescent emblems in peacetime and some provisions relating to occupation, but are not of essential relevance to our analysis, so they are not considered here.

A layman's definition of armed conflict might be that of Peter Wallenstein and Margreet Sollenberg, who define an armed conflict as “a contested incompatibility which concerns government and/or territory where the use of armed force between two parties, of which at least one is the government of a State, results in at least 25 battle-related deaths.”<sup>103</sup> One of the first efforts at a definition under international law describes an armed conflict as “a contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases.”<sup>104</sup> And one of the most elaborate efforts to define armed conflict identified only two agreed, but vague, criteria, namely, “the existence of organized armed groups” and that they are “engaged in fighting of some intensity.”<sup>105</sup> Although the definition of an armed conflict is not universally agreed upon, as the International Law Association has suggested, what is agreed is “that whether or not armed conflict exists depends on the satisfaction of objective criteria.”<sup>106</sup> It is therefore important to look more closely at what constitutes an armed conflict. Several dimensions of an armed conflict are readily apparent.

First, the term 'armed conflict' is intentionally used to describe the situations to which humanitarian law applies because it is broader than the term 'war'.<sup>107</sup> As the International Law Association recognizes “in international law the term “war” no longer has the importance that it had in the pre-Charter period.”<sup>108</sup> Indeed, even international humanitarian law normally uses the term “armed conflict” to describe the situation to which this law applies. The leading example being the four Geneva Conventions<sup>109</sup> and their Protocol I, which uses the term 'armed conflict'.<sup>110</sup> Even Article 1(2) of Protocol II to the four Geneva Conventions that extends the definition to situations where it applies<sup>111</sup>

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<sup>103</sup> P. Wallenstein & Sollenberg, M., *Armed Conflict 1989-2000*, 38(5) J. PEACE RES. 629–644 (2001).

<sup>104</sup> OPPENHEIM'S INTERNATIONAL LAW: A TREATISE 202 (H. LAUTERPACHT ed., Pt. II, 1952).

<sup>105</sup> International Law Association, *Final Report on the Meaning of Armed Conflict in International Law*, in PROCEEDINGS OF THE HAGUE CONFERENCE (2010) ON THE USE OF FORCE 32 (2011).

<sup>106</sup> *Id.* at 4.

<sup>107</sup> J. PICTET, COMMENTARY (IV) ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSON IN TIME OF WAR 20 (1958).

<sup>108</sup> *Supra* note 105, at 8.

<sup>109</sup> See common art. 1 of all four Geneva Conventions, namely, the Convention on the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, Oct. 21 1950, 75 U.N.T.S. 31 (hereinafter the First Geneva Convention); Convention on the Amelioration of the Wounded, Sick, and Shipwrecked Members of the Armed Forces Oct. 21 1950, 75 U.N.T.S. 85, (hereinafter the Second Geneva Convention); Geneva Convention relative to the Treatment of Prisoners of War, Oct 21,1950, 75 U.N.T.S. 135, (hereinafter the Third Geneva Convention); & Geneva Convention relative to the Protection of Civilian Persons in Time of War, Oct. 21, 1950, 75 U.N.T.S. 287, (hereinafter the Fourth Geneva Convention).

<sup>110</sup> See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 1(3) June 8 1977, 1125 UNTS 3 (hereinafter Additional Protocol to the Geneva Conventions).

<sup>111</sup> See *id.* art. 1, extending the situation to which the Protocol applies to “all armed conflicts which are not covered by Article 1 of ... (Protocol I)... and which take place in the territory of a High

distinguishes “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”<sup>112</sup> Thus, there is a threshold of violence over which a situation must pass to be considered an armed conflict under international law.

Second, the definition of armed conflict often focuses on conflicts between States. This is not surprising considering that under international law the focus has traditionally been on the responsibility of States or bodies akin to States in armed conflicts or wars.<sup>113</sup> Moreover, the principle of State sovereignty has guided and continues to guide, the creation and application of international law. Thus, under contemporary international law the focus continues to be on States, despite the extension to a limited number of other types of armed conflicts. Even in situations such as the United States’ proclaimed war on Al-Qaeda, it is unreasonable to acquaint the United States’ ability to control its armed forces or to do damage to mankind in general, with that of a group like Al-Qaeda.

Third, as Jean Pictet has recognized in his Commentary to the Red Cross Conventions, there are criteria for determining the existence of an armed conflict within the treaties themselves that have been agreed upon by States.<sup>114</sup> Focusing on the case of insurgents, Pictet identifies the following criteria for determining the existence of an armed conflict:

- (1) That the Party in revolt against the de jure Government possesses an organized military force; an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
- (2) That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.
- (3) (a) that the de jure Government has recognized the insurgents as belligerents; or
- (b) that it has claimed for itself the rights of a belligerent; or
- (c) that it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
- (d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.

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Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”

<sup>112</sup> *Id.*

<sup>113</sup> *See, e.g.*, GENTILI, A., *DE JURE BELLI* (1598); GROTIUS, H., *DE JURE BELLI AC PACIS* (1625).

<sup>114</sup> PICTET, J., *COMMENTARY (III) ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF PRISONERS OF WAR* 36 (1960).



- (4) (a) That the insurgents have an organization purporting to have the characteristics of a State.
- (b) that the insurgent civil authority exercises de facto authority over the population within a determinate portion of the national territory.
- (c) that the armed forces act under the direction of an organized authority and are prepared to observe the ordinary laws of war.
- (d) that the insurgent civil authority agrees to be bound by the provisions of the Convention.

While some of the above criteria point to an extended understanding of armed conflict—one that goes beyond intra-State conflicts to conflicts involving non-State entities—for purposes of the application of international humanitarian law to targeted killings, they all still require the involvement of at least one State party. This confirms that the targeted killings that are of primary concern to international law are those carried out by States.

Fourth, there appears to be an understanding among international bodies as to the criteria for determining if an armed conflict is taking place. Thus, while there is some ambiguity among writers, especially among American writers<sup>115</sup> as to what constitutes an international armed conflict, international bodies have made this determination. The Appellate Chamber of the International Criminal Tribunal for the Former Yugoslavia, for example, has determined that an armed conflict as existing “whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”<sup>116</sup> It went on to hold that “[i]t is indisputable that an armed conflict is international if it takes place between two or more States.”<sup>117</sup> It further clarified that a State exercising overall control over an armed group to the extent of assisting in the planning of military activity may thereby involve itself in an international armed conflict.<sup>118</sup> The Appellate Chamber, also held that whenever the threshold of an armed conflict is reached, the rule of international humanitarian law applies to all the territory under the jurisdiction of any party involved.<sup>119</sup>

The International Court of Justice has made a determination of the existence of an armed conflict in the context of the right to exercise self-defense.<sup>120</sup>

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<sup>115</sup> See, e.g., Watkin, K., *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98(1) A.J.I.L. 1, 3-6 (2004) (discussing some of the various views with a basis towards the views of United States or allied writers).

<sup>116</sup> *Prosecutor v. Dusko Tadić*, Case No. IT-94- 1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶70, (Oct. 2 1995).

<sup>117</sup> *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-A, App. Chamber, ¶84, (July 15 1999).

<sup>118</sup> *Id.* at ¶131, 145.

<sup>119</sup> *Prosecutor v. Dragoljub Kunarac Radomir Kovac and Zoran Vukovic*, Case No. IT-96-2311, App. Chamber (June 12 2002) ¶57.

<sup>120</sup> See Nicaragua Case, *supra* note , at 119-122, ¶229-236.

In this context, the Court was mainly concerned with whether certain acts constituted an armed attack that could give rise to the exercise of self-defense. The Court first distinguished between an armed attack and *prima facie* prohibited use of force, finding that the latter was committed by the United States when it placed mines in Nicaraguan waters and bombed Nicaraguan ports, oil installations and a naval base.<sup>121</sup> The Court then turning to the justification of use of force by the United States held that “an intermittent flow of arms” to insurgents by Nicaragua and the isolated border incursion by Nicaragua into other States were not sufficient to be an armed attack.<sup>122</sup> The Court also considered the timely characterization of events by the concerned States.<sup>123</sup> The Court's language suggests that perhaps States can characterize events as an armed attack by their representations, but this suggestion must be viewed with cautious deference to the fact that the Court was only considering evidence by affected States in support of established factual evidence.<sup>124</sup>

International human rights bodies that have considered whether an armed attack exists, have come to mixed conclusions. The non-binding Inter-American Commission on Human Rights has also held that an armed conflict can be found to exist in a situation emanating from a prison riot.<sup>125</sup> This case eventually made its way to the Inter-American Court that decided that the Commission could find the State liable for its violations of international human rights law, but not international humanitarian law.<sup>126</sup> In making this decision the Court avoided the determination of whether or not an armed conflict existed. Importantly, it also clarified that irrespective of whether or not an armed conflict is taking place, international human rights law continues to be the principle law taken into account by the Court.

Recently the UN Human Rights Council's independent international commission of inquiry on the Syrian Arab Republic has suggested that “the intensity and duration of the conflict [taking place in Syria during 2012], combined with the increased organizational capabilities of anti-Government armed groups, had met the legal threshold for a non-international armed conflict.”<sup>127</sup> The

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<sup>121</sup> *Id.* at 118, ¶227.

<sup>122</sup> *Id.* at 119-120, ¶231.

<sup>123</sup> *Id.* at 120-123, ¶232-237.

<sup>124</sup> *Id.* at 118-123, ¶227-237. The Court states that it “is entitled to take account. in judging the asserted justification of the exercise of collective self-defence ... the actual conduct of... [States]... at the relevant time, as indicative of a belief by the State in question that it was the victim of an armed attack...” *Id.* at 120, ¶232. It is also important to note that in the *Nicaragua Case* the Court was not making a determination of the existence of an armed conflict for purposes of applying *jus in bello*, but for the purpose of determining questions of *jus ad bellum*.

<sup>125</sup> *Juan Carlos Abella v. Argentina*, Case No. 11,137, OAS Doc. OAE/Ser.L/V/II.98, Doc.7 rev (April 13 1998).

<sup>126</sup> *Las Palmeras v. Colombia, Preliminary Objections*, Ser. C, No. 67 (Feb 4 2000).

<sup>127</sup> U.N.H.R.C., *Report of the independent international commission of inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/21/50, 6, ¶ 12 (August 16 2012).

Commission of Inquiry, however, did not explain what the legal threshold for a non-international armed conflict was exactly. Moreover, the engagement of Western governments in supplying weapons and logistics to the rebels<sup>128</sup> indicates that this conflict has become an international armed conflict.

Thus, in contrast to ordinary usage, international humanitarian law has had to develop an understanding of armed conflict that not only considers objective factors such as the level of violence or killing involved, but also the views of the participants in a targeted killing.

Moreover, the term ‘armed conflict’, in addition to the consideration of the definition indicated above, is understood in terms of two types of armed conflicts, namely international and non-international. A crucial question is, therefore, whether a situation in which targeted killings take place is an armed conflict and thereby entails the application of international humanitarian law to the State responsible for the targeted killing? Three situations might be envisioned: First, a situation when two States are at war with each other. Second, a situation in which a State and a non-State entity are involved in an armed conflict. And third, a situation in which there is no active armed conflict or a situation of peacetime.

In the first situation,—two States are at war with each other—an international armed conflict exists. The four Geneva Conventions, which are the leading instruments of international humanitarian law having each been ratified by 194 States, imply a broad definition of an armed conflict between States as “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”<sup>129</sup> The *Commentary* to this article, which is common to all four Geneva Conventions, confirms this broad application stating, “[a]ny difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place.”<sup>130</sup> States most certainly agreed just after World War II when they adopted the four Geneva Conventions, that an armed conflict involved only States.<sup>131</sup> This view has been reiterated by the International Committee of the Red Cross,<sup>132</sup> international tribunals,<sup>133</sup> and by numerous writers.<sup>134</sup>

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<sup>128</sup> See *Russia: Syrian rebels massively supplied by West*, (August 20, 2012), available at: <http://english.al-akhbar.com/node/11263> (21 August 2012), citing comments by Russia's Deputy Foreign Minister Gennady Gatilov.

<sup>129</sup> Geneva Conventions, *supra* note 109, art. 2 (1), common to all four Geneva Conventions.

<sup>130</sup> Pictet, J., *supra* note 107, at 32.

<sup>131</sup> *Id.* at 18-21.

<sup>132</sup> International Committee of the Red Cross (ICRC), *How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, Opinion Paper, 1 (March 17 2008).

<sup>133</sup> Prosecutor v. Dusko Tadić, *supra* note 117.

<sup>134</sup> See, e.g., GREEN, L.C., *THE CONTEMPORARY LAW OF ARMED CONFLICT*, Ch. 3 (2000);

Determining whether an international armed conflict exists will be straightforward when two States declare their involvement in a war. For example, the armed attacks by a United States-led coalition on Iraq in 1991 and 2003 clearly involved two or more States who at least implicitly declared they were at war with each other. Similarly, it would appear that the United States' attack on Afghanistan in 2001 and the United States-led attack on Libya in 2011 were also international armed conflicts even if they were initially non-international armed conflicts. In an international armed conflict the fuller regime of international humanitarian law will apply.

In contrast to an international armed conflict involving only States, a non-international armed conflict involves non-State actors as at least one of the participants. In such conflicts generally, a more limited set of rules apply. This is due in part to the reluctance of States to allow any rules of international law to apply to affairs that are within the domestic jurisdiction of a State. Non-international armed conflicts, by their very nature are usually within a single State. The ICRC notes that non-international armed conflicts are “between governmental forces and non-governmental armed groups, or between such groups only.”<sup>135</sup> It also notes that there are at least two distinct types of non-international armed conflicts and that the distinction is based in law.

The first type of non-international armed conflict is described by common Article 3 of the four Geneva Conventions.<sup>136</sup> This Article states that it applies to “armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties.”<sup>137</sup> In such conflicts only the very sparse provisions of common Article 3 apply. These provisions provide protection from violence to life, hostage taking, attacks on personal dignity, fair trial, and the right to adequate medical care.<sup>138</sup>

The second type of non-international armed conflict is that described by Article 1 of the Second Protocol additional to the four Geneva Conventions.<sup>139</sup> This definition of a non-international armed conflict is narrower than a definition in that it requires territorial control by the non-State actor and does not apply to conflicts that do not involve a State, according to the Appeals Chamber of the ICTY in the *Tadic* Case.<sup>140</sup> This second form of non-international armed conflict requires that the armed conflict takes place between a State's “armed forces and dissident armed forces.”<sup>141</sup> The non-state actors must meet the requirements of

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Schindler, D., *The different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, 163(2) R.C.A.D.I. 131 (1979).

<sup>135</sup> Prosecutor v. Dusko Tadić *supra* note .

<sup>136</sup> See Geneva Conventions, *supra* note 109, art. 3.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> Additional Protocols to Geneva Convention *supra* note 110, at art. 1.

<sup>140</sup> Prosecutor v. Dusko Tadić, *supra* note 133, at 4.

<sup>141</sup> Geneva Conventions, *supra* note 109, at art. 1.

being “organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations.”<sup>142</sup> In such cases, the rules embodied in the Second Protocol additional to the four Geneva Conventions will apply. This Protocol has been ratified by 166 States.<sup>143</sup>

Finally, when there is no active armed conflict, there is a situation of peace. In such a situation, international humanitarian law, with very few exceptions that are relevant to the consideration of targeted killings, will not apply.

## 2. HOW DOES INTERNATIONAL HUMANITARIAN LAW APPLY?

When an international armed conflict is found to exist, international humanitarian law will usually apply because the States concerned have ratified at least the four Geneva Conventions and/or other instruments of international humanitarian law or because customary international law is applicable.<sup>144</sup> The legality of armed conflict and which State is at fault for initiating the armed conflict will not prevent the application of international humanitarian law. Indeed, the principles of *pacta sunt servanda*<sup>145</sup> and *pacta tertiis nec nocent nec prosunt*<sup>146</sup> emphasize, as do the four Geneva Conventions,<sup>147</sup> that States that have ratified a treaty are bound by it as a matter of international law. A targeted killing that takes place during an international armed conflict must not be contrary to the obligations of States under international humanitarian law.

Unlike international human rights law, international humanitarian law has developed certain accountability mechanisms. The International Committee of the Red Cross, a Swiss non-governmental organization, plays a role in encouraging respect for the law, but has no power to ensure accountability. There exists a Fact-Finding Commission created by Article 90 of the First Additional Protocol to the four Geneva Conventions to examine situations of international armed conflict to which international humanitarian law applies. This Commission, however, has never been called into action by the 72 States that recognize its competence.

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<sup>142</sup> *Id.*

<sup>143</sup> See ICRC website listing the ratifying State parties, available at <http://www.icrc.org/>. Although many important countries such as China, Russia, Brazil and South Africa, have ratified this treaty, the United States, which has used force more than all other countries combined in the last 100 years, remains unwilling to sign or ratify this treaty.

<sup>144</sup> As almost every single State in the international community have ratified all four Geneva Conventions, the question of the application of customary international is largely academic. It gains more relevance, however, in the context of the some of the more specific protections provided by the first two protocols to the four Geneva Conventions, some of which are discussed below in this section.

<sup>145</sup> Meaning that States that have agreed to international obligations in treaties are bound by them. See Vienna Convention on the Law of Treaties, art. 26, 1155 *U.N.T.S.* 331 (1980).

<sup>146</sup> *Id.* at art. 34, Meaning that treaties generally do not create obligations for States that have not ratified them. *Also see*, SHAW M.N., *INTERNATIONAL LAW* 834 (2007).

<sup>147</sup> See, e.g., Pictet, *supra* note 107, at 19-20.

Instead, the application of international humanitarian law depends very much on the conscience of States. Common Article 1 of all four Geneva Conventions obliges the States parties to “undertake to respect and to ensure respect for the present Convention in all circumstances.”<sup>148</sup>

Issues concerning the relationship between international humanitarian law and international human rights law are dealt with in Part V below.

### C. TO WHOM DOES INTERNATIONAL HUMANITARIAN LAW APPLY?

International humanitarian law applies first and foremost to States. However, it also, creates obligations for individuals<sup>149</sup> and a corresponding responsibility for States to punish individuals who have violated some of the basic rules of international humanitarian law.<sup>150</sup>

In non-international armed conflicts, those armed conflicts that are wholly within and involving only one State, there is a general rule of customary international law requiring that a distinction be made between combatants and civilians and a rule providing that civilians shall never be subject to attack. Common Article 3 of the four Geneva Conventions further provides protections to any “[p]ersons taking no active part in the hostilities,” including those who were combatants, but for any reason have ceased to be combatants because they no longer participate in hostilities.<sup>151</sup>

A similar distinction exists in the international humanitarian law applicable to international armed conflicts. The Third Geneva Convention provides an often cited indirect definition of combatants by defining those who may be taken as prisoners of war.<sup>152</sup> According to Article 4 of the Third Geneva Convention, combatants include members of a State's military<sup>153</sup> or those with some special connection to a State's military or militias or volunteer corps<sup>154</sup> and other organized forces under a command hierarchy, that distinguish themselves, carry their weapons openly, and abide by the basic laws of war.<sup>155</sup> Other special cases of combatants include those persons who have a special status such as those who are

<sup>148</sup> Geneva Conventions, *supra* note 109, at art. 1.

<sup>149</sup> For example, international criminal law treaties such as the Rome Statute of the International Criminal Court, 2187 *U.N.T.S.* 90 (1998), provide for the punishment of individuals for violations of international humanitarian law or war crimes. See C.F.J. DOEBBLER, *INTRODUCTION TO INTERNATIONAL CRIMINAL LAW* (2007).

<sup>150</sup> For example, under international humanitarian law treaties such as article 146 of the Fourth Geneva Convention, *supra* note 109, States are obliged enact penal laws prohibiting the grave breaches in article 147 (that include wilful killing), to search for perpetrators, and to prosecute them or turn them over to another State that will prosecute them as well as to “take measures for the suppression of all acts contrary” to the Convention.

<sup>151</sup> Geneva Conventions, *supra* note 109 at art. 3. Cf SANDOZ Y. ET AL., *COMMENTARY TO THE ADDITIONAL PROTOCOLS OF 1977* §4789 (1987).

<sup>152</sup> See, e.g., F. KALSHOVEN, *CONSTRAINTS ON THE WAGING OF WAR* 28-29 (1991).

<sup>153</sup> Art. 4(A)(1) of the Third Geneva Convention, *supra* note 109 at art. 4(A)(1).

<sup>154</sup> *Id.*

<sup>155</sup> Third Geneva Convention, *supra* note 109 at art. 4(A)(2)(a)-(d).

*levée en masse*, i.e. those “who on the approach of the enemy spontaneously take up arms to resist the invading forces.”<sup>156</sup> However, care must be taken when referring to Article 4 as it also includes persons who are clearly not combatants but who may be detained as prisoners of war, for example, persons who were former soldiers in an occupied States' army.<sup>157</sup> The distinction between combatants and civilians in international armed conflicts is clarified with the adoption of the First Additional Protocol (Protocol I) to the four Geneva Conventions, which in Article 50, paragraph 1, states that “[a] civilian is any person who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2) (3) and (6) of the Third Geneva Convention and in Article 43 of this Protocol...”<sup>158</sup> Even more importantly, Article 50 states that “[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian.”<sup>159</sup>

Furthermore, the definition of who is a civilian under international humanitarian law is crucial, because the law regarding the protection of civilians from both targeted and even collateral killing is very strict. Under international humanitarian law, targeted killing is only lawful when the targeted person is a combatant.

Of course, civilians and civilian populations may become involved in an armed conflict. However, generally, it is prohibited to attack civilians or civilian populations.<sup>160</sup> The ICJ called this rule one of the “cardinal principles contained in the texts constituting the fabric of humanitarian law.”<sup>161</sup> The only exception to the immunity of civilians is when civilians participate in active hostilities in an armed conflict. They will then lose their immunity from attack “unless and for such time” as they take a direct part in hostilities.<sup>162</sup> The Geneva Conventions do not recognize other categories of persons who do not enjoy any protections under international humanitarian law,<sup>163</sup> but civilians are not among them.

Not considered in this contribution is the application of international humanitarian law to individuals through the mechanisms of international criminal law. Suffice it to say that individuals can and have been held responsible for

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<sup>156</sup> Third Geneva Convention, *supra* note 109 at art. 4(A)(6).

<sup>157</sup> Third Geneva Convention, *supra* note at art. 4(B)(1). *Also see*, art. 33 (for the special situation of religious and medical personnel).

<sup>158</sup> Additional Protocol to Geneva Conventions, *supra* note 110.

<sup>159</sup> *Id.*

<sup>160</sup> The prohibition of attacking civilians is found in Additional Protocol to Geneva Convention, *supra* note 110 at art. 48, 51(2) & 52(2), and Protocol II, *supra* note 110, art. 13(2). It was considered the first rule of customary international humanitarian law in the ICRC's seminal study on this law. *See* HENCKAERTS, J-M & DOSWALD-BECK, L., *CUSTOMARY INTERNATIONAL LAW* 1-24 (Vol. I, 2005).

<sup>161</sup> Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, *supra* note , at 257, ¶78.

<sup>162</sup> *See*, Additional Protocol to Geneva Conventions, *supra* note 110 at art. 51(3).

<sup>163</sup> Exceptional special categories include spies, *see, e.g.*, Hague Regulations annexed to the Convention (No. IV) Respecting the Laws and Customs of War on Land, art. 29-31, 36 *Stat.* 2277, 1 *Bevans* 631 (Oct. 18 1907), & Fourth Geneva Convention, *supra* note 109, at art. 5, 68.

violations of international humanitarian law by *ad hoc* tribunals created to deal with certain problems and by the International Criminal Court that has the potential ability to hold any individual responsible for violations of international humanitarian law.

#### 4. WHAT RULES OF INTERNATIONAL HUMANITARIAN LAW APPLY?

There may be numerous rights that are provided under international humanitarian law that are relevant in situations of targeted killings. Among these may be the obligation not to attack civilians and facilities that are necessary to civilians or extremely dangerous to them, the need to take precautions in an attack, the right to a fair trial, and the right to life or the prohibition of the willful killing of persons who are not combatants or who are protected persons. All of these restrictions on State action in an armed conflict, are part of customary international law today. The focus below will be on attacks against civilians and the precaution that must be taken when attacks against combatants take place.

The four Geneva Conventions,<sup>164</sup> and their Protocol I,<sup>165</sup> absolutely forbid the willful killing of non-combatants, which is anyone who is not actively engaged in combat activities. This includes civilians, injured combatants, or prisoners of war.

The prohibition of targeted killings of non-combatants can be traced back to the prohibition of assassinations – the Lieber Instructions drafted for the American civil war in 1863.<sup>166</sup> These instructions state in Article 148, which is the sole article in Section IX entitled 'Assassinations', that

*[t]he law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such intentional outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers of reward for the assassination of enemies as relapses into barbarism.<sup>167</sup>*

Today, the prohibition of willfully killing a person who is not an active combatant can very likely be considered customary international law. The general proposition—that neither non-combatants nor combatants may be arbitrarily

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<sup>164</sup> First Geneva Convention at art. 50, Second Geneva Convention at art. 50, Third Geneva Convention at art. 147 & Fourth Geneva Convention at art. GCIV, *supra* note 109.

<sup>165</sup> Additional Protocol to Geneva Conventions, *supra* note 110 at art. 11 & 85.

<sup>166</sup> F. Lieber, *Instructions for the Government of Armies of the United States in the Field*, General Orders, No. 100, War Department, Adjunct General's Office, Washington, D.C., USA (26 April 1863).

<sup>167</sup> *Id.* at art. 148.



killed—has several times been reiterated in modern international instruments. Article 6(b) and (c) of the Charter of the Nuremberg Tribunal reiterated that murder constitutes both a war crime and a crime against humanity.<sup>168</sup> The prohibition of willful killing of non-combatants is a grave breach of all the four Geneva Conventions.<sup>169</sup> As a principle of customary international law, this prohibition applies not only to States that are parties to relevant treaties, but to all States.

Article 51 of Protocol I, for example, obliges military forces to refrain from direct attacks on civilians stating unambiguously that “[t]he civilian population and individual civilians shall enjoy general protection against dangers arising from military operations...”<sup>170</sup> and that the “civilian population as such, as well as individual civilians, shall not be the object of attack.”<sup>171</sup> Paragraph 3 of Article 51 makes it clear that “[c]ivilians shall enjoy the protection afforded by this Section, unless and for such time as they take direct part in hostilities.”<sup>172</sup> In their *Commentary* on Protocol I, Yves Sandoz, Christopher Swinarski and Bruno Zimmermann conclude that “Article 51 est l'un des plus important du Protocole.”<sup>173</sup>

Moreover, any attack must be absolutely necessary to a legitimate military end and the force used against them must be proportionate to any anticipated military advantage. Attacks that constitute reprisals for past behavior that are directed against civilians, are absolutely prohibited. Article 23 (b) and (c) of the Hague Regulations also prohibits the treacherous killing or wounding of individuals who are part of an enemy's army or belonging to a hostile nation.<sup>174</sup>

While combatants may kill each other during an armed conflict this 'license to kill' ends as soon as the battle ends. The killings of wounded, captured soldiers or soldiers who are otherwise prevented or unable to take part in combat is also prohibited.

Again, like the right of life under international human rights law, the prohibition of willful killings or murder is only one of the various rights of an individual that are protected under international humanitarian law. Other rights that are interfered with by targeted killings include the grave breaches of inhumane

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<sup>168</sup> United Nations, *The Charter and Judgment of the Nuremberg Tribunal: History and Analysis*, 92, UN Doc. No. A/CN.4/5.

<sup>169</sup> See First Geneva Convention at art. 50, Second Geneva Convention at art. 51, Third Geneva Convention at art. 130, & Fourth Geneva Convention at art. 147, *supra* note 109.

<sup>170</sup> Additional Protocol to the Geneva Conventions *supra* note 110, at art. 51(2).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at art. 51(3).

<sup>173</sup> SANDOZ Y. ET AL., COMMENTAIRE DES PROTOCOLES ADDITIONNELS DU 8 JUNI 1977 AUX CONVENTIONS DE GENÈVE DU 12 AOÛT 1949 629 (1986). Translated to English by author: “Article 51 is one of the most important of the Protocol.”

<sup>174</sup> *Supra* note 163.

treatment; willfully causing great suffering or injury to body or health; and willfully depriving a protected person of a fair or regular trial.<sup>175</sup>

International humanitarian law provides significant fair trial protections to persons who are under the control of the enemy. Targeted killings are attempts to ignore these protections in cases where capture or detention is often possible, but has not been tried.

Being neither allowed nor obliged to take action that could include targeted killings, States will only be able to justify their actions as consistent with their obligations under international human rights law if they have a legal justification. The relevant possible justifications are considered below.

## **V. THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND HUMANITARIAN LAW**

The fact that international human rights law and international humanitarian law may apply to situations of targeted killings, does not adequately explain the relationship between these two fields of law. It is essential to understand how the two fields of law relate to each other. There are at least three possible relationships relating to the application of these fields of law that require closer consideration.<sup>176</sup> These are:

- i) International humanitarian law applies to the exclusion of international human rights law in situations amounting to armed conflicts thus the right to life is interpreted only in accordance with international humanitarian law;
- ii) Both international humanitarian law and international human rights law apply concurrently, but international human rights law must be interpreted in light of the provisions of international humanitarian law to restrict the application of the right to life; or
- iii) International humanitarian law applies side by side with international human rights law each providing separate protections and providing the individual the cumulative protection of both corpora of law.

Each of these three options is briefly considered below in respect of the right to life that is protected under both corpora of international law.

### **A. THE RIGHT TO LIFE IS INTERPRETED ONLY IN ACCORDANCE WITH INTERNATIONAL HUMANITARIAN LAW**

The International Court of Justice's decision in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* is sometimes cited in support of the

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<sup>175</sup> See, e.g., Fourth Geneva Convention, *supra* note 109 at art. 147.

<sup>176</sup> See Legal Consequences of the Construction of a wall in the Occupied Territory, *supra* note , at 178, ¶106, using a similar list of three possibilities, namely, “some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.

application of international humanitarian law to the exclusion of international human rights law.<sup>177</sup>

*[t]he test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.*<sup>178</sup>

According to supporters of this 'exclusive interpretation', the important word is “only” and the important quality of international humanitarian law is its “*lex specialis*” character.<sup>179</sup> It is claimed that these terms or phrases imply that only international humanitarian law applies. It is a view popular among military writers. Ian Henderson, for example, while admitting that international human rights law may be relevant to situations of targeting, even in an armed conflict, goes on to mainly discuss international humanitarian law.<sup>180</sup> Professor William Schabas has described this argument as “convenient and relatively straightforward,” but he also points out “that it results in a level of tolerance of serious violations of human rights, including killings of civilian non-combatants.”<sup>181</sup>

However, to claim international humanitarian law to the exclusion of international human rights law, would not appear to be consistent with some of the most basic principles of international law, many of which the defenders of targeted killings cited as justification. For example, respect for the principle of State sovereignty means that all States are entitled to enter into international agreements. To claim that international humanitarian law prevents the application of international human rights law would seem to impose a limitation on the sovereign right of a State to undertake certain legal obligations, which while not incompatible with each other, would otherwise apply cumulatively. Moreover, the treaty principle of *pacta sunt servanda* and the general principle of respect for the rule of international law, strongly dictate against an understanding of the law whereby a treaty obligation or an obligation under customary international law would

<sup>177</sup> See PAUST, J.J., BEYOND THE LAW: THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES IN THE “WAR” ON TERROR 34-35 (2007) claiming this to be the case and citing numerous other writers, although he does not take this view himself.

<sup>178</sup> Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, *supra* note , at 240, ¶26.

<sup>179</sup> Paust, J., *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19(2) J. TRANSNAT'L L. POLY 237, 266 (2010).

<sup>180</sup> HENDERSON, I., THE CONTEMPORARY LAW OF TARGETING: MILITARY OBJECTIVES, PROPORTIONALITY, AND PRECAUTIONS IN ATTACK UNDER ADDITIONAL PROTOCOL I 35 (2009).

<sup>181</sup> Schabas, W., *Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus ad Bellum*, 40 (2) ISRAELI L. REV. 592, 593 (2007).

disappear merely because a weaker or more limited obligation was undertaken. Not only would this contribute significantly to legal uncertainty, but also it could very likely undermine the very nature of the 'binding' character of international law.

It might be concluded that the exclusive application of international humanitarian law to the exclusion of international human rights law, would be much more problematic and much less attractive to any entity seeking to protect individuals' basic rights, than would be the concurrent application of both these types of law.

#### **B. INTERNATIONAL HUMAN RIGHTS LAW MUST BE INTERPRETED IN LIGHT OF THE PROVISIONS OF INTERNATIONAL HUMANITARIAN LAW**

In its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*,<sup>182</sup> the Court makes this statement immediately after it has stated unambiguously that international human rights law continues to apply in an armed conflict.<sup>183</sup> The Court's interpretation, if understood broadly, could effectively exclude the interpretation of international human rights law in situations of armed conflict—being contrary to the basic premise of the international human rights law that the Court itself applies. Judge Weeramantry makes this argument eloquently in his Dissenting Opinion focusing on the particularities of nuclear weapons.<sup>184</sup> To claim this law applies and that one of its most basic provisions is effectively excluded or very much limited in application would appear inconsistent. Second, the Court's statement applies to its application of Article 6 of International Covenant on Civil and Political Rights, a provision that expressly prohibits the “arbitrary” taking of life. As we have seen above, other provisions of international human rights law do not contain broad modifiers but prohibit all takings of life unless there is a specific justification.<sup>185</sup> Third, international human rights bodies have interpreted the right to life to create for States “the supreme duty to prevent wars, acts of genocide, and other acts of mass violence causing arbitrary loss of life,” continuing by instructing States that “every effort they make to avert the danger of war, especially thermonuclear war, and to strengthen international peace and security would constitute the most important condition and guarantee for the safeguarding of the right to life.”<sup>186</sup> And fourth, to allow a country to initiate the use of force by undertaking a targeted killing as anticipatory self-defense, as it has been justified,<sup>187</sup> would be to allow a State to start an armed conflict so as to lower the burden of its responsibilities. Such efforts by States have been resoundingly

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<sup>182</sup> *Supra* note 4, at 593.

<sup>183</sup> Schabas, *supra* note 181, at 593.

<sup>184</sup> *See, supra* note 4, at 506-508.

<sup>185</sup> *See infra* Part IV.

<sup>186</sup> U.N.H.R.C., General Comment 6 (1982), *supra*, note 76.

<sup>187</sup> *See, e.g.*, A. Guiora, *Targeted Killings as Active Self-Defense*, 36 CASE W. RES. J. INT'L L. 319 (2004).

rejected under international human rights law, even in cases where international humanitarian law has been used to interpret international human rights law.<sup>188</sup>

### C. INTERNATIONAL HUMANITARIAN LAW APPLIES SIDE BY SIDE WITH INTERNATIONAL HUMAN RIGHTS LAW

The UN Human Rights Committee has taken the position that international humanitarian law applies side by side with international human rights law, each providing separate protections and providing the individual the cumulative protection of both corpora of law. It has stated,

*[t]hat the applicability of the regime of international humanitarian law during an armed conflict does not preclude the application of the Covenant, including Article 4 which covers situations of public emergency that threaten the life of the nation. Nor does the applicability of the regime of international humanitarian law preclude accountability of States parties under Article 2, paragraph 1, of the Covenant for the actions of their authorities outside their own territories, including occupied territories. The Committee therefore reiterates that, in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law.*<sup>189</sup>

This parallel application is expressly recognized in the preamble of the Second Protocol to the four Geneva Conventions that recalls that “international instruments relating to human rights offer a basic protection to the human person”<sup>190</sup> in wartime as well as in peacetime. This savings clause, known as the Martens Clause, is found in the leading treaties of international humanitarian law.<sup>191</sup> It ensures the protections of human rights law, especially the right to life, whenever such protection goes further than what is provided by international humanitarian law itself.

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<sup>188</sup> See, e.g., Las Palmeras Case (Preliminary Objections), Inter-American Court on Human Rights (Feb. 4 2000). Also see U.N.H.R.C., General Comment 6 (1982), *supra* note 76.

<sup>189</sup> U.N.H.R.C., *Concluding Observations of the Human Rights Committee on Israel's second periodic report*, UN Doc. CCPR/CO/78/ISR, ¶11 (2003).

<sup>190</sup> Protocol (II), *supra* note 110.

<sup>191</sup> See, e.g., Hague Convention (No. II) with Respect to the Laws and Customs of War on Land, with annexed regulations, preamble 32 STAT. 1803, 1 BEVANS 247 (July 29 1899); Hague Convention (No. IV), preamble ¶8 36 STAT. 2227, T.S. NO. 539; First Geneva Convention at art. 63, Second Geneva Convention at art. 62, Third Geneva Convention at art. 142, Fourth Geneva Convention at art. 158, *supra* note 109. Also see DOEBBLER, C.F.J., INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW 15-16 (2005).

It is important to note that although international humanitarian law applies side by side with international human rights law, it may be that there is no forum with the jurisdiction to interpret and implement international humanitarian law, while it may be possible to apply international human rights law. The *Las Palmeras Case* before the Inter-American Court on Human Rights is an example of a case in which a human rights body recognized that while international humanitarian law may be relevant, the Court only has a mandate to apply international human rights law.<sup>192</sup>

According to this option, international humanitarian law applies during wartime to prohibit the targeted killing of civilians. The principle of distinction is essential to this protection as is the definition of a combatant. Civilians are in fact defined by the latter definition. In other words, whoever is not a combatant, is a civilian. Equally important to note is that although international humanitarian law may be relevant to the interpretation of international human rights law, this will not be the case when the party is seeking to justify a use of force. Although international humanitarian law will apply even when the use of force is illegal, the lower threshold of responsibility that is often inherent in international human rights law will also continue to apply for the parallel application of that law. Thus States are obliged to provide the greatest protection that either international human rights law or international humanitarian law provides. An interpretation of the law that allows a State to only apply international humanitarian law, would have the perverse consequence of encouraging a State seeking to use force in violation of individuals' human rights to create the inhumane situation of armed conflict. As Anicée van England reminds us, the “role of international humanitarian law is to regulate the conduct of conflict and to protect civilians and hors de combat, not to facilitate war.”<sup>193</sup> And as the Inter-American Court of Human Rights has unambiguously stated, human rights treaties must be “interpreted in favor of the individual, who is the object of international protection, as long as such an interpretation does not result in a modification of the system.”<sup>194</sup>

It may thus be concluded from this brief consideration of this option, that while international humanitarian law may be used to interpret international human rights law, as the International Court of Justice suggests, this does not mean that the right to life in international human rights law is restricted. International humanitarian law, must instead fill-in ambiguities and it cannot not replace clear treaty obligations under the guise of effecting the interpretation of the law. International humanitarian law can only add to the protection provided by international human rights law. Any other interpretation results in using the two

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<sup>192</sup> See, e.g., *Las Palmeras Case*, *supra* note 126.

<sup>193</sup> ENGELAND, A., VAN, CIVILIAN OR COMBATANT: A CHALLENGE FOR THE 21<sup>ST</sup> CENTURY 162 (2011).

<sup>194</sup> *In the matter of Viviana Gallardo et al. (Costa Rica)*, Advisory Opinion No. G 101/81, Inter-Am.Ct.H.R. (ser. A) ¶16 (1984).

special *corpora* of international law to undermine their common purpose: the protection of individuals from the inhumane acts of other individuals. Thus, although the right to life under international human rights law applies during an armed conflict, as indicated above, there is a parallel application of international humanitarian law applying only in armed conflicts, which adds to the protection of individuals during these times of the greatest inhumanity.

## VI. JUSTIFICATIONS FOR AN INTERNATIONALLY WRONGFUL ACT

From the above discussion of international human rights and humanitarian law it would appear that targeted killings *prima facie* interfere with the right to life under both sources of law. In such circumstances a State will have committed an internationally wrongful act for which it is responsible. Nevertheless, despite the fact that the basic requirements of State responsibility have been met; it might be possible for a State to proffer a justification for its action. The International Law Commission's Draft Articles on State responsibility reflect several justifications that have been recognized under customary international law and are often found in treaties. As justifications for an internationally wrongful act, they are exceptions; and thus must be interpreted restrictively so as not to interfere with the rights of the victims.

### A. SELF-DEFENSE AND COMBATING TERRORISM

Perhaps the most common reason given for targeted killings is self-defense. Indeed, the right to self-defense is recognized as a justification for an otherwise wrongful act not only in the ILC Draft Articles,<sup>195</sup> but also in the Charter of the United Nations.<sup>196</sup>

The United States,<sup>197</sup> the United Kingdom,<sup>198</sup> and Israel<sup>199</sup> all claim that their targeted killings are done in the name of combating terrorism. This is problematic for several reasons.

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<sup>195</sup> ILC Draft Articles, *supra* note , at art. 21.

<sup>196</sup> U.N. Charter art. 51.

<sup>197</sup> See, e.g., Speech by United States Attorney General Eric Holder on Monday, 5 March 2012 at Northwestern University School of Law in Chicago, *available at*: <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>, in which he defends the US policy of targeted killing of 'terrorists' as a legal use of force in a temporally and geographically undefined war, and Speech by the then-United States State Department Legal Adviser Harold Koh on Thursday, 25 March 2010 at the Annual Meeting of the American Society of International Law, *available at*: <http://www.cfr.org/international-law/legal-adviser-kohs-speech-obama-administration-international-law-march-2010/p.22300>.

<sup>198</sup> See, Cole, C., *Drone Wars Briefing: Examining the growing threat of unmanned warfare*, (January 2012), *available at*: <https://dronewarsuk.files.wordpress.com/2012/01/drone-wars-briefing-final2.pdf>, documenting the history and use of drones by the United Kingdom.

<sup>199</sup> See, e.g., Amnesty Int'l, *Israel and the Occupied Territories: State assassinations and other unlawful killings*, 1, AI Index No. MDE 15/005/2001 (Feb 21, 2001) quoting Israel's Deputy Defence Minister Ephraim Sneh as stating that Israel "will continue ... [its]... policy of liquidating those who plane or

First, even when one is a confirmed terrorist, it is not lawful to arbitrarily and summarily kill them. Israel's killing of a blind, wheelchair-bound cleric was justified on these grounds, but its irrationality is proven by the fact that Sheik Ahmed Yassin had been arrested by Israel several times before he was killed. In other words, there were other less onerous and, in the case of the illegally occupied Palestinian Territories, less, illegal forms of action. In fact the killing was condemned as an “extra-judicial killing,” thus illegal by the European Union.<sup>200</sup> The United Nations Secretary-General, the UN Under-Secretary-General and High Commissioner for Human Rights, and the UN Special Rapporteur on extrajudicial, summary, and arbitrary executions also condemned the targeted killing. Eleven States in the UN Security Council voted to condemn the killing as illegal, but they were blocked by the single dissenting vote of the veto wielding United States.

Second, the definition of who is a terrorist varies greatly as do the definitions of what acts constitute terrorism. The references to acts that terrorize in humanitarian law generally apply to State terrorism more than individual terrorism.<sup>201</sup> When States have tried to outlaw individual acts of terrorism, they have usually instead ended up outlawing acts that are already prohibited by specific treaties.<sup>202</sup> On the other hand, United States law makes a person seeking to protect animals a terrorist if her or his actions interfere with the rights, including the mere commercial rights, of others.<sup>203</sup> Most writers who have tried to define these terms have conceded defeat. For example, Robert Friedlander’s effort to define these terms for the prestigious *Encyclopedia of Public International Law* concludes that terrorism “exists in the mind of the beholder, depending on one's political views, and national origins.”<sup>204</sup> Sometimes writers just ignore the question of defining who is a terrorist altogether, preferring merely to use the vague term as an

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carry out attacks, and no one can give ... [it]... lessons in morality because ... [it has] ... unfortunately 100 years of fighting terrorism”.

<sup>200</sup> European Union Press Release No. 7383/04 (Presse 80) of 22 March 2004 cited in MELZER, *supra* note , at 440, n. 19, 8.

<sup>201</sup> See, e.g., Fourth Geneva Convention, *supra* note 109, at art. 33. Also see Hague Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, *Parliamentary Papers*, Cmd. 2201, Misc. No. 14, pp. 15-16, art. 22 (1924), (although never adopted by States so as to become legally binding) referred to in LAUTERPACHT, H., *OPPENHEIM'S INTERNATIONAL LAW*, *supra* note 104 at 519, as a reflecting customary international law.

<sup>202</sup> See, e.g., South Asia Association for Regional Cooperation Regional Convention on the Suppression of Terrorism (1987), available at [http://www.saarc-sec.org/areaofcooperation/detail.php?activity\\_id=21](http://www.saarc-sec.org/areaofcooperation/detail.php?activity_id=21) and the Arab. Cf. Convention of the Shanghai Cooperation Organization against terrorism, UN Secretariat registration number I-49374 (registered with the UN on 2 February 2012).

<sup>203</sup> Animal Enterprise Terrorism Act, 18 USC §43 (2000).

<sup>204</sup> Friedlander R.A., *Terrorism*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 371-372 (Bernhardt R., eds., 1981).



emotional rallying cry to achieve their own ends of putting human beings beyond the protection of the law.<sup>205</sup>

Third, discovering a State's intention may be extremely difficult and unreliable as States have extraordinary means of creating the impression of whatever intention they wish. Because international law depends on States actions and *opinio juris*, most States are careful to justify their action on the basis of an existing principle of international law. The usual justification of the United States is self-defense.<sup>206</sup> The basis of this defense depends on whether or not another State has attacked the United States or whether an imminent attack can be expected.

And finally, governments make mistakes based on their own erroneous information—or perhaps based on the malicious intentions of State actors—and target and kill people who are innocent.<sup>207</sup> Determining whether a government has made a mistake, and if so, why and how, is often extremely difficult. Governments do not regularly open themselves to scrutiny in such situations, especially when alleged terrorists are involved. A striking example is the United Kingdom's targeted killing of Jean Charles de Menezes in cold blood in a London Underground Station. The United Kingdom police had suspected him of being a terrorist, but as it turned out to he was completely innocent of any wrongdoing.<sup>208</sup> Despite an inquiry that cleared Mr. Menezes of any wrongdoing, the UK government, upheld by its courts, refused to prosecute any of the policemen involved for the wrongful killing.

As suggested in this Part, the designation of a person as a terrorist is an extremely flawed concept. Nevertheless, it is this concept that drives the actions of States that carry out targeted killings. At the same time it is a concept that has little to do with the law. Nowhere in international law is a terrorist defined.

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<sup>205</sup> See, e.g., Kellogg D. E., *International Law and Terrorism*, MIL. L. REV. 50 (2005) which argues that international law can be used as weapon to allow the “civilized nations” to kill terrorists without ever defining who is a terrorist.

<sup>206</sup> See Kretzmer, D., *Targeted Killings of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?* 16(2) EUROPEAN J. INT'L L. 173 (2005).

<sup>207</sup> See Cole, *supra*, note 198, documenting numerous mistaken killings by US and UK drones based mainly on press reports. Also see, for example, *McCann v. UK*, 324 E.Ct.H.R. 8, ¶45-46 (1995) in which for the first time a State was found to have violated the right to life in article 2 of the European Convention on Human Rights, in this case by the targeted killing of three person mistakenly alleged to have been involved in a terrorist plot; *US drone strike 'kills 40' in Pakistani tribal region*, B.B.C., (MAR. 17 2011), available at: <http://www.bbc.co.uk/news/world-south-asia-12769209>; *Disputes mounting in Turkey over mistaken killing of 35 citizens in airstrike*, XINHUA NEWS, available at: <http://English.news.cn>; Frankel, G., *Man Shot Dead by British Police Was Innocent Brazilian Citizen*, WASHINGTON POST, (JULY 25 2005), available at: <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/23/AR2005072300987.html>; and Byman, D., *Do Targeted Killings Work*, 85(2) FOREIGN AFFAIRS 95 (2006) noting that “[i]n 1973, agents of the Mossad, the Israeli foreign intelligence service, shot Ahmed Bouchiki, a Moroccan waiter, in Lillehammer, Norway, having mistaken him for a leader of Black September....”

<sup>208</sup> See MELZER, *supra* note , at 442-443, with a description of this case.

## B. NECESSITY

It is also sometimes argued that targeted killings are necessary. This argument usually does not rely on the legal understanding of necessity. This is evident because a legal understanding of necessity would require not only that a government carrying out a targeted killing had no other alternative to protect a vital national interest, but also was not interfering with a vital national interest of another country.<sup>209</sup> Furthermore, well-established principles of international law preclude a State from relying upon actions that *prima facie* violate international law, especially when it has contributed to creating the situation to which it is reacting.<sup>210</sup> The International Law Commission, in a statement that reflects customary international law, makes this clear in Article 25 of its Draft Articles on State Responsibility that explains that:

1. *Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:*
  - (a) *is the only way for the State to safeguard an essential interest against a grave and imminent peril; and*
  - (b) *does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.*
2. *In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:*
  - (a) *the international obligation in question excludes the possibility of invoking necessity;*
  - or
  - (b) *the State has contributed to the situation of necessity.*

Applying these well-established principles of international law it is hard to see how targeted killings could ever be tolerated as they would fall foul of one or more of the above conditions. To satisfy these conditions, a State carrying out a targeted killing must show that it has adequately evaluated alternatives. This means that the burden rests upon the State carrying out the targeted killing, to provide a detailed description of its procedure for determining necessity, and to allow this procedure to be examined by an impartial and independent body operating in a transparent manner. Such a State could not hide behind concerns of national security as its actions are *prima facie* in violation of one or more individuals' rights

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<sup>209</sup> Also see *Case Concerning Gabčíkovo-Nagymaros Project (Hung. v. Slovak)*, 1997 I.C.J. 7, 40 (Sept. 25) for a consideration of the exceptional nature of necessity, and *M/V Saiga (No. 2) (St. Vincent v. Guinea)*, Case No. 2, Order of July 1, 1999, 120 ITLOS Rep. 143, 191-2 highlighting the requirement that an essential interest of the State must be in grave and imminent danger for necessity to apply.

<sup>210</sup> In this regards it is relevant to remember that United States trained Osama Bin Laden to commit acts such as the one for which they later killed him. The United States and the United Kingdom creates the situations of violence in Afghanistan and Iraq by an illegal use of force to which they are now reacting with targeted killings. And Israel maintains an illegal occupation of Palestine, which it claims makes targeted killings of Palestinians necessary.

to life as well as another State's solemn international obligation to protect this right. The State thus, seeking to justify its action must carry the burden of proof. Even more difficult will be the burden of proving that the essential interest of another State or States' is not seriously impaired. Although the modifier 'seriously' might allow some room for maneuvering, it is a heavy burden to overcome.

For this reason, the authors who support targeted killing use a political understanding of necessity. They interpret it as allowing action when the law, in their view is inadequate<sup>211</sup> or when the law merely does not cover the allegedly sui generis situations of terrorism or asymmetrical warfare.<sup>212</sup> Either effort to deny the existence, or emphasize the inadequacy, of international law is troubling.

Although no law can cover every conceivable situation, there is very possibly no other situation than the protection of human life, where international law has been constructed to give as broad protection as possible.<sup>213</sup> This in effect has been recognized by authors who correctly note that both human rights and humanitarian law apply to persons involved in an armed conflict.<sup>214</sup> Both these *corpora* of laws are intended to protect human life; however inadequate they may be for this purpose.

## VII. CONCLUSIONS

Much has written about targeted killings, but no writer has been convincingly able to justify targeted killing as consistent with international law. Instead they suggest that the law is not yet adequate, that the killings are politically justified, or that their own confused assessment of unclear law makes targeted killings acceptable. Instead, as indicated above, there is in fact sufficient evidence that most targeted killings violate international law. Still a small minority of States continue to carry out target killings as part of their foreign relations.

Since 2011, the United States alone has killed more people by targeted killings in Pakistan alone, then were killed by the combined acts of violence in New York and Washington, D.C. in September 2001.<sup>215</sup> Almost all of the people whom the United States killed, must be assumed to have been innocent as hardly any of them had been convicted by a court of law. Moreover, the State's killing of thousands of people without any judicial process is an even more serious act than any criminal or terrorist attack, because the State is supposed to safeguard the rule

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<sup>211</sup> Schöndorf R.S., *Extra-State Armed Conflict: Is there a need for a new legal regime?*, 42 N.Y. UNIV. J.I.L. & POL. 697, 698 (2004).

<sup>212</sup> *Id.* at 697, ff. 5.

<sup>213</sup> U.N.H.R.C. General Comment No. 6, *supra* note 76 where the right has been called the "supreme right," and Center for Housing Rights and Evictions v. The Sudan, Comm. No. 279/03 and 296/05, ACHPR ¶146 (2009), stating that the right to life "is basic to all human rights and without it all other rights have no meaning."

<sup>214</sup> *See, e.g.*, Schabas W., *supra* note 179, at 237.

<sup>215</sup> *See US Senator says 4700 killed in drone strikes*, 21 February 2013, available at: <http://www.aljazeera.com> (quoting the estimate of US Senator Lindsey Graham).

of law. A State that carries out targeted killing betrays the trust that comes with sovereignty and sets a bad example that may be followed by many more people compared to the acts of a private criminal.

Since the State is the guardian of the rule of law, when it carries out a targeted killing, the burden of proof lies upon the State to show that its action was justified. Legally this justified because a targeted killing is a willful act of killing, a *prima facie* grave breach of both international human rights law and international humanitarian law protecting the right to life. A State may further be responsible for violating the right to life if it fails to adequately investigate a targeted killing. Similarly, the failure to search for, investigate, prosecute, and, if convicted, adequately punish any person involved in a targeted killing are all acts that give rise to State responsibility for an internationally wrong act in addition to the responsibility for the actual killing.

The United Nations' Human Rights Council has investigated whether targeted killings are consistent with international law. Three separate UN Special Rapporteurs between 2010 and 2013 have found that in general, targeted killings violated international human rights law.<sup>216</sup> In 2013, Amnesty International and Human Rights Watch also produced reports on targeted killings in Pakistan and Yemen, which arrived at a similar conclusion, although admitting that they did not have enough information to make definitive determinations because the US has withheld needed details about its targeted killings.<sup>217</sup> Although, these investigations come too late to save the lives of hundreds of victims of targeted killings, they can still contribute to upholding the integrity of international law. For this to happen, those in positions of responsibility must apply international law leaving behind the inevitable bias they have acquired in an international community where violence is increasingly perpetuated by government actors in the alleged name of upholding international law or in the name of necessarily preserving national security.

Applying international law to most instances of targeted killings, it is likely to lead to the conclusion that these killings are internationally wrongful acts attributable to the State that undertakes them and contrary to its international obligations. The State will thus be responsible for an internationally wrongful act and the consequences under international law. There may be exceptional circumstances that justify a targeted killing, but such justifications must be interpreted in a very restrictive manner, as exceptions to the general rules of international law. Together the collage of international human rights and humanitarian law form a seamless web of protection for individuals' right to life that allows only enumerated exceptions. Any decision to target an individual to be killed must come within these exceptions, if that is possible.

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<sup>216</sup> See *supra* note 83.

<sup>217</sup> See Amnesty International, *Will I Be Next: US Drone Strikes in Pakistan, Executive Summary*, AI Index no. ASA 33/014/2013 (Oct. 2013) and HUMAN RIGHTS WATCH, *BETWEEN A DRONE AND AL-QAEDA: THE CIVILIAN COST OF US TARGETED KILLINGS IN YEMEN* (2013).

Even when a targeted killing is justified, it does not mean that the rules of international law can be ignored. In other words, even when a targeted killing is justified, it must be conducted in accordance with international law. For example, when situations arise during armed conflict, the rules of international humanitarian law will apply. Thus, when a combatant has been identified as a target to be killed, the manner in which the attack on the combatant takes place must still comply with rules prohibiting certain weapons and with the requirement that the attacker bears the burden of proving that there was no alternative to the killing.

In peacetime, it will be quite different. It is quite unusual, if not impossible, that a targeted killing can be carried out during peacetime. The State will have a much higher burden of proving that it had no other means of apprehending a person who is a threat to others. It is most unlikely that this can ever be done in a situation where the contemplative planning of a killing takes place. Thus, even designating a person to be killed in peacetime will most certainly be a *prime facie* violation of the right to life.

Also, it must not be forgotten that targeted killings also have the consequence of justifying the person being targeted having the right to kill his or her attacker or attackers. The application of the rule of international law to targeted killings requires that those who are targeted, whether combatants or common criminals, have the same right of self-defense—the right to kill their attacker or potential attacker. The right to kill a potential attacker could be permissible even from thousands of kilometers away. Moreover, the person exercising self-defense against a potential attacker might have a lesser burden of restraint under international law because he or she may have less capacity to take precautions. It does not take too much creativity to understand how such a situation might spiral in an even graver threat to the security of a State than the targeted killing might ensure.

Similarly, even a successful targeted killing might cause more human carnage than it was intended to prevent. The US aggression against the people of Iraq and Afghanistan was aimed at killing Osama Bin Laden. However, it ended up killing an estimated three million Iraqis and Afghans, not to mention more that four thousand American soldiers lost their lives as well. The number of Americans killed in the September 2011 attacks pales in comparison to the huge number of Iraqis and Afghans killed in response. It is also very likely that the number of people killed in just these two instances is much higher than the number of deaths they could have conceivably prevented. It is even likely that the attacks will cause many more deaths than they prevent even a decade after they began due to the situation of animosity they created and the spiral of violence they perpetuated.

## EXAMINATION OF PRICE-FIXING IN INDIA

DR. SOUVIK CHATTERJI\*

*There exist many forms of cartels in different parts of the world which are detrimental to the interest of the society. If the cartels lead to loss in the economy of the jurisdiction, they are considered to be harmful and are prohibited. Price-fixing is one form of such cartels or anti-competitive agreements which are bad for the economy. Price-fixing was handled both by the Monopolies and Restrictive Trade Practices Commission ("MRTPC") and presently the Competition Commission of India ("CCI"). The Article examines the evil of price-fixing and the efficacy of the law which addresses the practice in India.*

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### **I. ANTI-COMPETITIVE AGREEMENTS IN INDIA**

In United States of America, Sherman Act and Clayton Act were the early acts which dealt with anti-trust issues in modern language we call Competition Law perspectives. In India Monopolies and Restrictive Trade Practices Act, 1969, was the first competition law statute. Although the Act had provisions relating to restrictive trade practices and unfair trade practices, it lacked teeth. Beside

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dominance was per se bad according to the Act.<sup>1</sup> In 2002, India enacted the Competition Act. But due to two writ petitions filed in High Court and Supreme Court, it took 5 years for passing the Act, and the Competition Commission of India started functioning from 2008. The present Act (Competition Act, 2002, as amended by the Competition Amendment Act 2007) is quite contemporary to the laws presently in force in the United States of America as well as in the United Kingdom. In other words, the provisions of the present Act and Clayton Act, 1914 of the United States of America, The Competition Act, 1988 and Enterprise Act, 2002 of the United Kingdom have somewhat similar legislative intent and scheme of enforcement. However, the provisions of these Acts are not quite *pari materia* to the Indian legislation. In United Kingdom, the Office of Fair Trading (OFT) is primarily regulatory and adjudicatory functions are performed by the Competition Commission and the Competition Appellate Tribunal. The U.S. Department of Justice Antitrust Division in United States deals with all jurisdictions in the field. The competition laws and their enforcement in those two countries are progressive, applied rigorously and more effectively. The deterrence objective in these anti-trust legislations is clear from the provisions relating to criminal sanctions for individual violations, high upper limit for imposition of fines on corporate entities as well as extradition of individuals found guilty of formation of cartels. This is so, despite the fact that there are much larger violations of the provisions in India in comparison to the other two countries, where at the very threshold, greater numbers of cases invite the attention of the regulatory/adjudicatory bodies.<sup>2</sup>

The term anti-competitive agreements as such has not been defined by the Act, however, Section 3 prescribes certain practices which will be anti-competitive. The Act also provides a wide definition of “agreement” under section 2 (b). Section 3(1) is a general prohibition of an agreement relating to the production, supply, distribution, storage, acquisition or control of goods or provision of services by enterprises, which causes or is likely to cause an AAEC within India.<sup>3</sup>

Section 3(2) simply declares agreement under section 3(1) void. Section 3(3) deals with certain specific anti-competitive agreements, practices and decisions of those supplying identical or similar goods or services, acting in concert for example agreement between manufacturer and manufacturer or supplier and supplier, and also includes such action by cartels. Section 3(4) deals with restraints imposed through agreements among enterprises in different stages of production or supply etc. For example, an agreement amongst manufacturer and supplier. Section 3(5)

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<sup>1</sup> The Monopolies and Restrictive Trade Practices Act, 1969 was enacted at a time when India was under the Command and control regime. Monopolies used to be considered bad for the economy. The new Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007, is modern in concept. It restricts anti-competitive activities, abuse of dominance and anti-competitive mergers.

<sup>2</sup> *Competition Commission of India v. Steel Authority of India & Anr* (2010) 10 SCC 744.

<sup>3</sup> Generally, after examining the manner in which appreciable adverse effect on competition is used by CCI, it is inferred that the yardstick is similar to that of rule of reason. The pro-competitive benefits are compared with the anti-competitive effects.

provides for exceptions, it saves the rights of proprietor of any intellectual property right listed in it to restrain the infringement of any of those rights regardless of section 3.<sup>4</sup>

Competition laws all over the world usually place anti-competitive agreements in two categories namely – horizontal agreements and vertical agreements.<sup>5</sup> Horizontal agreements are generally viewed more seriously than the vertical agreements. Firms enter into agreements, which may have the potential of restricting competition. A scan of the competition laws in the world will show that they make a distinction between horizontal and vertical agreements between firms.<sup>6</sup>

The former, namely the horizontal agreements are those among competitors and the latter, namely the vertical agreements are those relating to an actual or potential relationship of purchasing or selling to each other. A particularly pernicious type of horizontal agreements is the cartel. Vertical agreements are pernicious, if they are between firms in a position of dominance. Most competition laws view vertical agreements generally more leniently than horizontal agreements, as, *prima facie*, horizontal agreements are more likely to reduce competition than agreements between firms in a purchaser seller relationship.<sup>7</sup> The Act has not used the term horizontal agreements and vertical agreements, however the language used in the Act suggests that agreements referred to in section 3(3) and section 3(4) are horizontal and vertical agreements respectively. It is to be noted that section 3(3) and section 3(4) are the main provisions which are mainly attracted to prove the existence of any anti-competitive agreements.<sup>8</sup>

## II. PRICE FIXING ACROSS VARIOUS JURISDICTIONS

Price fixing is a conspiracy between business competitors to set their prices to buy or sell goods or services at a certain price point. This benefits all businesses or individuals that are on the same side of the market and involved in the conspiracy, as prices are either set high, stabilized, discounted or fixed.<sup>9</sup> Such agreement between competitors that sets the price of a good or service or interferes with how that price is reached is illegal under the Commerce Act.<sup>10</sup>

In a simple example of price fixing, two rival gas stations could meet and decide to offer their gas at the same price, creating an artificially high price for

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<sup>4</sup> Pratima Singh Parihar, *Anti-competitive Agreements-Underlying concepts & principles under the Competition Act, 2002* (January, 2012), available at: <http://cci.gov.in/images/media/ResearchReports/Pratima31jan2012.pdf> [Hereinafter *Parihar*].

<sup>5</sup> *Id.*

<sup>6</sup> Pradeep S. Mehta, A FUNCTIONAL COMPETITION POLICY FOR INDIA 56 (2006).

<sup>7</sup> *Id.*

<sup>8</sup> Parihar, *supra* note 1.

<sup>9</sup> *What is Price Fixing?*, [http://business-law.freeadvice.com/business-law/trade\\_regulation/price\\_fixing.htm](http://business-law.freeadvice.com/business-law/trade_regulation/price_fixing.htm) [hereinafter *Price Fixing*].

<sup>10</sup> Commerce Commission, New Zealand, *Price Fixing and Cartels*, available at: <http://www.comcom.govt.nz/business-competition/fact-sheets-3/price-fixing-and-cartels/> [Hereinafter *Commerce Commission*].



gasoline which consumers would be forced to pay through lack of choice. Usually, this practice is illegal, and in some nations, it comes with severe legal consequences.<sup>11</sup>

Price-fixing agreements are also sometimes referred to as cartels. A cartel is formed when businesses agree to act together for an anti-competitive purpose instead of competing against each other. Price fixing harms competition. Cartel members make more profit than they would if they competed fairly. This means that goods and services become more expensive, consumers end up with fewer choices, and quality or service levels are likely to deteriorate.<sup>12</sup>

Price fixing means the collusion of a number of firms or companies to fix the price or other attributes of goods and services. This practice can also involve individual players in the market which is being manipulated. People regard this practice as unfair because it allows companies to dictate the prices for goods and services, rather than allowing prices to fluctuate as the free market influences them. Governments may also become involved in price fixing.<sup>13</sup> If two companies happen to sell competing products at the same price, it is only considered price fixing if collusion can be proved. In other words, if two supermarkets both sell packs of a dozen eggs at the same cost, this would not be illegal. If, however, someone could prove that the owners of the supermarkets held a secret meeting in which they decided to sell their eggs at the same price, it would be considered price fixing.<sup>14</sup>

Often, price fixing results in price gouging. In a free market where businesses adjust prices to meet supply and demand needs, prices can fluctuate a great deal, but they are generally considered fair. When people collude, they usually elevate prices significantly, creating a price discrimination situation in which prices rise well above a level which would be considered acceptable. Many people believe that this practice hurts the economy as a whole, which is one of the reasons it is frowned upon.<sup>15</sup>

In a related concept, bid rigging, contractors collude together when offering sealed bids. The sealed bidding process is designed to generate a pool of competitive bids for a contract like supplying food to the troops or building a government building. When the contractors hold a secret meeting to determine which bid should be accepted and then submit bids in a way which promotes a particular contractor's bid, this is bid rigging. Bid rigging can be accomplished by pulling out of the bidding pool at the last minute, offering a bid which is way over-priced, or attaching unfavorable terms to a bid. These practices create the illusion of a diverse pool of bids to choose from, but they inevitably lead to a single contractor's bid as the obvious choice, thereby eliminating the competitive aspect of the process.<sup>16</sup>

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<sup>11</sup> *What is Price Fixing*, available at: <http://www.wisegeek.com/what-is-price-fixing.htm> [hereinafter *What is Price Fixing*].

<sup>12</sup> Commerce Commission, *supra* note 10.

<sup>13</sup> *What is price fixing*, *supra* note 11.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

The agreement to inhibit price competition by raising, depressing, fixing, or stabilizing prices is the most serious example of a per se violation under the Sherman Act. Under the Act, it is immaterial whether the fixed prices are set at a maximum price, a minimum price, the actual cost, or the fair market price. It is also immaterial under the law whether the fixed price is reasonable.<sup>17</sup>

Price fixing violates competition law because it controls the market price or the supply and demand of a good or service. This prohibits other businesses from being able to compete against the businesses in the price fixing agreement, which prevents the public from being able to expect the benefits of free competition. This violation can be implied or express, with minimal evidence needed to prosecute.<sup>18</sup> Even if there is evidence that competitors have appeared to agree on a price, this can lead to a collusion charge. Price fixing can be prosecuted federally as a criminal violation under the Sherman Antitrust Act or a civil violation under the Federal Trade Commission. Price fixing can also be prosecuted under state antitrust law.

It is important to remember that *illegal* price fixing only occurs when there is an agreement between businesses to fix prices. A business, acting on its own, may use legitimate efforts to obtain the best price they can, including the ability to raise prices to the detriment of the general public. Further, businesses that conform to the same prices without an express or implied agreement are not in violation of price fixing laws. However, there is a fine line between conforming to prices at one's own accord, and having an implied agreement to do so.<sup>19</sup>

Competition Act, 2002 has included the term association of price i.e. price fixing but it hasn't elaborated on vertical and the horizontal price fixing. If a manufacturer, by using his dominant position, fixes the price with retailer then it is vertical price fixing but if manufacturer fixes price with other manufacturer then it is horizontal price fixing. Vertical price fixing is also known as price maintenance e.g. Agreement between a film distributor and exhibitor is illegal. A patentee cannot control its resale price through price maintenance agreements. Generally prices are fixed when they are agreed upon.<sup>20</sup>

### III. PRICE-FIXING IN INDIA

Price-fixing agreement is a common form of anti-competitive agreement which directly or indirectly determines purchase or sale price. This is also referred to as a "price cartel". It is to substitute prices determined by fiat by combination or conspiracy without taking into account the interest of consumers. The aim and

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<sup>17</sup> *Sherman Anti-Trust Act - Price Fixing*, available at: <http://law.jrank.org/pages/10243/Sherman-Anti-Trust-Act-Price-Fixing.html>.

<sup>18</sup> Price Fixing, *supra* note 9.

<sup>19</sup> *Id.*

<sup>20</sup> Shrishti Dutt, *Competition Law in India, US, & UK: A Comparative Analysis*, (November, 2012), available at: <http://www.scribd.com/doc/209211150/Competition-Law-in-India-US-UK-A-Comparative-Analysis>.

objective of a price-fixing agreement is the elimination of the competition. Such agreements are made by way of informal understandings as to price for preventing competition and keeping the prices up. In this regard, Adam Smith wrote over two centuries ago.

*“People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public or some contrivance to raise prices. It is impossible indeed to prevent such meetings by any law which either could be executed, or would be consistent with liberty and justice.”*<sup>21</sup>

Thus, the power to fix prices, whether reasonably exercised or not, involves power to control the market and to raise the prices arbitrarily above the competitive level. A combination to fix prices is presumed to have an appreciable adverse effect on competition and, therefore, is void *per se*. The practice or agreement of price-fixing in concert falls under clause (a) of section 3(3) of the Competition Act. It covers not only the agreement between the sellers but also the agreement between the buyers.

In *FICCI-Multiplex Association of India v United Producers/Distributors Forum*<sup>22</sup>, there was a collective decision of the opposite parties producers and distributors of films) not to release films to the multiplexes with a view to pressurise the multiplexes into accepting the terms of revenue sharing ratio. The purpose of forming United Producers and Distributors Forum (“UPDF”) was extracting better revenue sharing ratios from multiplexes. UPDF issued notices instructing all producers and distributors, including those who were the members of UPDF, not to release any new films for the purpose of exhibition at the multiplexes. In this case, Competition Commission of India held that the agreement entered into by the opposite parties is covered within the mischief of clauses (a) and (b) of the Section 3(3) of the Act.<sup>23</sup>

In *Surinder Bhakoo v HDFC Bank Ltd*<sup>24</sup>, it was alleged that the bank was imposing pre-payment penalty on auto loan borrowers on early return of loans. But, there was no allegation that the HDFC Bank had any agreement with other Banks or Indian Bank Association in this regard. The Competition Commission, therefore, held that section 3 of the Competition Act has no application in this case. The Commission further found that it could not be established that the bank was in a dominant position in auto loan segment, and resultantly, there was no violation of section 4 of the Act.

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<sup>21</sup> See Adam Smith, THE WEALTH OF NATIONS, BOOK II 152 (1776).

<sup>22</sup> *FICCI-Multiplex Association of India v. United Producers/Distributors Forum*, Case No. 1/2009, CCI order dated 25-05-2011.

<sup>23</sup> *Id.* at ¶23.53.

<sup>24</sup> *Surinder Bhakoo v. HDFC Bank Ltd*, Case No. 15/2009, CCI order dated 22-03-2011.

#### IV. PRICE-FIXING UNDER MRTP ACT

In India, prior to the Competition Act, 2002, the practice or agreement of price fixing in concert was covered under clause (d) of section 33 of the MRTP Act. The clause provided that any agreement to purchase of sales goods or to tender for the sale or purchase of goods only at prices or on terms or conditions agreed upon the seller or purchasers, shall be subject to registration under section 35 of the Act. The MRTP commission was empowered to initiate an inquiry into the practice or agreement even if the agreement was not registered. The clause was so widely worded that it covered all agreements or understandings which might have an adverse effect of competition. It covered not only the agreement between the seller but also the buyers.

Many cases of the price fixing in concert, or fixing of other terms or conditions of sale or purchase came up before the MRTP Commission for its decision. Some of the leading cases are as follows:

The first inquiry instituted by the MRTP Commission was in case *Incneck Tyres Ltd*<sup>25</sup>. In this case the respondents were leading players who manufactured and sold automotive tyres of all varieties and sizes. They had entered into an agreement called "General Code of Conduct" ("GCC") for members of the automotive tyre industry of India. The Commission did say that the GCC actually fixed the standards based on which the prices and profits were determined.. The agreement made elaborate provision for joint credit policies and trade prices for all the respondents. The agreement was held to be restrictive of competition, and therefore, void.

In the case of *Hindustan Times Ltd*,<sup>26</sup> the respondents were the publishers of leading newspapers namely Hindustan Times, Statesman, Times of India, National Herald, Indian Express and Patriot, and were members of an association of newspaper publishers (Indian and Eastern Newspaper Society). All the six undertakings increased the prices of their newspapers three or four times between 1971-1974, on or about the same time. The prices of the newspaper were simultaneously reduced. It was alleged that these increases were done in concert either by informal consultation *inter se* by the six undertakings or through their association; and these increases adversely affected competition among the publishers and the sellers of the newspaper and tended to bring about manipulation of prices of newspapers so as to impose unjustified costs on the consumer. All the respondents except the publishers of 'Patriot' submitted to the orders of the MRTP commission. The Commission accordingly passed 'cease and desist' order against them. However, there were no evidence of collusion between 'Patriot' and the other respondents and thus the concert was accordingly proved against Patriot.

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<sup>25</sup> *RRTP v Incbecktyres ltd.* (1976) 46 Comp Cas 146 (MRTPC).

<sup>26</sup> *In Re. Hindustan Times Ltd*, 1979 Comp Cas 495 (MRTPC).

In the case of *RRTA v. Bombay Customs House Agents Association*<sup>27</sup>, the custom house agent had formed a trade association by its Code of Conduct and fixed the minimum rates to be charged by its members for various services rendered to their clients. The MRTP commission held it to be restrictive trade practice of fixing prices in concert.

In the case of *Durgapur Trucks owner's Association*<sup>28</sup>, the Commission was assured that the association would “cease and desist” from fixing hiring charges for the members, prohibiting the use of trucks other than those belonging to the association members, etc.

The study of the aforesaid cases reveals that the MRTP commission had taken a serious view of collective agreements fixing prices. It condemned all such concerted actions. The price fixing in concert is generally due to the instrumentality of the combination of the manufactures or the suppliers or by their association and is *prima facie*, anti-competitive in effect, adversely affecting consumers, and therefore, the Competition Act 2002 has rightly declared such agreements void *per se*.

The BCCI has been fined Rs 52.24 crore (US\$10m approx.) by the Competition Commission of India for misusing its dominant position and indulging in anti-competitive practices.<sup>29</sup> The Indian board had 90 days to pay the fine.<sup>30</sup>

In its order, the CCI, directed the BCCI to “cease and desist” from any practice that denies market access to potential competitors and not use its regulatory powers in deciding matters relating to its commercial activities. It suggested that the Indian board now must “set up an effective internal control system to its own satisfaction, in good faith and after due diligence.”

## V. CONCLUSION

In conclusion it can be said that the provisions against anti-competitive agreements like price-fixing are there in place in India. But CCI examines every case on the test of appreciable adverse effect on competition. Now the language of the provisions in section 3 of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007, is not very clear in the context of burden of proof in the test of appreciable adverse effect on competition. In jurisdictions like USA, there are concepts like *per se* illegality and rule of reason. From the mere wording the burden of proof of appreciable adverse effect on competition in India appears to be higher than rule of reason. In India there is hardly any concept of *per se* illegality. While it gives a lot of scope for the alleged parties to defend themselves in price-fixing cases, India could not show that price fixing is more harmful than

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<sup>27</sup> *RRTA v. Bombay Customs House Agents Association*, RTPE 14 of 1979, decision on 13-10-1960 (MRTPC).

<sup>28</sup> *RRTA v. Durgapur Trucks Owners Association*, RTPE 8 of 1980, decision on 8-8-1980 (MRTPC)

<sup>29</sup> *BCCI fined \$10m for anti-competitive practices*, (February 9, 2013), available at: <http://www.espnricinfo.com/india/content/story/604236.html>.

<sup>30</sup> *Id.*

other forms of anti-competitive activities. If stringent actions are not taken in price-fixing cases, the companies cannot be stopped from engaging in those practices.

**INDIAN RETAIL SECTOR FDI REGIME—LAW & POLICY—ISSUES, ANALYSIS AND SUGGESTIONS**

AJAY KR. SHARMA\*

*FDI in retail trading, particularly multi brand retail trading (MBRT) remains one of the most contentious policy issues. This article goes beyond the MBRT sector and seeks to examine FDI in single brand product retail trading (SBRT) policy as well, with takeaway lessons. At the outset, some key pertinent issues are identified, after which the adequacy of the current FDI regime to effectively address them is analysed. The law and policy implications (the ex-ante analysis) will be highlighted by anticipating future problems due to the restrictions placed in FDI in both these sectors. This paper also suggests normative improvements to the current retail FDI policy, proposing creative solutions for each of the law and policy problem discussed, thereby enhancing efficacy of the retail FDI policy in achieving its objectives. This paper provides a critical analysis so that necessary policy improvements can be systematically carried out, keeping in mind the interests of the stakeholders and the nation as a whole.*

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## I. INTRODUCTION

Indian Government's enormously contentious and highly debated policy enabling Foreign Direct Investment (FDI) in Multi brand Retail Trading (MBRT) Sector received praises and brickbats in equal measure. The economic implications of this policy were intensely debated in the Indian Parliament in December, 2012 apart from touching upon some legal aspects as well. Outside the Parliament, the opinions expressed by various interested stakeholders on the discussion paper floated by the Department of Industrial Policy and Promotion (DIPP), Ministry of Commerce and Industry, Government of India deserve special mention,<sup>1</sup> apart

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<sup>1</sup> See Issue of Discussion Paper on FDI in Multi-brand Retail Trading, Dep't of Industrial Policy and Promotion (DIPP) (Jul. 6, 2010), *available at*: [http://dipp.nic.in/english/Discuss\\_paper/DP\\_FDI\\_Multi-BrandRetailTrading\\_06July2010.pdf](http://dipp.nic.in/english/Discuss_paper/DP_FDI_Multi-BrandRetailTrading_06July2010.pdf). The extant Indian FDI Policy is contained in the Consolidated FDI Policy Circular of 2014 (Dep't of Industrial Policy and Promotion ('DIPP'), Min. of Commerce & Industry, Govt. of India, (Apr. 17, 2014), *available at*: [http://dipp.gov.in/English/Policies/FDI\\_Circular\\_2014.pdf](http://dipp.gov.in/English/Policies/FDI_Circular_2014.pdf) (hereinafter 'FDI Policy, 2014'). The previous FDI Policy was contained in the Circular No. 1 of 2013 (DIPP, Min. of Commerce & Industry, Govt. of India, (Apr. 5, 2013), *available at*: [http://dipp.nic.in/English/Policies/FDI\\_Circular\\_01\\_2013.pdf](http://dipp.nic.in/English/Policies/FDI_Circular_01_2013.pdf) (hereinafter 'FDI Policy, 2013'). Subsequent amendments were incorporated into the said Circular No. 1 of 2013 by various DIPP press notes issued from time to time, *available at*: <http://dipp.nic.in/English/Policies/Policy.aspx>. The earlier edition of the Indian FDI Policy contained was in the Circular No. 1 of 2012 (Dep't of Industrial Policy and Promotion ('DIPP'), Min. of Commerce & Industry, Govt. of India, (Apr. 10, 2012), *available at*: [http://dipp.nic.in/English/Policies/FDI\\_Circular\\_01\\_2012.pdf](http://dipp.nic.in/English/Policies/FDI_Circular_01_2012.pdf) (hereinafter *FDI Policy, 2012*).



from other publications.<sup>2</sup> Previously, the FDI policy in Single brand Retail Trading (SBRT) was also a debated issue and it still should not be neglected during the examination of the FDI in the retail sector in India.

The legal complexities and ramifications of the Retail FDI Policy — both in SBRT and MBRT — requires deeper examination. This article seeks to do just that by examining certain pertinent legal and constitutional issues after delineating them. The following are some of the issues and claims made in several parts of this article. Firstly, an effort is made to understand certain problematic complexities existing in the form of sectoral conditionalities in the regulation of the FDI in both single brand and multi brand retail trading sector in India and their anticipated adverse implications.<sup>3</sup> This has created a lot of vagueness in the whole investment environment in the sector.<sup>4</sup> Secondly, the issue of sporadic changes carried out in the retail sector FDI policy is raised, which creates unpredictability and consequently adversely affects the stakeholders despite apparently leading to liberalisation;<sup>5</sup> Thirdly, a consequential legal problem is highlighted in anticipation which may arise due to inconsistency in the relevant FEMA notification viz., FEMA 20 and the consolidated FDI policy;<sup>6</sup> Fourthly, some constitutional law and administrative law problems which may arise in future in the MBRT FDI policy's implementation particularly due to the unprecedented involvement of the prior states' consent before implementation of the MBRT FDI policy in the states are

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<sup>2</sup> See, e.g., Srikant Gokhale and Piyush Kumar Sinha, *FDI in Retail: Global Perspective*, (W.P. No. 2012-05-02, IIM Ahmedabad) (May, 2012), available at: <http://www.iimahd.ernet.in/assets/snippets/workingpaperpdf/17955043032012-05-02.pdf>; Anusha Chari and T.C.A. Madhav Raghavan, *Foreign Direct Investment in India's Retail Bazaar: Opportunities and Challenges*, (Working Paper) (March 2011), available at: <http://www.unc.edu/~achari/retail.pdf>.

<sup>3</sup> See, e.g., Rasul Bailay and Chaitali Chakravarty, *Global Retailers not Buying India Story: Not a Single FDI Proposal has Come in so Far*, ECONOMIC TIMES (Mumbai), (Feb. 1, 2013), at 1.

<sup>4</sup> See, e.g., Dilasha Seth, *Walmart Egg on Face, Govt may serve Tesco Omelette*, ECONOMIC TIMES (Mumbai), (Oct. 11, 2013), at 13 (citing a Tesco spokesperson saying: "We are excited about the India opportunity and await policy clarity before we can take further decisions on the matter."). This was after several amendments and a clarifications have been carried out already to the MBRT FDI Policy introduced last year. The 'Tesco Omellette' has been served, as the only FDI in MBRT sector in India so far has been purchase of 50 per cent of issued and paid-up equity share capital of Trent Hypermarket Ltd. (THL) by the British retail major Tesco (Tesco Overseas Investments Ltd., 'TOIL') and which has been cleared by the Competition Commission of India (CCI) under its combinations review jurisdiction, see First FDI transaction in multi-brand retail: Tesco gets CCI nod for Trent Hypermarket stake buy, THE INDIAN EXPRESS, (May 28, 2014), available at: <http://indianexpress.com/article/business/economy/first-fdi-transaction-in-multi-brand-retail-tesco-gets-cci-nod-for-trent-hypermarket-stake-buy/>; and Order under Section 31(1) of the Competition Act, 2002 in Combination Registration No. C-2014/03/162 (CCI, May 22, 2014), available at: <http://www.cci.gov.in/May2011/OrderOfCommission/CombinationOrders/C-2014-03-162.pdf>.

<sup>5</sup> See, e.g., DIPP Press Note No. 1 (2012 Series), *Review of the policy on Foreign Direct Investment—liberalization of the policy in Single-Brand Retail Trading*, (Jan 10, 2012).

<sup>6</sup> FEMA 20 is the short hand reference for the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 on basis of it notification no. FEMA 20/2000-RB, dated May 3, 2000.

discussed. Though the identification of these legal issues is a major contribution of this article, solutions to many of these problems are also proposed. This article concludes in summing up the aspects discussed in the preceding parts and raising some other imperatives.

## II. DECODING THE FDI POLICY IN SINGLE-BRAND PRODUCT RETAILING

There is no FDI limit in Single-Brand Product Retailing currently (i.e., limit as per the FDI Policy is 100%). Earlier, the proposals came under the Government Route requiring prior approval of the government after FIPB recommendation. In August 2013, the government chose to extensively change the sectoral policy, permitting up to 49% FDI under the automatic route and remaining 51% under the government route.<sup>7</sup> The following section discusses and analyses the contentious extant sectoral conditions which are imposed on FDI in SBRT:<sup>8</sup>

*“(a) Products to be sold should be of a ‘Single Brand’ only.”*

Notably, the term ‘single brand’ is not defined in the FDI Policy. This apparently does not however pose much problem, as the contours of the term can be easily culled out from clauses (b) and (c) which are reproduced below:

*“(b) Products should be sold under the same brand internationally i.e. products should be sold under the same brand in one or more countries other than India.*

*(c) ‘Single Brand’ product-retail trading would cover only products which are branded during manufacturing.”*

Thus, products which are branded as such during the manufacturing stage and later on sold under the same brand in one or more countries other than India comprise ‘single brand’ products. Notably as per clause (b) above, sale of goods under the same brand under which you intend to sell in India, in just one other country is a sufficient criterion.

### A. SUB-BRANDING IN SBRT

One problem recently arose due to inadequacy in the definition of “single brand”. As seen above, the ingredients of the definition have to be culled out on basis of the conjoint reading of clauses (b) and (c). However, it is common practice that the retailers in SBRT sell goods in various product lines under certain

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<sup>7</sup> See DIPP Press Note No. 6 of 2013, *Review of the policy on Foreign Direct Investment-caps and routes in various sectors*, (Aug. 22, 2013). This introduced changes in the extant FDI Policy, 2013. Earlier, changes were brought in the previous FDI policy, 2012, *supra* note 1, in the sectoral conditions governing single-brand product retail trading by Press Note No. 4 (2012 Series) (DIPP, Min. of Commerce & Industry, Govt. of India, Sep. 20, 2012) which amended ¶ 6.2.16.4 of FDI Policy, 2012.

<sup>8</sup> See FDI Policy, 2014, *supra* note 1, at ¶6.2.16.3.

“sub brands,” though they are sold from their own “brand” outlets. In absence of a clear norm permitting or prohibiting sale under various “sub brands,” a term which is still undefined, the business practice ran into trouble. A recent example is that of Marks & Spencer (M&S), who are retailing through their stores labels like *Autograph, North Coast, Portfolio and Per Una*.<sup>9</sup> An objection to this practice was raised by the Department of Economic Affairs (DEA), Ministry of Finance when a reference about M&S was sent to the DIPP. This is presumably on the basis of viewing such sale of goods under different “sub brands” as MBRT in the guise of SBRT for which alone the permission was obtained.<sup>10</sup> As an objection to this reference of the finance ministry, it can be said that so far as the pertinent sectoral clauses are met, no more restrictions should be imposed. It appears to be nobody’s case that M&S brand was not reflected in the merchandise sold. So the distinctiveness was clearly present. Since there is no restriction on the sub branding, it is clearly unreasonable to restrict it as it helps in product differentiation for the convenience of the different customers according to their different needs.<sup>11</sup> When the government seeks to promote India as an attractive investment destination, it certainly should not assume that the foreign investors in single brand retailing will indulge in vanilla marketing leading them to lose their competitiveness. Such parochialism has no place in an enabling FDI policy.

Thankfully, the then Commerce Minister resisted the DEA’s view by clearly opining that along with the flagship brand, the single brand retailers can sell their sub-brands from their stores in India.<sup>12</sup> The only restriction now is that the logo of the retailer has to be on the every product being sold by such a retailer. Though this controversy has been put to rest, such inconsistency between different government departments and regulators is damaging not only to investments but the country’s reputation as a conducive host state welcoming foreign investment. A comprehensive drafting envisaging future problems and scenarios is perhaps one effective solution.

## **B. LOCAL SOURCING IN SBRT**

The local sourcing condition prescribed in clause (e) is one of the most problematic ones. A part of this clause reads:

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<sup>9</sup> See Amiti Sen, *Sub-brands will need to carry company logo too*, THE HINDU BUSINESS LINE, (Sep. 3, 2013), available at: <http://www.thehindubusinessline.com/companies/subbrands-will-need-to-carry-company-logo-too/article5089951.ece>

<sup>10</sup> See Nivedita Mookerji, *Marks & Spencer: Single brand and multi-brand retail*, available at: [http://smartinvestor.business-standard.com/market/Econnews-176393-Econnewsdet-Marks\\_amp\\_Spencer\\_Single\\_brand\\_or\\_multi\\_brand\\_retail.htm](http://smartinvestor.business-standard.com/market/Econnews-176393-Econnewsdet-Marks_amp_Spencer_Single_brand_or_multi_brand_retail.htm).

<sup>11</sup> See *id.*

<sup>12</sup> See Dilasha Seth et al., *Single-brand retailers like Mark’s and Spencer’s can sell sub-brands: Anand Sharma*, ECONOMIC TIMES, (Aug. 3, 2013), available at: [http://articles.economictimes.indiatimes.com/2013-08-03/news/41034034\\_1\\_foreign-single-brand-retailers-100-fdi-multi-brand-retail-sector](http://articles.economictimes.indiatimes.com/2013-08-03/news/41034034_1_foreign-single-brand-retailers-100-fdi-multi-brand-retail-sector).

*In respect of proposals involving FDI beyond 51%, sourcing of 30% of the value of goods purchased, will be done from India, preferably from MSMEs, village and cottage industries, artisans and craftsmen, in all sectors. The quantum of domestic sourcing will be self-certified by the company, to be subsequently checked, by statutory auditors, from the duly certified accounts which the company will be required to maintain. This procurement requirement would have to be met, in the first instance, as an average of five years' total value of the goods purchased, beginning 1st April of the year during which the first tranche of FDI is received. Thereafter, it would have to be met on an annual basis.*

Where there is 'ownership' of the Indian target entity,<sup>13</sup> with holding beyond 51% in the capital of the target company in the hands of the non-resident investing entity, clause (e) is triggered. This clause when triggered requires a mandatory 30% local content sourcing.<sup>14</sup> A careful observer of Indian FDI Policy in SBRT will observe a relaxation of the similar condition in the previous version. Though it does not currently mandatorily prescribes sourcing from "MSMEs, village and cottage industries, artisans and craftsmen" it explicitly makes it preferable for them to do so. It is silent on the (pragmatic, if not legal) incentives attached for doing so or disincentives for non-compliance, which is a matter of speculation. It is precisely this reason that undermines its presence and purpose. Compliance with this seemingly directory provision has its own problems, discussed later.

Another restriction contained in clause (e) reads:

*"For the purpose of ascertaining the sourcing requirement, the relevant entity would be the company, incorporated in India, which is the recipient of FDI for the purpose of carrying out single-brand product retail trading."*

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<sup>13</sup> See FDI Policy, 2014, *supra* note 1, at ¶2.1.28: "A company is considered as 'Owned' by resident Indian citizens if more than 50% of the capital in it is beneficially owned by resident Indian citizens and / or Indian companies, which are ultimately owned and controlled by resident Indian citizens". It should be noted that corresponding definition of a company owned by non-resident entities does not exist in the present FDI policy. The only reasonable assumption is that the similar standard as laid down for the resident ownership should apply for non-resident ownership of the Indian company is adopted here. Further, notably, clause (e) should not be triggered for proposals for holding more than 50% up to 51% of the capital of the target Indian company. Is this reasonable interpretation of cl.(e) or, can such a proposal form a bone of contention; a potential case for dispute? This will be an interesting scenario where a non-resident owner of a target company can claim exemption from application of the onerous clause (e) restriction.

<sup>14</sup> See Dilasha Seth & Rasul Bailay, *Government mulls scrapping 30% domestic sourcing clause for FDI in single-brand retail*, THE ECONOMIC TIMES, (July 21, 2014), available at: <http://economictimes.indiatimes.com//articleshow/38760432.cms> (reporting that the current NDA government at the centre may scrap the 30% domestic sourcing clause altogether for attracting more foreign investment in SBRT).

It again becomes ambiguous so far as its applicability is concerned. Whether it applies on the investing non-resident entity when the non-resident investor has “ownership” of the target Indian company or irrespective of the stake in the target company, restricting the choice of vehicle for carrying on single-brand product retailing in India viz., only through an Indian (target) company?<sup>15</sup> Whatever version is accepted, at least some unnecessary restriction is essentially present. If it is said that setting up a target “company” is only required in case of majority stake be held by non-resident investor, it also poses some problems. If the business model is LLP, Partnership firm or proprietorship before having more than 50% FDI it would require conversion into company once the threshold limit of 50% is crossed. Why is it that the “monitoring of local content requirement” clause is not countenanced for other forms of business associations? This also appears to be discriminatory on the ground that SBRT can be carried out by other forms of Indian business entities like Partnerships, Limited Liability Partnerships (LLPs) or sole-proprietorship firms in India if they do not wish to have any FDI.

### C. RESTRICTION ON E-COMMERCE AND OTHER ISSUES

When retailing through e-commerce is becoming the norm, imposing restrictions on retail trading by e-commerce does not make much sense, as it may not be profitable for the retailers to trade only through their stores. The reach of e-commerce is phenomenal in a country like India. The relevant restrictive clause reads:

*“(f) Retail trading, in any form, by means of e-commerce, would not be permissible, for companies with FDI, engaged in the activity of single-brand retail trading.”*

Thus, Clause (f) imposes another onerous anti-business condition prohibiting the target Indian company carrying on single brand retail trading to indulge in retail trade by use of e-commerce. This puts these companies at a significant disadvantage in the Indian markets, particularly in view of increasing retail trade in India on e-commerce platform.<sup>16</sup> Similar restriction will not be faced by an Indian company indulging in SBRT without having FDI.

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<sup>15</sup> The Companies Act, 1956 (and now the Companies Act, 2013, to the extent notified) applies to Indian Companies, with all the prescribed compliance with attendant costs, which every foreign investor may not prefer. Currently, FDI policy permits, subject to prescribed conditions, non-residents to invest in *inter alia* LLPs, capital of a partnership firm or a proprietorship concern or any association of persons in India, see FDI Policy, 2014, *supra* note 1, at ¶3.2.

<sup>16</sup> See, e.g., ASSOCHAM & COMSCORE, STATE OF ECOMMERCE IN INDIA 8 (2012), available at: [http://www.assochem.org/arb/general/Comscore\\_%20ASSOCHAM-report-state-of-ecommerce-in-india.pdf](http://www.assochem.org/arb/general/Comscore_%20ASSOCHAM-report-state-of-ecommerce-in-india.pdf) (Retail category penetration has increased to 60% reach and has grown to 37.5 million unique visitors a month, an overall growth of 43% annually. The growth has come across all retail categories and most of them show promising transactions and conversion rates along with growth in visitors. The top retail sites shown above in India have each seen a growth of

Under Clause (3), *inter alia*, the applications seeking permission for FDI in SBRT exceeding 49% is required to be made to the Secretariat for Industrial Assistance (SIA) in the DIPP<sup>17</sup> for determining whether the proposed investment satisfies all requirements of the sectoral policy notified. It will then be processed by the Foreign Investment Promotion Board (FIPB) under the Ministry of Finance, where the product/product categories which are proposed to be sold under a “Single Brand are to be specifically stated, as required in all FDI proposals seeking ‘government approval.’” Any addition to the product/ product categories to be sold under “Single Brand” would require a fresh approval of the Government. Further, in case of automatic route applications, the RBI has to be provided this products list, while a similar list has to be provided to Secretariat of Industrial Assistance (SIA) for the applications under the government route.

As seen, Clause (3) does not allow addition to products or product categories sold without obtaining a fresh government approval. This restriction is reminiscent of the regressive licensing regime under the Industries (Development and Regulation) Act, 1951 [I(D&R)A] which was largely done away with by the Government of India way back in its Industrial Policy in 1991; there is no reason why in the extant FDI policy the government should have such restrictive and discriminatory clause. Other clauses merely highlight the procedure to be followed and the manner in which governmental approval can be obtained for the FDI proposal.

### III. MORE COMPLEXITIES AND GREATER RESTRICTIONS IN THE FDI IN MBRT POLICY

#### A. ENTRY-BARRIER AND ‘BACK-END’ INFRASTRUCTURE INVESTMENT PROBLEMS

After examining the restrictive conditions in the SBRT FDI policy, it is appropriate to now focus on the restrictions in perhaps the most contentious sector in Indian FDI policy—the multi brand retail trading (MBRT). In the year 2012, the Indian Government decided to review its policy and open up this sector

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over 100% in the last 12 months.”); *See also*, ERNST & YOUNG, REBIRTH OF E-COMMERCE IN INDIA (2013), *available at*: [http://www.ey.com/Publication/vwLUAssets/Rebirth\\_of\\_e-Commerce\\_in\\_India/\\$FILE/EY\\_RE-BIRTH\\_OF\\_ECOMMERCE.pdf](http://www.ey.com/Publication/vwLUAssets/Rebirth_of_e-Commerce_in_India/$FILE/EY_RE-BIRTH_OF_ECOMMERCE.pdf). Currently only FDI is permitted in case of B2B e-commerce excluding, retail trading, *see* FDI Policy, 2014, *supra* note1, at ¶6.2.1.

<sup>17</sup> It has been reported, that DIPP has, under the current government, due to its criticism for delaying processing of the FDI in SBRT applications in certain cases, has now prescribed ninety days as the time limit to process applications pending before it, *see* Dilasha Seth, *Single-brand retail: DIPP sets maximum time frame of 90 days to process all pending applications*, THE ECONOMIC TIMES, (July 30, 2014), *available at*: [http://articles.economicstimes.indiatimes.com/2014-07-30/news/52237959\\_1\\_dipp-time-frame-20-days](http://articles.economicstimes.indiatimes.com/2014-07-30/news/52237959_1_dipp-time-frame-20-days).

inviting foreign equity to the extent of 51 per cent under the Government route.<sup>18</sup> The initial hurdle to foreign equity in the multi-brand retail trading sector comes in form of minimum threshold requirement of investing at least USD 100 million. This works to the detriment of a foreign investor in two ways. First, it is an entry barrier for small foreign retailers who may not have either the resources to commit or may not be in a position to risk so much investment in a nascent sector in India.<sup>19</sup> Second, it is discriminatory when compared to an Indian retailer, who is allowed to do business in this sector without any such minimum investment restriction. A major concern against having FDI in this sector was to protect small businesses and retailers running small shops; which the Indian government rubbished.<sup>20</sup>

The second discriminatory condition is the restrictions imposed in clause (iii) on end uses of half of the FDI inflow. It reads:

*At least 50% of total FDI brought in the first tranche of US \$100 million,<sup>21</sup> shall be invested in 'backend infrastructure' within three years, where "back-end infrastructure" will include capital expenditure on all activities, excluding that on front-end units; for instance, back-end infrastructure will include investment made towards processing, manufacturing, distribution, design improvement, quality control, packaging, logistics, storage, ware-house, agriculture market produce infrastructure etc. Expenditure on land cost and rentals, if any, will not be counted for purposes of backend infrastructure. Subsequent investment in the backend infrastructure would be made by the MBRT retailer as needed, depending upon its business requirements.*

The expression "first tranche of US \$100 million" presumes that the investment is of more than USD 100 million and comes in tranches, either or both of which

<sup>18</sup> See Press Note No. 5 (2012 Series) (DIPP, Min. of Commerce & Industry, Govt. of India, Sep. 20, 2012), available at: [http://dipp.nic.in/english/acts\\_rules/Press\\_Notes/pn5\\_2012.pdf](http://dipp.nic.in/english/acts_rules/Press_Notes/pn5_2012.pdf).

<sup>19</sup> See AT KEARNEY'S 2014 GLOBAL RETAIL DEVELOPMENT INDEX™ (GRDI): FULL STEAM AHEAD FOR GLOBAL RETAILERS, 12, available at: <http://www.atkearney.in/documents/10192/4600212/Full+Steam+Ahead+for+Global+Retailers+-+2014+Global+Retail+Development+In...pdf/6f55a59b-e855-4236-96cb-464c2ca01e91> (discussing the fall of India by six spots, from the previous year, to its lowest-ever GRDI ranking viz., 20<sup>th</sup>. This should be a matter of concern for the Indian Government which should seek to remove market entry barriers for foreign retailers).

<sup>20</sup> See speech (in Hindi) of the then Leader of Opposition, Sushma Swaraj in LOK SABHA DEBATES 145 (Parliament of India) (Dec. 4, 2012), available at: <http://164.100.47.132/debatetext/15/XII/0412.pdf>. But, in fact, the discourse of the Government in Parliament *prima facie* also seems to be equivocal. See speech (in Hindi) of the then Union Minister for Communication and IT, Sh. Kapil Sibal in LOK SABHA DEBATES 145 (Parliament of India) (Dec. 4, 2012), available at: <http://164.100.47.132/debatetext/15/XII/0412.pdf>.

<sup>21</sup> The underlined portion viz., *the first tranche of US \$100 million* is one of the crucial inclusions in the clause (iii) vide Press Note No. 5 (2013 Series) (DIPP, Min. of Commerce & Industry, Govt. of India, Aug. 22, 2013). This has curtailed the 'backend infrastructure' investment obligation of the foreign investor which was earlier to the tune of 50% of the entire FDI brought in by the investor.

could be fallacious in a particular case, and thus furnishes one more instance of bad drafting. These restrictions are substantially milder than the previous version. However, these restrictions are discriminatory towards foreign investors as it requires no such commitment from an Indian multi-brand retailer without foreign equity regardless of the Indian retailer's size. Additionally, this condition may be detrimental to the commercial interests of the foreign investors. Notably, despite the concession, barring a few of them, hardly any foreign retailer appears to have committed to make investment in MBRT in near future. This clause tantamounts to a rent extracted by the host state for its infrastructure development in return of granting permit for foreign investment. A sizeable part of the investment has to be utilised for activities which may not be a priority as per the foreign retailer's business strategy, to begin with, which it intends to adopt in India.<sup>22</sup> This clause may be a *fait accompli* for some retailers culminating in their business failures due to huge losses and ultimately making it unfeasible for them to continue their business presence in India, within extreme competition which prevails in multi-brand retail sector today including, the organised sector.<sup>23</sup>

It should be noted, that even after the closure of businesses by foreign retailers in India the back-end infrastructure is going to remain for use by the Indian entities, contributing to the Indian GDP and infrastructure.

Furthermore the distinction between "back-end" and "front-end" infrastructure is not absolutely clear.<sup>24</sup>

## B. THE PROBLEMATIC LOCAL CONTENT REQUIREMENT

A controversial 'local content' requirement in clause (iv) is also imposed as a precondition on the intended foreign direct investment in multi-brand retail sector. The same is reproduced below:

*At least 30% of the value of procurement of manufactured/ processed products purchased shall be sourced from Indian micro, small and medium industries,<sup>25</sup> which have a total*

<sup>22</sup> See DIPP, *Clarification on queries of prospective investors/stakeholders on FDI policy for Multi-brand Retail Trading* (June 2013), available at: <http://pib.nic.in/archieve/others/2013/jun/d2013060602.pdf> [hereinafter *DIPP Clarification*] (precluding from the infrastructure investment conditions, *inter alia*, acquisition of 'supply/chain/back end assets or stakes from an existing entity', and franchisee model).

<sup>23</sup> See, e.g., Nevin John, *Digging Deep to Stay Fresh*, BUSINESS WORLD, (July 14, 2012), available at: <http://www.businessworld.in/en/storypage/-/bw/digging-deep-to-stay-fresh/r428531.0/page/0>.

<sup>24</sup> See FDI Policy, 2014, *supra* note 1, at ¶6.2.16.4(iii): "back-end infrastructure' will include capital expenditure on all activities, excluding that on front-end units; for instance, back-end infrastructure will include investment made towards processing, manufacturing, distribution, design improvement, quality control, packaging, logistics, storage, ware-house, agriculture market produce infrastructure etc. Expenditure on land cost and rentals, if any, will not be counted for purposes of backend infrastructure." The (inclusive) 'enlarging definition', as can be observed, does not exclude any other thing(s) which can be commonly attributed to the term defined.

<sup>25</sup> Prior to amendment by Press Note No. 5 (2013 Series), instead of the italicised portion 'small industries' was the expression used. The current terms is more in accordance with the MSMED Act, 2006, though the exact term used there is 'enterprise'. In fact, the expressions micro, small and



*investment in plant & machinery not exceeding US \$ 2.00 million. This valuation refers to the value at the time of installation, without providing for depreciation. The 'small industry' status would be reckoned only at the time of first engagement with the retailer and such industry shall continue to qualify as a 'small industry' for this purpose, even if it out grows the said investment of US\$ 2.00 million, during the course of its relationship with the said retailer.<sup>26</sup> Further, if at any point in time, this valuation is exceeded, the industry shall not qualify as a 'small industry' for this purpose. Sourcing from agricultural co-operatives and farmer co-operatives would also be considered in this category.<sup>27</sup> This procurement requirement would have to be met, in the first instance, as an average of five years" total value of the manufactured/ processed products purchased, beginning 1st April of the year during which the first tranche of FDI is received. Thereafter, it would have to be met on an annual basis.*

Does this exclude from valuation the raw materials used for production in the manufacturing carried out by the MBRT retailer itself? Despite the relaxations provided in Aug. 2013, there are still likely negative ramifications of clause (iv) on a potential foreign investor.<sup>28</sup> This restriction diminishes the utility of the established supply chains of the foreign retailer and adds to the costs by compelling them to create new supply chains with the Indian small industries.<sup>29</sup> The identification of a suitable 'local content' supplier is an onerous exercise apart from the fact that procurement from the Indian MSME sector may not be suitable for the business demands of the retailer. A succour in the form of allowing sourcing from agricultural and farmer co-operatives may help the investor, but the size of the relevant products segment may not constitute a sizeable proportion of

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medium need not qualify the 'industries', as the investment limit is prescribed in the clause, which is distinct from the limits prescribed for micro, small and medium enterprises under law.

<sup>26</sup> Prior to amendment by Press Note No. 5 (2013 Series), the relevant condition read: "[f]urther, if at any point in time, this valuation is exceeded, the industry shall not qualify as a 'small industry' for this purpose." Thus, the current position gives considerable relaxation to the investors. Further retaining the expression "small industry" in the latter part of the clause, while substituting it in the earlier part, *see id.*, causes an anomaly, and amounts to bad drafting. Notably, the 'total investment' limit has also been increased from USD 1 million to 2 million.

<sup>27</sup> This condition has been added vide Press Note No. 5 (2013 Series), *id.*

<sup>28</sup> *See, e.g., SME Sourcing Clause in Retail FDI could Change: Rule for Single-brand Retail Already Eased*, THE FINANCIAL EXPRESS 1 (Mumbai), (Feb. 22, 2013). Also, it may contravene the National Treatment obligations under the GATT and TRIMs Agreement, *see Ajay Sharma, Examining the Indian Multi brand Retail Sector FDI Policy's (In)Consistency with the WTO National Treatment Norms*, 53 IND. J. INT'L. L. 242–64 (2013).

<sup>29</sup> DIPP further unreasonably restricts the utilization of the goods sourced from 'small industries' to be utilized by the 'company owned and company operated' front end stores in MBRT sector only and not for any other purpose like, cash & carry activities (in India) or SBRT or exportation done by the foreign investor, *see DIPP, Clarification, supra* note 22. These clarifications apparently introduce more restrictions than are currently present in the FDI policy, and may be amenable to judicial review. Clarifications should not lead to norm creation, and thus this press release requires to be incorporated in the FDI policy through the press note route after suitable amendments.

total sale.<sup>30</sup> Furthermore, procurement from large Indian industrial houses does not count. This compels the retailers to sell the merchandise produced by the 'Indian small industries' irrespective of their market demand making them uncompetitive in this highly competitive market. It may not be financially viable also to procure from the existing Indian small industries. To deal with this problem, at the very onset, the retailers may have to set up modern manufacturing units in India for maintaining their quality standards while satisfying the above investment ceiling restriction to produce several of the commodities it intends to sell through their superstores. Indian MBRT firms in organised retail like Reliance are already manufacturing many of their products sold through their outlets like Reliance Fresh. This may not be a bad strategy in long run, particularly after you have established yourself in the market after a few years. However, at the beginning, this results in compelling overheads for a foreign investor as they may need to undertake manufacturing activities in India to satisfy their local sourcing requirements. If manufacturing units are indeed set up by the foreign retailers, they may trigger FDI sectoral norms governing that sector because of foreign investment, apart from the requirements of obtaining other requisite licenses and permissions. None of the restrictions in clause (iv) applies to the domestic multi-brand retailers without any FDI.

Clause (vi) is another discriminatory clause which makes the FDI norms in multi-brand retail unattractive for all potential foreign retailers except for perhaps extremely large global players like, Walmart,<sup>31</sup> Carrefour and Tesco. Of course, Tesco has already gone forward with its deal. This clause imposes 'locational restrictions' on the market presence of the foreign retailers restricting them to only one million plus population cities (as per 2011 census), and to such cities in states where the governments have given prior permission to set up the multi-brand retailing.<sup>32</sup> There is a slight relaxation for those other cities (i.e., having population

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<sup>30</sup> See, e.g., Anandita Singh Mankotia & Rishi Raj, *Reliance Fresh chops fruit & veg*, THE FINANCIAL EXPRESS, (October 9, 2007), available at: <http://www.financialexpress.com/story-print/226345>. Strangely, the DIPP in its June, 2013 'clarification', *id.*, had categorically stated, that "[p]rocurement of fresh produce is not covered by this condition."; but in Aug., 2013 has now relaxed the same to the extent discussed above. This policy flip-flops are not new, but problematic.

<sup>31</sup> Walmart which seemed to be the most prospective entrant in Indian MBRT Sector seems to be most unlikely in the near future. The FCPA proceedings and the recent breakup of the Walmart-Bharti JV in Cash & Carry segment are also important reasons for this apprehension, see Rasul Bailay and Chaitali Chakravarty, *Wal-Mart to take a call on its India plans by Month-end*, ECONOMIC TIMES. 8 (Mumbai) (Sep. 12, 2013); Rasul Bailay, *Marriage over: Biggest democracy loses biggest retailer's vote*, ECONOMIC TIMES 1 (Mumbai), (Oct. 10, 2013).

<sup>32</sup> The state of Himachal Pradesh was not included in the initial list of states/Union territories listed in ¶6.2.16.5 (2) of the FDI Policy, 2013 which gave their consent to allow FDI in MBRT as per the FDI policy in their territories, as required under ¶6.2.16.5(1)(viii) of the FDI Policy, 2013 discussed above, but was included later vide Press Note No. 1 (2013 Series) (June 3, 2013), available at: [http://dipp.nic.in/English/acts\\_rules/Press\\_Notes/pn1\\_2013.pdf](http://dipp.nic.in/English/acts_rules/Press_Notes/pn1_2013.pdf). As per the DIPP, the back end infrastructure investments can however be made in the states which do not permit FDI in MBRT currently, see DIPP Clarification, *supra* note 22.

up to 1 million) where the state government has specifically permitted the same. This clause is *per se* discriminatory as it restricts market access of the foreign retailers. Furthermore, restricting the setting up of businesses only to the states which have given prior permission is discriminatory compared to the Indian traders who have free access to set up their business presence in any state subject to compliance with the local and state laws applicable. To justify it legally in the name of making a permissive or enabling policy -<sup>33</sup> as the state governments ultimately give permissions to set up the MBRT outlets and shops under the state and local laws is unacceptable.

A counterargument can be that similar licenses by the state government authorities would be required by retailers in single brand retailing business but no such locational restrictions clause and prior permission of a state government to permit retail is there in the governing sectoral policy. Despite giving the general consent to allow FDI in MBRT in a state, it does not translate to any relaxations in grant of licenses/permits under various state and local laws. This undermines the prior consent sought from the state governments by the central government. Instead, a possibly insurmountable barrier, in case such permission is not given by a particular state government in which the investor wants to set up its business is created. Furthermore, FDI in different sectors including manufacturing sector may require mandatory adherence to various local and state laws including obtaining licenses and permissions but at the onset, primacy is not given in the FDI policy to the states to preclude an investor from setting up its project in a state altogether.

The list of discriminatory restrictions seems unending, as clause (ix) (which has a similar clause in the single-brand retail policy) imposes a restriction on use of e-commerce which could be a medium to transgress the borders of the Indian states. The negative impact of this restriction can be more pronounced compared to the similar restriction in single brand retailing due to several reasons. First, as seen above, the restrictions on FDI in MBRT are more pervasive and several compared to single brand retail sector. Second, the competition in MBRT is expected to be much more relatively, at least to begin with, due to a large number of existing players in the market, in both organised and unorganised retail. Third, the brand loyalty would be much more accentuated in single brand retail compared to the customer loyalty to a particular MBRT player.<sup>34</sup> This restriction makes foreign retailers' business proposition extremely uncompetitive. Thus, *prima facie*, the discriminatory conditions discussed above cause severe detriment to the foreign investors, manipulating marketplace competition in favour of the domestic investors.

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<sup>33</sup> See the FDI Policy, 2014, *supra* note 1, at ¶(6.2.16.5 (viii)).

<sup>34</sup> See DIPP Discussion Paper on FDI in Multi-brand Retail Trading, ¶1.1, (July, 2010), available at: [http://dipp.nic.in/english/Discuss\\_paper/DP\\_FDI\\_Multi-BrandRetailTrading\\_06July2010.pdf](http://dipp.nic.in/english/Discuss_paper/DP_FDI_Multi-BrandRetailTrading_06July2010.pdf).

Furthermore, since downstream investment norms in FDI Policy ignore, subject to exceptions, a downstream investment by an investing Indian company 'owned and controlled' ultimately by the resident Indian citizens, the importance of 'ownership' and 'control' assumes much importance. The application of the highly restrictive clauses discussed above, regardless of whether the non-resident investor has target's 'ownership' and/or 'control' seems to be even more unjust.<sup>35</sup>

#### IV. UNCERTAINTY IN THE FDI RETAIL POLICY

The uncertainty with which changes are introduced in the FDI Policy in the retail sector may pose difficulties for stakeholders both foreign and domestic. FDI policy in the single-brand retail trading sector furnishes an excellent example.

The policy conditions, as culled out from any of the 2011 FDI policies, as applicable to the single brand product retailing, prescribe 51% FDI Cap/Equity under the Government Route, as prescribed then. The FDI Cap in the 'single brand product retailing' was relaxed to 100% in the FDI Policy of 2012. However, more onerous sourcing requirements were brought into the sectoral policy. Two such restrictive clauses which were inserted require special mention, and are thus reproduced below:<sup>36</sup>

*(d) The foreign investor should be the owner of the brand. (e) In respect of proposals involving FDI beyond 51%, mandatory sourcing of at least 30% of the value of products sold would have to be done from Indian small industries/ village and cottage industries, artisans and craftsmen'. 'Small industries' would be defined as industries which have a total investment in plant & machinery not exceeding US \$ 1.00 million. This valuation refers to the value at the time of installation, without providing for depreciation. Further, if at any point in time, this valuation is exceeded, the industry shall not qualify as a 'small industry' for this purpose. The compliance of this condition will be ensured through self-certification by the company, to be subsequently checked, by statutory auditors, from the duly certified accounts, which the company will be required to maintain.*

These restrictions were possibly introduced to assuage the apprehensions of domestic retailers and their benefactors who viewed foreign equity in the retail sector with suspicion by showing that the further concessions in the equity cap were counterbalanced with other restrictions including the local content requirements to benefit the Indian small industries. These restrictions however would have caused greater difficulties, and it seems were introduced in haste. Later on, they were relaxed in a phased manner, as seen above.

<sup>35</sup> See Deepshikha Sikarwar, *No conditions apply: Paving way for Walmart, Tesco...: May drop stiff riders for up to 49% stake in India venture*, ECONOMIC TIMES, (Mumbai), (Jul. 1, 2013), available at: <http://epaper.timesofindia.com/Repository/ml.asp?Ref=RVRNLzIwMTMvMDcvMDEjQXlWMTUwMA=&Mode=HTML&Locale=english-skin-custom>

<sup>36</sup> See FDI Policy, 2012, *supra* note, at ¶6.2.16.4, before amendment carried out by Press Note No. 4 (2012 Series), *supra* note 1.

The problem is that over a period of just around two and a half years there have been four different sets of conditionalities governing the FDI policy in the single-brand product retailing. This rate of change in the sectoral policy can have potential ramifications for all stakeholders. For example, suppose an investor is planning to invest up to 51% of capital of an Indian company under the “FDI scheme,” and thus seeks legal and financial advice to structure the deal and proposal as per the consolidated FDI Policy contained in DIPP Circular 2 of 2011. However, before an application for approval under the ‘government route’ is completed, the FDI policy of 2012 comes into force on April 10, 2012, and an additional restriction of ownership of brand by foreign investor is imposed. Due to this new condition, the proposal may have to be amended after restructuring of deal or, it may become redundant in a particular case. This highlights that at least one of the onerous conditions initially imposed in the extant policy viz., on the brand ownership issue did not apply only to proposals where the equity inflow of over 51% is proposed, but also to the proposals till the 51% equity stake. The uncertainty may also be prejudicial to the domestic competitors who may not have anticipated such liberalisation and thus have to keep on changing their business strategy from time to time to match the increasing foreign players (investors) in their area/sector of business.

The chequered liberalisation history in the FDI policy in SBRT may serve as an example for carrying out a similar analysis of the changes carried out in the FDI policy in MBRT and the need for guarding against such abrupt policy changes is thus highlighted.

## V. APPREHENSION OF LAW AND POLICY MISMATCH

The exchange control laws created under the FEMA, 1999 framework, comprising of the pertinent Regulations and Rules under it should be in consonance with the FDI Policy, or there is a risk of the policy coming in conflict with the law, with the former getting overridden consequentially.<sup>37</sup> This lag between the FEMA laws and the FDI policy, which often exists, was usually ignored.<sup>38</sup> However, this critical issue caught attention of the public when the Supreme Court of India in a matter of the public interest litigation challenging the FDI in multi-brand retail trading sector clearly stated in its order, that the relevant

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<sup>37</sup> See FDI Policy 2014, *supra* note 1, at ¶1.1.2 (clearly stating about the FDI policy, that “in case of any conflict, the relevant FEMA notification will prevail”). See Ajay Kr. Sharma, *A Critique of the Indian FDI Law and Policy: Problems & Solutions*, 2(1) NLUJ Law Review 30 (2013), for a detailed analysis of these issues, from where some portions in this part are borrowed, available at: <http://www.nlujodhpur.ac.in/downloads/lawreview/AKS.pdf> [hereinafter *Sharma*].

<sup>38</sup> In this regard the author is reminded of a conversation with a highly experienced Indian Corporate lawyer, see Sharma, *supra* note 37, at note 52. His view, as emerged from our conversation was, that the more contemporary FDI policy is always looked at and preferred over the FEMA 20, which was not often updated, while tendering legal advice. Though this view may not be endorsed by majority of Indian transactional lawyers, but it is arguable that many lawyers may share it. This approach though pragmatic is fraught with danger as discussed above.

FEMA Regulation viz., Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 should permit the FDI in this sector or it will override the enabling FDI policy provision.<sup>39</sup> This situation was averted by timely amendments in the FEMA 20 in this regard, which was tabled in the Parliament,<sup>40</sup> and approved.<sup>41</sup>

It is reasonable to assume that the RBI may find it difficult to keep on updating its FEMA regulations to keep track with the evolving FDI Policy of the Government. The mismatch may have drastic consequences on the policy implementation, and create difficult interpretative problems for the Courts who may then attempt to harmoniously interpret law and policy provisions. Attempts may be made to synchronise the FEMA 20 and FDI policy by inserting suitable clauses.

## VI. SOME CONSTITUTIONAL LAW AND ADMINISTRATIVE LAW ISSUES

### A. THE CORE LEGAL ISSUES

Considering that the making of the FDI Policy falls within the purview of the Central Government,<sup>42</sup> how far is the Central Govt. justified in seeking previous consent of State Governments for extending the MBRT FDI policy to different states? Is such a policy, on becoming enforceable under law, amenable to Judicial Review? No doubt that if no such prior approval of the state government

<sup>39</sup> See also, Supreme Court of India's order, dated May 1, 2013, dismissing this writ petition (PIL) in *Manohar Lal*

*Sharma v. Union of India*, W.P. (C) No. 417 of 2012, available at: <http://courtnic.nic.in/supremecourt/temp/wc%2041712p.txt>. This order mentions *inter alia* that, "[w]hen the matter came up for consideration on 15.10.2012, learned Attorney General submitted that the process for necessary amendments to Regulations 2000 by the Reserve Bank of India was on and that necessary amendments in Regulations 2000 would be made soon." See also, e.g., J. Venkatesan, *Supreme Court refuses to interfere with FDI*, THE HINDU (New Delhi), (Nov. 5, 2012), available at: <http://www.thehindu.com/news/national/supreme-court-refuses-to-interfere-with-fdi/article4067657.ece>; *Govt issued 3 Fema amendments for multi-brand FDI, says attorney general*, BUSINESS STANDARD (New Delhi), (Nov. 6, 2012), [http://www.business-standard.com/article/economy-policy/govt-issued-3-fema-amendments-for-multi-brand-fdi-says-attorney-general-112110602001\\_1.html](http://www.business-standard.com/article/economy-policy/govt-issued-3-fema-amendments-for-multi-brand-fdi-says-attorney-general-112110602001_1.html).

<sup>40</sup> See S.48 of FEMA in this regard, which bears the heading "Rules and regulations to be laid before Parliament". See further in context with the laying of multi-brand retail sector FEMA 20 amendments, *FEMA changes for FDI in retail tabled*, BUSINESS TODAY, (Nov. 30, 2012), available at: <http://businesstoday.intoday.in/story/fema-changes-for-fdi-in-retail-tabled/1/190273.html>; and *FEMA amendments on FDI in retail tabled in Rajya Sabha*, IANS, (Dec. 13, 2012), available at: <http://in.news.yahoo.com/fema-amendments-fdi-retail-tabled-rajya-sabha-085606671--finance.html>.

<sup>41</sup> See also Vinay Kumar & J. Balaji, *Manmohan wins FDI vote*, THE HINDU (New Delhi), (Dec. 5, 2012), available at: <http://www.thehindu.com/news/national/manmohan-wins-fdi-vote/article4166365.ece>; and *UPA government wins FDI vote in Rajya Sabha*, TIMES OF INDIA, (Dec. 7, 2012), available at: [http://articles.timesofindia.indiatimes.com/2012-12-07/india/35669688\\_1\\_fdi-in-retail-sector-n-k-singh-fdi-vote](http://articles.timesofindia.indiatimes.com/2012-12-07/india/35669688_1_fdi-in-retail-sector-n-k-singh-fdi-vote).

<sup>42</sup> DIPP, as per Schedule II of the Government of India (Allocation of Business) Rules, 1961

is taken in the FDI policy, the MBRT retailer with FDI still needs permits and licenses under various local and state laws at par with the other Indian retailers with no FDI. Could a state government's officials deny the permissions or licenses solely on the ground that the said state government does not permit MBRT outlets in its state which are run by an enterprise having FDI? It appears that such a prejudicial decision, based on a consideration which will be extraneous to the local or state law under which the license or permission is to be granted, would be unsupportable on basis of administrative law principles and also be violative of Article 14 of the Indian Constitution.<sup>43</sup> Thus on judicial review such a decision is likely to be struck down on the merits of a particular case.

Secondly, can an Indian company carrying on MBRT business, having FDI in it, claim parity with another Indian company in the same sector, which has no FDI in it, so far as the former's challenge under Article 14 of the Constitution to the restrictive sectoral conditions imposed upon it are concerned, which allegedly discriminately apply to it and not to the latter company. Is there a reasonable classification which exists in this case to sustain such discrimination? Will it matter if both the ownership and control of the target Indian company in MBRT after obtaining FDI vests with resident Indian citizens only? These questions may arise if some MBRT Indian company with FDI in future chooses to impugn the sectoral policy in High Court(s) or the Supreme Court of India by filing a writ petition.

#### **B. EXAMINING THE POLICY STANCE OF THE PRESENT INDIAN GOVERNMENT**

This section analyses the likely implications of the National Democratic Alliance (NDA) Government, who was and still is opposed to the MBRT FDI policy,<sup>44</sup> coming to power after General Elections in 2014. What will happen if the current government withdraws the current FDI policy in MBRT or imposes still more onerous sectoral restrictions? Also, what will be the legal implications if a state government which gave general permission to allow FDI in MBRT in its state chooses to withdraw its consent after a party opposing such a decision is

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<sup>43</sup> Article 14 which is entitled "Equality before law" reads: "The State shall not deny any person equality before the law or the equal protection of the laws within the territory of India". Here, 'the State' does not refer to the state government(s), though they are included within the expansive definition of the term provided in Art. 12 of the Constitution. Thanks are due to my Law Dean Prof. I.P. Massey for enlightening discussion on this point, affirming my academic views. See I.P. MASSEY, ADMINISTRATIVE LAW 201–17, 394–98 (2008) (discussing *inter alia* "rule against bias"; and some common grounds of judicial review of administrative action like, "abuse of jurisdiction", "failure to exercise jurisdiction", and "irrationality (Wednesbury test)", all of which will be relevant in such cases). Also see M. P. JAIN, INDIAN CONSTITUTIONAL LAW 928–37 (2010) (discussing Art. 14 of the Indian Constitution and its mandate prescribing "equality before law" and "equal protection of laws", which is *inter alia* against, arbitrary exercise of power).

<sup>44</sup> See Dilasha Seth & Deepshikha Sikarwar, *Nirmala Sitharaman rules out FDI in multi-brand retail; open to foreign investment in other sectors*, THE ECONOMIC TIMES, (June 24, 2014), available at: Commerce Minister reiterating government's opposing policy on FDI in MBRT).

voted to power in that state?<sup>45</sup> These are complex situations, and such abrupt changes in policy decisions, if an investment or investor gets adversely affected, may be subject to judicial review before the Indian courts including, in at least some cases, on the principle of “promissory estoppel”.<sup>46</sup> In such situations, efficacious remedy of investor state arbitration (ISA) may also be available in certain cases under the international investment law particularly arising from various relevant treaties (BITs and FTAs) applicable to such investors, to which India is a contracting party, to bring action against India as a host state.<sup>47</sup>

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<sup>45</sup> In fact, the previous government of *Aam Aadmi Party* in Delhi and the current BJP government in Rajasthan have already withdrawn their consents, which were given by the previous Congress governments in these states. See, Mohammed Iqbal, *Rajasthan withdraws permission for FDI in multi-brand retail*, THE HINDU, (February 1, 2014), available at: <http://www.thehindu.com/todays-paper/tp-national/tp-otherstates/rajasthan-withdraws-permission-for-fdi-in-multibrand-retail/article5641357.ece>.

<sup>46</sup> See *A.P. Steel Re-Rolling Mill v. State of Kerala*, AIR 2007 SC 797, where the Supreme Court of India has extensively discussed the principle of “promissory estoppel”, and all landmark Indian judgments rendered by the Apex Ct., and finally concluded, that its application depends upon facts and circumstances of each case.

<sup>47</sup> See Joachim Karl, *International Investment Arbitration: A Threat to State Sovereignty?*, in REDEFINING SOVEREIGNTY IN INTERNATIONAL ECONOMIC LAW 225–46, 238–41, 244 (Wenhua Shan et al. eds., 2008) (arguing that states are “masters of the treaties” they conclude, and they should address sovereignty concerns in International Investment Agreements (IIAs) with respect to, both the substantive and procedural provisions. Further suggesting the dual strategy in this regard involving clarifying scope of the agreement and other treaty provisions, and also reaffirming the domestic public interests by carving out clear exceptions and exclusions. Also suggesting further, procedurally limiting access to investor state arbitration by having constraints in IIA like, excluding certain categories of disputes, introducing certain procedural preconditions through use of appropriate provisions like, having a “fork in the road” clause, exhaustion of local remedies clause and “denial of benefits clause” for certain investors). See Leon E. Trakman, *Investor State Arbitration or Local Courts: Will Australia Set a New Trend?*, 46 JOURNAL OF WORLD TRADE 83 (2012) (discussing the Australian Government’s 2011 Trade Policy announcing exclusion of investor-state arbitration (ISA) clauses in its future treaties, discussing merits and demerits of this policy. Further highlighting the risks posed to by MNEs which threaten to use the weapon of ISA to erode host state’s sovereignty by undermining its public policies). But see *White Industries Australia Ltd. v. Republic of India*, Final Award (Nov. 30, 2011), where an Australian Multinational Corporation successfully brought claim against the Indian government. Due to the scepticism about their efficacy in attracting FDI and due to the bad experiences with initiation of many ISA actions against India in the recent past, and an inimical White industries award, some views in the Indian government particularly, that of the DIPP are now also proposing the extreme step of terminating all the Indian BITs, see Dilasha Seth, *Department of industrial policy & promotion pitches for sunset clause to terminate all BIPPAs*, THE ECONOMIC TIMES, (July 18, 2014), available at: <http://economictimes.indiatimes.com//articleshow/38577444.cms>; but see Prabhash Ranjan, *Column: Get a BIT pragmatic*, THE FINANCIAL EXPRESS, (July 16, 2014), available at: <http://www.financialexpress.com/news/column-get-a-bit-pragmatic/1270640> (for a criticism of this extreme position, and offering more pragmatic suggestions and alternatives instead). See also Andrew Guzman, *Why LDCs sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT’L L. 639 (1998); Prabhash Ranjan, *Non Precluded Measures in Indian International Investment Agreements and India’s Regulatory Power as a Host Nation*, 2 AJIL 21 (2008); Prabhash Ranjan, *India and Bilateral Investment Treaties- A Changing Landscape*, ICSID REVIEW 1 (2014) (extensively discussing characteristics and problems with the Indian proliferating BIT Program beginning from the 1994 Indo-UK BIT, and offering suggestions for improvements).



However, in spite of continuing governmental opposition to FDI in MBRT,<sup>48</sup> at least at present, some instances of softening, in practice, are apparent.<sup>49</sup> There has been recently in the Indian media a reporting of the FIPB approval given to certain entities ‘duty-free shop segment’ with FDI, as a U-turn of the current central government on FDI in multi-brand retail.<sup>50</sup> However, the author does not view this as violating the stance of government on FDI in MBRT. The view of the government differentiating the ‘duty free shops’ from normal MBRT stores is a cogent one. Further, it is established that such approvals have been granted in past also.<sup>51</sup> It is also arguable, that such duty-free shops at airports may also be construed to be part of ‘passenger facilities’ which are included in the definition of the ‘airport’ in the FDI Policy, permitting up to 100% FDI.<sup>52</sup>

## VII. CONCLUSION

In this critique of the extant retail FDI Policy of both SBRT and MBRT, an analysis of the sectoral conditions lent clarity on them along-with understanding of their possible implications. This article also delineated on the evolution of the retail FDI policy and demonstrated how apparent liberalisation by increase of investment limit, which catches public eye, may be accompanied with simultaneous introduction of the regressive conditions undoing more than what is sought to be achieved by the liberalisation efforts. Does this reflect the government’s ‘dependency theory’ psyche despite of the liberalisation rhetoric? After showing how discriminatory and regressive such conditions can be, this article dwelt on the uncertainty in the regulatory environment. Finally, it discussed some anticipated constitutional and administrative law issues. Do such apparently parochial and protectionist restrictions really serve the avowed purpose? Does it lead to economic development of the host state in case of FDI in the retail sector? Should we depend on the development of our backend infrastructure on FDI, or

<sup>48</sup> See e.g., *India to disallow FDI in multi-brand retail: Nirmala*, THE HINDU, (September 8, 2014), available at: <http://www.thehindu.com/business/india-to-disallow-fdi-in-multibrand-retail-nirmala/article6391737.ece> (reporting the Commerce Minister's statement regarding the Government's stance against FDI in MBRT).

<sup>49</sup> Vikas Dhoot, *NDA may rethink FDI retail policy; “further discussion” needed, says BJP*, ECONOMIC TIMES, (Sept. 29, 2014), available at: [http://articles.economictimes.indiatimes.com/2014-09-29/news/54437313\\_1\\_multi-brand-retail-retail-fdi-single-brand-retail](http://articles.economictimes.indiatimes.com/2014-09-29/news/54437313_1_multi-brand-retail-retail-fdi-single-brand-retail).

<sup>50</sup> *Modi govt does a u-turn on FDI in multi-brand retail*, (Oct. 14, 2014), available at: [http://www.moneycontrol.com/news/economy/modi-govt-doesu-turnfdimulti-brand-retail\\_1203791.html](http://www.moneycontrol.com/news/economy/modi-govt-doesu-turnfdimulti-brand-retail_1203791.html). This report however also mentions of the refusal of the government officials in response, who state that the FDI in duty free segment was always allowed, since “technically, these shops do not fall under the ambit of Indian customs.” See also, *PAMP to set up duty free gold shop at Indira Gandhi International Airport*, ECONOMIC TIMES, (September 4, 2014), available at: [http://articles.economictimes.indiatimes.com/2014-09-04/news/53563622\\_1\\_fipb-interglobe-aviation-foreign-investment-promotion-board](http://articles.economictimes.indiatimes.com/2014-09-04/news/53563622_1_fipb-interglobe-aviation-foreign-investment-promotion-board).

<sup>51</sup> See e.g., Rajat Guha, *No more blanket nod for FDI in duty-free shops*, FINANCIAL EXPRESS, (November 8, 2011), available at: <http://www.financialexpress.com/news/no-more-blanket-nod-for-fdi-in-dutyfree-shops/872410>.

<sup>52</sup> See FDI Policy 2014, *supra* note 1, at ¶¶ 6.2.9.1, 6.2.9.2.

should the government develop such infrastructure, by becoming self-reliant, which will in turn attract more FDI? Does it send right signals internationally when the government imposes apparently protectionist investment conditions; and even more when it backtracks from them in due course in phases? Can we call such backtracking liberalisation or lack of proper foresight in policy formulations? These inconvenient questions need to be explored by the Indian government, sooner than later. The current Indian government in office post 2014 General Elections also appears to be currently hostile to the FDI in MBRT. The only project till date, the Tesco-Trent deal went to the regulators and could also get approval mostly due to one reason viz.,<sup>53</sup> it sought and obtained government approval at the time of earlier central government, which had introduced this enabling FDI in MBRT policy, despite stiff resistance from most of the opposition parties including BJP in Parliament. However now, as long as the said hostile stance of the government continues no more FDI in MBRT proposals are likely to come in spite of the FDI in MBRT Policy continuing to be in existence, due to pragmatic apprehensions.<sup>54</sup> Hypothetically, if a proposal comes in future, and the enabling sectoral FDI policy continues to be in existence, and no approval is accorded or denied because of the said policy stance it might create problems for the government as well. Will such a situation, if it escalates into a dispute, be amenable to judicial review by Indian courts and/or ISA? Though a detailed examination of this point lies beyond the scope of this article, it is the belief of the author, as has been expressed above, that they are amenable to challenge.

The pertinent FDI in MBRT policy imperatives cannot be solely examined from the legal perspective, and require a holistic approach. At least one thing seems to be clear, the Indian retail FDI policy needs greater introspection and retrospection, so that a better, clearer and more comprehensive policy can emerge in future.

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<sup>53</sup> See *supra* note 4.

<sup>54</sup> See *No scrapping of FDI in multi-brand retail*, THE ASIAN AGE, (July 18, 2014), available at: <http://www.asianage.com/india/no-scrapping-fdi-multi-brand-retail-25>., Amiti Sen & Richa Mishra, *Centre may not entertain new FDI proposals in multi-brand retail for now*, THE HINDU BUSINESS LINE, (June 9, 2014), available at: <http://www.thehindubusinessline.com/economy/centre-may-not-entertain-new-fdi-proposals-in-multibrand-retail-for-now/article6098207.ece>., and Manu Kaushik, *In the crosshairs: Why the future of FDI in multi-brand retail looks bleak after the polls*., BUSINESS TODAY, (May 11, 2014), available at: <http://businesstoday.intoday.in/story/future-of-fdi-in-multi-brand-retail-after-polls/1/205379.html>.

## ONE SIZE DOESN'T FIT ALL - A CONTEXTUALIST APPROACH TO NARROW TAILORING

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*The contentious issue of affirmative action finds itself in rough waters once again with the Supreme Court of the United States remanding a case involving race-conscious admissions to the lower court “because the Court of Appeals did not apply the correct standard of strict scrutiny.” While the US courts attempt to evolve scrutiny standards to affirmative action initiatives; the Indian sentiment on affirmative action remains strictly populist since its inception as a policy for remedying opportunity deficits among the poorly defined under privileged classes. It serves as an interesting study to compare the American approach on positive discrimination, vis-à-vis, the Indian approach which shows a stark difference in its rigidity, absence of a well-defined policy, judicial analysis, etc.*

*This article examines the strict scrutiny test and its narrow tailoring component, as it reviews the evolution of American jurisprudence and argues that a moderate contextualist approach best serves to balance the interests of the preferred and non-preferred groups, while adhering to the constitutional definition of equality. The chief legal proposition put forth is that race/caste-conscious ends can and must be achieved through policies that are primarily race/caste-neutral or those that veer towards neutrality as reviewed under the strict scrutiny test. It is proposed that a less formalistic approach, which steers clear of being an “either-or” policy and focuses on an individualised review combined with a narrow tailoring requirement unique to the situation would assure a more faithful adoption of the strict scrutiny test to satisfy constitutional standards. Further, it proposes that the strict scrutiny test must be applied to the Indian context*

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*and puts forth a new model for determining classes that require affirmative action in the Indian context of socio-economic realities.*

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### I. INTRODUCTION

The oft-disputed and contentious issue of affirmative action vis-à-vis the Equal Protection Clause<sup>1</sup> finds itself in rough waters once again with the Supreme Court of the United States (SCOTUS) remanding a major case involving race-conscious admissions at the *University of Texas in Fisher v. Texas* to the lower court “because the Court of Appeals did not apply the correct standard of strict scrutiny,

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<sup>1</sup> U.S. Const. amend. XIV, §1 (All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws).

its decision affirming the District Court's grant of summary judgment to the University was incorrect."<sup>2</sup> With the spotlight back on affirmative action years after it had faded from public and political discourse, an analysis of the jurisprudence that has evolved will shed light on the correct standard of strict scrutiny necessary to settle the question- to what extent do race-conscious policies, in so far as they serve compelling state interest, fall foul of the Equal Protection Clause?

The Indian sentiment on affirmative action, on the other hand, remains strictly populist since its inception as a policy for remedying opportunity deficits among the poorly defined under privileged classes. With no intelligent debate on either the criteria or delimitation of the classes that require positive discrimination, the policy of compensatory discrimination has become propagandist in the political sphere aimed at securing votes on casteist fault-lines.<sup>3</sup>

As the SCOTUS seeks to find a middle ground between individual rights and furtherance of group interests, it serves as an interesting study to compare the American approach on positive discrimination vis-à-vis the Indian approach. This shows a stark difference in its rigidity, absence of a well-defined policy, judicial analysis and heavy reliance on the historical context as justification for subverting the right to equality. Thus, the vastly distinct interpretations and application of affirmative action in democratic countries guaranteeing nearly identical rights to equality creates a fertile ground to objectively review race/caste-conscious policies. This article develops an approach that fits the constitutional subtext on equality in both countries while assuring the right to equality retains its sanctity.

This article examines the strict scrutiny test and its narrow tailoring component, in particular; as it reviews the evolution of American jurisprudence and argues that a moderate contextualist approach best serves to balance the interests of both, the preferred and the non-preferred groups, while adhering to the constitutional definition of equality. Further, it proposes that the strict scrutiny test must be applied to the Indian context and puts forth a new model for determining classes that require affirmative action in the Indian context of socio-economic realities while ensuring adherence to constitutional standards of permissible classification.

The article is divided into five parts. Part II outlines the chief legal proposition of the article. Part III provides an in-depth analysis of the jurisprudence on narrow tailoring through the swing voters of the SCOTUS who have largely evolved it. It traces the metamorphosis of the strict scrutiny test applied in the United States of America (US) and consequential development of the narrow tailoring component from the first ever look by SCOTUS at affirmative action in *Bakke* to its culmination in *Grutter* and *Gratz*. Part IV argues

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<sup>2</sup> *Abigail Noel Fisher v. University of Texas at Austin*, et al., 570 U. S. \_\_\_\_ (2013).

<sup>3</sup> See Part V.

that the strict scrutiny test and its narrow tailoring component can and ought to be applied in the Indian context. Part V undertakes an analysis of the existing Indian policy on reservations with respect to educational institutions and argues why it is glaringly unconstitutional and therefore must be overhauled. Part VI advocates the application of a largely caste-neutral model narrowly tailored to conform to the contextualist approach to be applied in India to achieve the benefits of affirmative action.

## II. CHIEF LEGAL PROPOSITION

The chief legal proposition put forth in this article is that race/caste-conscious ends can and must be achieved through policies that are primarily race/caste-neutral or those that veer towards neutrality as reviewed under the strict scrutiny test. It is proposed that a less formalistic approach, which steers clear of being an “either-or” policy and focuses on an individualised review combined with a narrow tailoring requirement unique to the situation would assure a more faithful adoption of the strict scrutiny test to satisfy Indian constitutional standards.

## III. FROM BAKKE TO PARENTS INVOLVED: THE EVOLUTION AND ANALYSIS OF THE NARROW TAILORING DOCTRINE DEVELOPED BY THE SCOTUS

Affirmative action, since its inception, has been a contentious constitutional issue not just with the SCOTUS but also in the public sphere often leading to a strict polarisation; most often on moralist grounds. While such debates are beyond the scope of this article, this Part traces the evolution of the strict scrutiny doctrine – a controversial and oft desecrated test used to examine the constitutionality of affirmative action programmes in the US. Although criticised for being “strict in theory, fatal in fact”<sup>4</sup> on account of its colour-blind approach,<sup>5</sup> it has slowly evolved into a means-ends test largely due to the efforts of the swing voters- Justice Powell, Justice O’Connor and Justice Kennedy.

Strict scrutiny as a test was crystallised to its current accepted form in *McLaughlin v. Florida*<sup>6</sup> where the SCOTUS stated that all racial classifications are “constitutionally suspect”, and should be subjected to “the most rigid scrutiny.” The Court went on to hold that “strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decision maker for the use of race in [a] particular context.”<sup>7</sup>

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<sup>4</sup> Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARVARD LAW REVIEW 1 (1972).

<sup>5</sup> In the past, this “means” test has been virtually impossible to satisfy. Only two of this Court’s modern cases have held the use of racial classifications to be constitutional. *See* *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

<sup>6</sup> *McLaughlin v. Florida*, 379 U.S. 184 (1964).

<sup>7</sup> *Fisher v. Texas*, 631 F.3d 213.

Thus, two conditions have to be satisfied for an affirmative action programme to be constitutional: First, the ends of such a programme must be compelling state interest, and second, the means used must be precise, being neither “over-inclusive or over-exclusive”<sup>8</sup> so as to not fall afoul of the Equal Protection Clause.

While the law is fairly settled on the ends, viz., racial diversity and remedying past discrimination,<sup>9</sup> the means, i.e., the narrow tailoring prong has remained wavering and unclear in its concept, scope and application. Narrow tailoring, a component of strict scrutiny, requires any use of racial classifications to so closely fit a compelling goal as to remove the possibility that the motive for the classification was illegitimate racial stereotyping.<sup>10</sup>

This Part of the article follows the development of narrow tailoring as a component of strict scrutiny from Powell, J to Kennedy, J, whilst exhorting the most practicable approach that must be taken while deciding *Fisher v. Texas*.

### A. JUSTICE POWELL

The SCOTUS's first brush with affirmative action in admissions to higher educational institutions came in *Regents of the University of California v. Bakke*<sup>11</sup> in 1978. Justice Powell provided the swing vote for invalidating the admission policy followed by University of California, Davis Medical School, of setting aside a specified number of seats for medical students<sup>12</sup> on grounds that it violated the Equal Protection Clause. The reasoning of Powell, J in his standalone opinion

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<sup>8</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) [*“Croson”*] (holding a set aside benefiting individuals from several racial groups from all over the country not narrowly tailored to remedying past discrimination against African Americans in Richmond because, inter alia, the beneficiary group was over-inclusive); *Wygant v. Jackson Bd. of Education*, 476 U.S. 267 (1986) [*“Wygant”*] (plurality opinion) (criticizing a school board's layoff provision that targeted certain groups of minorities as “undifferentiated” and noting that the board did not justify its selection of the minority groups that the plan favored. Also a theoretical matter, one might also conclude that an under inclusive program is not narrowly tailored [to the remedial interest] if victims of discrimination are arbitrarily excluded from the affirmative action preferences); Ian Ayres, *Narrow Tailoring*, 43 UNIVERSITY OF CALIFORNIA, LOS ANGELES LAW REVIEW 1781 (1996); Richard Fallon, *Strict Judicial Scrutiny*, 54 UNIVERSITY OF CALIFORNIA, LOS ANGELES LAW REVIEW 1267 (2007) (listing four inquiries: (1) “[n]ecessity of infringement on a triggering right,” (2) “under-inclusiveness,” (3) “over-inclusiveness,” and (4) “proportionality”).

<sup>9</sup> *Fullilove v. Klutznick*, 448 U.S. 448 (1980) [*“Fullilove”*] (Powell, J, concurring opinion) (laying down the test for “ends” - “Because the distinction between permissible remedial action and impermissible racial preference rests on the existence of a constitutional or statutory violation, the legitimate interest in creating a race-conscious remedy is not compelling unless an appropriate governmental authority has found that such a violation has occurred. In other words, two requirements must be met. First, the governmental body that attempts to impose a race-conscious remedy must have the authority to act in response to identified discrimination); *Cf. Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976) (Second, the governmental body must make findings that demonstrate the existence of illegal discrimination).

<sup>10</sup> *Croson*, (opinion of O'Connor, J.)

<sup>11</sup> *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) [*“Bakke”*].

<sup>12</sup> *Id.*, 272-76 (The University's admission policy required that the school operate a dual system application process where 84 of the 100 slots were open to everyone, and the remaining 16 slots were eligible only to minority students).

resonated in several judgements thereafter, setting the ground for a contextualist, fact-based analysis of race conscious policies to ensure they were narrowly tailored to fit the compelling state interest for which they were formulated.

Powell, J approved of Harvard's admission programme whilst pitting it against that of the impugned Davis policy<sup>13</sup> in so far as 'race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared to, for example, an applicant identified as Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism.

Thus, the Davis programme, in Justice Powell's words, violated the Fourteenth Amendment because "*it tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class.*" Therefore, "when [the policy] touches upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." The fatal flaw in the preferential program of the university was its disregard to individual rights as guaranteed by the Fourteenth Amendment.<sup>14</sup> Powell, J, thus leaned towards policies which were facially race-neutral, and where race was not the only determining factor.

However, in a host of subsequent public employment cases<sup>15</sup>, Powell, J steadfastly maintained a fact-focussed approach<sup>16</sup> determining the constitutionality of each policy by focussing more on the ends than the means as he had done in *Bakke*.

Although Justice Powell urged that the policy should be exactly tailored<sup>17</sup> to fit the goal, "no larger than that which is necessary to achieve compelling interest,"<sup>18</sup> he did not apply the test strictly enough. He focussed more on ends

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<sup>13</sup> *Bakke*, (opinion of Powell, J.) (The experience of other university admissions programs, which take race into account in achieving the educational diversity valued by the First Amendment, demonstrates that the assignment of a fixed number of places to a minority group is not a necessary means toward that end).

<sup>14</sup> *Bakke*, (opinion of Powell, J.)

<sup>15</sup> *Fullilove*, *supra* note 9.

<sup>16</sup> *Fullilove*, (opinion of Powell, J.) ("My view that this set-aside is within the discretion of Congress does not imply that other methods are unavailable to Congress. Nor do I conclude that use of a set-aside always will be an appropriate remedy, or that the selection of a set-aside by any other governmental body would be constitutional); *Bakke* (The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of a governmental body).

<sup>17</sup> *Fullilove*, (opinion of Powell, J.) (...even if the government proffers a compelling interest to support reliance upon a suspect classification, the means selected must be narrowly drawn to fulfil the governmental purpose).

<sup>18</sup> Ian Ayres, *Don't Tell, Don't Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEXAS LAW REVIEW 517 (2006).



rather than means as evidenced by the application of his analysis of narrow tailoring in *Fullilove*.<sup>19</sup> Set asides<sup>20</sup> or quotas were adjudged constitutional because they served compelling government interest of remedying racial discrimination in the construction industry with a strong basis-in evidence<sup>21</sup> of discrimination coupled with the recognition of the government's duty<sup>22</sup> to "ameliorate the effects of racial discrimination."<sup>23</sup> Powell, J also allowed for greater flexibility in testing the policy<sup>24</sup> as it was a Congressional plan thereby laying the ground for the concept of due deference to Congress in testing affirmative action plans. Although the policy passed Powell's narrow tailoring muster because it allowed for an exception to be made in cities where no discrimination had been seen, it was but a furtherance of the compelling interest test although mistakenly seen through the lens of narrow tailoring even when it did nothing to test the means. Further, the only ground on which the policy was struck down in *Wygant*<sup>25</sup> was that it imposed an intrusive burden on the non-minority groups.<sup>26</sup> Powell J did not require the policy to have the minimum necessary preference to satisfy the narrow tailoring test. What *Wygant* did do, however, was establish universal acceptance of the SCOTUS in applying strict scrutiny to affirmative action cases.<sup>27</sup>

Powell thus, laid down broad standards to test whether policies/programmes were narrowly tailored — he tested each programme to

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<sup>19</sup> *Fullilove*, (opinion of Powell, J.) (...the set-aside is a reasonably necessary means of furthering the compelling governmental interest in redressing the discrimination that affects minority contractors. Any marginal unfairness to innocent nonminority contractors is not sufficiently significant -- or sufficiently identifiable -- to outweigh the governmental interest served by § 103(f)(2). When Congress acts to remedy identified discrimination, it may exercise discretion in choosing a remedy that is reasonably necessary to accomplish its purpose. Whatever the exact breadth of that discretion, I believe that it encompasses the selection of the set-aside in this case).

<sup>20</sup> The question in this case was whether Congress may enact the requirement in § 103(f)(2) of the Public Works Employment Act of 1977 (PWEA), that 10% of federal grants for local public work projects funded by the Act be set aside for minority business enterprises.

<sup>21</sup> As opposed to *Bakke*, where the petitioners could not prove any past discrimination which they wanted to remedy so as to justify the set-aside.

<sup>22</sup> *Fullilove*, (opinion of Powell, J.) (In reviewing the constitutionality of § 103(f)(2), we must decide (i) whether Congress is competent to make findings of unlawful discrimination; (ii) if so, whether sufficient findings have been made to establish that unlawful discrimination has affected adversely minority business enterprises, and (iii) whether the 10% set-aside is a permissible means for redressing identifiable past discrimination. None of these questions may be answered without explicit recognition that we are reviewing an Act of Congress).

<sup>23</sup> *Fullilove*, (opinion of Powell, J.)

<sup>24</sup> *Id.* (In my view, a court should uphold a reasonable congressional finding of discrimination. A more stringent standard of review would impinge upon Congress' ability to address problems of discrimination, *see supra* at 500-503; a standard requiring a court to "perceive a basis" is essentially meaningless in this context).

<sup>25</sup> *Wygant*, (plurality opinion).

<sup>26</sup> *Id.*

<sup>27</sup> *Wygant*, (O'Connor, J., concurring in part and concurring in the judgment) (now would require that: (1) the racial classification be justified by a "compelling governmental interest," and (2) the means chosen by the State to effectuate its purpose be "narrowly tailored." Ante at 274. This standard reflects the belief, apparently held by all Members of this Court, that racial classifications of any sort must be subjected to "strict scrutiny," however defined).

ensure that it did the least harm to third parties,<sup>28</sup> did not impose “undue burden on non-preferred groups”<sup>29</sup> irrespective of whether it was “the least restrictive preference.”<sup>30</sup>

## B. JUSTICE O’CONNOR

O’Connor, J interpreted the narrow tailoring component in a far stricter manner<sup>31</sup> as opposed to Powell, J; requiring the least restrictive preference to be adopted to fall within the realms of the Equal Protection Clause. *Croson*<sup>32</sup> was an important judgement in terms of jurisprudential development of narrow tailoring as O’Connor, J made her debut as the swing voter taking over from where Powell, J left off.

Whilst following Powell’s analysis for determining “compelling interest”<sup>33</sup> on grounds of strong basis-in evidence;<sup>34</sup> O’Connor devolved her own version of narrow tailoring. Although the 30% set-aside<sup>35</sup> in *Croson* was struck down for showing no basis in evidence of racial discrimination in the construction industry; O’Connor made two important observations. While reiterating the importance of the existence of alternative remedies for testing the narrowness of a policy, she laid

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<sup>28</sup> *United States v. Paradise*, 480 U.S. 149 (1987) (Powell, J, concurring opinion) ((emphasis added) In determining whether an affirmative-action remedy is narrowly drawn to achieve its goal, I have thought that five factors may be relevant: (i) the efficacy of alternative remedies; (ii) the planned duration of the remedy; (iii) the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force; (iv) the availability of waiver provisions if the hiring plan could not be met; and (v) the effect of the remedy upon innocent third parties).

<sup>29</sup> *Wygant*, Powell, J (While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive. We therefore hold that, as a means of accomplishing purposes that otherwise may be legitimate, the Board's layoff plan is not sufficiently narrowly tailored).

<sup>30</sup> *Fullilove*, Powell, J (concurring opinion); *Austin Independent School District v. United States*, 429 U.S. 990 (1976), Powell, J (this Court has not required remedial plans to be limited to the least restrictive means of implementation).

<sup>31</sup> *Wygant*, O’Connor, J (concurring opinion) (Applying a “narrower” or “stricter” approach to determining compelling interest. I agree with the plurality that a governmental agency's interest in remedying “societal” discrimination, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny).

<sup>32</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>33</sup> *Croson*, (opinion of O’Connor, J.) (This Court reversed, with a plurality of four Justices reiterating the view expressed by Justice Powell in *Bakke* that “[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy”); *Austin*, plurality opinion.

<sup>34</sup> *Croson*, (opinion of O’Connor, J.) (None of these “findings,” singly or together, provide the city of Richmond with a "strong basis in evidence for its conclusion that remedial action was necessary"); *Austin*, plurality opinion.

<sup>35</sup> On April 11, 1983, the Richmond City Council adopted the Minority Business Utilization Plan that required prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises (MBE's).

emphasis specifically on race-neutral remedies.<sup>36</sup> This is a stark departure from references made earlier to alternate remedies whether preferential or not in determining narrowness. Secondly, she blanketly adjudged rigid quotas/set-asides to be unconstitutional,<sup>37</sup> calling it racial balancing which is *prima facie* prohibited. She also criticised the quota for being over-inclusive,<sup>38</sup> laying down one more criterion to pass the narrow tailoring test.

O'Connor put forth her own definition of strict scrutiny saying that the purpose of strict scrutiny is to smoke out illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. Further, taking a leaf from *Bakke*, O'Connor laid the foundation of her "individualised"<sup>39</sup> approach to narrow tailoring with *Croson*, emphasising that race cannot be the only factor for preferential treatment.

### C. JUSTICE KENNEDY

Kennedy, J adopted an even stricter approach<sup>40</sup> in his concurring opinion in *Croson*, veering towards a rule-based approach vis-à-vis the standards approach laid down by Powell. He reiterated the emphasis on "race-neutrality"<sup>41</sup> expecting "the strict scrutiny standard will operate in a manner generally consistent with the

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<sup>36</sup> *Croson*, (opinion of O'Connor, J.) (First, there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting. Paradise ("In determining whether race-conscious remedies are appropriate, we look to several factors, including the efficacy of alternative remedies).

<sup>37</sup> *Croson*, (opinion of O'Connor, J.) (second, the 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing. It rests upon the "completely unrealistic" assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population).

<sup>38</sup> *Croson*, (opinion of O'Connor, J.) (The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination. If a 30% set-aside was "narrowly tailored" to compensate black contractors for past discrimination, one may legitimately ask why they are forced to share this "remedial relief" with an Aleut citizen who moves to Richmond tomorrow? The gross over inclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation).

<sup>39</sup> The congressional scheme upheld in *Fullilove* allowed for a waiver of the set-aside provision where an MBE's higher price was not attributable to the effects of past discrimination. Based upon proper findings, such programs are less problematic from an equal protection standpoint, because they treat all candidates individually, rather than making the colour of an applicant's skin the sole relevant consideration. Unlike the program upheld in *Fullilove*, the Richmond Plan's waiver system focuses solely on the availability of MBE's; there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors.

<sup>40</sup> *Croson*, Kennedy, J (concurring opinion) (...a rule of automatic invalidity for racial preferences in almost every case would be a significant break with our precedents that require a case-by-case test....on the assumption that it will vindicate the principle of race neutrality found in the Equal Protection Clause, I accept the less absolute rule contained in JUSTICE O'CONNOR's opinion, a rule based on the proposition that any racial preference must face the most rigorous scrutiny by the courts).

<sup>41</sup> *Croson*, Kennedy, J (concurring opinion) (The moral imperative of racial neutrality is the driving force of the Equal Protection Clause).

imperative of race neutrality, because it forbids the use even of narrowly drawn racial classifications except as a last resort.”<sup>42</sup>

Departing from the Congressional deference in *Fullilove*, Kennedy dissented from O’Connor’s opinion in part II of the judgment which traces the “case law upholding congressional power to grant preferences based on overt and explicit classification by race.”<sup>43</sup> Kennedy sought to undo categorising while inspecting racial classifications, exhorting a universal test for any Fourteenth Amendment violation.<sup>44</sup>

In a detailed opinion on narrow tailoring, Kennedy further shaped the test, giving it new dimensions and criteria. Laying down the applicability of the strict scrutiny doctrine, Kennedy stated, “mechanisms [that] are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race...it is unlikely any of them would demand strict scrutiny to be found permissible. Assigning to each student a personal designation according to a crude system of individual racial classifications is quite a different matter; and the legal analysis changes accordingly.”

#### D. GRATZ<sup>45</sup> AND GRUTTER<sup>46</sup>

Relying heavily on Powell’s opinion in *Bakke*, O’Connor held that rigid quotas are prima facie unconstitutional while a “plus” fits within the constitutional standards. Powell had reasoned that a plus ensures that race is not the only criteria, laying emphasis on an overall consideration of the individual’s profile while granting admission. O’Connor erred in so far as she considered every plus constitutional; further inquiry<sup>47</sup> as to whether it translated into rigid criteria for admission<sup>48</sup> was not entered into.<sup>49</sup> Extreme deference was given to the law school

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<sup>42</sup> *Croson*, Kennedy, J (concurring opinion).

<sup>43</sup> *Croson*, Kennedy, J (concurring opinion); *Bakke*.

<sup>44</sup> *Croson*, Kennedy, J (concurring opinion in part) (The process by which a law that is an equal protection violation when enacted by a State becomes transformed to an equal protection guarantee when enacted by Congress poses a difficult proposition for me).

<sup>45</sup> *Gratz v. Bollinger*, 539 U.S. 244 (2003) [*“Gratz”*] was a United States Supreme Court case regarding the University of Michigan undergraduate affirmative action admissions policy. In a 6–3 decision announced on June 23, 2003, Chief Justice Rehnquist, writing for the Court, ruled the University’s point system’s “predetermined point allocations” that awarded 20 points to underrepresented minorities “ensures that the diversity contributions of applicants cannot be individually assessed” and was therefore unconstitutional.

<sup>46</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003) [*“Grutter”*].

<sup>47</sup> *Grutter*, Kennedy, J (The Law School has not demonstrated how individual consideration is, or can be, preserved at this stage of the application process given the instruction to attain what it calls critical mass).

<sup>48</sup> Struck down in *Parents Involved in Community Schools v. Seattle School District No.1*, 551 U.S. 701 (2007).

<sup>49</sup> *Grutter*, (opinion of O’Connor, J.) (As Justice Powell recognized in *Bakke*, so long as a race-conscious admissions program uses race as a “plus” factor in the context of individualized consideration, a rejected applicant “will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname... . His qualifications

in choosing its policy for admission and an enquiry into workable race-neutral alternatives was also not entered into.<sup>50</sup> Another striking factor of the opinion was a sunset clause<sup>51</sup>; of a fixed number of years; hitherto unknown to the strict scrutiny jurisprudence.

In contrast, O'Connor struck down the admissions programme in *Gratz* because it accorded a pre-determined weight of twenty points to race; making the preference given to race far higher than the other soft variables.<sup>52</sup> Whether O'Connor struck down the *Gratz* policy because it was a mechanical predetermined fixed quota or because it gave more weight age to race vis-à-vis the other soft variables is not clear. O'Connor laid down further dimensions to narrow tailoring, whether by misinterpretation of Powell's opinion in *Bakke* or by factual evidence. O'Connor stepped down, handing over the position of the decider in the SCOTUS to Kennedy who dissented strongly with O'Connor on the concept of individualised considerations.

Kennedy dissented from the opinion of the SCOTUS on the deference<sup>53</sup> accorded to educational institutions in determining the constitutionality of their admission process. He rose to question the critical mass<sup>54</sup> that was sought to achieve diversity, requiring the university to dispel the inference that it is not a quota or set-aside.<sup>55</sup> Kennedy found fault with the admissions policy for not being narrowly tailored; as it focussed solely on race for arriving at the critical mass of students to attain diversity.<sup>56</sup>

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would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment).

<sup>50</sup> *Grutter*, (opinion of O'Connor, J.) (We take the Law School at its word that it would "like nothing better than to find a race-neutral admissions formula" and will terminate its race-conscious admissions program as soon as practicable).

<sup>51</sup> *Grutter*, (opinion of O'Connor, J.) (We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today).

<sup>52</sup> Although the Office of Undergraduate Admissions did assign 20 points to some "soft" variables other than race, the points available for other diversity contributions, such as leadership and service, personal achievement, and geographic diversity, were capped at much lower levels.

<sup>53</sup> *Grutter*, Kennedy, J (dissenting opinion) (The Court confuses deference to a university's definition of its educational objective with deference to the implementation of this goal. In the context of university admissions the objective of racial diversity can be accepted based on empirical data known to us, but deference is not to be given with respect to the methods by which it is pursued).

<sup>54</sup> *Grutter*, Kennedy, J (dissenting opinion) (Whether the objective of critical mass "is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status," and so risks compromising individual assessment).

<sup>55</sup> *Grutter*, Kennedy, J (dissenting opinion) (The Law School has not demonstrated how individual consideration is, or can be, preserved at this stage of the application process given the instruction to attain what it calls critical mass. In fact the evidence shows otherwise. There was little deviation among admitted minority students during the years from 1995 to 1998. The percentage of enrolled minorities fluctuated only by 0.3%, from 13.5% to 13.8%. The number of minority students to whom offers were extended varied by just a slightly greater magnitude of 2.2%, from the high of 15.6% in 1995 to the low of 13.4% in 1998).

<sup>56</sup> *Grutter*, Kennedy, J (dissenting opinion) (The admissions officers could use the reports to recalibrate the plus factor given to race depending on how close they were to achieving the Law

Kennedy was critical of the plural opinion of the SCOTUS, delivered by O'Connor, considering it to be a departure from the strict scrutiny standards, particularly because it did not adhere to the race-neutral alternative requirement<sup>57</sup>. Surprisingly, Kennedy believed this lenient approach to strict scrutiny was a departure from what Powell envisioned when he laid down the doctrine even though Kennedy has in fact, strayed from Powell's jurisprudence to lay down a far stricter rule-based approach. *Grutter* and *Gratz* laid down the law on narrow tailoring with respect to higher educational institutions while *Parents Involved*<sup>58</sup> gives an idea about the future development of the test, especially how *Fisher v. Texas* will be decided in light of the SCOTUS opinion.<sup>59</sup>

Crystallizing the individualised approach to narrow tailoring in *Parents Involved*,<sup>60</sup> Kennedy required "...the facially race-neutral means set forth above or, if necessary, a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component." Kennedy struck down Seattle's plan as it relied upon a mechanical formula on the basis of three rigid criteria: (i) placement of siblings, (ii) distance from schools and (iii) race. He refused to draw an analogy of this plan with *Grutter*, since *race* was the only factor considered for maintaining diversity as opposed to being a *plus* which was approved in *Grutter*.<sup>61</sup>

Thus, even as the narrow tailoring test evolved, being handed down from one revolutionary swing voter to another, a contextualist approach remained its mainstay; in spite of errors in its application.

The ideal approach would be one that carries forward Powell's concept of contextuality in narrow tailoring- evaluating each policy individually without laying down rigid rules or tests pertaining to interpretation of facts. O'Connor expanded the concept of narrow tailoring far too much; giving more than required leeway to

School's goal of critical mass. The bonus factor of race would then become divorced from individual review; it would be premised instead on the numerical objective set by the Law School).

<sup>57</sup> *Croson*, 519, Kennedy, J (concurring in part and concurring in judgment) (noting that racial classifications "may be the only adequate remedy after a judicial determination that a State or its instrumentality has violated the Equal Protection Clause").

<sup>58</sup> *Parents Involved in Community Schools v. Seattle School District No.1*, 551 U.S. 701 (2007) [hereinafter *Parents Involved*].

<sup>59</sup> *Abigail Noel Fisher v. University of Texas at Austin*, et al., 570 U. S. \_\_\_\_ (2013).

<sup>60</sup> *Parents Involved*, (opinion of Kennedy, J.) (Respondent school districts voluntarily adopted student assignment plans that rely on race to determine which schools certain children may attend. The Seattle district, which has never operated legally segregated schools or been subject to court-ordered desegregation, classified children as white or nonwhite, and used the racial classifications as a "tiebreaker" to allocate slots in particular high schools).

<sup>61</sup> *Parents Involved*, (opinion of Kennedy, J.) (There the Court sustained a system that, it found, was flexible enough to take into account "all pertinent elements of diversity" (considered race as only one factor among many. Seattle's plan, by contrast, relies upon a mechanical formula that has denied hundreds of students their preferred schools on the basis of three rigid criteria: placement of siblings, distance from schools, and race. If those students were considered for a whole range of their talents and school needs with race as just one consideration, *Grutter* would have some application).

educational institutions and diluting judicial review of the policies. This translated into a more “deferential” rather than a contextualist approach. Preference given to race must be quantifiable lest it run the risk of causing more inequality albeit unconsciously. Kennedy as he has so far displayed in his opinions, harks a return back to the “categorical” approach that was criticised for its imminent fatality. He has come dangerously close to setting “rules” for testing constitutionality of preferences as seen in *Croson* rejecting blanketly any preference unless it was a last resort or if it only took race into account as seen in *Grutter*.

It is thus a middle ground between O'Connor and Kennedy's interpretations which would serve the Fourteenth Amendment best in realizing affirmative action policies. Even as the decision in *Fisher v. Texas* is pending, it is expected that the doctrine will be interpreted to lay focus on context and fact, availability of race-neutral alternatives, accountability to the judiciary and far less leniency accorded to the policy that became O'Connor's hallmark.

### III. APPLICABILITY OF THE STRICT SCRUTINY DOCTRINE IN THE INDIAN CONTEXT

This Part argues that the American doctrine of strict scrutiny can and must be applied to affirmative action policies in India. The application of strict scrutiny, apart from affirmative action programmes in educational institutions is not within the scope of this article. The question of the application of the strict scrutiny doctrine as interpreted by the Indian Supreme Court (“SC”), as discussed below, is in a state of flux, largely on account of a complete lack of understanding of the nuances of the doctrine.

#### A. SAURABH CHAUDRI V. UNION OF INDIA<sup>62</sup>

The SC spoke in some detail about the application of the strict scrutiny doctrine whilst answering the question framed — whether reservation by way of institutional preference comes within suspect classification warranting the application of the strict scrutiny test? Relying on the twin test of classification<sup>63</sup> as a test of constitutionality of statutes expounded in *Ram Krishna Dalmia*<sup>64</sup>, the SC rejected the strict scrutiny doctrine succinctly — “The strict scrutiny test or the intermediate scrutiny test applicable in the United States of America cannot be applied in this case. Such a test is not applied in Indian courts.” The rationale for rejecting any test that treats classification legislations as constitutionally suspect was the well-established principle of presumption of constitutionality in favour of the statute. Since legislation is always presumed to be constitutional, the burden to prove the contrary is on him who asserts the same; for the judge must always

<sup>62</sup> *Saurabh Chaudhri v. Union of India*, (2003) 11 SCC 140.

<sup>63</sup> Article 14, Constitution of India, 1950.

<sup>64</sup> *Shri Ram Krishna Dalmia v. Shri Justice S. R. Tendolkar & Ors.*, AIR 1958 SC 538 [hereinafter *Ram Krishna Dalmia*].

adopt an interpretation that veers towards constitutionality. Thus, this presumption rule excluded any application of the strict scrutiny test.

However, Justice Khare went on to say that the strict scrutiny test could be applied in cases where “legislation *ex facie*” is found to be unreasonable. Such a test may also be applied in a case where by reason of a statute the life and liberty of a citizen is put in jeopardy. What, however, the judgement did not lay down was the definition and scope of *ex facie* unreasonable legislations.

Thus, the judgement, though discussing strict scrutiny in more detail than any judgment had before, only left the stance in confusion instead of clearing the air. However, it did leave room for application of strict scrutiny in two cases: First, where the legislation was *ex facie* unreasonable, and second, where there was an alleged violation of Article 21.<sup>65</sup>

## **B. ASHOK KUMAR THAKUR V. UNION OF INDIA<sup>66</sup>**

*Ashok Kumar Thakur* was the last important SC case dealing with strict scrutiny in detail, more so for the purpose of this article because it dealt with the constitutionality of affirmative action programs. Although the five judge constitutional bench rejected the doctrine of strict scrutiny citing non-recognition of the same by Indian constitutional jurisprudence thus far; there was no concrete analysis given for refusal to adopt the same.

Thus, *Saurabh Chaudri* was misread to mean a blanket rejection on the application of the doctrine in India. Although Ashok Kumar Thakur did not offer much in terms of legal analysis, it did outline three alleged grouses against the application of the doctrine in India.

### 1. STRICT SCRUTINY DEFEATS THE PRINCIPLE OF PRESUMPTION OF CONSTITUTIONALITY

This inference is borne out of a misinterpretation of Justice Khare’s diktat in *Saurabh Chaudhri* which clearly recognised that presumption is not an absolute rule; having several exceptions. The SC in *Ram Krishna Dalmia* laid down principles to be borne in mind when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of equal protection of the laws:

*that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of*

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<sup>65</sup> Article 21, Constitution of India, 1950.

<sup>66</sup> *Ashok Kumar Thakur v. Union of India*, (2003) 11 SCC 146.



*constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.*

Strict scrutiny, in its application, inquires into the constitutionality of suspect legislations. Any legislation which seeks to make a classification or discrimination in any manner becomes suspect and violative of the Equal Protection Clause. As Justice Khare has postulated; there are certain exceptions to the presumption of constitutionality rule in India. Furtherance of this principle of exception is seen in the *Ram Krishna Dalmiacase* where the SC asserts that the presumption may be rebutted in cases of “hostile” and “discriminating” legislation. Thus, a court is *always* required to inquire into the rationale or the compelling interest which justifies the discrimination.

Therefore, it is asserted that any inquiry in the form of strict scrutiny cannot be considered contrary to the presumption of constitutionality test; but merely a furtherance of the inquiry to test constitutionality in cases where the presumption of constitutionality is not available.

## 2. THE TWIN TESTS OF CLASSIFICATION SATISFY ALL CONSTITUTIONALITY REQUIREMENTS

The argument advanced by opponents of the application of strict scrutiny is that the twin tests of classification are a constitutionally acceptable test for adjudging arbitrariness. However, this article argues that there is no foreclosure to applying more than one test for determining constitutionality of *ex facie* discriminatory laws. The two prongs of the twin test of classification are: First, there must be an intelligible differentia; and second, there must be a reasonable nexus of the differentia with the object sought to be achieved.<sup>67</sup>

This test is ably supplemented by the strict scrutiny test. The narrow tailoring prong of the strict scrutiny test mirrors the second rule of the twin tests. The twin tests require that the classification made must be connected closely or have a reasonable nexus with the purpose or object of the classification. In other words, the classification made must be narrowly tailored so that it fits the object.

This can be elucidated further by an example. A legislation is enacted for providing mid-day meals to lower income children; in a continuing endeavour to provide for the nutrition and health of children. Lower income group is defined to include only children belonging to the Scheduled Castes (“SCs”) and Scheduled Tribes (“STs”). If we test this legislation using the twin tests of classification, the legislation would be analysed in the following manner — first, whether the classification was based on intelligible differentia —whether the classification was over inclusive or over exclusive and reasonable. SCs and STs as the only criteria

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<sup>67</sup> *Ram Krishna Dalmia*, *supra* note 64.

for determining low income groups would in all probability be considered under-inclusive and unreasonable. Second, whether the classification had a reasonable connection with the purpose of the legislation — this could be assailed again for being an unreasonable nexus — providing only children belonging to SCs and STs with one meal a day is not a reasonable means to achieve the end of child welfare in the lower income group.

When tested under the strict scrutiny test, it would be tested in the following manner — determine whether the object — to provide for the nutrition and health of children was compelling enough to allow for discriminatory laws. Second, whether the classification was exactly tailored to achieve the goal — providing only children belonging to SCs and STs with one meal a day is not a reasonable means to achieve the end of child welfare. Applying the narrow tailoring test, these “means” do not exactly fit or further the object of child welfare as the classification over-excludes the probable recipient group.

Thus, strict scrutiny as a model works in tandem with the twin tests of classification and works in a more nuanced fashion to achieve the same goal of checking arbitrariness. The same goal to elaborate, would mean ensuring the means are suitable for, and justify the ends. To substantiate the importance of the strict scrutiny test, it would be appropriate to quote — “Absent searching judicial inquiry into the justification for such race-based measures, we have no way to determine what ‘classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.”<sup>68</sup>

### 3. THE INDIAN AND AMERICAN REQUIREMENTS OPERATE IN DIFFERENT FACTS AND CIRCUMSTANCES

*Ashok Kumar Thakur* overlooked the very origin of the Article 14 doctrine as expounded in *Deoman Upadhyaya*<sup>69</sup> —

*Article 14 of the Constitution of India is adopted from the last clause of s. 1 of the 14th Amendment of the Constitution of the United States of America, and it may reasonably be assumed that our Constituent Assembly when it enshrined the guarantee of equal protection of the laws in our Constitution, was aware of its content delimited by judicial interpretation in the United States of America. In considering the authorities of the superior courts in the United States, we would not therefore be incorporating principles foreign to our Constitution, or be proceeding upon the slippery ground of apparent similarity of expressions or concepts in an alien jurisprudence developed by a society whose approach to similar problems on account of historical or other reasons differs from ours.*

<sup>68</sup> *Fullilove*, *supra* note 9.

<sup>69</sup> *State of U. P. v. Deoman Upadhyaya*, AIR 1960 SC 1125.

This rebuts any argument made for non application of American doctrines. The Fourteenth Amendment provides the same equal protection guarantee that Article 14 purports to give. Thus, the essential protection guarantee is of the same kind and same nature so as to rebut any differences in the law. The similarity is echoed in *Adarand Constructors, Inc. v. Peña* — because the Fourteenth Amendment “protect[s] persons, not groups, all governmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed.”<sup>70</sup>

Similarly, Article 14 guarantees to each individual equality before law and equal protection before the law. Thus, at its fundamentals, Article 14 professes to protect every single individual by virtue of being a person from discrimination as opposed to protection by virtue of being a member of a group.

Further, the underlying idea behind affirmative action in both countries is largely similar — it seeks, *inter alia*, to undo the adverse affects of racial/ caste discrimination on individuals as members of an ethnic group whilst seeking to protect the sacrosanct right to individual equality. As each country puts its right to equality as well as the need to remedy ethnicity based discrimination on an equal pedestal, it would be myopic to say that an American test cannot be applied in the Indian context; citing cosmetic differences. Further, strict scrutiny as a test is applied only to legislations that are inherently suspect or are *ex facie* unreasonable — in line with the Indian jurisprudence on exceptions to presumptions of constitutionality.

It acts as a more refined, detailed and nuanced approach to the twin tests of classification to enable a more exacting review of discriminatory legislations within the constitutional boundaries. The notion that it is “strict in theory, fatal in fact” has already been dispelled by the largely contextual evolution of the doctrine; giving room for the peculiarities and the facts and circumstances in each case. Thus, the test is neutral, allowing for its application even in facts and circumstances inherently Indian and not American without tweaking our constitutional diktat as it tests each case on merits instead of rules.

Lending credence to the above analysis is a reiteration of the same in the case of *Subhash Chandra v. Delhi Subordinate Services Selection Board and Ors*<sup>71</sup>. Taking into account the analyses in *Saurabh Chaudhri* and *Ashok Kumar Thakur*, it was lamented that there was no clear direction given to the applicability of the doctrine. The SC then set down a template of cases where the doctrine ought to be applied:

- (i) Where a statute or an action is patently unreasonable or arbitrary.

<sup>70</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

<sup>71</sup> *Subhash Chandra v. Delhi Subordinate Services Selection Board and Ors*, (2009) 15 SCC 458.

- (ii) Where a statute is contrary to the constitutional scheme.
- (iii) Where the general presumption as regards the constitutionality of the statute or action cannot be invoked.
- (iv) Where a statute or execution action causes reverse discrimination.
- (v) Where a statute has been enacted restricting the rights of a citizen under Article 14 or Article 19 as for example clauses (1) to (6) of Article 19 of the Constitution of India as in those cases, it would be for the State to justify the reasonableness thereof.
- (vi) Where a statute seeks to take away a person's life and liberty which is protected under Article 21 of the Constitution of India or otherwise infringes the core human right.
- (vii) Where a statute is "expropriatory" or "confiscatory" in nature.
- (viii) Where a statute prima facie seeks to interfere with sovereignty and integrity of India.

However, by no means, the list is exhaustive or may be held to be applicable in all situations.

The SC then relied heavily on *Anuj Garg*<sup>72</sup> to justify the applicability of the doctrine — "It is to be borne in mind that legislation with pronounced 'protective discrimination' aims....potentially serve as double-edged swords. Strict scrutiny test should be employed while assessing the implications of this variety of legislations." Providing justification for the application, the SC went on —

*At the heart of the applicability of this doctrine in protective discrimination cases, including affirmative action matters, is the challenge before the court to facilitate the translation of the constitutional vision of substantive equality into a practical feature of the polity. When State puts its weight behind any particular set of rights by showing compelling interest, the courts have to ensure that the transfer or accrual of benefits as a result of the State action does not end up abrogating the competing rights of others to an unnecessary extent.*

The SC finally added that the doctrine of guided power postulated in *M. Nagaraj*<sup>73</sup> had been used as a corollary of the strict scrutiny rule. It is a distant relative of continuing mandamus. Strict scrutiny thus paves the way for a more searching judicial scrutiny to guard against invidious discriminations which could be made by the State against group of people in violation of the constitutional guarantee of just and equal laws.

The next Part analyses the shoddy Indian jurisprudence on affirmative action, making the need for the application of this doctrine even more pressing.

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<sup>72</sup> *Anuj Garg v. Hotel Association of India*, AIR 2008 SC 663.

<sup>73</sup> *M. Nagaraj & Others v. Union of India & Others*, (2006) 8 SCC 212.

#### IV. THE FAILINGS OF AFFIRMATIVE ACTION IN INDIA

This Part closely examines and analyses the affirmative action policy followed in India for admissions to higher educational institutions. It traces the evolution of compensatory discrimination in India and the changing parameters to define the deserving classes under the affirmative action programme. Attempts are made to analyze the defects in the prevailing system and the flaws in the methods adopted to determine the classes to be admitted under the programme and tracing the evolution of the affirmative action policy in India.

##### A. PRE-MANDAL COMMISSION – HOW CASTE WAS NEVER THE CRITERIA

In the case of *State of Madras v. Dorairajan*<sup>74</sup> — the first case challenging the constitutionality of reservations, the Supreme Court declared that compensatory discrimination is violative of Article 14 — the Equal Protection Clause equivalent in the Indian Constitution. Acknowledging the fact that the petitioners were denied admission not on any ground but for them being Brahmins and not being members of the community for which those reservations were made, the SC held that the classification made in the Communal Government Order in so far as it proceeded on the basis of religion, race, and caste was opposed to the Constitution and constituted a clear violation of the fundamental rights guaranteed under Article 29(2).

Considered widely as a narrow and literalist reading of the equality provision, the Legislature sought to circumvent the decision by amending Article 15 to add an enabling provision by virtue of introducing Clause 4 in Article 15.<sup>75</sup> Article 15(4) heralded the legitimization of affirmative action policies in India, no matter how wide the ambit and how ambiguous the power delegated to the State. While the clause enabled the State to make special provisions for the socially and educationally backward classes, these were neither pre-determined classes nor did the clause lay down any guidelines to identify the same. However, the use of the word ‘class’ stands as a stark contrast to the constant present reference to ‘caste’ in determining the beneficiaries of affirmative action policies. Thus, the affirmative action policy, although ambiguous, was clear to the extent that caste was never supposed to be the sole parameter in determining beneficiaries. This was further re-affirmed by the establishment of the first Backward Classes Commission, popularly known as Kaka Kalelkar Commission, under the aegis of Article 340<sup>76</sup> of

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<sup>74</sup> *State of Madras v. Dorairajan*, AIR 1951 SC 226.

<sup>75</sup> Article 15(4), Constitution of India, 1950. (Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes).

<sup>76</sup> Article 340, Constitution of India, 1950. (Appointment of a Commission to investigate the conditions of backward classes (1) The President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such

the Constitution ‘to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove difficulties and to improve their conditions.’<sup>77</sup>

Article 340(1), again, does not talk explicitly about reservations as the preferred policy. In fact, it does not even hint towards any sort of compensatory discrimination. It merely authorized the Commission to identify the socially and educationally backward classes and make recommendations for the removal of the difficulties they face and the grants that must be made in consequence.

The Backward Classes Commission used four criteria to determine social and educational backwardness: (i) low status in the traditional caste system, (ii) poor educational achievement, (iii) under-representation in public sector employment, and (iv) under-representation in the trade and business sector.<sup>78</sup> The Backward Classes Commission identified 2399 castes as backward; this computation did not include SC/ST population. In aberration to using caste as the unit, the commission recommended that even women should be treated as a backward class.<sup>79</sup> Thus, the basic unit of grouping was caste, even though there was no explicit mention of caste in either the enabling provision or Article 340 which accorded power to the Backward Classes Commission.

The report made by the Backward Classes Commission was considered by the Central Government. The Memorandum of Action (“Memorandum”) appended to the Report of the Commission (“Report”) while placing it on the table of the Parliament<sup>80</sup> on September 3, 1956, found fault with certain tests adopted by the Commission for identifying the backward classes. It expressed the opinion that a more systematic and elaborate basis should be evolved for identifying backward classes. Be that as it may, the Report was never discussed by the Parliament.<sup>81</sup> The Backward Classes Commission’s findings lay dormant, further fuelled by Mr. Kalelkar’s own misgivings about the Report. He criticized the Report on the ground that the unit of caste as a basis for computation of

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difficulties and to improve their condition and as to the grants that should be made for the purpose by the Union or any State the conditions subject to which such grants should be made, and the order appointing such Commission shall define the procedure to be followed by the Commission (2) A Commission so appointed shall investigate the matters referred to them and present to the President a report setting out the facts as found by them and making such recommendations as they think proper (3) The President shall cause a copy of the report so presented together with a memorandum explaining the action taken thereon to be laid before each House of Parliament).

<sup>77</sup> *Indira Sawhney v. Union of India*, (1999) 5 SCC 429.

<sup>78</sup> Karthik Nagarajan, *Compensatory Discrimination in India Sixty Years after Independence: A Vehicle of Progress or a Tool of Partisan Politics?*, 15 WASHINGTON AND LEE JOURNAL OF CIVIL RIGHTS AND SOCIAL JUSTICE 483 (2009).

<sup>79</sup> *Id.* at 495.

<sup>80</sup> As required by Clause (3) of Article 340 of Constitution of India, 1950.

<sup>81</sup> *Indira Sawhney*, *supra* note 77.

educationally and socially backward classes excluded the indigent Muslims and Catholics who may have been former Hindu SCs.

Thus, the very first computation of educationally and socially backward classes restricted itself towards identification of the educationally and occupationally backward among the prevailing low status castes in the traditional Hindu caste system. This was India's first step, although criticized and unimplemented, towards cementing caste as a basis for determining beneficiaries to the affirmative action programme. In the years that followed the non-implementation of the Kalelkar Commission, State Governments devised and implemented their own schemes of affirmative action by making provisions for reservations of seats for the backward classes without any computation or demarcation of the recipient classes based on analysis or data collection of what constituted backward classes.

In a string of cases in the 1960s-1970s, the SC revealed a striking shift in the literalist caste-neutral stance that the judiciary had adopted thus far in determining the constitutionality of reservations for backward classes on both prongs: The very policy of affirmative action chalked out in the form of reservations of seats in educational institutions, and the criteria for computation of the beneficiaries under the affirmative action policies. Starting from *Balaji*,<sup>82</sup> where the SC expressed concern about academic quality if admission policies were unduly liberalised, it correctly laid down the following in line with the constitutional principles: First, reservation cannot be more than 50%. Second, the classification of backward and more backward is invalid. Third, caste cannot be the only criteria since Article 15(4) talks about class, and class is not synonymous with caste. Therefore, other factors such as poverty should also be considered.<sup>83</sup>

The Court emphasized in *Chitrakleba*,<sup>84</sup> that "under no circumstance [can] a class be equated to a 'caste'." However, the SC did a *volte-face* in *A. Periakaruppan v. State of T.N.*<sup>85</sup> when it noted that caste had always been equated to class; and that a classification of the backward classes on the basis of caste is within the permissible limits of Article 15(4) if it is shown to be socially and educationally backward. This was in the background of the concept of national interest overriding academic quality in a bid to remedy the historical discrimination of the backward classes. In *P. Rajendran v. State of Madras*,<sup>86</sup> the SC justified reservation of seats made caste-wise. In *State of A.P. v. U.S.V. Balram*,<sup>87</sup> following *Rajendran* and *Periakaruppan* cases, the Court reiterated that "if a caste as whole was socially and educationally backward, the reservation made for such persons will have to be upheld

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<sup>82</sup> *Balaji v. State of Mysore*, AIR 1963 S.C. 649.

<sup>83</sup> *Balaji; Kumari K.S. Jayasree and Anr. v. State of Kerala and Anr.*, AIR 1976 SC 2381.

<sup>84</sup> *Chitrakleba v. State of Mysore*, AIR 1964 SC 1823.

<sup>85</sup> *A. Periakaruppan v. State of T.N.*, AIR 1971 SC 2303.

<sup>86</sup> *P. Rajendran v. State of Madras*, AIR 1968 SC 1012.

<sup>87</sup> *State of A.P. v. U.S.V. Balram*, AIR 1972 SC 1372.

notwithstanding the fact that a few individuals in that group may be both socially and educationally above the general average.” Vaidialingam, J in his conclusion upheld the list of “Backward Class as they satisfied the various tests, which have been laid down by this Court for ascertaining the social and educational backwardness of a class even though the said list was exclusively based on caste.” Chief Justice Ray, in *Kumari K.S. Jayasree*<sup>88</sup> was of the view that “in ascertaining social backwardness of a class of citizens it may not be irrelevant to consider the caste of the group of citizens. Caste cannot however be made the sole or dominant test....” In *P. Sagar v. State of A.P.*,<sup>89</sup> it was observed that poverty, caste, place of habitation, inferiority of occupation, low standard of education, low standard of living are considerations for backwardness. In *Janki Prasad Parimoo v. State of J & K*,<sup>90</sup> it was held that poverty alone cannot be the test of backwardness as large sections of population in India are backward and thus the whole object of reservation would be frustrated. Although well intentioned, the SC mistakenly referred to untouchables and the traditionally repressed socially low classes among the Hindus while alluding to backward classes to justify the compensatory discrimination policies.

Thus, till the 1980 Mandal Commission Report; the concept of reservations as an affirmative action programme was in a state of flux — both in terms of policy and law. While adopting a pro-socialist approach, the Court measured the affirmative action policy on the touchstone of intention rather than effect, in so far as these policies were adjudged constitutionally valid because they sought to remedy the historical context of caste discrimination. However; it erred in the analysis of the computation and determination of the beneficiaries: First, when the computation was based solely on caste, it would be squarely hit by Article 15(1). Second, when based on factors other than caste, it could not be justified solely by the historical context. Third, when based on factors in conjunction with caste, it must be tested for arbitrariness and caste-consciousness for reasonable nexus under Article 14.

This state of ambiguity was sought to be resolved by the electoral promise of the Janata Party when it came to power in 1977. This government set up a Commission under the leadership of B.P. Mandal to devise criteria for identifying backward classes and suggest measures to address their concerns.

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<sup>88</sup> *Kumari K.S. Jayasree and Anr.*, AIR 1976 SC 2381.

<sup>89</sup> *P. Sagar v. State of A.P.*, AIR 1968 AP 165.

<sup>90</sup> *Janki Prasad Parimoo v. State of J & K*, AIR 1973 SC 930.



## B. POST-MANDAL COMMISSION

Thus, in 1978, the second Backward Classes Commission called 'the Mandal Commission' was set up to identify communities that were socially and educationally backward.<sup>91</sup>

The Mandal Commission adopted a three-fold approach<sup>92</sup> to ascertain the backward classes. Indicators for backwardness were decided first by selecting a dozen well-known castes infamous for their educational and social backwardness from each state. These castes were treated as control to test the indicators and derive various cut off points for a particular state. Then, on the basis of analyzing several variables including caste as an independent variable, eleven indicators or criteria for social and educational backwardness were derived under three heads: social, educational, and economic.<sup>93</sup>

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<sup>91</sup> *Indira Sawhney, supra* note 77.

<sup>92</sup> Seminar of sociologists and reports by specialized agencies on social backwardness and analysis of census data. Evidence placed before the Commission by the communities saying that they were backward; extensive touring of the Commission to gain first-hand knowledge of the conditions of the backward classes. Issue of three set of questionnaires to the state governments, central government and the public, study of the lists prepared by the state governments of backward classes in their states.

<sup>93</sup> The 11 criteria are as follows:

### 3.4.1 Social Criteria (4 \* 3 = 12 points)

- Castes/classes considered as socially backward by others.
- Castes/classes which mainly depend on manual labour for their livelihood.
- Castes/classes where at least 25 per cent females and 10 per cent males above the state average get married at an age below 17 years in rural areas and at least 10 per cent females and 5 per cent males do so in urban areas.
- Castes/classes where participation of females in work is at least 2 per cent above the state average.

### 3.4.2 Educational Criteria ( 2 points each, total 6 point)

- Castes/classes where the number of children in the age group of 5-15 years who never attended school
- Is at least 25 per cent above the state average.
- Castes/classes where the rate of student drop-out in the age group of 5-15 years is at least 25 per cent above the state average.
- Castes/classes amongst whom the proportion of matriculates is at least 25 per cent below the state average.

### 3.4.3 Economic Criteria (1 point each, total 4 point)

- Castes/classes where the average value of family assets is at least 25 per cent below the state average.
- Castes/classes where the number of families living in kuccha houses is at least 25 per cent above the state average.
- Castes/classes where the source of drinking water is beyond half a kilometre for more than 50 per cent of the households.
- Castes/classes where the number of households having taken consumption loans is at least 25 per cent above the state average.

By using these criteria for Hindus, the Commission identified 3,743 caste groups as Other Backward Classes (“OBCs”) comprising 52%<sup>94</sup> of total population contrary to 32% as estimated by the Kalelkar Commission. So far as the recommendations were concerned, among others, the Commission called for 27% reservation for the OBCs in public services and scientific, technical, and professional institutions run by the Central and State governments.

The Mandal Commission, while listing down criteria, chose caste as the unit of computation as well as a standard for identifying the beneficiary classes. This measurement of the backward classes had two main defects. First, the scope of the backward classes was restricted to Hindus. Further, the identification criteria would become erroneous since if the object was to remedy the historical context; affirmative action policies in the form of reservations in higher educational institutions would become redundant since neither do they alleviate poverty nor reverse the prevalent abject social discrimination and exclusion of the backward classes on the basis of their caste. And if the object is not remedying the historical persecution of the socially repressed castes among Hindus, a computation based solely on caste would be squarely hit by the reasonable nexus requirement of Article 14.

The very figure of 52% showed that it could not be truly indicative of a class of people who are socially and educationally backward—those who require reservations in higher educational institutions to compete with those who are competent to do so on merit alone. A large part of the country was poor, at the time of tabling the Mandal Commission Report and even today, an even larger part belongs to castes that were traditionally subjugated and exploited; but that alone cannot lead to the inference that they do not have the access and means to education to justify reservations in higher educational institutions. Affirmative action may be used as a policy to aid a section or class of people, who, in spite of all other efforts still require an additional boost to put them on par with those who seek admissions on merit.

This is the primary and most fundamental reason that the Mandal Commission Report ought not to have been taken into consideration while framing affirmative action policies — the actual implementation would lead to a bitter caste divide (evidenced by the violent Gujjar protests to be included in the backward classes) and a failure of maintaining and improving academic quality in higher educational institutions. However, ultimately, the computation unit was caste in all future policy implementations of the Mandal Commission recommendations.

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<sup>94</sup> The 52% figure was arrived at by subtracting from 100 the population percentages for the SCs, STs and non-Hindus (22.56 and 16.16 respectively) as per the 1971 Census, and the percentage for “forward Hindus” (17.58), and adding to this derived sum (43.7) about half of the population percentage for non-Hindus (8.4).

This 27% reservation was challenged in the landmark case of *Indira Sawhney v. Union of India*<sup>95</sup> popularly known as the ‘Mandal Commission’ case. After lengthy discourse, the SC upheld the reservations while forewarning that it must not exceed 50%. It also discussed the concept of creamy layer for the first time stating — ‘Creamy layer amongst backward class of citizens must be excluded by fixation of proper income, property or status criteria.’ Ironically, it ruled against economic criteria for determining backward castes, entrenching and validating caste as the controlling factor.

### C. THE COMPUTATION OF NON-HINDU BACKWARD CLASSES

A recent Central Government decision<sup>96</sup> to provide 4.5% quota for reservation for Muslims among the existing 27% reservations for the Backward Classes has spurred a communal controversy in the midst of the prevailing casteist divides. Since caste has so far been the unit to compute backward classes, it would create the problem of identifying castes among the minority religions which did not have a traditional caste system — an inherently Hindu social structure. However, the National Commission for the Backward Classes says it has evolved a rough and ready criteria<sup>97</sup> viz., (i) all untouchables converted to any Non-Hindu religion and (ii) such occupational communities which are known by the name of their traditional hereditary occupation and whose Hindu counter-parts have been included in the list of Hindu OBCs - ought to be treated as Socially and Educationally Backward Classes (“SEBCs”).

But the use of the word “caste” is fallacious with respect to Muslims because its connotation vis-à-vis reservations comes from a historical context — the subjugation and exploitation of the lower castes solely on account of their social identity. Muslims, on the other hand, are divided into communities and sects and sub-sects; the social or educational backwardness is not on account of any exploitation which is caste-specific. The same applies to Catholics.

This leaves out the truly disadvantaged non-Hindus — who are neither converts nor have a historical context to their social and educational backwardness — squarely outside the ambit of the affirmative action policy.

The main problem with the focus on occupation and caste is that it does not correctly reveal the educational backwardness and the inaccessibility to education to merit reservations in higher educational institutions, on an individual basis; bereft of casteist or communist leanings. Thus, there is no standard fool proof formula evolved so far for determining backward classes and the numbers keep changing as the criteria keeps changing. Thus, a classification that is

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<sup>95</sup> *Indira Sawhney*, *supra* note 77.

<sup>96</sup> 4.5% sub-quota for minorities within 27% reservation for OBCs, DNA, (December 22, 2011), available at: <http://www.dnaindia.com/india/report-4-5pct-sub-quota-for-minorities-within-27pct-reservation-for-obcs-1629009>.

<sup>97</sup> *Indira Sawhney*, *supra* note 77.

uncertain, ambiguous and elastic cannot stand the test of reasonableness under Article 14.

#### D. THE POLITICAL RAMIFICATIONS OF THE AFFIRMATIVE ACTION POLICY

The most persuasive example of the politicisation of the prevailing reservation system would be the violent protests of the Gujjar community in 2008 and 2010, seeking to be reclassified lower in the complex caste matrix in Rajasthan. The Gujjars of Rajasthan, classified under the category of OBCs did not enjoy economic and political clout owing to presence of powerful castes like Jat, Mali, and Bishnoi in the OBC category. The Gujjars, therefore, felt short-changed, citing inability ‘to make much use’ of the 27% reservations given to OBCs.

Since 2006, Kirori Lal Bainsla, a retired Lieutenant Colonel who contested the state assembly elections unsuccessfully in 2008, organised at least four major Gujjar agitations, two of which were violent and resulted in the death of more than 70 people. Gujjars initially demanded that they be shifted from the OBC category to the ST category. However, the Vasundhara Raje government, which did not want to displease the ST category's influential Meena community that is opposed to clubbing Gujjars with them, created the separate SBC category. The Gujjars later even suggested separate quota for themselves within the OBC category, but this was bitterly opposed by the Jats.<sup>98</sup>

The Gujjar agitation reflects what this system of affirmative action has come to- grabbing a piece of the quota pie because you can. Discontent at the ‘political influence’ of the Meena and Jat being high, the game is about which candidate promises higher sops in the backward class pie to both the ‘powerful’ Jats and Meenas on one side and the ‘backward’ Muslims and Gujjars on the other side of the caste fray.<sup>99</sup> What is more disturbing is that even placation in the form of an ‘economic package’ wherein the Government would spend 2.8 billion rupees (\$67 million) for improving schools, clinics, and roads in Gujjar areas was rejected.<sup>100</sup>

In early 2012, the Kshatriya Maratha community demanded reservation in the state of Karnataka threatening “an agitation...on the lines of the one by Gujjars in Rajasthan.”<sup>101</sup> The community leaders also demanded that the local

<sup>98</sup> *Gujjars may field Independents in polls to fulfill quota demand*, THE TIMES OF INDIA, (January 30, 2013), available at: [http://articles.timesofindia.indiatimes.com/2013-01-30/jaipur/36635578\\_1\\_quota-demand-quota-fight-gujjars](http://articles.timesofindia.indiatimes.com/2013-01-30/jaipur/36635578_1_quota-demand-quota-fight-gujjars).

<sup>99</sup> Sudhanshu Mishra, *Gujjar-Meena divide holds key to Bainsla's fate*, INDIA TODAY, (May 3, 2009), available at: <http://indiatoday.intoday.in/story/Gujjar-Meena+divide+holds+key+to+Bainsla's+fate/1/40061.html>.

<sup>100</sup> *State government invites Bainsla for further discussions*, THE ECONOMIC TIMES, (June 14, 2008), available at: [http://articles.economictimes.indiatimes.com/2008-06-14/news/28460258\\_1\\_gujjar-leader-colonel-kirori-singh-bainsla-rajasthan-government](http://articles.economictimes.indiatimes.com/2008-06-14/news/28460258_1_gujjar-leader-colonel-kirori-singh-bainsla-rajasthan-government).

<sup>101</sup> *Kshatriya Marathas demand quota, threaten agitation if not conceded*, THE HINDU, (May 17, 2012), available at: <http://www.thehindu.com/todays-paper/tp-national/tp-karnataka/kshatriya-marathas-demand-quota-threaten-agitation-if-not-conceded/article3427311.ece?css=print>.

political representative from the Maratha majority constituency be elected from their community. Another instance of politicization of the entire process would be the “threats” of a dissident Congress state assembly member in Rajasthan to launch an agitation if the Chairperson of the National Commission for Backward Classes – Justice I. S. Israni, was not removed and a person from the Jat community was not appointed as its head. This demand was made on account of the Chairman’s intention of reviewing the reservation to the communities which have been getting the benefits of reservation for 10 years and have become powerful.<sup>102</sup> It is pertinent to note that such review is a statutory mandate under the National Commission for the Backward Classes Act, 1993.<sup>103</sup> Interestingly, the Jat demand to be included in the OBC category was accepted by the neighbouring Haryana government when protests by the all-powerful khap panchayats turned bloody.<sup>104</sup>

While politics in India is still largely played only on casteist sentiments, the quota system promises a whole new gamut of appeasements and adjustments to secure larger vote banks by widening the applicability of affirmative action policies. Post-Mandal politics is increasingly becoming important as is evidenced by the introduction of sub-quotas and division of the OBCs into Backward and Most Backward Classes all to please communities and secure votes. Perhaps the strongest instance would be the electoral games in Bihar where Nitish Kumar trumped arch nemesis and long serving Chief Minister Lalu Prasad by painting him a higher caste Yadav leader and thereby weaning away the ‘most backward classes’ from his political party. These are just few instances of how the caste dimensions of politics are changing in the complex, messy battles that are Indian elections.

While appeasements and sops in the form of quotas have become popular, their constitutionality remains an area to be considered. Article 15 (4)<sup>105</sup> and Article 15(5)<sup>106</sup> of the Constitution are merely enabling provisions which empower the legislature to make affirmative action laws as it deems fit. They do not confer an

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<sup>102</sup> *Dissident Cong MLA threatens agitation if Jat quota is reduced*, (July 20, 2012), available at: [http://zeenews.india.com/news/rajasthan/dissident-cong-mla-threatens-agitation-if-jat-quota-is-reduced\\_788682.html](http://zeenews.india.com/news/rajasthan/dissident-cong-mla-threatens-agitation-if-jat-quota-is-reduced_788682.html).

<sup>103</sup> National Commission for the Backward Classes Act, 1993, Section 11 (Periodic Revision of Lists by the Central Government

(1) The Central Government may at any time, and shall, at all expiration of ten years from the coming into force of this Act and every succeeding period of ten years thereafter, undertake revision of the lists with a view to excluding from such lists those classes who have ceased to be backward classes or for including in such lists new backward classes.

(2) The Central Government shall, while undertaking any revision referred to in subsection (1), consult the Commission).

<sup>104</sup> *Jat agitation in Haryana ends*, THE TIMES OF INDIA, (March 12, 2012), available at: [http://articles.timesofindia.indiatimes.com/2012-03-12/india/31152370\\_1\\_jat-agitation-jat-protectors-haryana-s-backward-classes-commission](http://articles.timesofindia.indiatimes.com/2012-03-12/india/31152370_1_jat-agitation-jat-protectors-haryana-s-backward-classes-commission).

<sup>105</sup> Article 15(4), Constitution of India, 1950.

<sup>106</sup> Article 15(5), Constitution of India, 1950.

absolute right on any class or caste to affirmative action. Thus, protesting and agitating for quotas as a right is constitutionally wrong. Even when a demand is made; it must be made according to the procedure<sup>107</sup> laid down by the Commission; which then determines its status as per the statutory criteria and which is binding on the government. Any deviation from this procedure can be challenged for arbitrariness under Article 14. Thus, when a caste is arbitrarily included or excluded from the list, it can be struck down as ultra vires: first, for not complying with the statutory requirements<sup>108</sup> and second, for offending Article 14 in so far as the classification festers inequality.

The last part of this article proposes a model that is gleaned off the defects seen thus far even as it lends itself to fit the narrow tailoring standards of the American jurisprudence.

## V. TAILORING THE AMERICAN MODEL TO THE INDIAN CONTEXT

The final part of the article advocates the application of a largely caste-neutral model while achieving the benefits of affirmative action in the Indian

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<sup>107</sup> National Commission for the Backward Classes Act, 1993, Section 9.

<sup>108</sup> Sections 8, 9, 10 and 11 of The National Commission for Backward Classes Act, 1993

8. Procedure to be regulated by the Commission.—

(1) The Commission shall meet as and when necessary at such time and place as the Chairperson may think fit.

(2) The Commission shall regulate its own procedure.

(3) All orders and decisions of the Commission shall be authenticated by the Member-secretary or any other officer of the Commission duly authorised by the Members-Secretary in this behalf.

9. Functions of the Commission.—

(1) The Commission shall examine requests for inclusion of any class of citizens as a backward class in such lists and hear complaints of over-inclusion or under-inclusion of any backward class in such lists and tender such advice to the Central Government as it deems appropriate.

(2) The advice of the Commission shall ordinarily be binding, upon the Central Government.

10. Powers of the Commission.—The Commission shall, while performing its functions under sub-section

(1) of section 9, have all the power of a civil court trying a suit and in particular, in respect of the following matters, namely: —

(a) summoning and enforcing the attendance of any person from any part of India and examining him on oath;

(b) requiring the discovery and production of any document;

(c) receiving evidence on affidavits;

(d) requisitioning any public record or copy thereof from any court or office; (e) issuing commissions for the examination of witnesses and documents; and

(f) Any other matter which may be prescribed.

11. Periodic revision of lists by the Central Government. —

(1) The Central Government may at any time, and shall, at the expiration of ten years from the coming into force of this Act and every succeeding period of ten years thereafter, undertake revision of the lists with a view to excluding from such lists those classes who have ceased to be backward classes or for including in such lists new backward classes.

(2) The Central Government shall, while undertaking any revision referred to in sub--section (1), consult the Commission.

context. This model is narrowly tailored to conform to the contextualist approach of narrowly tailoring as has been interpreted thus far.

Indian institutions have an infamous reputation of botching up conduct of examinations and consequent admissions, citing systemic deficiencies in handling the large number of applications. Therefore, proposing a model which requires intensive background work for segregating and quantifying each application into admissible ranges would be rejected *ex facie*. The model is, keeping in mind logistical and operational difficulties in processing applications which run into tens of thousands, deliberately simple, bereft of complex mathematical and statistical tests. Focussing exclusively on educational institutions, it is proposed that:

First, a fixed percentage of state-determined quotas for all educational institutions as enabled by Article 15(5)<sup>109</sup> should be done away with. Quotas bring in rigidity<sup>110</sup> into the process; as they are unable to factor in socio-economic compositions as peculiar to, and as stark as in the urban-rural divide, metropolis-small town divide etc. The oft-seen end result being: First, allotted seats remaining vacant, and second, students from the creamy layer availing of the seats.<sup>111</sup> This perpetuates reverse discrimination, amounts to caste balancing and is *prima facie* unconstitutional.

Second, quotas must be replaced with a permissible range<sup>112</sup> within which students may be admitted on the basis of affirmative action policies. Although a fixed percentage is *ex-facie* unconstitutional, a critical mass or a range has received the stamp of approval in *Grutter*. This works for two reasons — it gives room for manoeuvring for equality within the policy and it allows for judicial review. While the range may be determined by each state, every city, town, village or any other unit of local government or autonomous educational institution, as the case may be, can induct students on the basis of the population distribution between the have and have-nots, and the admission applications to the institution, fluctuating between the state-determined ranges. This ensures that the policy remains narrowly tailored— admitting students while strictly accounting for population variances and ratio of applicants among the haves and have-nots.

Third, a clear distinction must be made between historically repressed castes (on religious and/or social grounds) and classes of people who have the same socio-economic variables as the backward castes; thereby creating a subset of backward castes among the backward classes. The “backward classes” would thus be the larger group, comprising people from all castes and religions who are

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<sup>109</sup> Article 15(5), Constitution of India, 1950.

<sup>110</sup> See, *supra* Part III.

<sup>111</sup> The creamy layer income ceiling was increased from Rs 2.5 lakh to Rs 4.5 lakh in 2008, but even that could not achieve the desired result of filling the available vacancy under the OBC category. Under the present arrangement, the OBC creamy layer can get reservation while seeking admission in premier educational institutions such as the IIT's and IIMs. But the seats reserved there have remained vacant due to unavailability of candidates.

<sup>112</sup> See, *supra* Part III.

disadvantaged, while the “backward castes” within this classes would be people of historically discriminated castes. This neither ignores race completely, nor does it let it be the only factor. This becomes important in the context that the former fails to do justice to centuries of persecution, while the latter punishes those who never were a part of the historical discrimination.

Thus, the confusion and ambiguity in overlapping use of terms— often conveniently misused to subvert the requirements of equality under Article 14 by seeking refuge under Article 15 can be done away with. By defining socially and educationally backward classes, preferred treatment based only on caste will be struck down for offending Articles 14 and 15(1) — a practice hitherto acceptable.

A separate identification of backward classes and backward castes will help tailor policies more specifically — in terms of object, purpose, and the focus group the policy targets. For instance, a policy granting subsidies to a caste practicing a particular professionsuch asartisans or weavers<sup>113</sup> would require a computation of backward castes since the policy is aimed at a particular group of professionals who belong only to one caste. This is contrasted from policies providing, for instance, mid-day meals to unprivileged children. In such cases, application of the policy only to state-mandated backward castes would violate the right to equality since it replaces economic variables. Moreover, such a demarcation will help clarify the object behind providing affirmative action benefits to each group, thus helping in the examination of its reasonableness under the twin test of classification.

In terms of educational institutions, since the objective is to bring students from all strata of society on a level playing field in terms of higher education, irrespective of difference in means, a policy that caters only to backward castes cannot promote the constitutional tenet of equality. Such a policy is narrowly tailored only when the group of students who avail the affirmative action plan are socially and educationally backward not merely in terms of caste; so as to ensure that the objective of the policy is not lost due to wrong computation of the deserving group. This model does not seek to obliterate caste as a factor for determining whether an individual should be a recipient of the affirmative action plan or not. It merely seeks to create a group that fits perfectly to objectives it was created for.

Fourth, each educational institution must, while accepting admission forms; obtain information about the various variables of each student which are factors for determination of the backward class. This is based on the current policy of requiring student to list down whether they belong to the OBC, EBC, SC, ST categories so as to determine whether they fall in the reserved categories or not. This model proposes that the applicant be required to state not just his caste but also several other crucial variables like place of residence, education qualifications of parents, their annual income, personal achievements, instances of social or

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<sup>113</sup> *Indira Sawhney, supra* note 77.



economic discrimination etc. Such variables can be determined by each educational institution on the basis of its course and the type of students it seeks to cater to. Such an application will act as a better lens into the means, opportunities, and actual discrimination faced by the individual, enabling a better determination of the recipients of the affirmative action programme. This follows the approach of an individualised review of each applicant to help determine who must avail of the affirmative action policy. Such a class of students would be the backward class which may or may not include students from the backward castes if they do not fit the criteria.

Lastly, the institution must, if it takes caste into account, give a numerically quantifiable weight to the same. A student would be marked on two grounds: his actual scores and the soft variables, including caste, to determine whether he deserves discriminatory treatment. For example, consider the cut-off score is 45 on 100 and the strength of the course is 1000. Assuming the permissible range is 20-40 students for 500 students, the institution would have to compute the corresponding ratio of the recipients and non-recipients of the benefit of the policy. In the instant case, that would be 40-80. Assume the top 920 have scored between 75 and 100. The affirmative action programme would then segregate the applicants scoring between 45 and 75 into those falling under the affirmative action programme and those not. This can be determined by ascertained by assigning points to each variable. Taking 10 variables, let us assign a point each for the different variables. The mid-point would be the clinching factor to determine recipients and non-recipients. So in the current example, all those scoring 5 and below would be automatically ousted. If the number of students scoring between 5 and 10 is less than 40 such number of students would automatically avail of the affirmative action policy benefits. Accordingly if such number of students between 5 and 10 is more than 40, the institution must admit the students who have a combination of the highest scores on both the academic scale and the soft variable scale. Thus, the permissible range and the pre-determined weight to caste become measurable, enabling the courts to review whether the policy is narrowly tailored to fit its object.

Since the weightage given to each variable including caste is equal, there is no scope for shielded discrimination, the kind struck down in *Gratz* for disproportionate points to race over other variables.<sup>114</sup> While a mere plus accorded to race was approved in *Grutter*, it was vehemently criticised by Kennedy. This policy, therefore, is numerically quantifiable at all levels, allowing for judicial scrutiny for constitutionality.

Further, since it is not rigid, it doesn't offend the policy laid down in *Bakke*. The model also states that the variables must be discretionary, determined by each institution; tailored to fit its needs. Thus, it takes away a rule-based rigid

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<sup>114</sup> *Gratz v. Bollinger*, 539 U.S. 244 (2003).

approach to narrowly tailoring policies; sticking to what Powell<sup>115</sup> laid down, Kennedy<sup>116</sup> exhorted and O'Connor<sup>117</sup> remodelled- staying true to allowing fact based, contextualist analysis. At the same time, it makes room for deference to educational institutions by allowing discretion in determining the soft variables instead of setting forth state determined computations.

Additionally, there must be a sunset review of the policy in line with O'Connor's diktat in *Grutter*. This helps in ensuring the policy continues to be relevant for measuring affirmative action needs and methods of computation in changing times. Thus, the model, being as caste-neutral as possible, ensures that caste-conscious ends are achieved without unduly affecting the non-preferred classes.

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<sup>115</sup> *See, supra* Part III.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

**ELECTORAL REFORMS THROUGH JUDICIAL  
INTERVENTION: AN ATTEMPT AT PRESERVING  
DEMOCRACY**

YASHASVI TRIPATHI\*

*The notion of democracy draws value from the ideals of “free and fair elections and “good governance.” Inadequate and flawed electoral process is obstacle to democracy, justice and liberty. It results in absolute obliteration of public tranquillity and peace. Electoral reforms are therefore important to preserve democracy in its true spirit. In today’s world the two main pillars of democracy, that are, executive and legislature, have reduced to a sheer chimera, and thus, judiciary is the alternative left to the Indian democracy. In light of the debilitating Indian democracy, the paper critically analyses the recent judicial intervention through three instances of Supreme Court’s rulings in Chief Election Commissioner v. Jan Chawkidar, Lily Thomas v. Union of India, and People’s Union for Civil Liberties and Anr. v. Union of India, having a predominant impact on electoral reforms viz-a-viz the right to vote, decriminalization of politics and freedom of expression to voters.*

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## I. ELECTORAL REFORMS AND DEMOCRACY

Democracy involves two quintessential aspects “free and fair elections” and “good governance.”<sup>1</sup> It espouses popular participation in public affairs and perpetual scrutiny of the governmental processes through free and fair elections. Elections are essential but not enough. If the elections are themselves flawed, it is worse than not having an election in the first place as it opens the floodgates for injustice, exploitation and authoritarianism. Electoral reforms are therefore crucial to preserve unfeigned democracy.<sup>2</sup> Sudipta Kaviraj argues that the gradual process of democratic change has reinforced the groundwork of democracy in India.<sup>3</sup> Jaganmohan Reddy, J. in *Kesavananda Bharti v. State of Kerala*, laid down that “Sovereign Democratic Republic” and “Parliamentary democracy,” are basic features of our Constitution.<sup>4</sup>

The Constitution does not have an orthodox separation of powers, but endeavors to achieve a balanced separation of powers among the executive, the legislature and the judiciary.<sup>5</sup> Wolfgang Friedman states that in a democracy there are various systems of checks and balances.<sup>6</sup> Different groups in a democratic society have certain strengths and resiliencies which protect them against the strengths of other groups in the society.<sup>7</sup> In a democracy one would expect the elected representatives of people to protect and preserve the rights of the persons whom they represent. Unfortunately, the perception in India is that the two main pillars of democracy, that is, legislature and executive do not perform<sup>8</sup> and the judiciary seems to be the only recourse left. It has led to the emergence of a new field of jurisprudence in Indian Law, that of Public Interest Litigation, the origin of which lies in the need to protect the weaker sections of the society from exploitation.<sup>9</sup> In view of the judiciary’s mentioned role, the Supreme Court passed three rulings in *Chief Election Commissioner v. Jan Chaudhary*,<sup>10</sup> *Lily Thomas v. Union of India*,<sup>11</sup> and *People’s Union for Civil Liberties and Anr. v. Union of India*,<sup>12</sup> having a

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<sup>1</sup> T.S Krishnamurthy, THE MIRACLE OF DEMOCRACY, INDIA’S AMAZING JOURNEY 219 (2008) [hereinafter *Krishnamurthy*].

<sup>2</sup> *Id.*

<sup>3</sup> Sudipta Kaviraj, *The Culture Of Representative Democracy*, in WAGES OF FREEDOM 235 (Partha Chatterjee ed., 1998).

<sup>4</sup> *Kesavananda Bharti v. State of Kerala*, AIR 1973 SC 1465.

<sup>5</sup> Rafique Dada, *The Judiciary and Indian Democracy*, in CHALLENGES TO DEMOCRACY IN INDIA, 65 (Rajesh M. Basrur ed., 2009) [hereinafter *Rafique*].

<sup>6</sup> Wolfgang Friedman, LAW IN A CHANGING SOCIETY 7 (1972)

<sup>7</sup> Rafique, *supra* note 5, at 67.

<sup>8</sup> Rafique, *supra* note 5, at 66.

<sup>9</sup> Rafique, *supra* note 5, at 68.

<sup>10</sup> *Chief Election Commissioner v. Jan Chaudhary*, (2013) 7 S.C.C 507 [hereinafter *Chief Election Commissioner*].

<sup>11</sup> *Lily Thomas v. Union of India* (2013) 7 S.C.C. 653 [hereinafter *Lily Thomas*].

<sup>12</sup> *People’s Union for Civil Liberties and Anr. v. Union of India*, 2013 (12) SCALE 165 [hereinafter *PUCL*].

predominant impact on electoral reforms, which have been critically analyzed hereunder.

## II. RIGHT TO VOTE AND DEMOCRACY

In the case of *Chief Election Commissioner v. Jan Chaudhary*, the Court ruled that an individual who is confined in prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police is not entitled to vote by virtue of Sub-section (5) of Section 62 of the Representation of the People Act, 1951 (The 1951 Act). Hence, the individual is not an “elector” under Sub-section (e) (1) of Section 2 of The 1951 Act, which mentions that elector is a person whose name is entered in the electoral roll of the constituency for the time being in force and who is not subject to any disqualifications mentioned in Sec. 16 of the Representation of the People Act, 1950. Therefore, the individual is not qualified to contest elections to the House of People or the Legislative Assembly of a State because of the provisions in Sections 4 and 5 of The 1951 Act, which lay down the qualifications for membership of the House of the People and a Legislative Assembly respectively.<sup>13</sup>

Upon careful contemplation of the sections used by the court to arrive at the judgment, it will become evident that the given interpretation is flawed. The germane consideration for contesting the election as per Section 4 of the 1951 Act is whether an individual is an elector,<sup>14</sup> that is, if one is registered in an electoral roll without being subject to any disqualification under Section 16.<sup>15</sup> Thus sub-section (5) of Section 62 of The 1951 Act is not germane to be considered as it specifies the right to vote, and not disqualification from registration in an electoral roll. Therefore, an individual might not be entitled to vote under sub-section (5) of Section 62 of The 1951 Act because one is in prison or in police custody but that does not mean that one is not entitled to be on an electoral roll which is a prerequisite to qualification for membership of the House of the People.<sup>16</sup>

The error lies in extrapolating the denial of voting rights under sub-section (5) of Section 62 of The 1951 Act to the disqualification of being on an electoral roll under sub-section (1) (c) of Section 16 of The Representation of People Act, 1950 to being an elector. While denying voting rights to under trials already contradicts the principle that a person is innocent until proven guilty, disenfranchising convicts will aggravate their alienation from society.<sup>17</sup> Such an

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<sup>13</sup> *Chief Election Commissioner, supra* note 10.

<sup>14</sup> Section 4, The Representation of the People Act, 1951.

<sup>15</sup> Section 2, The Representation of the People Act, 1950.

<sup>16</sup> Section 4, The Representation of the People Act, 1951

<sup>17</sup> Anup Surendranath, *For A More Inclusive Ballot*, THE HINDU (August 8, 2013) available at: <http://www.thehindu.com/opinion/lead/for-a-more-inclusive-ballot/article5000188.ece>.

interpretation provides a perverse incentive for temporarily incarcerating and consequently disqualifying honest candidates.<sup>18</sup>

This ruling can also be analyzed in respect of violation of human rights, thus obscuring liberty of individuals which would be antithetical to the ideals of democracy. In India, the Police have been provided with certain unbridled powers of arrest. In some cases, powers of the Police extend to arresting any citizen without a warrant from a magistrate.<sup>19</sup> From surmising the relevant sections it can be deduced that in certain cases, law has left the determination of grounds for making the arrest at the discretion of a police officer.<sup>20</sup> In light of this it is not surprising to find several instances of human rights violations under police custody.<sup>21</sup> This can be corroborated by the rampant deaths in police custody<sup>22</sup> which underscores this evil.

In the arena of Indian democracy, since leaders have seemed to be ambivalent about having a dialogue with their opponents, the preference has been to use repression to browbeat activists rather than to negotiate for the larger good. The current left wing extremism in Bihar and unrest in Northeast well affirm the above assertion.<sup>23</sup> Unless there is reformation in the Police the current judgment will prove to be deleterious for the Indian democracy. It can deny any person the right to contest elections and escalate false imprisonments by the government in power which invariably rules the executive in India.

### III. DECRIMINALIZATION OF POLITICS AND DEMOCRACY

Democracy, in a way, could be understood as a procedure for taking decisions in a group, whereby all members have an equal right to have a say.<sup>24</sup> But where a considerable body of men acts together, the check on a man is, in a great measure, removed; since a man is sure to be approved of by his own party, for what promotes their common interest, and he soon learns to despise the clamors of adversaries.<sup>25</sup> If this interest is not checked and not directed towards the public, then a government formed of such men would result in disorder and tyranny.

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<sup>18</sup> Ajit Prakash Shah and Argyha Sengupta, *To Cleanse Politics, A New Pact*, THE INDIAN EXPRESS (August 12, 2013) available at: <http://archive.financialexpress.com/news/to-cleanse-politics-a-new-pact/1154210>.

<sup>19</sup> Section 54, The Criminal Procedure Code, 1973.

<sup>20</sup> Arvind Verma, *Police Agencies and Coercive Powers*, in THE STATE OF INDIA'S DEMOCRACY 125 (Sumit Ganguly, Larry Diamond and Marc F. Plattner eds., 2007) [hereinafter *Verma*].

<sup>21</sup> *Id.* at 126.

<sup>22</sup> 1574 people died in custody in 2010, NHRC Human Right Commission Annual Report 2010-2011.

<sup>23</sup> Verma, *supra* note 20, at xiv.

<sup>24</sup> David Beetham, *DEMOCRACY: A BEGINNER'S GUIDE 2* (2006).

<sup>25</sup> Eugene F. Miller, *DAVID HUME ESSAYS MORAL POLITICAL AND LITERARY* 65 (1985).

In the case of *Lily Thomas v. Union of India and Ors.*, the Court aims to decriminalize politics, which at present, is highly prevalent given the fact that political parties are increasingly working towards meeting their own self interests.

The Court's ruling and its aim of decriminalization was deep embedded in earlier electoral reforms. The National Commission to Review the Working of the Constitution was set up vide government Resolution dated 22 February 2000 and one of the suggestions in pursuance of electoral reforms was regarding entry of criminals in politics.<sup>26</sup> Rapid criminalization of politics was mentioned as one of the dangers to free and fair elections in the Dinesh Goswami Report on Electoral Reforms.<sup>27</sup> The importance of electoral reforms and obliterating criminalization of politics was again well elucidated in the Indrajit Gupta Committee Report.<sup>28</sup>

The Vohra Committee<sup>29</sup> appointed by the Government had stated in strong terms that the nexus between crime syndicates and political personalities is very deep and has developed into a business partnership in various parts of the country. The Committee quoted that the Mafia network is virtually running a parallel government, pushing the State apparatus into irrelevance.<sup>30</sup>

The court in *Lily Thomas v. Union of India and Ors.* held that the affirmative words used in Articles 102(1)(e) and 191(1)(e) of the Constitution, confer power on Parliament to make one law, laying down the same disqualifications, for a person who is to be chosen as a member and who is a sitting member of either House of Parliament or as a member of the Legislative Assembly or Legislative Council of a State. Further, the words in Articles 101(3)(a) and 190(3)(a) put express limitations on powers of the Parliament to defer the date on which the disqualifications would have effect. Now Sub-section (4) of Section 8 of the 1951 Act carves out a saving in the case of sitting members of Parliament or State Legislatures from the disqualifications under Sub-sections (1), (2) and (3) of the Section or which defers the date on which the disqualification will take effect in the case of a sitting member of Parliament or a State Legislature. Clearly, enacting such a provision is beyond the powers conferred on Parliament by the Constitution. Parliament, therefore, has exceeded its powers conferred by the

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<sup>26</sup> Justice M.N Ventakachaliah, *Report Of The National Commission To Review The Working Of The Constitution Of India., Electoral Process and Political Parties* 7 (2000), available at <http://lawmin.nic.in/ncrwc/finalreport/v1ch1.htm>.

<sup>27</sup> Dinesh Goswami, *Report Of The Committee On Electoral Reforms*, Government Of India, Ministry Of Law And Justice, 14 (May, 1990) available at: <http://lawmin.nic.in/ld/erreports/Dinesh%20Goswami%20Report%20on%20Electoral%20Reforms.pdf>.

<sup>28</sup> Indrajit Gupta, *Committee Report on state funding of elections*, Government Of India, Ministry Of Law, Justice And Company Affairs, 21, (December, 1998) available at: <http://lawmin.nic.in/ld/erreports/Indrajit%20Gupta%20Committee%20Report.pdf>.

<sup>29</sup> N.N Vohra, *Vohra Committee Report*, Ministry of Home Affairs, Government of India, (October 1993) available at: [http://adrindia.org/sites/default/files/VOHRA%20COMMITTEE%20REPORT\\_0.pdf](http://adrindia.org/sites/default/files/VOHRA%20COMMITTEE%20REPORT_0.pdf).

<sup>30</sup> BACKGROUND PAPER ON ELECTORAL REFORMS, Government Of India, Ministry Of Law and Justice, 8, (December, 2010) available at: <http://lawmin.nic.in/legislative/ereforms/bgp.doc>.

Constitution in enacting Sub-section (4) of Section 8 of the 1951 Act and accordingly this Section is ultra vires the Constitution.<sup>31</sup>

From the analysis of criminal cases adduced to sitting Members of Parliament and Members of Legislative Assemblies, it was found that a total of 1460 out of 4807 (30%) sitting MPs and MLAs have declared criminal cases against themselves in their self-sworn affidavits submitted by them to the Election Commission of India prior to contesting elections. Out of the total number of sitting MPs and MLAs analyzed, 688 (14%) have declared serious criminal cases against themselves.<sup>32</sup>

Political parties are essential for a democracy to function and their character determines the quality of the democracy in a country. A modern democracy cannot survive without political parties, thus they are not mere appendages but the foundation stone.<sup>33</sup> According to James Madison, parties are inherently oppressive and must be thwarted by an elaborate system of separation of powers with checks and balances.<sup>34</sup>

There has been unprecedented growth in the number of political parties. This proliferation of political parties is a matter of concern as with this increase in their numbers, the quality of candidates nominated by them has gone down.<sup>35</sup> There are candidates with predominant and conspicuous criminal background, but due to their sheer ability to bear the expenses of the election process they are nominated by the parties owing to the heavy expenses involved in election campaigns.

Earlier there was no deterrence for parties giving tickets to the candidates with pending criminal cases because even if any such candidate got convicted, they would appeal against the conviction and continue to be an MP or MLA. Now since the convicted representatives will immediately lose their seats, parties would be hesitant to give tickets to such candidates. This is a very significant judgment, as it would act as a deterrent to political parties from giving tickets to tainted candidates. Other logistical details could be finalized as criminal cases against politicians pending before Courts either for trial or in appeal must be disposed of speedily, if necessary, by appointing Special Courts.

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<sup>31</sup> Lily Thomas, *supra* note 11.

<sup>32</sup> Association For Democratic Reforms (ADR), *All India Analysis Of Criminal Cases On Elected Representatives*, (July 10, 2013), available at: <http://adrindia.org/sites/default/files/All%20India%20Analysis%20of%20criminal%20cases%20on%20elected%20representatives.pdf>.

<sup>33</sup> E.E Schattschneider, *PARTY GOVERNMENT: AMERICAN GOVERNMENT IN ACTION* 4 (2003).

<sup>34</sup> James Madison, *The FEDERAL PAPERS*, No. 47 (1788).

<sup>35</sup> Stefano Bartolini, *Challenges to contemporary political parties*, in *POLITICAL PARTIES AND DEMOCRACY* 327 (Lary Diamond and Richard Gunther eds., 2001).



#### IV. FREEDOM OF EXPRESSION TO VOTERS AND DEMOCRACY

Facts can be adduced from history and contemporary world that democracy may prove to be a direct antithetical to liberty and may give rise to an autocratic government, like despotism resting on a plebiscite is quite a natural form of democracy.<sup>36</sup> The love of democracy for authoritarian regulation will be conspicuous<sup>37</sup> when voters don't have the right to express their choice fearlessly and freely in the absence of secrecy.

In the case of *People's Union for Civil Liberties and Anr. v. Union of India*,<sup>38</sup> it was held that maintenance of secrecy was a must in direct elections to the House of People or State Legislatures. Rules 49-O, 41-2 and 41-3 which treated differently a voter who decided not to cast his vote and allowed his secrecy to be violated,<sup>39</sup> were arbitrary, unreasonable and violative of Article 19 of the Constitution and ultra vires Sections 79(d) and 128 of The 1951 Act. The mechanism of casting a vote through an Electronic Voting Machine and Rule 49-O of Conduct of Election Rules (the Rules) compromised on the secrecy of the vote as a neutral or negative vote was recorded by the presiding officer.<sup>40</sup> Thus, Rules 41(2) & (3) and 49-O of the Rules were ultra vires Section 128 of the 1951 Act and Article 19(1) (a) of Constitution to the extent that they violate the secrecy of voting and as a result of which the voter's right to freedom of expression in the polling booth was also violated.

In the case, the court drew a fine distinction between right to vote and freedom of voting as a species of freedom of expression.<sup>41</sup> The court laid down that secrecy of vote was essential to espouse the cardinal principle of free and fair elections. The main impact of the judgment was that the court directed to introduce a "None of the Above [NOTA]" option into the Electronic Voting Machines.<sup>42</sup> Its significance in the Indian scenario can well be gauged by the fact that over sixty lakh "None Of The Above (NOTA)" votes were cast in the sixteenth Lok Sabha elections, the first time that this option was given.<sup>43</sup> The proportion of negative votes was higher than the national average in Chhattisgarh (1.9 per cent), Gujarat (1.8 per cent), Jharkhand (1.5 per cent), with the highest of all in the two ST constituencies in Meghalaya.<sup>44</sup>

Democracy can indeed function only upon the faith that elections are free and fair and not rigged and manipulated, that they are effective instruments of

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<sup>36</sup> William Edward Hartpole Lecky, DEMOCRACY AND LIBERTY 217 (1981).

<sup>37</sup> *Id.*

<sup>38</sup> PUCL, *supra* note 12.

<sup>39</sup> Rule 41 (2), Rule 41(3) and Rule 49 –O, Conduct of Election Rules (1961).

<sup>40</sup> *Id.*

<sup>41</sup> PUCL, *supra* note 12.

<sup>42</sup> *Id.*

<sup>43</sup> Rukmini S. and Sneha Susan John, *Over 60 Lakh Nota Votes Polled*, THE HINDU, (May 17, 2014), available at: <http://www.thehindu.com/news/national/over-60-lakh-nota-votes-polled/article6017631.ece>.

<sup>44</sup> *Id.*

ascertaining popular will, both in reality and form, and are not mere rituals calculated to generate the illusion that mass opinion is being defended.<sup>45</sup> Secrecy of ballot, undoubtedly, is an indispensable adjunct of free and fair elections. A voter has to be statutorily assured that he will not be compelled to disclose his vote by any authority so that he may vote without fear or favour.<sup>46</sup> The right to vote freely for the candidate of one's choice is of the essence in a democratic society.<sup>47</sup> Since the freedom to vote naturally includes the freedom not to vote, it would be arbitrary to extend secrecy to one and not the other.<sup>48</sup> Voting is a formal expression of will and such a right implies the right to remain neutral as well.<sup>49</sup> So when the court held that secrecy of voting has to be maintained, it upheld the ideals of democracy and liberty by assuring that the voters will not be victimized in the event of them exercising their own free will in electing their representative and thus securing the essence of democracy.

## V. DEFENDING OF DEMOCRACY BY THE COURT

One of the most important decisions to be made in a democracy is the choice of electoral reforms. The choice of electoral system in India was seriously deliberated upon, as evident by Jawaharlal Nehru's views expressed in the constituent assembly about improving the democracy through electoral reforms.<sup>50</sup>

In India, while adopting the Westminster system of Government, enormous powers were vested in the judiciary to maintain the system of checks and balances, which is the bulwark of our democracy.<sup>51</sup> Today the courts are assuming more functions because of the failure or apathy of the administration in performing its duties and discharging its responsibilities.<sup>52</sup>

The paradox in the party system is that while people have trust in the democratic form of governance, their trust in parties is low.<sup>53</sup> The ruling of the Court in *Lily Thomas v. Union of India and Ors.*<sup>54</sup> could be an answer to the paradox. While the ruling in *Chief Election Commissioner v. Jan Chaudhary*<sup>55</sup> is detrimental to Indian democracy by vitiating the right to contest elections and a potential threat to the liberty of individuals having views contrary to the ruling party, the Court in

<sup>45</sup> *Indira Nehru Gandhi v. Raj Narain*, (1975) Supp 1 S.C.C 198.

<sup>46</sup> *S. Raghubir Singh Gill v. S. Gurcharan Singh Tohra and Ors.*, (1980) S.C.C 53.

<sup>47</sup> *Charles W. Burson v. Mary Rebecca Freeman*, (1992) 119 L.ed. 2d 5: 504 US 119.

<sup>48</sup> PUCL, *supra* note 12.

<sup>49</sup> *Lily Thomas v. Speaker, Lok Sabha*, (1993) 4 S.C.C 234.

<sup>50</sup> Jawaharlal Nehru moving the Objective Resolution of the Principles (December 30, 1946). "We are aiming at democracy and nothing less than a democracy...In any event whatever system of government we may establish here must fit with the temper of our people and be acceptable to them. We may improve upon it."

<sup>51</sup> Krishnamurthy, *supra* note 1, at 57.

<sup>52</sup> Rafique, *supra* note 5.

<sup>53</sup> Krishnamurthy, *supra* note 1, at 101- 103.

<sup>54</sup> *Lily Thomas*, *supra* note 11.

<sup>55</sup> *Chief Election Commissioner*, *supra* note 10.

*People's Union for Civil Liberties and Anr. v. Union of India*<sup>56</sup> has again protected secrecy and hence, the liberty of individuals. In light of the above three judgments, the Court has defended democracy by upholding the principles of liberty and freedom of expression of voters and decriminalizing politics which in in turn preserves myriad ideals of democracy.

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<sup>56</sup> PUCL, *supra* note 12.

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Aman, “Shareholder Claims by Substitution for Companies” – *The Scope and Status in International Law post Diallo*, 2(2) NLUJ Law Review 113 (2014).

**“SHAREHOLDER CLAIMS BY SUBSTITUTION FOR  
COMPANIES” — THE SCOPE AND STATUS IN  
INTERNATIONAL LAW POST *DIALLO***

AMAN\*

*With a focus on cases involving diplomatic protection, the note argues that there exists a rule in international law whereby the home state of the shareholders could bring a claim against the host state in case of an injury to the corporation. Such a rule finds its legal basis in the principle of equity which has been recognized as a general principle under art. 38(1)(c) of the ICJ Statute. The note also attempts to formulate the specifics of such a rule as it exists in international law today.*

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## I. INTRODUCTION

The *casus classicus* addressing claims of shareholders under customary international law is the decision of the International Court of Justice (ICJ) in the *Case concerning Barcelona Traction, Light and Power Co.*<sup>1</sup> In this decision, the ICJ laid down the general rule that the home state of the shareholders of a company does not have standing to present a claim on behalf of the company for the injuries suffered by the company at the hands of the host state.<sup>2</sup> Though the ICJ accepted that the Belgian shareholders had suffered losses due to the bankruptcy of Barcelona Traction, it refused to accept the *jus standi* of Belgium as the alleged conduct by Spain did not interfere with the legal rights but mere “economic interests” of the shareholders.<sup>3</sup> However the Court recognised, on grounds of equity, an exception to the aforementioned rule. As per the exception, when the affected company was unable to take up a claim to protect itself, the state of nationality of the shareholders could bring a claim in certain situations. One such situation arises when the state of incorporation is itself responsible for inflicting injury on the company and the foreign shareholders’ sole means of protection at the international level is through their state(s) of nationality.<sup>4</sup> However, the Court noted that this principle was not applicable to *Barcelona Traction*, since Spain was not the national state of the company injured.<sup>5</sup> The ICJ noted that,

*[I]t is quite true that it has been maintained that, for reasons of equity, a State should be able, in certain cases, to take up the protection of its nationals, shareholders in a company which has been the victim of a violation of international law. Thus a theory has been developed to the effect that the State of the shareholders has a right of diplomatic protection when the State whose responsibility is invoked is the national State of the company.*<sup>6</sup>

This exception laid down in *Barcelona Traction* was later incorporated with some modifications as Article 11(b) to the Draft Articles on Diplomatic Protection (DADP) for the purpose of progressive development of customary international law. It added the condition that the corporation injured must be shown to have been incorporated in the host state as a precondition for business there. The provision reads thus,

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<sup>1</sup> *Case Concerning Barcelona Traction, Light & Power Co., Ltd. (Second Phase) (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5) [hereinafter *Barcelona Traction*].

<sup>2</sup> *Id.* at ¶¶41, 42.

<sup>3</sup> *Id.* at ¶46.

<sup>4</sup> *Id.* at ¶92.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

*The State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation unless:*

...

*(b) The corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that State was required by it as a precondition for doing business there.<sup>7</sup>*

This exception laid down in *Barcelona Traction* and Article 11(b) was again brought into contention in the *Case Concerning Ahmadou Sadio Diallo* (Diallo).<sup>8</sup> The ICJ discussed the scope and the status of this claim by “substitution” (as the ICJ coined it)<sup>9</sup> whereby the state of nationality of the shareholders could bring a claim against the host state even in the case of an injury to the corporation.

This note proposes to discuss the status and the scope of this rule as it stands post the *Diallo* decision with respect to the one exception discussed above. The note is divided into 5 parts. Part II of the note analyses Article 11(b) of the DADP. Part III discusses the decision of the ICJ in *Diallo* in respect of the “rule of substitution.” Part IV evaluates the scope and the status of this rule in international law, followed by Part V that concludes the note.

## II. ARTICLE 11(B) OF THE DADP

As discussed earlier, the International Law Commission (ILC) Draft Articles recognizes certain exceptions to the rule laid down in *Barcelona Traction*. Article 11(b) identifies one such situation. It states the twin requirements for the application of the exception: First, that the company must have the nationality of the state alleged to have caused the injury and second, that the incorporation of the injured company in that state must be required as a precondition for doing business there. This is clearly a narrower right than the one recognised by the majority opinion in *Barcelona Traction* — it requires those wanting to rely on the exception, an additional condition to establish that incorporation in the host state was mandatory.

The ILC, in its Commentary to the DADP accepts that art. 11(b) has not attained the status of customary international law.<sup>10</sup> However, there is a support for such an exception, gaining recognition through awards by arbitral tribunals.<sup>11</sup>

<sup>7</sup> *Draft Articles on Diplomatic Protection with Commentaries*, U.N. Doc A/61/10 (2006), art. 11(b) [hereinafter *DADP*].

<sup>8</sup> *Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo)*, 2007 I.C.J. 582 [hereinafter *Diallo*].

<sup>9</sup> *Id.* at ¶¶76-95.

<sup>10</sup> DADP, *supra* note 7, art. 11, ¶12.

<sup>11</sup> *Delagoa Bay Railway Company*; *Mexican Eagle (El Aguila)* in M. Whiteman, DIGEST OF INTERNATIONAL LAW, vol. VIII, 1272-1274 (1967) [hereinafter *Mexican Eagle*]; *Romano-Americano*, Hackworth, DIGEST OF INTERNATIONAL LAW, vol. V, 841; *El Triunfo* award of 8 May 1902, UNRIIAA, vol. XV, 467; *Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers* award of 5 August

This, as per the ILC, indicates that the limited exception is gaining legal force on the basis of judicial opinion.<sup>12</sup> Even the separate opinions of both, Judge Fitzmaurice and Judge Jessup in *Barcelona Traction* expressed full support of an equity based exception where the nationality of the shareholders can exercise diplomatic protection when the company was injured by the state of incorporation. Their opinions highlight that the rule was “particularly required” when incorporation was a precondition for doing business in the host state.<sup>13</sup>

Judge Fitzmaurice noted that,

*[N]otwithstanding these cogent considerations of principle, the validity of this exception to or limitation on the rule of non-intervention by the government of the shareholders in respect of wrongs done to the company, is contested on a variety of grounds. It is said for instance that this type of intervention on behalf of foreign shareholders ought only to be permissible where the company itself is also essentially foreign as to its management and control, and the nature of the interests it covers, and where its local nationality did not result from voluntary incorporation locally, but was imposed on it by the government of the country or by a provision of its local law as a condition of operating there, or of receiving a concession...*

*[I]t is doubtless true that it is in the case of such ‘enforced’ local nationality that situations leading to foreign shareholders in the company invoking the intervention of their government are most liable to arise.*<sup>14</sup>

As per the DADP, even post *Barcelona Traction*, such an exception was brought before the ICJ in the *Case Concerning Elettronica Sicula S.p.A. (ELSI)*.<sup>15</sup> Though the Court was silent on the aspect, John Dugard believes that this silence can also be seen as a support for the exception in favour of the right of the state of shareholders in a corporation to intervene against the state of incorporation when it is responsible for causing injury to the corporation.<sup>16</sup>

The ICJ again came up with this issue in the 2010 decision on preliminary objections in the case of *Diallo*. The next Part discusses the same.

### III. DIALLO AND ARTICLE 11(B) OF THE DADP

*Diallo* involved claims presented by Guinea on behalf of its national, Ahmadou Sadio Diallo. Mr. Diallo was the manager and sole shareholder of two

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1926, UNRIAA, vol. II, 790.

<sup>12</sup> *Id.*

<sup>13</sup> *Barcelona Traction*, *supra* note 1 (separate opinions Fitzmaurice and Jessup).

<sup>14</sup> *Id.*, (separate opinions Fitzmaurice) at ¶¶15, 16.

<sup>15</sup> *Case Concerning Elettronica Sicula S.p.A. (ELSI)* (*United States of America v. Italy*) 1989 I.C.J. 87-88 (July 20). This is clear from an exchange of opinions between Judges Oda, *id.* at 87-88 and Schwebel, *id.* at 94 on the subject.

<sup>16</sup> DADP, *supra* note 7, art.11, ¶11.

companies, both incorporated in the Democratic Republic of Congo (DRC) - Africom-Zaire and Africontainers-Zaire. Guinea claimed that the DRC, formerly Zaire, took actions that harmed the companies as well as Mr. Diallo, individually and, as a shareholder of the companies. Guinea also claimed to exercise diplomatic protection to espouse the claim Mr. Diallo made against the injury to Africom-Zaire and Africontainers-Zaire by substitution. In other words, the ICJ had to find out if such a substitution was permissible in international law.<sup>17</sup> This Part proposes to analyse the Court's response to this claim.

The ICJ, while deciding the same, acknowledged that the ILC Draft Articles on Diplomatic Protection contemplated an exception to the general rule that would permit the home state of the shareholders of a company to present a claim on behalf of the company itself. This situation would arise when the company was required to be incorporated in the state whose conduct is alleged to have caused injury.<sup>18</sup>

The Court in *Diallo* clearly rejected the broad exception of "substitution" (similar to the one expressed in the majority opinion in *Barcelona Traction*)<sup>19</sup> relied on by Guinea saying that it has not attained the status of customary law.<sup>20</sup> However the court refused to answer the status of a limited exception given under art. 11(b) of the DADP,<sup>21</sup> It said,

*[I]t is a separate question whether customary international law contains a more limited rule of protection by substitution, such as that set out by the ILC in its draft Articles on Diplomatic Protection, which would apply only where a company's incorporation in the State having committed the alleged violation of international law "was required by it as a precondition for doing business there" (Article 11, paragraph (b)).<sup>22</sup>*

Nonetheless, the court went into an investigation of the facts which clearly pointed out that the companies, Africom-Zaire and Africontainers-Zaire, were not required to be incorporated in DRC. Hence, it was noted that they would not fall within the scope of protection by substitution in the sense of Article 11, paragraph (b), of the DADP.<sup>23</sup> This, however, was solely done to avoid the question of whether or not paragraph (b) of Article 11 reflects customary international law.<sup>24</sup> The next Part analyses if there was any other way to deal with the question the Court faced

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<sup>17</sup> *Diallo*, *supra* note 8, at ¶¶76-95.

<sup>18</sup> *Id.* at ¶91.

<sup>19</sup> *Id.* at ¶83, for the contention by Guinea.

<sup>20</sup> *Id.* at ¶89.

<sup>21</sup> *Id.* at ¶91.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at ¶92.

<sup>24</sup> *Id.* at ¶93.



#### IV. SCOPE AND STATUS OF “RULE OF SUBSTITUTION” IN INTERNATIONAL LAW

As discussed earlier, the Court in *Diallo* declared that the wider rule of substitution has no status in customary international law and refused to apply the same.<sup>25</sup> Even the limited exception proposed under Art. 11(b) has not attained the status of customary international law as suggested by the ILC.<sup>26</sup> The decision in *Diallo* was not helpful in clarifying the scope and the status of substitution since it remains silent in relation to these questions.<sup>27</sup> The question thus arises, if the approach the ICJ adopted in *Diallo* i.e. to look at customary law status alone, was correct. The doubt arises since the majority decision of *Barcelona Traction*, along with the separate opinion of Judge Fitzmaurice and Judge Jessup, pointed out that the rule of substitution is based on equity.<sup>28</sup> It could be argued that the rule of substitution can derive itself from equity under art. 38(1)(c) of the ICJ Statute and that the dismissal of the legal validity of substitution, without finding its roots in equity under art. 38(1)(c), is questionable (However it should be kept in mind that this could also be because a contention to that effect was not raised by Guinea). This Part seeks to deliberate on the same. It will first discuss equity and its use under art. 38(1)(c) of the Statute of the ICJ and will then elaborate on the status and the scope of the rule of substitution under international law.

##### A. EQUITY PRAETER LEGEM UNDER ART. 38(1)(C) OF THE ICJ STATUTE

The positions in law that the ICJ has the freedom to apply equity within article 38(1)(c) of the ICJ Statute and that such power is not restricted by the special power to decide cases *ex aequo et bono* under art. 38(2) are not much in contention today. The doubt arises in the way equity could be applied i.e. should its application be restricted as an interpretative tool within the confines of law (*infra legem*) or should it also be used to fill gaps in law or individualize justice by tempering the rigours of strict law (*praeter legem*) The latter has found considerable support in the practice of the ICJ.

One of the first few cases to apply equity *praeter legem* are the North Sea Continental Shelf Cases.<sup>29</sup> It must be noted that though the authority for the use of equity was not derived from art. 38(1)(c) of the ICJ Statute, the equitable principles that the ICJ identified for delimitation of continental shelf were “general

<sup>25</sup> *Id.* at ¶89; See also Alberto Alvarez-Jimenez, *Foreign Investors, Diplomatic Protection and the International Court of Justice's Decision on Preliminary Objections in the Diallo Case*, 33 N.C.J. INT'L L. & COM. REG. 437 (2008), on the point that the court ignored the grounds of equity laid in *Barcelona Traction*.

<sup>26</sup> DADP, *supra* note 7, art.11, ¶12.

<sup>27</sup> See *Diallo*, *supra* note 8, at ¶¶91 -93.

<sup>28</sup> See *Barcelona Traction*, *supra* note 1, at ¶92; *supra* note 13.

<sup>29</sup> *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)* 1969 I.C.J. 3 (Feb. 20) [hereinafter *North Sea Continental Shelf*].

principles.” We could identify the Court’s decision in terms of a *renvoi* to equity as a source of principles that are recognised by nations.<sup>30</sup> This view has been supported in the writing of scholars like M. W. Janis and C. W. Jenks.<sup>31</sup> This approach was followed in number of delimitation cases by the ICJ to prevent an unjust result.<sup>32</sup> For instance, the ICJ, in the *Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* says,

“[Equity] was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice. In general, this contrast has no parallel in the development of international law; the legal concept of equity is a general principle directly applicable as law.”<sup>33</sup>

This view has, however, been criticised as the principles could be subjective, unstructured and could permit the international judge to exercise unfettered judicial discretion.<sup>34</sup> However, there are benefits of such application too. Besides the prevention of unjust application of rules, the use of equity *praeter legem* prevents the creation of *non-liquet* as well. Hence, this rule will suffer less criticisms if the “equitable principles” could be predictable in certain concrete circumstances.<sup>35</sup>

With this background in mind, the note now proposes to explore if there is a basis to sustain the rule of substitution under art. 38(1)(c) of the ICJ Statute and also see if we could define concrete circumstances where this rule could apply.

## B. STATUS OF THE RULE IN INTERNATIONAL LAW

It is accepted that the rule of substitution, both in its traditional version and in the modified version (as adopted by the ILC) lacks customary status.<sup>36</sup> However, the rule cannot be denied a normative status on grounds of equity under art. 38(1)(c) of the Statute of the ICJ. The ICJ’s approach in *Barcelona Traction* itself supports this claim. In this case, the ICJ did not rule out the possibility of recourse

<sup>30</sup> *Id.* at ¶85.

<sup>31</sup> M. W. Janis, *The Ambiguity of Equity in International Law* 9 BROOKLYN J. INT’L. L. 7, 33-34 (1983); C. W. Jenks, *Equity as a Part of the Law Applied by the Permanent Court of International Justice*, 53 L.Q.R. 519, 523 (1937).

<sup>32</sup> *Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* 1982 I.C.J. 18 (Feb. 24) [hereinafter *Continental Shelf - Tunisia/Libyan Arab Jamahiriya*]; *Case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* 1984 I.C.J. 246 (Oct. 12) [hereinafter *Gulf of Maine*].

<sup>33</sup> *Continental Shelf - Tunisia/Libyan Arab Jamahiriya*, *supra* note 32, at ¶71.

<sup>34</sup> Dissenting Opinion of Judge Gros, *Continental Shelf - Tunisia/Libyan Arab Jamahiriya*, *supra* note 31, at ¶¶18-19 (highlights the problem of subjectivity); Dissenting opinion of Judge Gros, *Gulf of Maine*, *supra* note 31, at ¶¶41- 44 (highlights the problem that it will become a government of judges); Advisory Committee of Jurists, PROCIS-VÉRBAUX OF THE PROCEEDINGS OF THE COMMITTEE, 1920 296-333 (highlighting the issue of “unfettered judicial discretion”).

<sup>35</sup> See Ruth Lapidot, *Equity in International Law*, 22 ISR. L. REV. 161 (1987).

<sup>36</sup> See *supra* notes 25-27.

to equity as an alternative to law. However, it did not apply equity since Spain was not the national state of *Barcelona Traction* – a situation which the ICJ felt did not demand a departure from the general rule.<sup>37</sup>

Substitution, under equity, has also found express support in the Iran-US Claims Tribunal that allowed shareholders to take claims on behalf of the corporation subject to the defences and counterclaims that could have been raised against the corporation in *Harza et al v The Islamic Republic of Iran*.<sup>38</sup> This shows that a rule of substitution can, subject to the scope, derive its source from article 38(1)(c) of the ICJ Statute.

### C. SCOPE OF THE RULE IN INTERNATIONAL LAW

It is difficult to contain the content of equity to one specific rule guiding all situations. This “subjectivity” has often been criticised. However, in the context of substitution, *Barcelona Traction* identifies a specific circumstance (i.e. when the state of incorporation is itself responsible for inflicting injury on the company and the foreign shareholders’ sole means of protection at the international level is through their state(s) of nationality)<sup>39</sup> that triggers the application of equity to protect the shareholders against a situation without a remedy. A similar situation logically demands an assessment to see if a remedy could be provided in equity. The same should have been done in *Diallo*.

However, it could be argued that the narrower rule identified by the DADP (as discussed above, the principle codified is also a principle of equity even though it does not have a status in customary international law) is correct and it goes a step further in identifying a more concrete circumstance in which the rule must apply. However, it is questionable to restrict a rule based in equity to this degree to avoid subjectivity. Even Judge Fitzmaurice in *Barcelona Traction* did not suggest that it is in cases of forced incorporation that the intervention is mandatorily needed, (He said that it is “most” needed in such situations).<sup>40</sup> *Kunzli* believes that this narrower right under DADP is correct since *Diallo* acknowledged the merits of the exceptions provided in this article.<sup>41</sup> This viewpoint has been criticized by various scholars like Knight and O’Brien who believe that this rule in equity has been unnecessarily stunted to reduce the number of claims. The requirement to show that incorporation is a pre-condition is stringent and arbitrarily excludes cases where business prudence demands the

<sup>37</sup> *Barcelona Traction*, *supra* note 1, at ¶¶92-102.

<sup>38</sup> *Richard D. Harza, et al v. The Islamic Republic of Iran, et al*, Award, (2 May 1986), Award No. 232-97-2, 11 Iran-U.S.C.T.R. 86, 110.

<sup>39</sup> *Barcelona Traction*, *supra* note 1, at ¶92.

<sup>40</sup> *DADP*, *supra* note 7, art.11, ¶9; *supra* note 14.

<sup>41</sup> Annemarike Vermeer Kunzli, *Diallo and the Draft Articles: The Application of the Draft Articles on Diplomatic Protection in the Ahmadou Sadio Diallo Case*, 20 LEIDEN JOURNAL OF INTERNATIONAL LAW 941 (2000).

setting up of business. It could render many claims without remedy. Knight and O'Brien suggest,

*[C]onsistent with past authority, both the Court and the ILC treated the requirement to incorporate in a state in order to do business there as potentially giving rise to different legal rights. Logically, it is difficult to see why this would be so. In both cases, the investor has made a choice to conduct business in the state and has thereby assumed the risk that it will be subject to regulatory or other intervention. When both investors freely choose to conduct business in a foreign state, thereby assuming risk of regulation, why should one investor be denied diplomatic protection simply because they incorporated in the wrongdoing state? If 'considerations of equity' necessitate a substitution rule, there appears to be no good reason why the rule should benefit only those legally required to incorporate in a state as a prerequisite to doing business there. A cynical view might be that the distinction has arisen because it will reduce the number of diplomatic protection claims brought. Perhaps this is not surprising when the very existence of the doctrine is premised on 'considerations of equity' rather than any logical consistency with the principles of diplomatic protection. [Emphasis added]<sup>42</sup>*

It must be pointed out that the note does not attack ILC's approach towards the progressive development of customary law. ILC is not incorrect to work towards a narrower right of substitution to which many states may consent (However, this effort may be not be required in light of the existence of a broader rule in equity). In fact, the rule under art. 11(b) of the DADP is also for progressive development and has been accepted by many states.<sup>43</sup> However, as far as equity goes, it will be wrong to limit it to the narrow exception the ILC proposes in art. 11(b) of the DADP.

## V. CONCLUSION

The rule of substitution was first introduced in the *Barcelona Traction* as a relief under equity and could be continued to be defended as a manifestation of equity, i.e. a general principle under art. 38(1)(c) of the ICJ Statute. However, subsequently in *Diallo*, the ICJ ignored the equity ground and restricted itself to finding if the traditional notion of substitution has reached the status of customary

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<sup>42</sup> Stephen Knight, Angus O'Brien, *Abmadou Sadio Diallo Republic of Guinea v Democratic Republic of The Congo - Clarifying the Scope of Diplomatic Protection of Corporate and Shareholder Rights*, 9(1) MELBOURNE JOURNAL OF INTERNATIONAL LAW 151 (2008).

<sup>43</sup> John Dugard, Special Rapporteur, *Third Report on Diplomatic Protection*, UNGAOR, 2002, U.N. Doc. A/CN.4/523, ¶¶11-12; John Dugard, Special Rapporteur, *Fourth Report on Diplomatic Protection*, UNGAOR, 2003, U.N. Doc. A/CN.4/530, ¶¶1-27.

international law. Post *Diallo*, mostly, the scholars have focused merely on Art. 11 of the DADP to define the content of the rule; or have focused solely on determining the status of such a rule in customary international law. This is clearly not the best route to take. With already established reasons in equity, the development of the rule under art. 38(1)(c) of the ICJ Statute is desirable. It, in fact, makes the application easier – as one will not have to take an elaborate assessment of its customary status (or even work towards progressive development). Further, it also avoids the unnecessary exclusion of shareholders who cannot establish that incorporation of the company was a precondition of doing business in the host state from any possible remedy. It is perhaps the ILC's efforts in the progressive development of the customary status of art.11 (b) that has been the reason for the ICJ and scholars to not explore alternative sources to back the rule of substitution. A serious re-consideration of the rule's status is thus welcome.

**JOHN H. ELY'S FORMULATION OF  
"REPRESENTATION- REINFORCEMENT" AS AN  
APPROACH FOR CONSTITUTIONAL  
INTERPRETATION**

ANJALI RAWAT\*

*John Hart Ely's theory of "Representation-Reinforcement" is a pioneering theory of judicial review. Ely proposed this theory in the late '70s as a tool to regulate actions of political process in a democratic manner. Judiciary can exercise judicial review only to repair the breakdown of the political process (such as infringement of rights of discrete and insular minorities) so as to reinforce the representational principles of the Constitution and maintain a representative democracy.*

*Almost four decades have passed since the theory was proposed by Ely but the theory still continues to attract attention of legal theory scholars and critics all across the globe. The paper is an attempt to understand what Ely's theory entails and what significance it has for the theory of judicial review in a democratic setup. It further evaluates the contrasting positions which democracy and judicial review supposedly occupy, and explores if Ely's theory harmonises the two concepts. The final understanding is that Ely's theory is still relevant and can be successfully used to exercise judicial review in spite of its apparent shortfalls and inconsistencies.*

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**I. INTRODUCTION**

*“Modern democracy invites us to replace the notion of a regime founded upon laws, of a legitimate power, by the notion of a regime founded upon the legitimacy of a debate as to what is legitimate and what is illegitimate – a debate which is necessarily without any guarantor and without any end.”*

- Claude Lefort<sup>1</sup>

Democracy and constitutionalism are not always in harmony and face an “irresolvable tension.”<sup>2</sup> Judicial interpretation of constitutional rights needs to be justified in order to reconcile it with democratic governance. The American Constitution does not explicitly provide for judicial review but its need and importance are undisputed. Hamilton famously called the judiciary “the least dangerous” branch of Governance to “the political rights of the Constitution.”<sup>3</sup> The courts were assigned a role of intermediary between the people and the legislature, with the courts checking the exercise of powers by the legislature.<sup>4</sup> He envisaged judicial review of the Constitution by the courts wherein the judges were to ascertain its meaning and also decide whether the Constitution will prevail if it is at an “irreconcilable variance” with legislative text. Varying interpretive mechanisms can be employed for judicial review ranging from originalist to textualist to intentionalist to pragmatist to a natural law theorist reading and understanding of the Constitution.<sup>5</sup> The search for a proper theory of constitutional interpretation is still alive. It is in this series that

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<sup>1</sup> Robert Post, *Theories of Constitutional Interpretation*, PAPER 209 FACULTY SCHOLARSHIP SERIES, YALE LAW SCHOOL LEGAL SCHOLARSHIP REPOSITORY, 13 (1990).

<sup>2</sup> Wouter G. Werner, *Democracy, Constitutionalism and the Question of Authority*, 39 RECHTSFILOSOFIE & RECHTSTHEORIE (3) 267 (2010), available at: [http://www.bjutijdschriften.nl/tijdschrift/rechtsfilosofieentheorie/2010/3/RenR\\_1875-2306\\_2010\\_039\\_003\\_006.pdf](http://www.bjutijdschriften.nl/tijdschrift/rechtsfilosofieentheorie/2010/3/RenR_1875-2306_2010_039_003_006.pdf).

<sup>3</sup> Alexander Hamilton, *Federalist No. 78*, THE JUDICIARY DEPARTMENT, MCLEAN’S EDITION, NEW YORK, available at: [http://thomas.loc.gov/home/histdox/fed\\_78.html](http://thomas.loc.gov/home/histdox/fed_78.html).

<sup>4</sup> *Id.*

<sup>5</sup> See *Exploring the Constitution: Theories of Constitutional Interpretation*, available at: [cstl-cla.semo.edu/hhill/ui305/constitutional%20interpretationa.htm](http://cstl-cla.semo.edu/hhill/ui305/constitutional%20interpretationa.htm); Wil Waluchow, *Constitutionalism*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed.) (2014), available at: <http://plato.stanford.edu/entries/constitutionalism/>.

John Hart Ely in 1980s developed his process-based theory of constitutional interpretation.

The paper is an attempt to evaluate and explain the significance of Ely's approach to constitutional interpretation. It starts with a brief description of Ely's theory of representation-reinforcement. It then proceeds to examine the critique which his theory has received in academic circle. Next the paper locates Ely's theory amidst the claim of incompatibility of democracy and judicial review. The paper concludes with the understanding that even with all the shortcomings of Ely's theory, it has been and might be successfully used by courts in future to exercise judicial review.

## II. ELY'S THEORY OF "REPRESENTATION-REINFORCEMENT"

Ely through his "participation-oriented" and "representation-reinforcement" theory of judicial review proposed a new process-based approach to constitutional interpretation that he believed was consistent with "the American system of representative democracy."<sup>6</sup> Put simply, what Ely proposed was that when the judiciary finds that the political process is defective such that the republican goal of representative democracy is out of some people's reach, it should intervene with the democratic exercise of law and exercise judicial review of such unconstitutional measures.

Ely was a thorough critic of both interpretivism<sup>7</sup> and non-interpretivism<sup>8</sup> and believed that value imposition is not needed to fill-in the Constitution's open texture.<sup>9</sup> He drew inspiration for his theory from footnote four<sup>10</sup> of the

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<sup>6</sup> John Hart Ely, *Toward a Representation-Reinforcing Model of Judicial Review*, 37 MARYLAND L.R. 471 (1977-1978) [hereinafter *Ely, Judicial Review*].

<sup>7</sup> Interpretivism is largely restrictive of judicial discretion for it claims that Constitutional text has a discoverable meaning and judges should remain within the four walls of this traceable meaning. Dworkin's claim is also interpretivist in the sense it claims that interpretation of a text involves assigning it such a meaning which best fits and justifies. See Ronald Dworkin, *LAW'S EMPIRE* (1986). Interpretivism thus aims at deriving the meaning of Constitution in accordance with the clearly stated or implicit values and norms. See John Hart Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 INDIANA LAW JOURNAL 399 (1978) [hereinafter *Ely, Interpretivism*].

<sup>8</sup> Non-Interpretivism aims at looking beyond the references in the Constitutional text and enforcing values or norms not implicit within the boundaries of the Constitution. See Ely, *Interpretivism*, *supra* note 7. It looks for extra-constitutional fundamental values to fill in the open-textured provisions. (It is often perceived as being an anti-democratic theory for it vests in non-elected judges the power to invalidate executive and legislative action as unconstitutional against the will of majority.)

<sup>9</sup> Ely, *Judicial Review*, *supra* note 6, at 451.

<sup>10</sup> "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or racial minorities...whether prejudice against discrete and insular



*Carolene Products*<sup>11</sup> case. His theory anticipates a form of judicial review where judges will intervene only when the “political market is malfunctioning.”<sup>12</sup> The malfunctioning referred to here which warrants the judges to set aside decisions of elected representatives is when their “value determinations” cannot be trusted.<sup>13</sup> Ely identified two kinds of malfunctions which should pull the trigger of judicial review in action:

*(1) the in's are choking off the channels of political change to ensure they will stay in and the out's will stay out, or (2) though no one is actually denied a voice or a vote, an effective majority, with the necessary and understandable cooperation of its representatives, is systematically advantaging itself at the expense of one or more minorities whose reciprocal support it does not need and thereby effectively denying them the protection afforded to other groups by a representative system.*<sup>14</sup>

This characterization resonates with paragraphs two and three of footnote four of the *Carolene Products* judgement by Justice Stone.<sup>15</sup> Ely's insistence on value-free constitutional adjudication can be seen from his painting of *Carolene Products* in a participational light.

He sees it as being concerned not with a particular “substantive value” which is extremely important and fundamental (and hence needs judicial protection) but on ensuring smooth and unhindered participation in the political process by which value identification and accommodation takes place or the settlement these reach.<sup>16</sup>

Ely's focus therefore, is on “rights through process” where the Court ought to step in when the legislation either directly contains the ‘process of change’ or the groups which the legislation targets are incapable of making effective use of the process.<sup>17</sup> The obstruction Ely contemplates is not just of a formal barrier to participation. He gives a broadened interpretation to Justice Stone's “discrete and insular minorities” by outlining a theory of suspect classification.<sup>18</sup> Ely covers even those “groups we know to be the object of

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minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”

<sup>11</sup> *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

<sup>12</sup> Ely, *Judicial Review*, *supra* note 6, at 486.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 487.

<sup>15</sup> Jane S Schachter, *Ely and the Idea of Democracy*, 57 *STANFORD L.R.* 740 (2004-2005) [hereinafter *Schachter*].

<sup>16</sup> Ely, *Judicial Review*, *supra* note 6, at 456.

<sup>17</sup> Samuel Estbeicher, *Platonic Guardians Of Democracy: John Hart Ely's Role for the Supreme Court in the Constitution's Open Texture*, 56 *NEW YORK UNIVERSITY L.R.* 552-553 (1981) [hereinafter *Estbeicher*].

<sup>18</sup> Judiciary must be suspicious of the unconstitutional motive of the legislation not only when the group in question is disadvantaged by obstructing its political participation but also where there is serious prejudice against its interests even when it is formally represented. Suspect classification is a useful “handmaiden of motivational analysis” for Ely. For him the

widespread vilification, groups we know others (specifically those who control the legislative process) might wish to injure.”<sup>19</sup>

In his theorisation, Ely makes three specific claims, the success or otherwise of which will be evaluated in the next section. His first argument is targeted at establishing that the Constitution is “primarily concerned with structure and process,”<sup>20</sup> that is, it is principally dealing with procedural fairness in *process writ small* and with ensuring broadened participation in “processes and benefits of Government.”<sup>21</sup> He makes this claim by way of an *ejusdem generis* argument seeking to show most of the Constitution is about values of process and not substance.<sup>22</sup> His second claim is that his approach is in line with the American concept of Representative Democracy.<sup>23</sup> Third, he makes the “*competence argument*”<sup>24</sup> claiming that judges being “experts on process” and as political outsiders are better suited to perform a participation-oriented, representation-reinforcing review of the disputed matter than the elected political officials.<sup>25</sup>

### III. CRITIQUE OF ELY’S MODEL AS AN APPROACH TO CONSTITUTIONAL INTERPRETATION

Ely’s theorisation set in motion debates in constitutional interpretation and received positive as well as negative response.<sup>26</sup> His camp of supporters either endorsed his theory completely or broadened its ambit by increasing the scope of its application. His critics on the other hand, mostly attacked the fundamental premises of his theory and pointed out the missing links or faulty assumptions in his theorisation.

One of the biggest critiques levelled against Ely’s theory is the falseness of the claim about its value-neutrality. In defining democracy Ely himself engaged in a value-laden exercise in some ways.<sup>27</sup> A connected problem is his equation of the concepts of majoritarianism and democracy. Ely gives no basis

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benchmark of analysis is not just the numerical numbers or the insularity of the minority alone but also the prejudice the group faces in terms of either “outright hostility” or “unconscious generalization.” See John Hart Ely, *DEMOCRACY AND DISTRUST* 145; 153-154; 157 (1980).

<sup>19</sup> *Id.* at 153.

<sup>20</sup> Joseph D. Grano, *Ely’s Theory of Judicial Review: Preserving the Significance of the Political Process*, 42 OHIO STATE L.J. 175 (1981) [hereinafter *Grano*].

<sup>21</sup> Ely, *Judicial Review*, *supra* note 6, at 470.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 471.

<sup>24</sup> Grano, *supra* note 20, at 178.

<sup>25</sup> Ely, *Judicial Review*, *supra* note 6, at.

<sup>26</sup> As per the broad material surveyed in this paper, his theory found limited support of Joseph D. Grano; Richard A. Posner, *Democracy and Distrust Revisited*, 77 VIRGINIA L. R. 77 (1991); David A. Strauss, *Modernization and Representation Reinforcement: An Essay in Memory of John Hart Ely*, 57 STANFORD L. R. 761 (2004); Raoul Berger, *Government by Judiciary: John Hart Ely’s Imitation*, 54 INDIANA L.R. (1979). His critics include Jane S. Schachter; Paul Brest, *The Substance of Process*, 42 OHIO STATE L.J. (1981) [hereinafter *Brest*]; Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. (1980) [hereinafter *Tushnet*]; Samuel Estreicher; Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. (1979-1980); Paul N. Cox, *John Hart Ely, Democracy and Distrust: A Theory of Judicial Review*, 15 VALPARAISO UNIVERSITY L.R. (1981).

<sup>27</sup> Schachter, *supra* note 15, at 754.

for his version of democracy which is comprised of the substantive principles of ‘non entrenchment’ and ‘fair representation’.<sup>28</sup>

Estbeicher hits Ely’s theory by questioning its preference for one set of values over others since the idea of democracy envisaged by Ely is also a created value.<sup>29</sup> He further elaborates Ely’s hollow attempts at outlining “participational values” as value-neutral even though they embody substantive choices.<sup>30</sup> Estbeicher also attacks Ely’s three claims which give more importance to process-based values over substantive values. First, his *ejusdem generis* argument to prove that the major part of the Constitution is concerned with process fails on its clause by clause analysis which proves it to be a fair balance between substance and procedure.<sup>31</sup> Second, his theory also involves value creation and one cannot evaluate the court’s action unless we grant a substantive meaning to what democracy entails.<sup>32</sup> Third, his justification for making judges “appropriate decision-makers” for being outsiders, having adjudicative skills, etc. can be equally used to justify their role in adjudicating on fundamental values.<sup>33</sup>

Another critique is to the basic premise itself – Brest questions how courts are competent to engage in a representation-reinforcing review when they lack the ability to do a fundamental values review.<sup>34</sup> This links back to the falsity of Ely’s apparent value-neutrality since Brest claims that, one, representation-reinforcing review necessitates value judgments which touch upon fundamental values, and two, claims made by parties in fundamental value cases can be converted into representation-reinforcing claims.<sup>35</sup> Brest also attacks Ely’s theory’s inability to come to the rescue of homosexuals by exempting discriminatory legislation based on ‘sincerely held moral beliefs’.<sup>36</sup> Tushnet questions Ely’s assertion of participation being compatible with the ‘American system of Representative Democracy’ of which Ely offers no evidence.<sup>37</sup>

Tribe similarly strikes pointing at the substantive roots of procedural norms:

*“The process theme by itself determines almost nothing unless its presuppositions are specified, and its content supplemented, by a full theory of substantive rights and values – the very sort of theory the process-perfecters are at such pains to avoid.”*<sup>38</sup>

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<sup>28</sup> *Id.* at 753.

<sup>29</sup> Estbeicher, *supra* note 17, at 552.

<sup>30</sup> *Id.* at 565.

<sup>31</sup> *Id.* at 570-571.

<sup>32</sup> *Id.* at 572-573.

<sup>33</sup> *Id.* at 577.

<sup>34</sup> Brest, *supra* note 26, at 131.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 135.

<sup>37</sup> Tushnet, *supra* note 26, at 1047.

<sup>38</sup> Tribe, *supra* note 26, at 1064.

He even attacks the premise that a discriminatory legislation against a group is the result of a “flawed” political process and imposes a burden which affects an “independently fundamental right.” He is of the opinion that the approach here needs to look beyond process and proclaim fundamental substantive rights for the affected group.<sup>39</sup>

#### IV. JUDICIAL REVIEW VIS-À-VIS DEMOCRACY AND ELY’S THEORY

The tussle between proponents of democratic governance and supporters of judicial review is well known. Waldron, for instance, is a major opponent of judicial review. His twofold argument states that one, rights are better protected by democratic legislatures, and two, judicial review is democratically illegitimate. He seeks to explain that what judicial review proponents call ‘tyranny of the majority’ and thereby warrant a rights based review, is merely a disagreement about rights which can be sorted by ordinary legislative processes.<sup>40</sup> Waldron does agree that in certain circumstances – “peculiar pathologies, dysfunctional legislative institutions, corrupt political cultures, legacies of racism and other forms of endemic prejudice”<sup>41</sup> – judicial review can be accepted although he wants its defenders to make the claim on these grounds rather than couching it as “the epitome of respect for rights and as a normal and normatively desirable element of modern constitutional democracy.”<sup>42</sup> Tushnet, yet another opponent, argues that judicial review disrupts self-governance and choices about fundamental values are better left to people.<sup>43</sup> On the other hand, we have Brett Schneider and Eisgruber arguing that judicial review is not necessarily undemocratic, and in fact by overriding majoritarian decision-making it protects core democratic values and promotes non-majoritarian representative democracy, and acts as a guardian of democratic political systems.<sup>44</sup> The main question, however, which we seek an answer is: *Where does Ely’s participation-oriented and representation-reinforcing theory feature in this long standing tiff?*

Ely proposed a justification of the theory of judicial review by casting it in purely proceduralist terms. He being an opponent of value-imposing constitutional interpretation devised a theory whose fundamental premise is representative democracy. Ely’s approach ensures that the courts keep a watch over the processes required for a healthy majoritarian democracy and oversee whether there is actual representation of all the groups by the elected

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<sup>39</sup> *Id.* at 1077.

<sup>40</sup> See Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 YALE L.J. (2006).

<sup>41</sup> *Id.* at 1406.

<sup>42</sup> *Ibid.*

<sup>43</sup> Mark Tushnet, *Democracy Versus Judicial Review: Is It Time to Amend the Constitution?*, 52 DISSENT 59-60(2005).

<sup>44</sup> Annabelle Lever, *Democracy and Judicial Review: Are they really Incompatible?*, 7 PERSPECTIVES ON POLITICS 806 (2009). (Lever further builds this and after contrasting the leading scholarship on the issue concludes that it is possible to defend judicial review on democratic arguments though she doesn’t engage much with Ely’s theory).

representatives.<sup>45</sup> If we see democracy as Ely defines it –inclusive and participatory: broad access to political processes and an equal, fair and a non-discriminating access of such processes to minorities- review of the same by an independent judiciary assumes heightened importance and judicial review becomes a sine qua non of democratic procedures.<sup>46</sup> Ely's theory also successfully avoids the general claim levelled against judicial review in terms of competence of judges to pronounce on substantive values in a democratic setup by vesting only procedural review powers in judges. Ely's conception of judicial review is compatible with a certain view of democracy. After all, "*majoritarian democracy is best when it is structured and limited by minoritarian constitutionalism.*"<sup>47</sup>

## V. CONCLUSION

Ely's approach has had a fair amount of influence on the Supreme Court's approach to constitutional interpretation since the 1990s. Boynton argues that Ely and the Court's approach resembles in many areas.<sup>48</sup> The Court has not completely adopted Ely's approach but it is leaning towards it, in its reading of privileges and immunities clause for instance.<sup>49</sup> Ely's approach also serves to explain the Warren Court's decisions but he did not agree with all of Warren Court decisions.<sup>50</sup> No one theory can fully explain the decision making of the Court in a comprehensive manner. Insofar as Ely's theory has given us a limited justification of judicial review in tandem with democratic ideals of the American polity, it has made its mark.

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<sup>45</sup> Ely, *supra* note 6, at 485.

<sup>46</sup> Christopher F. Zurn, DELIBERATIVE DEMOCRACY AND THE INSTITUTIONS OF JUDICIAL REVIEW 47 (2007).

<sup>47</sup> *Id.* at 48.

<sup>48</sup> See Section III of Brian Boynton, *Democracy and Distrust after Twenty Years: Ely's Process Theory and*

*Constitutional Law from 1990 to 2000*, 53 STANFORD L.R. 422-445 (2000-2001).

<sup>49</sup> *Id.* at 422.

<sup>50</sup> Strauss, *supra* note 26, at 762.