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# **DELHI LAW REVIEW**

## **STUDENT EDITION**

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## INTRODUCTORY NOTE

BY HON'BLE MR. JUSTICE DEEPAK GUPTA

I am extremely happy to note that my alma mater is now bringing out the Student Edition of the Delhi Law Review. This, I am told, is the VI<sup>th</sup> Volume of the Journal. In my time, we never had such a Journal, though we did attend a lot of seminars and lectures by senior counsel and academicians.

I have pleasant memories of my 3 years in the Faculty of Law, Delhi University. At that time, it was the only law school in India following the case law study method. We had some brilliant teachers like Dr. Upendra Baxi, Dr. D.K. Singh, Dr. Lotika Sarkar, Dr. Sivarammaiya, Dr. Punnuswamy, Dr. Jaffer Hussain, Dr. P.K. Tripathi and many others. It was a pleasure attending their classes. The classroom was never dull or dreary. There was a lot of discussion and debate on many issues. In my view, the faculty of that time has to be given credit for the fact that there are at the present moment 10 sitting Judges viz., Hon'ble the Chief Justice of India Ranjan Gogoi along with Justices R.F. Nariman, D.Y. Chandrachud, S.K. Kaul, Navin Sinha, Indu Malhotra, Sanjiv Khanna, Ravindra Bhat, Hrishikesh Roy and myself in the Supreme Court of India, who have passed out from this faculty. Two alumni who retired recently are Justices M.B. Lokur and A.K.Sikri.

A member of the legal fraternity is a student for life. No lawyer or judge can claim that he knows all the law. It is, therefore, necessary to keep pace with what is happening in the legal field around the world. It is also important to keep up with what is the statement of law in different jurisdictions. As communications grow, international trade grows and people travel more often across borders, there has to be more interaction. In this situation, articles like those printed in this review are very interesting and relevant because they cover a wide range of topics from domestic to international law.

In my view, law schools in India do not train the students adequately in so far as practice is concerned. Even the moot courts are based on topics and subjects which most lawyers will not engage in, definitely not in the initial years of their practice. There is almost no training as far as trial court practice is concerned. More than 99% of the litigation in India is at the District level. The training in this regard is woefully lacking. When a student of law school goes to a District Court and especially a student going from a metropolis to Munsif town, she/he finds

herself/himself totally at sea. I feel that this is one issue which law schools in India need to address.

Law has always been viewed as a harbinger of social change. Lawyers all over the world have led movements not only for the independence of their countries but also for social change. Therefore, no person can claim to be a complete legal professional unless he is also equipped with knowledge not only of laws but of many other subjects. A good lawyer/judge has to be aware of many subjects outside the legal profession.

It gives me immense pleasure to see that this edition of the Delhi Law Review includes research papers and articles on niche areas of law. It is heartening to see young students of law carrying out in-depth and detailed research into technical legal subjects. I am impressed not only with the wide range of subjects but also with the quality of articles appearing in this Review. It is initiatives like these that keep alive the interaction between legal practice and theory.

In India there is lack of synthesis between academia and the profession. There are hardly any academicians who actually argue matters in Court. On the other hand, barring a few lawyers who teach some procedural subjects, there are hardly any lawyers who teach regularly in law schools. This has created a further divide between academia and practitioners.

A healthy academia-practice interaction, will not only help in the advancement of legal practice, but will also help the academic field by ensuring that theory never loses sight of the practical applicability of law. The theory and practice cannot be in two water-tight compartments. One may be in academics, practice, or judiciary, whatever field one chooses, there can be no denying the fact that for true growth and social impact, one needs to be skilled in both theory and practice of law. The recipe to a perfect legal practitioner includes the impeccable command over both theory and practice in equal proportions.

At the end of the day, a law to achieve its purpose has to be theoretically and constitutionally sound, and at the same time be practically implementable. When this balance is achieved, it will ensure that law as a tool for social change is truly serving its purpose.

The work of a Judge involves continuous interpretation of the laws as well as analyzing the policy and practical implementation of the laws. It involves dealing with intricate jurisprudential questions as well as the impact they may have on the people of this nation. All of these questions have an academic, as well as a practical facet. The answers to these questions don't just lie in theory or practice, but in a perfect blend of the two. It is probably for this reason, that the

Constituent Assembly in all its wisdom made a provision for a distinguished jurist to sit on the Bench of the Supreme Court along with practitioners.

In 1939, President Roosevelt appointed Felix Frankfurter, someone who had taught law for 25 years, to the United States Supreme Court. Today, 69 years after our Supreme Court came into existence, it's time to ask ourselves, that maybe it's time India too deserves its own Felix Frankfurter?

**Justice Deepak Gupta**

## FROM THE EDITOR'S DESK

Legal scholarship is at the cornerstone of the development of law, and journals such as ours seek to capture the evolving discourse at the intersection of law and policy. With this in mind, the first online issue of the Student Edition of the Delhi Law Review (SDLR) was released in 2017-18 with the intention of reviving the dialogue between academia, the judiciary and legal practice initiated by its predecessor-in-print, the Delhi Student Law Review. The latter publication first appeared in 2004, but was unfortunately discontinued after a few years.

By 2016, the perceived necessity for a student-run journal to fill in the vacuum had set things in motion. It was through the untiring and patient efforts of select students and faculty members, under the patronage of the Dean of the Faculty of Law, Professor Ved Kumari, that the SDLR came into existence. The journal provided an opportunity to motivated and proficient students to directly involve themselves in advancing academic research at the Faculty of Law. At the same time, the deliberate decision to style the release of the SDLR as an exclusively online publication aimed at easing access for all to the content, while permitting us to remain mindful of our environment footprint.

It would appear that our efforts at reviving and distinguishing the SDLR have already been met with some success. We received a very large number of submissions from every conceivable corner, including students and faculty from various institutions across the country and abroad. We would like to thank each of them for their valuable contribution to the present issue.

Bringing this volume into its present form has required no small measure of effort on the part of those involved. I would like to thank all the members of the editorial board, the Dean, Faculty of Law and, of course, the authors for their contributions. Finally, this would not have been possible without the unwavering support of our faculty advisor, Dr. L. Pushpa Kumar, from whose experience and attention to detail we all gained immensely.

The content of the present journal contains a diverse range of topics which touch upon international law, intellectual property rights, alternative dispute resolution, critical analyses of various developments in municipal law, as well as discussion of future laws which are yet to crystallise.

The articles have been selected following a double-blind peer review process, and the editorial board has tried its best to keep up the standard set by the previous editions of the Student Delhi Law Review.

The views and opinions expressed in the journal are of the authors alone; the editorial board has limited itself to making suggestions and minor changes for improved readability, and ensuring consistent formatting.

Despite the best efforts of the editorial board, some mistakes may have crept in inadvertently. In our capacity as editors, we take responsibility for any such oversight.

**Harsh Bedi**

Editor-in-chief

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## TRoubled Waters: Countering Piracy In The Indian Ocean Region

Anirban Das\*

*Piracy in the Indian Ocean has emerged as a serious threat to international peace and security. Since the Sea Lanes of Communications (SLOCs) traversing the ocean are of strategic significance to global maritime connectivity, these attacks have a direct impact on global trade, the local economies and the humanitarian assistance operations in West Africa. This paper analyses the distinct characteristics of modern-day piracy phenomena and the extent to which existing international legal instruments have been successful in addressing the emerging challenges. A stakeholder-based study of the issue brings out its far-reaching political, economic and humanitarian impact. Along with a critical appraisal of the functioning of two key counter-piracy legal frameworks from South-East Asia (ReCAAP) and the Western Indian Ocean (Djibouti Code of Conduct), the current issues concerning the Global Anti-Piracy Regime with recommendations to overcome them are discussed in this paper. The problem being transnational, an urgent necessity for developing inter-operability capabilities has become self-evident. The international community needs to charter the course ahead in these troubled waters with cooperation. A comprehensive inter-regional anti-piracy framework with the participation of all the relevant stakeholders is the need of the hour.*

### 1. INTRODUCTION

Are the existing international conventions and regional mechanisms well equipped to curb the menace of modern-day piracy? In other words, is the comity of nations sufficiently empowered to arrest the recent growth of piratical attacks in the Indian Ocean Region (IOR) and beyond?

Addressing the above questions has become a seminal task, especially since the approach taken to find the answers would have decisive consequences for the economic and political stability of this region. According to the International Maritime Organization (IMO), 90 percent of global trade is sea-borne with a major portion of it passing through the Indian Ocean.<sup>1</sup> A third of this

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<sup>1</sup>UN, *International Maritime Organization Profile* (UN-Business Action Hub, 2019), available at: <https://business.un.org/en/entities/13> (Visited on February 24, 2019).

trade passes through South-East Asia alone.<sup>2</sup> A volatile security situation in the Indian Ocean waters could, therefore, potentially paralyse global trade.<sup>3</sup>

In particular, oil trade through the Indian Ocean is greatly significant to international energy security. According to the *2017 World Oil Transit Chokepoints Report* of the U.S. Energy Information Administration (EIA), 18.5 MBD (Million Barrels Per Day) of crude oil and petroleum liquids pass through the Strait of Hormuz (the busiest transit chokepoint in the world) and another 16 MBD are transported through the Strait of Malacca (the second busiest transit chokepoint).<sup>4</sup> Additionally, the report underscores the importance of the Bab el-Mandeb Strait, which carries a further 4.8 MBD of international oil transit. Taken together, these three chokepoints account for 63.7% of the total seaborne-oil trade.

Apart from the huge commercial losses for the shipping companies running into billions of dollars every year, maritime piracy has put at risk the lives of crew and the passengers alike. Piracy no longer remains a local or regional issue. A single piracy incident can affect a number of countries. Further strengthening the case set out by this paper, the U.N. Security Council (UNSC) has on several occasions identified Indian Ocean piracy as “*a serious threat to international peace and security.*”<sup>5</sup>

Indeed, pirates have once again emerged as *hostis humani generis* or ‘the enemy of all mankind.’<sup>6</sup> In the present study, therefore, an attempt is made to comprehensively analyse the various facets of the issue at hand. Furthermore, the paper will examine the international conventions that empower the states to contain acts of piracy in the high seas. The importance of a robust structure for coordination is underscored while discussing the practical aspects of implementing and monitoring a Joint Maritime Security Regime.

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<sup>2</sup> Ted Kemp, “Dangerous waters: Meet the new face of piracy” *CNBC*, Sept. 15, 2014, *available at*: <https://www.cnbc.com/2014/09/15/worlds-most-pirated-waters.html> (Visited on February 24, 2019).

<sup>3</sup> Ruijie He, “Coast Guards and Maritime Piracy: Sailing Past the Impediments to Cooperation in Asia” 22 *PAC. REV.* 667 (2009).

<sup>4</sup> U.S. Government, Report: *World Oil Transit Chokepoints* (U.S. Energy Information Administration, 2017), *available at*: <https://www.eia.gov/beta/international/regions-topics.php?RegionTopicID=WOTC> (Last modified on July 25, 2017).

<sup>5</sup> U.N. Security Council, *S.C. Res. 1814*, U.N. Doc. S/RES/1814 (May 15, 2008).

<sup>6</sup> T. Treves, “Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia” 20 *EJIL* 400 (2009).

## SCOPE OF PIRACY IN THE 21<sup>ST</sup> CENTURY

Contemporary piracy has developed close links with evils such as terrorism, kidnapping, and drug trafficking; undoubtedly, then, this devious nexus poses a serious security threat to international commerce and order on the high seas.

Today, piratical groups are highly organized and technologically-equipped, and utilise intelligence received from informers on the shore in order to coordinate precise attacks on specially targeted vessels. New modes of operations have emerged such as radio jamming of communications infrastructure of the targeted vessel, looting of valuables in swift raids using modern high-speed boats before any intervention could arrive, and even theft of the vessel which is then either sold to pre-arranged buyers or utilised as a mothership for later attacks.<sup>7</sup>

Millions of dollars in ransom money received in return for hostages are subsequently channelled into the black market to finance other illegal activities such as oil bunkering and drug trafficking.<sup>8</sup> According to a 2014 World Bank Study, tracing the flow of this ransom money accurately is indeed a challenge for law enforcement agencies.<sup>9</sup> Recognizing the dangers of this money laundering, the UNSC in 2010 had urged States 'to further investigate international criminal networks involved in piracy off the coast of Somalia, including those responsible for illicit financing and facilitation.'<sup>10</sup> Hence, coordination based on economic intelligence between national governments has also emerged as a vital priority for counter-piracy initiatives in the present decade.

The very nature of piracy has changed in the 21<sup>st</sup> century. Therefore, it is essential for us to dissect some of the definitions of piracy outlined in international conventions and understand their application today.

### I. What is piracy?

Piracy, in general parlance, would mean any act of violence in the seas intended towards private ends. However, it is necessary to delimit the scope of this term in order to bring coherence in its application.

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<sup>7</sup> Robert Haywood & Roberta Spivak, *Maritime Piracy* 13 (Routledge, London, 2012).

<sup>8</sup> Jay Bahadur, *Deadly Waters: Inside the Hidden World of Somalia's Pirates* (Profile Books, London, 2011).

<sup>9</sup> World Bank, *Pirate Trails: Tracking the Illicit Financial Flows from Pirate Activities off the Horn of Africa* 59 (March, 2014).

<sup>10</sup> U.N. Security Council, *S.C. Res. 1950*, U.N. Doc. S/RES/1950 (November 23, 2010).

Piracy has been defined variously in different international documents as unlawful or violent acts that are committed on the High Seas or the Exclusive Economic Zones (EEZ). In some definitions, a distinction based on the location of the act is not relevant.

A holistic understanding of this term needs to be derived from the comparative analysis of the relevant provisions of the United Nations Convention on the Law of the Sea (hereinafter referred to as UNCLOS), the International Law Commission Draft (ILC Draft), the Harvard Draft Convention on Piracy 1932, as well as the definitions coined by the International Maritime Organization (IMO) and the International Maritime Bureau (IMB).

At this juncture in the evolution of the Law of the Sea, the most widely accepted definition of the term comes from the UNCLOS.

Article 101 of the UNCLOS has defined piracy as follows:

“Piracy consists of any of the following acts:

(a) Any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) Any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).”<sup>11</sup>

Comparing the above definition with the definitions provided by the Harvard Draft Convention, the Convention on the High Seas (*viz.* Article 15), and the ILC Draft (*viz.* Article 39), the following common features of the various definitions of piracy are evident:

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<sup>11</sup> Convention on the Law of the Sea, 1982, (Hereinafter “UNCLOS”), art 101.

- (i) Piracy is any illegal act of violence, detention or depredation committed for private ends and without bona fide reasons;
- (ii) It is directed against another ship or aircraft, or against persons or property on board such ship or aircraft in a place outside the jurisdiction of any state;
- (iii) It is committed by the crew or passengers of a private ship or private aircraft;
- (iv) It includes the following:
  - (a) Any act of voluntary participation in the operation of a ship or an aircraft with knowledge of facts making it a pirate ship or aircraft;
  - (b) Any act of incitement or facilitation of an act described above.

Certain key consequences of this definition are as follows:

(A) Acts committed within a state's territorial jurisdiction

It is to be noted that all these definitions of piracy have reinforced the classic principle that acts of piracy can only take place on the High Seas or outside the territorial jurisdiction of any state. Thus, if an attack takes place inside the territorial jurisdiction of a state, it is not recognised as an act of piracy under the Law of the Sea.<sup>12</sup>

Instead, such acts would fall within the ambit of *Armed Robbery against Ships*, as defined in *IMO's Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships*.<sup>13</sup>

(B) Piracy by a warship, government ship or government aircraft whose crew has mutinied.

In the pre-UNCLOS Era, acts of mutiny were excluded from the ambit of piracy in the Convention on the High Seas.<sup>14</sup> It was only when the mutiny affected other vessels or aircrafts that the act qualified as piracy.

However, under Article 102 of the UNCLOS, acts of piracy by a warship, government ship or a government aircraft whose crew has mutinied and taken control over the ship or the aircraft are now treated as acts committed by a private ship or aircraft.

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<sup>12</sup> R. Collins & D. Hassan, "Applications and Shortcomings of the Law of the Sea in Combating Piracy: A South East Asian Perspective" 40 *J. MAR. L. & COM.* 97 (2009).

<sup>13</sup> International Maritime Organization, *Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships* IMO Assembly Resolution A. 1025 (26) (IMO, London, 2009).

<sup>14</sup> Convention on the High Seas, 1958, (Hereinafter "High Seas Convention"), art 16.

### (C) The Two Ships Criterion

Traditionally, it has been required that two ships must be involved for application of the piracy provisions.<sup>15</sup> Specifically, this would involve attacks by a private vessel against another vessel. This criterion, in effect, excludes acts of violence, detention or depredation by the crew or passenger of a vessel towards their own vessel.

## II. Universal Jurisdiction and its extensions

The aforementioned definitions limit the so-called ‘universal jurisdiction’ of the international community to act against attacks which may occur within the territorial waters of another nation-state, regardless of whether they affect the general enjoyment of rights at sea by the international community. This is a major point of contention in Law of the Seas and puts constraints on hot pursuits and pre-emptive actions.

To address this problem, the subsequent 1988 Suppression of Unlawful Act Convention (SUA), its 2005 Protocol, and the International Maritime Bureau (IMB) made an attempt to expand the ambit of ‘unlawful acts against persons, ships, aircrafts or maritime facilities’ to ‘...any location on the sea.’<sup>16</sup>

However, these enlarged definitions have not been universally accepted. This is understandable since acceptance of such a definition would automatically allow international incursions into the territorial waters of littoral states - a privilege that has the potentiality of being misused if not monitored from time to time. Therefore, the international community should work on building consensus for the establishment of an independent action authorizing and monitoring agency.

## 2. STAKEHOLDERS-BASED ANALYSIS OF INDO-PACIFIC PIRACY

In its first ever resolution addressing piracy off the coasts of Somalia, the UNSC stated that such piracy ‘exacerbate[s] the situation in Somalia which continues to constitute a threat to international peace and security.’<sup>17</sup>

The SLOCs passing through the Indian Ocean, particularly at the critical chokepoints of the Gulf of Aden and the Malacca Straits, are of immense geopolitical and commercial significance

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<sup>15</sup> UNCLOS, *Supra* note 11 at art 101 (a).

<sup>16</sup> Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988, (Hereinafter “SUA Convention”), art 3.

Art. 3 of the 1988 SUA Convention states that, ‘Any person commits an offense if that person unlawfully and intentionally seizes or exercises control over a ship by force or threat thereof or any form of intimidation.’

<sup>17</sup> U.N. Security Council, *S.C. Res. 1816*, U.N. Doc.S/RES/1816 (June 2, 2008).

as they are the primary commercial corridors connecting Europe, Asia and the Pacific.<sup>18</sup> Indeed, it would be no exaggeration to suggest that the Indian Ocean connects the world.

When good order and security in the Indian Ocean is threatened, the stakes are high and have far-reaching consequences – economic, political and humanitarian.

### I. Economic perspective

At its peak, the global economic costs of piracy were estimated to be between USD 7 billion to USD 12 billion.<sup>19</sup> According to a 2017 Report by Oceans Beyond Piracy, the ‘Somali Piracy Phenomenon’ alone cost the international community over USD 1.4 billion because of increased insurance rates, freight expenses, deterrent security equipment costs, and the cost of rerouting ships.<sup>20</sup> Deployment of naval forces and cost of prosecution of captured pirates are some of the expenditures incurred by governments. It is estimated that approximately USD 292.5 million was spent on contracted private maritime security in East Africa alone.<sup>21</sup>

Macroeconomic costs to local economies also gain significance as ships are forced to use longer and costlier alternative routes and ports for avoiding pirate-infested areas. Shifting of trade to other places also hurts local small businesses and merchants, adversely affecting the economic well-being of the populace.

A large proportion of the cargo transported via sea to Somalia, a key aid recipient country in the Horn of Africa Region, consists of food stock.<sup>22</sup> Upon facing piracy attacks on these bulk carriers and cargo shipments, which amounted to approximately 40 percent of the total piracy incidents at its peak in 2009,<sup>23</sup> the entire food distribution chain in the region becomes prone to disruption. These attacks lead to delay in delivery of food consignments and result in huge losses in revenue. Subsequently, this lack of supply of food contributes to acute food price inflation. Since a large part of these consignments are meant for regions struck with food scarcity, it aggravates the hunger and malnutrition situation around the Horn of Africa and beyond. Needless to say, this further complicates the humanitarian crisis in the region.

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<sup>18</sup> Bibi Van Ginkel & Frans-Paul Van Der Putten, *The International Response to Somali Piracy: Challenges and Opportunities* 153 (Martinus Nijhoff Publishers, Leiden, 2010).

<sup>19</sup> MN Murphy, *Small Boats, Weak States, Dirty Money: Piracy and Maritime Terrorism in the Modern World* 378 (CUP, New York, 2010).

<sup>20</sup> Oceans Beyond Piracy, *The State of Maritime Piracy 2017: East Africa Report* (2018), available at: <http://oceansbeyondpiracy.org/reports/sop/east-africa> (Visited on February 24, 2019).

<sup>21</sup> Id.

<sup>22</sup> MIT, *The Observatory of Economic Complexity: What does Somalia import?* (2017), available at: [https://atlas.media.mit.edu/en/visualize/tree\\_map/hs92/import/som/all/show/2017](https://atlas.media.mit.edu/en/visualize/tree_map/hs92/import/som/all/show/2017) (Visited on June 7, 2019).

<sup>23</sup> Maximo Q. Mejia, Pierre Cariou & Francois-Charles Wolff, “Is maritime piracy random?” 16 *AEL* 891-895 (2009).

## II. Political perspective

The rise of piracy in the Indian Ocean relates to the prevailing political climate in the region. For instance, one of the key factors that has contributed to piracy off the coast of Somalia is the lack of capacity on the part of the Somali Federal Government to efficiently control and patrol its territorial seas. Inefficient law enforcement and absence of coordination between the countries in the region have also allowed piratical attacks to continue without major interventions.

In view of the renewed surge in Somali-based piracy in 2016-17, the priorities of national governments should be as follows:

- (a) Capacity building of navy and coast guard personnel;
- (b) Review of national legislations for harmonisation of piracy laws;
- (c) Developing inter-operability with navies of major extra-regional stakeholders such as India and U.S.;
- (d) Investment in digital infrastructure for reducing response time and for smooth information-sharing between governments.

Furthermore, the importance of confidence-building measures is paramount to ensure the success of the above recommendations and the overall success of the anti-piracy activities in the region.

## III. Humanitarian perspective

The problem is not limited to high commercial and geopolitical costs. By posing a direct threat to humanitarian relief operations in Somalia, the pirates have once again shown that they truly are *hostis humanis generis*.<sup>24</sup> In the wake of the attack on World Food Programme (WFP) ships by Somali pirates in 2007, the UN agency urged the international community to curb this menace with high-level actions.<sup>25</sup>

As the principal UN organ tasked with the primary responsibility for the maintenance of international peace and security under Chapter V of the UN Charter,<sup>26</sup> the UNSC in its

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<sup>24</sup>*Supra* note 6.

<sup>25</sup> World Food Programme, "New pirate attack on aid ship: WFP urges high-level international action against Somali piracy", May 21, 2007, *available at*: <https://www.wfp.org/news/news-release/new-pirate-attack-aid-ship-wfp-urges-high-level-international-action-against-somali-piracy> (Visited on February 24, 2019).

<sup>26</sup> Charter of the United Nations, 1945, (Hereinafter "UN Charter"), art 24.

Resolution 1816 of 2<sup>nd</sup> June 2008 authorised action against piracy in Somalia.<sup>27</sup> The trigger effect of the piracy attacks on food aid and other humanitarian assistance shipments, particularly the 2007 attack on WFP ships, was clearly evident as the UNSC Resolution referred to these attacks directly in the preamble. It urged all the member states to coordinate with each other, the IMO and other stakeholder organizations to come together and combat piracy and armed robbery off the Somali and connected coastlines.

At the peak of the Somali piracy phenomenon, thousands of seafarers were attacked by pirates using firearms. Eventually, there was a welcomed reduction in Somali-based piracy incidences. But multiple agencies active in the region have recorded a disturbing trend reversal of late. For instance, the Western Indian Ocean saw more than a 100 percent increase in seafarers exposed to piracy/robbery at sea from 545 in 2016 to 1,102 in 2017.<sup>28</sup>

Crew members and passengers who have been taken hostage have reportedly been subjected to abuse.<sup>29</sup> Long-term physical and psychological trauma on the crew also needs to be addressed. The families and other dependants of these seafarers and passengers have also been mentally affected due to piracy attacks.<sup>30</sup>

Therefore, a lot is at stake with different parties being involved in every instance of a piracy attack.

### 3. REPRESSING PIRACY – THE INTERNATIONAL RESPONSE SO FAR

The primary international response in order to repress piracy in the Indo-Pacific waters has been through international naval operations under Chapter VIII of the UN Charter.<sup>31</sup> Several organizations including IMO, IMB, the European Union Naval Force and the NATO are involved in these counter-piracy operations.

In this section, the paper delves into the various UN instruments which empower the international community to repress piracy activities. Wherever applicable, it also analyses the limitations of these provisions and provides relevant constructive feedback.

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<sup>27</sup> *Supra* note 17.

<sup>28</sup> *Supra* note 20.

<sup>29</sup> Steven Jones, “Tipping Point”, *Maritime Security Review* (2011), available at: <http://www.marsecreview.com/2011/05/tipping-point> (Visited on February 26, 2019).

<sup>30</sup> *Id.* at 19.

<sup>31</sup> U.N. Security Council, S.C. Res. 1838, U.N. Doc. S/RES/1838 (Oct 7, 2008); U.N. Security Council, S.C. Res. 1844, U.N. Doc. S/RES/1844 (Nov 20, 2008); U.N. Security Council, S.C. Res. 1897, U.N. Doc. S/RES/1897 (Nov 30, 2009); U.N. Security Council, S.C. Res. 1918, U.N. Doc. S/RES/1918 (Apr 27, 2010).

## Comparison of the Counter-Piracy Provisions of International Legal Instruments:

### I. United Nations Convention on the Law of the Sea (UNCLOS)

UNCLOS has set out the basic legal foundation for combating piracy and armed robbery at sea under International Law.<sup>32</sup> Articles 100 to 110 of the UNCLOS 1982 have equipped the member states with certain powers to curb global piracy. These Articles have drawn their succession from Articles 14-21 of Geneva High Seas Convention 1958. The principles underlined by these Articles are widely accepted as binding on all nations:<sup>33</sup>

#### (i) Duty to cooperate in repression of piracy (Article 100)

Article 100 states as follows:

‘All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.’<sup>34</sup>

This Article imposes a duty on the state parties; however, the extent of this duty is not provided. While it embodies the collective intent of the comity of nations to jointly respond to the menace of piracy, it does not explain how the states are to perform this duty. In other words, it leaves it upon the individual states to decide what cooperation to ‘*the fullest extent possible*’ practically stands for.

However, the significance of this Article nevertheless should not be underestimated as it embodies the fundamental pillar of mutual understanding amongst the international community of the necessity of cooperation for successfully tackling piracy.

#### (ii) Seizure of a pirate ship or aircraft (Article 105)

Article 105 of UNCLOS has empowered states with the right to seize a pirate ship or aircraft or a ship or aircraft taken and controlled by pirates and arrest the persons and seize the property on board in a situation on the high seas or outside the jurisdiction of any state.<sup>35</sup> This Article has codified the ‘universal jurisdiction’ accorded by customary international law on the seizing state. This jurisdiction is primarily of a permissive nature.

After seizure and/or arrest under this Article, the courts of the seizing/arresting state have jurisdiction to impose penalty and determine action to be taken with regard to the ships, aircraft

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<sup>32</sup> U.N. Security Council, S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec 16, 2008).

<sup>33</sup> M. Sterio, “Fighting Piracy in Somalia (and Elsewhere): Why more is needed” 33 *FORDHAM INT. J.* 385 (2009).

<sup>34</sup> UNCLOS, *Supra* note 11 at art 101.

<sup>35</sup> UNCLOS, *Supra* note 11 at art 105.

or property, subject to the right of the third parties acting in good faith. However, in practice, this right is discretionary in nature. It codifies the customary right of the states to exercise municipal jurisdiction over the pirates, the ships and/or the property confiscated. It is not expressly mandatory for the state to arrest or prosecute the arrested pirates.

It has further been observed that some states are, more often than not, reluctant to exercise this universal jurisdiction. Human rights considerations, the difficulty of gathering evidence in a hostile environment, risks involved with extraditing these arrestees, and the expenses involved with the legal procedures among other factors are usually said to have contributed to this reluctance of major maritime nations active in these regions.

Since these pirates are usually from high-risk zones marred with weak governance, violent conflicts and possible abuse of human rights, such arrests are avoided where possible, since it could also lead to asylum claims.<sup>36</sup>

### (iii) Right of hot pursuit (Article 111)

Article 111 of UNCLOS sets out the rules of hot pursuit and the procedure involved in its execution. The right allows a state to hold accountable those foreign ships which have violated its laws and regulations and are trying to escape from its territorial jurisdiction by taking refuge in international waters. This Article enables the concerned state's authorised warships or military aircrafts to pursue the fleeing vessel into the high seas.

Following are the pre-conditions for exercising the powers under this Article:

- The right of hot pursuit begins when the offending vessel is within the internal waters, the archipelagic waters, territorial sea or the contiguous zone of the pursuing state;<sup>37</sup>
- It continues till the point when the vessel enters the territorial sea of another state;<sup>38</sup>
- The hot pursuit may be continued outside the territorial sea or the contiguous zone only if it has not been interrupted;<sup>39</sup>
- The pursuit may only begin after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship;<sup>40</sup>

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<sup>36</sup> D.B. Rivkin Jr. & L.A. Casey, "Pirates Exploit Confusion About International Law" *Wall Street Journal*, Nov. 19, 2008.

<sup>37</sup> UNCLOS, *Supra* note 11 at art 111(1).

<sup>38</sup> UNCLOS, *Supra* note 11 at art 111(3).

<sup>39</sup> UNCLOS, *Supra* note 11 at art 111(1).

<sup>40</sup> UNCLOS, *Supra* note 11 at art 111(4).

- The right of hot pursuit may only be exercised by warships or military aircraft (or other authorized ships or aircraft clearly marked and clearly identifiable as being on government service).<sup>41</sup>

Where the interception or arrest of the ship outside the territorial sea is not justified by the circumstances, compensation for any loss or damage sustained thereby needs to be provided.<sup>42</sup>

The provisions of this Article apply “*mutatis mutandis* to violations in the Exclusive Economic Zone or on the Continental Shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal state applicable in accordance with this Convention to the Exclusive Economic Zone or the Continental Shelf, including such safety zones.”<sup>43</sup>

However, the anti-piracy regime established by UNCLOS is fraught with certain limitations.<sup>44</sup> For instance, other than the superfluous ‘duty’ to cooperate under Article 100 (as discussed above), the states are not bound to implement the relevant piracy provisions. This is, of course, not a problem which is unique to UNLOS but is a wider problem under Public International Law.

Although the UNCLOS anti-piracy regime has granted power to states to seize vessels and arrest pirates, no framework set of procedures exist with regard to the exercise of these powers. For instance, no obligation is imposed on state parties to provide mutual legal assistance to others in matters of criminal prosecution of arrested pirates. This creates problems with regard to evidence collection, summoning persons to the concerned courts, and with regard to extradition of the persons. These issues among others need to be addressed especially in the current times since piracy has acquired new dimensions in its *modus operandi* in the Indian Ocean Region.

## II. 1988 Suppression of Unlawful Acts Convention (SUA) and its 2005 Protocol

Following the 1985 *Achille Lauro Incident*, limitations of the International Anti-Piracy Regime were felt by the international community. In response, the 1988 SUA was adopted to rectify these limitations to a certain extent.<sup>45</sup> This convention and its subsequent 2005 Protocol complement the piracy provisions of the UNCLOS.

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<sup>41</sup>UNCLOS, *Supra* note 11 at art 111(5).

<sup>42</sup> UNCLOS, *Supra* note 11 at art 111(8).

<sup>43</sup> UNCLOS, *Supra* note 11 at art 111(2).

<sup>44</sup> R.C. Beckman, “The Piracy Regime under UNCLOS: Problems and Prospects for Cooperation” *CIL* Workshop on International Maritime Crimes: National University of Singapore 17 (2011).

<sup>45</sup> Y.M. Dutton, “Maritime Piracy and the Impunity Gap: Insufficient National Laws or a Lack of Political Will?” 86 *TUL. L. REV.* 1126 (2012).

The convention represented a positive step in combating maritime piracy and terrorism.<sup>46</sup> However, unlike UNCLOS, this convention is not regarded as customary international law and binds only the signatories.<sup>47</sup> As per the January 2019 IMO Status Report, the number of such contracting states stands at 166 with the notable exception of Somalia.<sup>48</sup>

(i) Offences under SUA and the 2005 Protocol (Article 3)

Article 3 of the convention has set out the following offences:

“1. Any person commits an offence if that person unlawfully and intentionally:

(a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or

(b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or

(c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or

(d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or

(e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or

(f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or

(g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).

2. Any person also commits an offence if that person:

(a) attempts to commit any of the offences set forth in paragraph 1; or

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<sup>46</sup> L. Bento, “Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish” 29(2) *Berkeley J. Int’l L.* 424 (2011).

<sup>47</sup> V.P. Nanda, “Maritime Piracy: How Can International Law and Policy Address this Growing Global Menace?” 39(2) *DENJILP* 182 (2011).

<sup>48</sup> IMO, Report: *Status of IMO Treaties*, 433 (February, 2019).

- (b) abets the commission of any of the offences set forth in paragraph 1 perpetrated by any person or is otherwise an accomplice of a person who commits such an offence; or
- (c) threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraph 1, subparagraphs (b), (c) and (e), if that threat is likely to endanger the safe navigation of the ship in question.”<sup>49</sup>

Therefore, SUA 1988 has addressed a wider array of offenses against ships, which was expanded by the 2005 SUA Protocol to include using a ship in a terrorist offense; transporting a BCN weapon and raw material items; transporting a terrorist fugitive; and other related offenses.<sup>50</sup>

This convention has remedied some of the limitations of the International Anti-Piracy Regime which was established by the UNCLOS. Some of the changes brought in by this convention have been hereinafter mentioned.

(ii) Broadened geographical application (Article 4)

Unlike UNCLOS, SUA applies to territorial waters as well. In fact, it applies everywhere, except in internal waters. It is submitted that this expansion of scope is aimed at tackling the problem of pirates escaping from foreign naval forces by entering the territorial sea of a coastal state.

However, warships or authorised ships of foreign governments are, in practice, allowed to enter the territorial waters pursuant only to the successful obtaining of authorization from the concerned coastal state. This could lead to potential delays and possibly allow the pirates to escape from the reach of either the foreign naval force or the coast guard of the coastal state.

The appropriate remedy would be to constitute a set of criteria that would automatically qualify a state to undertake legitimate counter-piracy activities without overstepping their mandate. Real-time data sharing would also increase the trust between the two governments and produce a conducive environment for eradicating piracy from all places.

(iii) Obligation to enact appropriate punishments with penalties (Article 5)

Some countries did not have adequate legislations for prescribing punishments for crimes amounting to piracy. This ultimately placed a question mark over the fate of these pirates. SUA, through its Article 5, has attempted to address this problem.

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<sup>49</sup> SUA Convention, *Supra* note 16 at art 3 & art 4(4).

<sup>50</sup> Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 2006, (Hereinafter “2005 SUA Protocol”), art 3ter.

Article 5 has placed an express responsibility on the parties to this convention to make the offences mentioned in Article 3 punishable by appropriate penalties.<sup>51</sup>

(iv) Obligation to establish jurisdiction (Article 6)

This Article places the obligation on the states to establish jurisdiction over the offences mentioned in Article 3.

In consonance with the Universal Jurisdiction Principle and further expanding its application, it provides the following types of jurisdiction when the said offence is committed:

- (a) ‘against or on board a ship flying the flag of the State at the time the offence is committed’<sup>52</sup> (Flag state-based jurisdiction); or
- (b) ‘in the territory of that State, including its territorial sea’<sup>53</sup> (Territorial jurisdiction); or
- (c) ‘by a national of that State’<sup>54</sup> (Nationality-based jurisdiction).

It further provides that such jurisdiction over the said offences can also be established when:

- (a) ‘it is committed by a stateless person whose habitual residence is in that State’<sup>55</sup> (Habitual residence-based jurisdiction); or
- (b) ‘during its commission a national of that State is seized, threatened, injured or killed’<sup>56</sup> (Jurisdiction passive); or
- (c) ‘it is committed in an attempt to compel that State to do or abstain from doing any act’<sup>57</sup> (State target-based jurisdiction).

The wide array of routes to establishing jurisdictions provided by SUA is meant to empower the state to curb the impunity of the perpetrators of various crimes at sea including piracy to escape from its grasp.

(v) Investigation and prosecutorial assistance (Article 12)

States are to provide “*the greatest measure of assistance*” to one another in relation with criminal proceedings brought in respect of the SUA offences set forth in Article 3. This Article

<sup>51</sup> SUA Convention, *Supra* note 16 at art 5.

<sup>52</sup> SUA Convention, *Supra* note 16 at art 6 (1) (1).

<sup>53</sup> SUA Convention, *Supra* note 16 at art 6 (1) (2).

<sup>54</sup> SUA Convention, *Supra* note 16 at art 6(1) (3).

<sup>55</sup> SUA Convention, *Supra* note 16 at art 6 (2) (1).

<sup>56</sup> SUA Convention, *Supra* note 16 at art 6 (2) (2).

<sup>57</sup> SUA Convention, *Supra* note 16 at art 6 (2) (3).

strengthens the criminal procedure concerning pirates and other offenders at sea by also obligating states to afford assistance with regard to obtaining evidence.<sup>58</sup>

The legislative intent behind these provisions is to ensure that the courts trying these offenders are provided with all the requisite assistance regardless of their geographical distance from the actual place of occurrence of the offence in question.

(vi) Duty to cooperate (Article 13)

Article 13 can be said to correspond to Article 100 of the UNCLOS. However, this Article is relatively more extensive and covers cooperation from the point of preparation to commission and beyond.<sup>59</sup> The duty is to cooperate in the prevention of the SUA offences by taking suitable steps which includes exchange of information, administrative coordination,<sup>60</sup> and other measures to avoid the undue delay or detention of other ships due to the commission of such offences.<sup>61</sup>

**SUA in practice – Limitations and scope for improvement:**

SUA along with its 2005 Protocol have made significant contributions to the rule-making process of the International Anti-Piracy Regime. Particularly, the 2005 SUA Protocol has devised elaborate procedures to be followed by the state parties in order to protect the human rights of the arrestees/detainees such as the procedure for boarding ships flying under a foreign flag.<sup>62</sup> It has set forth the right of the state to pursue the perpetrators of SUA offences including piracy when they seek refuge in the territorial waters of a coastal state. However, this convention has experienced certain problems in its implementation.

One of the shortcomings in SUA (in context to its formation) is the absence of any recourse against parties who have not fulfilled their treaty obligations<sup>63</sup>. Additionally, it is submitted that SUA (like UNCLOS) has not placed any real obligation on the parties to prosecute offenders.<sup>64</sup>

The SUA provisions, as discussed earlier, have not obtained the status of customary international law and hence, are limited in application to the signatory states. This creates problems in its uniform application. For instance, since the SUA Convention is only binding on the signatories,

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<sup>58</sup> SUA Convention, *Supra* note 16 at art 12 (1).

<sup>59</sup> SUA Convention, *Supra* note 16 at art 13 (1).

<sup>60</sup> SUA Convention, *Supra* note 16 at art 13 (2).

<sup>61</sup> SUA Convention, *Supra* note 16 at art 13 (3).

<sup>62</sup> 2005 SUA Protocol, *Supra* note 50 at art 8*bis*.

<sup>63</sup> Omer Elagab, "Somali Piracy and International Law: Some Aspects" 24 *ANZMLJ* 63 (2010).

<sup>64</sup> Tullio Treves, "The Convention for Suppression of Unlawful Acts against the Safety of Maritime Navigation" 2 *SJICL* 551 (1998).

if the flag state is not a SUA signatory state, the SUA provisions with regard to boarding of the ship or interviewing people on board are not applicable.

Whereas the jurisdictional linkages have been discussed at great length in Article 6 of the convention, it is said that such elaboration could also undermine the principle of universal jurisdiction applicable to piracy.<sup>65</sup> Problems exist with the invocation of these provisions in as much as they increase financial and legal burdens for the states.

However, these implementation problems do not take away from the SUA Convention and its 2005 Protocol the credit of making a significant contribution to further empower the existent International Anti-Piracy Regime. The 2005 SUA Protocol had the effect of further obliging its state parties to work together to limit the menace of piracy in the Indian Ocean today.

Along with the Terrorist Bombings Convention,<sup>66</sup> and the Terrorism Financing Convention,<sup>67</sup> the SUA and the UNCLOS work together in tandem to provide for an extensive legal framework for investigation, prosecution, and extradition of pirates. These instruments will undoubtedly continue to have a significant influence on rule-making in the area of piracy offences in the future.

### III. International Convention Against the Taking of Hostages 1979 (Hostage-Taking Convention)

Piratical attacks in the Indo-Pacific Waters have more often than not been accompanied with a hostage situation. This is especially the case as for piracy off the coast of Somalia.

The Hostage-Taking Convention<sup>68</sup> aims to address the legal vacuum that existed in the scope of the Law of the Sea in hostage situations. Although it is difficult to say for certain if it was drafted with the foresight that maritime piracy in the 21<sup>st</sup> century would have hostage-taking as one of its persisting characteristics, its provisions have found practical utility to a great extent in relation to the 21<sup>st</sup> century maritime piracy.

#### (i) Offense under Hostage-taking Convention (Article 1)

Article 1 of the Hostage-Taking Convention defines the offense of hostage-taking as follows:

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<sup>65</sup> Joseph M Isanga, "Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes" 59 *AM. U. L. REV.* 1293 (2010).

<sup>66</sup> International Convention for the Suppression of Terrorist Bombings, 1998 (Hereinafter "Terrorist Bombings Convention").

<sup>67</sup> International Convention for the Suppression of the Financing of Terrorism, 2000 (Hereinafter "Terrorism Financing Convention"), art 2.

<sup>68</sup> International Convention Against the Taking of Hostages, 1979 (Hereinafter "Hostage-Taking Convention").

“1. Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the ‘hostage’) in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking hostages (‘hostage-taking’) within the meaning of this Convention.

2. Any person who:

(a) Attempts to commit an act of hostage-taking, or

(b) Participates as an accomplice of anyone who commits or attempts to commit an act of hostage-taking likewise commits an offence for the purposes of this Convention.”<sup>69</sup>

For this offence to materialise, therefore, it requires the following three ingredients:

(A) Detention of a person;

(B) Such detention being aimed to compel another to act or not act;

(C) Such act or abstention being a condition for release of the hostage.

(ii) Requirement of Transnational Element (Article 13)

This Article specifies that the Convention does not apply if the offence is entirely committed within the territorial limits of a single state, or if the hostage and alleged offender are nationals of that state and the alleged offender is found in the territory of that state.<sup>70</sup> In other words, a transnational element is necessary for the application of the provisions of this convention.

#### **4. CASE STUDIES IN CURBING PIRACY IN THE TROUBLED WATERS – REGIONAL ARRANGEMENTS IN ACTION**

International Conventions empowered various states with certain measures to contain piracy in the Indian Ocean Region. However, there exist operational issues that various naval forces experience when engaging in joint anti-piracy operations. In this section, an attempt is made to examine the regional arrangements brought into force in the IOR to reduce the difficulties in enforcement of law in the international waters.

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<sup>69</sup>*Id.* at art 1.

<sup>70</sup> Hostage-Taking Convention, *Supra* note 68 at art 13.

## I. Role of Regional Maritime Security Initiatives – An Overview

Regional arrangements supplement the force of international conventions. For instance, the right of hot pursuit provided by Article 111 of the UNCLOS has been strengthened by cooperation among different states. Extradition arrangements and cooperation in investigation and information exchange, as envisaged by the SUA Convention, are greatly enabled by regional arrangements between countries. They are able to curb the impunity of pirates who have taken the undue benefit of the lack of coordination between the various states off the Horn of Africa and South-East Asia.

UNCLOS has been successful in providing the legal foundation for states to create a regional cooperative framework as part of the global anti-piracy regime. Article 100 of the UNCLOS encourages international cooperation. However, the states as the primary actors have to give shape to this spirit.

International naval action can deter and disrupt piracy, but it is argued that it cannot eradicate the root cause of the issue.<sup>71</sup> Piracy usually emerges as a result of a number of factors including socio-political, economic, law enforcement, and weak governance-related problems. Such problems require a deeper level of intervention and cooperation at various levels: bilateral, trilateral and regional.

## II. Area Study I – South-East Asia

South-East Asia ("SE Asia") has been a leader in comprehensive regional cooperation for limiting the proliferation of piracy. This region is indispensable in the global counter-piracy operations. This makes sense especially because since the 1990s, nearly half of all the reported piracy incidents have taken place in the vicinity of the South China Sea.<sup>72</sup>

In the 20<sup>th</sup> century, ASEAN was never viewed to be a facilitator of a collective security regime.<sup>73</sup> Cooperation on piracy was primarily based on bilateral and trilateral agreements. However, rising incidences of piracy in the Straits of Malacca made a very compelling case for greater multilateral engagement.

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<sup>71</sup> Martin N Murphy, "Suppression of Piracy and Maritime Terrorism: A Suitable Role for a Navy?" 60 (Summer) *NWCR* 42 (2007).

<sup>72</sup> James Clad, Sean M. McDonald & Bruce Vaughn, *The Borderlands Of Southeast Asia* 107-126 (NDU Press, Washington D.C., 2011).

<sup>73</sup> Sheldon Simon, "ASEAN and Multilateralism: The Long, Bumpy Road to Community" 30 *CSEA* 274 (2008).

Beginning with the *1997 ASEAN Declaration on Transnational Crime*, the ASEAN states along with key extra-regional partners have devised various regional strategies to safeguard navigational safety.

### **The Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP)**

By the late 1990s, piracy, a menace in the region, became a cause of growing concern for extra-regional stakeholder countries such as India, China and Japan. In 2001, therefore, the Japanese Government took the initiative and proposed to create the world's first inter-governmental organization with the mandate to contain piracy in SE Asia<sup>74</sup>.

The ReCAAP was finalized in 2004 and came into force on 4<sup>th</sup> September, 2006. This was the first successfully executed, completely regionally 'owned' counter-piracy initiative for this region.<sup>75</sup> A sense of ownership and direct responsibility was instilled through this arrangement amongst the member states.

The list of contracting parties includes important regional and extra-regional naval partners such as Singapore, the UK, China, India, Japan, Denmark and Philippines among others.<sup>76</sup>

It has established a ReCAAP Information Sharing Centre in Singapore to act as a depot for communication and exchange of information between the members. It is linked with the various ReCAAP Focal Points designated by the various member states including the navies, coastguards, and other related bodies via a digital online platform.<sup>77</sup> This arrangement has enabled a seamless and quick sharing of incidences of piracy with the entire region.

ReCAAP has focussed on regional capacity building, information dissemination and mutual legal assistance.

### **III. Area Study II - Gulf of Aden and Western Indian Ocean**

Efforts in Gulf of Aden and Western Indian Ocean have primarily focused on the piracy hotspots off the coast of Somalia and disparate attacks in the deeper Indian Ocean. Inadequate

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<sup>74</sup> J. F. Bradford, "Shifting the Tides against Piracy in Southeast Asian Waters" 48(3) *ASIAN SURV.* 473- 491 (2008).

<sup>75</sup> ReCAAP, Report by the ReCAAP Information Sharing Centre for the Ninth Meeting of the UN Open-ended Informal Consultative Process on Oceans and the Law of the Sea 1 (June, 2008).

<sup>76</sup> ReCAAP, About ReCAAP Information Sharing Centre, available at: [http://www.recaap.org/about\\_ReCAAP-ISC](http://www.recaap.org/about_ReCAAP-ISC) (Visited on June 7, 2019).

<sup>77</sup> Government of Singapore, *Factsheet on the ReCAAP Information Network System* (Singapore Ministry of Transport, 2006).

coordination and limited objectives with regard to maritime security have often been cited as perennial problems in the regional arrangements of this region.<sup>78</sup>

A number of counter-piracy initiatives have been adopted, amongst which, the Djibouti Code of Conduct is seen as the most successful endeavour.

### **Djibouti Code of Conduct**

UNSC Resolution 1851 advised the states in the Western Indian Ocean to bring into motion an agreement similar in function to ReCAAP in order to deter piracy in the Gulf of Aden.<sup>79</sup>

The Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden ('Djibouti Code of Conduct') was adopted on 29<sup>th</sup> January 2009 as a result of an IMO Conference in the city of Djibouti. Its signatories include a total of 20 countries of the region including Somalia, Egypt, Seychelles and Maldives.<sup>80</sup>

It provides for a comprehensive framework for capacity building and regional cooperation against piracy in the Western Indian Ocean and the Gulf of Aden. It has four broad thematic pillars:

- (i) Delivering national and regional training;
- (ii) Enhancing national legislation;
- (iii) Information sharing;
- (iv) Building counter piracy capacity.<sup>81</sup>

The Code has been pivotal to curbing piracy and armed robbery against ships off the coast of Somalia through such steps as training of coastal guards and reviewing of national legislations.<sup>82</sup>

The main objective of the Code has been to strengthen the processes of the prevention, interdiction, prosecution and punishment of persons engaged in piracy and armed robbery against ships.<sup>83</sup>

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<sup>78</sup> Commander Michael L Baker, "Toward an African Maritime Economy: Empowering the African Union to Revolutionise the African Maritime Sector" 64 *NWCR* 161 (2011).

<sup>79</sup> *Supra* note 32.

<sup>80</sup> IMO, Djibouti Code of Conduct Newsletter 2 (4<sup>th</sup> ed.) (IMO Maritime Safety Division, 2015).

<sup>81</sup> *Id.* at 2.

<sup>82</sup> IMO, *Djibouti Code of Conduct*, available at: <http://www.imo.org/en/OurWork/Security/PIU/Pages/DCoC.aspx> (Visited on June 7, 2019).

<sup>83</sup> IMO, Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden, 2009 (Hereinafter "Djibouti Code of Conduct"), Preamble.

Some of the key features of this Code of Conduct include:

- (a) Power to seize, arrest, and prosecute pirates or suspected pirates;
- (b) Duty to extend mutual legal assistance with relation to extradition and evidence collection;
- (c) Expanded right of hot pursuit: The Code allows the participant states to pursue pirate ships or suspected pirate ships into the territorial waters of another participant state.<sup>84</sup>

Particularly, the three Information Sharing Centres (ISCs) are seen as instrumental in promoting the exchange, analysis and dissemination of information on piracy incidents in the region.<sup>85</sup>

## 5. CONCLUSION—CHARTING THE WAY FORWARD FOR INTERNATIONAL COOPERATION ON PIRACY

Regional counter-piracy action arrangements in the IOR have received positive feedback which goes to instil confidence in the notion that greater coordination is the way forward to solving this problem in the long-run. However, the author finds it pertinent to submit that the future of counter-piracy operations would rely on our ability to support trans-regional cooperation rather than simply relying on intra-regional instruments such as ReCAAP and Djibouti Code of Conduct. This inter-operability needs to be brought about through harmonisation of legal definitions of such terms as ‘piracy’, ‘hot pursuit’ and developing consensus on the application of the ‘Universal jurisdiction’ principle among the stakeholder nations.

Further, an urgent need is felt for transparency and uniformity in legal procedure concerning handling of arrested offenders at sea, safeguards for protection of their human rights and determining the bare minimum benchmarks for a fair trial in such cases, especially owing to their international character and highly sensitive nature.

It should be recalled here that pirates are not accorded the status of ‘combatants.’ Therefore, the possibility of pre-emptive attacks on pirates is limited.<sup>86</sup> The International Tribunal for the Law of the Sea, in the *M.V. Saiga No. 2* judgement, had laid down that the use of force in the Law of the Sea, as in other areas of International Law, must be avoided to the greatest extent possible. Where inevitable, it must be reasonable and proportionate.<sup>87</sup> Due care needs to be taken in order to ensure that the human rights of the arrestees are protected. Therefore, there is a need for

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<sup>84</sup>*Id.* atart 4.

<sup>85</sup> Natalie Klein, *Maritime Security and The Law Of The Sea* 244 (OUP, Oxford, 2011).

<sup>86</sup> *Supra* note 6 at 412.

<sup>87</sup> ITLOS Case No. 2 (Official Case No) ICGJ 336, 144 (ITLOS 1999).

establishing a monitoring mechanism to ensure a fair treatment to the captured pirates in the custody of the foreign states. India, a key stakeholder and a country which has pushed for a rules-based international order, needs to take the lead in preparing the groundwork for the establishment of the necessary checks and safeguards concerning naval interventions in the Indian Ocean.

Such interventions can help reduce piracy incidences. However, the root cause of the piracy problem has to be addressed by the governments and organizations if we want to eliminate piracy from this ocean. Any effective response to this problem would certainly have to entail the empowerment of the local law enforcement agencies and securing the safe delivery of the humanitarian aid and other support being delivered through the SLOCs to these regions. In tandem with the increase in deterrence and penalties, the incentive for the local population to resort to piracy needs to be eliminated. New opportunities in livelihood, education and connectivity have to be created.

## ACCESS TO AFFORDABLE MEDICATION VIS-À-VIS RIGHTS OF THE PATENTEE

Lakshita Handa and Naina Jindal\*

*The debate on intellectual property protection in the pharmaceutical sector has assumed significance due to its socio-economic relevance, especially in developing economies. Strong IPR protection for pharmaceuticals is expected to adversely impact access to affordable medication and this gives rise to a broader issue that realises the inherent dichotomy between public health and the exclusive rights of the patent holder in relation to his/her invention. This issue poses a greater problem due to the nature of the pharmaceutical industry which is a research-intensive field involving great amount of investment in R&D.*

*This paper seeks to discuss India's product-patent regime in relation to the pharmaceutical industry and seeks to see the impact of the product-patent regime on the pharmaceutical sector in India, and understand the long-standing debate between public health and patent-holder's rights in light of access to affordable medication. Further, it undertakes a detailed analysis of Section 3(d) of the Patents Act along with a case study of the Novartis Case. Finally, it analyses the patentability criteria in USA and looks at the US position on the Indian patent regime.*

### 1. INTELLECTUAL PROPERTY RIGHTS: AN INTRODUCTION

*'Adam Smith taught us that the wealth of a nation rested on three pillars - labour, capital and natural resources. Our generation has added a fourth pillar- intellectual property in all its forms.'*

*-Gerald J. Mossinghoff*

#### 1.1. What is Intellectual Property?

Property is defined as the rights of a person with respect to a thing that may be tangible or intangible. 'Private property' essentially means the exclusive right of a private person to control an economic good. Aristotle, while negating Plato's call for a communist social order, noted that private property, which has continually existed throughout the history of mankind, serves as an incentive mechanism that fosters the productive impulse of a human being, and at the same time induces feelings of hospitality and benevolence.

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<sup>1</sup> Mossinghoff, Gerald J., and Ralph Oman, "The World Intellectual Property Organization: A United Nations Success Story", 160 World Affairs 104 (1997).

With the growth of science and technology, the conception of property has now become an extremely wide concept that has also come to encompass Intellectual Property, which is primarily incorporeal in nature. The same was recognised in *RC Cooper v. Union of India*,<sup>2</sup> wherein the Hon'ble Apex Court stated that 'property means the highest right a man can have to anything, being that right, which one has to land or tenements, goods or chattel, which doesn't depend on another's courtesy: it includes ownership, estates and interests in corporeal things, and also rights such as trade-marks, copyrights, patents and even rights in personam capable of transfer.' The inclusion of intellectual property within the definition of property is in consonance with the Natural Right Theory (Labour Theory) propounded by Locke which, while recognising Right to Property as a natural right, noted that a person has a right to own the creation of his mind, in the same manner he owns the creation of his labour.<sup>3</sup>

Intellectual property is the creative work of the human intellect.<sup>4</sup> The word 'intellect' comes from the Latin term 'intellectus' which means the perception of knowing or reasoning. Thus, property created by the intellect of a person is intellectual property. By its very nature, it refers to intangible property. A person is granted certain positive rights in respect of such property so as to serve as an incentive mechanism. In this sensibility, the 'Intellectual Property Rights' regime seeks to strike a balance between public interest and individual effort.

## 1.2. Exclusionary in Nature

The Right to Property belongs to a domain of negative rights wherein others are excluded from enjoyment of the same. It can be said that to exclude, is a basic strategy of property rights and this strategy sufficiently protects the interests of the right-holder who is granted exclusive rights with regard to maintenance, enjoyment, disposal, transfer etc. of the property. It is to be noted that exclusion strategies vary according to the type of property involved - whether tangible or intangible. Typically, rights do not surround the abstract non-physical entity; rather, IPR's govern the 'physical manifestations of expressions - they

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<sup>2</sup> 1970 AIR SC 564.

<sup>3</sup> Alex Tuckness, "Locke's Political Philosophy" *The Stanford Encyclopedia of Philosophy Archive (Summer 2018 Edition)*, Nov. 9, 2005 available at: <https://plato.stanford.edu/archives/sum2018/entries/locke-political/> (Visited on June 19, 2019)

<sup>4</sup> V.K. Ahuja, *Law Relating to Intellectual Property Rights* (LexisNexis, New Delhi, 2013).

protect ideas by protecting, through rights, the physical manifestations or instantiations of those ideas.<sup>5</sup>

### 1.3. What is a Patent?

A patent is granted in relation to an invention. ‘It means a grant of a limited monopoly, privilege or property by the Government or the sovereignty of the country to a person who has invented a new and useful article or an improvement of an existing article or a new process of making an article, in return for the disclosure of technical information. The instrument by which such grant is made is known as a Patent.’<sup>6</sup> It has been stated that the ‘right of the patentee to exclude others, is a right antagonistic to, and superior to, rights normally accruing to owners of chattels under the state law.’<sup>7</sup>

The principle behind patenting an invention is simple. Once the invention has been patented, the patentee has an exclusive right to exploit his invention for a given period of time (20 years in India) and the profits earned during this time will duly make up for all the expenses incurred in developing the invention. In exchange for this, information is disclosed to the public, which would have otherwise, not been disclosed as such and this leads to further development of ideas thereby leading to overall economic growth.<sup>8</sup>

## 2. GRANT OF PATENTS AND PHARMACEUTICAL INDUSTRY IN INDIA

‘The idea of granting patent protection to pharmaceuticals, especially essential drugs, has always been a contested one. The inherent tussle between profit-driven drug companies and welfare-oriented governments seeking to ensure cheaper access to essential medicines has frequently occupied the global centre-stage.’<sup>9</sup> This issue gives way to a larger dichotomy of public health versus patent protection to pharmaceutical companies.

### 2.1 Growth of Pharmaceutical Industry: Present Trends.

In India, the MNC’s from developed countries started developing new drugs after the mid-1930s and indigenous companies mostly focussed on developing manufacturing processes. Over the years, India has established itself to be one of the largest producers of generic drugs

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<sup>5</sup> Rajshree Chandra, “Intellectual Property Rights: Excluding Other Rights of Other People” 44 *EPIW* 86 (2009).

<sup>6</sup> D.N. Choudhary, *Evolution of Patent Laws -Developing Countries Perspective* (Capital Law House, Delhi, 1<sup>st</sup> edn., 2006).

<sup>7</sup> Thomas Reed Powell, “The Nature of a Patent Right” 8 *CLR* 663 (1917).

<sup>8</sup> Eliana B. Souto, *Patenting Nanomedicines—Legal Aspects, Intellectual Property and Grant Opportunities* (Springer-Verlag Berlin Heidelberg, 1<sup>st</sup> Edn., 2012).

<sup>9</sup> Mansi Sood, “Natco Pharma Ltd. v. Bayer Corporation and The Compulsory Licensing Regime in India” 6 *NUJS L. Rev.* 99 (2013).

in the world - some producers invest in R&D and manufacture their own drugs whereas others simply find easier and cheaper processes to manufacture drugs created by MNC's in developed countries by employing different reverse engineering techniques.

The Indian pharmaceutical industry has contributed immensely to not just Indian but global healthcare outcomes. 'India's strong position as a pharma supplier rests on its ability to provide high quality medicines backed by strong innovation capabilities and a structural cost advantage. The cost of manufacturing formulations in India remains 30-40 percent lower than other comparative manufacturing hubs such as China and Eastern Europe, notwithstanding low productivity levels. This is driven by lower labour costs vis-à-vis other geographies.'<sup>10</sup>

'The pharmaceutical sector was valued at US\$ 33 billion in 2017. The country's pharmaceutical industry is expected to expand at a CAGR of 22.4 per cent over 2015-20 to reach US\$ 55 billion. India's pharmaceutical exports stood at US\$ 17.27 billion in 2017-18. In 2018-19 these exports are expected to cross US\$ 19 billion.'<sup>11</sup>

## 2.2. Patent grant - An incentive to the Pharmaceutical Industry

'It is through the commercialization and use of new products and processes that productivity gains are made and the scope and quality of goods and services are expanded.'<sup>12</sup>

The grant of patents helps govern appropriability in the most efficient and strongest manner. Where a patent is not obtained, the inventor runs the risk of his invention being imitated. This is why patents are usually deemed to be 'essential' in the pharmaceutical sector due to the level of R&D involved. The pharmaceutical industry is one of those three technology-based industries in which the patent virtually equals the product. The other two are the chemical industry and the biotechnology industry (dealing with a wide array of things including engineered plant varieties). 'Unlike industries which produce products requiring expensive and complex manufacturing infrastructures, the patented products of pharmaceutical companies can be easily and cheaply replicated by copiers with little capital investment.'<sup>13</sup>

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<sup>10</sup> FICCI, Report: Trends & Opportunities for Indian Pharma (2018).

<sup>11</sup> IBEF, Report: Indian Pharmaceutical Industry (2018).

<sup>12</sup> CRS Report for Congress, Order Code RL30756, Report on Patent Law and Its Application to the Pharmaceutical Industry: An Examination of the Drug Price Competition and Patent Term Restoration Act of 1984 ("The Hatch-Waxman Act") (January 2005).

<sup>13</sup> The Pharmaceutical Industry and the Patent System, *available at*:

However, the problem that comes into the frame is that the access to the drugs manufactured by MNC's is restricted due to high pricing. The problem is especially grave in developing countries where most of these drugs are sold at unaffordable prices, which defeats the entire system of public welfare.

### 2.3. Pre-TRIPS position in India

*'Thus, under our existing patent laws, molecules, which are products of chemical reactions, are as such non-patentable in India. This restriction, coupled with the restriction on mere admixtures resulting in aggregation of properties in which the components do not exhibit any synergistic behaviour, severely limit the items, which can be patented in India. Standard drug formulations in which the ingredients behave as mere admixtures also do not qualify for patents in India. In such cases only the process, i.e. the method of making the product is patentable.'*

- Pradubuddha Ganguli<sup>14</sup>

The first law pertaining to intellectual property was enacted in India at the time of the British Regime to protect rights of British inventors who wanted to secure a patent in India and, thereby, enjoy monopolistic rights over their inventions in British colonies.

After independence, the Ayyangar Committee,<sup>15</sup> appointed by the government, found that 'between 80 and 90 percent of the patents in India were held by transnational companies and over 90 percent of these were not being exploited in India.'<sup>16</sup> This report paved way for the Patents Act, 1970 which became a landmark legislation.

While balancing the interests and right of the inventor with public welfare and societal interest, the Act excluded pharmaceutical products from eligibility for patents. 'The 1970 Act gave space to Indian firms to develop alternate processes and they did so, successfully. These firms were able to develop alternate processes, keep prices low, introduce new drugs in the Indian market and a little later, also export to various other countries.'<sup>17</sup>

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[https://users.wfu.edu/mcfallta/DIR0/pharma\\_patents.pdf](https://users.wfu.edu/mcfallta/DIR0/pharma_patents.pdf) (Visited on November 19, 2018).

<sup>14</sup> Nilesh Zacharias and Sandeep Farias, "Patents and the Indian Pharmaceutical Industry", *Nishith Desai Associates: IP Rights/Patents*, available at:

[http://www.nishithdesai.com/fileadmin/user\\_upload/pdfs/Patents\\_and\\_the\\_Indian\\_Pharmaceutical\\_Industry.pdf](http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Patents_and_the_Indian_Pharmaceutical_Industry.pdf) (Visited on November 19, 2018).

<sup>15</sup> Government of India, Report: Ayyangar Committee on the Revision of the Law in India Relating to Patents for Inventions (Ministry of Commerce and Industries, 1959), available at: [https://spicyip.com/wp-content/uploads/2013/10/ayyengar\\_committee\\_report.pdf](https://spicyip.com/wp-content/uploads/2013/10/ayyengar_committee_report.pdf) (Visited on 18th June 2019).

<sup>16</sup> Jagjit Kaur Plahe, "The Implications of India's Amended Patent Regime: STRIPPING Away Food Security and Farmers' Rights?" 30 *TWQ* 1197-1213 (2009).

<sup>17</sup> C. Niranjan Rao, "Patents and Pharmaceuticals in India" 41 *EPW* 1975-1977 (2006).

## 2.4. Impact of TRIPS

The Uruguay Round of GATT negotiations resulted in an agreement on Trade Related Aspects of Intellectual Property Rights.

‘In an attempt to narrow the gaps in the IPR regimes across the countries, the TRIPS agreement established minimum levels of protection that each government has to give to the intellectual property of fellow WTO members. In doing so, it tried to maintain a balance between the long-term benefits and possible short-term costs to society. The underlying logic is that protection of intellectual property rights generates long-term benefits for the society through encouragement given to original creation and invention.’<sup>18</sup> Thus, the primary goal of TRIPS was ‘to stop nations from adopting blatantly protectionist intellectual property rules akin to the non-tariff barriers to free trade that the General Agreement on Trade & Tariffs had regulated for many years.’<sup>19</sup>

Article 27 of the TRIPS agreement made the availability of patent, for every invention mandatory irrespective of whether it related to a product or a process with some, only very limited, exceptions. India, which at the time of enforcement of TRIPS was one of the largest manufacturers of generic drugs, sought to align its laws to meet international standards, while balancing such changes with local needs of the country and making full use of flexibilities contained in TRIPS.

It was in the light of this that the first amendment was made to the Patents Act, 1970 in 1999. This amendment allowed for product patents in agro-chemical and pharmaceutical fields in the form of ‘mailbox’ and introduced the system of ‘Exclusive Marketing Rights’ wherein an ‘EMR could be obtained for a particular application if a patent had been granted for the same in some other WTO country and the same was not rejected in India on grounds of not being an invention.’<sup>20</sup>

The Patent (Amendment) Act, 2002, which mainly focussed on the pharmaceutical sector, brought about several changes such as ‘redefining patentable inventions, granting new rights, extension of term of patent to 20 years, providing for the onus of proof on the violator in case of infringement, conditions for compulsory licenses and creation of an appellate board.

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<sup>18</sup> Dr. Prankrishna Pal, *Intellectual Property Rights in India- General Issues and Implications* (Regal Publications, New Delhi, 2008).

<sup>19</sup> Pamela Samuelson, “Implications of the Agreement on Trade Related Aspects of Intellectual Property Rights for Cultural Dimensions of National Copyright Laws” 23 *J of Cult. Eco.* 95 (1999).

<sup>20</sup> Sudip Chaudhuri, “TRIPS Agreement and Amendment of Patents Act in India” 37 *EPW* 3354 (2002).

All these changes unfortunately did not address the ground realities bedevilling the industrial manufacturing sector in India.<sup>21</sup>

#### **2.4.1. Flexibilities under the TRIPS Agreement**

Several scholars have noted that all Intellectual Property Rights regimes have certain policy levers in common - they usually lay down areas of protection as well as policy-based limitations on the scope of protection. ‘Such domains of adjustment are usually referred to as ‘policy levers’ and they may be used to calibrate the law’s application to particular contexts. In the terminology associated with TRIPS, such domains are known as ‘flexibilities’ that denote where the patent may be adjusted, consistent with TRIPS, to adapt to different innovation and domestic policies.<sup>22</sup>

Article 7 and 8 of the TRIPS provide express recognition for the policy objectives that are pivotal to intellectual property rights protection. Article 7 lays down a general principle that protection and enforcement of IPRs should contribute to the promotion of technological innovation as well as transfer and dissemination of technology to the mutual advantage of the users and producers and in a manner that is conducive to social and economic welfare and a balance of rights and obligations. Article 8 states that ‘[m]embers may adopt, inter alia, measures necessary to protect public health and nutrition, provided that those measures are consistent with the Agreement.’<sup>23</sup> ‘By transcending treaty and forum boundaries, these provisions not only influence interpretative practice, they also encourage a convergence of policy objectives that facilitates greater coherency within the international system, and links IP with other areas of socio-economic importance.’<sup>24</sup>

#### **2.4.2. Key changes brought by Patents (Amendment) Act, 2005**

Some of the most important provisions inserted via the 2005 amendment are:

##### **2.4.2.1.1. Product Patent for Pharmaceuticals**

One of the most important and ground-breaking changes brought by the Patents (Amendment) Act, 2005 was the deletion of Section 5 that restricted grant of product patents on pharmaceuticals and other chemical innovations.

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<sup>21</sup> J. George, “Patent (Amendment) Act 2002 and Technological Innovation” 40 *EPW* 850 (2005).

<sup>22</sup> *Supra* note 14.

<sup>23</sup> United Nations Conference on Trade and Development, *Dispute Settlement*, WTO, 3.14 TRIPS (United Nations, 2003) available at: [https://unctad.org/en/Docs/edmmisc232add18\\_en.pdf](https://unctad.org/en/Docs/edmmisc232add18_en.pdf) (Visited on November 20, 2018).

<sup>24</sup> Alison Slade, “Articles 7 and 8 of the TRIPS Agreement: A Force for Convergence within the International IP System” 14(6) *The Journal of World Intellectual Property* 413 (2011), available at: <https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1747-1796.2011.00429.x> (Visited on November 20, 2018).

One of the immediate concerns of granting a product patent in India was brought by a sharp rise in prices. However, several shock-absorption factors were included in the Patents Act to ensure that there was no steep rise.

#### 2.4.2.2. *Mailbox Application Procedures*

Under TRIPS, 'all countries were to provide for a means (a mailbox) by which patent applications for pharmaceuticals and agricultural chemical products be filed during the transition period. Patent applications in the mailbox did not have to be examined until the developing country adopted the provisions of TRIPS.'<sup>25</sup>

Thus, in India, mailbox applications were filed from 1995 to 2005. It was feared that once these mailbox patents are granted, the production of their generics in India would go off the market, thereby leading to a sharp rise in prices of the given drugs. The same was taken care of by the proviso inserted to Section 11(A)7. 'The Patent Act remedied this provision by allowing Indian companies already producing these drugs to continue to produce them even after the drugs are patented, as long as a royalty is paid to the company owning the patent. This provided a level playing field for domestic companies who already have made substantial investments in the products. Specifically, the provision explains that the patentee's rights begin from the date of the grant of the patent, rather than from the date of application.'<sup>26</sup>

#### 2.4.2.3. *Scope of Patentability*

The Patents (Amendment) Act, 2005 re-defined and narrowed the scope of patentability by insertion of several new definitions and clauses.

The most important among these was the high threshold of an inventive step adopted by insertion of Section 2(ja). Likewise, 'a pharmaceutical substance' was defined as 'any new entity involving one or more inventive steps'<sup>27</sup>. Further, 'a new invention' was defined as 'any invention or technology which has not been anticipated by publication in any document or used in the country or elsewhere in the

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<sup>25</sup> Ronald J. T. Corbett, "Protecting and Enforcing Intellectual Property Rights in Developing Countries" 35 *T Int'l Lawyer* 1083 (2001).

<sup>26</sup> Sierra Dean, "India's Controversial New Patent Regime: The End of Affordable Genetics?" 40 *The Int'l Lawyer* 725 (2006).

<sup>27</sup> The Patents Act, 1970 (Act 39 of 1970).

world before the date of filing of the patent application with complete specification.<sup>28</sup>

The important idea behind introducing these definitions was to prevent grants of patent to frivolous inventions thereby limiting the scope of patentability.

#### *2.4.2.4. Compulsory Licensing Regime*

Sections 82-94 of the Patents Act, 1970 provides elaborate provisions on Compulsory Licensing. Some important procedural and substantive changes were made to the law relating to Compulsory Licensing by the 2005 amendment. The most important of these is Compulsory License for Exports; under the Act, an exporter can resort to Section 92A in a situation where the importing country has, by notification or otherwise, allowed importation of patented pharmaceutical products from India.

The most important procedural change made with regard to compulsory licensing is the cap of 6 months which has been laid as a 'reasonable' period for negotiation with the patent holder for a grant of a voluntary license, failing which a compulsory license may be obtained.

#### *2.4.2.5. Bolar Exception*

The Bolar Exception was incorporated in Section 107A of the Patents Act (amended up to 2002) to enable the entry of generic manufacturers immediately after the expiry of the term of patent. However, the Patents (Amendment) Act, 2005 expanded this provision to bring 'importing' within its sweep. Therefore, generic manufacturers can now make, use, sell or import the patented invention for the purpose of obtaining information.

#### *2.4.2.6. Parallel Imports*

'The earlier section 107A(b) provided that it was not an infringement to import a patented product provided such import was from an exporter who was duly authorised by the patentee to sell or distribute the product. The 2005 Act now makes such import easier by dispensing with the authorisation required from the patentee -

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<sup>28</sup> Ibid.

it only requires that the exporter of such patented product be duly authorised under the law to produce and sell or distribute the product.<sup>29</sup>

### **2.4.3. Criticisms of the 2005 Act**

The most common criticism of the Act has come from activist groups and organisations which have put forward that granting a product patent to pharmaceuticals would adversely affect access to affordable medication, thereby jeopardising right to health. ‘They insist the new laws will stifle routine generic competition for newer, more expensive AIDS medicines and argue that twenty-year monopolies on drugs will drive up cost of treatment until the world's supply of generic HIV medicines disappears. They believe that the 5.1 million Indians suffering from HIV/AIDS will be unable to afford the possible 99 percent increase in the cost of these drugs.’<sup>30</sup> Another area of the Act which has invited considerable debate and criticism is the provision pertaining to compulsory licensing which, as per critics, is not effective and has several loopholes that may be utilised by drug manufacturers to keep producers of generics at a safe distance.

### **2.4.4. Implications of the Patents Act, 2005**

#### *2.4.4.1. Impact on the Pharmaceutical Industry*

‘Critics of the patent system have argued that the system blocks the industrial development in less developed countries because it does not serve the two claimed functions - a) inducing transfer of technology, or b) promoting R&D and technological innovation. This is obviously truer in the case of countries that do not have an R&D base at a level which results in significantly patentable innovation activity.’<sup>31</sup>

Changes in India’s Patent Laws have led to large scale investment and establishment of operations by several leading MNC’s around the world. ‘Capitalizing on India’s low labour costs and skilled workforce, several MNCs are establishing major research and development facilities in India. For example, General Electric’s Jack Welch Technology Centre in Bangalore is the company’s largest R&D centre outside the U.S.’<sup>32</sup>

A fairly recent Report presented by McKinsey & Company suggests ‘that the Indian pharmaceuticals market will grow to USD 55 billion by 2020 driven by a steady increase

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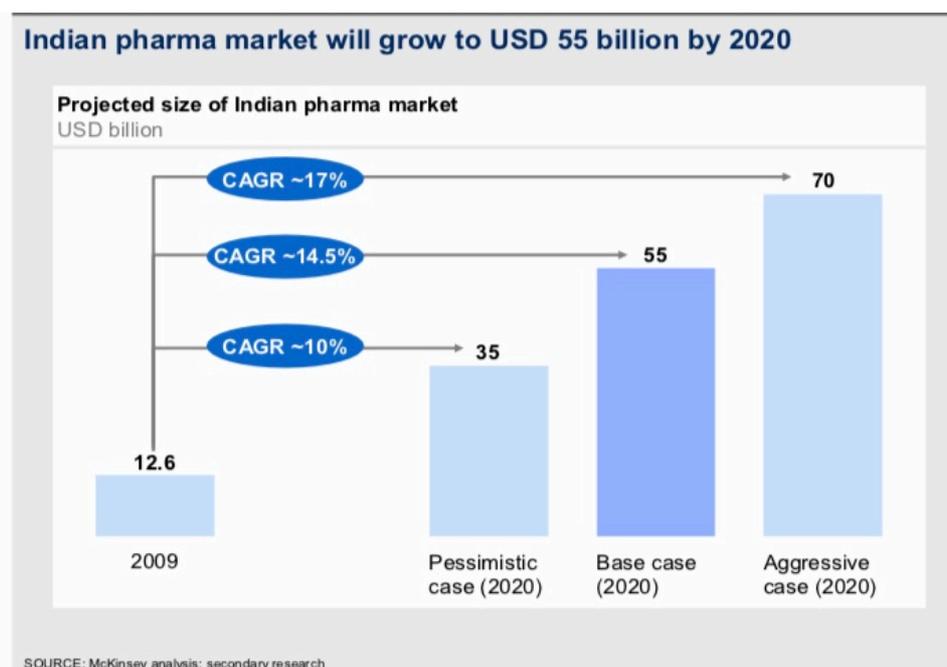
<sup>29</sup> Shamnad Basheer, “India’s Tryst with Trips: The Patents (Amendment) Act, 2005” 1 *IJLT* (2005).

<sup>30</sup> TRIPS Agreement (January 1, 1995).

<sup>31</sup> N. N. Mehrotra, “Patents Act and Technological Self-Reliance: The Indian Pharmaceutical Industry” 24 *EPW* 1059 (1989).

<sup>32</sup> *Supra* note 23.

in affordability and a steep jump in market access. At the projected scale, this market will be comparable to all developed markets other than the US, Japan and China. Even more impressive will be its level of penetration. In terms of volumes, India will be at the top, a close second only to the US market. This combination of value and volume provides interesting opportunities for upgrading therapy and treatment levels<sup>33</sup>.



While the growth of the Indian pharmaceutical industry seems fairly promising, there are a few bottlenecks on the way. The first and most important being, that Indian firms lack deep pockets to make international blockbusters. ‘Even as a first innovator, it will be difficult for an Indian firm to sell a final product on its own in the western markets. Well-established American, British or European firms with strong brand loyalty dominate the international pharmaceutical market.’<sup>34</sup>

#### 2.4.4.2. Access to Medicines

One of the most important concerns in granting product-patent to pharmaceuticals was that of activists who feared that this would pose impediments in accessing affordable medication and healthcare in India.

<sup>33</sup> McKinsey & Company, Report: Pharmaceutical and Medical Products Practice, India Pharma 2020- Propelling access and Acceptance, Realising True Potential.

<sup>34</sup> Shyama V. Ramani and Augustin Maria, “TRIPS: Its Possible Impact on Biotech Segment of the Indian Pharmaceutical Industry” 40 *EPW* 675 (2005).

However, it must be noted that the Patents (Amendment) Act, 2005 by itself lays down certain safeguards to prevent a surge in such prices and ensure that no frivolous patents are obtained.

The most important of these provisions is Section 3(d) which prohibits a patent on new use or new form of known substances unless there is enhanced therapeutic efficacy. Other important provisions include Compulsory Licensing as well as the research exemption and Bolar Provisions which could be used by generic manufacturers.

There has been a general view that in the short term, pharmaceutical patent protection would have little or no impact on drug prices in India since majority of the drugs manufactured are off-patent. Proponents of the new patent regime have also stated that these laws will not hurt the AIDS battle because compulsory licensing provisions will still allow India to deal with health emergencies.

As per research, drugs will become increasingly affordable due to consistent growth in income levels and better insurance cover. 'With real GDP growing at nearly 8 per cent over the next decade, income levels will rise steadily. Rising incomes will drive 73 million households into the middle - and upper -income segments. In addition to income growth, health insurance coverage will augment affordability. By 2020, nearly 650 million people will enjoy health insurance coverage. Private insurance coverage will grow by nearly 15 per cent annually till 2020. However, the largest impact will be seen through government sponsored programmes that are largely focused on the 'below poverty line' (BPL) segment and are expected to provide coverage to nearly 380 million people by 2020.'<sup>35</sup>

### 3. HUMAN RIGHTS DEBATE: PUBLIC HEALTH v. PATENT PROTECTION

*'Human rights and Intellectual property rights that were once strangers are now becoming increasingly intimate bedfellows. For decades the two subjects developed in virtual isolation from each other. But in the last few years, international standard setting activities have begun to map previously uncharted intersections between intellectual property laws on the one hand and human rights law on the other'*

- Laurence R. Helfer<sup>36</sup>

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<sup>35</sup> *Supra* note 23.

<sup>36</sup> Laurence R. Helfer, "Human Rights and Intellectual Property: Conflict or Coexistence?" 5 *Minn. Intell. Prop. Rev.* 47 (2003).

International standards mandating product-patents for pharmaceuticals sparked the inherent debate between right to public health v. patentee's right of exclusive use over the invention. Human Rights activists in most developing countries feared that product-patents on pharmaceuticals would result in a monopoly of the inventor and adversely affect access to such drugs owing to unaffordable pricing - thereby sparking human rights concerns.

### **3.2. Root Cause of the Debate**

It has been stated that intellectual property rights are a very important structural determinant of health. Particularly in the context of the pharmaceutical industry, patents on drugs may largely limit their accessibility owing to comparatively higher prices of patented drugs. 'This implies a strong link between lack of access to drugs and poverty. About one-third of the world's population does not have access to basic drugs, a proportion which rises above one-half in the most affected regions of Africa and Asia. Furthermore, a large proportion of people in developing countries do not have access to medical insurance and more often than not pay for drugs themselves.'<sup>37</sup>

The Director General of the WTO while advocating product patents for pharmaceuticals also emphasized the need for affordable drugs in the world's poorest countries. He noted that 'malaria, tuberculosis and AIDS kill six million people each year, with most of the deaths occurring in the developing world. He described how access to drug care is made impossible by the fact that keeping an AIDS patient alive for one year can cost up to \$15,000 - the equivalent of twenty-four times the average annual income in Zimbabwe, where one in four adults is HIV- positive.'<sup>38</sup>

Thus, the impact of patents on access to medicines and healthcare has been a contested area. On the international front, the dramatic story of the HIV/AIDS pandemic in late nineties is testimony to critical implications of patent policy on access to essential medicines.

### **3.3. Right to Health v. IPR's - Various approaches**

Nelson Mandela eloquently remarked that 'to deny people their human rights is to challenge their humanity.' Human rights are certain basic indivisible rights granted to all human beings at birth which are essential to live a life of dignity. Article 25 of the Universal Declaration of Human Rights recognises that everyone has a right to a standard of living adequate for the

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<sup>37</sup> Philippe Cullet, "Patents and Medicines: The Relationship between TRIPS and the Human Right to Health" 79 *Int'l Affairs* 139 (2003).

<sup>38</sup> Arnaldo Lacayo, "Seeking a Balance: International Pharmaceutical Patent Protection, Public Health Crises, and the Emerging Threat of Bio-Terrorism" 33 *The University of Miami Inter-American Law* 295 (2002).

health and well-being of himself and his family, including medical care. The same has also been recognised under Article 12 of the International Covenant on Economic Social and Cultural Rights, 1976.

A perusal of the above internationally accepted documents proves that right to medical and healthcare services is a human right and must, thus, be protected. It is now important to assess the position of intellectual property rights. Article 27(2) of the UDHR states that '[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.' The same is also reflected in Article 15(1) of ICESCR. Given that both of them are human rights, it is difficult to declare pre-emption of one over the other.

One plausible approach is to view intellectual property rights and the right to health as two diametrically opposite rights that cannot exist in the same space i.e. stringent protection of intellectual property rights affects basic human rights and public health. Where this approach is taken, the result is usually to accord primacy to 'right to health,' given its normative nature. However, rendering primacy to 'right to health' completely ignores the right of an individual over fruits of his labour and creativity. If largescale public interest is always placed at a pedestal above intellectual property rights, inventors would lose the incentive to engage and invest in R&D as they would never receive a return on their investment. 'Access without innovation would simply mean a declining capacity to meet an evolving global disease burden. As declared by the US delegate to WTO "there can be no access to drugs that have not been developed."<sup>39</sup> Therefore, while favouring a basic human right like 'right to health' over intellectual property rights may seem just from a moral and ethical standpoint, this approach can never garner full support at the international level.

The second plausible approach is a 'coexistence approach which sees the intersection of human rights and intellectual property as concerned with the same fundamental question: defining the appropriate scope of private monopoly power that gives authors and inventors a sufficient incentive to create and innovate while ensuring that the consuming public has adequate access to the fruits of their efforts.<sup>40</sup>

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<sup>39</sup>Nerina Boschiero, "Intellectual Property Rights And Public Health: An Impediment to Access to Medicines and Health Technology Innovation?" 22 *Stato Chiese e pluralismo confessionale* (2017), available at: [https://www.statochiese.it/images/uploads/articoli\\_pdf/Boschiero.2\\_Intellectual.pdf?pdf=intellectual-property-rights-and-public-health-an-impediment-to-access-to-m](https://www.statochiese.it/images/uploads/articoli_pdf/Boschiero.2_Intellectual.pdf?pdf=intellectual-property-rights-and-public-health-an-impediment-to-access-to-m) (Visited on November 23, 2018).

<sup>40</sup> Subramanya Sirish Tamvada, "TRIPS and Human Rights: The Case of India" 2 *JGLR* 131 (2010).

### 3.4.Meeting Halfway

*‘That be the inventor, ought to be both compensated and rewarded ...will not be denied ...it would be a gross immorality of the law to set everybody free to see (or use) a person’s work without his consent and without giving him an equivalent’<sup>41</sup>*

*-John Stuart Mill (1848)*

‘The Doha Declaration adopted in 2001 affirms that the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights "can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all," and it reaffirms that the Agreement "provides various flexibilities for this purpose'<sup>42</sup>.

More recently, in June 2017, the United Nations Human Rights Council in its 35<sup>th</sup> Session adopted a resolution on Right to Health in relation to UN 2030 Sustainable Development Goals.<sup>43</sup> Target 3.b of this resolution encourages member states to support the R&D of vaccines and medicines for the various diseases that affect developing countries, provide access to affordable essential medicines.

However, even with the growing sensitivity of the international community towards the need for better healthcare and access to medicines, lines of interest can be laid down in black and white. On one hand, the developed countries are seeking to protect their valuable pharmaceutical industries, on the other hand, the developing countries are struggling to meet the demands of their sick citizenry for more affordable medications. ‘If the question was one of taking from the rich to give to the poor, a simple answer based on morality and social justice would suffice. Unfortunately, the reality is much more complex and potentially tragic.’<sup>44</sup>

In such a scenario, developing countries must incorporate various safeguards in their national legislations. Some of these safeguards are a part of the flexibilities within the TRIPS regime which have been enlisted in the foregoing chapters. These include Bolar Provisions, Parallel Importation, Compulsory License, Government Use Exceptions etc. It has also been

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<sup>41</sup> Harshita Mathur, “Compulsory Licensing under Section 92A: Issues and Concerns” 13 *JIPR* 464 (2008).

<sup>42</sup> Frederick M. Abbott, “The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health” 99 *AJIL* 317 (2005).

<sup>43</sup> United Nations General Assembly, Report: The Right Of Everyone to the Enjoyment Of The Highest Attainable Standard Of Physical And Mental Health In The Implementation Of The 2030 Agenda For Sustainable Development (Human Rights Council, 2017).

<sup>44</sup> *Supra* note 32.

considered ideal for states to avoid criminal sanctions on patent infringement as in many instances, a patent may be infringed inadvertently and, in such cases, criminal sanctions would be too harsh a punishment.

#### 4. CASE ANALYSIS: NOVARTIS AG v. UNION OF INDIA

India modified its laws in order to make them TRIPS compliant in the year 2005 and one of the most important additions in this regard was the grant of a product-patent on pharmaceuticals. As a means of balancing public interest with rights of the patent-holder, the Act introduced Section 3(d), which has been a breeding point of conflict, and one of the most prominent cases which attracted worldwide attention towards this was the case of *Novartis AG v. Union of India*.<sup>45</sup>

##### 4.1. Background and History of the Case

Jurg Zimmerman invented a number of derivatives of N-phenyl-2-pyrimidine-amine, one of which was imatinib that had anti-tumour properties and could be used for producing pharmaceutical products. A patent for this derivative was granted in the United States of America in 1996 and came to be known as Zimmerman Patent.<sup>46</sup>

In the context of Novartis, their drug ‘Gleevec is used for the treatment of chronic myeloid leukaemia (CML), a disease that afflicts nearly 5,000 new patients in the United States each year. Studies have shown that Gleevec, which targets specific cancer proteins, is almost ten times more effective than traditional interferon therapy. In 1993, Novartis filed patents worldwide for the active molecule imatinib.<sup>47</sup> No application was filed in India at that time because the Indian patent regime did not permit product patents on pharmaceutical products. However, after the enactment of TRIPS in 1995, mailbox procedure was adopted in India and Novartis filed a “mailbox” patent application in the Madras Patent Office in 1998 for imatinib mesylate, a beta crystalline form of the free base imatinib. In 2003, the Patent Office granted Novartis Exclusive Marketing Rights (EMR) in India, which allowed Novartis to enjoy monopoly rights over the drug thereby prohibiting its production by generic manufacturers. After the Patents (Amendment) Act, 2005 which sought to align the Indian patent regime with international standards, Section 3(d) was introduced.

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<sup>45</sup> (2013) 6 SCC 1.

<sup>46</sup> Ibid.

<sup>47</sup> Linda L. Lee, “Trials and TRIPS-Ulations: Indian Patent Law and Novartis AG v. Union of India” 23 *Berkeley Tech. Law J.* 281 (2008).

Post this, Novartis's patent application was taken up for consideration but the Assistant Controller of Patents, vide 5 orders passed on 25-01-2006, rejected the claim for patenting Imatinib Mesylate holding that the same was anticipated by prior publication in Zimmerman's Patent; was obvious to a person skilled in the art owing to disclosures made in Zimmerman's Patent and was also in contravention of Section 3(d) of the Patents Act. Since IPAB was not formed, Novartis filed writ petitions against the Union of India before the Madras High Court wherein it was also stated that Section 3(d) violates Article 14 of the Constitution of India. The appeal from the order of the Controller was transferred to the IPAB in Madras by virtue of Section 117G of the Act. However, the Madras HC reserved its judgement on constitutional validity of Section 3(d). In August 2007, the Madras High Court found that Section 3(d) was not violative of Article 14 of the Constitution.

Through its order dated 26-6-2009, the Intellectual Property Appellate Board, while concurring with the ultimate decision of the Assistant Controller of Patents held that even though Novartis's invention satisfied the criteria of invention and inventive step, it failed the test of enhanced efficacy provided under Section 3(d) of the Patents Act. This decision was directly challenged in the Supreme Court, wherein the decision regarding patentability of Imatinib Mesylate (marketed under the name of Gleevec) was taken and the Supreme Court found that the drug could not be patented because it neither satisfied the test of 'inventive step,' nor that of Section 3(d).

#### **4.2. Difference between patentability and invention**

The Supreme Court, while rejecting Novartis's patent application, noted that there is a vital distinction between 'patentability' and 'invention'. The Hon'ble Court observed that most of the debate surrounding Section 3(d) in the legislature was pertaining to medicines and drugs. This provision sets up a second-tier test to rule out inventions (even if true or genuine), and check attempts of repetitive patenting. Thus, the threshold of Section 3(d) is one notch higher and more specific than that of invention under Section 2(1)(j) and (ja). The outcome is that while the test of an invention is more general, the test under 3(d) is a specific one. So far as questions of novelty and inventive step were concerned, the SC held that the Zimmerman patent did disclose Imatinib Mesylate as well as its pharmacological properties and thus, the disclosures were sufficient for a person skilled in the art to make Imatinib Mesylate from Imatinib.

#### 4.3. Meaning of 'Efficacy' under Section 3(d)

The concept of 'efficacy' is of prime importance under Section 3(d). This concept gains importance when a differentiation is drawn between patent-eligibility and patentability. Section 3(d) is ideally a patent-eligibility provision; however, it also involves two patentability tests - of non-obviousness and utility. This is because the principle of efficacy is also used under 'inventive step' in Section 2(1)(ja) where the Act provides for a technical advance in comparison to existing knowledge.

Section 3(d) states that no patent shall be granted for the new form of a known substance or new use of a known substance unless there is 'enhancement of known efficacy.' Explanation to Section 3(d) requires derivatives to differ significantly in properties with regard to efficacy. In the former case, 'new form of a known substance has to have significant advantageous and beneficial properties over known substance in order to pass the bar of enhanced therapeutic efficacy under Section 3(d).'<sup>48</sup> Whereas in the latter case, not all advantageous and beneficial parameters would amount to enhancement of efficacy.

The Hon'ble Supreme Court interpreted the word 'efficacy' to mean 'the ability to produce a desired or intended result.' 'On the basis of Dorland's Medical Dictionary definition of efficacy in the field of pharmacology, the court interpreted efficacy as the ability of a drug to produce the desired therapeutic effect and 'therapeutic' as 'healing of disease' i.e. having a good effect on the body.'<sup>49</sup> However, it has been stated that this interpretation goes against legislative intent as Section 3(d) not only deals with human-targeted drugs but also deals with other chemicals where the test of therapeutic efficacy cannot be applied.

In the case at hand, Novartis submitted an affidavit of a study conducted by a technical expert who determined that the relative bioavailability of the free base with that of beta-crystal form of imatinib mesylate was that of about 30 percent and the same amounted to enhanced efficacy. 'There are two moments of black boxing seen here. First, efficacy is rendered in terms of bioavailability This is a rather curtailed definition of efficacy, because it rests on the assumption that an increase in the bioavailability of a drug will lead to a corresponding

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<sup>48</sup> Ajay Chandru and Gowree Gokhale, "Novartis Indian Supreme Court Judgment: What is Efficacy for Pharmaceutical Invention?" *Manupatra Intellectual Property Reports* 165(2013), available at: [http://www.nishithdesai.com/fileadmin/user\\_upload/pdfs/Research%20Articles/MIPR\\_Novartis.pdf](http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Articles/MIPR_Novartis.pdf) (Visited on November 24, 2018).

<sup>49</sup> Aditya Kant, "An Attempt at Quantification of Efficacy Factors Under Section 3(d) of the Indian Patents Act" 18 *JIPR* 303 (2013).

increase in physiological or therapeutic effect— which may not be true in practice. And second, it is deemed that a 30 percent increase is insignificant.<sup>50</sup>

#### 4.4. Implications of the Judgement

The judgement rendered by the Hon'ble Supreme Court in this matter is remarkable as it transcends the specific technical and legal disputes and takes a holistic view of the matter in a larger economic and political backdrop. While the implications of the judgement are multi-fold owing to the number of stakeholders involved, one of the areas of the most profound impact is that of public health. India has often been touted as the 'pharmacy of the developing world' due to its mass production of generic drugs at affordable prices and the Novartis judgement is a testimony of the judicial bent to balance concerns of public health with patent protection.

However, so far as the position of Novartis or other MNC's is concerned, the most important implication in this regard would be less R&D and investment in the country. It would not be wrong to say that pharmaceutical companies will now be more cautious before introducing a new drug in India as India anyway accounts for a very small portion of their global market. 'Perhaps an unintended effect of this court case will be a much needed dialogue between industry, the public health community, and government on how to share the burden of innovation costs and how this can be done in such a way that access to the fruits of innovation are ensured for all who need them.'<sup>51</sup>

### 5. CONCLUSION

'Patenting is broadly the outcome of political economists and philosophers like Locke and Hegel who first argued that intellectual works abstracted from matter can be held as property. Hegel debated that if personality is fundamental to property, then something as personal as artistic expression should certainly be protected as private property.'<sup>52</sup> The past few decades have witnessed a massive wave on the international front to create a strong IP regime; across the world patents incentivise innovation by offering monopoly rights in exchange for disclosure. In the long run, this disclosure enables further research and inventions, thereby kickstarting a virtuous cycle of socio-economic development.

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<sup>50</sup> Kaushik Sunder Rajan, "Property, Rights, and the Constitution of Contemporary Indian Biomedicine: Notes from the Gleevec Case" 78 *Social Research* 975 (2011).

<sup>51</sup> Hoen, Ellen 't. "A Victory for Global Public Health in the Indian Supreme Court." 34 *Journal of Public Health Policy* 370 (2013).

<sup>52</sup> Senan, Suja, et al. "Patenting of Microorganisms in India: a Point to Ponder." 100 *Current Science* 159 (2011).

Over the years, India has demonstrated its adherence to TRIPS and to non-protectionism and a national treatment regime by revamping its systems and by establishing prudent IP standards that apply equally to both domestic and foreign companies. Each of these standards remains in conformity with the TRIPS agreement and carefully calibrated to accommodate its national objectives within the scope of the flexibilities accorded under the TRIPS agreement.<sup>53</sup>

Some of the core discussions undertaken in this paper pertain to the following: -

### **5.1. Public Health v. Patent Protection**

During the course of this research, the most persistent issue has been the dichotomy that exists between public health and patent protection. I believe that there is no clear winner here in black and white. While public health is a major issue, there can be no affordable access without innovation. As earlier mentioned, national legislations must adopt the flexibilities provided in TRIPS to ensure access to affordable medication. In places where the flexibilities cannot be made use of, the government must step in to subsidise the rates of those medicines through financing so that the burden on the common man is limited. As for organisations like WIPO and WTO, opening up to a human rights perspective would benefit the legitimacy of these organisations and will aid the establishment of a coherent balance between the two.

### **5.2. Section 3(d) and Impact of the Novartis Judgement**

Section 3(d) is a unique provision incorporated in the Patents (Amendment) Act, 2005 which seeks to prevent ever-greening and lays down that no patent shall be granted for a new form or new use of a known substance unless 'enhanced efficacy' is proven. Even though the Supreme Court undertook a detailed analysis of this provision in the Novartis case, there are some issues that still persist. What constitutes 'enhanced efficacy' in general has not been settled and the means to establish it has not been defined. The question still persists as to whether bioequivalence or bioavailability is to be made use of. Since, in this case, 30 percent difference in bioavailability was rejected as 'insignificant,' there is also a question as to how much difference is sufficient.

### **5.3. Impact of the product-patent regime on Indian pharmaceutical industry**

'It was argued that the introduction of the product-patent regime in India would restrict the generic producer's scope of operation, particularly their ability to export to preferred

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<sup>53</sup> Srividhya Ragavan, Sean Flynn & Brook Baker, "Justifying India's Patent Position to the United States International Trade Commission and Office of the United States Trade Representative", 7 *IJIPPL* 1 (2015).

destinations.<sup>54</sup> In this scenario, it was expected that imports would get a fillip and exports would suffer, however what has happened is contrary to these expectations. India has established itself as the global pharmacy of the developing world by exporting generics at affordable pricing. ‘Indian pharmaceutical sector accounts for about 2.4 per cent of the global pharmaceutical industry in value terms and 10 per cent in volume terms.’<sup>55</sup> India accounts for 20 per cent of global exports in generics, thereby making it one of the largest exporters of generic drugs in the world. ‘India’s pharmaceutical exports stood at US\$ 17.27 billion in 2017-18. In 2018-19 these exports are expected to cross US\$ 19 billion.’<sup>56</sup>

‘India plays a major role in supply of Active Pharmaceutical Ingredients, and also drug intermediates, at global level. India exports bulk drugs to approximately over 190 countries/colonies, and to 62 of them, the export of Bulk Drugs/Intermediates is over US\$ 10 million per annum (for each country).’<sup>57</sup>

Thus, it can be concluded that the impact of the post-product patent regime on the Indian pharmaceutical industry has been a positive one.

#### 5.4. Concluding Remarks

‘The relationship between changing international regulations on intellectual property and access to medicines in the developing world has been the subject of an ever-growing body of literature.’<sup>58</sup> The issue of granting patents on pharmaceutical products has invited considerable debate and discussion, sparking human rights concerns pertaining to affordable access to medication. Generally speaking, ‘the entire edifice of intellectual property rights is built around a simple dilemma: without proprietary rights, insufficient innovation will occur, but with proprietary rights, innovations will be inadequately distributed.’<sup>59</sup> In this given situation, the key is to reconcile these differences and incorporate an intellectual property regime which balances public interests against rights of the patent-holder.

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<sup>54</sup> Reji K. Joseph, “Estimating India’s Trade in Drugs and Pharmaceuticals” 44 *EPW* 18 (2009).

<sup>55</sup> India Brand Equity Foundation, Report: *Pharmaceuticals* (2017), available at: <https://www.ibef.org/download/Pharmaceutical-March-2017.pdf> (Visited on June 19, 2019).

<sup>56</sup> *Supra* note 11.

<sup>57</sup> Government of India, Report: *Towards Sustainable and Lasting Growth* (Ministry of Commerce & Industry, 2017).

<sup>58</sup> Kenneth C. Shadlen, “The Political Economy of AIDS Treatment: Intellectual Property and the Transformation of Generic Supply” 51 *International Studies Quarterly* 559 (2007).

<sup>59</sup> Clarisa Long, “Patents and Cumulative Innovation” 2 *Wash. U. J. L. & Pol’y* 229 (2000).

## THIRD PARTY FUNDING IN ARBITRATION: INDIAN LEGAL PERSPECTIVE

Gokul Holani\*

*Third Party Funding is no longer alien to arbitral jurisprudence. With it having the potential of becoming a profitable investment market, there have been various attempts to aptly define third party funding agreements. A cross jurisdictional analysis has been attempted by analysing the position of funding agreements amongst various jurisdictions and arbitral institutions. Further, an attempt has been made to ascertain the validity of third-party funding litigation in India, the validity of doctrines of maintenance and champerty. An attempt to ascertain the validity of third-party funding agreements as per the conditions of a valid contract was laid down under Section 10 of the Indian Contract Act, 1872. A qualifier of reasonability put forth by the Indian judiciary while ruling on funding agreements has also been discussed. The author being convinced about the validity of these agreements under the Indian Contract Act, has further tried to analyse the position of the funders in arbitration proceedings. Acknowledging a lack of regulations in the country regarding such funding agreements, an attempt has also been made to pick out regulating mechanisms from various jurisdictions in order to identify and fix the apertures pertaining to the regime of funding agreements in India till an act is devised by the legislature.*

### I. INTRODUCTION:

Third Party Funding (TPF) is no longer a new concept to arbitration. The recent decade has witnessed an increase in TPF, such that it is potentially seen as a blooming investments market of the future. The International Council for Commercial Arbitration (ICCA) has observed that the global market for dispute funding for arbitration and litigation is estimated to exceed US\$10 billion and is “rapidly growing”.<sup>1</sup> With institutions such as the Singapore International Arbitration Centre (SIAC), London Court of International Arbitration (LCIA) and the Hong Kong International Arbitration Centre (HKIAC) welcoming TPF and starting to address challenges associated with it by conducting symposiums, deliberations and by ICCA setting up a commission on TPF in international arbitration, it is high time for India to settle the uncertainties associated with TPF in the country.

There have been frequent debates as to the requirement of TPF. However, the most important question which still remains unsettled is: *what is TPF?* There have been efforts towards answering this from scholars, international bodies like ICCA by setting up task forces, and states like Hong-

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<sup>1</sup> The International Council for Commercial Arbitration, Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, The ICCA Reports No. 4 p. 17 (April, 2018).

Kong setting up commissions and enacting laws such as those in Singapore. The principle contention has been with respect to the scope of the definition of the term- whether it should be wide i.e. non-exhaustive (*latusensu*) or narrowed down to a few sources i.e. an exhaustive list (*strictosensu*).

There have been different responses and regulatory mechanisms to address TPF in different jurisdictions like UK, USA, Singapore, Australia, etc., each unique in itself, thus making it relevant to determine the global response to TPF. Now, with India's efforts to promote international trade and a bid to turn New Delhi into a likely centre for International arbitration, it becomes relevant to determine the status of TPF in India and its possible legal hurdles. The Indian legal system has primarily two prevalent modes of resolution of civil disputes, and it also recognises the concept of indigent parties through its Code of Civil Procedure, 1908 to cater to the needs of litigation as well as realising Article 39A of the Constitution of India, 1950 i.e. "*Access to legal recourse*". The Supreme Court of India recently made an observation as to the validity of third-party litigation funding and its legality in a 'non-indigent persons' scenario and also as a commercial activity, but there is no such sister provision or judicial pronouncement that caters to the funding needs of arbitration.<sup>2</sup> Until this point, there have been no such reportable disputes in India as to TPF in arbitration, but with an increase in arbitration as a preferred dispute settlement mechanism and realising the costs associated with it, it becomes imperative to look forward to funding agreements. Therefore, an analysis of doctrines of maintenance and champerty have been conducted. Legality of funding agreements is not just related to whether they are violative of common law doctrines but whether they are fulfilling the requirements of the law of contracts in India, which confers on them not just legality but also enforceability. Thus, a brief analysis of comparing TPF agreements with the essentials of the Indian Contract Act, 1872 with respect to 'lawful considerations', 'objects' and 'wager agreements' is required.

Having determined the validity of TPF agreements under Indian Law, the position of the funders with respect to arbitration proceedings must be determined under the Indian Arbitration and Conciliation Act, 1996. Acknowledging a lack of regulations in the country with respect to the working of TPF agreements, a cross jurisdictional analysis as to determining the best alternative practices and apt regulatory mechanisms for India that can regulate TPF as well as cater to challenges pertaining to the Indian context has been attempted.

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<sup>2</sup> Bar Council of India v. A.K. Balaji & Ors., AIR 2018 SC 1382.

## II. THIRD PARTY FUNDING DEFINED:

There has been a general consensus amongst scholars that TPF is difficult to define.<sup>3</sup> TPF is a form of investment which provides for funders who are alien or have no connection to the claim of the plaintiff to invest in consideration of a share in future proceeds, if the claim succeeds.

The term “third-party funding” refers to an agreement by an entity that is not a party to the dispute to provide a party, an affiliate of that party or a law firm representing that party,

- a) funds or other material support in order to finance part or all the cost of the proceedings, either individually or as part of a specific range of cases, and
- b) such support or financing is either provided in exchange for remuneration or reimbursement that is wholly or partially dependent on the outcome of the dispute or provided through a grant or in return for a premium payment.<sup>4</sup>

The International Bar Association (“IBA”) defines the term as, “[T]he terms ‘third-party funder’ and ‘insurer’ refer to any person or entity that is contributing funds, or other material support, to the prosecution or defence of the case and that has a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.”<sup>5</sup> Scholars like Yves Derains defines TPF as, “a scheme where a party unconnected to a claim finances all or part of one of the parties’ arbitration costs, in most cases the claimant. The funder is then remunerated by an agreed percentage of the proceeds of the award, a success fee, or a combination of the two or through more sophisticated devices. In the case of an unfavourable award, the funder’s investment is lost.”<sup>6</sup> Lord Justice Jackson defines it as “the funding of claims by commercial bodies in return for a share of the proceeds.”<sup>7</sup> It involves a “third person” to the proceedings providing financial “assistance or support to a party to” the proceedings.<sup>8</sup>

A feature of TPF that distinguishes it from other forms of financing of Proceedings is that the Third-Party Funder will be compensated only from the Funded Party's net recoveries from the Proceedings. A Funded Party will not have to pay any amount to the Third-Party Funder if the Proceedings are unsuccessful.<sup>9</sup> Typically, when discussing TPF, one should keep in mind the

<sup>3</sup> Catherine A. Rogers, *Ethics in International Arbitration* 183 (Oxford University Press, 2014).

<sup>4</sup> The ICCA-Queen Mary Task Force Report on Third Party Funding.

<sup>5</sup> IBA Guidelines on Conflicts of Interest in International Arbitration, 2014, Explanatory Note to General Standard 6.

<sup>6</sup> Foreword by Yves Derains in Bernardo M. Cremades and Antonias Dimolitsa (eds.), *Third-party Funding in International Arbitration* (International Chamber of Commerce, Paris, 2013).

<sup>7</sup> Lord Justice Jackson, "Third Party Funding or Litigation Funding" Speech delivered at the Sixth Lecture in the Civil Litigation Costs Review Implementation Programme, The Royal Courts of Justice, Nov. 23, 2011.

<sup>8</sup> *Unrub v. Seeberger*, (2007) 10 HKCFAR 31, at ¶ 118 (*per* Ribeiro PJ).

<sup>9</sup> “Third Party Funding for Arbitration” HKLRC Consultation Paper (2016).

non-recourse financing by a third party of the costs of pursuing a claim in exchange for a portion of the recovered proceeds. In case of an unfavourable award, the third-party funder's investment will be lost.<sup>10</sup>

Only two jurisdictions, namely Singapore and Hong Kong, have attempted to define TPF by providing TPF with a statutory recognition. Singapore enacted the amended Civil Law Act and the Civil Law (TPF) Regulations 2017 (Regulations) thereby allowing TPF in Singapore. Section 5B(2)<sup>11</sup> attempts to define TPF as, “A contract under which a qualifying Third-Party Funder provides funds to any party for the purpose of funding all or part of the costs of that party in prescribed dispute resolution proceedings is not contrary to public policy or otherwise illegal by reason that it is a contract for maintenance or champerty.”

In India, TPF is at a nascent stage. There is no statute or case law defining TPF in India. It is neither expressly barred nor allowed by law. The Supreme Court recently in *Bar Council of India v. A.K.Balaji and ors*<sup>12</sup> allowed third parties (non-lawyers) to fund litigation with recipients of their profits based on the outcome.

### III. LEGALITY OF THIRD-PARTY FUNDING IN JURISDICTIONS ACROSS THE GLOBE:

Common law jurisdictions historically ruled against champerty and maintenance whereas in civil law jurisdictions, the existence of professional attorneys, ethics, rules and ownership of claim constraints have played a divisive role in providing limitations on TPF arrangements<sup>13</sup> thereby resulting in a diverse national law across globe.

An explicit law governing and regulating TPF has been only enacted by two states, Singapore and Hong-Kong, whereas most states like US, UK, Australia, Netherlands etc. have ruled TPF agreements to be valid and enforceable contracts but there are still no such rules governing them.

Civil Law Act and the Civil Law (TPF) Regulations, 2017 (“Regulations”) allow for the third-party regulations in Singapore. The scope of the 2017 regulations pertains to allowance of third-party dispute funding in Singapore, but allowing it strictly only in international arbitration in line

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<sup>10</sup> Derains (supra at note 6), Foreword, p. 5.

<sup>11</sup> Civil Law Act, Singapore (Chapter 43) (Original Enactment: Ordinance 8 of 1909).

<sup>12</sup> *Bar Council of India v. A.K.Balaji and Ors.*, AIR 2018 SC 1382.

<sup>13</sup> Lisa Bench Nieuwveld and Victoria Shannon Sahani, “Third Party Funding in International Arbitration” *Kluwer Law International B.V.* 43 (2016).

with efforts to make Singapore as the most preferred destination for arbitration. Otherwise, TPF agreements are void and not enforceable in Singapore on grounds of the common law doctrine of maintenance and champerty.<sup>14</sup>

Efforts of a similar nature were attempted in Hong Kong in 2015 where the Law Reform Commission (LRC) released a consultation paper deliberating on the viability of TPF in arbitration and that it should be permitted under Hong Kong law. The Commission has recommended that funding must be allowed to keep Hong Kong as a preferred source of arbitration.<sup>15</sup> The efforts of the Commission finally culminated with the passing of the Code of Practice for Third Party Funding of Arbitration in December 2018 and to be effectively applicable from February 2019.<sup>16</sup>

In England, the presence of the common law doctrines of maintenance and champerty have historically led to TPF being void and unenforceable under English law. This rule has been applied to domestic but not to overseas litigation,<sup>17</sup> and has further been extended to apply to arbitration as well<sup>18</sup>; but lately, the country has been relaxing the norms of certain forms of funding, and lawyers are being specifically permitted by the legislation to enter into conditional fee agreements. Furthermore, the courts have expressly legitimized the same, which allows litigators to take a part of the award claim as their fees and expenses.<sup>19</sup> TPF has been a self-regulated industry through the Association of Litigation Funders in England, and there has been an absence of any specific legislation pertaining to TPF. However, despite the absence of any specific regulation, TPF has been seen in a positive light by the judiciary.<sup>20</sup>

In New Zealand, the funded party needs to expressly disclose the contract of funding.<sup>21</sup> In other jurisdictions like Australia, the courts have expressed that TPF agreements are not contrary to the doctrines of maintenance and champerty, and that the potential for abuse of process posed by funding arrangements can be protected by judicial forums.<sup>22</sup> Courts have further expanded their view point as to hold that it is not an abuse of process for a funder to exercise a degree of

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<sup>14</sup>The Law Society of Singapore v. Kurubalan s/o Manickam Rengaraju, [2013] SGHC 135; Otech Pakistan Pvt Ltdv. Clough Engineering Ltd., [2007] 1 SLR 989.

<sup>15</sup>The Law Reform Commission of Hong Kong, Consultation Paper on Third Party Funding for Arbitration(October 2016).

<sup>16</sup> Code of Practice for Third Party Funding of Arbitration, Arbitration Ordinance (Cap. 609).

<sup>17</sup>*Mansell v. Robinson*, [2007] EWHC 101 (QB).

<sup>18</sup> *Bevan Ashford v. Geoff Yeandle*, [1998] 3 WLR 172.

<sup>19</sup> Courts and Legal Services Act 1990, § 58.

<sup>20</sup> *Arkin v. Borchard Lines Ltd.*, [2005] 1 WLR 3055 (CA).

<sup>21</sup> *Waterhouse v. Contractors Bonding Ltd*, [2013] NZSC 89.

<sup>22</sup> *Giles v. Thompson*, [1994] 1 AC 142, at p.153.

control which renders the plaintiff's interests subservient.<sup>23</sup> In other states such as Finland, Nigeria, Sweden and Brazil, third party costs can be irrecoverable because the claimant has not incurred those costs, and the funder does not have the standing to recover their own costs.

Other major arbitral institutions around the world such as LCIA, SCC, SIAC etc. are still in the deliberations process as to position of the TPF agreements while organising symposiums and discussions around the globe.

#### IV. THIRD PARTY FUNDING IN INDIA:

India follows a common law system with adversarial proceedings. The legal system is bifurcated into civil and criminal domains. There are two major dispute resolution mechanisms available as to-

- a. litigation in Indian courts and tribunals;
- b. arbitration governed by Arbitration and Conciliation Act, 1996.

The Civil Procedure Code, 1908 ("CPC") recognizes the concept of indigent parties.<sup>24</sup> Further, TPF has been also expressly recognized in certain states as Maharashtra, Gujarat, Madhya Pradesh and Uttar Pradesh through amendments in Order XXV Rule 1 of CPC which provides that courts have the power to secure costs for litigation by asking the financier to become a party and depositing the costs in court.

There are two doctrines of maintenance and champerty that govern the legality of funding agreements in common law, and since India is a common law country, this gains all the more relevance. Prohibitions on champerty and maintenance evolved in medieval England<sup>25</sup> and the rationale was to counter the growing practice of intermeddling by third parties, which was considered as endangering the inherent integrity of the judicial process, historically a private matter restricted to the judge and the two litigants.<sup>26</sup> In common law, maintenance means the procurement, by direct or indirect financial assistance, of another person to institute, carry on, or defend civil proceedings without lawful justification practice of powerful feudal lords and noblemen resorting to prosecution of frivolous claims against adversaries to intimidate them and

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<sup>23</sup> Campbells Cash and Carry Pty Ltd v. Fostif Pty Ltd, [2006] HCA 41.

<sup>24</sup> The Code of Civil Procedure Code, 1908, Order XXXIII.

<sup>25</sup> David S. Abrams and Daniel L. Chen, "A Market for Justice: A First Empirical Look at Third Party Litigation Funding" 15 *University of Pennsylvania Journal of Business Law* 1075 (2013).

<sup>26</sup> Max Radin, "Maintenance by Champerty" 24 *California Law Review* 48 (1935).

dissuade legal action.<sup>27</sup> Champerty has been often viewed as a form of maintenance where the funder also keeps a share in the proceeds.

In the colonial era, English doctrines were seen to be applicable to India as English customs were imported into the Indian legal system. The uncertainty over the applicability of these doctrines remained as in an unreported decision of Peel, J. in 1825, who held that the English prohibitions on champerty and maintenance did not apply to India<sup>28</sup>. However, the decision was not followed, and was soon rebutted in *Grose & Anr v. Amirtamayi Dasi*<sup>29</sup> and *Mulla*<sup>30</sup> where it was concluded that champerty and maintenance would be inapplicable to the Presidency Towns, and such agreements would be void on grounds of public policy.

In 1876, the position of law reversed as the Privy Council held that these doctrines inherited a special character and the British statutes relating to them were inapplicable to India. It was recognised that an agreement to supply funds to carry on an action as consideration for a share of the proceeds arising out of such action would not per se be opposed to public policy.<sup>31</sup> Subsequently, the courts maintained a uniform position to hold that the doctrines of champerty and maintenance are not applicable in India. Indian courts have made observations to the extent that funding agreements can be struck down only if the object is contrary to public policy<sup>32</sup> and that the funding agreement is a tool to provide access to justice.<sup>33</sup> Recently, a division bench of Justice A.K. Goel and Justice U.U. Lalit observed in *Bar Council of India v. A.K. Balaji & ors.*<sup>34</sup>

*“35. In India, funding of litigation by advocates is not explicitly prohibited, but a conjoint reading of Rule 18 (fomenting litigation), Rule 20 (contingency fees), Rule 21 (share or interest in an actionable claim) and Rule 22 (participating in bids in execution, etc.) would strongly suggest that advocates in India cannot fund litigation on behalf of their clients. There appears to be no restriction on third parties*

<sup>27</sup> Jonathan Rose, 'The Law of Maintenance: The Judicial Development of the Law' *British Legal History* Conference (Oxford, July 2007), available at:

[www.law.harvard.edu/programs/ames\\_foundation/BLHC07/MaintBLHC.pdf](http://www.law.harvard.edu/programs/ames_foundation/BLHC07/MaintBLHC.pdf) (Visited on June 18, 2019).

<sup>28</sup> M. P. Jain, 'The Law of Contract Before its Codification' *Journal of the Indian Law Institute*, Special Issue: Laws of Evidence and Contract 188 (1972), available at:

[http://14.139.60.114:8080/jspui/bitstream/123456789/16203/1/006\\_The%20Law%20of%20Contract%20before%20its%20Codification%20%28178-204%29.pdf](http://14.139.60.114:8080/jspui/bitstream/123456789/16203/1/006_The%20Law%20of%20Contract%20before%20its%20Codification%20%28178-204%29.pdf) (Visited on June 18, 2019).

<sup>29</sup> *Grose & Anr v. Amirtamayi Dasi*, (1869) 4 Beng LR 1.

<sup>30</sup> *Mulla Jaffarji Tyeb Ali Saib v. Yacali Kadar Bi & Ors*, (1871-1874) 7 Mad HCR 128.

<sup>31</sup> *Ram Coomar Condo v. Chandra Canto Mukerjee*, (1876-77) 4 IA 23, 1876 SCC OnLine PC 19.

<sup>32</sup> *Sri Raja Vatsavaya Venkata Subhadeayamma Jagapati Bahadur Garu v. Sri Poosapati Venkatapati Raju Garu & Ors.*, AIR 1924 PC 162, (1924) LW 298, 1924 SCC OnLine PC 22; *Mukesh Mahadeo Mahadik v. Shaila Jayant Rane & Ors.*, 2015 SCC OnLine Bom 2852; *Shankarappa Kotrabasappa Harpanhalli v. Khatumbi Kom Jamaluddinsab Nashipudi & Ors.*, AIR 1932 Bom 478; *Rattan Chand Hira Chand v. Askar Nawaz Jung (Dead) by LRs & Ors.*, (1991) 3 SCC 67.

<sup>33</sup> *Kishen Lal Bhoomik v. Pearve Soondree & Ors.*, 1852 Sudder Dewanny Adawlut (SDA) 394-397.

<sup>34</sup> *Bar Council of India v. A.K. Balaji & Ors.*, AIR 2018 SC 1382.

*(non-lawyers) funding the litigation and getting repaid after the outcome of the litigation. In U.S.A., lawyers are permitted to fund the entire litigation and take their fee as a percentage of the proceeds if they win the case. Third Party Litigation Funding/Legal Financing agreements are not prohibited. In U.K., Section 58B of the Courts and Legal Services Act, 1990 permits litigation funding agreements between legal service providers and litigants or clients, and also permits third party Litigation Funding or Legal Financing agreements, whereby the third party can get a share of the damages or “winnings”.*

36. *In India, partnerships with non-lawyers for conducting legal practice is not permitted. In U.K., Section 66 of the Courts and Legal Services Act, 1990 expressly permits solicitors and barristers to enter into partnerships with non-solicitors and non-barristers.”*

While the CPC expressly recognizes the concept of litigation financier, the judiciary has held that the doctrines of maintenance and champerty as not violative of public policy of the country. Section 19 of the Arbitration and Conciliation Act, 1996 expressly carves out arbitration from the CPC as it states, “*the arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908*”. Further, there is a lack of sister provision in the Arbitration and Conciliation Act, 1996 catering to TPF.

## V. LEGALITY OF THE AGREEMENTS IN ACCORDANCE WITH THE INDIAN CONTRACT ACT, 1872:

Section 10 of the Indian Contract Act, 1872 enunciates a valid contract as “*all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are hereby not declared as void.*” Therefore, the act lists down five conditions for a lawful contract i.e. a free consent, competency of the parties, lawful consideration, lawful object and hereby not declared as void.

### ***Lawful Consideration:***

As Pollock states, “Consideration is the price for which the promise of the other is brought, and the promise thus given for value is enforceable.”<sup>35</sup> Lush, J. in *Curie v. Misa*<sup>36</sup> states, “A valuable consideration in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by the other.” Section 2(d) defines consideration as “*when, at the desire of the promisor,*

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<sup>35</sup> Sir Frederick Pollock, *Pollock on Contracts* 133 (Stevens & Sons, London, 13<sup>th</sup> edn., 1950).

<sup>36</sup>*Curie v. Misa*, (1875) 10 Ex 153, 162.

*the promisee or any other person has done or abstained from doing or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.”*

If there have been successful claims, there is a fulfilment of the condition of payment of consideration by both the parties, but what if the claims are unsuccessful? For example, consider that the funder has already performed his part of consideration and the claim is unsuccessful. According to the concept of the TPF, the funded party owes no liability as to the refund of the consideration. In that case, will it be a valid contract?

A TPF contract consists of a transfer of money or a promise to pay money in future to cover legal and all the other antecedent costs of the claim along with a liability to pay damages in case of the failure of the claim in lieu of a share in proceeds of the claim if it is successful. It provides the party an interest in the arbitration proceedings along with conditional profits and benefits in cases of a claim being successful, and forbearance of liability in cases of failure. A coverage needs to be provided for the insured's own legal fees and costs and/or the insured's potential liability for the opponent's legal fees and costs if the claim is unsuccessful.<sup>37</sup> Litigation/arbitration insurance is taken out after a legal dispute has arisen and covers the risk that the insured party will be unsuccessful in the litigation/arbitration.<sup>38</sup> They are also funded by equity based investments, corporate finance, loans or a hybrid of them. Therefore, a TPF agreement is not hit by a requirement of a valid consideration requirement as there is the presence of a valid quid-pro-quo between the parties as to the payment or a promise to pay in the future in lieu of benefits in the final claim amounts.

### ***Competency and Free Consent:***

Section 11 of the act enunciates as to who are competent to contract as, *“Every person is competent to contract who is of the age of majority according to law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.”* This general condition applies to a fact specific scenario and will not be applicable to third-party contracts as a concept. Similar is the concept of free consent to the contract which is fact-specific and thus does not affect the third-party contracts as a concept.

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<sup>37</sup>Bristows, “Guide to Litigation Costs Funding and Insurance” *Zorin available at:* [http://www.zorinlegal.com/fileadmin/user\\_upload/docs/Litigation\\_funding\\_insurance\\_guide.pdf](http://www.zorinlegal.com/fileadmin/user_upload/docs/Litigation_funding_insurance_guide.pdf) (Visited on June 18, 2019).

<sup>38</sup> The International Council for Commercial Arbitration, Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, The ICCA Reports No. 4 at p. 34 (April, 2018).

***Lawful Object:***

Section 23 of the act stipulates that the consideration or object of an agreement is lawful unless the court regards it as immoral or opposed to public policy. Public policy, being considered as a vague term, a contract which has the object of interference with the administration of justice has been considered as opposed to public policy. The doctrines of maintenance and champerty have been viewed as a public policy objective by various common law jurisdictions including India. Agreements by which a stranger advances money for maintenance of litigation with a view to obtaining an unconscionable gain are called champertous agreements.<sup>39</sup>

The courts in India have observed that there is no specific prohibition on champertous agreements as discussed earlier, but there have been few instances of certain qualifiers put by the courts on funding agreements. In *Harilal Nathalal Talati v. Bhailal Pranlal Shah*,<sup>40</sup> the agreement was held to be extortionate and unconscionable and opposed to public policy for a reason that an agreement which provides the funder with 3/4<sup>th</sup> of the share is not reasonable or fair. Similar agreements with share agreed as to 3/6<sup>th</sup><sup>41</sup>, 1/4<sup>th</sup><sup>42</sup> and 1/8<sup>th</sup><sup>43</sup> have been upheld as valid agreements. Whereas in one of the cases, an agreement of 1/6<sup>th</sup> of the property was also held as invalid because of the value of that share<sup>44</sup> whereas an agreement to pay 40 percent of the proceeds was also held to be champertous.<sup>45</sup>

Thus, a qualifier of “reasonability” and “genuine commercial interest” in the quantum of proceeds that has been put so as to check the practices of unfair contractual terms and exploitation of the party in a weak position. Now, what is reasonable has been left to the wisdom of the courts and is purely subjective in nature. Courts may undertake considerations such as the share percentage, net value of the share, and position of the parties while bargaining the shares into consideration when determining the nature of the contracts as champertous or not. Though the courts have expressly held the non-applicability of these doctrines in the Indian legal system, they have also not been hesitant to apply these doctrines in fact-specific circumstances.

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<sup>39</sup> *Khaja Moinuddin Khan v. S.P. Ranga Rao*, AIR 2000 AP 344 at p.346.

<sup>40</sup> *Harilal Nathalal Talati v. Bhailal Pranlal Shah*, AIR 1940 Bom 143; *Nuthaki Venkataswami v. Katta Nagi Reddy*, AIR 1962 AP 457; *Babu Ram v. Ram Charan Lal*, AIR 1934 All 1023.

<sup>41</sup> *Vatsavaya Venkata Subhadeayamma Jagapati Bahadur Guru v. Poosapati Venkatapati Raju Guru*, AIR 1924 PC 162.

<sup>42</sup> *Valluri Ramanamma v. Marina Viranna*, (1931) 33 MLW 757.

<sup>43</sup> *Rajah Mokham Singh v. Rajah Rup Singh*, (1892-93) 20 IA 127.

<sup>44</sup> *Ratanchand Hirachand v. Askar Nawaz Jung*, AIR 1976 AP 112.

<sup>45</sup> *Khaja Moinuddin Khan v. S.P. Ranga Rao*, AIR 2000 AP 344.

There have been various funding sources such as individual direct funding, insurance, loans, corporate financing, equity-based and inter-corporate funding, attorneys as funders etc.<sup>46</sup> Applying the golden English constitutional principle of “*Everything which is not forbidden is allowed*”, every form of funding is allowed in the Indian legal scenario except attorneys as funders.

As provided in Bar Council of India Code of Conduct and expressly stated by a division bench of Justices AK Goel and UU Lalit in *Bar Council of India v. A.K. Balaji & ors.*<sup>47</sup>,

*“35. In India, funding of litigation by advocates is not explicitly prohibited, but a conjoint reading of Rule 18 (fomenting litigation), Rule 20 (contingency fees), Rule 21 (share or interest in an actionable claim) and Rule 22 (participating in bids in execution, etc.) would strongly suggest that advocates in India cannot fund litigation on behalf of their clients.”*

Therefore, a funding agreement between advocates and clients has been expressly barred in India. Further, a system of contingent fee, i.e. fee to the advocate depending upon the outcome of the case has been held as against the public policy. It is a professional misconduct for an advocate to stipulate for or agree with his client to accept as his fee or remuneration a share of the property sued or other matter in litigation upon the successful issue thereof.<sup>48</sup> In *Re: 'G', A Senior Advocate of The Supreme Court*,<sup>49</sup> where a senior advocate was suspended by the bar council for misconduct under Section 11(1) of Bar Councils Act for entering into an agreement of contingent fee with the client, his suspension was upheld by the Supreme Court and the agreement was held to be illegal and void.

### ***Hereby not declared as void [Wager Contracts]***

Another contentious point could be that whether the funding agreement, being subject to a contingent future situation, may be termed as an agreement by wager and be void ab-initio. Section 30 of the Indian Contract Act stipulates as, “*Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.*” Now, there can be one potential argument against TPF, which is that since the funding agreements are based on the success of a future uncertain event or feed on uncertainty, they are wager contracts and thereby void ab initio.

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<sup>46</sup> The International Council for Commercial Arbitration, Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, The ICCA Reports No. 4 p. 35 (April, 2018).

<sup>47</sup> *Bar Council of India v. A.K. Balaji & ors.*, AIR 2018 SC 1382.

<sup>48</sup> *Kathu Jairam Gujar v. Vishvanath Ganesh Javadekar*, AIR 1925 Bom 470.

<sup>49</sup> *Re: 'G', A Senior Advocate of The Supreme Court*, AIR 1954 SC 557.

Definition of wager as given in *Carlill v. Carboloc Smoke Ball Co.*<sup>50</sup> as “a wagering contract is one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of such event, one shall win from the other, and that other shall pay or hand over to him, a sum or money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake which he will so win or lose, there being no other real consideration for the making of such contract by either of the parties.” Thus, mutual chances of gain or loss has been an essential to a contract being a wager.<sup>51</sup>

Applying the principles of wager into a TPF agreement:

1. It is based on a future uncertain event i.e. subject to an outcome of an arbitration claim.
2. The two parties to the contract do not hold an opposite view about the future uncertain event as both the parties to the agreement are in favour of a single outcome, i.e. a positive outcome of the claim which could serve their individual respective purposes, which is a funder getting return on his investment and the funded party being provided with his claimed right.
3. Both the parties would be either at the winning or the losing end and therefore an essential requirement that either side should either win or lose respectively is not fulfilled.

Further, an agreement is a wager agreement only if neither party has any interest in the happening of the event other than the sum that he will lose according to the contract. Whereas, in funding agreements, one of the parties has a pre-existing interest in the arbitration proceedings as a claimant or the respondent apart from the costs under the funding agreement.

However, TPF agreements can find a place under the Indian Contracts Act, 1872 under the ambit of contingent contracts. Section 31 of the act defines contingent contract as, “a ‘contingent contract’ is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.” Since, the nature of TPF is that the payment of the proceeds to the funder is based on the event of success of the claims, it can be termed as contingent contract and hold validity under Indian law.

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<sup>50</sup> *Carlill v. Carboloc Smoke Ball Co.*, (1893) 1 QB 256.

<sup>51</sup> *Sasson v. Tokersey*, ILR (1913) 28 Bom 616.

## VI. POSITION OF THE THIRD-PARTY FUNDER IN ARBITRATION PROCEEDINGS:

Having already established that the funding agreements are not in contravention of the Indian laws, another challenge exists as to the position of the funders with respect to the arbitration proceedings. In the Arbitration and Conciliation Act, 1996 there lies no express provision which vests the power to the tribunal or the courts to bind any third party or signatory to arbitration. Further, the act does not contain any provision wherein a third party can challenge the award. But the legislature made the amendment to Section 2(1)(h) of the Act which earlier defined a 'party' to mean 'a party to an arbitration agreement'; but with the amendment, the term 'party' in various sections of an arbitration agreement and in reference of the court to arbitration, finality of award, etc. has been made wider, and the words 'any person claiming through or under him' have been added, showing the legislative intent to include, to a certain extent, third parties to the initiation, proceedings and award of the arbitration. As held in *Chloro Controls*,<sup>52</sup> "It does occasionally happen that the claim is made against or by someone who is not originally named as a party. These may create some difficult situations, but certainly, they are not absolute obstructions to law/the arbitration agreement. Arbitration, thus, could be possible between a signatory to an arbitration agreement and a third party."

There is no dispute about the proposition of law that a third party cannot appear before the arbitral tribunal and seek any interim measures under section 17 of the Arbitration & Conciliation Act, 1996 or seek any modification or variation of the interim measures if granted by the arbitral tribunal against such third party even though he may be aggrieved by such interim measures granted by the arbitral tribunal.<sup>53</sup> A person having vital interest in the subject matter of arbitration agreement cannot be asked to watch proceedings from the fence and leave the arena for the parties to the arbitration agreement to cut swords, when the victim of the outcome of the dispute is non else but the person pushed to the fence.<sup>54</sup>

Thus, the possibility of a third party being involved directly in an arbitration proceeding is not farfetched in view of the recent developments of the arbitral jurisprudence in India. But with a possibility of funders being involved in the proceedings, a condition of mandatory disclosure of the funding agreements before the arbitrators must be introduced so as to facilitate the entire process.

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<sup>52</sup> *Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc. and Ors.*, (2013) 1 SCC 641 at para 65.

<sup>53</sup> *Prabhat Steel Traders Pvt. Ltd. and Ors. v. Excel Metal Processors Pvt. Ltd. and Ors.*, 2019 SCC OnLine Bom 2347 at para 41.

<sup>54</sup> *Mohammad Ishaq Bhat v. Tariq Ahmad Sofi & Anr.*, (2010) 3 Arb.LR 107.

## VII. REQUIREMENT OF THIRD-PARTY FUNDING IN INDIA:

A bid is being made to turn New Delhi into a centre for International Arbitration by the announcement of the New Delhi International Arbitration Centre Bill, 2018 and its passing in Lok Sabha and comparing it to the likes of Singapore, London, Stockholm and Hongkong— but settlement of disputes is still a lengthy process. The Supreme Court recently in *Bar Council of India v. A.K. Balaji & ors.*<sup>55</sup> allowed TPF in litigation in India. This leads us to a possibility of TPF in arbitration in India.

Though arbitral institutions in the country such as Delhi High Court Arbitration Centre, Mumbai Centre for International Arbitration (“MCIA”), Nani Palkhivala Arbitration Centre and Indian Institute of Arbitration and Mediation (“IIAM”) have taken an initiative to make arbitration more accessible and cost-friendly, arbitration is still perceived as an elite dispute settlement process. The filing costs and expenses still override litigation, which has subdued its growth in the country. The basic costs or administration fees for filing an arbitration is still as high as Rs. 30,000 in Delhi High Court Arbitration Centre and IIAM to Rs. 40,000 in MCIA, excluding arbitrator’s fees and other expenses (such as costs of stay, travel etc.) compared to court fees for filing a fresh civil suit range from Rs. 50 - 15000<sup>56</sup> with no additional expenses borne unlike arbitration. Rise of the international arbitration has led to attendant costs and thus users are demanding ways to finance their matters.<sup>57</sup>

The International Council for Commercial Arbitration (“ICCA”) has noted that some reports suggest that the global market for dispute funding for arbitration and litigation is estimated to exceed US\$10 billion and is “rapidly growing”<sup>58</sup>. Thus, to keep up with competitive scenarios around the globe and the potential for a profitable economic market, an effort to make arbitration a cost-friendly process in India and bring recognition to India as an arbitration friendly jurisdiction, TPF agreements pertaining to arbitration should be given an expressive recognition under Indian law, and statutory rules should be formulated determining thresholds as to the qualifiers of “reasonability” and “genuine commercial interest” in the quantum of proceeds with respect to TPF.

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<sup>55</sup> *Bar Council of India v. A.K. Balaji & Ors.*, AIR 2018 SC 1382.

<sup>56</sup> Court Fee Required to be Affixed in Fresh Cases Filed Before the Establishment of District and Sessions Judge, available at:

[https://districts.ecourts.gov.in/sites/default/files/Court%20Fee%20for%20Filing%20Fresh%20Case\\_2\\_0.pdf](https://districts.ecourts.gov.in/sites/default/files/Court%20Fee%20for%20Filing%20Fresh%20Case_2_0.pdf) (Visited on June 18, 2019).

<sup>57</sup> J. Von Goeler, “Third Party Funding in International Arbitration and its Impact on Procedure, International Arbitration Law Library” 35 *Kluwer Law International Volume* 1-2 (2016).

<sup>58</sup> The International Council for Commercial Arbitration, Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, The ICCA Reports No. 4 p. 17 (April, 2018).

### VIII. PROPOSED REGULATORY FRAMEWORK:

TPF jurisprudence is still at a developing stage throughout the globe. There has been some development in the jurisprudence due to non-applicability of the doctrines of maintenance and champerty in Civil law countries, and Germany is an excellent example of a booming TPF market.<sup>59</sup>

There have been distinct examples of TPF regulatory mechanisms across the globe. In Netherlands, there is no bar on accessing TPF; however, no legislation has been enacted to govern this practice. In the absence of special legal provisions governing these transactions, funding agreements are governed by principles of Dutch contract law and lawyers are expected to follow ordinary professional rules while advising on matters of TPF.<sup>60</sup>

In England and Wales, TPF is subject to voluntary regulation through the Association of Litigation Funders of England and Wales (“ALF”) and has been a classic model of voluntary regulation as a mechanism being widely recognised by government to provide a viable regulatory framework as an alternative to statutory regulation.<sup>61</sup>

In Australia, there is a minimum regulatory mechanism as to third-party funders that should ensure that conflict of interest has been managed by them adequately.<sup>62</sup> In Germany, a funder does not provide legal advice to the client.<sup>63</sup> Apart from such restriction relating to attorneys, TPF in Germany has been an unregulated industry. Singapore prohibits third-party dispute funding domestically but has strategically allowed it in International Arbitration via Civil Law Act and the Civil Law (TPF) Regulations 2017 (Regulations) which allows for the third-party regulations in Singapore. In Hongkong, the Law Reform Commission (LRC) released in 2015 a consultation paper on TPF where it suggested a set of non-binding regulations to be put forth as a testing mechanism for 3-5 years and subsequently a regulatory law covering the inadequacies of the regulations. The commission recommended:<sup>64</sup>

*A. We recommend that the Arbitration Ordinance should be amended to provide that TPF for arbitration taking place in Hong Kong is permitted under Hong Kong law.*

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<sup>59</sup> Cento Veljanovski, “Third Party Litigation Funding in Europe” 8 *Journal of Law, Economics & Policy* 405 (2012).

<sup>60</sup> Maarten Drop, Jeroen Stal and Niek Peters, ‘Netherlands’ in Steven Friel and Jonathan Barnes (eds.), *Woodsford Litigation Funding, Litigation Funding 2018 - Getting the Deal Through* 48 (Law Business Research Ltd., London, 2017).

<sup>61</sup> Association of Litigation Funders, available at: <http://associationoflitigationfunders.com/about-us/> (Visited on June 18, 2019).

<sup>62</sup> Regulation 7.6.01AB of the Corporations Regulations, 2001 (Cth).

<sup>63</sup> Section 49b (2) of the Federal Lawyer's Act (Bundesrechtsanwaltsordnung, BGBl. I,565,1959).

<sup>64</sup> The Government of the Hong Kong Special Administrative Region of the People's Republic of China, available at: [https://www.hkreform.gov.hk/en/docs/tpf\\_se.pdf](https://www.hkreform.gov.hk/en/docs/tpf_se.pdf) (Visited on June 18, 2019).

- B. *We recommend that clear ethical and financial standards for Third-Party Funders providing TPF to parties to arbitrations taking place in Hong Kong should be developed.*

Having analysed regulatory mechanisms pertaining to TPF of various jurisdictions, there are two essential models governing the TPF globally – self-regulated/unregulated and regulation through statutes.

We propose that India, while determining the type of model it wants to pursue, can take the example of Netherlands to make the entire process self-regulated in the transition process before the Legislature and Bar Council can be called upon to provide a set of ethical standards which need to be adhered to by the advocates in cases of presence of funding agreements like mandatory disclosure of the funding agreements such as Law Society of Singapore's Guidance Note 10.1.1 on TPF read with Rule 49A of the Legal Profession (Professional Conduct) Rules 2015. Another way can be the creation of a voluntary regulatory entity like ALF. It can act as a master directory of all the third-party funders in the country and can also be useful to run a confidentiality check.

India being at nascent stages of TPF, with no reportable cases existing in its jurisprudence regarding the subject, the country is at the most prime stage to adapt to regulatory mechanisms and kickstart funding operations a step ahead. The Hong Kong model, i.e. a set of non-binding regulations, should be released by the government to provide a sense of regulation in the market and subsequently a binding act can be enacted. However, there are a few challenges as to funding agreements in Indian such as the conflict of interests, control of the arbitration by third party funder's, disclosure requirements and regulating the unscrupulous funders.

NITI Aayog deliberated as to insufficiency of a pool of professional arbitrators who are able, conflict free and above all, non-partisan.<sup>65</sup> Conflict of interests can be curbed through setting up guidelines as to mandatory disclosure of funding agreements, by streamlining the process of appointment of arbitrators under Section 11 of the Arbitration and Conciliation Act, and reducing the challenges to the validity of the arbitral award. Further, there can be a dedicated bar set up like "Insolvency Professionals" and "Insolvency Professional Agencies" who are enrolled with the Board to calculate conflicts in a speedy manner.

Further reference can be taken from IBA which laid down the Guidelines on Conflicts of Interest in 2014 where general standard 7A which required that a party to receive a TPF should

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<sup>65</sup> Bibek Debroy and Suparna Jain, *Strengthening Arbitration and its Enforcement in India – Resolve in India* (NITI Aayog), available at: [www.niti.gov.in/writereaddata/files/document\\_publication/Arbitration.pdf](http://www.niti.gov.in/writereaddata/files/document_publication/Arbitration.pdf) (Visited on June 18, 2019).

disclose it to the tribunal at the very first opportunity. General Standard 7(a) lays down that a party shall inform the arbitrator, the tribunal and all other parties (as well as any administering or appointing authority) of any relevant direct or indirect relationship between the arbitrator and “the party (or another company of the same group of companies or an individual having a controlling influence on the party in the arbitration), or between the arbitrator and any person or entity with a direct economic interest in the award to be rendered in the arbitration” (i.e. a third-party funder or insurer).<sup>66</sup>

ICC in 2016 issued a guidance note for the disclosure of conflicts by arbitrators which “aims at ensuring that arbitrators are forthcoming and transparent in their disclosure of potential conflicts”.<sup>67</sup> It states that, “*in addressing possible objections to confirmation or challenges, the Court will consider... Relationships between arbitrators, as well as relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award, should also be considered in the circumstances of each case.*”<sup>68</sup> Various investment tribunals also have supported the view of disclosing the TPF agreements to the tribunals at the earliest opportunity and recognized this ground as to challenge the constitution of the arbitration panel.<sup>69</sup>

The 2015 amendment to the Act has been a positive step for third parties to arbitration proceedings in India. A further amendment as to the scope of involvement of the funders in arbitration proceedings can be set out as in Germany where funders cannot provide with legal advice. The focus of the Indian Judiciary, despite ruling out maintenance and champerty doctrines, has been to put a qualifier of “reasonability” in the percentage or part of proceeds to be with the funder to keep a check on the practices of unfair contractual terms and exploitation of the party in a weak position. This leads to uncertainty of the funding agreements. There should be a fixation of the total percentage of the proceeds apart from initial investment that a funder can appropriate, which should be set out so as to end the realm of uncertainty.

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<sup>66</sup> General Standard 7(a), IBA Guidelines on Conflicts of Interest in International Arbitration, 2014.

<sup>67</sup> [ICC Court adopts Guidance Note on conflict disclosures by arbitrators, available at: https://iccwbo.org/media-wall/news-speeches/icc-court-adopts-guidance-note-on-conflict-disclosures-by-arbitrators/](https://iccwbo.org/media-wall/news-speeches/icc-court-adopts-guidance-note-on-conflict-disclosures-by-arbitrators/) (Visited on June 18, 2019).

<sup>68</sup> Regulation 28, Chapter III, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, 2019.

<sup>69</sup> Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia, UNCITRAL, PCA Case No. 2011-17, Procedural Order No. 13 of February 21, 2013; Muhammet Çap & Sehil İnşaat Endüstri ve Ticaret Ltd. Sti. v. Turkmenistan, ICSID Case No. ARB/12/6, Procedural Order No. 3 of June 12, 2015; South American Silver v. Bolivia, PCA Case No. 2013-15, Procedural Order No. 10 of January 11, 2016.

## IX. CONCLUSION:

TPF has recently started taking big steps across the globe, though still at the nascent stage as countries struggle to their its own models to regulate it and define the ambit of the funding agreements within their policy objectives. India stands at an advantageous position since countries like Singapore and Hong Kong, with similar legal systems to ours, have been enacting TPF regulation and have thus been providing us with already existing models to analyse, compare and come up with regulations. Historically, India has always rejected doctrines of champerty and maintenance and there is no statute or case law defining TPF in India. It is neither expressly barred nor allowed by law. With this, we hold an opportunity, to set the ball rolling by allowing funding agreements with no inhibitions as per our legal system since funding agreements also comply with the conditions of a valid contract in India with a certain subjective qualifier as to reasonability in share to be apportioned. With an estimated 31 million cases pending in various courts and India being ranked 131 out of 189 countries on how easy it is for private companies to follow regulations and observation been made as to much as 1,420 days and 39.6% of the claim value for dispute resolution, arbitration has been considered as the key going forward. In a new era of dispute mechanisms where new concepts need to replace old ones, TPF should be preferred over maintenance and champerty. As India makes its bid to become an arbitration hub, the time is ripe for the country to adopt TPF.

## IMPOSITION OF ADDITIONAL DUTIES AS A GROUND FOR COMMERCIAL HARDSHIP UNDER ARTICLE 79 OF THE CISG

*Analysis of the Interplay Between Public International Trade Law and Private International Trade Law*

Rishabha Meena\*

*There has been a tremendous increase in international sales transactions due to the emergence of globalization. The United Nations Convention on Contracts for International Sale of Goods [CISG], a domain of private international trade law, is one of the laws regulating international sales. The cost, duty, shipping charges, etc. involved in the transactions is determined by the international commercial terms in the contract. The author delves into the issue of commercial hardship under Article 79 of the CISG for the breach of contract due to the imposition of the additional duty. The author specifically deals with the imposition of additional duties such as anti-dumping duty, safeguards duty and countervailing duty by the country, which is in the domain of public international trade law. It is the interplay between public international trade law and private international trade law in the above context that has become the source of dispute. The author explores the various aspects of this issue such as history of the commercial law, international commercial terms, WTO agreements pertaining to trade remedies, application of Article 79 of CISG on such situations, et cetera. Finally, the author concludes the paper by identifying the way ahead.*

### Introduction

The earliest form of international commercial law [‘ICL’] is *lex mercatoria*, which contains a special set of legal norms which are separate from common law.<sup>1</sup> It developed into ICL in three stages, *first*, old *lex mercatoria*, *second*, its integration into municipal legal system, and *third*, emergence of new *lex mercatoria*.<sup>2</sup> During initial periods, it was only based on customs. It was an ‘anational’ system of principles and rules accepted in international commerce.<sup>3</sup> The dispute arising out of *lex mercatoria* was settled through *lex loci contractus*, *lex loci solutionis* or *lex fori*. Consequently, it resulted in non-uniformity, uncertainty and imposition of additional financial

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<sup>1</sup> Frederick Pollock & Frederick William Maitland, *The History of English Law before the time of Edward I*, 467 (Cambridge University Press, Great Britain, 1968).

<sup>2</sup> Harold J. Berman & Colin Koffman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 19 *Harvard International Law Journal* 221 (1978).

<sup>3</sup> P.M. North & J.J. Fawcett, *Cheshire and North’s Private International Law* (Butterworths, London, 1987).

burden on the party.<sup>4</sup> The first step towards its development in international context was on the suggestion of Ernst Rebel to the Governing Council of UNIDROIT regarding the unification of international sales law, which led to the formation of Uniform Law on the International Sale of Goods, and the Uniform Law on the Formation of Contracts for the International Sale of Goods.<sup>5</sup> Later, UNCITRAL was established and entrusted with the task of uniformity. UNCITRAL's draft of 1978 led to the formation of the CISG.

The CISG is divided into four parts. Part I deals with the sphere of its application. Part II deals with the essential requisite for the formation of the sales contract. Part III contains the obligations of the buyer and the seller, and remedies for breach of the contract. Part IV is related to the reservations to the CISG. However, the CISG does not govern the validity of the contract involving the international sale of goods.<sup>6</sup>

The laws regulating contracts in civil law countries are different from common law countries.<sup>7</sup> The former is based on case laws which subsequently include legislation, whereas in the case of latter, it is the other way around.<sup>8</sup> For instance, in the civil law countries, the offer is irrevocable during the time limit stated in the contract. If the contract is silent on time limit for its acceptance, the offer is irrevocable for a reasonable period of time.<sup>9</sup> Whereas, in common law countries, the offer can be revoked until it has been accepted.<sup>10</sup>

The complexities in the contract are less when both the parties are from same countries but complexities increase when the parties to the contract are from different countries with different legal traditions. The CISG is an attempt to minimise such complexities in a contract involving the parties from different countries by including provisions which aim to settle the contract law between civil law country and common law country.<sup>11</sup> For instance, in case of a revocation under Article 16(1) of the CISG, an offeror can revoke the offer if his communication of revocation

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<sup>4</sup>John Felemegas, An International Approach to the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law, *available at*: <https://www.cisg.law.pace.edu/cisg/biblio/felemegas14.html> (last visited on June 13, 2019).

<sup>5</sup>Jarrod Wiener, The "Transnational" Political Economy:- A Framework for Analysis, *available at*: <https://www.jus.uio.no/lm/the.transnational.political.economy.a.framework.for.analysis.jarrod.wiener.ukc/doc.html> (last visited on June 13, 2019).

<sup>6</sup>The United Nations Convention on Contracts for International Sale of Goods (CISG), art. 4(a).

<sup>7</sup>Civil Law countries includes Netherland, Switzerland, Turkey, etc; and Common Law countries includes Canada, Cyprus, India, New Zealand, Northern Ireland, etc.

<sup>8</sup>Joesph Dainow, The Civil Law and the Common Law, Some Points of Comparison, 15(3) *The American Journal of Comparative Law* 427 (1966 - 1967).

<sup>9</sup>Allison E. Butler, A Practical Guide to the CISG: Negotiations through Litigation 11 (Aspen Publishers, New York, 2007).

<sup>10</sup>Ibid.

<sup>11</sup>Belkis Vural, Formation of Contract according to the CISG, 1 *Ankara Bar Review* 135 (2013).

reaches the offeree before the acceptance is dispatched by the offeree.<sup>12</sup> Under Article 16(2), the offer cannot be revoked if it contains the fixed time for acceptance or if the offeree has acted in reliance on the offer.<sup>13</sup> Thus, this is a compromise between the common law and the civil law.

The CISG is a part of private international trade law, regulating the contract between the parties. But such contract can never be performed, either in full or in partial, if there is an impediment due to public international trade law regulating border measures such as Marrakesh Agreement establishing World Trade Organization [WTO] and its covered Agreements dealing with Trade in Goods [WTO Laws]. WTO Law regulates two kinds of barriers, *tariff* and *non – tariff* barriers. Tariff barriers are those which are related to the Schedule of Concession [‘SoC’] governed by Article II of the General Agreement on Tariff and trade, 1994.<sup>14</sup> Non – tariff barriers include quantitative restrictions, technical regulations, customs valuation *et cetera*. A WTO Member is allowed to increase its duty to an extent which is within its bound rate in the Schedule of Concessions. The bound rate is the maximum amount of duty recorded in a Member’s SoC. But there are certain situations when a serious injury is caused to the domestic market of the importing country due to the subsidy (countervailing duty),<sup>15</sup> dumping (anti-dumping duty)<sup>16</sup> and is severely threatened due to increase in imports (safeguards measure)<sup>17</sup>. In such situations, a WTO Member can impose duty in addition to its SoC. For instance, United States has imposed safeguard duty,<sup>18</sup> and also removed generalized system of preferences given to India, which imposed additional burden on the exporters including consequences of breach of contract between the exporter and importer, if any, due to above circumstances. When a country imposes such sudden duties, the price of the goods to be exported suddenly increases after the conclusion of contract between the importer (buyer) and the exporter (seller).

The burden of such additional cost is determined by the parties, either by incorporating it expressly in the contract or through the incorporation of International Chamber of Commerce International Commercial Terms [INCOTERMS]. The party obliged to incur such costs under

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<sup>12</sup> The CISG, art. 16(2).

<sup>13</sup> The CISG, art. 16(2).

<sup>14</sup> The General Agreement on Tariff and Trade, 1994[GATT], art. II.

<sup>15</sup> *Ibid*; The Agreement on Subsidies and Countervailing Measures (*hereafter* ASCM), art. 16.

<sup>16</sup> *Ibid*; The Anti – Dumping Agreement (*hereafter* ADA), art. VI.

<sup>17</sup> *Ibid*; The Agreement on Safeguards (*hereafter* AOS), art. XIX.

<sup>18</sup> Tom Miles, Trump’s tariff head for a legal minefield, Reuters, *available at*: <https://www.reuters.com/article/us-usa-trade-wto/trumps-tariffs-head-for-a-legal-minefield-idUSKCN1GS1KL> (last visited on June 06, 2019); Trump approves relief for US Washing Machines and Solar Cell Manufacturers, USTR, *available at*: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/january/president-trump-approves-relief-us#> (last visited on June 06, 2019); India’s solar exports to the US to 25% safeguard duty from June 05, 2019, *available at*: <https://mercomindia.com/trump-india-solar-exports-safeguard/> (last visited on June 06, 2019).

the contract may refuse to perform the contract leading to the breach of contract. The party can invoke the provisions of the CISG as the grounds for defence to escape the liability.

Against this background, Part II of this paper discusses the application of the CISG in cases of international sale of goods. It includes essential prerequisites of a valid contract with major emphasis on the price clause. Further, it discusses the price clause referred to under Article 14 and Article 55 of the CISG. Part III and IV discuss various INCOTERMS used in the contract with a focus on who pays the duty in each type of INCOTERMS so as to determine which party to the contract, buyer or seller, can invoke the defence of commercial hardship on failure to perform the contract. Part V of the paper deals with the law pertaining to the imposition of additional duties such as anti – dumping duty, safeguard duty and countervailing duty can be imposed and the law regulating the same. Part VI of the paper will focus on the Article 79 of the CISG which deals with commercial hardship. Under this part, the author will analyse whether imposition of such additional duties constitutes a ground for commercial hardship so to exempt the party from performing the contract. Part VII concludes the paper.

### **Formation of a Contract**

The CISG deals with such contracts when the parties to the contract, the buyer and the seller, are located in different countries. The CISG does not aim to bring uniformity merely for the sake of uniformity, but aims to develop a notion among the trading communities of the world that it will facilitate international trade.<sup>19</sup>The CISG aims to bring the parties to the contract at par with each other.<sup>20</sup> Under the CISG, the essential requisites of a valid contract are offers and their acceptance. A proposal constitutes an offer when it is addressed to one or more specific persons, is sufficiently definite and made with the intention to bind the offeror in case of acceptance.<sup>21</sup> There are different ways of accepting an offer as specified under Article 18-22 of the CISG. Under Article 18, a statement or conduct (including customary practices and usages involved in the trade) indicating an assent to the offer is an acceptance.<sup>22</sup> However, silence does not amount to acceptance.<sup>23</sup> A reply to an offer with alterations does not constitute an acceptance.<sup>24</sup> An offer can be withdrawn if the withdrawal reaches the offeree before or at the

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<sup>19</sup> New Zealand Law Commission, 23<sup>rd</sup> Report on The United Nations Convention on Contracts for the International Sale of Goods: New Zealand's Proposed Acceptance, (1992) 23.

<sup>20</sup> Stefan Kroll, Loukas Mistelis, et.al., *UN Convention on Contract for the International Sales of Goods* 5 (Beck/Hart Publishing, 2011)[Kroll, Mistelis & Viscasillas].

<sup>21</sup> The CISG, art. 14.

<sup>22</sup> The CISG, arts. 18(1) and 18(3).

<sup>23</sup> The CISG, art. 18(2).

<sup>24</sup> The CISG, art. 19.

same as the offer.<sup>25</sup> The acceptance can be withdrawn before it reaches the offeror.<sup>26</sup> The important issues which arise in case of international sale of goods are, *first*, the formation of the contract and, *second*, the rights and obligations of the parties to the contract for international sale of goods.<sup>27</sup> However, CISG does not govern the validity of the contract involving the international sale of goods.<sup>28</sup>

Article 6 of the CISG expresses a practice-based and flexible character, in full and in partial, as the parties to a contract, despite being from the country which is party to the CISG, can still wish to exclude the application of the convention.<sup>29</sup> But, sometimes Article 6 creates complexities by allowing variations in substantive rights rather than complete exclusion and, consequently, it entangles the application of the remedies provided under the CISG.<sup>30</sup> By doing variations in substantive rights rather than its complete exclusion in the contract, the terms of the contract becomes vaguer and hence it leads to an uncertainty in the interpretation which ultimately affects the legal grounds for providing the remedy.

Article 14 of the CISG deals with the formation of the international sales contract. Article 14 contains two requirements, *first*, the specificity requirement and *second*, the intention to be bound by the proposal. With regard to the specificity requirement, the essential requirement for proposal for the international sale of goods is a determination of good, quantity, and price or if '*a provision is made for their determination*'.<sup>31</sup> A proposal lacking these elements does not lead to an acceptance of the offer and hence a valid contract cannot be concluded.<sup>32</sup> The court should make reference to Article 55 when the parties to the contract agree to the fact that despite the absence of the price clause, the offer would constitute an offer because parties' autonomy under Article 6 allows the parties to do so.<sup>33</sup>

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<sup>25</sup> The CISG, art. 15.

<sup>26</sup> The CISG, art. 22.

<sup>27</sup> Kroll, Mistelis & Viscasillas, *supra* note 20, at 16.

<sup>28</sup> The CISG, art. 4(a).

<sup>29</sup> Michael G Bridge, *The International Sale of Goods: Law and Practice* (Oxford university Press, 2007), ¶ 11.42; Franco Ferrari, Specific topics of the CISG in light of judicial application and scholarly writing, *Journal of Law and Commerce* 85(1) (1995/1996) cited in Marlene Wethmar – Lemmer, Party Autonomy and International Sales Contract, *Journal of South African Law* 432 (2011) [Ferrari].

<sup>30</sup> Petal Sarcevic & Paul Volken, *The International Sale of Goods Revisited* 66 (Kluwer Law International, 2001); Kroll, Mistelis & Viscasillas, *supra* note 20, at 100.

<sup>31</sup> The CISG, art. 14(1); MunchKommHGB (2007), art. 14, ¶ 17.

<sup>32</sup> Handelgericht St. Gallen (Switzerland) 5 December 1995, CISG – Online 245, *available at*: <http://cisgw3.law.pace.edu/cases/951205s1.html> (last visited on August 29, 2018).

<sup>33</sup> Kroll, Mistelis & Viscasillas, *supra* note 20, at 228.

Article 55 puts an implied agreement with reference to the price “*generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned*”.<sup>34</sup> Thus, it is evident that Article 14 and Article 55 of the CISG are contradictory to each other.<sup>35</sup> The other view is that Article 55 is “*triumph of party autonomy*” whereas Article 14 “*merely gives statutory presumption of which terms are essential content of an offer*”.<sup>36</sup>

Article 14 mandates that an offer is sufficiently definite where it at least stipulates the method for the calculation of the price. In this context, Article 55 aims at the preservation of the contract without fixing the price or providing a means of determining the price.<sup>37</sup> Thus, “*failure to determine price does not go to the validity of the contract, thereby resolving the contradiction in Article 55*”.<sup>38</sup> In other words, Article 55 acts as a gap-filling<sup>39</sup> provision which aims to provide a structure so as to determine the price term after a valid conclusion of the contract even when the parties have failed to provide the price term.<sup>40</sup> In a nutshell, Article 55 is applicable only in situations in which gap filling allows the conclusion of the contract without fixing the price or providing a method for determining the price.<sup>41</sup>

Rather than incorporating the fixed price, the contracting parties should incorporate the method of price determination in their contract of international sale of goods. In the cases of international sale of goods, it is not only the manufacturing or production cost of the goods, but it is also about the cost of shipment, payment of customs duty, *et cetera*. Thus, the contract involving the international sale of goods must include the additional costs which are incurred in the transfer of goods from the buyer to seller apart from the actual cost of goods. For this, incorporation of INCOTERMS along with Article 55 is the most appropriate method to guide the parties with regard to the price determination as it brings both the parties on equal footing as it prevents benefitting the seller from a rise in price and the buyer from fall in price and hence it determines who has to bear the additional cost.

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<sup>34</sup> The CISG, art. 55.

<sup>35</sup> John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* ¶ 325.3 (Kluwer Law International, The Hague 1999).

<sup>36</sup> Loukas Mistelis, *Article 55 CISG: The Unknown Factor*, 25 *Journal of Law and Commerce* 286 (2005 – 06).

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> Joseph Lookofsky, *The 1980 United Nations Convention on Contracts for the International Sale of Goods*, in 1 *International Encyclopaedia of Laws – Contracts*, 129 (2000) cited in Kroll, Mistelis & Viscasillas *supra* note 20.

<sup>40</sup> Ferrari, *supra* note 29.

<sup>41</sup> Albert H. Kritzer, *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* 134-35 (Kluwer Law and Taxation, 1993) cited in Kroll, Mistelis & Viscasillas *supra* note 20.

### Determination of the Price

Article 55 of the CISG makes reference to the price generally charged when a contract is concluded for such “*goods sold under comparable circumstances in the trade concerned*”.<sup>42</sup> Article 55 describes an objective standard for the determination of the current price of the goods sold,<sup>43</sup> and the buyer is protected from excessive pricing to be charged by the seller.<sup>44</sup> Under Article 55 of the CISG, “*the reference to sale under the comparable circumstances*”<sup>45</sup> does not include only the price of goods but it also includes “*comparable delivery and payment terms, especially INCOTERMS*”<sup>46</sup> and hence additional costs, such as duties, rebates, *et cetera* must be considered. Thus, it leads to the conclusion that an increase in such additional cost may lead to a situation where the party may fail to perform the contract. One of the most important points in this regard is that it must be determined who bears this additional cost, the seller (exporter) or the buyer (importer). It depends on the INCOTERMS incorporated in the contract for the international sale of goods or through the express clause in this regard provided in the contract. Failure as to the determination of the price or unsatisfactory solution with regard to the price determination leads to the conclusion that the contract has not been concluded.<sup>47</sup>

Thus, the best way to include such additional cost is by the incorporation of INCOTERMS or making express provision in the contract so as to determine who has the liability to pay such additional cost.

### INCOTERMS: Who is obliged to pay the duty?

*“Incoterms are international commercial terms that represent a set of agreements regarding the place of delivery, responsibility for carriage and insurance, and the transfer of risk of goods subject to an international sale”*.<sup>48</sup> Public international trade law plays a vital role in maintaining the world trading order. It is the private international trade, more specifically, international sales contract, which leads to the development of the economy of the country. Public international trade regulates these private contracts. Issues related to the carriage of the goods involving export and import clearances along with the risk and costs to be borne by the parties are of utmost importance. Such types of

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<sup>42</sup> The CISG, art. 55.

<sup>43</sup> Peter Schlechtriem & Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sale of Goods* 821 (Oxford University Press, 2010).

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> Paul Amato, UN Convention on Contracts for International Sale of Goods – The Open Price Terms and Uniform Application: An Early Interpretation by Hungarian Courts, 13 *Journal of Law and Commerce* 29 (2001).

<sup>48</sup> Joseph F. Morrissey, *International Sales Law and Arbitration: Problems, Cases and Commentary* 148 (Kluwer Law International, 2008).

issues in the international sales contract can be addressed through the use of trade terms, more specifically INCOTERMS. Such trade terms, although, are only a part of the international sales contract, they are the key elements of the international sales contract. Currently, there are 11 INCOTERMS.<sup>49</sup> The INCOTERMS become applicable in the cases of contract for international sales of goods in two ways, either through their express incorporation in the contract or by virtue of Article 9 of the CISG. Due to Article 9(2) of the CISG, it becomes evident that the contracting parties have made INCOTERMS applicable through usage which is prevalent in the trade concerned.<sup>50</sup> In the case of *BP Oil International v Hmpresa Hstatal Petroleos De Ecuador*, the court held that despite the fact that INCOTERMS are not universal but “*they can be incorporated by virtue of article 9(2) CISG because they are well known in international trade*”.<sup>51</sup> It has now become a customary norm that the trade terms should be interpreted with “*a reference to the INCOTERMS in toto*”.<sup>52</sup>

The INCOTERMS rules apply only when they have been incorporated in the contract for sale agreement.<sup>53</sup> After the incorporation, the INCOTERMS become a part of the governing law of contract<sup>54</sup> and hence they hold the characteristics of standard contract terms.<sup>55</sup> There are 11 INCOTERMS which can be divided into four categories as follows:

CATEGORY	INCOTERMS	DESCRIPTION
Category – I	Ex Works [“ExW”]	The exporter makes the goods available to the buyer (importer) at exporter’s own premises. <sup>56</sup>
Category – II	Free Carrier [“FCA”], Free Alongside Ship [“FAS”], Free On Board [“FOB”]	The exporter has to deliver the goods to the carrier which has been appointed by the buyer.

<sup>49</sup> INCOTERMS, 2010.

<sup>50</sup> Juana Coetzee, Incoterms 2010: Codified Mercantile Custom or Standard Contract Terms, 23 *Stellenbosch Law Review* 564 (2012) [Juana Coetzee].

<sup>51</sup> *BP Oil International v Hmpresa Hstatal Petroleos De Ecuador* 332 F3d 333 (5th Cir 2003) 338, 200 ALR Fed 7-1 Federal Appellate Court [5th Circuit] United States (11 June 2003) cited in *supra* note 43, at 575.

<sup>52</sup> Juana Coetzee, *supra* note 50, at 578.

<sup>53</sup> Robert Bergami, A risk management approach for export letter of credit transactions, 14(2) *The Vindobona Journal of International Commercial Law and Arbitration* 157 (2001).

<sup>54</sup> Juana Coetzee, *supra* note 50, at 564.

<sup>55</sup> CM Schmitthoff, The Unification or Harmonisation of Law by means of Standard Contracts and General Conditions, 17 *International Comparative Law Quarterly* 557 (1968).

<sup>56</sup> Juana Coetzee, Development and Legal Nature – A Brief Overview, 13 *Stellenbosch Law Review* 119 (2002).

Category – III	Cost and Freight [“CFR”], Cost Insurance Freight [“CIF”], Carriage and Insurance Paid [“CIP”], Carriage Paid To [“CPT”]	The exporter has to only arrange the carriage whereas any damage, risk, loss occurred or any additional cost incurred post the shipment of the goods is not borne by the exporter.
Category – IV	Duty Delivery Paid [“DDP”], Delivered At Terminal [“DAT”], Delivered At Place [“DAP”]	The exporter pays for the carriage also.

#### Detailed analysis of each INCOTERM

S. No.	INCOTERM	Description	Who pays the duty
1.	ExW	Exporter has to place goods at the disposal of the buyer. All other risks are borne by the importer.	Importer
2.	FCA	Seller delivers the goods to the carrier nominated by the buyer after the goods are cleared for export.	Importer
3.	FCA	Same as FCA but the mode of transport is through waterways.	Importer
4.	FAS	Exporter has to clear all the goods for export. Importer bears all the risks after the goods are cleared.	Importer
5.	CFR	Exporter bears the cost and freight to bring goods to the port of destination. Other costs are borne by the importer.	Importer
6.	CIF	It is same as CFR with an additional obligation on the exporter for paying for the marine insurance.	Importer

7.	CPT	The exporter delivers the goods to the carrier. Additionally, the exporter also bears the cost of freight and carriage. Risks and additional costs are borne by the importer. It applies to multi-modal mode of transportation.	Importer
8.	CIP	It is similar to CPT. Additionally, the exporter has to obtain an insurance for the goods during the carriage against the risks borne by the importer.	Importer
9.	DDP	The risks and additional costs such as duties, taxes, additional charges, cost of carrying out customs formalities, <i>et cetera</i> are borne by the exporter.	Exporter
10.	DAP	The exporter bears all the costs associated with the transport of the goods to the named place of destination. The cost of unloading is borne by the importer.	Importer
11.	DAT	It similar to DAP. Additionally, the exporter also bears the cost of unloading the goods.	Importer

Due to the incorporation of such INCOTERMS, the seller has to bear these additional costs. In this context, sometimes there might be a situation when the country imposes additional duties in the form of anti – dumping duty, safeguard duty or countervailing duty. As a consequence of this, there can be a situation of commercial hardship which prevents the party from performing the contract. In case of DDP, the seller might claim the defence of Article 79 whereas in case of other INCOTERMS, the buyer might take the defence of Article 79.

The role of INCOTERMS is not only limited to the determination of rights, duty or obligations of the party. It also helps in determining the jurisdiction of the court. Under Article 7 of the EU Regulations No. 1215/2012, the place of jurisdiction is the place where the delivery of goods takes place or should have taken place. In *Electrosteel Europe SA v Edil Centro SpA*, the court held that all the terms of the contract including INCOTERMS must be considered to determine place

of delivery and hence the place of jurisdiction.<sup>57</sup> In *Granarolo SpA c. Ambrosi Emmi France SA*, goods produced in Italy were to be sent to France and the contract contained Ex-Works INCOTERMS. Here, the Court held that the place of delivery is Italy only and hence the Italian Courts have the jurisdiction.<sup>58</sup> In a German case, the court decided that in the case of incorporation of DDP INCOTERMS in the contract, the place of delivery will be the place of jurisdiction in case where the goods are delivered from Korea to Germany.<sup>59</sup> But incorporation of the INCOTERMS is not the sole criteria to make any determination as to the clauses in the contract. In *Euro-Asian Oil SA v. Abilo (UK) Ltd*, the court held that in cases of conflict between the INCOTERMS and party's will, the party's will always prevail.<sup>60</sup> The absence of a jurisdiction clause in the contract leads to an increase in litigation time and cost. Thus, the parties should include jurisdiction clause rather allowing the determination of jurisdiction of the court through INCOTERMS. The author explores the implication of the imposition of additional duty with an obligation of the party to pay duty and hence claiming ground of commercial hardship for non-performance of the contract.

### **Imposition of Additional Duties: An Analysis in Context of WTO Law**

Every WTO Member has its Schedule of Concession which stipulates the maximum amount of tariff which can be imposed. Sometimes a member can impose tariff more than what has been provided in its Schedule of Concession if the case falls under certain exceptions. Consequently, if the duty is increased by a WTO Member after the conclusion of the contract between the parties which also incorporates the obligation to pay the duty, then the performance of the contract would become impossible due to commercial hardship. For instance, while entering into a contract, a party took obligation to pay duty only on the premise that it has to pay only a fixed amount of duty. Later, if a country increases the duty unreasonably, it would go against the legitimate expectation of the party who took obligation to pay the duty. The performance of contract by paying increased duty would put that party in destitution. Thus, the only defence available to the party for the non-performance of the contract is commercial hardship available under Article 79 of the CISG. This part of the paper analyses the law pertaining to the imposition of additional duty i.e. public international trade law aspect.

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<sup>57</sup>*Electrosteel Europe SA v Edil Centro SpA*, (C-87/2010), ¶22.

<sup>58</sup> *Granarolo SpA c. Ambrosi Emmi France SA*, C-196/15.

<sup>59</sup> *Bundesgerichtshof*, BGH, judgement dated 7 November 2012, VIII 108/12.

<sup>60</sup> *Euro-Asian Oil SA v. Abilo (UK) Ltd and Others*, 21 December 2016, The High Court of Justice, Queen's Bench Division (Commercial Court).

### A. Imposition of Anti – Dumping Duty

Dumping is a situation when the price of the exported goods is below its normal value i.e. price of good in the domestic market of exporting country.<sup>61</sup> Dumping, *per se*, is not condemned.<sup>62</sup> The issues of dumping, especially in WTO context, arise only if ‘*it causes or threatens to cause material injury*’ to the domestic industry of the exporting country.<sup>63</sup> Thus, in a nutshell, the essential requirements for the determination of dumping are, (i) the existence of dumping; (ii) the existence of an injury; and (iii) existence of a causal link between the dumping and the injury.<sup>64</sup>

*First*, the fact of dumping is concluded when there exists a difference between the normal price (price of goods in the country of production) and the export price,<sup>65</sup> more specifically when the normal value exceeds the export value.<sup>66</sup> With regard to the calculation of the normal value, the conditions which must be complied with are (i) the presence of the sale in the ordinary course of transactions; (ii) the products must be alike; (iii) the product must be destined for the purpose of consumption in the importing country; and (iv) the price must be comparable.<sup>67</sup> With regard to the *first* element, a transaction is not made in the ordinary course of trade if the ‘*sale is to the affiliated party*’ or sales are priced ‘*abnormally high*’ or sales are priced ‘*abnormally low*’ or the sale is below the cost of production.<sup>68</sup> With regard to the *second* element, the concept of ‘likeness’ is a relative one that evokes the image of an ‘accordion’,<sup>69</sup> and it is determined by taking into account physical characteristics, end use, tariff classification and consumer tastes and preferences.<sup>70</sup> With regards to the *third* element, there must be importation of these products. With regard to the *fourth* element, the price must be comparable, meaning that it shall be made at the same level of trade.<sup>71</sup> Here, the implication of international trade can be observed, as the price must be determined in level by adjusting it with INCOTERMS, normally at ex-factory level.<sup>72</sup>

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<sup>61</sup> Agreement on Implementation of Article VI of the GATT, 1994 [ADA], art. 2.1; Andreas F Lowenfeld, *International Economic Law* 263 (Oxford University Press, 2008).

<sup>62</sup> Van den Bossche, *The Law and Policy of World Trade Organization, Texts, Cases and Materials* 516 (Cambridge University Press, 2005) [VDB].

<sup>63</sup> The GATT, art. VI.

<sup>64</sup> Simon Lester, Arwel Davies et. al., *World Trade Law, Text, Materials and Commentary* 480 (Hart Publishing, 2012).

<sup>65</sup> The ADA, art. 2.1.

<sup>66</sup> *Supra* note 62, at 518.

<sup>67</sup> The ADA, art. 2.1; Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697, ¶ 165.

<sup>68</sup> *Supra* note 62, at 520.

<sup>69</sup> Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996: I, 21.

<sup>70</sup> Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243, ¶ 102.

<sup>71</sup> *Supra* note 62, at 520.

<sup>72</sup> *Ibid.*

*Second*, the determination of injury involves two factors. *First*, the volume of the dumped imports and an effect of the same on prices of the goods in the domestic market for the like products. *Second*, the consequent impact of these products on the domestic producers of such products.<sup>73</sup>

*Third*, while determining the existence of a causal link, the factors other than dumped imports must also be investigated and these other factors should be considered while assessing the 'causal link'.<sup>74</sup>

As a consequence of this act of the dumping by the exporting country in the importing country, the importing country may opt for an anti-dumping duty,<sup>75</sup> which is an additional duty and might be more than the duty undertaken by a country in its Schedule of Concessions. The implication of imposition of such duties in private international trade, specifically impacts the contracting parties for the international sale of goods. The party has to pay additional duty which might be impossible and the hence the contract cannot be performed. The defaulting party can claim defence of commercial hardship under Article 79 of the CISG.

### **B. Imposition of Safeguard Duty**

Safeguard measures are economic emergency exceptions. Unlike other measures, safeguard measures are imposed against fair trade. It can be imposed when (i) there is an increase in imports; (ii) there is an injury to the domestic industry; and (iii) there exists a causal link between the increased imports and injury to the domestic industry.<sup>76</sup>

*First*, the increase in the imports can be either absolute *id est* in terms of tonnes or units of imported products or relative *id est* in relation to the domestic industry.<sup>77</sup> A mere increase in imports does not constitute 'increase in imports', it must also be recent, sudden, sharp and absolute.<sup>78</sup> Apart from this, another condition which must be complied with is that it should be the result of an unforeseen development i.e. an unexpected development.<sup>79</sup>

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<sup>73</sup>The ADA art. 3.1.

<sup>74</sup>The ADA art. 3.5.

<sup>75</sup>The ADA, art. 7.

<sup>76</sup>The GATT, art. XIX:1(a); The Agreement on Safeguards [AOS] art. 3.1.

<sup>77</sup>The AOS, art. 2.1; *Supra* note 62, at 642.

<sup>78</sup> Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000: I, p. 515, ¶ 131 [ABR, Argentina –Footwear].

<sup>79</sup> Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000: I, p. 3, ¶ 84; Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003: VII, p. 3117, ¶ 319.

*Second*, there must be a serious injury to the domestic industry as a consequence of increase in import which is concluded from the fact of “*significant overall impairment in the position of domestic industry*”.<sup>80</sup> The ‘injury factors’ for the determination of injury include the rate and the amount at which the imports increased, either in absolute or in relative terms, then consideration must be given to the share of the domestic market in the increased imports, and then the changes which took place in the level of production, sales, productivity, profit and loss, capacity utilization, and employment.<sup>81</sup> Apart from these, all the factors which have an impact on the situation of the domestic industry must be taken into consideration for the determination of injury.<sup>82</sup>

*Third*, a causal link between the above-mentioned aspects must be established so as to conclude that injury is determined by, *first*, the causal link between the increased imports and the serious injury or threat, and, *second*, identification of injury caused by the factors other than increased imports.<sup>83</sup>

A country can impose safeguard duty only after complying with certain procedures set out in the Agreement of Safeguards.<sup>84</sup> Thus, after complying with all the above requirements, a country can impose a safeguard measure which can take the form of an increase in duty which might be more than the commitment taken by a country in its Schedule of Concessions and hence pose a commercial hardship to the seller. Consequently, it becomes difficult for the party to perform the contract. In case the seller performs the contract, he will not get the expected economic value out of it and hence would be at a disadvantageous position. The same rule also applies if buyer is obliged to pay the duty.

### C. Imposition of Countervailing Duty

The countervailing duty<sup>85</sup> can be imposed only on export subsidy<sup>86</sup> and actionable subsidy<sup>87</sup>. The existence of an export subsidy on which a countervailing duty can be imposed is determined by two factors, *first*, there must be a subsidy and, *second*, it must be export oriented or based on the

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<sup>80</sup> The AOS, art. 4.1.

<sup>81</sup> The AOS art. 4.2(a) cited in VDB at 647.

<sup>82</sup> ABR, Argentina –Footwear, ¶ 136.

<sup>83</sup> Appellate Body Report, United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, WT/DS202/AB/R, adopted 8 March 2002, DSR 2002: IV, p. 1403, ¶ 215.

<sup>84</sup> The AOS, arts. 3, 6 and 12.

<sup>85</sup> The Agreement on Subsidies and Countervailing Measures [ASCM], art. 3.

<sup>86</sup> The ASCM, art. 5.

<sup>87</sup> The ASCM, art. 10.

usage of domestic goods over the imported goods (for export subsidy and import substitution subsidy under Article 3) or must have adverse effect (for actionable subsidy under Article 5).<sup>88</sup>

*First*, the requirements for the determination of the existence of subsidy are (i) financial contribution; and (ii) benefit, which must be conferred to the recipients.<sup>89</sup> Under the Agreement on Subsidies and Countervailing Measures [“ASCM”], a ‘*direct transfer of funds*’ amounts to a financial contribution.<sup>90</sup> The conferment of benefit is determined by whether the financial contribution was provided “*on terms that are more advantageous than those that would have been available to the recipient on the market, if such contribution had not been made.*”<sup>91</sup>

*Second*, with respect to export subsidy, a subsidy is contingent upon export when it is conditional or dependent on the export performance.<sup>92</sup> Under footnote 4 of ASCM,<sup>93</sup> a subsidy is contingent, in fact, upon export performance, if it is a subsidy ‘*tied to*’ the actual or anticipated exportation or export earnings.<sup>94</sup> A subsidy is, *in fact*, ‘*tied to*’ export earnings if it has a close link with anticipated exportation,<sup>95</sup> and is proved from the “*total configuration of the facts constituting and surrounding the grant of subsidy.*”<sup>96</sup> A subsidy is ‘*tied to*’ export earnings if it provides *an incentive* to increase the overall anticipated export in comparison to the historical exports.<sup>97</sup> With respect to import substitution subsidy, there must exist local content requirement as per which subsidy is provided only on the usage of domestic goods over imported goods.<sup>98</sup> With respect to actionable subsidies, a subsidy causes adverse effects if (i) it causes injury to the domestic industry of another member; or (ii) causes nullification or impairment of benefits or (iii) causes serious prejudice to the interest of another member.<sup>99</sup> However, after 1999, even non-actionable subsidies can be countervailed.

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<sup>88</sup> Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, upheld by Appellate Body Report WT/DS70/AB/R, DSR 1999: IV, p. 1443, ¶ 9.112.

<sup>89</sup> The ASCM, art. 1.1.

<sup>90</sup> Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/AB/R and Corr.1, adopted 17 December 2007, DSR 2007: VII, p. 2703, ¶ 250.

<sup>91</sup> Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999: III, p. 1377, ¶ 157 [ABR, Canada – Aircraft].

<sup>92</sup> ABR, Canada – Aircraft, ¶171.

<sup>93</sup> The SCM Footnote 4; Appellate Body Report, *Canada – Aircraft*, ¶171.

<sup>94</sup> ABR, Canada – Aircraft, ¶171.

<sup>95</sup> Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*, WT/DS126/R, adopted 16 June 1999, DSR 1999: III, p. 951, ¶ 9.74.

<sup>96</sup> ABR, Canada – Aircraft, ¶171.

<sup>97</sup> Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011: I, p. 7, ¶ 1046–1048.

<sup>98</sup> The ASCM, art. 3.1(b).

<sup>99</sup> The ASCM, art. 5.

When the subsidy exists and leads to the distortion of trade, the country can impose a countervailing duty.<sup>100</sup> Consequently, the imposition of additional duty will be more than the obligation of a country in its schedule of concessions and hence the cost of such duty will be borne by the party obliged to pay the duty. The next part analyses whether the defaulting party can claim imposition of additional duty as a ground for commercial hardship.

### **Imposition of Additional Duty: Commercial Hardship?**

In a contract for the international sale of goods, on the one hand, the seller is obliged to deliver the goods along with the requisite documents to the buyer and hence transfer the goods to the buyer. On the other hand, the buyer is obliged to pay price and hence accept the delivery of goods.<sup>101</sup> Anything which is less than what has been stated above amounts to a breach of contract and thereby the other party is entitled to compensation.<sup>102</sup> A contract between the parties is an instrument which allocates risk after the conclusion of negotiations between the contracting parties and thereby govern the satisfaction of dual obligations. Article 79 of CISG gives an opportunity to the parties to the contract to avoid paying the damages only if the breach of contract is due to non-performance caused due to the existence of a circumstance beyond the control of the party not complying with the contract. The national courts have been very inconsistent with regard to the interpretation of commercial hardship or impediment,<sup>103</sup> and hence Honnold concludes that Article 79 successfully leads to the uniformity in law pertaining to the international sale of goods.<sup>104</sup>

Article 79(1) exempts the party from the liability of failure to perform any of its obligations under the contract on the fulfilment of certain conditions. *First*, the failure was due to an impediment. *Second*, the impediment was beyond the control of the party failing to perform its obligations. *Third*, the impediment was not expected at the time of conclusion of the contract, i.e. it was not foreseeable. *Fourth*, the party could not have reasonably been able to avoid the impediment. Article 79(2) deals with the situation when a third party has been appointed to perform the contract and that third party fails to do so. Article 79(3) puts a limitation on the duration of the exemption only till the time of existence of such impediment. Article 79(4) imposes an obligation on the party failing to perform its obligation under the contract to notify the other party regarding the same. Article 79(5) deals with the remedies and prohibits the other

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<sup>100</sup> The ASCM, art. 10.

<sup>101</sup> *Supra* note 20, at 1056.

<sup>102</sup> *Ibid*.

<sup>103</sup> Larry A. DiMatteo, Contractual Excuse under the CISG: Impediment, Hardship, and the Excuse Doctrines, 27 *Pace International Law Review* 274 (2015) [DiMatteo].

<sup>104</sup> *Supra* note 35, at 483.

party from seeking damages on non-performance of the contract. It must be noted that the author in paper restricts his analysis to Article 79(1).

Article 79 exempts the party from performing ‘any of his obligations’.<sup>105</sup> Under Article 79, apart from non-performance of a necessary or main obligation, the party is also exempted from performing ancillary obligation such as ‘*concluding a transport insurance, packaging or notification duties*’.<sup>106</sup> The impediments under Article 79, which are beyond the control of the buyer, are of two types--natural and man-made. In case of natural impediment, it includes earthquake, fire, flood, *et cetera*. Whereas in the case of man-made, it includes war, invasion, riots, acts of authorities like embargos, currency restrictions, *et cetera*.<sup>107</sup> A circumstance constitutes an impediment under Article 79 only if it has its ‘root outside the sphere of influence of obligor’.<sup>108</sup> Apart from the requirement of impediment beyond the sphere of the buyer, the impediment must be unforeseeable at the time of the conclusion of the contract.<sup>109</sup>

Kröllopines that anything which falls within the commercial foreseeability is not enforceable under Article 79.<sup>110</sup> The concept of foreseeability has also been dealt under Article 25 and Article 74 of the CISG. Article 25 deals with fundamental breach of contract. A breach is fundamental if it leads to substantial deprivation of what party is entitled under the contract and such deprivation was not foreseeable. Foreseeability means the knowledge of harsh consequences of the breach.<sup>111</sup> The notion of foreseeability under Article 25 is different from Article 79. Article 25 deals with the foreseeable consequences of the breach of contract whereas Article 79 deals with the foreseeability of the event leading to the breach of contract. Article 74 deals with the damages for breach of contract which cannot be more than the loss foreseeable at the time of conclusion of the contract.<sup>112</sup> Article 74 deals with the fact that only those damages which are foreseeable at the time of conclusion of contract will be granted.<sup>113</sup> Again, Article 74 deals with

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<sup>105</sup> The CISG, art. 79.

<sup>106</sup> Ingeborg Schwenzer, Schwenzer, et.al., *Commentary on the UN Convention on the International Sale of Goods* (Oxford University Press, Oxford, 2005) [Schwenzer] cited in Kröll, Mistelis & Viscasillas *supra* note 20, ¶ 79.

<sup>107</sup> Dionysios P. Flambouras, Impossibility of Performance and Clausula Rebus SIC Stantibus in the 1980 Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law - A Comparative Analysis, 13 *Pace International Law Review* 266 (2001).

<sup>108</sup> Kröll, Mistelis & Viscasillas *supra* note 20, at 1072.

<sup>109</sup> *Raw Materials Inc. v. Manfred Forberich*, U.S. District Court, Illinois, CISG 925 Online (Pace).

<sup>110</sup> Kröll, Mistelis & Viscasillas *supra* note 20, at 1075.

<sup>111</sup> Robert Koch, The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods, Review of the Convention on Contracts for the International Sale of Goods, *available at*: <http://cisgw3.law.pace.edu/cisg/biblio/koch.html#165> (last visited on June 10, 2019).

<sup>112</sup> The CISG, art. 74.

<sup>113</sup> The CISG art. 74.

the foreseeability of damage suffered by the other party so as to determine the damages whereas Article 79 deals with the foreseeability of the occurrence of the event leading to the damages.

In *Nuova Fucinati v. Fondmetall International*, the court held that a 30% increase in the price of good does not lead to the situation of impediment to prevent the contract performance.<sup>114</sup> The court was of the opinion that buyer is exempted from the liability for the act of failure to take the delivery on the ground as such failure was because the officials of the importing country would not certify their safety.<sup>115</sup> Further, in *Vital Berry Marketing NV v. Dira-Frost NV*, it was held that any fluctuations in the prices of goods is considered as a foreseeable event in international trade and a consequent economic loss is considered as a normal risk in the commercial activities.<sup>116</sup> By this principle, the increase in additional duty does not amount to commercial hardship.<sup>117</sup>

Further, in an Italian case,<sup>118</sup> the court held that hardship cannot be a substitute for impediment. In this case, the seller claimed that a major increase in the international price has put him at an inferior position and thus amounts to commercial hardship. However, the court rejected the seller's argument. In a German case, the court held that a threefold increase in the market price does not amount to hardship.<sup>119</sup> In *Oberlandesgericht* case, the ICC Arbitration tribunal held that sudden and extreme increase in the prices does not amount to an impediment as it fell within the ambit of foreseeability in the business.<sup>120</sup>

On the basis of the above principles and the judgments of the Court, the imposition of additional duties does not amount to commercial hardship.

Another view is that the occurrence of a particular type of event in the past makes it foreseeable for the parties but it does not lead to the conclusion that the party breaching the contract expected it at the time of conclusion of the contract,<sup>121</sup> and hence imposition of additional duty

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<sup>114</sup>*Nuova Fucinati v. Fondmetall International*, District Court Monza, Italy, available at: <http://cisgw3.law.pace.edu/cases/930114i3.html> (last Modified on January 14, 1993).

<sup>115</sup> Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, (Arbitral award No. 155/1996), available at: <http://cisgw3.law.pace.edu/cases/970122r1.html> (last Modified on January 22, 1997).

<sup>116</sup> *Vital Berry Marketing NV v. Dira-Frost NV*, Rechtbank van Koophandel, Hasselt AR 1849/94, Belgium 2 May 1995.

<sup>117</sup> *Ibid.*

<sup>118</sup> Tribunale, R.G. 4267/88, Italy, 14 January 1993.

<sup>119</sup> *Oberlandesgericht* [OLGI [Provincial Court of Appeal] 1 U 167/95, Germany, available at: <http://cisgw3.law.pace.edu/cases/970228g1.html> (last Modified on February 28, 1997).

<sup>120</sup> ICC Arbitration Case No. 6281 of 26 August 1989 (*Steel bars case*), available at: <http://cisgw3.law.pace.edu/cases/896281i1.html> (Last modified on August 26, 1989).

<sup>121</sup> Fritz Enderlein & Dietrich Maskow, *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods & Convention on the Limitation Period in the International Sale of Goods Commentary* 322 (Oceana Publications, 1992).

can be taken as a ground for commercial hardship. This view is applicable in today's scenario where the U.S. has been continuously imposing additional duty and hence the private non-performing party can take such defence. This situation can be compared to the case of relative impossibility as propounded by Professor Jan Smits.<sup>122</sup> It means despite possibility, the court may excuse the party from performing the contract on the ground that the cost of performance is more than the benefit which accrues,<sup>123</sup> provided that such cost and divergence are grossly disproportionate.<sup>124</sup> This principle was taken into account for the purpose of a contract. It must be noted that a party enters into a contract on the expectation of certain benefits. The occurrence of the event of commercial hardship deprives the party of those benefits if the party chooses to not to perform the contract. From Kröll's point of view, the imposition of additional duty comes within the ambit of the reasonable foreseeability as the parties to the contract of the international sale of goods are generally aware of the trade policies and economic conditions prevailing in the exporting country.<sup>125</sup>

In *Scaform International Case*, 70% increase in price was held to be reasonably unforeseeable and such a precipitous increase in price places an unreasonable burden on the exporter and hence, allowed the party to defend its failure due to commercial hardship.<sup>126</sup> Although, change or breakneck increase in the price is foreseeable but the best counterargument against this point is that the amount of increase is so drastic that it becomes unforeseeable.<sup>127</sup>

The failure to perform obligation under Article 79 can be claimed only on the ground of unforeseeable and unpredictable impediment which was outside the realm of sway of the parties. Further, in *Semi-automatic Weapons Case*,<sup>128</sup> it was held by the court that the seller could have foreseen the necessity of getting an import approval as such law mandating the import approval existed in the U.S. for many years. But this case does not become apposite here to prevent the supplier from claiming commercial hardship as a ground for non-performance of the contract because an imposition of additional customs duty is not something which could have been in existence for many years as found in the above case.

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<sup>122</sup> CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG, *available at*: <http://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html> (last Modified on October 12, 2007).

<sup>123</sup> Schwenzer, *supra* note 106, at 1076.

<sup>124</sup> *Scaform International BV v. Lorraine Tubes S.A.S.*, Supreme Court, Belgium, 19 June 2009.

<sup>125</sup> Kröll, *Mistelis & Viscasillas supra* note 20, at 1075.

<sup>126</sup> *Ibid.*

<sup>127</sup> DiMatteo *supra* note 103, at 296.

<sup>128</sup> *Semi-automatic Weapons Case*, CIETAC Arbitration proceeding, China, 7 August, 1993, *available at*: <http://cisgw3.law.pace.edu/cases/930807c1.html> (last Modified on August 07, 1993).

Currently, after imposition of additional duties by the United States on imported products from different countries, it has become difficult for the parties to contract to perform their obligations. Consequently, the parties might want to claim the defence of the Article 79 so as to escape the obligation of paying damages. In such cases, the defence can be claimed on by assessing the fact that whether such imposition of duties was foreseeable. The defence of Article 79 cannot be taken in this case because these duties are imposed only after conducting the investigation. Hence, the parties might be aware of the imposition of the additional duties due to the ongoing investigation at the time of conclusion of the contract, but, at the same time, the magnitude of an increase in the additional duties must be considered. If there is a significant increase in the duty despite the fact that the imposition of duty was foreseeable, then it can be taken as a ground for commercial hardship. The rule enunciated under Article 79 applies in two situations, *first*, when performance of the contract is solely burdensome and *second*, when there exists total impossibility.<sup>129</sup> Consequently, it is not reasonable to compel the party to perform the contract by imposing such extreme burden on the party. Thus, extreme economic hardships can be considered as an impediment.

### Conclusion

India is a common law country. India has not ratified the CISG. India is 20<sup>th</sup> largest exporting country and 12<sup>th</sup> largest importing country in the world and India's export accounts to 18.781% of its Gross Domestic Product (GDP).<sup>130</sup> The countries that are party to the CISG accounts for 2/3<sup>rd</sup> of the world's international trade. It shows that these countries are going towards the uniformity in the laws governing international trade.<sup>131</sup> There is a high probability that the CISG will become norm of international trade in future as it encapsulates both common law and civil law approach. Legal system of a country is one of the important factors in facilitating its economy.<sup>132</sup> The CISG takes into account modern trade usage, customs and international practices. Thus, becoming a party to the CISG would improve India's export and hence would boom its GDP.

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<sup>129</sup> Rolf Kofod, Hardship in International Sales, Pace Law School Institute of International Commercial Law, available at: <http://www.cisg.law.pace.edu/cisg/biblio/kofod.html> (last visited on June 11, 2019).

<sup>130</sup> Jessica Dillinger, *The World's 20 Largest Exporting Countries*, available at: <https://www.worldatlas.com/articles/exports-by-country-20-largest-exporting-countries.html> (last visited on June 11, 2019); *Export of Goods and Services (% of GDP)*, The World Bank, available at: <https://data.worldbank.org/indicator/NE.EXP.GNFS.ZS?locations=IN> (last visited on June 11, 2019).

<sup>131</sup> Yashasvi Nain & Shashank Manish, Why India should opt for CISG, 4(3) *India Law Journal* (2007).

<sup>132</sup> *Ibid.*

With regard to commercial hardship, there is a difference in the approach of civil law and the common law countries. The contract law of the civil law countries makes a distinction between the circumstances which make the performance impossible, *id est* impediment and the change in circumstance in which the party can still perform the contract, *id est* hardship. Whereas, common law countries do not differentiate between the two, impediment and hardship, as oppose to the civil law countries and hence follow unitary approach.<sup>133</sup> The CISG, in this case, fails to form a compromise as it embraces the common law system's 'unitary' approach.<sup>134</sup> The U.S. has incorporated the doctrine of commercial hardship under Section 2-615 of the Uniform Commercial Code ["UCC"]. It includes not only the doctrine of frustration and impossibility, but also include impracticability which means the performance is possible but "*unduly burdensome or would cause more economic hardship*".<sup>135</sup> Prior, to the UCC, American law included only hardship and impracticability and hence it was similar to English law.<sup>136</sup> As oppose to UCC, the CISG applies only to the impediments resulting impossibility of performance rather than impracticability or frustration.<sup>137</sup> Thus, the CISG has restrictive approach than the UCC. Such similar ground for exemption is provided under Section 56 of the Indian Contract Act, 1872 but it is narrower than the UCC. Under Indian law, such exemption can be availed only in the cases of *force majeure* including unforeseeable supervening event which cannot be prevented by human care and diligence,<sup>138</sup> but it does not include the cases of economic hardship even though it imposes extraordinary burden on the party.<sup>139</sup> In nutshell, the UCC provides broader ground for claiming such exemption as compare to the CISG and Indian law.

The author opines that the party should be exempted from performing its obligation in cases of commercial hardship. On the basis of the principle of good faith under Article 8, Article 79 does not impose an obligation on affected party to take on extraordinary responsibilities so as to perform the contract.<sup>140</sup> Moreover, it is also supported by the fact that the foreseeability dealt under Article 79 should be judged from the intention of the parties while entering into the

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<sup>133</sup> Ingeborg Schwenzer, Christopher Kee, et.al., *Global Sales and Contract Law* 651 (Oxford University Press, Oxford, 2012).

<sup>134</sup> Ibid.

<sup>135</sup> Sarah Howard Jenkins, Exemption for Non-performance: UCC, CISG, UNIDROIT Principles-A Comparative Assessment, University of Arkansas at Little Rock William H. Bowen School of Law, *Bowen Law Repository: Scholarship & Archives* 2025 (1998).

<sup>136</sup> DiMatteo *supra* note 103, at 267.

<sup>137</sup> Henry D. Gabriel, A Primer on the United Nations Convention on the International Sale of Goods: From the Perspective of the Uniform Commercial Code, *7 Ind. International & Comparative Law Review* 279, 308 (1997)

<sup>138</sup> Dhanrajamal Gobindram v. Shamji Kalidas & Co, AIR 1961 SC 1285, ¶17-19,

<sup>139</sup> Alopi Parshad & Sons Ltd v. Union of India, AIR 1960 SC 588.

<sup>140</sup> O. Lando, *Udrenrigshandelens kontrakter*, 299 (Djof Forlag, Copenhagen, 1987).

contract which must be looked at from reasonable man's perspective under Article 8(2) of the CISG.

The invocation of defence of Article 79 only exempts the promisor from paying damages which is limited only to the duration of the existence of the impediment.<sup>141</sup> The remedy that promisor (buyer) can seek is avoidance of the contract or reduction in the price.<sup>142</sup>

Due to the complexity in the international transactions, the parties to the contract should provide an express hardship clause in the contract stipulating well-defined conditions as to what constitutes a commercial hardship and in what circumstances the parties to the contract are exempted from performing their obligations. Inclusion of such a clause prevents contracting parties from incurring additional costs while settling the dispute and helps them in deciding whether the circumstances leading to the non-performance of the contract constitute a commercial hardship. The failure by the parties to incorporate such clause will create more disputes and the parties to the contract will be destroyed by the monster of their own creation.

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<sup>141</sup> The CISG, art. 79(5).

<sup>142</sup> Piltz, Internationales Kaufrecht, ¶ 4-253 cited in Schwenger, *supra* note 106, 1085, ¶ 55.

## FORCED JOINDER/INTERVENTION OF THIRD PARTIES IN ARBITRATION: VIOLATION OF PARTY AUTONOMY?’

Devansh Rathi\*

*The rampant use of complex arbitral agreements involving a number of parties and non-adherence to a standard pattern by the Indian courts in a plethora of cases have raised the contention which is whether forced joinder or intervention of third parties in absence of consent on part of the signatories to the arbitral agreement is breaching party autonomy or not. The paper would focus on both the angles where party autonomy is being maintained as well as superseded with the help of numerous case laws, especially the Duro Felguera and Chloro Controls. Results would also rely on the rules and procedures being followed by international arbitral tribunals and the precedents set up in other nations due to the absence of any joinder provision in The Arbitration and Conciliation (Amendment) Act, 2015. The paper would stress on how the intention of the parties became an imperative attribute behind the contrasting judgements. Before concluding, certain plain and plausible arguments would be drawn to delineate how joinder or intervention of non-signatories would affect the right of the signatories as well as bulwarking the interests of non-signatories, thus addressing both the sides of the coin.*

### [1] Introduction

Rapid globalization has unlocked trails for various States, entities and individuals to come into contracts with others and determine the law governing those contracts through arbitration. The augmenting international trade has acknowledged arbitration and not judicial courts or tribunals as the mode for reconciling the disputes that may transpire between the parties to a contract due to the various benefits it entails. However, these contracts that comprises international parties are often multifaceted. There may be several dissimilarly worded contracts with the same party or similarly worded contracts with different parties. There may also be an amalgam of domestic arbitration as well as international commercial arbitration in various contracts that are signed by the same parties pointing to the fact how different contracts can be interconnected.<sup>1</sup>

Assertions may arise against or by an external party who may be a ‘non-signatory’ to the contract but is tangled in the transaction somehow leading to the cardinal issue of whether parties who

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<sup>1</sup>Duro Felguera S.A. v.Gangavaram Port Ltd.(2017) 9 SCC 729.

are non-signatories to the agreement should be made part of the arbitral proceedings even when there is a non-consensus by any of the signatories to the contract or even the non-signatory.

It is a non-negated fact that party autonomy is the foundation of arbitration.<sup>2</sup> It is the vital cause which drives the parties to cherry-pick arbitration over litigation. But the circumstance where a non-signatory is entwined in a transaction that is signed only between the signatories is enough to rule over this basic tenet of arbitration? It is imperative to understand the fact that issues revolving around joinder and consolidation originate out of an intrinsic conflict existing between party autonomy and the need to ultimately settle a dispute by joining in the necessary third parties to the arbitral proceedings irrespective of the fact whether they have given their consensus or not.<sup>3</sup>

It is vital to decrypt the issue as the international agreements which opt for arbitration are highly multiplex and involve a number of parties in different contracts. The multiplicity of these contracts is propounding the swelling emergence to examine whether non-signatories should be entitled to be a part of the arbitral proceedings. Apart from this, there is no uniform standard being adhered to by the Indian courts. There has always been an anomaly regarding the issue of forced joinder/intervention of third parties in the Indian context.

‘Joinder’ refers to when a party, who is not a party to the arbitration agreement, is joined as party to the arbitration proceedings by an already existing signatory.<sup>4</sup> Whereas, ‘intervention’ refers to the device used by non-signatories to make themselves party to the arbitration.<sup>5</sup>

The following paragraphs will deal with both sides of the coin where party autonomy is honoured as well as cornered. The paper will encompass the Indian scenario of forced joinder/intervention of parties and the rationale of the Indian courts behind the contrasting judgements. Thereafter, the paper vets the rules and procedures that are being followed in different international arbitral tribunals and other nations regarding forced joinder/intervention of non-signatories to the agreement in order to give suggestions as to what could be abided by the Indian courts. Before concluding, certain arguments would be put forward scaling the ups and downs of joinder/intervention.

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<sup>2</sup> Sunday A. Fagbemi, “The Doctrine of Party Autonomy In International Commercial Arbitration: Myth Or Reality?” 6 *JSDLP* 223 (2015).

<sup>3</sup> Arjun Gupta, Sahil Kanuga, Vyapak Desai, “Blessed Unions in Arbitration- An Introduction to Joinder And Consolidation in Institutional Arbitration” 4 *IJAL* 129 (2016).

<sup>4</sup> *Id.* at 130.

<sup>5</sup> S. I. Strong, “Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or A Proper Equitable Measure?” 31 *Vand. J. Transnat'l L.* 921 (1998).

It should be made univocal that the paper is not advocating either of the sides but is simply mentioning the multitude reasons, relevant case laws and certain arguments buttressing the respective sides and the unbalanced Indian scenario which is oscillating between safeguarding party autonomy and bolstering joinder of third parties.

## [2] Upholding Party Autonomy

‘Joinder’ and ‘Intervention’ are well recognized and acknowledged in litigation and are opted for as a means of procedural proficiency and tranquil administration. In litigation, it is the court or the tribunal, which presides to resolve the quarrel and chooses the means and procedures to avail the same. In contrast, in arbitration, it is the arbitration agreement, which conceives arbitration sanctioning the utmost authority to the signatories of that arbitration agreement to decide the methods and procedures in order to reconcile the disputes if any arise in the near future, pointing to the supremacy of party autonomy.

Party autonomy is the epicentre of arbitration. It is considered the principal element of this alternative dispute resolution method and the same has been upheld by the division bench of *Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya*<sup>6</sup> where it said that arbitration would be limited only to signatories to the arbitration agreement.

*“All the defendants to the suit are not parties or partners in the partnership firm and the terms of the partnership deed including the arbitration clause are not binding to them.”*

Moreover, it was also ruled that,

*“Further, there is no power conferred on the court to add parties who are not parties to the agreement in the arbitration proceedings.”*<sup>7</sup>

Even in the case of *Deutsche Postbank Home Fin. Ltd v. Taduri Sridhar & Anr*, the court had a parallel outlook and held that the respondent cannot include Deutsche Postbank as a party to the proceedings in relation to the disagreement surfacing out of the assertion made by the respondent against the developer and clarified the position of joinder by citing an instance

*“Therefore, if ‘X’ enters into two contracts, one with ‘M’ and another with ‘D’, each containing an arbitration clause providing for settlement of disputes arising under the respective contract, in a claim for*

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<sup>6</sup> (2003) 5 SCC 531.

<sup>7</sup>Sukanya Holdings (P) Ltd. V. Jayesh H. Pandya (2003) 5 SCC 534.

*arbitration by 'X' against 'M' in regard to the contract with 'M', 'X' cannot implead 'D' as a party on the ground that there is an arbitration clause in the agreement between 'X' and 'D'.*<sup>8</sup>

The aforementioned judgement highlighted the fact that though all the parties to the suit are interconnected with each other, the court didn't arrange for the joinder of parties due to separate arbitration agreements and hence upholding the principle of party autonomy.

It should be brought to the cognizance of the readers that the joinder of third parties can be taken as a subset of consolidation of arbitral proceedings. To consolidate means to unite into one mass or body<sup>9</sup> - meaning by all the parties of all the different arbitration agreements irrespective of whether they may or may not be on different subject matters are consolidated into one arbitration proceeding. The readers should also be aware that the term 'party' as defined by The Arbitration and Conciliation Act means 'a party to an arbitration agreement'<sup>10</sup>. Even the 2015 amendment brought no changes to the provision, inferring to the point that it is only the *signatories* of the particular agreement that enjoys the prerogative of being called as the 'party'.

In the recent 2019 case of *Royale India Rail Tours Ltd. v. Cox & Kings India Ltd. & Anr.*<sup>11</sup> where a Joint Venture Agreement (JVA) was executed between the two signatories, the question arose whether a non-signatory can be made part of the arbitration as a result of a dispute arising from the JVA. After scrutinizing the facts of the case, JJ. Naveen Chawla ruled that the third party was in existence at the date of execution of the JVA but will not be a signatory to the same. JVA was a result of execution between the signatories only. The court adjudged that only C&K and IRCTC were bound by the arbitration agreement and no relief could be sought by C&K against RIRTL.

*"There can be no quarrel with the above proposition of law, however, the facts of each case have to be considered in applying the above principles. In the present case, the IRCTC and C&K are equal Joint Venture Partners in RIRTL. The Arbitration Agreement clearly binds only C&K and IRCTC. The disputes are also only between IRCTC and C&K. C&K, being the claimant, is seeking no relief against RIRTL."*

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<sup>8</sup>Deutsche Postbank Home Fin. Ltd v. Taduri Sridhar & Anr (2011) 11 SCC 382.

<sup>9</sup> Black's law dictionary (2<sup>nd</sup> ed.), available at: <https://thelawdictionary.org/consolidate/> (visited on February 8, 2019).

<sup>10</sup> Sec. 2(1)h, The Arbitration and Conciliation (Amendment) Act, 2015 (No. 3 of 2016).

<sup>11</sup> 2019 SCC OnLine Del 6905.

**[2.1] Gravity of Intention as propounded in *Duro Felguera S.A. v. Gangavaram Port Limited (GPL)*<sup>12</sup>**

In this case, a tender invited by Gangavaram Port Limited (GPL) for the construction of a port was allotted to Duro Fulguera S.A. (DFSA) along with its Indian subsidiary Fulgueras Gruas India Pvt. Ltd. (FGI). The Original agreement was branched into five different agreements whereby some were executed between DFSA and GPL while others were executed between FGI and GPL. Each of these agreements had a separate arbitration clause and there was a mix of domestic as well as international commercial arbitration. After discord transpired between the parties, DFSA and FGI issued arbitration notices under their agreements for international and domestic arbitration respectively. Concurrently, GPL also issued an arbitration notice under the Original Agreement and sought to make a composite reference of all the disputes.

In spite of the five agreements and the three parties being so intrinsically linked, the bench held that:

*In the case at hand, there are six arbitrable agreements (five agreements for works and one Corporate Guarantee) and each agreement contains a provision for arbitration. Hence, there has to be an Arbitral Tribunal for the disputes pertaining to each agreement. While the arbitrators can be the same, there has to be six Tribunals - two for international commercial arbitration involving the Spanish Company- Duro Felguera, S.A. and four for the domestic.'*

The intention of the parties should be another important aspect to vet in order to determine whether forced joinder or intervention of non-signatories may be permitted or not. The court in the above case buttressed its decision of not allowing the joinder of parties by relying on the fact that splitting up of the original contract into five different contracts indicates the prima facie intention of the parties to not consolidate the proceedings.<sup>13</sup>

Intention, like in any other aspect of law is pivotal to shape the outcome of any legal proceeding. In the arbitration cases where parties have constructed different arbitration agreements, it should not be strenuous to construe the impression that the parties have no intent of merging the arbitration proceedings but to proceed with each of the arbitration agreements independently unless there is a specific clause in the arbitration agreement which provides for their joinder or consolidation. And the same was propounded in *Deutsche Postbank* which was discussed earlier. The court held that *If there had been an arbitration clause in the tripartite agreement among the first*

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<sup>12</sup> (2017) 9 SCC 729.

<sup>13</sup> Id. at 750.

*respondent, developer and the appellant, and if the first respondent had made claims or raised disputes against both the developer and the appellant with reference to such tripartite agreement, the position would have been different.*<sup>14</sup>

### [3] Renouncing Party Autonomy

Party autonomy has emerged to be an indispensable attribute of the arbitration as per the above-mentioned case laws. However, it would be uneven to proclaim this as a settled fact without analysing the cases that have set aside the principle of party autonomy. The Indian Supreme Court in a handful of instances has paid heed to other important elements over party autonomy.

In *P.R. Shah, Shares and Stock Brokers Private Limited v. B.H.H Securities Private Limited and Others*<sup>15</sup>, the bone of contention was whether single arbitration could be permitted between a signatory and a non-signatory. The Supreme Court held that:

*If A had a claim against B and C and if A had an arbitration agreement with B and A also had a separate arbitration agreement with C, there is no reason why A cannot have a joint arbitration against B & C... It would be proper and just to say that when A has a claim jointly against B and C, and when there are provisions for arbitration in respect of both B and C, there can be a single arbitration...'*

The division bench of the Apex Court allowed for a single arbitration but ruled the mandatory existence of an arbitration clause with the non-signatory in order to include him in the arbitration proceedings.<sup>16</sup> In this case, the parties to the suit were connected to each other and a dispute arose between one of the members of Bombay Stock Exchange against another member of Bombay Stock exchange as well as a non-member in consonance to a certain share of transactions. Taking this as a well-established bridge between the parties arising out of the same set of transactions, JJ. R Raveendran opined that:

*"In my view it would be most undesirable to adopt a construction which would bring about the possibility of two fora reaching different conclusions where the cause of action is based on same set of facts."*<sup>17</sup>

#### [3.1] Exceptions to Party Autonomy as laid down in *Chloro Controls* case

Multinational parties dwelling in large construction projects especially turn-key and Engineering, Procurement and Construction (EPC) projects opt generally for arbitration over any other dispute resolution method. Turn-key and EPC projects are usually signed between an owner and

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<sup>14</sup>*Deutsche Postbank Home Fin. Ltd. v. Taduri Sridhar & Anr.*, (2011) 11 SCC 384.

<sup>15</sup> (2012) 1 SCC 594.

<sup>16</sup> *Id.* at 601.

<sup>17</sup> *Id.* at 598.

a contractor where a certain scope of work may be delegated by the contractor to a sub-contractor or its subsidiary company or any third party. Thus, these multinational contracts are more of composite nature including not just a single contract, but a multitude of them, materializing between different parties, though for an ultimate single objective. What is intriguing to find out is whether the sub-contractor or the subsidiary company can be forced to join the arbitral proceedings arising between the owner and the contractor. This issue was acknowledged in the case of *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*<sup>18</sup> where the Apex Court carved out exceptions of party autonomy in the following way

*'A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The Court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the Court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the Court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed.'*

The exceptions as acknowledged above makes it evident that the judgement would be fit in cases where individuals, entities or States enjoy a proximate relationship with others like the relationship that is enjoyed between a parent/holding company and its subsidiary company and are working towards achieving the common goal but through different means. Moreover, the different contracts between different parties need to be so intrinsically linked that it would not be possible to segregate them in order of viewing the completion of the common goal.

The case also brings to the fore the concept of 'Group of Companies Doctrine'<sup>19</sup> which propound the idea of binding the sister or subsidiary companies to be a part of the arbitral proceedings if it can be proved that there exists a common intent of the parties to bind the non-signatory affiliates in addition to binding the signatories.

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<sup>18</sup> (2013) 1 SCC 641.

<sup>19</sup> *Id.* at 682.

Apart from this, the other means to bind the subsidiary or sister companies can be availed through the principles of agency, assignment, novation of contract and 'Alter Ego' doctrine only if their pre-requisites are realized.

### [3.2] Cases on the path of *Chloro Controls*

The recent catena of cases has laid out their judgements on the foundation of the *Chloro Controls* case. In the case of *Cheran Properties Limited v. Kasturi And Sons Limited*<sup>20</sup> the full bench of the Supreme Court ruled that in order to permit for a joint arbitral proceeding there has to be a 'direct commonality' of the disputed claim, either of the parties need to share a direct relationship with the non-signatory and the agreement need to be a fraction of the composite transaction.

In the Delhi HC case of *Astonfield Renewables Pvt. Ltd. & Anr v. Ravinder Raina*<sup>21</sup> where the dispute arose in relation to two agreements, the single bench decided that the two agreements form part of the same transaction case by heavily relying on *P.R. Shah*<sup>22</sup> apart from *Chloro Controls* and also held that the law held in the *Duro Felgura* case would not be applicable to the present circumstances.

In another Delhi HC case of *RV Solutions Pvt. Ltd. v. Ajay Kumar Dixit & ors.*,<sup>23</sup> it was held that "In the present case, there is clearly commonality of facts which bind the defendants together." JJ. Jayant Nath ruled that the *Chloro Controls* was squarely applicable in the present scenario.

Even in the case of *Ameet Lalchand Shah v. Rishabh Enterprises*<sup>24</sup> it was construed that agreements that are intertwined, with a mutual commercial purpose, would bind all the parties to the agreements, even though one of them might be lacking an arbitration clause, or an entity is not the party to all such agreements.

There is a common denominator in the cases discussed above which is that the dispute was arising from similar transactions or there was a commonality in the facts or the subject matter. This turned out to be a major factor which superseded the principle of party autonomy and persuaded the courts to allow for joinder of non-signatories.

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<sup>20</sup> 2018 SCC OnLine SC 431.

<sup>21</sup> 2018 SCC OnLine Del 6665.

<sup>22</sup> (2012) 1 SCC 594.

<sup>23</sup> 2019 SCC OnLine Del 6531.

<sup>24</sup>(2018)15 SCC 678.

#### [4] Rules and Procedures Followed by International Arbitral Tribunals

After vetting a number of cases favouring forced joinder of non-signatories on one hand and upholding the concept of party autonomy on the other, it has become imperative to approach another source of law due to the lack of uniformity being adhered to by the Indian courts.

Since not only the Arbitration and Conciliation Act of 2015 but also the Indian Council of Arbitration contain no provision regarding the power conferred to courts or arbitral tribunals for joinder/intervention or consolidation, it is vitally important to assess what rules and procedures are being followed by various international arbitral institutes and the rationale behind such provisions.

Party autonomy in arbitral proceedings is of pivotal significance and value. The forced joinder of third parties is in conflict with the basic principles of arbitration.<sup>25</sup> And such a notion has been recognised by the following arbitral institutes.

- London Court of International Arbitration (LCIA) contains a consolidation as well as a joinder clause but both require the consensus of the parties.<sup>26</sup>
- China International Economic and Trade Arbitration Commission (CIETAC) permits consolidation after the parties have given their consent for the same.<sup>27</sup> Pertaining to its joinder provision, the same can be availed by the filing of an application by any of the parties, either before or after the formation of a tribunal, and in case there is any objection arising, the same will be rectified by CIETAC itself.<sup>28</sup>
- The Stockholm Chamber of Commerce (SCC) has no joinder provision and allows consolidation if there are same parties.<sup>29</sup>

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<sup>25</sup> Arjun Gupta, Sahil Kanuga, Vyapak Desai, "Blessed Unions in Arbitration- An Introduction to Joinder And Consolidation in Institutional Arbitration" 4 IJAL 130 (2016).

<sup>26</sup> Art. 22.1, LCIA Rules, 2014.

<sup>27</sup> Art. 19, CIETAC Rules, 2014.

<sup>28</sup> Art. 18, CIETAC Rules, 2014.

<sup>29</sup> Art. 11, SCC Rules, 2010.

- There is no consolidation provision in the Singapore International Arbitration Centre (SCIA) and the United Nations Commission on International Trade Law (UNCITRAL) but both permits joinder of a third party only when there is a consensus.<sup>30</sup>

It is salient to stress on the fact that the lawmakers of the Arbitration and Conciliation Act, 1996 had borrowed several principles of UNCITRAL which can be used as a striking point by readers who are not in favour of forced joinder/intervention as a bulwark for preserving the concept of party autonomy.

Each of the above international arbitral institutes supports the concept of joinder/intervention but not *forced* joinder/intervention highlighting the fact of keeping party autonomy intact.

On the other hand, there are other International Arbitration Institutions which supports joinder/intervention.

- Hong Kong International Arbitration Center (HKIAC) allows joinder/intervention on an application by a signatory or a third party and only if that third party at prima facie is a party to the arbitration agreement.<sup>31</sup> Pertaining to its consolidation provision, the same can be availed if there exists a common question of fact or law or the claims are made under the same arbitration agreement.<sup>32</sup>
- The International Centre for Dispute Resolution<sup>33</sup> and the International Chamber of Commerce<sup>34</sup> allows joinder and consolidation if the following pre-requisites are realized –
  - i. claims, counterclaims or set-offs are made under more than one arbitration agreement;
  - ii. involve the same parties;
  - iii. the disputes arise in association with the same legal relationship; and

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<sup>30</sup> Art. 24(b), SIAC Rules, 2013; Art. 17, UNCITRAL Ad Hoc Rules, 2013.

<sup>31</sup> Art. 13, HKIAC Rules, 2013.

<sup>32</sup> Art. 28.1, HKIAC Rules, 2013.

<sup>33</sup> Art. 7, 8, ICDR International Arbitral Rules, 2014.

<sup>34</sup> Art. 8, 10, ICC Rules, 2012.

- iv. the consolidation arbitrator finds the arbitration agreements to be compatible.

The rationale behind preferring forced joinder can be the possibility of uniform award-making regarding the same facts and legal issues, shorter duration and lower costs of arbitral proceedings, and increased possibilities for determining and pursuing the party's procedural tactics relative to the conduct of separate proceedings.<sup>35</sup>

### [5] Arbitral Procedures in Other Nations

The Indian Constitution is distinctive in its attributes. The reason being that it has borrowed many of its features not from one but multiple nations. The concept of borrowing essential elements from different nations and the omission of any provisions in the Arbitration and Conciliation (Amendment) Act, 2015 calls for the need to see the precedents apart from the procedures and rules being followed by the different nations in the sphere of arbitration essentially pertaining and confining to the concept of joinder or intervention. The following paragraphs will cite several nations who either favour party autonomy or joinder/intervention of third parties.

Joinder in litigation should not be taken to be on the same pedestal as joinder in arbitration. In the former, a joinder is allowed on the grounds of effective administration and reduced costs which does not necessitate the consent of the parties<sup>36</sup> unlike most arbitration proceedings which makes it mandatory to obtain consent, thus strengthening the idea of party autonomy. This being a vital reason, arbitration laws of most nations except a few don't acknowledge forced joinder/intervention and consolidation if it is against the will of any of the parties.<sup>37</sup>

In the United Kingdom, there is a provision for consolidation but requiring consent from the parties is a *sine qua non* for such consolidation.<sup>38</sup> In *Oxford Shipping Co Ltd v. Nippon Yusen Kaisha (the Eastern Saga)*<sup>39</sup>, though both claims revolved around mutual law and facts and were part of the common agreement, the court ruled that consolidation was not possible, in the absence of parties' consensus on the basis that arbitration is, by nature, a private method of dispute resolution. In a similar case, the court acknowledged the desirability of efficiency and the consistency of results if there is consolidation but emphasised that in arbitration, *'party choice,*

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<sup>35</sup> Vladimir Filipovic, "Multiparty Arbitration and Consolidation of Arbitral Proceedings" 39 *Zbornik PFZ* 507 (1989).

<sup>36</sup> Arjun Gupta, Sahil Kanuga, Vyapak Desai, "Blessed Unions in Arbitration- An Introduction to Joinder and Consolidation in Institutional Arbitration" 4 *IJAL* 130 (2016).

<sup>37</sup> *Ibid.*

<sup>38</sup> Sec. 35, United Kingdom Arbitration Act, 1996

<sup>39</sup> (1984) 2 Lloyd's Rep. 373.

*privacy and confidentiality are relevant and important*<sup>40</sup> ordering not to consolidate the proceedings. Apart from upholding party autonomy, the United Kingdom has also stressed on the importance of incorporating a clause in the arbitration agreements to avail the facility of joinder and the same was laid down in the case of *Lafarge Redland v. Shepard Hill*.<sup>41</sup>

In France, international arbitration is silent on provisions that authorise courts to interfere in the arbitral process, inferring that intervention or joinder by additional parties could be permissible only by the signatories to the agreement.<sup>42</sup>

Sweden has not incorporated any law which necessitates compulsory consolidation in order to uphold party autonomy.<sup>43</sup> Nor there is any provision outspreading any equitable powers to arbitral tribunals or courts in Sweden.<sup>44</sup>

Pertaining to the United States the scenario is different. The country is a union of 50 states each having different laws. Moreover, there are derivations at the federal level and state level with no standard procedure being followed. Some of the states prefer consolidation under their state Act<sup>45</sup> and some otherwise. However, there is no clause for consolidation or joinder in the Federal Arbitration Act (FAA).

Federal courts, in a number of case laws have ruled that forced joinder/consolidation is against the basic tenet of arbitration and is in the violation of the same.<sup>46</sup> In *United Kingdom v. Boeing Co and Textron Inc*<sup>47</sup>, respondents had different contracts with the United Kingdom but with identical clauses. However, there was no provision for consolidating the proceedings. This being the cause, there was no authority with the court to consolidate the different proceedings simply

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<sup>40</sup>Guidant L.L.C. v. Swiss Re International S.E.(2016) EWHC 1201.

<sup>41</sup> [2000] 1 WLR 1621 (U.K.).

<sup>42</sup> W. Laurence Craig, "Some Trends and Developments in the Laws and Practice of International Commercial Arbitration" 30 *Tex. Int'l L.J.* 52 (1995).

<sup>43</sup> Michael F. Hoellering, "Consolidated Arbitration: Will it Result in Increased Efficiency or an Affront to Party Autonomy?" *DisP. Res. J.* 49 (1997).

<sup>44</sup> S. I. Strong, "Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or A Proper Equitable Measure?" 31 *Vand. J. Transnat'l L.* 956 (1998).

<sup>45</sup> Okuma Kazutake, "Party Autonomy in International Commercial Arbitration: Consolidation of Multiparty and Classwide Arbitration" 9 *Ann. Surv. Int'l & Comp. L.* 191 (2003).

<sup>46</sup> *American Centennial Ins. Co. v. National Cas. Co.* 951 *F.2d* 107, 108 (6th Cir. 1991); *Baessler v. Continental Grain Co.* 900 *F.2d* 1193, 1195 (8th Cir. 1990); *Protective Life Ins. Corp. v. Lincoln Natl Life Ins. Corp.* 873 *F.2d* 281, 282 (11th Cir. 1989); *Del E. Webb Constr. v. Richardson Hosp. Auth.* 823 *F.2d* 145, 150 (5th Cir. 1987).

<sup>47</sup> 998 *F.2d* 68, 74 (2d Cir. 1993).

because there was familiarity in facts and issues.<sup>48</sup> This case shares the same rationale which was propounded in the Indian case of *Duro Felguera*<sup>49</sup> and *Deutsche PostBank Home Fin. Limited*.<sup>50</sup>

In contrast to the above case of *Boeing Co and Textron Inc* there are several judgments which were not rendered in the favour of party autonomy. The Supreme Court<sup>51</sup> of Minnesota in one of the cases reversed the judgements of the lower courts which were against consolidation. The Supreme Court held that consolidation of arbitration claims is a fact-intensive issue to be made by the trial courts after considering “*the efficiencies of consolidation, the danger of inconsistent judgments if disputes are arbitrated separately, and the prejudice that parties may suffer as a result of consolidation.*”<sup>52</sup>

New York courts may permit consolidating proceedings when (a) separate proceedings involve similar facts or legal issues, (b) consolidation does not cause damage to any of the parties involved, (c) there exist the same or similar arbitral clauses regarding proceedings to be consolidated, (d) there is danger of making contrary awards in separate proceedings, (e) consolidation is in the interest of justice, and (f) other procedural advantages can be thus achieved.<sup>53</sup>

The inconsistency that is seen in the United States can also be traced in Canada. In Canada, most of the provinces have different laws pertaining to domestic and international arbitration. For instance, in Alberta, consolidation can be done only with the consent of the parties.<sup>54</sup> However, regarding international arbitration, the law is silent as to whether consent is a pre-requisite or not.

Courts in Canada will order consolidation with the mutual consensus of all parties and “*on terms the court considers just and necessary.*”<sup>55</sup> In the case of *Priscapian Development Corp v. BG International Ltd*<sup>56</sup>, in deciding whether consolidation can be granted in the absence of parties’ consent, the Chief Justice established a framework that allowed for consolidation on the basis of the following factors which are terms of the arbitration agreement; involvement of any common question of law or fact; claim arising out of the same series of transactions; court being non-

<sup>48</sup> Okuma Kazutake, “Party Autonomy in International Commercial Arbitration: Consolidation of Multiparty and Classwide Arbitration” 9 Ann. Surv. Int’l & Comp. L. 189 (2003).

<sup>49</sup> (2017) 9 SCC 729.

<sup>50</sup> (2011) 11 SCC 384.

<sup>51</sup> *Illinois Farmers Insurance Company v. Glass Service Company* 683 NW 2d. 792 (2004).

<sup>52</sup> *Grover-Diamond v. American Arbitration Ass’n* 211 NW 2d 787 (1973).

<sup>53</sup> Vladimir Filipovic, “Multiparty Arbitration and Consolidation of Arbitral Proceedings” 39 Zbornik PFZ 508 (1989).

<sup>54</sup> Sec. 8(4), Arbitration Act, RSA, 2000

<sup>55</sup> S. I. Strong, “Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or A Proper Equitable Measure?” 31 *Vand. J. Transnat’l L.* 946 (1998).

<sup>56</sup> 2016 ABQB 611.

interventionist in proceedings; both the arbitration agreements are at the same stage; neither of the parties is getting seriously prejudiced by consolidation and if the consolidation will be economical.

However, on the other hand, in *Liberty Reinsurance Canada v. QBE Insurance and Reinsurance*<sup>57</sup>, a dispute arose between a reinsurer and a reinsured party which had multiple contracts signed between them containing different arbitration clauses. The party applied to consolidate the proceedings, but the Superior Court of Justice ruled that the consent of all the parties was required in order to consolidate the arbitrations. In likewise cases of *Western Oil Sands Inc v. Allianz Insurance Company of Canada*<sup>58</sup> and *Alberta Motor Association Insurance Company v. Aspen Insurance UK Ltd*<sup>59</sup> it was held that without obtaining the consent of either of the parties, joinder or consolidation was not permissible.

However, the common question of fact/law and dispute occurring out of the same series of transactions are the main factors which allow consolidation of proceedings in Australia<sup>60</sup>, Netherlands<sup>61</sup> and Hong Kong<sup>62</sup>.

In *Chun Wo Building Construction v. China Merchants Tower Co and others*<sup>63</sup> consolidation was permitted on the ground of sufficient common issues, that the claims were arising from the same transactions and that the arbitral proceedings were at an early enough stage to make a consolidation order.

Scrutinising case laws and procedures followed in the aforementioned nations doesn't lead to a conclusive outcome as some of them are in favour of party autonomy while the rest prefer joinder. But what should be taken into consideration is the ratio being followed by the two polar set of nations which are in consonance with the rationale that is being followed in the cases of the Indian judiciary.

### **[6] Weighing the Pros and Cons Of Joinder/Intervention**

Keeping aside the case laws and procedures being followed throughout the globe, one should also investigate the numerous merits and demerits of joinder/intervention, which it entails.

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<sup>57</sup> (2002) 42 CCLI (3d) 249.

<sup>58</sup> (2004) AJ No. 85.

<sup>59</sup> 2018 ABQB 207.

<sup>60</sup> Australia International Arbitration Act, 1974, Sec. A24(1)(a)-(c).

<sup>61</sup> Netherlands Arbitration Act, 1986, Art. 1046.

<sup>62</sup> Hong Kong Arbitration Ordinance, 1997, Schedule 2.

<sup>63</sup> [2000] 2 HKC 255.

Party autonomy is a major, though not the only, attribute which entices the parties to choose arbitration over litigation. Confidentiality is another hallmark. The entire subject matter and every disclosure of information remain intact only among the parties and the arbitrator. But with the entry of a third party into the proceedings, the signatories to the agreement have to divulge the requisite information notwithstanding whether they consent or not, leading to the violation of another vital element.

Handpicking the arbitrator is an exclusive prerogative enjoyed by the parties to the contract. The same has been enshrined in the Arbitration and Conciliation Act.<sup>64</sup> However, there is a major downside regarding the same. Joinder/intervention will deprive the third parties of the process of participating in appointing the arbitrator that may lead to unlikely consequences. For instance, after the joinder is made and the award is not rendered in the favour of the third party, it may come up and say that since it didn't have a say in the appointment of the arbitrator why should it abide by the award? This would ultimately collapse the entire process of arbitration.

Due to the complex nature of contracts made these days, it is highly probable to have a blend of international and domestic arbitrations, as it was in the case of *Duro Felguera*. The counselor for the petitioners in the case stated a heavy reason to bar consolidation. He stated that if joinder is done and the arbitral proceedings are governed by International commercial arbitration, then the Indian subsidiary might lose the opportunity of challenging the award under Section 34(2A) of the 1996 Act, arguably a wider provision, available only in domestic arbitration.<sup>65</sup>

The non-existence of procedural rules for consolidated arbitration<sup>66</sup> is another shortcoming which must be dealt by the parties leading to unwanted delay and extensive costs.

Apart from the numerous downsides, joinder also enjoys countless merits upholding the concept of 'equality of the parties.' It is highly probable that the party claiming for joinder would be deprived of certain possible defences if the third parties are not made a part of the arbitral proceedings which can eventually lead to inconsistent arbitral awards.<sup>67</sup> This usually occurs in scenarios involving agreements signed by parties fulfilling a different scope of work but the transactions are intertwined with each other.

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<sup>64</sup> The Arbitration and Conciliation (Amendment) Act, 2015 (No. 3 of 2016), Sec. 10(1).

<sup>65</sup> *Duro Felguera S.A. v. Gangavaram Port Ltd.* (2017) 9 SCC 757.

<sup>66</sup> Vladimir Filipovic, "Multiparty Arbitration and Consolidation of Arbitral Proceedings" 39 *Zbornik PFZ* 507 (1989).

<sup>67</sup> S. I. Strong, "Intervention and Joinder As of Right in International Arbitration: An Infringement of Individual Contract Rights or A Proper Equitable Measure?" 31 *Vand. J. Transnat'l L.* 980 (1998).

Proponents of consolidation would advocate that intrinsically linked arbitration agreements should prefer intervention if the third parties' rights are prejudicially affected in scenarios where proceedings take place without them - for instance, where a dispute arises between the owner and the parent company. Proceedings are initiated discussing the scope of work done by the subsidiary company and rendering the award in accordance. If the subsidiary company is not made a part of the proceedings and the award is rendered against it, not only would it negatively affect the subsidiaries' rights but would also lead to a breach of the principle of natural justice.

Another contention is that in specific cases, the non-appearance of the third party makes it outlandish for the arbitrator to proceed with the procedures. Since the arbitrator has a commitment to direct the hearings in a way that guarantees equality among the parties and a reasonable open door for each signatory to show their case, the arbitrator will not proceed with the procedures except if those third parties are available.<sup>68</sup>

Joinder or consolidations also enjoys some economical points like avoiding the use of the same evidentiary materials in the arbitral proceedings apart from single payment of arbitrator's fees.

Proponents of joinder/intervention would stress on the point that if the claims involve the same parties, are at roughly the same stage of arbitral proceedings and are related to each other in one way or the other then there should be no reason for barring consolidation as it was held that "*arbitration must be simple, less technical and more responsible to the actual realities of the situations.*"<sup>69</sup>

## [7] Conclusion

The mushrooming usage of multifaceted contracts has led the arbitration societies and arbitral tribunals to come up with never tested solutions which have resulted in an unprecedented wave of clashing judgements. Cabining it to the Indian context, polar judgements by the same Apex Court has led it to further conundrums. But what should be given recognition here is that every judgement by the Hon'ble Supreme Court was fact-intensive notwithstanding whether it goes with or against the principle of party autonomy. For instance, in *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*<sup>70</sup> the bench allowed for consolidation because in their principle agreement there was an expression "under and in connection with" which was construed by the court as "*very wide to make it more comprehensive*". Though in the case there was no explicit clause giving reference to a joinder, the expression as ascertained by the court was implicit in nature to

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<sup>68</sup> Id. at 992.

<sup>69</sup> Food Corporation of India v. Joginderpal 1989 SCR (1) 880.

<sup>70</sup> (2013) 1 SCC 641.

give allusion to a joinder which makes it obvious that intention is a keystone that must be examined by the court prior to any joinder or consolidation. Intention here can be written or implied. If any arbitration agreement has similarly worded expressions, then it should not be an arduous task for the court to follow the guidelines as laid down in the case.

As previously discussed above, there was a succession of 2018 cases which laid their judgement on the foundation of the *Chloro Controls* case. However, the recent case of *Royale India Rail Tours Ltd. vs Cox & Kings India Ltd. & Anr.*<sup>71</sup> created a hiatus in the string of judgements endorsing joinder making it obvious that consideration by the Indian judiciary vis-à-vis third parties are a brew of noes and yeses indicating the ineptitude of the Indian courts to resonate in a single unanimous tone.

The above-discussed judgements have not ameliorated the situation but have made it rather more complex due to non-uniformity in the pattern being followed. But all these case laws share one mutual ground i.e. it was only after scrutinising the facts of each case the judgement was rendered, irrespective of whether it is upholding party autonomy or bolstering joinder or consolidation. Taking a plausible view, no two cases are identical. There are always some nuances which obliges the court to vet each case and render judgement accordingly which at the moment seems to be the correct stratagem.

Apart from this, another viable solution to get rid of being swamped in such a dilemma is the mandatory incorporation of a clause in the arbitration agreement whether to allow or refuse joinder/intervention in near future.

Proponents of party autonomy may at a split second recommend joinder or consolidation but would question the likelihood of an upper-hand of the party in the proceedings in whose favour the consolidation or joinder is done. Therefore, in order to make the state of affairs free from any biases, if any consolidation or joinder is done, it ought to be decided at a nascent stage of the proceeding, thus ruling out the chances that the arbitral award will be set aside later on the grounds that the arbitrators exceeded their authority by consolidating the arbitrations.<sup>72</sup>

Due to discrepancy in the pattern being followed by varied International Arbitral Tribunals and nations, it would be challenging for the legislature to adhere to either of the sides. However,

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<sup>71</sup> 2019 SCC OnLine Del 6905.

<sup>72</sup> S. I. Strong, "Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or A Proper Equitable Measure?" 31 *Vand. J. Transnat'l L.* 955 (1998).

drawing an analogy between those countries, tribunals and India which have familiar arbitration laws, trends and borrowing their certain suitable provisions keeping in mind the growing Indian arbitration developments can be a way out.

However, these suggestions will be futile until they are included in the Arbitration and Conciliation Act or become a precedent. The state of affairs calls the need for a judgement by the Apex Court as a final nail in the coffin which would settle the matter once in for all by laying the parameters on the basis of which joinder of third parties be allowed or denied. Till they are not incorporated in our system, it is certain that the principles of consolidation or joinder/intervention will hurl new challenges for the Indian judiciary regarding the implementation proceedings.

## RETRACING JOHN LOCKE'S INALIENABLE RIGHTS IN LIGHT OF RECENT JURISPRUDENCE CONCERNING CULTURAL RELATIVISM IN INDIA

Harsh Dhiraj Singh and Vivek Krishnani\*

*The text of the constitution is shaped by certain basic principles which must be regarded without exception. Accordingly, a purposive interpretation of the text is not only prudent but also necessary. In this regard, views of jurists, who have contributed to the principles, become highly relevant for the analysis of constitutional questions. John Locke is one such jurist whose concept of inalienable rights demands a revisit vis-a-vis the present-time developments in the realm of cultural relativism, which have raised unsettling concerns.*

*The fulcrum of this essay, which touches upon a wide range of questions, remains Locke's theory as presented in his seminal work, "Two Treatises of Government". The authors' views derive colossal inspiration from the same and this note is a celebration of his work and the Indian Judiciary's activism that has time and again curtailed the unfounded and wrongfully averred 'essential' religious practices. This note in furtherance of this objective is structured as follows: beginning with an insight into the jurist's theory, the note progresses to contrast the inalienable rights with the rights pertaining to religion as discussed in certain judgments.*

### I. Introduction to Lockean Model

*"Nobody can give more power than he has himself; and he that cannot take away his own life, cannot give another power over it."*<sup>1</sup>

John Locke's sense of inalienable rights stems from the premise that humans are a creation of God. Accordingly, they are no more than custodians of their own life in that they do not have the ultimate right over it. They are neither permitted to destroy it nor to transfer their own interests over it to other humans for they too are nothing but creations of the same creator who has title over every 'body'. Rights, so bestowed on an individual, are inalienable in that they are rights which people possess by virtue of being humans. Consequently, they are widely regarded as human rights. They are not derived from the Constitution or any Grundnorm but from god's creation and they very well exist even in the state of nature.<sup>2</sup>

This idea of Locke has come a long way, but it seems very relevant when we reflect on it in light of recent judgments passed by the Indian courts. The concept of certain *inalienable rights* holds its

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<sup>1</sup>John Locke, *Two Treatises of Government* 206 (Whitmore and Fenn and C Brown, London, 1821).

<sup>2</sup>*Id* at 304.

ground firm till this very moment and will continue to do so, when this Lockean point of view is appreciated in its true sense. The sanctity of 'life' is to be protected and defended from all those invasions made in the name of certain concrete elements that our society attaches value to—one such element is religion.

The challenge that religion poses to the concept of *inalienable rights* can be very well referred to as *cultural relativism*, especially when certain practices in the veil of religion try to define this concept of *inalienable rights* as *divisible*. *Cultural relativism simply refers to the idea that an individual's belief, value or sentiment be judged only by that individual's culture and not against any other parameter*. However, it is argued that these rights are in the ends of ensuring equality for all and must take precedence over 'religious fanaticism' which comes in the guise of such relativism. The authors are in complete consonance with the recent judgments pronounced in the *Sabarimala*<sup>3</sup> and *Triple Talaq*<sup>4</sup> cases. Nevertheless, some decisions, like the Supreme Court's stay order on the ban of *Santhara*,<sup>5</sup> are equally off-putting.

The Lockean theory forms a great basis for a jurisprudential analysis of these judgments as herein certain inalienable rights are perceived as antithetical to the idea of cultural relativism. This article, accordingly, expounds the authors' perspective on these controversial religious practices through the lens of John Locke's inalienable rights.

## II. An entry to the Sabarimala shrine: from a libertarian perspective

Regard must be had to the concurring opinion of Sahai J. in *Sarla Mudgal*, which aptly highlights the issue at hand:

*"Some of these (religious) practices observed by members of one religion may appear to be excessive and even violative of human rights to members of another ...today there is no Raja Ram Mohan Rai who single handedly brought about that atmosphere which paved the way for Sati abolition."*<sup>6</sup>

A perusal of the aforementioned lines indicates the need to do away with cultural relativism that is transgressing the exercise of human rights, life and liberty being the most widely acknowledged ones.

Although practices like *Sati* or *Suttee* had been observed by members of our society, the same being in violation of human rights was abolished eventually. Matters of faith and belief which

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<sup>3</sup>*Indian Young Lawyers Assn. v. State of Kerala*, Writ Petition No. 373 of 2006, Decided by the Supreme Court of India, on September 28, 2018.

<sup>4</sup>*Shayara Bano v. Union of India*, (2017) 9 SCC 1.

<sup>5</sup>*Nikhil Soni v. Union of India*, (2015) Cr LJ 4951 (Raj).

<sup>6</sup>*Sarla Mudgal v. Union of India*, AIR 1995 SC 1531.

can be attributed to a particular religion, wherein reason and logic have little role to play,<sup>7</sup> require time to come in sync with the belief system of society at large. Even if the sentiments and emotions required persistent efforts to cool down, they did so with time.

Comparable is the scenario, as of now, with respect to the Apex Court's take on women's entry into the *Sabarimala* shrine. The preservation of 'liberty' as against the ideals of a significantly small sect of people has been emphasised by the court. The same, however, has invited upheaval from the concerned social segment, which conforms to the opinion of Indu Malhotra J., who controversially dissented. In fact, several incidents of unrest reported by media are illustrations in this regard. Recently, a Malayalam film director was attacked with cow dung for merely voicing his views concerning the issue on a social media platform.<sup>8</sup> Such is the sensitivity of this religious minority, whose rights are in question, that women, despite the court's verdict, refrain from entering the shrine. In fact, a few of them who have managed to enter the *sanctum sanctorum* have conveniently made it to the headlines.<sup>9</sup> Social acceptance, in the authors' opinion, would as a matter of time, be conferred on this issue precisely like it did for the abolition of *Sati*.

In the ends of prioritising cultural relativism, the liberty of individuals must not be undermined. Curtailing the liberty of women in furtherance of staunch religious beliefs deprives them of an inalienable right which should not be compromised in any case whatsoever. It must be noted that sustenance of gender justice is the cultivated achievement of intrinsic human rights and there cannot be any discrimination solely on the ground of gender.<sup>10</sup>

On this note, in the *Triple Talaq* judgment, the misogynistic practice of 'talaq-e-biddat' was dispensed with. In essence, the judiciary deemed it fit to transgress into the realm of personal laws. This is absolutely incongruent with the dissenting opinion of Indu Malhotra J. in *Sabarimala*, who stated that "*issues of deep religious sentiments should not ordinarily be interfered with by the Court..... (and) notion of rationality cannot be invoked in the matters of religion.*"<sup>11</sup>

The authors, however, are in line with such judicial intervention for the achievement of the time-hallowed aim of a uniform code. Judicial activism which seeks achievement of this aim must not be enfeebled to make way for the customary practices that stand as an obstacle to the

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<sup>7</sup>M.P. Raju, *Uniform Civil Code: A Mirage?*297 (Media House, Delhi, 2003).

<sup>8</sup>Director Priyanandan attacked with cow dung following FB post on Sabarimala, *available at: <https://www.thenewsminute.com/article/director-priyanandan-attacked-cow-dung-following-fb-post-sabarimala-95630>* (last visited on February 5, 2019).

<sup>9</sup>Sabarimala: The Indian god who bars women from his temple, *available at: <https://www.bbc.com/news/world-asia-india-45901014>* (last visited on February 5, 2019); Kanakadurga, woman who entered Sabarimala temple, attacked by mother-in-law, *available at: <https://www.indiatoday.in/india/story/kanakadurga-attacked-sabarimala-kerala-1431082-2019-01-15>* (last visited on February 5, 2019).

<sup>10</sup>Charu Khurana v. Union of India, (2015) 1 SCC 192.

<sup>11</sup>*Supra* note 3.

preservation of inalienable rights. Such preservation is the principle underlying the all-encompassing interpretation attributed to Article 21<sup>12</sup> of the Indian Constitution. There is consistent jurisprudence in this regard to buttress the authors' claim.<sup>13</sup>

Here, it becomes imperative to revisit Locke's model wherein God doesn't entitle even the individual himself to tamper with his own life and liberty. In fact, paramount importance has been accorded to these rights, and other rights have been considered to be an extension of them. Consequently, any conflict between these rights and any other rights would demand prevalence of the former. The Indian Judiciary subscribes to the same line of thought in that utmost protection has been provided to rights covered under Article 21.

Time and again, contentions in favour of constitutional protection of religious practices and autonomy of personal laws have been encountered by the courts of India. The settled position, nonetheless, is that any usage<sup>14</sup> or personal law<sup>15</sup> cannot be used as a mean to claim any right when it is found to violate human rights.

Another specimen of the foregoing proposition can be found in the judgment in the *Shirur Mutt* case,<sup>16</sup> wherein the Indian Constitution was held not to be used as a shield to afford protection to religious practices. The practice of appointing a non-Malayala Brahmin as priest of the temple concerned was not considered to be under the canopy of constitutional protection. The practice was adjudged as 'derogatory' to the law of the land and human rights, and as a result, prevailed. It can be very well observed that an individual is at complete liberty to profess or propagate the religious practice, but this in no way interferes with any of the two rights concerned herein.

Having established a case against absolute constitutional protection against religious practice and in favour of the need to prioritise certain human rights, the authors now seek to highlight an interesting observation by again referring to the *Sabarimala* issue, which makes for a strong alternative argument. Even if it is accepted that constitutional protection must be accorded to these religious practices and courts must not intervene into the realm of personal laws, a careful insight into the issue would reveal that there exists no such point-blank conflict. The judgment, in fact, provided women the choice of entering or abstaining from entering the shrine. Resultantly, the choice of entering the shrine would not only remove the impediment to the

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<sup>12</sup>The Constitution of India, art. 21.

<sup>13</sup>*Maneka Gandhi v. Union of India*, AIR 1978 SC 597; *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180; *Vishakha v. State of Rajasthan*, AIR 1997 SC 3011.

<sup>14</sup>*The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, AIR 1954 SC 282.

<sup>15</sup>*Supra* note 4.

<sup>16</sup>*Supra* note 14.

exercise of their right to profess the religion and consequently their right to liberty, but also allow them to act in accordance with the way their section has managed the affairs till now.

Complacent about the verdict, the authors stand in conformity with the line of reasoning adopted by the judges. Attributing too much significance to the dissenting opinion<sup>17</sup> of Indu Malhotra J., would only invite more room for inconsistency which already stems from the Supreme Court's stay on the ban of *Santhara*. This inconsistency will significantly affect the test of essential religious practices and will give an extra space for conflicting religious sentiments. In the interest of avoiding such problems, court's interference in issues concerning 'deep religious sentiments' cannot be absolutely barred.

### III. Now that women are permitted to enter the Shrine, does *Santhara* ban seem just?

While Locke would be happy to approve of the entry of women to the *Sabarimala* shrine, the stay order on *Santhara*'s ban is contrary to his ideals. On the one hand, the right to liberty has been preferred to religious customs, but on the other hand the right to life has been overpowered by *religious fanaticism*.

Providing context for answering the question raised above, the Rajasthan High Court,<sup>18</sup> in its well elucidated judgment, had quashed the practice of *Santhara*, prevalent among the Shvetambara sect of the Jains, as unconstitutional. However, the Supreme Court ordered a stay on the judgment of the High Court. It may be noted that the Indian law in this regard is Section 309<sup>19</sup> of the Indian Penal Code, 1860 ["IPC"], which punishes the attempt to commit suicide and Article 21<sup>20</sup> of the Indian Constitution, which protects the right to life of citizens and non-citizens. Other provisions like Section 115<sup>21</sup> of the Mental Healthcare Act, 2017 require attention too.

In light of these provisions, an understanding of the practice of *Santhara* is requisite to analyse the decision taken by the Supreme Court. Generally, a person of old age takes the vow of *Santhara* to detach himself from the material world.<sup>22</sup> This practice, to which sheer glory is attached by the community that indulges in it, is a fast unto death<sup>23</sup> which arguably leads to attainment of *moksha* (salvation). Legally, *Santhara* was alleged, before the High Court, to fall outside the ambit of Section 309 as *it is a voluntary act of giving up of one's body for salvation and is*

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<sup>17</sup>*Supra* note 3.

<sup>18</sup>*Supra* note 5.

<sup>19</sup>The Indian Penal Code, 1860 (Act 45 of 1860), s. 309.

<sup>20</sup>The Constitution of India, art. 21.

<sup>21</sup>The Mental Healthcare Act, 2017 (Act 10 of 2017), s. 115.

<sup>22</sup>Sonali Bhatt Marwaha, *Colors of Truth: Religion, Self and Emotions* 125 (Concept Publishing Company, India, 2006).

<sup>23</sup>Arun Kumar Jain, *Faith & Philosophy of Jainism* 108 (Kalpaz Publications, India, 2009).

*not violent in any manner.*<sup>24</sup> This argument completely lacks legal soundness in that *first*, it has confused the motive of the individual with criminal intention and *second*, it takes into consideration the degree of violence which the penal provision is least bothered about.

An intention to kill self *simpliciter* satisfies the *mens rea* requirement of the provision.<sup>25</sup> In *Ram Sunder Dubey*, a person who openly declared that he will fast to death and subsequently refused all nourishment until the stage when there was imminent danger of death ensuing, had been declared guilty of attempted suicide.<sup>26</sup> This precisely expounds the scenario of zealots who take the vow of *Santhara*.

John Locke, in his *Two Treatises of Government*, does mention the word 'religion'. However, he refrains from discussing the same in detail. Accordingly, it can be safely deduced that under his model, right to profess the religion of one's choice, like other freedoms, is an extension of the right to liberty. However, as regards the practice of *Santhara*, noteworthy is Locke's stand regarding life and god. Throughout his treatise, he has maintained that an individual is not entitled to destroy his own life<sup>27</sup> as it belongs to his creator. It may be noted that in the name of salvation, the practice of *Santhara* curtails the natural span of life. Consequently, this practice has an inherent disregard for Locke's idea, which provides primacy to life.

A deeper analysis would show that this innate contradiction with respect to taking of life arises from the fact that, as against John Locke, Jainism does not identify god as the creator of the universe.<sup>28</sup> In fact, as per the latter, god is simply a good individual, as can be understood from the following reference to the Jain Sutras: "By obedience to co-religionists and to the Guru the soul obtains discipline (*vinaya*)...by zealous praise of, devotion to, and respect for (the Guru) he obtains birth as a (good) man or god, gains perfection and beatitude, does all praiseworthy actions prescribed by discipline, and prevails upon others to adopt discipline."<sup>29</sup> Accordingly, Jainism recognises god but not as a creator as there are multiple gods (souls). Interestingly, Jainism ideology comes in contradiction with the law of the land too as the latter subscribes to the view taken by John Locke. In India, the lives of men are considered as valuable not only to their possessors, but also to the State which protects them and

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<sup>24</sup>*Supra* note 5.

<sup>25</sup>*Emperor v. Dwarka Poonja*, (1912) 13 Cr LJ 246; *Radharani v. State of Madhya Pradesh*, AIR 1981 SC 1776.

<sup>26</sup>*Ram Sunder Dubey v. State*, AIR 1962 All. 262.

<sup>27</sup>*Supra* note 1 at 191.

<sup>28</sup>N.K. Singh & A.P. Mishra, *Encyclopaedia of Oriental Philosophy and Religion* 134 (Global Vision Publishing House, India, 2007).

<sup>29</sup>Hermann Jacobi, 29<sup>th</sup> lecture: The Exertion in righteousness, *Jaina Sutras*, Part II (SBE45) [1895], Sacred Texts, available at: <http://www.sacred-texts.com/jai/sbe45/sbe4531.htm> (last visited on June 18, 2019).

for the protection of which the State exists. In fact, this is the fundamental principle<sup>30</sup> underlying Section 309, which punishes attempt to suicide and is certainly applicable in the present debate.

Recently, a popular argument against this provision has ensued from the advent of the Mental Healthcare Act, 2017, which through its Section 115 almost decriminalizes suicide. Section 115 provides for a presumption of severe stress in case of attempt to commit suicide and as a result demands non-trial of the person. However, the presence of 'unless proved otherwise' in the provision, bars its own application in the case of *Santhara*, as a vow to practise it cannot be deemed to be under any sort of stress. In fact, the decision to practise it is a conscious decision of the person. Accordingly, the application of Section 309 does not stand ousted.

Additionally, it must be understood that the life of an individual matters morally not because that organism is sentient, rational, free of pain, or because he values its own existence but simply because it is a human life.<sup>31</sup> It derives its significance from, as Locke suggests, the fact that it has been created by God and it has to be preserved regardless of these considerations. Mere old age and inability with respect to certain pursuits does not entitle individuals to terminate their lives.

Here is where *Santhara* becomes different from 'passive euthanasia', which is permissible in India. It is in fact comparable to 'active euthanasia' which has never been given validation by the Indian courts for it being incompatible with Article 21 of the Indian Constitution. To better explain the analogy, the authors place reliance on the recent judgment pronounced in *Common Cause v. Union of India*<sup>32</sup> wherein post a detailed analysis of precedents and opinions of eminent social thinkers, the position regarding euthanasia was clarified.

Euthanasia, a word that comes from the Greek, literally, means an act which leads to a *good* death. Active euthanasia necessarily requires the presence of a specific overt act done to end one's life as one of its significant characteristics.<sup>33</sup> Passive euthanasia, on the contrary, is the withdrawal of treatment that is necessary to sustain the life of a 'patient'.<sup>34</sup> However, *Santhara* is not always practised by a person who is suffering from a life-aborting ailment. It is merely putting an end to a life which is thriving even in the absence of medical assistance. Accordingly, it is comparable, if not similar, to active euthanasia, as against passive euthanasia.

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<sup>30</sup>Sri Hari Singh Gour, *Penal Law of India* 3162 (Law Publishers India Pvt Ltd., India, 2002).

<sup>31</sup>Elizabeth Wicks, *The Right to Life and Conflicting Interests* 16 (Oxford University Press, Oxford, 2010).

<sup>32</sup>(2018) 5 SCC 1.

<sup>33</sup>Ibid.

<sup>34</sup>*Airedale National Health Service Trust v. Bland*, [1993] 1 All ER 821.

#### IV. An Essential Religious Practice or Merely a Controversial One?

Having taken into account the suicidal aspect of *Santhara*, the authors in this segment would view it in light of the *Sabarimala* judgment. The Supreme Court, which has recently quashed the unjust practice which had been endemic in the Kerala temple, had stayed the ban imposed on the infamous practice of *Santhara* despite the appreciable reasoning employed by the Rajasthan High Court. Consequently, it becomes vital to revisit the old debate concerning the essential religious practices doctrine (hereinafter 'the doctrine').

Acknowledging the autonomy of religious denominations to manage the 'state of affairs in the matters of religion',<sup>35</sup> the authors submit that the doctrine cannot be used to protect controversial practices like *Santhara*. The language used in Article 26(b) suggests that there could be other affairs of a religious denomination which are not strictly matters of religion and to such affairs, the right does not apply.<sup>36</sup> To bring a religious practice under the purview of protection, the doctrine lays down that the practice should be an essential and integral part of the religion.<sup>37</sup> An essential practice is one which cannot be done away with and as a result, 'optional' practices are not within the ambit of the same.<sup>38</sup> It has been reiterated time and again that only if the taking away of that part or practice could result in fundamental change in the character of that religion, then such part could be treated as an essential or integral part.<sup>39</sup> As a consequence, practices which have sprung from merely superstitious beliefs and are unessential accretions to the religion must not be preserved under the doctrine.<sup>40</sup> For the same reason, activities put to question in the *Triple Talaq* and *Sabarimala* judgments too, have not been considered essential religious practices. Therefore, even if we were to go by the well-settled position in India regarding essential religious practices and not the Lockean idea, the recognition of *Santhara* as an essential religious practice of Jainism is unacceptable. The simple, significant reason behind this claim is that the practice is very 'rare'. Very rarely do we even hear about people engaging in *Santhara*. As a result, it is far from being an essential part of the religion as the same is being done away with by a lot of people who belong to the religious sect.

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<sup>35</sup>The Constitution of India, art. 26 (b).

<sup>36</sup>*Supra* note 14.

<sup>37</sup>*Javed & ors. v. State of Haryana & ors.*, (2003) 8 SCC 369.

<sup>38</sup>*State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat & ors.*, (2005) 8 SCC 534.

<sup>39</sup> Durga Das Basu, *Shorter Constitution of India* 475 (LexisNexis, India, 2009).

<sup>40</sup>*The Durgah Committee, Ajmer v. Syed Hussain Ali & ors.*, AIR 1961 SC 1402.

## V. Locke's take on intrinsically Patriarchal Superstitious Practices

In this segment, the authors ponder upon a very pertinent question raised in the *Sabarimala* judgment, which has been presented below. The same has later been analysed considering Locke's views.

*“The ages of ten to fifty have been marked out for exclusion on the ground that women in that age group are likely to be in the procreative age. Does the Constitution permit this as basis to exclude women from worship? Does the fact that a woman has a physiological feature – of being in a menstruating age – entitle anybody or a group to subject her to exclusion from religious worship? The physiological features of a woman have no significance to her equal entitlements under the Constitution.”<sup>41</sup>*

Patently, Locke provides for three inalienable rights concerning life, liberty and property. Nonetheless, these rights too are not the precise end in his theory. It could be understood on close perusal that an individual's life too shall be subordinate to the ‘principle of life’ in that the former can be forfeited for the latter.<sup>42</sup> This leads us to the conclusion that none of the three rights is an end in itself and consequently, none of them is inalienable.

If we dig deeper into this model, we find that there is another latent right which is indeed free from forfeiture and that, in the authors' opinion, is the inalienable right in the Lockean model. This abstract inalienable right is that of ‘equality’. It must be noted that one forfeits his right to life when he violates or infringes another's right to life. This signifies that the right to life is not unconditional in that it can be forfeited in certain conditions. However, this is not the case with the right to equal treatment. In Locke's opinion, we are all a creation of god. Throughout his work, he has harped on about the equality of individuals. Herein, another reference could be made to his work: *“a state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another....without subordination or subjection, unless the lord and master of them all should set one above another by an evident and clear appointment.”<sup>43</sup>* Taking from this, he expounds how the social contract which is the very foundation of government stems from the sense of duty which is a result of equality. In his words, *“if I do harm, I must look to suffer, there being no reason that others should shew greater measure of love to me, then they have by me shewed unto them.”<sup>44</sup>* Hence, equality, which forms the essence of this model, must hinder the inadmissibility of women alone in the *Sabarimala* shrine.

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<sup>41</sup> *Supra* note 4.

<sup>42</sup> *Supra* note 1, at 206.

<sup>43</sup> *Supra* note 1, at 189.

<sup>44</sup> *Supra* note 1, at 190.

Additionally, the authors opine that this practice of menstrual discrimination against women stems from nothing but 'patriarchy' that has with time taken the name of religion. The Indian judiciary, as a consequence, has frequently attended to questions of such discriminatory superstitious beliefs which stem from *inter alia* the patriarchal society. Two very popular instances of the same are the judgments relating to *Triple Talaq* and *Sabarimala*, which are within the scope of this discussion. 'Patriarchy' is apt for sociologically describing forms of society in which the institution of asymmetry between males and females is both legitimate and necessary.<sup>45</sup> However, the modern trends globally suggest that the said social arrangement has been done away with.<sup>46</sup> Unfortunately, patriarchy continues to impact the Indian scenario, thanks to superstitious beliefs which disregard the dignity of women in the society. The observation of Misra J. is highly relevant here: "*The society has to undergo a perceptual shift from being the propagator of hegemonic patriarchal notions of demanding more exacting standards of purity and chastity solely from women to be the cultivator of equality where the woman is in no way considered frailer, lesser or inferior to man.*"<sup>47</sup>

It is argued that the conventional archetypes of patriarchy must not drive society into discriminatory superstitious beliefs that eventually take the form of religion. On the one hand, women are posed with questions of chastity and purity and on the other, a man is permitted to divorce his wife at the mere utterance of two words thrice without providing any reason whatsoever. Such traditions, which amount to nothing but an old wives' tale, have been ubiquitously present in the picture. The inadmissibility of women from the temple on the grounds of celibacy and menstruation is one among the countless ways in which patriarchy as a social institution works to keep women in a position of subordination.<sup>48</sup>

However, Locke would be happy to know that not only in *Sabarimala* but also in *Dr. Noorjehan Safia Niaz*,<sup>49</sup> the court upheld equality by doing away with the patriarchal dominance that continues to plague Indian religious fanatics who stop women from entering religious institutions.

## VI. Conclusion

The authors have, instead of making a strictly legal-constitutional analysis, used Locke's theory as the backdrop for weighing these developments, which basically provides a jurisprudential angle

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<sup>45</sup>Eric Mace, From Patriarchy to Composite Gender Arrangements? Theorizing the Historicity of Social Relations of Gender 00 *Social Politics* 1 (2018).

<sup>46</sup>Ibid.

<sup>47</sup>*Supra* note 3.

<sup>48</sup>The Sabarimala Judgment – III: Justice Chandrachud and Radical Equality, Indian Constitutional Law and Philosophy, available at: <https://indconlawphil.wordpress.com/2018/09/29/the-sabarimala-judgment-iii-justice-chandrachud-and-radical-equality/> (last visited on February 05, 2019).

<sup>49</sup>*Dr.Noorjehan Safia Niaz & anr v. State of Maharashtra & ors.*, AIR 2017 (NOC 45) 18.

to the scrutiny undertaken. Locke's opinion, being antithetical to the idea of patriarchy and in absolute conformity with the preservation of life and liberty, seems to be very well respected by the Constitution makers. All of the notions in his model that have been discussed in this article find a significant place in the law of the land. In fact, the last few years have witnessed fantastic developments in the sphere of cultural relativism which somehow stand in conformity with the values of both Locke and the constitution. Judicial intervention, in the Indian context, for upholding the inalienable right of non-discrimination along with the paramount principles of life and liberty, demands massive appreciation. The authors, accordingly, present this article as an acclamation for the Indian Judiciary, which through its activism, has constantly quashed practices that are in violation of constitutional principles. However, certain deviations from the said course of action, like the stay on Santhara's ban, are yet to be rectified.

## WITNESS PROTECTION SCHEME, 2018 AND FAIR TRIAL RIGHTS: WHERE DOES THE BALANCE LIE?

Palash Srivastava\*

*The Supreme Court has recently notified the Witness Protection Scheme, 2018, in its judgment in Mahender Chawla and Ors. v. Union of India. Given the high number of witnesses turning hostile in high-profile cases, a Program intended to protect vulnerable witnesses and secure their impartial testimony must certainly be appreciated. However, certain witness protection measures, such as witness anonymity, must be subjected to a critical gaze before they are introduced in the Indian legal system. This paper seeks to critique the Witness Protection Scheme, 2018, from the standpoint of rights of the accused. The core argument of this paper is that the Program in its current form unduly tilts the balance in favour of the prosecution, thereby undermining the rights of the accused and the legitimacy of the criminal justice system itself. The Program does nothing to tackle the systemic reasons behind witnesses turning hostile, and instead myopically seeks a solution to the problem of witness hostility in denuding the rights of accused persons. The paper concludes with certain suggestions on how the Program can ensure the protection of witnesses without compromising on rights of accused persons.*

### Introduction

Recently, the Supreme Court of India has notified the ‘Witness Protection Scheme, 2018’ (hereinafter “Program”) in the case of *Mahender Chawla and Ors. v. Union of India*.<sup>1</sup> The case dealt with the question of protection for four petitioners involved in different capacities in the trial of the self-professed godman Asaram Bapu and his son, Narayan Sai on charges of rape and murder. In its judgment, the Supreme Court made observations about the “pathetic” conditions of witnesses in India,<sup>2</sup> and the necessity of a witness protection program for increased conviction rates.<sup>3</sup> Low conviction rates in rape and murder cases have also been cited as a justification for the Witness Protection Scheme, 2018, as it was formulated by the National Legal Services Authority (hereinafter ‘NALSA’) and the Bureau of Police Research and Development (hereinafter ‘BPRD’) in its original form (hereinafter ‘Scheme’). It was this Scheme which was

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<sup>1</sup> 2018 SCCOnLine SC 2679.

<sup>2</sup>*Id.* at 2.

<sup>3</sup>*Supra* note 1 at 6.

altered by the division bench of Sikri and Abdul Nazeer JJ. and was declared law under Article 141 of the Constitution of India, 1950 ('the Constitution').

Under the Program, a Witness Protection Order can be granted by the Competent Authority<sup>4</sup> (hereinafter 'Authority') adjudicating a Witness Protection Application after a Threat Analysis Report<sup>5</sup> (hereinafter 'TAR') has been presented before it.<sup>6</sup> A Witness Protection Order can provide protective measures as mentioned in clause 7, identity protection under clause 9, change of identity under clause 10, and relocation of witnesses under clause 11 of the Program, as may be requested by the witness. 'Competent Authority' is a committee to be constituted at the District level, comprising of the concerned District and Sessions Judge as the chairman, the Head of the Police of the District as member, and Head of the Prosecution in the District as its member secretary. The 'Threat Analysis Report' is to be prepared by the Head of the Police in the district where the case is being investigated, and it is to appraise the Authority of the credibility of the threat to the witness and/or to her/his family members, the risk caused by the threat, and the ability of those threatening the witness or her/his family to execute the threat.

The Program has been well received as it is believed that it will act as a sufficient safeguard against witnesses turning hostile in criminal trials. The recently decided case of Sajjan Singh,<sup>7</sup> and the case of Sohrabuddin encounter,<sup>8</sup> have been cited as examples of how political and financial power can tamper with the judicial process, thereby highlighting the need of strict witness protection measures. The issue has also received significant legislative attention, with 4 Bills being introduced in the Lok Sabha and 1 Bill being introduced in the Rajya Sabha on this subject between 2015 and present date. State authorities have also begun to implement the Program, with the Authority being formally constituted in Chandigarh,<sup>9</sup> and the six trial courts in Delhi issuing directions for their staff to ensure compliance with the Program.<sup>10</sup> Courts have begun to grant protection to vulnerable witnesses under the Program, with the protection granted to Sr.

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<sup>4</sup> Program, clause 2(c).

<sup>5</sup> Program, clause 2(j).

<sup>6</sup> Program, clause 6.

<sup>7</sup> Gaurav Vivek Bhatnagar, "1984 Case Verdict: HC Draws from 2002 Trials, Emphasises Better Witness Protection" *The Wire*, Dec. 18, 2018 available at <https://thewire.in/communalism/1984-case-verdict-hc-draws-from-2002-trials-emphasises-better-witness-protection> (Visited on Jan. 16, 2019).

<sup>8</sup> Kanu Sarda, "Hostile witnesses: Crucial factor turning fate of criminal trials in India" *The New Indian Express*, Dec. 22, 2018 available at <http://www.newindianexpress.com/nation/2018/dec/22/hostile-witnesses-turning-fates-of-criminal-trials-1914914.html> (Visited on Jan. 16, 2019).

<sup>9</sup> "Panel formed to provide protection to witnesses" *The Tribune*, Mar. 13, 2019 available at <https://www.tribuneindia.com/news/chandigarh/panel-formed-to-provide-protection-to-witnesses/742083.html> (Visited on June 20, 2019).

<sup>10</sup> "Tackling witnesses turning 'hostile' situation, courts to provide appropriate protection" *The New Indian Express*, Mar. 17, 2019 available at <http://www.newindianexpress.com/thesundaystandard/2019/mar/17/witness-protection-soon-in-courts-1952198.html> (Visited on June 20, 2019).

Lissy Vadakkal, who is acting as a witness against Bishop Franco Mullakal in the rape case filed against him, garnering significant media attention.<sup>11</sup>

Fair trial standards are a growing body of “minimum guarantees” that must be adhered to ensure that justice is done in a trial, both to the accused and to the victim and witnesses. Right to a fair trial is recognized by international instruments such as The International Covenant on Civil and Political Rights, 1966 (hereinafter “ICCPR”). In India, the accused persons have a right to fair trial under Article 21 of the Constitution.

While the Program must be appreciated for its purported intent of protecting vulnerable witnesses, it ought to be ensured that its populist appeal does not end up detrimentally impacting the rights of accused persons. The effort in this paper is to critique the Program from the standpoint of the right of the accused to a fair trial. To better elucidate this argument, the paper relies on the following propositions – that the Program routinizes an exceptional measure by making it extremely easy to avail witness anonymity; that the Program violates the fair trial principles of separation of powers and equality of arms; that the accused is not given any opportunity to oppose the grant of anonymity to witnesses; that there exist no procedural safeguards under the Program to control granting of anonymity to witnesses; and that the Program frustrates the right of the accused to confront the witness and to cross-examine her/him. This paper concludes with certain suggestions for the approach that the Program should take on its way forward, keeping in mind the need to ensure security of witnesses and the fair trial rights of the accused.

### **Normalizing the Exceptional: The History of Witness Anonymity in India**

The right to confront one’s accusers (meaning both the victim and the witnesses for the prosecution) is a “bundle of rights” which includes the right to a public trial, the right to come face-to-face with the accusers, and the right to cross-examine them.<sup>12</sup> The right is considered to be foundational in an adversarial system of adjudication of claims.<sup>13</sup> There have been historic exceptions to the rule, with the Spanish Inquisition and the English Star Chamber being infamously notable among them. The practice of conviction based on anonymous testimony, born in extraordinary times, was an attempt of authoritarian institutions to crush all dissent

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<sup>11</sup> Jaikrishnan Nair, “Kerala nun rape case: State asked to give protection to key witness nun” *The Times of India*, Apr. 19, 2019, available at <https://timesofindia.indiatimes.com/city/kochi/nun-rape-case-kerala-govt-asked-to-provide-protection-to-key-witness/articleshow/68848061.cms> (Visited on June 20, 2019).

<sup>12</sup> Ian Denis, “The Right to Confront Witnesses: Meanings, Myths and Human Rights” 4 CLR (2010).

<sup>13</sup> David Lusty, “Anonymous Accusers: An Historical and Comparative Analysis of Secret Witnesses in Criminal Trials” 24 SLR 361 (2002).

against the status quo.<sup>14</sup> However, even with the ushering in of democratic governments, anonymous testimony is still allowed across the globe in varying degrees. India is no exception to the rule, and the Program further regularizes this exceptional feature in the Indian legal system.

Witness anonymity was first provided for in India in anti-terror legislations, such as the Terrorist and Disruptive Activities (Prevention) Act, 1985 (hereinafter “TADA”)<sup>15</sup> and the Prevention of Terrorism Act, 2002 (hereinafter “POTA”),<sup>16</sup> citing the security of witnesses in such cases as a chief reason for the same. The constitutionality of TADA and POTA was challenged in *Kartar Singh v. State of Punjab* (hereinafter “Kartar Singh”)<sup>17</sup> and in *People’s Union for Civil Liberties v. Union of India* (hereinafter “PUCL”)<sup>18</sup> respectively. In both of these cases, the Supreme Court upheld the constitutionality of the Acts, as well as the constitutionality of the provisions which allowed witnesses to testify anonymously. However, in both these cases, the Supreme Court underscored the need to allow witness anonymity only in exceptional circumstances.<sup>19</sup>

The standard for the right of the accused to confront witnesses against her/him was further diluted in *Sakshi v. Union of India*, where the Supreme Court allowed the use of two-way closed-circuit television systems in cases involving sexual offences to prevent the witness from seeing the accused, since, as per the court, it may induce fear and trauma in the mind of the witness and deter her/him from testifying openly.<sup>20</sup> Even the questions that the accused could put to the witness had to be vetted by the Magistrate or the Judge presiding over the matter, and the Magistrate/Judge was to ask these questions to the witness in a “non-embarrassing way”.<sup>21</sup> Such dilutions of the right to confront witnesses against one might be justified on the grounds that the witness is not being allowed total, unimpeachable immunity from having her/his evidence put to test.

After the introduction of the provisions for witness anonymity in terror related and sexual offence related cases, the Law Commission of India in its 198<sup>th</sup> Report titled “Witness Identity Protection and Witness Identity Programmes” sought to extend these provisions to those offences under the Indian Penal Code, 1860 (hereinafter ‘IPC’) which were considered to be grave in nature, meaning thereby offences carrying a punishment of at least 7 years’

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<sup>14</sup> Kweku Vanderpuye, “Traditions in Conflict: The Internationalization of Confrontation” 43 CILJ 513, 521 (2010).

<sup>15</sup> Terrorist and Disruptive Activities (Prevention) Act, 1985 (Act 28 of 1987), s. 16.

<sup>16</sup> Prevention of Terrorism Act, 2002 (Act 15 of 2002), s. 30.

<sup>17</sup> (1994) 3 SCC 569.

<sup>18</sup> (2004) 9 SCC 580.

<sup>19</sup> (1994) 3 SCC 569, 685; (2004) 9 SCC 580, 610.

<sup>20</sup> (2004) 5 SCC 518, 543.

<sup>21</sup> (2004) 5 SCC 518 545.

imprisonment or more. This recommendation of the Law Commission is reflected in the definition of “offence” in the Program.<sup>22</sup> Witness anonymity, once considered an exceptional measure, has now been routinized in the criminal justice system. It evidences a slippery slope in terms of rights of individuals wherein once the rights of the accused are compromised in exceptional situations, they can never be restored to their original position, even if the exceptional situation which ostensibly necessitated the dilution of the rights of the accused has since then been mitigated.<sup>23</sup>

### **Violation of the Principle of Separation of Powers under the Program**

The Program is unduly biased in favour of granting anonymity to witnesses. This bias is evident from a bare examination of the constitution of the Authority. The Head of the Police in the District, who prepares the TAR, is also a member of the Authority which decides whether the TAR should be acted on or not. In view of the doctrine of separation of powers, and the fair trial right of the accused to have the judiciary function independently of the executive,<sup>24</sup> the Head of the Police and the Head of Prosecution should not ideally be members of the Authority. Under the Scheme, the executive was not involved in the process of determining which witnesses, if any, should be granted anonymity. Depending on the witness protection measure sought, either the Secretary or the Chairperson of the District Legal Services Authority served as the Competent Authority under the Scheme.<sup>25</sup>

Even under the Bills introduced in the Parliament on the issue, the decision to grant anonymity was either left to the court<sup>26</sup> or to the Member Secretary of the National Legal Services Authority or the State Legal Services Authority,<sup>27</sup> as the case may be. These measures ensured that the prejudice of the police against the accused did not unduly influence the decision of the court or the concerned Authority. This influence was discernible in a recent case from Chandigarh wherein a witness was granted protection on the instructions of District Attorney, Chandigarh,

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<sup>22</sup> Program, clause 2(i).

<sup>23</sup> *R v. Hughes* [1986] 2 NZLR 129, 148 (New Zealand Court of Appeal).

<sup>24</sup> Amnesty International, *Fair Trial Manual* 111 (2<sup>nd</sup> edn., 2014).

<sup>25</sup> Scheme, clause 2(d).

<sup>26</sup> The Witness Protection Bill, 2015 (Bill 341 of 2015); The Compulsory Protection of Witnesses and Victims of Crime Bill, 2017 (Bill 36 of 2017); The Compulsory Protection of Witnesses and Victims of Crimes Bill, 2018 (Bill 131 of 2018).

<sup>27</sup> The National Witness Protection Bill, 2016 (Bill 84 of 2016); The Witness Protection Program Bill, 2016 (Bill 245 of 2016).

immediately after he had filed an application for protection under the Program, without there being a TAR in place.<sup>28</sup>

Another peculiar provision in the Program is the unbridled discretion given to the police to decide who can avail witness protection. A Witness Protection Application can be made either by the witness himself, or by the family members of the witness, or by the police officers concerned.<sup>29</sup> It thus appears that even without the consent of the witness, s/he can be subjected to protection measures such as monitoring of her/his phone calls,<sup>30</sup> and concealment of her/his identity,<sup>31</sup> among others. This provision is highly susceptible to misuse as the police operating under pressure to secure a conviction may move such applications for key witnesses in certain cases, severely curtailing the ability of an accused to conduct her/his defence. Moreover, given how loosely “witness” is defined under the Program,<sup>32</sup> the police and the prosecution can move such an application for anyone acquainted with the facts of the case.

### **Exclusion of the Defence from the Process of Determination of Witness Anonymity**

The principle of equality of arms, which is a non-derogatory principle of fair trial rights, aims to establish procedural equality between the prosecution and the defence. To establish equality of arms, the counsel for the accused must be given adequate time and facilities to prepare their case.<sup>33</sup> Provision of “facilities” means access to all the information that is necessary to prepare a defence for the accused.<sup>34</sup> Keeping this principle in mind, it stands to reason that either witness anonymity should not be allowed and if it is allowed, the accused or at least her/his counsel must be a party to any such proceedings in which the protection measures to be granted to a witness are to be considered. However, this is not the case under the Program, which is marked by a total exclusion of the accused and even her/his counsel from such proceedings.

The proceedings under the Program are to be held *in-camera*.<sup>35</sup> “In Camera Proceedings” have been defined as those proceedings wherein only those persons who are “necessary” to decide the

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<sup>28</sup> Jagpreet Singh Sandhu, “Chandigarh: In murder case, witness allegedly threatened outside courtroom, granted protection” *The Indian Express*, Apr. 12, 2019, available at: <https://indianexpress.com/article/cities/chandigarh/chandigarh-in-murder-case-witness-allegedly-threatened-outside-courtroom-granted-protection-5671742/> (Visited on June 20, 2019).

<sup>29</sup> Program, clause 2(l).

<sup>30</sup> Program, clause 7(b).

<sup>31</sup> Program, clause 7(e).

<sup>32</sup> Program, clause 2(k). “Witness means *any* person, who possess information, or document about *any* offence.” (Emphasis my own)

<sup>33</sup> *Supra* note 24 at 119.

<sup>34</sup> Lawyers Committee for Human Rights, *What is a Fair Trial?: A Basic Guide to Legal Standards and Practice 16* (2000).

<sup>35</sup> Program, clause 6(f).

application of the witness are present.<sup>36</sup> Since the liberty and possibly the life of the accused is at stake, s/he ought to be a necessary party to such proceedings provided certain measures for the security of the witness have been adopted. But, given that including the accused or her/his counsel in such proceedings would defeat the purpose of protecting the identity of the witness, it is in doubt whether the accused or her/his lawyers would be allowed to participate in such proceedings. The Scheme was more instructive in this regard as it exhaustively defined “In Camera Proceedings” to mean those proceedings which excluded the public and the press (but not the accused) from the proceedings.<sup>37</sup> It can be speculated that under the Scheme, the accused and/or his counsel may have been qualifiedly permitted to participate in such proceedings.

No doubts arise about the ability of the accused to oppose an application for witness anonymity under The Witness (Identity) Protection Bill, 2006 (hereinafter “Law Commission Bill”) that was drafted by the Law Commission for its 198<sup>th</sup> Report. The Law Commission Bill allowed the accused to oppose the application for identity protection filed by a witness once chargesheet had been filed against the accused.<sup>38</sup> The accused was allowed to orally examine the witness, and the Magistrate/Judge was required to communicate the apprehensions of the witness to the accused.<sup>39</sup> The accused was even allowed to elicit further information about the perceived threat of the witness through a list of questions that it could submit to the Magistrate/Judge who could ask these questions to the witness.<sup>40</sup> Thus, some scope was available to the accused to oppose the application for identity protection once the trial commenced so that the defence of the accused was not altogether prejudiced.

### **Witness Anonymity and Right of Accused to Confront the Witness**

The principle of equality of arms again comes to the forefront here, as the ability of the defence to challenge the case of the prosecution critically hinges on the freedom given to the defence counsel to confront the witnesses rallied against the accused.<sup>41</sup> The three hallmarks of the adversarial trial process are the administration of oath to the witness, the observation of demeanour of the witness, and the cross-examination of the witness. The right to confront witnesses allows the accused to be satisfied that these three requirements have been met. Right to cross-examine a witness is a specie of the general right to confront one’s accuser.<sup>42</sup> The right

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<sup>36</sup> Program, clause 2(f).

<sup>37</sup> Scheme, clause 2(h).

<sup>38</sup> Law Commission Bill, clause 9(3).

<sup>39</sup> Law Commission Bill, clause 9(4).

<sup>40</sup> Law Commission Bill, clause 9(4).

<sup>41</sup> *Supra* note 24 at 119.

<sup>42</sup> *Pointer v. Texas*, 380 US 400 (1965) (Supreme Court of the United States of America).

to call and examine witnesses is also considered to be a fair trial right of the accused.<sup>43</sup> Under the ICCPR, it is a minimum guarantee to an accused person that s/he shall be allowed to examine witnesses brought against her/him when s/he is exposed to a criminal charge.<sup>44</sup> India is a party to the ICCPR, and therefore is bound to uphold this minimum guarantee.

In India, the right to confront witnesses against the accused has been enshrined in Section 273 of the Code of Criminal Procedure, 1973 (hereinafter “Code”). As per Section 138 of the Indian Evidence Act, 1872 (hereinafter “IEA”), the accused has a right to cross-examine witnesses brought against her/him. The Supreme Court had remarked in *Kartar Singh* that the right to cross-examine is not absolute in India and that it can be subjected to certain exceptions.<sup>45</sup> However, it must be noted that the verdict in *Kartar Singh* was delivered in exceptional circumstances wherein the Indian State perceived a threat of national disintegration due to separatist insurgency that prevailed in some parts of the country and it must not govern the ordinary understanding of the right to cross-examine. In fact, in *Sakshi*<sup>46</sup> the Supreme Court has held that the right to cross-examination is sine qua-non in the Indian criminal justice system.

Under the Program, there are provisions ensuring that the witness and the accused do not physically come face to face with each other,<sup>47</sup> that the identity of the witness is concealed from the accused,<sup>48</sup> that in-camera trials are allowed,<sup>49</sup> and that the voice and/or the image of the witness be distorted.<sup>50</sup> “Concealment of Identity of Witness” is defined as prohibiting the publication of the name, address or other particulars of the witness which might lead to the identification of the witness.<sup>51</sup> If an identity protection order is passed, the scope of prohibition becomes broader, and in addition to the grounds mentioned before, no questions can also be asked about the parentage, occupation and digital footprints of the accused.<sup>52</sup> Such restrictions on the line of questioning that may be adopted by the accused unduly hinder the efficacy of a cross-examination<sup>53</sup> without providing for any alternative procedural safeguards to check the reliability of the evidence given by the witness.

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<sup>43</sup> *Supra* note 24 at 160.

<sup>44</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 14(3)(e).

<sup>45</sup> *Supra* note 17 at 686.

<sup>46</sup> *Supra* note 20 at 545.

<sup>47</sup> Program, clause 7(a).

<sup>48</sup> Program, clause 7(e).

<sup>49</sup> Program, clause 7(j).

<sup>50</sup> Program, clause 7(l).

<sup>51</sup> Program, clause 2(b).

<sup>52</sup> Program, clause 9.

<sup>53</sup> *Alford v. United States*, 282 US 687, 691-692 (1931) (Supreme Court of the United States of America).

Anonymity orders also affect the ability of the accused to impeach the credibility of the witnesses produced against her/him. Under Section 146(2) and (3) of the IEA, the accused person can ask questions of the witness that establish her/his “position in life”, and questions that shake her/his credit, respectively. Under Section 155 of the IEA, the credibility of a witness may be impeached in a cross-examination by showing through testimonies of others that the witness is unworthy of credit,<sup>54</sup> or that the witness has received a bribe or any other “corrupt inducement” to give her/his testimony.<sup>55</sup> However, these avenues of questioning are effectively foreclosed to the accused under the Program, as questions along these lines require knowledge of the witness’s whereabouts, occupation and associations.

### **Lack of Procedural Safeguards Against Grant of Witness Anonymity**

While adjudicating on a Witness Protection Application which prays for anonymity among other reliefs, the Authority must be bound by certain controlling factors which govern the grant of anonymity to a witness. While diverse factors for grant of anonymity have been recognized worldwide, there are certain universal considerations which determine whether a witness should be granted anonymity or not. The requirements laid down by the International Criminal Tribunal for the Yugoslavia (hereinafter “ICTY”) in *Prosecutor v. Tadic, Decision on Prosecution Motion for Protective Measures for Witnesses*<sup>56</sup> are comprehensive enough in their scope to reflect the international trend.

It is internationally accepted that before an order for any sort of witness protection can be made, the court must be satisfied of the *necessity* of the same. Indeed, a majority of the Bills introduced in the Parliament on the topic only permitted a protection order to be passed when the same was necessary to protect the witness. The New Zealand Evidence Act, 2006<sup>57</sup> and the UK Criminal Evidence Witness Anonymity Act, 2008<sup>58</sup> which was later replaced by the Coroners and Justice Act, 2009<sup>59</sup> provide a comprehensive set of factors that the court ought to take into account before an identity protection order for a witness can be passed. The Law Commission Bill heavily draws from these legislations to lay down the factors which help the court in determining

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<sup>54</sup> The Indian Evidence Act, 1872 (Act 1 of 1872), s. 155(1).

<sup>55</sup> The Indian Evidence Act, 1872 (Act 1 of 1872), s. 155(2).

<sup>56</sup> International Criminal Tribunal for the Former Yugoslavia, *Decision on Prosecution Motion for Protective Measures for Witnesses*, available at <http://www.icty.org/x/cases/tadic/tdec/en/100895pm.htm> (Visited on Jan. 16, 2019). The case dealt with whether the witnesses to be produced in the prosecution of the Dus ko Tadic, a man accused of grievous violations of international humanitarian law in the erstwhile Yugoslavia, required anonymity for their testimony.

<sup>57</sup> New Zealand Evidence Act, 2006 (Act 69 of 2006), s. 115.

<sup>58</sup> Criminal Evidence (Witness Anonymity) Act, 2008, s. 4.

<sup>59</sup> Coroners and Justice Act, 2009, s. 88.

the necessity of a Witness Protection Order.<sup>60</sup> Under the Law Commission Bill, anonymity can only be granted to a “*threatened witness*”<sup>61</sup> in cases where the presiding Magistrate/Judge is satisfied of the *necessity* of such anonymity.<sup>62</sup>

Under the Law Commission Bill, the Magistrate/Judge had to take into account 6 factors while considering the application for identity protection, which prominently included the right of the accused to know the identity of the witness,<sup>63</sup> the principle that anonymity should only be granted in certain exceptional circumstances,<sup>64</sup> and the reliability of the witness,<sup>65</sup> among other considerations. After considering these factors, if the Magistrate/Judge was satisfied that the witness is a threatened witness,<sup>66</sup> that such anonymity is not contrary to the interest of justice,<sup>67</sup> and that the necessity of such an order outweighs the right of the accused to know the identity of the witness,<sup>68</sup> then s/he was empowered to pass an identity protection order. However, no such guidelines are laid down in the Program. Even though it requires a TAR to be submitted, no guidelines are laid down for the weightage to be assigned to TAR, compounded by a lack of exposition of other factors that may be accounted for by the Authority before the grant of a Witness Protection Order. In absence of such controlling factors, there is nothing preventing the Authority to grant witness anonymity as a rule irrespective of the credibility of the testimony of the witness and the trustworthiness of the witness her/himself.

### Conclusion

It appears that while the intent of the Program, viz., to protect vulnerable witnesses and their family members from harm that may be caused to them on account of the witness’s testimony is appreciated, the means adopted in the Program to protect witnesses are to an extent at loggerheads with the tenets of a fair trial. Low conviction rates are often cited as a justification for a witness protection program. However, it must be understood that a witness protection program is not a panacea for lack of convictions. In fact, the association of a witness protection program with increased conviction rates leads to the inference that witness protection may be used as a tool to allow anonymous witnesses to testify with impunity.

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<sup>60</sup> Law Commission Bill, clauses 5-6.

<sup>61</sup> Law Commission Bill, clause 2(e).

<sup>62</sup> Law Commission Bill, clause 6; Law Commission Bill, clause 10.

<sup>63</sup> Law Commission Bill, clause 5(6)(i).

<sup>64</sup> Law Commission Bill, clause 5(6)(ii).

<sup>65</sup> Law Commission Bill, clause 5(6)(v).

<sup>66</sup> Law Commission Bill, clause 6(1)(a).

<sup>67</sup> Law Commission Bill, clause 6(1)(b).

<sup>68</sup> Law Commission Bill, clause 6(1)(c).

Any measure for witness protection in India should be based on strong empirical foundations, something the Program in its current state thoroughly lacks.<sup>69</sup> The Program does not take into account the multitude of reasons that induce hostility in witnesses. While it may certainly be the case that in some cases physical or financial influence may be deployed by the accused against the witnesses, in a substantial number of cases it is the procedural rigmarole of the courts that makes witnesses turn hostile.<sup>70</sup> In cases involving serious offences, more than six hearings may sometimes be required to record the evidence of a single witness.<sup>71</sup> Most witnesses hail from economically and socially weaker sections of the society,<sup>72</sup> and it is an onerous burden on them to forego work on multiple days to discharge their duty as witnesses.

Being subjected to arduous cross-examinations, frequent adjournments and indifferent attitude of court officials often induce hostility in witnesses who desire an end to their ordeal.<sup>73</sup> Only a very small proportion of witnesses is able to successfully claim their travelling and lodging costs, which can be ordered by any criminal court under Section 312 of the Code.<sup>74</sup> A majority of witnesses suffer some form of monetary loss on account of appearing as a witness, and some even suffer physical loss and loss of social status.<sup>75</sup> Some witnesses also get involved in fabricated cases as retaliation.<sup>76</sup> Given that a majority of witnesses hail from vulnerable groups, they might be unwilling to incur these costs attendant to being a witness. The Program does nothing to ensure that vulnerable witnesses feel protected from such non-physical consequences and are financially insured to come forward to depose freely.

The Program envisions witness protection through the parochial blinders of witness anonymity, with the implicit assumption that anonymity automatically will translate to security. However, this approach is not rooted in any substantial study on the subject, and ends up disproportionately impacting right of the accused to ably conduct her/his defence while at the same time not securing sufficient protection for witnesses. As a crucial study points out, witnesses often turn hostile due to the fear of a nexus between the police, the accused and the

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<sup>69</sup> G.S. Bajpai, "What witnesses really need" *The Indian Express*, Feb. 12, 2019 available at <https://indianexpress.com/article/opinion/columns/india-witness-protection-scheme-supreme-court-5578921/> (Visited on March 9, 2019).

<sup>70</sup> G.S. Bajpai, "Witness in the Criminal Justice Process: A study of Hostility and Problems associated with Witnesses" 149 (Centre for Civil and Criminal Justice Administration, National Law Institute University, 2009).

<sup>71</sup> *Id.* at 128 – 129.

<sup>72</sup> *Supra* note 70 at 89.

<sup>73</sup> *Supra* note 70 at 35.

<sup>74</sup> *Supra* note 70 at 97.

<sup>75</sup> *Supra* note 70 at 124.

<sup>76</sup> *Supra* note 70 at 124.

prosecution.<sup>77</sup> Under the Program, no efforts have been made to separate the task of witness protection from regular policing and investigative duties. Given that the possibility of the accused influencing the police/prosecution cannot be discounted, especially in high-profile/political cases, the Program does nothing to inspire confidence in witnesses about their security.

Another factor that is a major determinant of hostility of witnesses is the routine use of stock witnesses by the Police in criminal proceedings.<sup>78</sup> Stock witnesses are those witnesses who have no personal knowledge about the incident, and are usually paid some money by the police to testify for the prosecution. Stock witnesses have a higher propensity of turning hostile, as they can always be paid a higher amount of money by the accused.<sup>79</sup> Indeed, sometimes stock witnesses are planted for the very purpose of turning hostile and thereby to weaken the case of the prosecution.<sup>80</sup> Also, bail ought not be granted to an accused in cases where there is a chance that s/he can influence the witnesses upon release. However, in cases where the accused is a prominent personality, bail is often granted with ease. Instead of diluting the right of the accused to a fair trial under the Program, there is a need to grant bail more judiciously in cases where there is a high likelihood of witnesses being susceptible to political, physical or monetary influence.

Trials marked by high witness hostility such as the Sohrabuddin Sheikh encounter case often capture people's imagination and lead one to the specious inference that some form of influence exercised by the accused operates in all cases where witnesses turn hostile. However, in a majority of trials which do not garner a lot of media attention, witnesses turn hostile due to social dynamics prevalent in particular communities.<sup>81</sup> In the Indian penal scheme, offences are seen as either compoundable (can be privately settled between parties) or non-compoundable (cannot be privately settled between parties).<sup>82</sup> However, private compromises are often reached within communities for non-compoundable offences as well. Given that law does not recognize compromises in such cases, witnesses often turn hostile to ensure acquittal of the accused.<sup>83</sup> The

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<sup>77</sup> *Supra* note 70 at 151.

<sup>78</sup> Meenu Gupta and Bhavish Gupta, "Hostile Witnesses: Socio-Legal Impact on Justice Delivery System" 1 *AIJLMS* 31, 38 (2017).

<sup>79</sup> *Ibid.*

<sup>80</sup> G.S. Bajpai, "On Witness in the Criminal Justice Process: Problems & Perspectives" 1 *ILR* 1, 13 (2010).

<sup>81</sup> Daniela Berti, "Hostile witnesses, judicial interactions and out-of-court narratives in a north Indian district court" 44 *CTIS* 235, 236 (2010).

<sup>82</sup> The Code of Criminal Procedure (Act 2 of 1974), s. 320.

<sup>83</sup> *Supra* note 81 at 237.

Program does not account for such private compromises, and does nothing for protection of witnesses in situations where familial/social dynamics may be at play.

Witness protection measures generally, and witness anonymity specifically, are extraordinary measures that should only be adopted when the cause of justice will be severely hampered if the witness is not afforded such protection. In cases involving war crimes where the witness will have no option but to go back to a politically unstable and unsafe areas after testifying, measures like anonymity might be considered reasonable. However, this is an exceptional circumstance the contours of which have to be very narrowly defined. In fact, the ICTY only allowed for witness anonymity in *Tadic* because no organized mechanism for protection of witnesses existed then at the international level.

Under the Program, fair trial rights of the accused such as the right to have an autonomous tribunal/court adjudicate on Witness Protection Applications, the right of the accused to oppose witness anonymity, and the right to confront the witnesses being produced against her/him are violated. Moreover, there are no guidelines under the Program that control the grant of anonymity to witnesses. The net of witness anonymity and other protective measures under the Program is cast too wide, and with too little oversight of the judiciary. While it is admitted that the interest of the criminal justice system in protection of witnesses is legitimate, it must be balanced against the right of accused persons to have a fair trial. Instead of measures like witness anonymity, supervision of telephone calls, image/sound distortion and in-camera trials, what is needed is a strong and well-funded witness protection program that protects witnesses from threats without compromising the rights of the accused.

Currently, how the Indian witness protection program is going to be funded, and the quantum of funds it shall receive, remains uncertain. There is no sum that has been statutorily committed to the State Witness Protection Fund, and the nature of funding under the Program is largely dependent on governmental and private goodwill.<sup>84</sup> Experience from other jurisdictions has shown that once a robust witness protection program which ensures the physical safety of the witness is put in place, the alleged need for witness anonymity vanishes.<sup>85</sup> What is thus required is that the witnesses be given protection outside of the courtroom rather than anonymity inside it. One way of better protecting witnesses could be to employ the inherent powers of the High Court under Section 482 of the Code more often and more creatively to protect witnesses

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<sup>84</sup> Program, clause 4.

<sup>85</sup> Alan George Ward, "Evidence of Anonymous Witnesses in Criminal Courts: Now and into the Future" 21 *DIJ* 67, 86 (2009); Maille Brady Bates, "A Balancing Act: The Rights of the Accused and Witness Protection Measures" 17 *TCLR* 143, 162 (2014).

without violating the rights of the accused. However, it must be conceded that moving the High Court would be a significant financial expenditure, which many witness may not be willing to make or be able to afford. A greater number of prosecutions under Section 195A<sup>86</sup> as well as under other provisions of IPC which may be applicable when witnesses are threatened<sup>87</sup> may also help to restore the credibility of the criminal justice system in terms of its commitment to protection of vulnerable witnesses. All of these measures, combined with a well-funded witness protection program that protects witnesses as long as threat to their safety persists, would go a long way in restoring the legitimacy of the criminal justice system.

Witness anonymity and other measures which unfairly abridge the right of the accused to a fair trial are criticized the world over, and Indian law on witness protection needs to take this criticism into account. Even if witness anonymity is to be allowed, it should only be allowed in certain very narrow, highly exceptional circumstances, where the testimony of a key witness cannot be secured through any other means. Once anonymity has been granted by a court, it must also ensure that it procedurally counterbalances the prejudice that such anonymity may cause to the accused.<sup>88</sup> While witness protection is certainly important in any legal system interested in unprejudiced, impartial testimony, it must not come at the cost of the right of the accused to a fair trial.

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<sup>86</sup> Threatening any person to give false evidence.

<sup>87</sup> Such as under Section 506 dealing with criminal intimidation, among others.

<sup>88</sup> *Supra* note 24 at 162.

## SECTION 295-A OF THE IPC: A WEAPON TO SUPPRESS DISSENT

Akanshha Agrawal and Harikartik Ramesh\*

*In September 2018, the Odisha police arrested journalist Abhijit Iyer-Mitra. He was booked under Section 295-A for making “derogatory remarks” against “Odiya people”. In a democracy which provides the fundamental right to freedom of speech and expression, such an arrest raises doubts on the constitutionality of the section. Section 295-A, ever since its enactment in 1927, has been used for a multitude of similar reasons, ranging from mocking a self-proclaimed God to eating beef in a foreign country. A study of the data provided by the National Crime Records Bureau shows that the section has a very high rate of arrest and a remarkably low conviction rate. It is clear that the section is being used as a weapon to suppress dissent. Therefore, it comes as a surprise that the Supreme Court in *Ramji Lal Modi v State of Uttar Pradesh* upheld the constitutionality of this section. Through this paper, the researchers argue that such a reasoning was flawed and can no longer be reconciled with the free speech jurisprudence of India. It is overbroad and vague, and without any clear tests. Therefore, the section should be struck down as unconstitutional.*

### Historical background of Section 295-A

On an early morning in May 1924, the reader of a recently published *Rangila Rasool* could hardly have imagined the controversies that were set to follow, which would finally culminate in an amendment to the Indian Penal Code. The pamphlet described scandalous details about the sexual life of Prophet Mohammad. Following a piece written by Mahatma Gandhi in *Young India*, it soon gained popularity and became a cause for discussion. In Gandhi’s opinion, such a “highly offensive” pamphlet could only be written with a motive to “inflame passions”.<sup>1</sup> An FIR was filed against Mahashe Rajpal, the publisher of the pamphlet under Section 153-A IPC for the offence of ‘promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony’.<sup>2</sup>

The motive behind publishing the pamphlet, as questioned by Gandhi, soon became an important matter of discussion. Rajpal pleaded that he was motivated by a desire for social

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<sup>1</sup> Mohandas K Gandhi, Hindu-Muslim Unity, *Young India*, Jun. 19, 1924.

<sup>2</sup> Indian Penal Code, 1860 (Act 1 of 1860), s. 295A.

reform.<sup>3</sup> He believed that people would be “weaned and deterred” from the “evils of polygamy, concubinage, *mutas*, and gross disparity of age in marriage” on reading the pamphlet’s discussion of such practices in the life of the Prophet Muhammad.<sup>4</sup> However, his defence was not accepted and he was held guilty by the Trial Court and then the Sessions Court of Lahore. The High Court of Lahore in its judgment on the matter noted the Trial Court’s observation that the pamphlet had no intention other than to make a wanton attack upon the Prophet of Islam<sup>5</sup> and if read as a whole, it was intentionally offensive, scurrilous, and wounding to the religious feelings of the Mahomedan community.<sup>6</sup> However, this decision was overruled by the Lahore High Court.<sup>7</sup> Justice Dalip Singh wrote the judgment for the Court:

*“...It undoubtedly is nothing more or less than a scurrilous satire on the founder of the Muslim religion, but I cannot find anything in it which shows that it was meant to attack the Mahomedan religion as such or to hold up Mahomedans as objects worthy of enmity or hatred. The question to be decided is whether a malicious satire on the personal life of religious teacher is within the purview of S. 153-A...”*<sup>8</sup>

*...It seems to me that that section was intended to prevent persons from making attacks on a particular community as it exists at the present time and was not meant to stop polemics against deceased religious leaders however scurrilous and in bad taste such attacks might be... I am unable to hold that S. 153-A was meant or was intended to prevent all adverse discussions of the life and character of a deceased religious leader... I cannot hold that it [the pamphlet] would necessarily promote feelings of enmity and hatred between different classes of His Majesty's subjects. That might be the result, but, as I have endeavoured to show, that cannot be made the test of the section...”*<sup>9</sup>

Accordingly, the Court held that the objective of Section 153-A is to prevent enmity and hatred among different religious communities. However, a comment on a religious leader, which will not promote such enmity or hatred, will not fall under the purview of the Section. As a result, no offence could be made out against Rajpal and he was acquitted. Justice Singh also suggested the introduction of a clause to Section 297 by which the publication of pamphlets published with

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<sup>3</sup> Neeti Nair, Beyond the ‘Communal’ 1920s: The Problem of Intention, Legislative Pragmatism, and the Making of Section 295A of the Indian Penal Code, 50 *IESCHR* 319 (2013).

<sup>4</sup> *Ibid.*

<sup>5</sup> *Raj Paul v. Emperor*, AIR 1927 Lah 590, para 4.

<sup>6</sup> *Id.* at para 5.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Id.* at para 5.

<sup>9</sup> *Id.* at para 11, 12.

the intention of wounding the religious feelings of any person or of insulting the religion of any person might be made criminal.<sup>10</sup>

The decision raised widespread dissatisfaction amongst the Muslim population in Punjab. Within weeks of the unexpected acquittal of Rajpal, three other attacks against the Prophet were published in Arya-oriented newspapers in Punjab. There were “Sair-i-Dozakh” in Rangila Vartmanin Amritsar, “What Europeans Servants Think of Mohammad Sahib” in Arya, and “Hazrat Rangila Rasul” in Pratap.<sup>11</sup> As a result of this, the already aggravated communal tensions between Hindus and Muslims in Lahore deteriorated further. The satisfaction of the Muslim population became necessary to control the growing communal tension. Accordingly, a Special Division Bench comprising two English judges, Broadway and Skemp was set up. Justice Broadway, writing for the Court held that a reasoned, critical and strong attack on a religion or its founder, written by way of comment and with a view to induce people to forsake that religion for another will not be prohibited by Section 153-A.<sup>12</sup> However, the present criticism, which was “scurrilous and foul” in nature prima facie falls under the section.<sup>13</sup>

The decision failed to satisfy the Muslim population and the Council decided to form a hasty legislation to control the situation of distress.<sup>14</sup> However, such an opinion was not supported by all the members. Some members of the Council considered the Legislation to be a mere “expedient measure” and not a cure.<sup>15</sup> It was decided that the Bill should be sent to a Select Committee to deliberate on it further. However, there were several dissatisfactions with the way the Bill was sent to the Select Committee.<sup>16</sup>

Following this, a Select Committee was formed to deliberate upon the amendment. However, even this Committee was divided in its opinion and couldn't come to a unanimous decision. Few members of the Committee believed that the present amendment would encourage religious fanatics and would be a new provision against the social reformers who seek to question the radical understanding of certain religions.<sup>17</sup> An effort was made by N C Kelkar who vouched for the addition of an explanation in the Section so that it will not be an offence to criticise

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<sup>10</sup> *Id.* at para 12.

<sup>11</sup> Gene Robert Thursby, *Hindu-Muslim Relations in British India: A Study of Controversy, Conflict, and Communal Movements in Northern India 1923-1928* 64-65 (Brill, Leiden, 1975).

<sup>12</sup> Abhinav Chandrachud, *Republic of Rhetoric: Free Speech and the Constitution of India* 229 (Penguin Random House India, 2017).

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> Government of India Press, Report of the First session of the 3rd Legislative Assembly, *The Legislative Assembly Debates vol. 14* 3963, 5 September 1927.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Supra.* note 12 at 231.

principles, doctrines, tenets, or observances of any religion, with a view to promote social reform.<sup>18</sup> This was intended to restrict the interpretation and abuse of the Section. Some members of the Committee opined that the amendment was not required as the present laws had the capacity of bringing peace and stability, as depicted by the judgment given by Justice Broadway in *Risala Vartnam*.<sup>19</sup> One of them was K C Roy who argued that the addition of laws which restrict the freedom of speech in India is not in the spirit of tolerance which has long been followed by the Indian legal culture. One of the primary concerns that the Committee had while drafting was the intention to restrict the Section, such that it doesn't become an impediment to free speech. It did so by adding the words 'deliberate and malicious' to the Section. However, some members of the Committee, led by M A Jinnah, argued that the punishment was not harsh enough, and it was primarily due to his efforts that the offence was made non-bailable.<sup>20</sup>

The opinion of the Select Committee<sup>21</sup> was that the amendment should not introduce a section which is too broad and open for abuse. The addition of "deliberate and malicious" was retained with a view to protect the insults "inflicted in good faith" and with the purpose of "facilitating social reform" by "administering shock to the followers". The Report further clarifies that it will only criminalise such words which are "bound to be regarded by any reasonable man as grossly offensive and provocative". Therefore, this Section uses the word "outrage" which is much stronger than the word "wounding", as used in Section 298 of the Indian Penal Code. Even though the attack on the founder of a particular religion is not excluded from the purview of the Section, the intention to insult or outrage must be the "sole or primary, or at least deliberate or conscious intention". After the deliberations, the Indian Penal Code was amended in 1927:

**295-A. Deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs.**—*Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, by words, either spoken or written, or by signs or by visible representations or otherwise, insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.*

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<sup>18</sup> *Supra*. note 3 at 334.

<sup>19</sup> *Ibid*.

<sup>20</sup> *Ibid*.

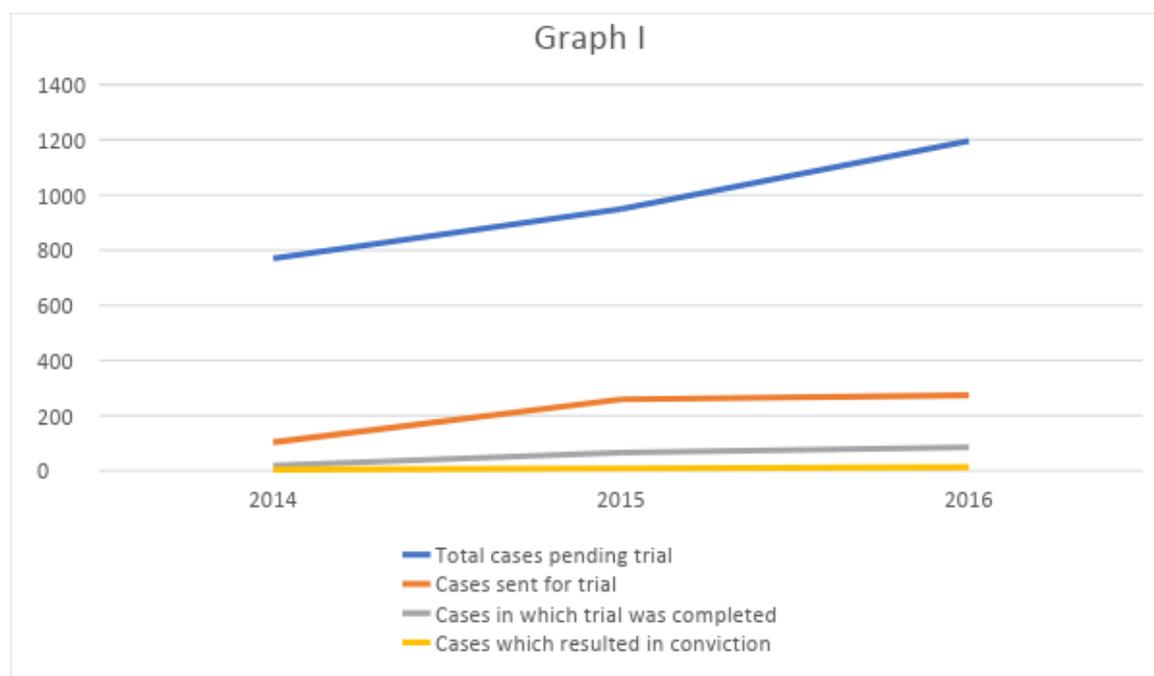
<sup>21</sup> Select Committee Report, 17 Sept 1927, Gazette of India.

### Incidents of Abuse of Section 295-A

The undeniable conclusion is that the primary reason behind the amendment was the political scenario of the time. With the rise of communal hatred between the Hindus and Muslims in Punjab, a hasty committee was formed. The amendment came into place in order to bring calm into the State and to stop further violence. It was brought under pressure as a result of threats of violence. However, it remains debatable if this provision is justiciable and achieves the purpose it was intended to achieve. Due to the vagueness in the provision, it has been widely abused. This fact can be seen through the low conviction rates. The case of misuse of the law for the purpose of stopping dissent and infringing on the freedom of speech can be seen through an analysis of the National Crime Records Bureau (NCRB).<sup>22</sup>

Year	Cases pending trial	No. of cases reported	Total cases sent for trial	Cases in which trial was completed	Cases which resulted in conviction	Conviction rate	No of persons arrested during the year	No of persons convicted
2014	434	336	103	19	4	21.1	648	6
2015	525	424	259	66	9	13.6	941	11
2016	718	478	274	85	13	15.3	966	19

<sup>22</sup>National Crime Records Bureau, Statistics: Crime in India (2014-2016) (NCRB, 2017).



In the current scenario, Section 295-A is so broad as to cover virtually every act of expressing an opinion with regards to religion or religious beliefs. Such an abuse can be better understood by looking at specific instances. In 2016, Kiku Sharda, a character in a weekly comedy show, Comedy Nights with Kapil, was arrested and put under 14 days of judicial custody for hurting the religious sentiments of the followers of a self-proclaimed god Gurmeet Ram Rahim Singh.<sup>23</sup> Another such instance is of the arrest of Ravi Shastri, a former test cricketer, for hurting Hindu religious sentiments by allegedly eating beef in Johannesburg during the India-Pakistan test series.<sup>24</sup> The case was filed by Bajrang Dal stating that their feelings were hurt as Shastri made a comment saying that even though he is a Brahmin, he can't stop himself from eating beef.<sup>25</sup> In another instance, a case was lodged by two religious leaders of different sects alleging that the act of designing and selling clothes which have Gayatri Mantra and Navkar Mantra printed on them hurts the religious sentiment of Hindus and Jains.<sup>26</sup> Another such instance is of the complaint lodged against Rashid Jan and two other young women for denouncing the patriarchal customs and sexual hypocrisies which are practiced by the rich landowner.<sup>27</sup> She was threatened with

<sup>23</sup>Comedian Kiku Sharda arrested; sent to judicial custody', India Today, available at:<https://www.indiatoday.in/india/north/story/comedian-kiku-sharda-arrested-for-hurting-religious-sentiments-303576-2016-01-13> (last modified January 14, 2016).

<sup>24</sup> Case filed against Ravi Shastri for eating beef, Zee News, available at:[http://zeenews.india.com/sports/case-filed-against-ravi-shastri-for-eating-beef\\_343792.html](http://zeenews.india.com/sports/case-filed-against-ravi-shastri-for-eating-beef_343792.html) (last modified December 23, 2006).

<sup>25</sup> Ibid.

<sup>26</sup> Sacred text on clothes: fashion designer booked, Nerve, available at:<http://www.nerve.in/news:25350010632> (last visited on April 10, 2019).

<sup>27</sup> Priyamvada Goyal, "History repeats in religious fundamentalists' cowardly persecution of Taslima Nasreen", Outlook India, available at:<http://www.global-sisterhood-network.org/content/view/1988/59/> (last visited on April 10, 2019).

death and disfigurement and was later prosecuted.<sup>28</sup> There are countless similar instances where the Section was invoked for frivolous reasons which were merely an abuse of the cognizable nature of the Section.<sup>29</sup> There is no legal backing to substantiate the arguments and a majority of these First Information Reports (FIRs) are quashed by the Courts later on.

As per the powers given by Section 482 of the Criminal Procedure Code, 1973, High Courts have the power to quash FIRs and cease judicial proceedings to 'prevent abuse of any Court'.<sup>30</sup> Due to the rampant filing of FIRs for unwarranted reasons, without due excuse, most such FIRs filed are eventually quashed. Thus, the Section is just used to facilitate arrest by exploiting the system, and few cases reach the trial stage. In a 2017 case, a complaint was filed because the complainant was "disappointed" by seeing the cover page of a magazine which had a picture of Lord Vishnu with the face of Mahendra Singh Dhoni with a caption that said "The God of Big Deals".<sup>31</sup> This was quashed by the Court on the ground that the "allegations remotely did not satisfy the essential ingredients of the offence."<sup>32</sup> As was in the abovementioned case of Kiku Sharda, the Haryana government later came to the decision of applying for quashing the FIR which was filed against him.<sup>33</sup> Therefore, there were no judicial proceedings against him except a fourteen-day judicial custody. In 2010, an FIR was filed against the accused for creating a dispute between the actors of Ramlila.<sup>34</sup> In the 2012 judgment, the FIR was quashed as there was no evidence and the continuance of the trial would have been a 'sheer abuse of the law'.<sup>35</sup> There are numerous other cases where the Court quashed the FIR to prevent abuse.<sup>36</sup> Due to the

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<sup>28</sup> Ibid.

<sup>29</sup> Achal Prabhala, "When India became the first country to ban 'The Satanic Verses' much before the Iranian fatwa", Scroll, available at: <https://scroll.in/article/758288/when-india-became-the-first-country-to-ban-the-satanic-verses-much-before-the-iranian-fatwa> (last visited on April 10, 2019).; "India's First Blasphemy Prosecution", Web Archive, available at: <https://web.archive.org/web/20080704202026/http://www.iheu.org/node/285> (last visited on April 10, 2019).; "Rakhi in legal trouble over bathtub scene", Nerve, available at: <http://www.nerve.in/news:25350044642> (last visited on 10 April 2019).; Madhu Jain, "M.F. Husain's 20-year-old painting of nude deity raises questions about artistic freedom", India Today, available at: <https://www.indiatoday.in/magazine/society-the-arts/story/19961031-m-f-husain-20-year-old-painting-of-nude-deity-raises-questions-about-artistic-freedom-833984-1996-10-31> (last visited on April 10, 2019).; Kamal Mitra Chenoy, S.P. Shukla, K.S. Subramaniam, AchinVanaik, "Gujarat Carnage 2002: A Report To the Nation by An Independent Fact Finding Mission", available at: <https://www.outlookindia.com/website/story/gujarat-carnage-2002/215160> (last visited on April 10, 2019).; Shivprasad Swaminathan, "Scribblers, scholars in the same boat" available at: <http://www.thehindu.com/opinion/lead/scribblers-scholars-in-the-same-boat/article5723012.ece?homepage=true> (last visited on April 10, 2019).

<sup>30</sup> The Code of Criminal Procedure, 1973 (Act No. 2 of 1974), s. 482.

<sup>31</sup> Mahendra Singh Dhoni v. Yerraguntla Shyamsunda and Ors, AIR 2017 SC 2392, para 10.

<sup>32</sup> Ibid.

<sup>33</sup> "Haryana govt seeks to quash FIRs against Kiku Sharda for mimicking Gurmeet Ram Rahim", *First Post*, Sept. 9, 2017.

<sup>34</sup> *Nishan Deep v State of Punjab*, 2012 SCC OnLine P&H 22857.

<sup>35</sup> Ibid.

<sup>36</sup> Manoj Rai and Ors. v State of Madhya Pradesh, AIR 1999 SC 300; Manvir Singh v State of Punjab and Ors., 2011 SCC Online P&H 15158; Satinder Pal Singh v Union Territory of Chandigarh, 2017 SCC Online P&H 3317; Maninder Singh v State of Punjab, MANU/PH/1286/2013.

widespread cases of abuse, various attempts have been made by the judiciary to restrict the interpretation of the law.

### Constitutionality of Section 295-A

The constitutionality of Section 295-A was upheld in the case of *Ramji Lal Modi v State of Uttar Pradesh*.<sup>37</sup> The factual matrix of the case was that the petitioner was the editor of a monthly magazine named 'GauRakshak' which was dedicated to cow protection, and he was being prosecuted for an article that appeared in its Kartik Samvat edition which was alleged to offend the sentiments of Muslims. The argument made to the Court was that the section could not attract the benefit of the reasonable restriction of 'public order' in Article 19(2) of the Constitution as the Section criminalised all insults to religion. As all insults to religion may not necessarily lead to public disorder, the section was unconstitutionally vague and ambiguous. Therefore, it should be struck down by the Supreme Court for infringing upon the fundamental right to freedom of expression.<sup>38</sup>

The Supreme Court refused to accept this argument and held that the section did not criminalise all insults or attempts to insult the religious sentiments of a class of citizens, but only criminalises those deliberate insults uttered with malicious intention to hurt the sentiments of the class of citizens. Insults offered unwittingly or carelessly would not be covered by the section. Further, the Court reiterated its stand from *Debi Soren v The State*<sup>39</sup> that the term "in the interest of public order" in Article 19(2) of the Constitution implies that the protection is not just to those acts which actually cause the occurrence of public disorder but also to those acts which have a tendency to cause public disorder even though no actual disorder results from the impugned action.<sup>40</sup> In this part, it shall be argued that *Ramjilal Modi* no longer holds relevance in Indian free speech jurisprudence and it needs to be re-examined because, *firstly*, the judgment forms fertile ground for heckler's veto, a concept which has been explicitly rejected by the Court in subsequent judgments and *secondly*, it fails to lay down a clear causal link between the act and public order.

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<sup>37</sup> AIR 1957 SC 620.

<sup>38</sup> *Id.* at para 8.

<sup>39</sup> AIR 1954 Patna 254.

<sup>40</sup> *Supra.* note 37 at para 7.

### Heckler's Veto

The Court's reasoning in *Ranjilal Modi vs State of Uttar Pradesh*<sup>41</sup> leads to the issue that without any qualification on the causation between the impugned expression and public order, the Court effectively lends a heckler's veto to fringe extremist groups. The Heckler's Veto is the concept that if a heckler is able to be disruptive enough, they can convince the government to censor certain expression solely due to the unreasonable, disproportionate response of the heckler to the said expression.<sup>42</sup>

This further necessitates the Supreme Court to re-examine its ratio and reasoning in *Ranjilal Modi* is that the judgment has no reasonableness criteria. The Court has not distinguished between a situation where the threat to public disorder is a reasonable or foreseeable response by the insulted class and a situation where the insulted class is clearly overreacting and acting in a disproportionate manner.<sup>43</sup> This lack of differentiation means that, as per the *Ranjilal* doctrine, even if a group has no reasonable reason for being insulted, the speaker may still be censored because the only pertinent factor becomes the reaction, and not the reason for the reaction.<sup>44</sup>

The Supreme Court has dealt with the heckler's veto and in a few cases set a progressive benchmark. In the *S Rangarajan vs P Jagjivan Ram*<sup>45</sup> Case, the state of Tamil Nadu argued that even if the expression were to be deemed as legitimate expression, the state did not have the resources to maintain public order in the case of any violence. The Court rejected this argument completely and very famously commented that "We want to put the anguished question, what good is the protection of freedom of expression if the state does not care to protect it".<sup>46</sup> The Court clearly understood that to force the speaker to censor themselves due to the unreasonable reaction of a group would amount to surrendering the freedom of expression to blackmail and extortion.<sup>47</sup>

The Supreme Court has reiterated this stance in *Prakash Jha Production and Anr v Union of India*<sup>48</sup> and *Viacom Media 18 Pvt. Limited v Union of India*.<sup>49</sup> In *Prakash Jha* the Supreme Court was deciding upon a ban on the movie 'Aarakshan' where the state argued that the movie could

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<sup>41</sup> Ibid.

<sup>42</sup> Ruth McGaffey, "The Heckler's Veto" 57 MLR 40 (1973).

<sup>43</sup> AS Panerselvan, "The Heckler's Veto" *The Hindu*, Mar. 20, 2017.

<sup>44</sup> Chinmayi Arun, "Freedom of Expression Gagged" *The Hindu Business Line*, Feb. 15, 2013.

<sup>45</sup> 1989 SCC (2) 574.

<sup>46</sup> *Id.* at para 51.

<sup>47</sup> Karan Lahiri, "Annuling the Heckler's Veto over Films" *Live Mint*, Jan. 24, 2018.

<sup>48</sup> (2011) 8 SCC 372.

<sup>49</sup> (2018) 1 SCC 761.

precipitate a public order situation, despite it already having received CBFC certification. The Supreme Court rejected this argument by reiterating its stance in *Rangarajan*. The Court explained that it was the obligation of the state to maintain public order in such a way that permissible freedom of expression is not censored. In *Viacom Media 18*, the Court dealt with a similar situation in conjunction with the movie 'Padmavati' where it reached the same conclusion that permissible freedom of expression could not be stifled due to the unreasonable reaction of some sections of the populace.

It will be important for the Supreme Court and legislature to take note of the heckler's veto doctrine during any exercise of re-examining Section 295-A of the IPC, so as to ensure that the state does not sanction and incentivise fringe groups to step up their violence and aggressiveness in order to meet their ends.<sup>50</sup>

### **Post *Ranjilal Modi* Era—Proximate Nexus and Spark in Powder Keg**

The *Ranjilal Modi* judgment was further flawed because it did not explain what the standard of causal connection was beyond mere 'tendency', which was required to be demonstrated between the impugned act and the public disorder resulting from it.<sup>51</sup> The Supreme Court noticed this and hence, soon after this judgment, revised its jurisprudence around public order in the case of *Superintendent of Central Prison, Fatehpur v Ram Manohar Lohiya*.<sup>52</sup>

In *Ram Manohar Lohiya*, the petitioner had been demanding that people of the country should stop paying taxes, in violation of Uttar Pradesh State law. The Government's argument was that the law was valid and if a certain number of people stopped paying taxes on listening to the petitioner, it could cause a domino effect which would lead to large chunks of the population not paying taxes, which would lead to complete anarchy and public disorder. This argument of the government highlights the loophole left by the Court's reasoning in *Ramji Lal Modi*.<sup>53</sup> Devoid of any burden, the government could say that public disorder would be the inevitable for nearly every act of dissent, as such an act could have the 'tendency' to cause disorder. The Supreme Court recognised this lacuna in their jurisprudence and ruled that when the government was legislating on matters regarding public order, they would have to show a clear causal link between the impugned action and the resulting public order such that there was a proximate

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<sup>50</sup> *Supra.* note 44.

<sup>51</sup> Lawrence Liang, 'Free Speech and Expression' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu (eds.) *Oxford Handbook on the Indian Constitution* 826 (OUP, 2016 Reprint).

<sup>52</sup> AIR 1966 SC 740.

<sup>53</sup> *Supra.* note 37.

nexus.<sup>54</sup> They could not rely on vague and fanciful eventualities to justify the enactment of a law restricting the freedom of expression of the populace.<sup>55</sup> The Court further held that the enactment had the power to restrict the right only as much as was necessary to achieve the object. The parliament does not have the power to excessively restrict the right, even if a lesser restriction could achieve the object of the legislation as well.<sup>56</sup>

The reasoning of *Ram Manohar Lohiya* was further strengthened in *S Rangarajan v P Jagjivan Ram*.<sup>57</sup> Here, the government of Tamil Nadu wished to censor the Tamil movie 'Ore Oru Gramathile' which was a controversial movie regarding reservations in the State. The Government had argued that there was a risk posed to public order if the movie was allowed to be screened. The Supreme Court, when evaluating the concern raised by the government ruled that the standard which had to be demonstrated by the government was that the action would be the 'spark in the powder keg' which if not interfered with, will cause disorder.<sup>58</sup> Therefore, the standard laid down was that the expression must be 'intrinsically dangerous to public order'.<sup>59</sup>

The Court was impliedly adopting the standard adopted by the US Supreme Court in the landmark case of *Brandenburg v Ohio*.<sup>60</sup> It was held that the US government could only interfere with freedom of expression if some expression would lead to 'imminent lawlessness'. Further, the US Supreme Court also held that the US government could not criminalise the mere advocacy of an issue, without any incitement occurring parallelly as well.<sup>61</sup>

The latter part of the judgement in *Brandenburg* was explicitly adopted by the Indian Supreme Court in *Shreya Singhal v Union of India*.<sup>62</sup> The Supreme Court struck down Section 66-A of the Information Technology Act, 2000 and the judgment marked a significant change in the Court's freedom of expression jurisprudence. In particular, the Court explicitly held that Article 19(2) was not broad enough to allow for the criminalisation and censorship of advocacy of any inflammatory ideas unless it was advocacy of such a high order that it could constitute incitement.<sup>63</sup> The Court said that the impugned offence did not have any ingredient of incitement in the offence, that is, there was no requirement that the action cause anybody to do

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<sup>54</sup>*Supra*. note 52 at para 13.

<sup>55</sup> Durga Das Basu, *Commentary on Constitution of India 'Vol. 2'* 2453 (Wadhwa Nagpur, 8th Edn., 2007).

<sup>56</sup>*Supra*. note 52 at para 13.

<sup>57</sup>*Supra*. note 45.

<sup>58</sup>*Id.* at para 45.

<sup>59</sup> Ram Jethmalani, *Media Law 'Vol. 1'* 320 (Thompson Reuters, 2nd Edn., 2014).

<sup>60</sup> 89 S. Ct. 1827 (1969)

<sup>61</sup>*Id.* at 1830.

<sup>62</sup> AIR 2015 SC 1523.

<sup>63</sup>*Id.* at para 13.

anything that a reasonable person would believe would affect public order.<sup>64</sup> The Supreme Court discussed the past jurisprudence on free speech and stressed the importance of freedom of expression. In particular, the Court stressed on the point that laws which criminalise expression must be tailor-made to ensure that they only criminalise illegal incitement and not mere advocacy of a sentiment.<sup>65</sup> Since the statute in question criminalised mere irritation as well, the Supreme Court held that the provision was ultra vires as the legislation failed to treat advocacy and incitement differently and rather treated both forms of expression as equally criminal, which as illustrated above is not constitutionally permissible. The Court also refused to read the provision down to only criminalise acts of incitement as nothing in the provision could allow for such a reading.<sup>66</sup>

The Court clearly states that an opinion, no matter how unpopular and despised, cannot be censored at the stage of discussion or advocacy, as these form the very heart of the right to free speech. Censorship can only begin to play its role when such discussion reaches a level of incitement.<sup>67</sup> The incitement must be imminent as well. The Court rejects the idea that mere tendency can be used as justification to uphold a statute. To survive, a statute must only apply to such expression which causes imminent threats to law and order, therefore the central pillar of *Ranjilal Modi* has been knocked out.<sup>68</sup>

The Supreme Court's views in *Shreya Singhal* crystallised the new line of thought of the Court, first started in *Arup Bhuyan v State of Assam*.<sup>69</sup> In this case, the Supreme Court read down Section 3(5) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 which criminalised membership of an illegal organisation/group. The Court held that a literal interpretation of a section would render it unconstitutional as constitutionally, only active membership of an organisation could be criminalised not passive membership. Therefore, mere membership in an illegal organisation would not be criminal unless shown that the person also took part in incitement to violence or an occurrence of violence. The Court by giving this interpretation has

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<sup>64</sup> Gautam Bhatia, *The Transformative Constitution* 254 (Harper Collins, 2019).

<sup>65</sup> *Supra*. note 62 at para 17.

<sup>66</sup> *Id.* at para 99.

<sup>67</sup> *Id.* at para 13.

<sup>68</sup> Gautam Bhatia, 'The Striking Down of Section 66-A, how Indian Free Speech Jurisprudence has found its soul again' Indian Constitutional Law and Philosophy, available at: <https://indconlawphil.wordpress.com/2015/03/26/the-striking-down-of-section-66a-how-indian-free-speech-jurisprudence-found-its-soul-again/> (last visited on 15 June, 2019).

<sup>69</sup> (2011) 3 SCC 377.

by implication accepted that mere advocacy could not be criminalised.<sup>70</sup> This was affirmed by the Bombay High Court as well by Justice Thipsay in *Jyothi Chorge v State of Maharashtra*.<sup>71</sup>

Having examined the change in jurisprudence after *Ramjilal Modi*, it becomes abundantly clear that the Court's reasoning in the judgment is no longer applicable. A reading of the section makes it clear that the section has not been drafted with any distinction in mind between advocacy and incitement. The section merely says that if the speaker deliberately, with malicious insults, attempts to outrage the feelings of the religion of the class through insult, that expression shall be criminalised. The line of reasoning used by the Court in *Ramji Lal Modi* that an accidental insult is not criminalised, therefore section survives constitutional scrutiny is no longer acceptable reasoning. For a law to be held constitutional, it needs to make a clear linkage with public order. As no such link has been made, the section fails to draw any distinction between advocacy and incitement. Therefore, it suffers from the vice of overbreadth. Just as Section 66-A of the IT Act, Section 295-A does not require that said expression caused a person to act in such a way that can affect public order. When no such link has even been made, there is no question that the statute fails the new tests of causation laid down in *Lobia* and *Rangarajan*. The section criminalises insults even if there is no causal connection between the insult and public disorder or any imminent lawlessness resulting from said expression. Therefore, it is abundantly clear that due to the change in Supreme Court jurisprudence on public order and its meaning, Section 295-A would not constitute a reasonable restriction as envisioned under Article 19(2) of the constitution.

### Conclusion

Section 295-A was drafted in a pre-colonial era where the framers did not have to worry about satisfying any reasonable restrictions criteria set down in Article 19(2). The legislature has failed to amend it and bring it in line with current reasonable restriction requirement. Hence, the legislation makes no connection whatsoever with public order or any of the other criteria set out in the article. According to the free speech jurisprudence in India, this is a clear violation of the rights enshrined in the constitution. Further, the Supreme Court has made constant efforts to remove the doctrine of heckler's veto. As Section 295-A lays fertile ground for the same, it becomes extremely necessary to re-examine the constitutionality of the section.

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<sup>70</sup>*Supra*. note 62.

<sup>71</sup> (2012) 6 AIR Bom R 706.

## SECTION 300: IS THE MURDER CLAUSE IN NEED OF REVISION?

Saachi Agrawal\*

*The murder provision of any criminal code is the most significant provision due to the value accorded to human life and dignity, and the inalienable rights that stem from it. Section 300 of the Indian Penal Code, 1860 has served as a comprehensive provision for the same, accounting for different degrees of intention. However, society has undergone a great deal of change since the time the provision was first drafted. Certain clauses have been constructed inaccurately while others have served no purpose – this can be seen by the treatment of the clauses under the section by the different courts of the judiciary in the past hundred years. It is time that necessary reforms be brought in – whether it be doing away with a redundant clause, accounting for moral culpability or ensuring that doctrines are more precise in their formulation. These reforms will help the provision and the Code to be a modern and updated one, meeting the objectives for which it was originally drafted. This article argues for greater codification of the clauses, their updated illustrations, and a complete removal of Section 300(2) from the Indian Penal Code to enhance accuracy in decision making.*

### INTRODUCTION

The definition of ‘murder,’ under s. 300 of the Indian Penal Code, was described by Sir James Stephen in 1893 to be the weakest part of the Code.<sup>1</sup> The murder provision provides four clauses that account for different levels of intention, knowledge, and injury caused to assign criminal liability for murder to the accused. Clause (1) states ‘*done with the intention of causing death.*’ This clause is the least contentious out of the four for it serves as the basic provision of murder over which the rest of the three are built. Clause (2) eliminates the possibility that Clause (1) be read too broadly to extend liability for murder beyond what was originally intended by the legislature. It states that ‘*done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused.*’ This clause was especially inserted into the Code keeping in mind the special conditions that prevailed in India. Indians have large spleens and, quite often, mistreatment by British officers in the form of kicks to the abdomen resulted in death. To assign criminal liability for murder in similar cases, such a clause was necessary. It has

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<sup>1</sup> James Fitzjames Stephen, *A History of the Criminal Law of England* 553 (Macmillan and Company, London, 3<sup>rd</sup> edn., 1883).

been developed in accordance with the principle of the ‘egg shell skull’ rule and also necessitates a certain amount of knowledge as pre-requisite.<sup>2</sup>

In the construction of intention, frequent use of inferences in obvious instances has led to the formulation and hardening of certain rules. Thus, courts have frequently stated that where lethal weapons were used by the offender to commit the act, intention can be made out<sup>3</sup> but where agricultural or other implements were used, intention cannot be clearly inferred.<sup>4</sup> Attacking on a vital body part is also taken into account and the effect of the two cumulatively is considered. Additionally, the term ‘intention to kill’ was a Benthamite invention and was used with precision by them; however, in the 19<sup>th</sup> century it acquired a meaning of malice aforethought which was not what was intended by the creators of the phrase. This means that English precedents serve limited purpose in interpretation of the clause. The ‘*secondly*’ clause did not exist in Macaulay’s first draft and was absent in the then existing English law. It requires both a subjective intention and knowledge of the physical condition of the victim.

Part I of this paper will focus on the judicial accretions to clause 1 of Section 300 of the Indian Penal Code such as the ‘dangerous weapons’ doctrine, the ‘vital part of the body’ doctrine and so on. Part II will look at the ‘*secondly*’ clause and the various discrepancies that have arisen in this regard. It will also examine the construction and interpretation of the clauses by the courts as well as the ambiguity and discrepancies that exist with the help of case law. Part III of the paper will make suggestions for necessary reforms and how to make the Code more precise, drawing from the practice of other states and jurisdictions that implement the same Code.

### I. ‘*Firstly*’ of Section 300 of the Indian Penal Code

The clause states that *‘Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which death is caused is done with the intention of causing death.’* This clause of the murder provision is the most straightforward one and has been subject to the least controversy and discussion regarding its interpretation in court as compared to the other clauses. Since intention of the accused is within the confines of his mind and cannot be accessed or used by the prosecutor to establish their case and prove the guilt of the accused, ‘intention of causing death’ is inferred from the facts and circumstances surrounding the acts of the accused.<sup>5</sup> Here, it is imperative to

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<sup>2</sup> Mark McBride, “Section 300(C) of the Indian Penal Code: From First Principles” 26 *Nat’l L. Sch. India Rev.* 77 (2014).

<sup>3</sup> Dr. K.I. Vibhute, *P.S.A. Pillai’s Criminal Law* 349 (Lexis Nexis, 11<sup>th</sup> edn., 2012); See also *Fatte v. State* AIR 1979 SC 1504.

<sup>4</sup> *Dhanai Mahto v. State of Bihar* AIR 2000 SC 3602(1).

<sup>5</sup> Ronan Patrick Keane, “Murder: The Mental Element” 53 *N. IR. Legal Q.*1 (2002).

point out that this clause is identical to s. 299(a) and any crime that is said to fall under s. 300(1) will also fall under s. 299(a) and the crime will be ‘Culpable Homicide Amounting to Murder.’ Several doctrines have been developed through judicial precedents to read into the acts of the accused and infer the intention. These doctrines include the dangerous weapon doctrine, the vital body part doctrine and the cumulative effect of the two. Almost all courts have constructed ‘intention’ and while the construction of one court is often in consonance with the construction of another, there have also been various points of conflict.

**(i) Precedents which have laid down methods and doctrines to infer intention**

In the case of *R. Vankalu v. State*<sup>6</sup> it was held that a man’s intention must, as a general rule, be gathered only from his acts. Further, in *Fatte v. State*<sup>7</sup> it was held that in deciding the question of intention, the court has to consider the nature of the weapon used, body part where the blow was given, force used in giving the blow from which an inference can be drawn. Thus, the three tests laid down in this case were that of the dangerous weapon test, the vital body part test and the force with which the injury was inflicted. It has been affirmed by judicial precedents and scholarly opinion that intention can only be proved by its external manifestations. Thus, when injury is inflicted on a vital part of the body with sharp edged instruments, intention to kill can be attributed to the offender.<sup>8</sup> In *Devaramani Bheemanna v. State of Karnataka* it was held that the magnitude of damage apparent on the dead body showed intention to kill on the part of the accused.<sup>9</sup> In *Nashik v. State of Maharashtra*<sup>10</sup> it was held that the intention of the accused to cause death can be inferred from the nature of injuries caused. In this particular case, the accused had caused injury to a vital part of the body of the deceased with the help of a knife. In *Chabat Khan v. State of Haryana*<sup>11</sup> it was held that where a person causes injury to a vital part, intention can be attributed to the accused. This was re-iterated in *Bhaskar Pandit Kadam v. State of Maharashtra*.<sup>12</sup> In the case of *Ram Jatan v. State*<sup>13</sup> the court stated that ‘sometimes nature of weapon used, part of the body on which injury caused and sometimes both is relevant to determine intention to kill.’ Here, the word ‘sometimes’ brings in a level of vagueness and ambiguity to the various tests and doctrines. It gives the court the freedom to look at certain aspects of the acts of the accused and give them more importance than the others. For instance, the court is at liberty to give more

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<sup>6</sup> *Supra* note 3.

<sup>7</sup> AIR 1979 SC 1504.

<sup>8</sup> Dr. K.I. Vibhute, *P.S.A. Pillai’s Criminal Law* 349 (Lexis Nexis, 11<sup>th</sup> edn., 2012).

<sup>9</sup> S.K. Sarvaria, *R.A. Nelson’s Indian Penal Code* 786 (Lexis Nexis, 9<sup>th</sup> edn., 2003).

<sup>10</sup> AIR 1993 SC 1485.

<sup>11</sup> AIR 1972 SC 2574.

<sup>12</sup> 1984 (2) Bom. CR 769.

<sup>13</sup> 1995 Cri. LJ 3904.

importance to the nature of the weapon used than to the body part on which the injury was inflicted to determine intention on the part of the accused. This may be necessary in most cases given the particular facts and circumstances of every case but it also leads to the possibility that there may be cases where judgements are inconsistent with each other because they assign different weightage to the aspects of the acts of the accused.

**(ii) Precedents which have inferred intention and made use of Section 300 (1) of the IPC**

Based on the cases above that have laid down tests as to how to determine intention, scores of cases have applied them to determine intention and assign criminal liability. In the case of *Asbok Laxman Soboni v. State*<sup>14</sup> the appellant was under the belief that his wife had been practising witchcraft and he beat her in the presence of and at the instigation of his sister. His beating continued till she died and subsequently she was hastily cremated. The court held that this was a clear case of intentional murder and fell under s. 300(1) of the Indian Penal Code. In *Sreedharan Satheesan v. State of Kerala*<sup>15</sup> there was a dispute between the accused and the deceased regarding payment of certain money. The accused was a driver by profession and caused serious injuries with his minibus as he hit the deceased with great speed in the middle portion of his body. There were visible tyre marks on the thigh of the deceased and the court held that there was clear intention to kill and a case under s. 300(1) could be made out. In the case of *Vasanth v. State of Maharashtra*<sup>16</sup> where the accused drove his jeep in the wrong direction against the victim and ran him over, the Supreme Court held that there was no reason for the accused to do so other than the intention to cause death. In *Prabudayal v. State*,<sup>17</sup> which was a bride burning case, the deceased was completely burnt and died of 100 percent burn injuries from the fire. The accused had put a half-burnt postcard to make it look like a suicide note and had aimed to pass it off as a case of suicide. Further, the accused watched the whole incident through the window without raising alarm or making any attempt to save the deceased. The court held that it was an obvious case of intentional murder and there was no doubt about the inference of intention. In *Nandkumar Natha v. State*,<sup>18</sup> the accused poured kerosene on the deceased and set her on fire resulting in 30 per cent burn injuries from the fire. Subsequently, a supervening illness developed which was a natural consequence of the burning. The court held that it was clear that the accused had killed the deceased with the intention of causing her death. In the case of *Bandampalli*

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<sup>14</sup> AIR 1977 SC 1319.

<sup>15</sup> 1995 (2) ALT Cri 598.

<sup>16</sup> AIR 1983 SC 361.

<sup>17</sup> AIR 1993 SC 2164.

<sup>18</sup> 1987 (3) Bom. CR 139.

*Venkateshwaru v. State of Maharashtra*<sup>19</sup> the accused set fire to the deceased after pouring kerosene on the body of the deceased, thus the intention to kill was evident. In the case of *Robtas v. State of Uttar Pradesh*<sup>20</sup> the two accused persons came fully prepared with spears to attack. A blow was inflicted on the chest of the deceased that pierced his heart and lungs, leading to profuse bleeding and subsequently, death. The intention to kill of the accused was clearly evident in this case. In the case of *Maniben v. State of Gujarat*<sup>21</sup> there was a property dispute between the accused and the deceased. The death of the deceased was caused by burning after pouring of kerosene on the deceased by the accused. The Supreme Court held that accused was guilty of murder because the intention to kill was clear. In the case of *Satvir v. State of Uttar Pradesh*<sup>22</sup> the accused persons were armed with knives and laid down the deceased on the ground. They caused injuries on his vital parts resulting in his death. The Supreme Court said that the intention to cause death was proved and a case under s. 300(1) could be made out. In the recent 2017 case of *State of Gujarat v. Puriya*,<sup>23</sup> the accused inflicted multiple sword blows on the body of the deceased resulting in death. The court said that the seventeen external injuries, the dangerous weapon employed and the fact that it was not a single accidental blow pointed out to the clear intention to cause death on the part of the accused. Thus, the court has inferred intention to kill in various fact situations which serve as useful precedents and harden the judicially constructed doctrines.

### (iii) Discrepancies in established doctrines

While there is no dearth of precedents when it comes to doctrines relating to inference of intention, there have been cases that have led to confusion and possibilities of misinterpretation. In *Namdeo v. State of Maharashtra*<sup>24</sup> the accused attacked the deceased on his head with an axe. The doctor mentioned that the injury was sufficient in the ordinary course of nature to cause death. The Supreme Court applied s. 300(1) to the case holding that the intention to kill was clear. The clause 'firstly' is a subjective test<sup>25</sup> and to apply the objective test of 'ordinary course of nature' is to encroach on the ambit of s. 300(3).<sup>26</sup> The court should either not have applied the test of 'ordinary course of nature' or if they applied that test, they should have assigned liability under s. 300(3). In the case of *Jaspal Singh v. State*<sup>27</sup> a similar situation occurred. In this case, the accused

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<sup>19</sup> (1975) 3 SCC 492.

<sup>20</sup> AIR 1997 SC 2444.

<sup>21</sup> 2007 Cr. LJ 3187.

<sup>22</sup> 2009 (4) SCC 289.

<sup>23</sup> (2018) 1 GLR 288.

<sup>24</sup> AIR 1977 SC 381.

<sup>25</sup> Stanley Yeo, Neil Morgan et al., *Criminal Law in Malaysia and Singapore* 48 (Lexis Nexis, 2<sup>nd</sup> edn., 2013).

<sup>26</sup> Wing Cheong Chan, "What's Wrong with Section 300(c) Murder" 2005 *Singapore J.L.S.* 2 (2005).

<sup>27</sup> AIR 1986 SC 683.

inflicted knife blows on the groin region and the back side of the chest, which were in the 'ordinary course of nature,' sufficient to cause death. Based on this the court held that the accused actually intended to cause death of the victim. Again, in this case they should have assigned liability under s. 300(3) since it does away with the subjective element of knowledge as in s. 300(2) or constructing intention from the facts and circumstances as in s. 300(1). They should not have used the test of 'ordinary course of nature' and then held the accused liable under s. 300(1).<sup>28</sup> This is because it leads to confusion as to the distinction between the clauses as well as ambiguity as to inference of intention and the degree and nature of knowledge required to constitute an offence. For instance, wrongly assigning a case under s. 300(3) instead of s. 300(1) will cause future judgements to have incorrect reasoning and there may be a situation wherein ordinarily criminal liability could be assigned under s. 300(1) or s. 300(3) but due to its misinterpretation by courts, no criminal liability is recognized or assigned to the accused.

Certain constructions of the courts relating to 'single blow' and 'dangerous weapons' are also conflicting in nature.<sup>29</sup> For instance, in the case of *Dhanai Mahto v. State of Bihar*<sup>30</sup> it was held that mere bamboo sticks or 'lathis' are not dangerous weapons and in the case of *Joseph v. State of Kerala*<sup>31</sup> it was held that a 'lathi' is not a deadly weapon. However, in the case of *Bhagwan Swaroop v. State of Madhya Pradesh*<sup>32</sup> it was held that a 'lathi' is capable of causing a simple as well as a fatal injury. In the case of *Inder Singh Bagga Singh v. State of Punjab*<sup>33</sup> another qualification to 'lathi' as a weapon was made. In that case, it was held that since the 'lathi' was not an iron rod and the deceased was a young man and was strongly built, the accused could not under the circumstances be held to have been actuated with the intention of causing death of the deceased nor was the injury sufficient in the ordinary course of nature to cause his death seeing that he was alive for three weeks before death and the injury was curable. In the case of *Ramaotar v. State of Madhya Pradesh*<sup>34</sup> it was held that the injuries were not inflicted with the sole intention of causing death but when the 'lathi' was dealt with force on the head of the deceased, it may be contended that the accused should be aware that such injury is likely to cause death. In the case of *Sarman v. State of Madhya Pradesh*<sup>35</sup> it was held that although the post-mortem report said that all injuries might have caused the death of the deceased but in as much as the accused inflicted injuries with 'lathis' and particularly when they are simple and on non-vital parts, it cannot be said that their object

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<sup>28</sup> S.C. Sarkar, *Commentary on the Indian Penal Code 1860* (Dwivedi Law Agency, 3<sup>rd</sup> edn., 2011).

<sup>29</sup> R.P. Kathuria, *Supreme Court on Criminal Law 324* (Lexis Nexis India, 7<sup>th</sup> edn., 2009).

<sup>30</sup> *Supra* note 4.

<sup>31</sup> AIR 1994 SC 34.

<sup>32</sup> AIR 1992 SC 675.

<sup>33</sup> AIR 1955 SC 439.

<sup>34</sup> AIR 1993 SC 302.

<sup>35</sup> AIR 1993 SC 40.

was to kill the deceased; however, they may have knowledge that the blows given were likely to cause death. In the case of *Ranjit Singh v. State*<sup>36</sup> it was held that if assault made on the head with 'lathi,' the intention may not be to kill, but where the 'lathi' is with long knife on the chest of the deceased, there is a clear intention to kill. Thus, there have been a range of judgements on the issue, upholding different principles or making extremely intricate or fine points of distinction that make it difficult for a clear well-established principle to emerge.

## II. 'Secondly' of Section 300 of the Indian Penal Code

The 'secondly' clause states that *'Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused.'* This clause has often been confused with s. 300(3) by courts as the difference between them is only with regard to the subjective and objective requirement of knowledge of the injury inflicted and its likeliness to cause death. Here, it is important to note that s. 299(b) is similar to s. 300(2); however, there exists a key distinction between them - in s. 299(b) the 'knowledge' that the injury is likely to cause death is not present and conceptualised as it is in s. 300(2). Further, in s. 299(b) there is no mention or requirement of subjective knowledge on the part of the accused whereas in this provision it is an essential prerequisite. Thus, 'knowledge' or more specifically subjective knowledge on the part of the accused becomes the one point of distinction between the clauses. Another distinction that may be drawn between the two clauses is that the word 'likely' in s. 299(b) indicates a mere probability or possibility of death being caused due to the injury that is inflicted whereas in s. 300(2) the word 'likely' to an extent is representative of a certainty of death being caused. This is affirmed by Illustration (b) to s. 300. Thus, the degree of probability of death occurring is also a point of distinction between the two clauses. Under this clause, there is a two-fold requirement of *mens rea* to assign liability for a particular act. The first step is that there must be intention to cause bodily harm and the second step is that there must be 'knowledge' that death is a 'likely' result or consequence of such a bodily injury.<sup>37</sup> 'Knowledge' here refers to subjective knowledge, that is, the accused's own personal perception of the consequences of his act. Additionally, it must be noted that the usage of the words 'likely' and 'knowledge' coupled together indicate a definiteness or certainty of death and not a mere probability.<sup>38</sup>

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<sup>36</sup> 67 PLR 1175.

<sup>37</sup> *Supra* note 8 at 350.

<sup>38</sup> *Ibid.*

T. Bhattacharya<sup>39</sup> also offers his opinion on the same and says that two essential elements need to be proved. First, the intention to inflict bodily injury and second, subjective knowledge that the injury being caused to the particular person is likely to cause his death because the victim was suffering from certain physical disability. *R. A. Nelson* offers his opinion and defines s. 300(2) by distinguishing it from s. 300(3). It is stated that clause (2) is different from clause (3) because clause (3) speaks about injury sufficient in the ordinary course of nature to cause death. It contemplates injury caused to a normal grown-up and does not take into account special physical condition of the person harmed, accelerating his death. On the other hand, clause (2) talks about knowledge of peculiar sub-normal state of health of victim due to reason of age, disease or previous injuries. It asserts that if the injuries would not ordinarily cause death or if the assailants did not know of it, clause (2) would be inapplicable to the particular fact situation. In the case of *Rajwant Singh v. State of Kerala*<sup>40</sup> it was held that the second clause requires a two-fold mental attitude. There is first the intention to cause bodily harm and next there is the subjective knowledge that death will be the likely consequence of the intended injury. The word 'subjective' is important in the interpretation of this clause as the third clause discards the test of subjective knowledge and that is what distinguishes the two clauses.

**(i) Precedents which have laid down tests of subjective knowledge and made use of section 300 (2) of the IPC**

In the authoritative case of *Willie (William) Slaney v. State of Madhya Pradesh*,<sup>41</sup> the facts were as follows. The accused was on terms of intimacy with one Beryl who was the sister of Donald. Donald did not like the relationship shared between them and one day they had a heated exchange of words. The accused slapped Donald on the cheek and Donald lifted his fist. The accused gave one blow on his head with a hockey stick with the result that this skull was fractured. Donald died in the hospital ten days later. The High Court did not address itself to the nature of the offence and held that it was obvious that the appellant had not intended to kill the deceased (following the single-blow doctrine). Although the doctor opined that the injury was likely to result in fatal consequences, the court said that by itself was not enough to bring the case within the scope of s. 300. Since Donald was a young well-built man and the hockey stick was wooden, the court held that there was nothing to attribute special knowledge to the appellant that the injury was liable to cause death or that it was so imminently dangerous that it

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<sup>39</sup> Prof. T. Bhattacharya, *The Indian Penal Code* 331 (Central Law Agency, 8<sup>th</sup> edn., 2014).

<sup>40</sup> AIR 1996 SC 1874.

<sup>41</sup> 1956 AIR SC 1166.

must in all probability cause death. The fact that Donald lived for ten days afterwards shows that it was not sufficient in the 'ordinary course of nature' to cause death.

In the case of *Arun Nivalaji More v. State of Maharashtra*<sup>42</sup> the court eliminated the clauses of murder that would not apply to the facts of the case. It emphasized on the word 'knowledge' as used in the clause. In that regard, it stated that knowledge means the condition of being cognizant, conscious or aware of something. Thus, it imported some kind of certainty and not merely a probability. The court said that consequently, it could not be held that the accused caused the injury with the intention of causing such bodily injury as the accused knew to be likely to cause the death of the deceased. Thus, clause (2) was not applied to the case on this principle.

### **(ii) Precedents which highlight discrepancies in the usage of section 300(2)**

It has often been opined<sup>43</sup> that s. 300(2) is rarely invoked in practice because cases involving such a high degree of culpability often generate an inference that the accused actually intended to kill or an inference of knowledge under s. 300(3) or s. 300(4). This means that in practical experience, it is more suitable to assign criminal liability under the other clauses of the provision than to assign it under 'secondly' because there is usually a high degree of intention or knowledge that can be inferred from the acts of the accused that is a better fit with the wordings and interpretation of the other clauses which are objective and deal with 'ordinary course of nature' than what the second clause provides for. The case of *Dhansi v. State*<sup>44</sup> illustrates this perfectly. In this case, the accused assaulted a 70-year-old man with a wooden pole, inflicting about 19 injuries, some on vital parts. The High Court said that the case would fall under s. 300(2) because the accused had subjective knowledge that the injuries were likely to cause death of the deceased. However, the Supreme Court changed the conviction to one under s. 300(3) because those injuries were likely to cause death in the ordinary course of nature and therefore the victim's old age could not be held to be subjective knowledge on the part of the accused. Thus, we see that in most cases there is such a high degree of intention or knowledge that can be inferred from the acts of the accused that the element of subjective knowledge is pushed into the background and it becomes more appropriate to determine guilt of the accused under some other clause or provision.

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<sup>42</sup>2006 (2) SCC 613.

<sup>43</sup>*Supra* note 25 at 50.

<sup>44</sup>1969 Cri. LJ 626.

Additionally, the application of s. 300(2) has often been confused with that of s. 300(3). In the case of *Dhanni and Anr. v. State of Rajasthan*<sup>45</sup> the peculiar facts are imperative to understand why the application of the clause was incorrect. The accused had delivered two blows by using a 'pharsi' on the head and the leg of the deceased. It led to the instantaneous death of the accused on the spot. It was held that the accused had clearly acted in a 'cruel and unusual manner.' The court then held that case of the accused clearly fell under s. 300(2) as the act was clearly done with the intention of causing such bodily injury as the offender knew is likely to cause death. The court's reasoning was in sync with the application of s. 300(3) and not of s. 300(2) and thus, the application of the latter is incorrect. There was no special knowledge on the part of the accused about any aspect of the physical health of the deceased and therefore the case should have been excluded from the ambit of s. 300(2) since that is the second mandatory step of *mens rea* required to assign criminal liability under this clause. In the case of *B.N. Srikantiah v. Mysore State*<sup>46</sup> the deceased suffered 24 injuries due to the acts of the multiple accused, out of which 21 were incision injuries. The injuries were on the deceased's head, neck and shoulders. Thus, the injuries being on vital parts of the body coupled with the fact that a sharp weapon was used, led the court to conclude that the acts were done with such intention as to cause bodily injury as the offender knew likely to cause death of the accused. In this case as well, the nature and number of injuries as well as the fact of a sharp weapon being used indicate that criminal liability in this case should have been assigned under s. 300(3) since the injuries were sufficient in the ordinary course of nature to cause death and since no actual subjective knowledge on the part of the accused contributed to their acts which caused the death of the deceased.

In the case of *State of Maharashtra v. Sadanand Laxman Tawde*<sup>47</sup> the accused caused the first external injury on the stomach of the deceased. While the deceased attempted to escape after the first injury, the accused inflicted another injury on his back. After this, the deceased died. Through the post-mortem report it was discovered that the liver of the deceased was fatty and enlarged. The court held that the case would attract both s. 300(2) and s. 300(3). While the latter provision may have been appropriate to assign criminal liability under, none of the requirements of s. 300(2) were met. The accused had no subjective knowledge about the victim's liver or special disability. The court's justification that after the first injury, the accused had 'special knowledge' that inflicting the second injury would likely cause death, should not hold. This is because, in a large number of cases the victim makes an attempt to run away and is caught a little distance

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<sup>45</sup>1973 Cri. LJ 1336.

<sup>46</sup> AIR 1958 SC 672.

<sup>47</sup> 1987 (1) BomCR 656.

away where the fatal blow is delivered. All such cases cannot and do not come under s. 300(2) since the wordings nor the objective of the provision allow for it. In this case, the court should have looked merely at the nature of the injuries caused, the body part on which they were delivered and the weapon with which this was done to assign criminal liability under s. 299(b) or s. 300(3). In the case of *State v. Ram Sagar Yadav*<sup>48</sup> the deceased had been brought to the police station on a false charge of dacoity and was beaten mercilessly by police personnel. He died as a result of the multiple injuries inflicted on him. The Supreme Court convicted them under s. 300(2) holding that the beating on their part meant the intention to cause bodily injury, and they knew that the injuries were likely to cause death. However, the court seems to have erred in applying the second clause because there was no subjective knowledge on the part of the accused about any particular physical condition of the deceased and in the absence of such knowledge the clause could not be applied. They possibly did not apply s. 300(3) because *Virsa Singh v. State*<sup>49</sup> had laid down that for application of s. 300(3), it must be proved that there was an intention to inflict that particular injury and that it was not accidental or unintentional or that some other kind of injury was intended which was not established in this case. In that case the Court should have applied s. 299(b) and not s. 300(3) since by doing so they were going against its own holding given in *Dhansi v. State*.<sup>50</sup>

### III. Criticisms and Possible Improvements

Although the clauses have been adequate in serving their purpose, several reforms may be made. Certain authors have made suggestions<sup>51</sup> to improve the construction of the provision. It is their contention that since the Indian Penal Code was drafted in the 19<sup>th</sup> century, it no longer reflects the values and language of our current era. They submit that the illustrations are also inadequate since they reflect the practices of an earlier century. The illustrations that follow provisions have the purpose of minimizing doubt and clarifying the provision by giving an instance that is relevant keeping in mind the current moral, legal and social fabric of society. Since the illustrations in the Indian Penal Code have not been updated, they often do not remotely resemble or come close to the situation at hand.

Further, there are problems with the *mens rea* standard as it currently stands. The differences in the *mens rea* requirement between s. 299 and s. 300 are very fine and whether a case falls under

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<sup>48</sup> AIR 1985 SC 416.

<sup>49</sup> AIR 1958 SC 465.

<sup>50</sup> *Supra* note 44.

<sup>51</sup> Jonathan Muk Chen Yeen and Chin Wan Yew Rachel, "Sections 299 and 300 of the Penal Code: A Revisit and Further Suggested Amendments" 33 *Sing. L. Rev.* 129 (2015).

the former or the latter would depend on the degree of risk to human life and the probability of death occurring which is decided based on the particular evidence in a case. Thus, the distinguishing threshold for the two sections is relatively unclear. With regards to *mens rea* it is also stated that the definition of ‘intention’ in clause *firstly* does not account for the different levels of moral culpability.<sup>52</sup> It is a crucial ingredient in the offence that has to be made out but it remains undefined. If intention arose spontaneously or was pre-meditated, the moral culpability assigned must be different.<sup>53</sup>

Another criticism that may be levelled against the Indian Penal Code as it is present and used today is the absence of any mechanism to clarify the fundamental ambiguities that have arisen in the past century and a half. Lord Macaulay had intended for the Code to be precise, comprehensible and relevant. Thus, a revision mechanism to clarify ambiguities would not be out of line. However, such an institutional mechanism has never been established and ‘piecemeal reforms’ have resulted in judges contorting and constructing the words of the provision to fit the case at hand. Thus, we see discrepancies arising regarding the interpretation of words and construction of the provision, especially with regard to the single blow doctrine, dangerous weapon doctrine and the vital part doctrine. There have been many instances, as mentioned above wherein the same court has given conflicting judgements in similar fact situations because they interpreted intention in a different way and focussed on a different external manifestation of it. There can be definitions of certain key terms such as intention and knowledge so that there is greater consistency in the way intention is interpreted.<sup>54</sup> This can be seen in the penal codes of other countries. For instance, the New York Penal Code offers definitions of words such as homicide and the varying mental states to help in the interpretation of the provisions.<sup>55</sup> A similar practice has also been adopted in the Australian Commonwealth Criminal Code Act, 1995 and the Criminal Code of Canada, 1985.

The relevance of the clause *secondly* can be questioned greatly. It was not a part of Macaulay’s original draft and was introduced keeping in mind the Indian context, people being inflicted at the hands of British officers and the special condition of enlarged spleens that prevailed in that particular time period. Since then, the scenario has changed greatly and none of these two conditions are relevant anymore. In practical terms, this provision is not attracted because usually there is such a high degree of intention and culpability that subjective knowledge becomes

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<sup>52</sup> Frank Brenner, “The Impulsive Murder and the Degree Device” 22(3) *Fordham Law Review* (1953).

<sup>53</sup> Stanley Yeo, “Staying True to the Indian Penal Code: A Case Study on Judicial Laxity” 4 *NUJS L. Rev.* 2 (2011).

<sup>54</sup> *Supra* note 43.

<sup>55</sup> New York Penal Law U.S.C. (U.S.) §15.05 and §15.00(6) (1967).

irrelevant and it becomes more appropriate to assign culpability under *firstly*, *thirdly* or *fourthly*. Any situation that falls under the *secondly* clause can be covered by *firstly* or *fourthly*, the latter also covering situations wherein one deliberately seeks to exploit the victim's weakness. Further, the existence of the *secondly* clause has often been misapplied in place of *thirdly* and either the apex court has corrected the mistake by changing the clause under which liability is assigned, or more dangerously it has gone largely unnoticed and weakened the construction of the clauses. This is dangerous because it disrupts set and accepted rules of interpretation and brings in an element of confusion, especially among the lower courts which is not ideal or in consonance with the principles of penal policy followed in India.

### Concluding Remarks

Thus, it is concluded that the clauses *firstly* and *secondly* are the most fundamental provisions when it comes to the murder provision and assigning criminal liability under it. The two clauses account for different situations and for different degrees of *mens rea*. They have been interpreted and constructed by the courts throughout the years; however, it can now be seen that this is inadequate and certain reforms must be introduced so that the Code remains true to its original objectives and fulfils the requirements that its drafters had intended. It must account for moral culpability and uphold the policy of deterrence. Further, any construction or amendment must abide by the Macaulay Objectives of comprehensibility, accessibility, precision, and democracy.<sup>56</sup>

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<sup>56</sup> M. Sornarajah, "The Definition of Murder under the Penal Code" 1994 *Singapore J.L.S.* 1 (1994).

## HUSBAND IS NOT THE MASTER OF WIFE: AN ANALYSIS OF THE IMPACT OF DECRIMINALISING SECTION 497 ON THE SEXUAL AUTONOMY OF A WOMAN AND ON THE INSTITUTION OF MARRIAGE

Anju Joseph\*

*On 27 September 2018, a five-judge Constitution Bench of the Supreme Court unanimously struck down Section 497 of the Indian Penal Code, 1860 as unconstitutional and thereby decriminalised adultery as an offence in India. The 158-year-old Victorian morality law which penalised the adulterer for committing adultery, and which allowed the woman who committed adultery to run scot-free was long overdue to be struck down. The paper presents that the section that was enacted as a preventive for the preservation of the institution of marriage, was the embodiment of sexism, inequality and patriarchal supremacy and was a blatant violation of Articles 14, 15 and 21 of the Constitution of India. This paper analyses Section 497 in detail as to how it adversely affected the dignity and sexual autonomy of married women in India. It also studies the impact of the Supreme Court decision decriminalising adultery on Indian society in general, and makes a comparative study of the scenario within the society prior to decriminalisation and after decriminalisation of adultery. Finally, the paper also looks into the positive and negative aspects of decriminalisation of such an act which is still considered to be a great social taboo and the likely aftermath of it.*

**Keywords:** Adultery, Section 497, Sexual Autonomy, Privacy, Marriage, Article 14, Patriarchal.

### I. Introduction

It all started when the Supreme Court in December 2017 accepted the Public Interest Litigation which prayed for the Court to strike down Section 497 of the Indian Penal Code as unconstitutional on the ground of the Section being violative of Article 14<sup>1</sup> and Article 15<sup>2</sup> of the Constitution of India. While it was not the first time that a case requesting decriminalisation of adultery came up before the Hon'ble Supreme Court, it is the first time that the Supreme Court has acted upon it and as a result has definitely left its mark in history with its landmark judgment in the case of *Joseph Shine v. Union of India*<sup>3</sup> (Hereinafter referred to as the "Joseph Shine case"). This was a case where the Court not only decriminalised adultery in India, but also observed that women are not the property of their husbands and that decriminalising adultery is not licensing

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<sup>1</sup> The Constitution of India, art. 14.

<sup>2</sup> The Constitution of India, art. 15.

<sup>3</sup> *Joseph Shine v. Union of India*, 2018 SCC OnLine SC 1676.

it, as it will remain a ground for divorce under civil law. The court found no justification in making a moral wrong an offence when it only granted selective justice and did not serve the purpose of law, which is the prevention of the occurrence of crime.

Penalising adultery does not prevent a person from not being faithful to their spouse, nor does it protect the institution of marriage or family as an adulterous relationship is the sign of an already unhappy and broken marriage. For, what is the purpose of a law that, instead of upholding justice acts as a shield for protecting the adulterous woman from liability and grants power to the husband to prosecute the adulterer and does not grant the same power to the aggrieved wife so as to seek justice? The Section overall is an archaic and arbitrary section which is founded on gender-based presumptions and defies reasoning.

In addition to this, this judgment also touched upon the dignity of a married women and her sexual autonomy. While sexual autonomy was not held to be absolute, Justice Indu Malhotra in her judgement wrote that “The autonomy of an individual to make his or her choices with respect to his/her sexuality in the most intimate spaces of life should be protected from public censure”.<sup>4</sup> This relays the essence of the judgment that where an act is wrong in the eyes of the society but does not wrong the public nor does it affect the lives of a large section of people in the society, it is erroneous to classify it as a crime. It is not the purpose of law to solve the personal problems of citizens but to ensure justice and prevent the commission of crimes. If the law ventures into the personal lives of people, then it would open a can of worms that is better left unopened. The Adultery Judgment is a testimony of the fact that while it is difficult and sometimes impossible to define the line demarcating morality and law, where morality crosses the line dividing equality from inequality and creates an imbalance, law will prevail and the judiciary plays a pivotal role in this.

## II. Dignity of Women in the Face of Male Chauvinism

The crux of the problem lies in the chauvinistic attitude prevalent in society. Despite having a Constitution that embodies the principles of natural justice and a comprehensive legal framework to uphold human dignity, dignity of women is something that has to be fought for and is not granted in the society. To consider a free citizen as the property of another is an anathema to the ideal of dignity<sup>5</sup>. Section 497 of the Indian Penal Code presupposes gender equality, and yet at the same time is also discriminatory. Section 497, by creating gender-specific

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<sup>4</sup> Joseph Shine v. Union of India, 2018 SCC OnLine SC 1676.

<sup>5</sup> Ibid.

distinctions based on stereotypes indents the individual dignity of women. In order to gain a proper understanding of Section 497 and the relevancy of the judgment in *Joseph Shine v. Union of India*<sup>6</sup>, a proper reading of the Section against Article 21<sup>7</sup> of the Constitution is required.

With the passage of time, courts have recognised basic dignity not only as an essential to life, but also as a basic right. The importance of dignity was once again emphasised in the recent case of *Common Cause (A Registered Society) v. Union of India and another*<sup>8</sup>, where it was stated as follows:

“Human dignity is beyond definition. It may at times defy description. To some, it may seem to be in the world of abstraction and some may even perversely treat it as an attribute of egotism or accentuated eccentricity. This feeling may come from the roots of absolute cynicism. But what really matters is that life without dignity is like a sound that is not heard. Dignity speaks, it has its sound, it is natural and human. It is a combination of thought and feeling, and, as stated earlier, it deserves respect even when the person is dead and described as a body.”

With regard to the dignity of a woman, in the case *State of Madhya Pradesh v. Madanlal*<sup>9</sup>, it was held by Justice Dipak Misra that:

“Dignity of a woman is a part of her non-perishable and immortal self and no one should ever think of painting it in clay. There cannot be a compromise or settlement as it would be against her honour which matters the most. It is sacrosanct. Sometimes solace is given that the perpetrator of the crime has acceded to enter into wedlock with her which is nothing but putting pressure in an adroit manner; and we say with emphasis that the Courts are to remain absolutely away from this subterfuge to adopt a soft approach to the case, for any kind of liberal approach has to be put in the compartment of spectacular error. Or to put it differently, it would be in the realm of a sanctuary of error.”

Similarly, in *Pawan Kumar v. State of Himachal Pradesh*,<sup>10</sup> it was observed by the court that just like a man, a woman has her own space and enjoys as much equality under Article 14 of the Constitution as a man does. The right to live with dignity as guaranteed under Article 21 of the Constitution cannot be violated by indulging in obnoxious acts which upsets the primary concept of gender sensitivity and justice and the rights of a woman under Article 14 and 15 of the Constitution. It was further observed that:

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<sup>6</sup>*Supra* note 2.

<sup>7</sup>The Constitution of India, art. 21.

<sup>8</sup> *Common Cause v. Union of India*, (2018) 5 SCC 1

<sup>9</sup> *State of Madhya Pradesh v. Madanlal*, (2015) 7 SCC 681

<sup>10</sup>*Pawan Kumar v. State of Himachal Pradesh*, (2017) 7 SCC 780

“In a civilized society male chauvinism has no room. The Constitution of India confers the affirmative rights on women and the said rights are perceptible from Article 15 of the Constitution. When the right is conferred under the Constitution, it has to be understood that there is no condescension. A man should not put his ego or, for that matter, masculinity on a pedestal and abandon the concept of civility. Egoism must succumb to law. Equality has to be regarded as the summum bonum of the constitutional principle in this context.”

In a patriarchal society like India, many have viewed women as a vulnerable section which is inferior to men. Women are still treated as the property of men, and as those who should wait on hand and foot for men at their homes. Though there has been a shift in such a viewpoint, such a shift is not complete nor absolute. In *Madhu Kishwar v. State of Bihar*<sup>11</sup>, the Supreme Court stated that Indian women have suffered and are suffering discrimination in silence. Also, self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination. However, one is compelled to think and constrained to deliberate why the women in this country cannot be allowed to live in peace and lead a life that is empowered with a dignity and freedom. It has to be kept in mind that she has a right to life and is entitled to love according to her choice. She has an individual choice which has been legally recognised. It has to be socially respected<sup>12</sup>.

Today our nation recognises contributions made by women whether a wife, a daughter, a mother, or a sister, women are recognised as nurturers whose acts cannot be valued with money and who are invaluable to society. Section 497 was brought about to preserve the institution of marriage and also to protect the interests of married women. Though it was intended to protect the dignity of women, by striking down Section 497 and by decriminalising an act for which the aggrieved wife cannot gain remedy and the defaulting woman gains immunity, the judiciary has upheld the dignity of women in the face of gender disparity. Consequently, the dignity of women gets equated with the concept of gender equality, and a law which guarantees gender equality selectively is not just unfair and unjust but is against the true nature of equality.

### III. Breaking Down Section 497 and Adultery

To understand the impact of decriminalising adultery on the institution of marriage, the scenario prior to the Joseph Shine case must be analysed. The law on adultery being an offence was a 158-year-old Victorian morality. The common law historically perceived women as objects and as the

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<sup>11</sup> *Madhu Kishwar & Ors. Etc vs State of Bihar & Ors*, (1996) 5 SCC 125.

<sup>12</sup> *Pawan Kumar v. State of Himachal Pradesh*, (2017) 7 SCC 780.

property of men, which is why adultery law does not consider women liable and why a married man entering into sexual relationships with an unmarried woman was not considered as adultery as those unmarried women were not considered as the property of another man yet. By tracing history, one can see that the act of adultery was frowned upon and punished in almost all ancient cultures and civilizations. With regard to the Indian context, among Hindus, the Smritis and Sutras prescribed punishments where the former prescribed those which cause terror, including banishment, and the latter stated that the punishment depends upon the class or caste of the adulterers; both the man and the woman, and prescribes a life of chastity for two years as punishment for a man and three years if he commits adultery with a Vedic scholar's wife. Thus, even from an early time, adultery was considered as a sin in our nation and severely punished.

Section 497, in Chapter XX of the Indian Penal Code, 1860 provides for the offence of adultery. This section was enacted and persisted for preserving the institution of marriage. The Section reads as follows:

“Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.”

Another relevant section is Section 198(2) of Code of Criminal Procedure, 1973 which states that—

“For the purposes of sub-section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under section 497 or section 498 of the said Code: Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed may, with the leave of the Court, make a complaint on his behalf.”

An initial reading of the section shows that the section provides relief to the affected spouses of the adulterers. For Section 497 to apply, firstly, there must be sexual intercourse with a married woman, secondly, it should be done without the consent or connivance of the husband, thirdly, the offender should know or have reason to believe that the woman is the wife of another man, fourthly, the sexual intercourse should not amount to rape and fifthly, the wife who commits adultery is not treated as and punished as an abettor.

Thus, a proper reading of Section 497 of IPC sheds light on the fact that, this is a law made solely for the protection of the institution of marriage and family in the society and does not give importance to the consent of women. Once the consent of the husband is established the offence no longer stands and the opinion of the wronged wife does not matter. Viewed from the said scenario, the provision creates a dent on the individual independent identity of a woman when the emphasis is laid on the connivance or the consent of the husband. This is opposed to Article 14 as Section 497 prescribes subordination of a woman where the Constitution bequeaths equality in all senses.

Section 497 is similar to Section 375 of the Indian Penal Code, 1860, under which only a man can commit adultery and be punished for it. The woman who commits adultery is absolved of liability and is not punished as an abettor. The ideology behind this is the belief that only a man will entice a woman and compel or induce her into committing adultery. Also, according to the Section, only the husband of the woman who committed adultery can prosecute the adulterer, which is the person who had sexual intercourse with the married woman. Neither the aggrieved wife nor the aggrieved husband can prosecute the adulterous wife. Nor can the aggrieved wife prosecute her husband for adultery. In addition to this, Section 497 does not consider cases where the husband has sexual relations with an unmarried woman indirectly resulting in husbands having free warrant under the law to have extramarital relationships with unmarried women. This makes the section arbitrary and unreasonable as it is the spouses of the parties to the adultery who are affected by their act and who have to face humiliation, and not allowing them to prosecute the offenders is equivalent to denying them justice.

All of these contentions along with the statement that Section 497 is a flagrant instance of 'gender discrimination', 'legislative despotism' and 'male chauvinism' were raised in *Sowmithri Vishnu v. Union of India and Another*<sup>13</sup>. In this case, the wife had left the matrimonial home due to certain marital disputes and was living in an adulterous relationship. While divorce proceedings were pending, the husband filed a criminal case under Section 497 against one Dharma Ebenezer for adultery with his wife. Challenging this the wife filed a writ petition for quashing the complaint. In her petition she raised the following contentions:

(a) Section 497 is discriminatory and violative of Article 14 of the Constitution because, by making unfounded classification between men and women, it denies the wife the right to

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<sup>13</sup> AIR 1985 SC 1618.

prosecute the husband who has committed adultery with another woman while the same right is made available to the husband.

(b) Section 497 grants free licence to the husband to have sexual relations with an unmarried woman as it does not penalise extra-marital relationship with unmarried woman or a widow.

The Court in this case dismissed the writ petition and held that the offence of adultery as defined in Section 497 can only be committed by a man, not by a woman and hence, does not envisage the prosecution of the wife by the husband for adultery.

In *Yusuf Abdul Aziz v. State of Bombay*<sup>14</sup>, where the appellant was being prosecuted for adultery under Section 497 of the Indian Penal Code, Section 497 was challenged, particularly the immunity that the adulterer wife enjoys, as being violative of Articles 14 and 15 of the Constitution of India. Here, the court held that such an immunity is covered by Article 15(3) as a special provision made for women and the stability of marriage should always be kept in mind. The Court said that the two Articles read together validate the impugned clause in Section 497 of the Indian Penal Code. The Court stated the protection of a woman who commits adultery as not discriminatory but as being an affirmative provision under clause (3) of Article 15 of the Constitution.

When it came to *V. Revathi v. Union of India*<sup>15</sup>, the court ruled that both the husband and the wife are disabled from striking each other with the weapon of criminal law and stated that it is the 'outsider' who breaks into the matrimonial home that is punished and the erring man alone can be punished and not the erring woman. It was held that the provision is not vulnerable to the charge of hostile discrimination. In *W. Kalyani v. State through Inspector of Police and Another*<sup>16</sup>, the court held the provision to be under criticism from certain quarters for showing a strong gender bias as it puts a married woman in a position where she is almost like a property of her husband. In terms of the law, the section provides only for the prosecution and punishment of the man who committed adultery and not for the wife who committed adultery.

The inadequacy and atrocity of Section 497 was clearly outlined by Justice Chandrachud in the judgment as concluding points as:<sup>17</sup>

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<sup>14</sup> AIR 1954 SC 321.

<sup>15</sup> (1988) 2 SCC 7.

<sup>16</sup> (2012) 1 SCC 358.

<sup>17</sup> *Supra* Note 5 at 73.

- a) Section 497 is violative of Article 14 of the Constitution of India and is unmistakably arbitrary as it lacks a sufficiently decisive principle to criminalise consensual sexual activity.
- b) Section 497 is violative of Article 15 of the Constitution due to it being constructed on gender stereotypes which are prejudicial to women.
- c) Section 497 is violative of Article 21 of the Constitution as it denies dignity, liberty, privacy and sexual autonomy guaranteed by the said Article in the Constitution of India.

It was not that no attempt was made to make the section gender-neutral and fair. Indeed, one such attempt was made by the Law Commission of India through its 42nd Law Report<sup>18</sup> which recommended the removal of the exemption provided for women from being prosecuted and reducing the punishment for the offence from five years to two years. It suggested making the section gender-neutral and having equal application instead of removing it from the Indian Penal Code. However, the recommendation given in the report was disregarded and not put into action. Thus, prior to the Joseph Shine case the judiciary was of the viewpoint that despite the various drawbacks of Section 497, it was to prevail for the protection of the institution of marriage and, the judgments in all the above cases validate the fact that Section 497 though it may appear to be the hand of justice, is in reality unfair, unjust and discriminatory and inherently patriarchal. There is no logical explanation for the section to have been in operation for so long.

#### **IV. The Adultery Judgment: Joseph Shine v. Union of India**

Joseph Shine, a non-resident Keralite hotelier, had filed a PIL in December 2017 under Article 32 of the Constitution challenging Section 497 along with Section 198(2) of the CrPC on three main grounds, that is:

- a. Section 497 was violative of Article 21 of the Constitution as well as the right to privacy.
- b. Section 497 was violative of Articles 14 and 15 of the Constitution.
- c. Section 198(2) CrPC shall be unconstitutional only to the extent that it is applicable to Section 497.

A three-judge bench, headed by the then Chief Justice of India, Dipak Misra, had referred the petition to a five-judge Constitution Bench which had unanimously passed the judgment that

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<sup>18</sup> Law Commission of India, 42<sup>nd</sup> Report on the Indian Penal Code (June, 1971).

struck down Section 497 as unconstitutional, thereby overruling all previous judgments that held the provision to be constitutional. This was a case where the court had to consider the previous judgments on adultery, all of which were in favour of adultery, as well as the ethical and moral principles of society, need for the protection of the institution of marriage and family, consistency with the fundamental rights and the possible impact that a differing judgment from its predecessors would have on Indian society as a whole.

The Supreme Court after considering all of these factors held that the demand by law for the parties to a marriage to remain faithful and maintain fidelity, and only making the adulterer the culprit in itself was a socio-moral prejudicial command that infringed privacy. The court took notice of the fact that many other culturally diverse nations no longer considered adultery as a crime. The court insisted that the theories of punishment whether deterrent or preventive would not save a marriage that suffered from adultery as it was a matter of privacy at its pinnacle where parties to a marriage, either one or both lose commitment to their relationship and therefore a punishment is unlikely to establish it. It is then purely up to the parties to either save the marriage or to break it down. The court reiterated the fact that infidelity need not be the cause of an unhappy marriage, instead it can be its result and it is difficult to conceive of such situations in absolute terms. In such a scenario, where punishment is concerned, the court cannot make a distinction between marriages which have broken down due to adultery and those that have already broken down where adultery is only an outcome.

In addition to this, the court also held that considering adultery as a crime would be a degenerating step and unwarranted in law as it is inappropriate to punish an act which is no longer considered a crime by the majority of society with a law that was made for an era where adultery was considered as a sin and a crime worthy of stringent punishment. Taking note of all these facts, the court held Section 497 and Section 198(2) to be violative of Articles 14, 15 and 21 of the Constitution.

#### **V. Do Married Women Have Sexual Autonomy?**

Sexual autonomy, in simple terms, can be defined as a person's right to determine when, how, where and with whom they should engage in sexual activity provided that, such sexual intercourse takes place with that person's consent. However, the autonomy of a woman in making decisions about their sexuality and sexual relations is very much restricted in India. Due to cultural and religious forces and traditions, many women are compelled to have sexual relations with their husbands whether they wish to or not. It is disheartening to note that the

increasing instances of marital rape in India is indicative of women in India losing their sexual autonomy to chauvinistic beliefs and attitudes.

Whether it be a married woman, a widow, an unmarried woman, a single mother, or a lesbian, all of their freedom to make decisions with regard to their sexual autonomy is fettered and manacled by society and supported by many laws. This should end as sexual autonomy is not just about the right to say no to one's husband—it also forms an integral part of a woman's life and personal liberty under Article 21 and can be said to be the trademark of her individuality and dignity. Until women are given full freedom over their bodies and their sexuality, India cannot claim to have achieved the ideals of equality and liberty. Exercising control over a woman's sexual autonomy, whether in a marriage, family or otherwise, is a sign of the deep-rooted patriarchal supremacy prevalent in our country. Simply because a person has entered into a matrimonial relationship does not permit or sanction the husband or wife to curb the sexual autonomy of each other. One's sexual autonomy is part of one's freedom of expression and curbing a woman's sexual autonomy would be violative of her fundamental rights.

The Adultery Judgment took into serious consideration the question of sexual autonomy of a married woman. The Supreme Court concluded its judgment in the Joseph Shine case, with Justice Chandrachud reiterating and emphasising the importance of sexual autonomy of a married woman and her right to say no to her husband. According to the learned judge, entering into a marriage does not make a woman the chattel or property of the husband which he can use according to his wishes, nor does marriage forfeit the right of the wife to say no to the husband. In a marriage, neither the husband nor the wife surrenders their freedom to make sexual choices and the court recognised that section 497 actually restricted the sexuality of a woman and interfered with her sexual privacy.

On appraising Section 497, the court found it to be a provision manifested with arbitrariness, disguised and protected in the name of law. It clearly mandates the subordination of the wife in the marital relationship without any reasonable justification and Section 497 completely disregards a married woman's sexual autonomy and indirectly controls the woman's sexuality firstly, by only permitting the husband to prosecute the adulterer for having sexual intercourse with his wife, and secondly, if the wife engages in sexual intercourse with another man with the consent of the husband, then it is not considered to be adultery and the law will not punish such an act. Thirdly, Section 497 prescribes that the adulteress be the wife of another person and does not emphasise on the adulterer being married. This is highly arbitrary as it indicates the perception of the husband being the master of the wife's sexuality and sexual preferences.

Section 497 does not provide any logical or reasonable basis for penalising consensual sexual activity between a man and a woman other than the objective of protecting the institution of marriage which is only a purely moral reason and is hardly sufficient. Section 497, though it may have been enacted with a good intention has actually forced the concept of faithfulness on women as a form of obligation rather than something of divine nature. The section treats women as unequals in a marital relationship and considers them as not being capable of giving consent to a sexual act and incapable of making decisions regarding the same.

An important aspect to be brought to notice is the fact that Section 497 is against 'constitutional morality'. The provision is the embodiment of the patriarchal mind-set still prevalent in the country and is completely opposed to the principles of equality, liberty, dignity and privacy which are not only the foundation of Article 21 and Article 14 of the Constitution, but are also the fundamental touchstones of the Indian Constitution. The importance of sexual autonomy as an aspect of individual liberty was clearly highlighted by Chief Justice Dipak Misra in *Navtej Singh Johar & Ors. v. Union of India thr. Secretary Ministry of Law and Justice*<sup>19</sup> (hereinafter referred to as the "Navtej Singh case"), which was a recent landmark judgment of the Supreme Court whereby the court unanimously held that Section 377 of the Indian Penal Code, was unconstitutional in so far as it criminalised consensual sexual conduct between adults of the same sex. He stated as follows:

"The sexual autonomy of an individual to choose his/her sexual partner is an important pillar and an inseparable facet of individual liberty. When the liberty of even a single person of the society is smothered under some vague and archaic stipulation that it is against the order of nature or under the perception that the majority population is peeved when such an individual exercises his/her liberty despite the fact that the exercise of such liberty is within the confines of his/her private space, then the signature of life melts and living becomes a bare subsistence and resultantly, the fundamental right of liberty of such an individual is abridged."

The same judgment further emphasised on how the identity and dignity of a woman is connected to her individuality, as autonomy establishes identity which ultimately becomes a part of one's dignity and how a woman can wilfully relinquish her autonomy to another individual, and the intimacy between them in privacy being a matter of their choice.

The aforementioned case was one where the Chief Justice highlighted the injustice in criminalising "acts within their personal sphere" based on backsliding social attitudes. Just like

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<sup>19</sup> *Navtej Singh Johar & Ors. v. Union of India*, (2018) 1 SCC 791

marriage and family being intimate and personal matters between two persons which the State should not interfere with unless it is of utmost national importance or for the interest of the general public, the sexual autonomy of a husband or a wife are also matters which are of intimate nature which should not be mandated by the State. Sexual autonomy is a matter of one's choice and the Constitution recognises the right to make one's own choice with regard to one's life a core human trait, which neither the law nor the State should dictate because it is the sexual choice of spouses, and so would be an infringement on their privacy. This principle was reiterated in the Navjet Singh case.

Man is said to be the only animal that can reason, and in a marital relationship both the husband as well as the wife have a reasonable or more appropriately termed, a 'legitimate' expectation from each other with regard to all that is expected from a marriage. These include providing care and companionship, respecting each other's identity and privacy, providing comfort to each other as well as being supportive. Respect for the sexual autonomy of one's spouse is one such reasonable expectation. This entails not forcing one's spouse to engage in sexual acts whenever and however one decides. If the wife does not wish to do what the husband wants her to do within the bedroom, then he should very well respect that. Same is the case when it comes to a husband's sexual autonomy. There should be parity and not disparity, where both spouses consider each other as equals and not as someone inferior to them in terms of their sexuality.

#### **VI. The Ultimate Question: Decriminalising Adultery Good or Bad?**

At the end of the day the question is whether the Supreme Court's decision in striking down Section 497 of the Indian Penal Code, 1860 as unconstitutional will have a good or bad effect on the institution of marriage and family within India. What would be the likely impact of this judgment on Indian society where adultery is considered to be an act opposed to morality and one of the greatest sins as per many religions in India? What does it say for the future of all those children whose family life has broken down and become miserable due to both, or one of their parents engaging in the act of adultery? All of these questions were left unanswered by the court but have plagued the minds of individuals in the aftermath of the Joseph Shine case.

What should be analysed first is the likely impact of the judgment on the institution of marriage. A common misconception is that as the act of adultery is being decriminalised, the judgment has actually licensed it. This is incorrect because adultery was prevalent in society even before the birth of law, and law prohibiting adultery, though it may have been initially enacted for the purpose of prohibiting the act, later on came to be a preventive measure. Enactment of Section

497 did not mean to showcase a complete abandonment of the practice of adultery; in fact, that men and women continued adulterous activities even after having full knowledge of the repercussions which could potentially follow is testimony to this fact. Hence, the court by decriminalising adultery has not licensed it, instead, it would be appropriate to say that the Supreme Court was wise in decriminalising adultery and has taken a progressive step in coming at par with developed nations, as well as in modernising and developing Indian society.

Forceful enforcement of faithfulness in marriage is like forcing two persons to fall in love with each other legally, which is an absurd notion. An act such as adultery is something that affects the personal life of two married persons and it does not affect the general public in a manner that offences like murder, rape or dacoity would. Hence it is wrong to attach such an extent of criminality to an act which is essentially only a moral wrong. Every individual is his own person and is capable of making their own choices. To commit adultery or not is one such choice made by an individual as part of his/her sexual autonomy.

Another contention is that with this judgment, the Supreme Court has facilitated the breaking down of the sanctity of marriage which will adversely affect the lives of the children who were born out of the marriage. This can be said to be partially right as well as partially wrong. In a country beset with rising divorce rates and cases of marital infidelity, decriminalisation of adultery can critically endanger the institution of marriage. Not only does it run the risk of fostering extra-marital affairs, emergence of divorce as a way out will catalyse the break-up of marriages leaving little children in the lurch.<sup>20</sup> While the Supreme Court has done well in ensuring that there is no gender based arbitrariness in availing remedy by a married woman against her husband, it would have been even better had the Supreme Court laid down the remedies for children who would be affected from their parents adulterous relationship, and possible divorce that may follow.

However, what should always be kept in mind is that whether the act of adultery is the cause or the result of an unhappy marriage, whether there is already a big tear in the marriage and whether to stitch it up or to completely break it apart are matters which are up to the spouses since, penalising the adulterer spouse may not make them feel guilty and shameful of their act and may not prevent them from committing it again. Section 497 was only a temporary bar or a form of warning which would make the adulterous wife and the adulterer more cautious so as not to get

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<sup>20</sup>Decriminalisation of Adultery: A Setback to the Institution of Marriage in India', *available at*: <https://www.outlookindia.com/website/story/decriminalisation-of-adultery-a-setback-to-the-institution-of-marriage-in-india/317282> (last visited on 10 March 2019).

caught. It should also be noted that the judgment in the Joseph Shine case has at last laid down the foundation for eventually tearing down Exception 2 of Section 375<sup>21</sup>. The exception to rape does not recognise or penalise marital rape. This is another arbitrary section which is inherently masculine and discriminatory. With the courts decriminalising adultery after recognising it to be a gender biased and unfair section, it has given hope that the courts will also criminalise marital rape which is another gender biased section which is violative of Articles 14, 15 and 21 of the Constitution of India.

## VII. Conclusion

The line demarcating morality and crime is a fine one. It is very difficult and sometimes next to impossible to separate them from one another. Almost all or most crimes are opposed to morality, but it is not necessary that what may morally be wrong is essentially an offence. It is when the line between morality and crime becomes blurred that the court has to step in and, the recent Supreme Court's judgment which struck down Section 497 of the Indian Penal Code as unconstitutional is a glaring example of a case where an act, even if opposed to morality, did not have the sufficient ingredients for becoming a crime. No longer is a husband the master of his wife. The court has struck down a provision which is both archaic and prejudicial and has once again upheld constitutional morality in the face of discrimination and arbitrariness.

Section 497 of the Indian Penal Code, 1860, supported by Section 198(2) of Criminal Procedure Code, 1973, was a gender biased section which excluded the female adulteress from prosecution while at the same time preventing the aggrieved wife to prosecute both her husband as well as the woman who had engaged in the act of adultery with her husband. The section was very much demeaning to the dignity of women, portraying them as vulnerable and gullible beings and as properties of their husbands who were not capable of making their own choices nor capable of exercising their sexual autonomy. Though the section was enacted for preserving the sanctity of the institution of marriage and family in the society, it only served its purpose to a small extent.

There is no use of a law which only serves the interests of certain people for namesake. The purpose of law is to ensure that justice and fairness is served without distinction to all. The Supreme Court has made the right decision in decriminalising adultery as a crime, and has shown that every individual has the right to make right and wrong decisions as per Article 21 and, where an act is wrong in the eyes of society but does not adversely affect the public as a whole or threaten the peace and security of the State, it is not apt to categorise it as a crime simply because

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<sup>21</sup>The Indian Penal Code, s. 375

society demands it. The Apex Court has once again acted as the champion of fundamental rights by upholding Articles 14, 15 and 21 of the Constitution in the face of male chauvinism and patriarchal attitudes prevalent in our country.

## TAXATION OF DIGITAL ECONOMY AND THE SIGNIFICANT ECONOMIC PRESENCE TEST: THE WAY AHEAD

Muskan Agarwal\*

*Digitalization of the economy has brought with itself various challenges including the taxation of digital profits. The rapid growth of online activities and heavy reliance on data, intangibles, and user-interaction allows entities to occupy an economic presence in locations that are distant from the place of their actual residence. Foreign entities legally avoid taxation by shifting profits to low or no-tax locations. The Organisation for Economic Co-operation and Development (OECD) has addressed this and other tax issues arising out of digitalisation and has recommended measures as a part of its Base Erosion and Profit Shifting (BEPS) project. Countries across the world have gone ahead and adopted unilateral measures to tackle the tax issues posed by the digital economy in light of the various measures that were recommended in BEPS reports. Replacement of the principle of 'Permanent Establishment' with 'Significant Economic Presence' is one of the various options. In this regard, the article focuses on the utility of the international income tax law principle of 'Permanent Establishment' against the background of the changing environment and critically depicts the test of 'Significant Economic Presence' added in the provision of 'Business Connection' of the Income Tax Act of India.*

### I. Introduction

To subject non-residents to a country's taxing jurisdiction, a nexus or a connection of such foreign enterprises with that country is required. In other words, non-resident entities are taxed if they have a 'permanent establishment' (PE) in the source country i.e. the country where profits are earned. In essence, the nexus based on the physical presence of the entities must exist to subject the business profits to tax. However, with the emergence of the digital economy and with the coming up of new business models, non-resident enterprises can interact with the customers of another country without having any physical presence in that country.<sup>1</sup> For example, digital products, as well as services, is delivered over the Internet in the absence of physical presence in the source country.

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<sup>1</sup> Explanatory Notes to the provisions of the Finance Act, 2018, Government of India Ministry of Finance Department of Revenue (Central Board of Direct Taxes), available at: [https://www.incometaxindia.gov.in/News/Circular\\_8\\_2018.pdf](https://www.incometaxindia.gov.in/News/Circular_8_2018.pdf) (last visited on March 01, 2019).

The tax challenge posed by the digital economy was identified as one of the main areas of focus of the 2013 Organisation for Economic Co-operation and Development (OECD) Base Erosion and Profit Shifting (BEPS) Project.<sup>2</sup> As a consequence, the OECD adopted a 15-point BEPS Action Plan in 2015. In the 2015 Action 1 Final Report (“Action 1 Report”), the OECD noted that it is ‘difficult to ring-fence the digital economy from the rest of the economy’ since the ‘digital economy is becoming the economy itself’.<sup>3</sup> Features of the digital economy—mobility, reliance on data, network effects, the spread of multi-sided business models, and volatility<sup>4</sup> make it difficult for the authorities to pin down digital profits<sup>5</sup> to a specific jurisdiction. The digitalization of the economy, thus, necessitates a change in the system of taxation—a need for establishing a nexus based not only on the physical presence of the business entity in the source country but also on the economic presence through which the foreign company earns profits in the source country.

Thus, part II of the paper briefly reviews the utility of the PE principle *vis-à-vis* the changes in the digital economy. Part III discusses the scope and ambit of the term ‘significant economic presence’(SEP)and seeks to understand India’s move in the direction of resolving tax issues arising out of digitalization by including the SEP test in the Income Tax Act, 1961 (ITA). Part IV concludes with an observation that the change in the definition of PE/business connection has been brought in haste and with no consultation.

## II. Utility of the PE Principle

Permanent Establishment (PE) as a concept emerged to avoid double taxation.<sup>6</sup> As a rule, the source country (where the PE is situated) is allowed to tax profits of the non-resident attributable to the PE and the residence country (where the taxpayer resides) exempts taxation of the non-resident’s income earned in the source country or credits the tax amount paid.<sup>7</sup>

Under Article 5 of the OECD Model Tax Convention on Income and Capital (OECD Model tax treaty) and the UN Model Double Taxation Convention between Developed and Developing

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<sup>2</sup> OECD, Action Plan on Base Erosion and Profit Shifting, *available at*:

[https://read.oecd-ilibrary.org/taxation/action-plan-on-base-erosion-and-profit-shifting\\_9789264202719-en#page1](https://read.oecd-ilibrary.org/taxation/action-plan-on-base-erosion-and-profit-shifting_9789264202719-en#page1) (last visited on March 01, 2019).

<sup>3</sup> OECD, Addressing the Tax Challenges of the Digital Economy Action -1- 2015 Final Report, *available at*: <http://www.oecd.org/ctp/addressing-the-tax-challenges-of-the-digital-economy-action-1-2015-final-report-9789264241046-en.htm> (last visited on March 12, 2019).

<sup>4</sup>Ibid.

<sup>5</sup> Maarten de Wilde, Tax jurisdiction in a digitalizing economy; why ‘online profits’ are so hard to pin down 12 *Intertax* 796–803 (2015).

<sup>6</sup> Arthur J. Cockfield, Reforming the Permanent Establishment Principle through a Quantitative Economic Presence Test 38 *Can. Bus. L.J.* 400 (2003).

<sup>7</sup> R. Rohatgi, *Basic International Taxation* (Richmond Law and Tax Ltd, United Kingdom, 2<sup>nd</sup> edn., 2005).

Countries (UN Model Tax Treaty), PE means 'a fixed place of business through which the business of an enterprise is wholly or partly carried on'. The phrase 'fixed place of business' carries importance in the present context. The OECD Model commentary on Article 5 provides that a 'place' is a certain amount of space<sup>8</sup> within the soil or on the soil. Examples of PEs listed in Article 5(2) include, *inter alia*, stores, offices, branches or factories show a close attachment to the territory of the source state. Moreover, it has been noted that the requirement of the place is the cornerstone of the PE definition.<sup>9</sup> However, if the PE principle is to be juxtaposed with today's economic scenario, then an example of e-commerce multinationals involved in cross-border transactions shows that profits could be earned online through a 'web-store', and not necessarily through a fixed store on land.

In this regard, it is to be noted that the OECD Model commentary on tax convention states that "an internet website, which is a combination of software and electronic data ... does not have a location that can constitute a place of business." It has been argued that 'virtual control is not sufficient because data do not constitute a 'place' under Article 5(1) OECD Model Tax Treaty'.<sup>10</sup> Unsurprisingly, it has been a subject of debate whether a computer and a web server in particular, constitute a PE at the place where the computer is physically located.<sup>11</sup>

In this regard, the Indian judiciary has responded to the changes taking places in digital technology.<sup>12</sup> In the case of *Galileo International Inc. v. DCIT*,<sup>13</sup> the non-resident company, Galileo, had a fixed place of business in the form of the computers installed in the premises of the travel agents. Galileo provided computerised reservation system (CRS) services,<sup>14</sup> which were existent partially in the computers installed at the premises of the travel agents. CRS services which provided real-time access to airline fares were the main source of non-residents' revenue and therefore, the Income Tax Appellate Tribunal of Delhi went on to rule that the non-resident, in

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<sup>8</sup> OECD, Commentary on Article 5: Concerning the Definition of Permanent Establishment, No. 4.1, available at: [https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-2014-full-version/commentary-on-article-5-concerning-the-definition-of-permanent-establishment\\_9789264239081-39-en#page24](https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-2014-full-version/commentary-on-article-5-concerning-the-definition-of-permanent-establishment_9789264239081-39-en#page24) (last visited on March 09, 2019).

<sup>9</sup> Ekkehart Reimer, Nathalie Urban, et.al. (eds.), *Permanent Establishments: A Domestic Taxation, Bilateral Tax Treaty and OECD Perspective 33-34* (PricewaterhouseCoopers, Wolters Kluwer, 2011).

<sup>10</sup> Ekkehart Reimer, Stefan Schmid, et.al. (eds.), *Permanent Establishments: A Domestic Taxation, Bilateral Tax Treaty and OECD Perspective 483* (PricewaterhouseCoopers, Wolters Kluwer, 2018).

<sup>11</sup> *Supra* note 8, See OECD, Commentary on Article 5: Concerning the Definition of Permanent Establishment, No. 42.2.

<sup>12</sup> [2008] 19 SOT 257 (Delhi Tribunal). See *Amadeus Global Travel Distribution S.A. v. DCIT*, (113 TTJ 767) (Delhi Tribunal).

<sup>13</sup> *Ibid*.

<sup>14</sup> CRS is a 'system' which includes not only the Host computer in USA., but also telecommunication network in India (regional Network) as also hardware & software installed on the premises of the subscriber.

the present case, using internet and information technology had a 'virtual' presence in India and that it constituted a 'virtual' PE in India.<sup>15</sup>

E-commerce and other technological developments in the digital economy have led to increased economic integration into the source country. The OECD has now recognised, as a part of its work in BEPS Action Plan I, the issues of tax arising out of digitalization. Other countries have also positively responded. To implement the BEPS rules and to work in the direction of an international solution, the European Commission in March 2018 through a press release, introduced two proposals to tax the digital economy.<sup>16</sup> While the first proposal aims to reform corporate tax rules and is preferred to be a long-term solution, the second initiative is a short-term remedy providing for an interim tax of 3% on certain revenue from digital transactions.<sup>17</sup> Other countries like the United Kingdom, Israel, and Australia have employed unilateral measures to address the challenges posed by the digital economy.<sup>18</sup> The next part discusses some of the measures that India has taken in the direction to tax foreign digital businesses.

### III. Scope and Ambit of the Term SEP

'Business Connection' mentioned in S. 9(1)(i) of ITA is equivalent of the term PE in tax treaties. Section 4 of the Finance Act, 2018 (Act) introduced the concept of 'significant economic presence' under S. 9(1)(i) of ITA.<sup>19</sup> It has amplified the scope of the term 'business connection'. As per the Act, the SEP of a non-resident in India shall constitute business connection in India.

An SEP has been defined as a transaction in respect of any goods, services or property carried out by a non-resident in India provided where such transactions exceed the prescribed amount. It also means a 'systematic and continuous soliciting' of business activities with a prescribed

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<sup>15</sup> Nishith Desai Associates, "Digital Economy in India" (2018).

<sup>16</sup> European Commission, Digital Taxation: Commission proposes new measures to ensure that all companies pay fair tax in the EU, *available at*: [http://europa.eu/rapid/press-release\\_IP-18-2041\\_en.htm](http://europa.eu/rapid/press-release_IP-18-2041_en.htm) (last visited on March 09, 2019).

<sup>17</sup> European Commission, Fair Taxation of the Digital Economy, *available at*: [https://ec.europa.eu/taxation\\_customs/business/company-tax/fair-taxation-digital-economy\\_en](https://ec.europa.eu/taxation_customs/business/company-tax/fair-taxation-digital-economy_en) (last visited on March 01, 2019).

<sup>18</sup> Israel through a circular introduced 'significant economic presence' test in 2016.

Israeli Tax Authorities publish draft circular regarding internet activity of foreign companies in Israel, *available at*: <https://www.ey.com/gl/en/services/tax/international-tax/alert-israeli-tax-authorities-publish-draft-circular-regarding-internet-activity-of-foreign-companies-in-israel> (last visited on March 01, 2019);

Profitable companies would be taxed at 2 percent on the money they make from UK users from April 2020. UK to introduce 'Google tax' in 2020, *available at*: <https://www.politico.eu/article/uk-to-bring-in-digital-services-tax-in-2020/>, (Last visited on March 15, 2019); Australia's Diverted Profits Tax (DPT) imposes a penalty tax rate of 40% on diverted profits. Australia's Diverted Profits Tax Bill: includes updated transfer pricing guidelines and increased penalties, *available at*: [https://www.ey.com/Publication/vwLUAssets/australias-diverted-profits-tax-bill-february-2017/\\$FILE/EY-australias-diverted-profits-tax-bill-february-2017.pdf](https://www.ey.com/Publication/vwLUAssets/australias-diverted-profits-tax-bill-february-2017/$FILE/EY-australias-diverted-profits-tax-bill-february-2017.pdf) (last visited on March 01, 2019).

<sup>19</sup> Union Budget 2018, Amendment to Section 9(1) of the Income Tax Act of 1961, *available at*: <http://egazette.nic.in/writereaddata/2018/184302.pdf> (last visited on March 01, 2019).

number of users through ‘digital means’. Explanation 2A to Section 9(1)(i) of the ITA further provides that transactions could still be constituted as an SEP where an agreement for the transaction is not entered into in India or where the non-resident does not have a place of residence or a place of business in India.

As outlined above, the use of subjective and broad terms like ‘systematic and continuous soliciting’, makes the definition of the SEP incorporated in section 9 of the IT Act unclear and ambiguous.<sup>20</sup> To clarify the ambiguity, on 13 July 2018, the Central Board of Direct Taxes (CBDT) invited suggestions of stakeholders and the general public on the quantum of ‘number of users’ and ‘revenue’ thresholds for determining the SEP in India.<sup>21</sup> While CBDT is yet to notify the thresholds for the aforementioned, speculations are being made regarding the ambit of the meaning of undefined phrases which are, *inter alia*, ‘systematic and continuous soliciting’, ‘engaging in interaction’ and ‘digital means’.

The parts to this head, thus, will deal with questions relating to applicability and enforceability of the SEP as stipulated in the Act. Part A deals with the problems of emerging business models and the setting of thresholds for revenues and user base. Part B delves into an understanding of the undefined phrases while Part C deals with the applicability of the SEP test in India where till date the conventional PE test has been followed to allocate tax to foreign companies’ profits.

### **A) Business models, transactions and thresholds:**

As set out above, Clause (a) of Explanation 2A to Section 9(1)(i) of the Act provides that transaction in respect to any goods, service or property by a non-resident in India would constitute an SEP if payments arising from such transactions exceed the prescribed amount.

Firstly, the amendment is not clear as to which business models the section would apply to.<sup>22</sup> There are various forms of prevalent businesses across the multiple segments of the digital economy –Business-to-business (B2B) models, Business-to-consumer (B2C) models, Consumer-to-consumer (C2C) models and Consumer-to-Business (C2B) models.<sup>23</sup> And as

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<sup>20</sup> Shilpa Goel, [India Consulting on ‘Significant Economic Presence’: Some Observations](http://kluwertaxblog.com/2018/07/19/india-consulting-significant-economic-presence-observations), available at: <http://kluwertaxblog.com/2018/07/19/india-consulting-significant-economic-presence-observations> (last visited on March 02, 2019).

<sup>21</sup> Significant Economic Presence: CBDT invites suggestions on ‘revenue/user’ cap for NRIs, available at: <https://www.thehindubusinessline.com/economy/significant-economic-presence-cbdt-invites-suggestions-on-revenueuser-cap-for-nris/article24413822.ece> (last visited on March 02, 2019).

<sup>22</sup> Ritu Shaktawat & Krutika Chitre, ‘Significant Economic Presence’ – Missing Pieces of the Indian Tax Puzzle! available at: <https://www.khaitanco.com/PublicationsDocs/TPNews-KCOCoverage27July18Ritu.pdf> (last visited on March 02, 2019).

<sup>23</sup> *Supra* note 3.

technologies evolve, digitalization would offer wide possibilities of new and innovative models. For example, growth in distributed ledger technology has offered blockchain enabled business models. These models 'transfer value peer-to-peer, without a need for a centrally coordinating entity'.<sup>24</sup> This makes it imperative that in order to align taxation with economic activities and value-creation, new digital models different from traditional ownership business models be considered.

Secondly, there is an ambiguity on the nature of transactions covered by the amended section. While clause (b) categorically provides for the SEP to be based on user interaction through digital means, clause (a) does not have a digital connection and leaves it open for interpretation. Therefore, transactions and activities mentioned therein can cover digital transactions as well as 'brick and mortar' transactions. Moreover, clause (a) takes on a broad and wide connotation by including the phrase 'provision of download of data or software in India'. This can have a far-reaching impact as the opening of a web page may also amount to downloading of data.<sup>25</sup>

Thirdly, the transactions and activities need to generate a certain amount of revenue to be able to be subject to India's taxing rules. While the OECD's BEPS Action 1 Report suggested applying other considerations and claimed that 'revenues will not be sufficient in isolation to establish nexus in the form of a significant economic presence',<sup>26</sup> the definition of significant economic presence in India hints that 'the revenue-based factor would apply regardless of and not subject to other considerations'.<sup>27</sup> While setting the threshold for revenues of a non-resident in India, the amount has to be set neither too low to harm the small companies nor high enough to allow businesses to escape taxation of significant revenues earned.<sup>28</sup>

## **B) Undefined phrases:**

To take a cue from the jurisdiction where the concept of the SEP has been used much before the OECD reports, the case of *Tax Commissioner of the State of West Virginia v. MBNA America Bank*<sup>29</sup> becomes relevant. Considered to be breaking in the direction of the economic presence

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<sup>24</sup> Blockchain & Distributed Ledger Technology (DLT), available at: <https://www.worldbank.org/en/topic/financialsector/brief/blockchain-dlt> (last visited on March 01, 2019).

<sup>25</sup> CA Srinivas Maddury, India's move from physical to economic presence criterion: Significant Economic Presence Comprehensive Insights, available at: <https://taxguru.in/finance/indias-move-physical-economic-presence-criterion-significant-economic-presence-comprehensive-insights.html> (last visited on March 01, 2019).

<sup>26</sup> *Supra* note 3.

<sup>27</sup> *Supra* note 20.

<sup>28</sup> *Supra* note 22.

<sup>29</sup> No. 33049, WL 3455005 (W. Va. 2006).

test,<sup>30</sup> the West Virginia Supreme Court of Appeals, in this case, rejected the physical presence test and adopted the SEP. The majority, in this case, ruled that the applicability of the SEP required analysis of certain factors—‘the quality and quantity of the entity’s economic presence’ in the taxing jurisdiction, and ‘the frequency, quantity and systematic nature’ of the entity’s economic contacts with the jurisdiction.<sup>31</sup> These factors when compared with the requirements laid down for the SEP test in India, brings an observation to the forefront of readers’ attention that significant presence implies a systematic interaction of the entity with a significant number of users in a country. However, the terms used—‘systematic and continuous soliciting of business activities’ and ‘engaging in interaction with users’—in clause (b) are subjective and can encompass various meanings.<sup>32</sup> Who will be considered users and what kind of interaction with such users would qualify to constitute a non-resident’s SEP in India are some questions that need to be answered. The OECD’s BEPS Action 1 Report lists a range of factors based on users to reflect the level of participation in the economic life of a country, i.e., are—monthly active users, online contract conclusion and data collected.<sup>33</sup> These factors, when taken into consideration along with India’s digital market condition, will help to better clarify the position on a foreign company’s SEP in India.

Furthermore, the proviso to Explanation 2 entails taxation of only those profits, which are attributable to a foreign company’s significant economic presence in India. It is to be noted that the points of reference for subjecting corporate profits to tax have been based on the idea that an enterprise needs to be legally and physically present in a market to earn money there.<sup>34</sup> A change in the market brought by the advancement in information and communication technology, however, has changed the underlying idea of taxing the enterprises close to the geographical source of the income. The OECD notes in the BEPS Action 1 Report that the source of income is ‘the jurisdiction in which value creation occurs’.<sup>35</sup> It further points out that the taxes have to be paid where a company creates its value—irrespective of whether it is a digital or a traditional enterprise.<sup>36</sup> In the current scenario, a company can provide virtual services

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<sup>30</sup>Chris Atkins, Does the Commerce Clause Protect Commerce or State Coffers?, *available at*: <https://taxfoundation.org/does-commerce-clause-protect-commerce-or-state-coffers/> (last visited on March 02, 2019).

<sup>31</sup> Andrew Swain and John Snethen, The Significant Economic Presence Test: The Shape of Nexus to Come, 25 J. St. Tax’n 23 (2007).

<sup>32</sup>*Supra* note 22.

<sup>33</sup>*Supra* note 3.

<sup>34</sup>*Supra* note 5.

<sup>35</sup>*Supra* note 2.

<sup>36</sup>Significant digital presence and digital services to be taxed, *available at*: <https://www.governmenteuropa.eu/significant-digital-presence-services-tax/91539/> (last visited on March 01, 2019).

to people in a country without even having any physical presence in that country. Places of residence and creation of value are different. Similarly, other kinds of digital transactions or activities, which happen over internet, enable the companies to create value in several jurisdictions. It becomes extremely difficult and almost impossible in the case of highly digitalised businesses, to allocate profits from the digital economy to different jurisdictions, and even more so, to allocate taxing rights between those jurisdictions. In this context, attributing profit to an SEP in India is a complex exercise and requires broad consultations.<sup>37</sup> Moreover, the methodology of attributing profits has not been defined, pointing to another loophole in the section.

### C) Applicability of the SEP test in India:

Article 5 of Double Tax Avoidance Agreements (DTAA) provides for the definition of PE. At present, India has entered into comprehensive agreements with 97 countries.<sup>38</sup> It has been notified by the Government of India in the explanatory memorandum to the Finance Act, 2018<sup>39</sup> that the SEP in place of physical presence-based nexus rule will not be read into such treaties unless modifications are made to the PE rules of the treaties.<sup>40</sup> Therefore, the direct impact of the expanded scope of business connection would be on those non-residents who do not have tax treaty benefits.

Moreover, India has introduced a six percent 'equalization levy' on specified digital services. This would not be a tax on the income of the digital businesses and hence would not be covered under the tax treaties or ITA.<sup>41</sup> Only after the thresholds are prescribed, one can determine whether an SEP or equalisation levy would be applicable to foreign entities.

Furthermore, India has signed 'Multilateral Instrument' (MLI), a convention aimed at closing the gaps in existing international tax rules by transposing results from the OECD BEPS Project into bilateral tax treaties worldwide.<sup>42</sup> To ensure that profits are taxed where substantive economic activities generating the profits are carried out, the OECD suggested the application of MLI

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<sup>37</sup> *Supra* note 20.

<sup>38</sup> Double Taxation Avoidance Agreements, Income Tax Department, *available at*: <https://www.incometaxindia.gov.in/Pages/international-taxation/dtaa.aspx> (last visited on March 01, 2019).

<sup>39</sup> *Supra* note 1.

<sup>40</sup> *Ibid*.

<sup>41</sup> Report of the Committee on Taxation to Examine the Business Models for E-Commerce, *available at*: <https://taxguru.in/income-tax/report-taxation-of-e-commerce-equalization-levy-or-google-tax.html> (last visited on March 02, 2019).

<sup>42</sup> OECD, Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, *available at*: <http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm> (last visited on March 02, 2019).

alongside existing treaties to avoid a time-consuming exercise of bilateral renegotiation of existing agreements.<sup>43</sup> This means that only those agreements, which India agrees to modify on the lines of MLI, will be covered. It is to be noted that India has submitted a list of 93 tax treaties to be amended through MLI.<sup>44</sup> However, MLI will not have an immediate impact until treaty partner(s) also list the tax treaties as agreements to be covered by MLI.

Therefore, the SEP test is not immediately applicable to countries with which India has entered into a tax treaty until a renegotiation of the bilateral treaties happens; however, it may have a huge impact on countries with no tax treaty benefits.

#### IV. Conclusion

The way the markets work, is changing. Entities interact with customers in real-time over the internet and provide instantaneous services without the need for a physical presence. This possible change in the economy was not envisioned when the Permanent Establishment principle was formulated. It is the principle of the pre-electronic era and allocates taxing rights over profits based on a physical nexus. Though its scope has expanded over the years, its core prerequisite is still intact- the requirement of place. The OECD has taken the lead and categorically addressed the problem.

Informed by the OECD reports, India has taken a step in the direction by including the requirement of Significant Economic Presence in business connection. However, as noted above, certain terms used to explain the concept, have not been defined and can thus have various interpretations. While revenue and user-based thresholds are two exclusive grounds for determining value-creation and triggering SEP in India, Action 1 Report of the OECD on BPES suggests that the countries adopt a combination of two or three methods.

It is noteworthy that Proviso to Explanation 2 of section 9(1)(i) provides that the SEP test would be applicable notwithstanding whether the foreign entity has a physical presence or not which plausibly means that India has completely done away with the concept of PE. However, India's unilateral approach of introducing SEP can have negative effects on investments, innovation and growth. The OECD feared its adverse consequences on businesses and consumers and

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<sup>43</sup> Ibid.

<sup>44</sup> India signs Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, *available at*: [https://www.ev.com/Publication/vwLUAssets/India\\_signs\\_Multilateral\\_Convention\\_to\\_Implement\\_Tax\\_Treaty\\_Related\\_Measures\\_to\\_Prevent\\_BEPS/\\$FILE/2017G\\_04135-171Gbl\\_India%20signs%20MC%20to%20Implement%20Tax%20Treaty%20Related%20Measures%20to%20Prevent%20BEPS.pdf](https://www.ev.com/Publication/vwLUAssets/India_signs_Multilateral_Convention_to_Implement_Tax_Treaty_Related_Measures_to_Prevent_BEPS/$FILE/2017G_04135-171Gbl_India%20signs%20MC%20to%20Implement%20Tax%20Treaty%20Related%20Measures%20to%20Prevent%20BEPS.pdf) (last visited on March 02, 2019).

suggested the introduction of measures only after taking into consideration the treaty obligations. With equalization levy and SEP, India has taken steps towards taxation of digital profits in haste and has not acted in conformance with the principles of tax policies. Certainty, simplicity, and transparency – the three—fundamental features of any tax policy are not present in India's tax policy vis-à-vis non-residents. It is hoped that the loopholes are plugged in, timely and effectively.

## DO SECTIONS 376A AND 376E OF THE IPC VIOLATE THE BASIC PRINCIPLES OF CRIMINAL LAW?

Mrinal Gupta\*

*Section 376A of the IPC imposes criminal liability on the offender for death or permanent vegetative state of victim, if caused so during the commission of rape, thereby applying the doctrine of felony murder. This doctrine artificially imposes mens rea on the accused, thereby violating the essential element of mens rea as a constituent of the crime. The author will justify the applicability of the felony murder rule under section 376A on the basis of the principle of autonomy, recklessness and causation. The author will also analyse section 376E and its underlying objective of deterrence in order to establish a link between section 376A and 376E.*

### I. Introduction

Inserted by Section 9 of the Criminal Law (Amendment) Act, 2013, section 376A imposes criminal liability on the offender for death or permanent vegetative state of victim, if caused so during the commission of rape. This section applies the doctrine of felony murder, wherein there is artificial imposition of *mens rea* on the accused for death of the victim, if the same is caused as a result of injuries inflicted by the accused during the commission of the felony itself. Therefore, the accused is held liable for an offence for which he did not possess the intention, thereby resulting in usage of terms such as “harsh anomaly” and “artificial aggravation of actual guilt” to define the felony murder doctrine.<sup>1</sup>

In order to attempt to understand the logic behind imposition of the felony murder doctrine, the author will initially lay down the definitions and understanding of *mens rea*, trace the evolution of the principle by looking at both UK’s common law, application of the principle in the United States and argue that the applicability of the felony murder rule in 376A is justifiable when considered from the perspective of principle of autonomy and recklessness.

In the second part about the principle of autonomy, the author will consider individual autonomy and the specific concept of sexual autonomy with respect to rape cases. In establishing the link between recklessness, rape and the felony murder rule, in the third part of my paper, the author will consider the cognitive theory of culpability, the choice principle and recklessness with

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<sup>1</sup> Frederick C. Jr. Moesel, “A Survey of Felony Murder” 28 *Temple Law Quarterly* (1955).

respect to circumstantial element. In the final part relating to section 376A, the author will briefly mention causation and its applicable test of foreseeability and proximate cause in summary of arguments of the first issue.

Section 376E of the IPC includes the provision of escalated punishment for repeat offenders. In the fifth and final part, in order to understand the objective behind insertion of this section and its link with section 376A, the author will analyse deterrence from a theoretical perspective with respect to felony murder, due to lack of empirical data on applicability of the same in the Indian context.

## II. The concept of *Mens Rea* and 376A

The *Black's Law Dictionary* defines *mens rea* as Latin for 'guilty mind'. It is '*the state of mind that the prosecution, to secure a conviction, must prove that the defendant had when committing a crime. Mens rea is the second of two essential elements of every crime at common law, the other being actus reus.*'<sup>2</sup> According to the *Encyclopedia of Crime and Justice*, '*the mens rea of an offence consists of those elements of the offence definition that describe the required mental state of the defendant at the time of the offence but does not include excuse defences or other doctrines outside the offence definition.*'<sup>3</sup> Only the Model Penal Code drafted by the American Law Institute classifies *mens rea* in four different types of culpability – *purpose, knowledge, recklessness and negligence* but it is not a legally-binding document in itself. Apart from the US' states that have directly adopted this code or incorporated the same in their state codes, all other jurisdictions follow the aforementioned strict understanding of *mens rea*. The Latin maxim '*Actus Reus Non Facit Reum Nisi Mens Sit Rea*' also incorporates this definition in its meaning that '*an act does not make one guilty unless there is a guilty mind or criminal intent*'.

Under section 376A, even if the *mens rea* to cause death is absent, the accused is still held liable for causing the death of the victim, if such death is a result of injuries caused during the commission of the offence. Therefore, there is an artificial imposition of *mens rea* which seems to violate the basic principles of criminal law by not fulfilling the essential preconditions for imposition of criminal liability.

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<sup>2</sup> Bryan A. Garner, *Black's Law Dictionary* 1134 (Thomas Reuters Pvt. Ltd., UK, 10th ed.)

<sup>3</sup> Joshua Dressler, *Encyclopedia of Crime & Justice* 995, 996 (Macmillian Co., New York, 2002)

### III. Evolution of the Felony Murder Rule

The history and evolution of the concept of artificial imposition of *mens rea* or ‘transferred intent’ are important to understand as is the logic behind its conception and can be traced back to the early years of common law.

In the mid-thirteenth century, an English jurist, Bracton, in the application of canon law to the crime of homicide, argued that accidental killing (*per infortunium*) or necessity of self-preservation do not amount to homicide.<sup>4</sup> This created a problem because until the eighteenth-century, accidental killing was used as a defence in cases of killing during commission of an unlawful act. To counter this problem, English commentators such as Coke, Hale, and Hawkins<sup>5</sup> came up with the principle “*killing with soiled hands*” which laid down the non-availability of *per infortunium* as an excuse to someone who’d accidentally killed in the course of an unlawful act. This principle was further evolved by Foster—creator of the “classic” felony murder rule in his *Discourse of Homicide* wherein he, while introducing the concept of transferred intent, argued that “*it will be murder by reason of the felonious intent.*”<sup>6</sup> Foster focussed on the fact that the unlawful act should be a felony, and was not concerned with the level of dangerousness of the felony.<sup>7</sup> This wide application was later limited by the rule offered by Blackstone, which drew a distinction between murder and manslaughter in cases of involuntary killing as a result of an unlawful act on the basis of the nature of the act.

The felony murder rule as adopted in America wasn’t a replica of the doctrine as adopted under common law. The refinement of the doctrine was achieved by creation of lists enumerating felonies and treating them as the basis for criminal liability under the felony murder rule.<sup>8</sup> This can be attributed to Pennsylvania’s murder grading statute, which divided murder into two categories, namely, first-degree capital murder and second-degree murder. First-degree capital murder meant imposition of capital punishment for felonies as occurred in arson, rape, robbery or burglary, whereas second degree murder related to punishment for other common law felonies as stated in the statute.

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<sup>4</sup>Guyana Binder, “*The Origins of American Felony Murder Rules*” 57 *Stanford Law Review* 59, 74 (2004).

<sup>5</sup> Leonard Birdsong, “Felony Murder: A Historical Perspective By Which To Understand Today’s Modern Felony Murder Rule Statutes” 30 *Thurgood Marshall L. Rev.* 1 (2006).

<sup>6</sup> John Foster, *Crown Law* (Oxford, Clarendon Press, United Kingdom, 1762).

<sup>7</sup> Leonard Birdsong, “Felony Murder: A Historical Perspective By Which To Understand Today’s Modern Felony Murder Rule Statutes” 30 *Thurgood Marshall L. Rev.* 1 (2006).

<sup>8</sup> Leonard Birdsong, “Felony Murder: A Historical Perspective By Which To Understand Today’s Modern Felony Murder Rule Statutes” 30 *Thurgood Marshall L. Rev.* 1 (2006).

Presently, there are approximately 45 states in the United States that have a felony murder rule.<sup>9</sup> As for United Kingdom, the felony rule was ostensibly abolished in 1957, but the effect of the principle has been preserved to an extent by a warped application of the principle of “joint enterprise”.

#### IV. Principle of Autonomy

The principle of autonomy is one of the critical principles of criminalisation. As pointed out by Ashworth, there are two elements of this right of autonomy: factual and normative.<sup>10</sup> While the factual element means recognition of individuals with the capacity to make autonomous choices, the normative element focuses on treatment of individuals as self-determining and self-governing agents.<sup>11</sup> These two elements highlight the fundamental notion of this principle as “*the right to live one’s life as one likes*”.<sup>12</sup> Despite its ostensibly broad scope, the principle of autonomy, being integrally linked to the harm principle, justifies criminalisation by punishing individuals for direct harms caused to others on the basis that such harms impact the autonomy of the affected person.

In the context of the principle of autonomy with respect to criminalisation, the offence of rape violates both the individual and the sexual autonomy of the victim. The notion of sexual autonomy is an extension of the principle of autonomy that addresses the capability and right of people to decide whom to have sex with, and under what circumstances.<sup>13</sup> Considered to be intrinsically linked to the idea of ‘choice’, sexual autonomy has been considered in traditional rape law by looking at the ‘participation of a woman in sexual activity as her choice, as long as she consented or was not compelled by force.’<sup>14</sup>

Frye and Shafer, by using the concept of “domain” to explain bodily and sexual violation as one of rape’s most central harms, have argued that a person’s domain—“*the physical, emotional, psychological, and intellectual space it lives in*”—is the space wherein a person can exercise her consent.<sup>15</sup> Since a person’s body forms the very core of this consensual space, or domain, an

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<sup>9</sup> As of 2008, there were 46 states. G. Larry Mays, Jeremy Ball, et.al., *Criminal Law: Core Concepts*, (Wolters Kluwer Law & Business, New York, 2015).

<sup>10</sup> Andrew Ashworth, Jeremy Horder *Principles of Criminal Law* 27 (Oxford University Press, United Kingdom, 1999).

<sup>11</sup> *Ibid.*

<sup>12</sup> Joseph Raz, “Authority, Law and Morality” 68 *The Monist* 295 (1985).

<sup>13</sup> Robert R. Slaughter, “The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy” 122 *Yale Law Journal* 1372, 1379 (2013).

<sup>14</sup> Dorothy E. Roberts, “Rape, Violence, and Women’s Autonomy” 69 *Chi-Kent Law Review* 359(1993).

<sup>15</sup> Mary Vetterling-Braggin, Frederick Elliston et.al., *Feminism and Philosophy*, 333–346 (Littlefield, Adams, New Jersey, 1977).

intentional invasion of the body is a denial of the person itself.<sup>16</sup> This has been further observed by Cahill by calling rape a total denial of the “*victim's agency, will, and personhood*”.<sup>17</sup> The most evident manifestation of a wider scope of sexual autonomy can be understood by Anderson's definition, who has considered rape to be “*sexually invasive dehumanization*”.<sup>18</sup>

There is a fundamental linkage between rape and violation of individual and sexual autonomy. The aforementioned definitions also reflect the need to consider a prolonged or extended violation of autonomy rather than restricting it to the duration of commission of the offence of rape. This is because the victim's autonomy continues to be violated in terms of the consequences ensued with respect to her inability to exercise autonomy as a result of trauma, humiliation and fear which is caused by total subjugation and loss of control of body. This extension of the principle of autonomy in rape cases becomes important for classification of rape as a *mala in se* crime or an inherently dangerous crime, which further justifies of imposition of felony-murder rule for rape.

Rape as an underlying felony has been punishable in both UK (before abolition of the felon-murder doctrine) and US by application of the felony-murder rule. This has been attributed to the inherently dangerous nature of rape as a crime.<sup>19</sup> The aforementioned explanation of sexual autonomy presents an enhanced understanding of the reason for classification of rape as an inherently dangerous crime.

In India, the principle of sexual autonomy and rape as an inherently dangerous crime have been expressed. The Justice Verma Committee, in its report, observed:

*“When a woman complains of rape, it is not the physical part of the woman which is directly the focus of attention. It is the offence and the offence against the bodily integrity of the woman as a person which is the offence in question. We therefore think that we need a woman to be viewed as a whole and not as a physical centre of sexual congress.”*<sup>20</sup>

A similar view, focussing on the sexual autonomy of the victim, was expressed by Sohaila Abdulali, a rape victim, while recounting her experience. She said, “*Rape is horrible. It is horrible*

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<sup>16</sup>Mary Vetterling-Braggin, Frederick Elliston et.al., *Feminism and Philosophy*, 333–346 (Littlefield, Adams, Totowa, New Jersey, 1977).

<sup>17</sup> Ann J Cahill, *Rethinking Rape* (Cornell University Press, Ithica, U.S., 2001).

<sup>18</sup> Scott Anderson, “Sex Under Pressure: Jerks, Boorish Behavior, and Gender Hierarchy” 11 *Res Publica* 349, 369 (2005).

<sup>19</sup> Guyora Binder, “The Culpability of Felony Murder” 83 *Notre Dame Law Review* 505 (2008).

<sup>20</sup> Justice Verma Committee Report: *Amendments to the Criminal Law* (2013).

*because you are violated, you are scared, someone else takes control of your body and hurts you in the most intimate way. It is not horrible because you lose your virtue.*<sup>21</sup>

In the case of *State of U.P v. Chhotey Lal*, the accused came prepared to engage in violence towards a specific victim, and violence actually occurred in furtherance of his act. He targeted, approached a particular victim, and used violence. With regards to the consideration of punishment, the Supreme Court observed:

*“The important thing that the court has to bear in mind is that what is lost by a rape victim is face. The victim loses value as a person. The courts must be sensitive and responsive to the plight of the female victim of sexual assault. Society's belief and value systems need to be kept uppermost in mind as rape is the worst form of woman's oppression. A forcible sexual assault brings in humiliation, feeling of disgust, tremendous embarrassment, sense of shame, trauma and lifelong emotional scar to a victim.”*<sup>22</sup>

In the case of *Bacchan Singh v. State of Punjab*<sup>23</sup> (later approved in *Macchi Singh v. State of Punjab*<sup>24</sup>) laid down the criteria for qualification of ‘rarest or the rare’ cases deserving death sentence as punishment. One of the five conditions was *Anti-Social or socially abhorrent nature of the crime*. Furthermore, *Mulla v. State of U.P*<sup>25</sup> identified the following tests for determining imposition of death sentence upon the victim—

- *The gruesome nature of the crime;*
- *The mitigating and aggravating circumstances in the case.*
- *Whether any other punishment would be completely inadequate*

Therefore, the offence of rape as understood in the broad framework of impact on the victim's autonomy classifies as a *mala in se* crime, and this understanding of rape as an inherently dangerous crime which justifies imposition of felony-murder rule has also been judicially evolved in India.

## V. Recklessness

One of the primary criticisms of the felony murder rule is that it imposes liability on a person by constructing malice or artificially imposing *mens rea* in a situation where the person didn't possess

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<sup>21</sup> Sohaila Abdulali, “I Was Wounded, My Honour Wasn't” *New York Times*, January 7, 2013.

<sup>22</sup>State of Uttar Pradesh v. Chhotey Lal, AIR 2011 SC 697.

<sup>23</sup> Bacchan Singh v. State of Punjab, AIR 1980 SC 898.

<sup>24</sup>Macchi Singh v. State of Punjab, AIR 193 SC 957.

<sup>25</sup> Mulla v. State of U.P., AIR 2010 SC 942.

the mental intention to cause that consequence. In this context, while section 375 of the IPC makes rape a strict liability offence, section 376A imposes liability on the defendant for the death of the victim or causing the victim to be in a permanent vegetative state, if the same is caused by an injury occurring in the course of commission of rape.

The author will consider the cognitive theory of culpability, with special emphasis on the choice principle, and recklessness in order to justify the application of felony murder rule under section 376A.

There are two theories of culpability—cognitive and expressive theories.<sup>26</sup> While the expressive theory focuses on the reasons of the defendant for commission of the offence, and assesses the values of his act, the cognitive theory of culpability focuses on the expectation of harm that can be attributed to an actor at the time of his act.<sup>27</sup> The cognitive theory is supported by the utilitarian approach as well as the rights theory because while the former argues about considering the “*hedonistic consequences*” of the act, the latter emphasises on ‘harm to others’ to justify punitive power of the State. Both utilitarianism and rights theory support the notion of a value-free structure and regulation of harmful consequences of actions, without consideration of their motivating ends.<sup>28</sup>

The cognitive theory of culpability finds further support in the choice principle, which determines culpability on the basis of—

- 1) *The decision to perform (or forego) an action, and*
- 2) *Expectations concerning the consequences of that decision*

The combination of the choice principle with recklessness helps in understanding the inherent recklessness in the offence of rape.

In the Cunningham case, the defendant’s act of removing a gas meter in order to steal money led to leaking of the gas in the victim’s property, thereby causing her to be poisoned by the gas. This case gave the test of subjective recklessness, according to which the defendant’s liability is determined on the basis that he is aware of the risk or that his conduct will cause a particular result and that the risk undertaken is an unreasonable one. An extension of this traditional recklessness includes recklessness on the basis of circumstantial element, wherein the defendant

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<sup>26</sup> Guyora Binder, *Felony Murder* 41 (Stanford University Press, Stanford, California, 2012).

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

is held liable unless there exists a positive belief that the circumstance is lacking. For example, D will be held liable if he recognised that the victim hadn't consented or did not believe that she had consented.<sup>29</sup> Similarly, in *Regina v. Kimber*<sup>30</sup>, where the defendant tried to have sexual intercourse with the victim (who was a schizophrenic patient in a mental hospital), the court said that 'recklessness' is established by "indifference" to the woman's consent, "*aptly described in the colloquial expression 'Couldn't care less.'*"<sup>31</sup>

The recklessness with respect to circumstantial element test includes cognitive beliefs of the defendant, thereby bringing in aspects of the cognitive culpability theory and the choice principle.

In a case of rape, the defendant's actions of deciding to perform the act of rape may be based on expectations limited to sexual gratification or subjugation (element of power dynamics that comes into play in rape cases), rather than foreseeability of injury. But during the commission of rape, there exists awareness of the risk of injury to the victim, and the defendant's indifference to the consequence, while realising that the risk undertaken is an unreasonable one, attributes an element of inherent recklessness that is present in the act of the defendant in the commission of rape. Therefore, the imposition of the felony murder rule (because death of the victim is caused as consequence of an injury inflicted during commission of rape) as applicable in section 376A is justified on the basis of this inherent recklessness present in the offence of rape.

## VI. Causation

Causation, referring to causal relationship between the act and result, has two elements, namely, factual and legal causation.<sup>32</sup> While factual causation includes the 'but-for' test, legal causation has different tests and theories such as the proximate cause, substantial factor test, etc. In cases of death of victim during commission of a felony, the test of foreseeability is used, i.e., it is seen whether the death is a "*foreseeable result of the underlying felony*".<sup>33</sup> Because the defendant came prepared to engage in violence towards a specific victim, violence actually occurred in furtherance of his act and since he targeted and approached a particular victim and used violence in furtherance of the same, application of this objective test that leads to imposition of liability on the defendant for unintended death of the victim doesn't violate the principles of fairness.

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<sup>29</sup> AP Simester, G R Sullivan, et.al., *Criminal Law Theory and Doctrine* 140(Hart Publishing, Oregon, 2007).

<sup>30</sup>*Regina v. Kimber* [1983] 3 All ER 316.

<sup>31</sup>*Regina v. Kimber* [1983] 3 All ER 316.

<sup>32</sup> Michelle S. Simon, "Whose Crime is it Anyway?: Liability for the Lethal Acts of Nonparticipants in the Felony" 71 *U. Det. Mercy L. Rev.* 223, 236 (1994).

<sup>33</sup> *Ibid.*

376A, which uses the felony murder rule in rape cases fits into the framework of foreseeability test under causation.

Therefore, the three elements—principle of autonomy, recklessness and causation can be used to justify application of the felony murder rule under section 376A of the Indian Penal Code. The *Aruna Shanbaug* case<sup>34</sup> wherein the victim was in a persistent vegetative state for decades as a result of the injuries inflicted during the commission of rape (according to the present definition of rape under section 375 after the *Criminal Law Amendment Act, 2013*) and the infamous *Nirbhaya* case<sup>35</sup> wherein the victim died as a result of injuries inflicted during the commission of rape are classic situations that would fall under section 376A.<sup>36</sup>

## VII. Deterrence

The deterrence theory finds its origin in Bentham's *An Introduction to the Principles of Morals and Legislation (Introduction to the Principles)* wherein he argued about the twin goals of pain and pleasure that determine human behaviour.<sup>37</sup> The deterrence theory is based on the assumption that since all individuals are rational beings that seek to increase pleasure (or gain greater gain), they will not commit crimes if the pain of penal punishment is greater than the gain they derive from the commission of such a crime.<sup>38</sup> Moreover, the belief regarding the effect of deterrence is strengthened in cases where the punishment is death penalty, because it is assumed that no rational person would commit an act that may result in his or her own death.<sup>39</sup>

The element of the felony murder rule in 376A and the provision of escalated punishment for repeat offenders in 376E present a common objective of deterrence that is present in both the Sections. There are two aspects in the understanding of deterrence in the felony murder rule: economic rationale and policy consideration. The economic rationale is that considering the nature of the felony murder rule, it serves as a tax on violence, and the raising of the relative price of violence by imposing higher level of expected penalty creates a deterrent effect that leads

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<sup>34</sup> *Aruna Ramachandra Shanbauh v. Union of India* AIR 2012 SC Supp 435

<sup>35</sup> *Mukesh v. State (NCT of Delhi)* AIR 2017 SC 2161

<sup>36</sup> The Criminal Law (Amendment) Act, 2013 was enacted as a result of the Nirbhaya case. This Amendment Act expanded the definition of rape under section 375, which was earlier restricted only to forcible penile-vaginal penetration, to include non-consensual oral sexual acts as well as insertion of objects. In the Aruna Shanbaug case, there was "sodomy" and an "attempt to rape" due to the earlier definition of rape which covered only forcible penile-vaginal penetration. The section 376A was not in existence at the time of either of these two cases. Presently though, both of these two situations would fall under section 376A

<sup>37</sup> Raymond Paternoster, "How Much Do We Really Know About Criminal Deterrence" 100 *The Journal of Criminal Law and Criminology* 765, 770 (1973).

<sup>38</sup> Raymond Paternoster, "How Much Do We Really Know About Criminal Deterrence" 100 *The Journal of Criminal Law and Criminology* 765, 770 (1973).

<sup>39</sup> Law Commission of India, 262<sup>nd</sup> Report on Death Penalty (Ministry of Law, 2015).

to a decrease in the level of criminal output.<sup>40</sup> The policy consideration is protection of innocent lives, and the harshness of the felony murder rule aims to create a deterrent effect on the commission of felonies.<sup>41</sup>

Escalated punishment for repeat offenders brings in the concept of individual deterrence, wherein it is assumed that imposition of higher penalty for repetition of criminal act will create fear in the offender's mind, and thereby serve as a deterrent.<sup>42</sup> So, when an individual performs the cost-benefit analysis, he will be deterred because he will realise that apart from imposition of immediate sanction, he will have a record which will make his punishment in the second period higher than the normally imposed punishment. Another justification of escalated punishment for repeat offenders is based on the "type" of offender, that if an individual isn't deterred in the first instance, he or she might continue to violate in the future. Therefore, the repeated offences must be deterred by escalating punishment.<sup>43</sup>

Though they employ different elements of the theory of deterrence, sections 376A and 376E have a common objective of deterrence running through them.

### VIII. Conclusion

The application of the felony doctrine as in section 376A is justifiable on three counts, i.e., a) principle of individual and sexual autonomy, b) principle of recklessness, c) causation. The principle of autonomy depicts a fundamental linkage between rape and violation of individual and sexual autonomy. The violation of autonomy is not restricted to the period of commission of the offence of rape, but it is an extended violation because of direct consequences ensued such as the victim's inability to exercise her autonomy in future sexual relationships due to trauma, fear, etc. This extension of the principle of autonomy in rape cases becomes important for classification of rape as a *mala in se* crime or an inherently dangerous crime, which further justifies of imposition of the felony murder rule for rape. Moreover, the principle of sexual autonomy and rape as an inherently dangerous crime has not only been expressed by the Justice Verma Committee, but cases such as *Uttar Pradesh v. Chhotey Lal* and *Bachhan Singh v. State of Punjab* have also helped in judicial evolution of an understanding of the offence of rape in the framework of impact on the victim's autonomy, and its justification as a *mala in se* crime.

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<sup>40</sup> J. Gregory Sidak, "Two Economic Rationales For Felony Murder" 51 *Cornell Law Review* 51, 56 (2016).

<sup>41</sup> James J. Tomkovicz, "The Endurance of the Felony- Murder Rule: A Study of the Forces that Shape Our Criminal Law" 51 *Washington and Lee Law Review* 1429, 1463 (1994).

<sup>42</sup> Kent Greenawalt, "Punishment" 74 *J. Crim. L. & Criminology* 343,354 (1983).

<sup>43</sup> Polinsky, Shavell, "The Economic Theory of Public Enforcement of Law" 38 *Journal of Economic Literature*, 45 (2000).

The inherent recklessness present in rape that brings in the test of recklessness with respect to circumstantial element and includes both cognitive culpability theory and the choice principle, further help to understand the reason for imposition of the felony murder rule as applicable in Section 376A. Furthermore, the application of the test of foreseeability in order to establish causation in rape cases can also be used to understand the justifiable imposition of the felony murder rule.

Section 376E imposes escalated punishment for repeat offenders and is based on the theory of deterrence. Though there's no empirical evidence of impact of theory in India, especially with respect to rape cases, there runs a common link of the objective of deterrence in sections 376A and 376E.

## SCOPE FOR LEGISLATION IN SPACE LAWS

Vrinda Baheti\*

*India's aviation & space technology has been a high-farer in the news for a better part of the century now, and it is constantly growing to accomplish new feats. While the expanse of space has not yet been articulated and understood in its entirety, recent advancements of many nations showcase their ambition to comprehend the celestial bodies of the galaxy. In the near future, sub-orbital space tourism will be an exciting possibility. Yet, all these adventures in the field of exploration and research come with costs, and there has to be a set of stringent rules to govern the various activities in relation to space. For this reason, the development of international and national space legislation has become a demand from eminent scholars and enthusiasts who recognize the importance of the same. India, in its capacity, has ratified various international treaties for space exploration, exploitation for peaceful purposes and international cooperation. Substantiating on this, India also requires domestic legislations to come into play for a smooth balance between advancement in space technology and its demand for commercial as well as non-commercial, scientific and military purposes.*

### Introduction

When in 1943 a children's book titled 'The Little Prince' spoke of a businessman who 'owned stars'<sup>1</sup>, a little boy in the story asked him how it was possible to own stars because they belonged to nobody. The businessman replied, "Then they belong to me, because I was the first person to think of it."<sup>2</sup> In 2012, when Sylvio Langvein, a Quebec man marched into a Canadian court, declaring himself to be the owner of planets of the solar system amidst other celestial bodies,<sup>3</sup> scholars reiterated the conflict behind countries attempting to possess their own expanse in space. In August 2018, the United States of America spoke of its plan to register a Space Force for military purposes.<sup>4</sup> There have been significantly disturbing trends in the contemporary times directly linked to news related to wishes of colonisation of Mars.<sup>5,6</sup> A website by the name of

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<sup>1</sup> Antoine De Saint-Exupery, *The Little Prince* 41 (Mariner Books, 1<sup>st</sup> edn., 2000)

<sup>2</sup>Supra, p. 42.

<sup>3</sup> 2012 QCCS 613.

<sup>4</sup> Adam Rogers, "The President Wants a Space Force, He Might Get One" *Wired*, Aug. 9, 2018, available at: <https://www.wired.com/story/space-force-mike-pence-pentagon/> (Visited on August 08, 2018).

<sup>5</sup>Zahaan Bharmal, "The case against Mars colonisation" *The Guardian*, Aug. 28, 2018, available at: <https://www.theguardian.com/science/blog/2018/aug/28/the-case-against-mars-colonisation> (Visited on August 28, 2018).

'mars-one.com' has already started accepting registrations to 'establish a permanent human settlement on Mars'.<sup>7</sup> What should one make of such a trend of 'ownership' or 'possession'? Is this a threat to the future of human species, to economy, to ethics and to the environment?

This paper attempts to articulate a brief overview of the development of space laws on a general international forum. Secondly, it shall attempt to measure out the conflict that the legal undercurrents in an international atmosphere pose with regard to outer space while calculating the various practices that are being followed alongside the negatives that they unveil. Lastly, it shall address the efforts construed by India in framing laws in the field of space law and the need for a uniform national state legislation which is binding in nature on the subject.

## I. Brief Overview of Space Laws

A prerequisite for conquering space was to have knowledge of the basic physical laws dealing with celestial mechanics, which was a topic that had been explored over centuries by the works of Copernicus, Kepler, Newton. The 20<sup>th</sup> century brought an urge for modern technology to rise to the theories laid down, and the 21<sup>st</sup> century sees its yearning to establish laws related to 'outer space' for smooth functioning of civilized nations. Stephen E. Doyle points out that development of space law during the 20<sup>th</sup> century evolved in four interrelated phases: (1) the development of concepts of space law before Sputnik: from 1910 to 1957; (2) the clarification and adoption of basic applicable laws: from 1957 to 1966; (3) the expanding uses of space and national and international laws & regulations to manage such uses, which has been a process continuing since the late 1950s; and (4) the regulation of human activities beyond the atmosphere, including eventually development of law to manage settlements and societies existing off the Earth.<sup>8</sup>

The topic of space law begins with the question of where outer space begins, a question to which no direct answer has been found<sup>9</sup> after decades of debates across the globe. A more 'functional' approach to determine where air space demarcates from outer space has been a point of major

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<sup>6</sup> Derek Thompson, "Is Colonising Mars the Most Important Project in Human History?" *The Atlantic*, Jun. 29, 2018, available at: <https://www.theatlantic.com/technology/archive/2018/06/could-colonizing-mars-be-the-most-important-project-in-human-history/564041/> (Visited on June 29, 2018).

<sup>7</sup> Mars One, available at: <https://www.mars-one.com> (Visited on July 16, 2019).

<sup>8</sup> Stephen E. Doyle, "A Concise History of Space Law: 1910-2009" in Mark J. Sundahl and V. Gopalakrishnan (eds.), *New Perspectives on Space Law, The Proceedings of the 53<sup>rd</sup> IISL Colloquium on the Law of Outer Space, Young Scholar Session* (2011).

<sup>9</sup> Tanja Masson-Zwaan, "Space Law in the 21<sup>st</sup> Century" in Prof. (Dr.) Ranbir Singh et. Al. (eds.), *Current Developments in Air and Space Law, National Law University Delhi Press* (2012).

difference in different states; while Australia has enacted legislations limiting its boundary to 100 kms,<sup>10</sup> the United States of America is convinced that no boundary is necessary.<sup>11</sup>

In his dissertation, Piotr Manikowski states that in the field of international space law, two inter related terms are often used inconsistently: “responsibility” and “liability”. Some languages (French, Polish) use the same word for both notions: “responsabilité”.<sup>12</sup> The word ‘liability’ has a negative connotation for accountability of damages, and the word ‘responsibility’ mandates obligations taken up by states as a social and moral entity.<sup>13</sup>

International space law developed parallel to space technology. With advancement of rocket science, there emerged an arena of discussion about legal regulation, prompted by Emile Laude’s statement in 1910 for requirement of special laws for outer space as a region.<sup>14</sup> In 1932, Vladimir Mandl argued that “space law is different from the law of the sea and the law of the air”<sup>15</sup> expressing the view that state sovereignty should be restricted in its vertical dimension, and that in the area above and beyond state sovereignty there should be freedom, which is widely accepted in the present times. After World War II, rocket science, which was primarily designed for military purposes, donned political and diplomatic garbs to enter into satellite intelligence gathering. Many scholars deem the launch of Sputnik 1 by USSR in 1957 to be the birth of international space law and the beginning of ‘Space Race’.<sup>16</sup>

Manfred Lachs, one of the more prominent academicians in the field of international space law after World War II, described it as, “Space law is the law meant to regulate relations between States to determine their rights and duties resulting from all activities directed towards outer space and within it – and to do so in the interest of mankind as a whole to offer protection to life, terrestrial and non-terrestrial, wherever it may exist.”<sup>17</sup> Moreover, Francis Lyall and Paul B. Larsen divide international space law into three main legal aspects –public international law aspect, private international law aspect, and national law aspect, which are accompanied by hybrid aspects.<sup>18</sup> Gibson M.J. defines international space law as “the rights and obligations on the

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<sup>10</sup> Ibid.

<sup>11</sup> Supra at 9.

<sup>12</sup> Piotr Manikowski, “Examples of space damages in the light of international space law” 6(1) *Economics and Business Review* 58 (2006).

<sup>13</sup> ibid

<sup>14</sup>E. Laude , “Questions Pratiques” 1 *Revue Juridique Internationale de Locomotion Arienne* 16 (Paris, 1910).

<sup>15</sup> Vladimir Mandl, *The Law of Outer Space: A Problem of Space-flight* (Berlin, 1932).

<sup>16</sup> Johannes M. Wolff, “‘Peaceful uses’ of outer space has permitted its militarization – does it also mean its weaponization?” 4 U.N. Institute for Disarmament Research, *Disarmament Forum* (2003).

<sup>17</sup>Manfred Lachs, *The Law Of Outer Space – An experience in contemporary law-making* 33 (Brill – Nijhoff, Leiden, 50<sup>th</sup> Anniversary of IISL Edition, 2010).

<sup>18</sup>Fracnis Lyall and Paul B. Larsen, *Space Law: a Treatise* 31 (Routledge, Abingdon, 2<sup>nd</sup> edn., 2017).

international level, as included in treaties that individual states have signed and ratified, whereas domestic space law refers to national legislation.”<sup>19</sup>

Adoption of space law treaties and principles at the international level has become the foremost landmark in the development of the first era of international space law. With the evolution of the concept of international space law, several organisations became significant contributors to the field with their treaties and conventions. One such was the United Nations Committee on Peaceful Uses of Outer Space (UNCOPUOS) which was established in 1958 to provide answers and settle tussles between warring states on questions of space laws. It commenced with a membership of over twenty States and has now been ratified by more than seventy nations.

United Nations has given the generally accepted definition of the term "space law" to be most often associated with the rules, principles and standards of international law appearing in the five international treaties and five sets of principles governing outer space which have been developed under the auspices of the United Nations.<sup>20</sup> Various matters get enlisted under consideration of the topic, such as principles guiding conduct of space activities, freedom of exploration, preservation of Earth and the environment, liabilities for damages that are caused by space objects, potential dangers of outer space, space-related technologies and international claims and disputes.

The Committee established five international treaties along with sets of guiding principles on space related issues to deal with aspects such as non-appropriation of space by any one country, nuclear power, arms control, benefit and interests of all states, safety of spacecrafts and astronauts, preventing harmful interference with space activities, freedom of exploration, and exploitation of natural resources in space. These treaties are:

1. The Outer Space Treaty, 1967
2. The Rescue Agreement, 1968
3. The Liability Convention, 1972
4. The Registration Convention, 1976
5. The Moon Agreement, 1984

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<sup>19</sup>M. J. Gibson. and J.Powell, *AU Space Primer* 43 (Air Command and Staff College, Air University Press, Maxwell air force base, Alabama, 2009).

<sup>20</sup>United Nations Office for Outer Space Affairs, *Space Law*, available at: <http://www.unoosa.org/oosa/en/ourwork/spacelaw/index.html> (Visited on July 16, 2019).

The proposition that the State must bear “international responsibility for national activities in outer space” and that “each State which launches or procures the launching of an object into outer space is internationally liable for damage sustained on earth, in airspace or in outer space” was set out in the 1963 Declaration on the Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space<sup>21</sup> and later incorporated in the ‘Outer Space Treaty’ which provides that “the exploration and use of outer space [...] shall be carried out for the benefit and in the interests of all countries [...] and shall be the province of all mankind.”<sup>22</sup> Article 2 of the Treaty states that there is no ‘territorial jurisdiction’ in space and it cannot be appropriated or claimed by any state or private parties. In accordance with this, law applying to outer space has been codified in the UN Charter<sup>23</sup> placing an obligation on all UN members to follow the law.<sup>24</sup> While the law relating to outer space might not be perfect at the moment, it is present and ever growing. What has also been witnessed is “bilateral, regional, and global cooperation at levels never before realized”<sup>25</sup> in such a short span of a few years. Still, the persistent question remains: what influence would colonization or exploitation of outer space have on future economic and environmental trends? Livingston has exclaimed, “capturing space without implying ethical considerations could lead to significant problems.”<sup>26</sup>

## II. Legal undercurrent in international space law

On the one hand, the benefits of space-based technologies have engorged into commercial, industrial, and scientific enterprises, and have identified and exploited global communications, navigation, military for ‘peaceful purposes’– the stark contrast shows that the security of various nations has been threatened along with fluctuations in economic assets. The challenge lies in being able to utilize the resources gained from networking into the space orbit while maintaining the balance of the universe for sustainable development.

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<sup>21</sup> Piotr Manikowski, “Examples of space damages in the light of international space law” 6(1) *Economics and Business Review* 55 (2006).

<sup>22</sup>Article 1, Outer Space Treaty, 1967, available at:

<http://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/outerspacetreaty.html> (Visited on July 16, 2019).

<sup>23</sup> Erazem Bohinc, *International Space Law: Legal Aspects of Exploiting Outer Space* 15 (E. Bohinc, 2013).

<sup>24</sup> United Nations Treaties and Principles on Outer Space, related General Assembly resolutions and other documents, available at:[http://www.unoosa.org/pdf/publications/ST\\_SPACE\\_061Rev01E.pdf](http://www.unoosa.org/pdf/publications/ST_SPACE_061Rev01E.pdf) (Visited on July 16, 2019).

<sup>25</sup> Stephen E. Doyle, “A Concise History of Space Law: 1910-2009” in Mark J. Sundahl and V. Gopalakrishnan (eds.), *New Perspectives on Space Law, The Proceedings of the 53<sup>rd</sup> IISL Colloquium on the Law of Outer Space, Young Scholar Session* 23 (2011).

<sup>26</sup> Daniel M. Livingston, “The Ethical Commercialisation of Outer Space”, *Mars Society*, Aug. 14, 1999.

The term 'peaceful purposes' raises some controversies due to different layers of interpretation of the term. One suggests 'non-aggressiveness' and another hints towards 'non-military'.<sup>27</sup> Further, there is prohibition of use of specific weapons but some military activities for research purposes are permitted.

In 2000, the United Nations General Assembly<sup>28</sup> stressed upon the importance of promoting effective means of using space technology to combat problems of regional or global substance and of bolstering capabilities of Member States, specifically developing countries, to use the applications of space research for economic, social and cultural development.<sup>29</sup> It is clear from convention-based laws that all nations have non-exclusive rights to use and explore outer space. They also put certain limitations.

### **1. Absence of territorial sovereignty**

Drafted in the 1960s during rapid de-colonisation after World War II, the Outer Space Treaty reflected on a limitation to freedom by restricting states from 'national appropriation by claim of sovereignty, by means of use or occupation, or by any other means'. Another set of relevant obligations is contained in Article IX which places a positive obligation on states for establishing that states shall exercise due care in their activities in space, further requiring states to be guided by the principles of cooperation and mutual assistance when they explore and use space. States pursuing research or conducting exploration of space and celestial bodies must use appropriate measures to do so in a way that circumvents any contamination. If there is a belief that any activity potentially risks and interferes with space activities of any other state or the environment of space, then it is required to consult with international organisations for the same.

### **2. Freedom of use**

The logical counterpart of prohibition of territorial sovereignty becomes freedom to use outer space where no one particular state can own the celestial bodies but all states have the opportunity to explore. Yet, there is no detailed explanation of this freedom, unlike that which is available in the laws of the "freedom of the High Seas"<sup>30</sup> which includes freedom of navigation, overflight, laying submarine cables, pipelines, constructing artificial lands, fishing, and more so. One reason for this could be to make way for technological advancements without law

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<sup>27</sup> Supra note 23, p. 37.

<sup>28</sup> Third United Nations Conference on the Exploration and Peaceful Uses of Outer Space, United Nations, 2000.

<sup>29</sup> Mohammad Saiful Islam, "The Sustainable Use of Outer Space: Complications and Legal Challenges to the Peaceful Uses and Benefit of Humankind" 9 *Beijing Law Review* 236 (2018).

<sup>30</sup> Article 87, United Nations Convention on the Law of the Sea.

encumbering its potential. The principle of free use allows commercial or non-commercial activities to use frequencies and orbital positions of satellites for consumption by government or private bodies, the drawback being that without any legal stability, misuse in way of commercial utilization of space cannot be withheld.

### 3. Use for Benefit and Interest of all Countries

Article I of the Outer Space Treaty states usage of outer space shall be carried out 'for the benefit and in interest of all countries. Again, there are different schools of thought regarding what the phrase signifies. According to a paper by IISL,<sup>31</sup> one interpretation states that 'only detrimental uses which directly and immediately cause damage to other countries are barred'. Au contraire, another maintains that 'the benefits of the use should be shared – because only this would be in the interests of all countries.' A reasonable conclusion from this appears to be that states should pay due regard to the interests of other states by avoiding harmful interference with use of space by other states and by respecting environmental concerns.<sup>32</sup>

This hints at the extent to which use of non-renewable resources is permitted, which makes scholars delve into the question of what can be called 'use' – not entirely consuming a source but only using it for a certain amount of time and then leaving it, or; using a portion of the resource, or; using the entire resource. The extent to which usage is permitted becomes paramount to discuss what can be used for the 'interests' of all countries. Another challenge posed by the vast expanse of the galaxy, much of which has not been discovered by the human species, is whether or not celestial resources are renewable or non-renewable.

A drawback of this, according to Johnson,<sup>33</sup> is that no international body has been established to assure preservation for future generations or keep a check on what has been considered to be sustainable use. No legally binding treaty addresses space debris and protection of the space environment as like as the earth environment through using outer space.<sup>34</sup>

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<sup>31</sup> Setsuko Aoki, Steven Freeland, Mahulena Hofmann et. al., "Does International Space Law either permit or prohibit the taking of Resources in Outer Space and on Celestial Bodies, and how is this relevant for National Actors? What is the Context, and what are the Contours and Limits of this Permission or Prohibition?" 31 *IISL, Directorate of Studies*, 2016.

<sup>32</sup> Richard B. Bilder, "A Legal Regime for the Mining of Helium-3 on the Moon: U.S. Policy Options" 33(2) *Fordham Int'l. L.J.* 257 (2009).

<sup>33</sup>David Johnson, "Limits on the Giant Leap for Mankind: Legal Ambiguities of Extra-terrestrial Resource Extraction" 26(5) *American University International Law Review* 1477 (2010).

<sup>34</sup> Supra note 29, p. 239.

#### 4. Province of all mankind

The concept of 'province of all mankind' as used in the Outer Space Treaty is distinguished from the phrase 'common heritage of mankind'<sup>35</sup> as used in the Moon Agreement. The latter, in a detailed analysis, states ways and means to establish an international regime for and a legal stance against exploitation of resources on Moon and other celestial bodies as referred to under the Agreement. The former reflects the aspiration of all countries, and not just a few, to benefit from space activities. But, the drawback is that this is only one form of explanation endorsed by S. Hobe,<sup>36</sup> who has interpreted the concept keeping in mind the principle of international cooperation which has been addressed by several provisions of the Treaty. There is no direct explanation of the concept in the Outer Space Treaty. One noticeable difference between countries is their economic growth and assets which get linked with constructing satellites to be placed in space for information purposes – not all countries have the resources to invest in space technology for their purposes.

#### 5. Nuclear Weapons and Arms

Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water that came into force in 1963 is also known as the Partial Test Ban Treaty or Nuclear Test Ban Treaty. It is the first treaty to contain specific international legal obligations on space use, whereby countries are prohibited from testing nuclear weapons in space using their agencies. Currently, 117 countries have ratified it. Countries which have not signed but are known to have tested nuclear weapons are France, China and North Korea.<sup>37</sup> Though this was not a UN treaty, there is no repetition of the clause in the treaties established by UNCOPUOS, and so, only members to this particular treaty are prohibited from using nuclear weapons in space.

Article IV of the Outer Space Treaty explicitly prohibits nuclear weapons and weapons of mass destruction, while consciously leaving out ballistic missiles from this category.<sup>38</sup> Conversely, this prohibition does not apply to conventional weapons and military satellites, and as Hasselmann notes, it is designated for a fractional prohibition of arms only. The United Nations General Assembly has passed the Principles Relevant to the Use of Nuclear Power Sources in Outer

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<sup>35</sup> Article 11, Moon Agreement, 1979.

<sup>36</sup> Stephen Hobe, Bernhardt Schmidt-Tedd, Kal-Uwe Schrogl, 1 *Cologne Commentary on Space Law* 39 (Carl Heymanns, Cologne, 1<sup>st</sup> edn., 2009).

<sup>37</sup> Thomas Graham, "The Law and the Military Use of Outer Space" *Safeguarding Space for All: Security and Peaceful Uses*, U.N. Inst. for Disarmament Research 91 (2004).

<sup>38</sup> Glenn H. Reynolds and Robert P. Merges, *Outer Space: Problems of Law and Policy* (Westview Press, Boulder, 1989).

Space (“NPS Principles”), which do not have any binding effect and do not have textual mentioning of all the nuclear power sources which are used in space.

There lays a massive arena of speculation on many of the terms for their exact meaning, and consequently, many theories also float. The meanings of ‘nuclear weapon’, ‘space weapon’, ‘weapons of mass destruction’ are not specifically explained.

## 6. Evading Human Rights Provisions

While the Outer Space Treaty clearly refers to a provision for astronauts visiting space and conducting research, and different agencies have now made space tourism a possibility, there is no provision in international law under human rights envisaging protection of human rights while in space.

## 7. Domestic Laws

Public International Law recognizes the monist approach and the dualist approach when ratifying to international laws on a domestic sphere. While many countries bring about an international law by incorporating legislations in the municipal law, some directly follow the laws that they have ratified to at an international forum. Yet, there is a drastic need for countries to have specific legislations for space laws that are binding on all citizens and complying with the internationally-set conventions.

After the 2015 Act,<sup>39</sup> the United States has developed on its domestic space laws and intends to do so rapidly. The modern Russian legislation in the topic of exploration and exploitation of space has been based on the Law of the Russian Federation on Space Activities, 1993, and as such, its principal approaches remain traditional. China in the present day does not have specific laws or policies on the issue concerning celestial bodies and outer space. Brazil was one country to have envisaged an elaborate space program as early as the 1960s but still awaits approval of concrete domestic legislation. In Japan, two space activities bills were submitted to the Diet,<sup>40</sup> the Japanese Parliament, in 2016,<sup>41</sup> apart from which is the Basic Space Act, 2008. Luxembourg announced its aspiration to explore the potential resources in space in 2016 and presented a

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<sup>39</sup> US Commercial Space Launch Competitiveness Act, 2015.

<sup>40</sup>The formal title translated into English is: “Bill on the launch of satellites and the control of satellites” (Bill no. 41 of the 190<sup>th</sup> Diet) and “Bill to ensure the appropriate treatment of records obtained from remote sensing satellites” (Bill no. 42 of the 190<sup>th</sup> Diet).

<sup>41</sup>Decisions at the regular cabinet meeting, *available at*:<http://www.kantei.go.jp/jp/kakugi/2016/kakugi-2016030401.html>, March 4, 2016 (in Japanese) (Visited on March 14, 2016).

Draft Law on the Exploration and Use of Space Resources for the same. The scenario in India regarding domestic laws on outer space has been dealt with in Part III.

### **8. Damages and Debris**

Infliction of harm on the machine or humans during space travel is a very potential risk. Damages in outer space are mostly connected in some way to collisions, electromagnetic interference, or other such links. Space debris is also a concern regarding sustainable usage, for once the satellite is placed in an orbit in space and after it has been consumed to its fullest potential, its debris gets mixed with the celestial bodies. Human activity in outer space has resulted in the appearance of many objects orbiting the earth— the majority of them serve no purpose.<sup>42</sup>

In conclusion, with the advancement of space technology and all the benefits it brings, its risks must be equally voiced and emphasized in order to plan a sustainable growth of the industry in future. This can only be brought about by curbing human desires in the way of strict laws, both in the international sphere as well as the domestic sphere.

### **III. An overview of Indian legislation on space laws**

India is a member party of all treaties governing space laws under the United Nations, except for the Moon Agreement which India has signed but not ratified. Indian Space Research Organisation (ISRO) is also a member of Interagency Space Debris Coordination Committee. The legislative bodies of the country are focusing on shaping global space and law policy with the help of international treaties and many laws that have been adopted by different countries.

The inherent basis of respect fostered for international laws stems from Article 51 of the Constitution of India, 1950 which imposes on the state an obligation to strive for the promotion of international peace and security, including maintaining just and reasonable relations between nations, respect for international law and treaty obligation, and settlement of international dispute by arbitration. To enshrine domestic laws on outer space, the Constitution under Article 73 gives the Union executive power to make laws.

To develop on the municipal laws on space, India must address important subtopics of control, authorization, safety, dispute resolution mechanisms and agreements for space assets. Specific provisions for space laws shall bring changes into the already existing laws and codes, such as the

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<sup>42</sup> Supra note 29, p. 239.

Intellectual Property Right, law of contract, transfer of property, registration, stamp duty, weapons and arms, environmental laws. ISRO emanates various IP rights such as patents, trademarks, copyright, data rights that necessitate a legislation which can cover these. While private satellite systems are given the nod to conduct their business in space, no specific provision attempts to protect the legal regime under which come the operators of such private systems, nor is any liability ensued upon the government.

One of the earliest legislations pertaining to domestic space laws in the country was Remote Sensing Data Policy, 2001 which had provisions for acquisition and distribution, national security and other societal requirements. In 2011, Remote Sensing Data Policy was amended to lift restrictions on supply of satellite data. The authority of remote sensing data in India remains the National Remote Sensing Centre (NRSC), which functions under ISRO. Yet, what can still be seen missing is the balance between requirements of the user community, the development of technology, and the laws governing the same. In November 2017, the Department of Space in India released the Draft Space Activities Bill, 2017, which was mostly modelled on the 'Model Law on National Space Legislation' drafted by the International Law Association.<sup>43</sup> This draft recognised the uniqueness of the Indian space systems while serving as an 'instrument of harmonizing and developing space law'.<sup>44</sup> There has been an attempt to create space for domestic scientific experiences and preferences.

Following are some of the factors that legislation on outer space in India are recommended to incorporate as given by eminent theorists and scholars<sup>45,46</sup> to construe with the international laws:

- i. Legal issues connected to launching of technology and space transportation systems.
- ii. Legal issues connected to earth observation services, navigation and information broadcasters including satellite telecommunications.
- iii. Legal issues connected to privacy through satellite broadcasting.
- iv. Assessment of the Intellectual Property Rights regime and laws of transfer of technology.

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<sup>43</sup> Sofia Guidelines for a Model Law for National Space Legislation, *available at*:[http://www.unoosa.org/pdf/limited/c2/AC105\\_C2\\_2013\\_CRP06E.pdf](http://www.unoosa.org/pdf/limited/c2/AC105_C2_2013_CRP06E.pdf) (Visited on July 16, 2019).

<sup>44</sup> Ibid.

<sup>45</sup> Surendra Kumar Yadav, "International Space Law Applicability in Indian Perspective" 5 *IJSR* 265 (2016).

<sup>46</sup> S.G. Sreejith, "Unmaking a National Space Legislation for India: Indigenizing Space Law Through the 'Organic Science' of the Indian Program" 83 *Journal of Air Law and Commerce* (2018).

- v. Space activity related issues: safety, insurance, funding, licensing and certification, liability for damages, dispute resolution.
- vi. Legal issues connected to use of weapons and military purposes.
- vii. Environmental issues for sustainable development.
- viii. Legal issues connected to international cooperation.

India's aspirations have been set at the highest of levels with dedicated teams which are ready to overcome challenges and attain their goals. Only recently, in January 2019, K. Sivan of ISRO spoke of the 32 planned space missions to be launched in 2019<sup>47</sup> while simultaneously working to pursue India's maiden human space mission, Gaganyaan in 2021-2022. Furthermore, students in India made the world's lightest satellite which can fit into a palm, named Kamalsat V2 which was placed in the orbit in January, 2019.<sup>48</sup> In 2018, ISRO achieved many feats with the launch of their heaviest satellite in November<sup>49</sup>, launching their heaviest communication satellite in December,<sup>50</sup> managing real-time flood crisis of Kerala with disaster management strategies<sup>51</sup> and much more. Indian potential is not lost on an EU Commissioner who uses Indian launchers for space missions.<sup>52</sup>

While Indian capability in the field of space technology remains undoubted, there is now more than ever a need to 'recover the indigeneity of the science of the Indian Space Program ("ISP")'<sup>53</sup> with its experience of space exploration without imitating efforts elsewhere for the same, and contextualize its rules as laws for minimal damage and maximum utility. Sreejith S.G. brilliantly explains why national space legislation in India is not a requirement to facilitate market growth

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<sup>47</sup> "India Plans To Launch 32 Space Missions In 2019" *NDTV*, Jan. 2, 2019, available at: <https://www.ndtv.com/india-news/india-plans-to-launch-32-space-missions-in-2019-1971722> (Visited on July 16, 2019).

<sup>48</sup> Abhimanyu Bose, "World's Lightest Satellite Made By Indian Students, Fits In Palm: 5 Facts" *NDTV*, Jan. 26, 2019, available at: <https://www.ndtv.com/science/worlds-lightest-satellite-made-by-indian-students-fits-in-palm-5-facts-1983463> (Visited on: January 26, 2019).

<sup>49</sup> "ISRO successfully launches its heaviest satellite GSAT-29 from Sriharikota" *The Economic Times*, Nov. 14, 2018, available at: <https://economictimes.indiatimes.com/news/science/isro-successfully-launches-its-heaviest-satellite-gsat-29-from-sriharikota/videoshow/66621463.cms> (Visited on November 14, 2018).

<sup>50</sup> "India's heaviest communication satellite GSAT-11 launched successfully from French Guiana" *ISRO*, Dec. 5, 2018, available at: <https://www.isro.gov.in/update/05-dec-2018/india-s-heaviest-communication-satellite-gsat-11-launched-successfully-french> (Visited on December 5, 2018).

<sup>51</sup> "Kerala floods: ISRO satellites have been critical in saving lives" *Money Control*, Aug. 20, 2018, available at: <https://www.moneycontrol.com/news/india/kerala-floods-isro-satellites-have-been-critical-in-saving-lives-2861511.html> (Visited on August 20, 2018).

<sup>52</sup> Kirtika Suneja, "EU keen on boarding Indian startups for space missions" *The Economic Times*, Mar. 4, 2019, available at: <https://economictimes.indiatimes.com/news/science/eu-keen-on-boarding-indian-startups-for-space-missions/articleshow/68261239.cms> (Visited on March 4, 2019).

<sup>53</sup> S.G. Sreejith, "Unmaking a National Space Legislation for India: Indigenizing Space Law Through the 'Organic Science' of the Indian Program" 83 *Journal of Air Law and Commerce* 109 (2018).

but rather to make the world recognize the indigeneity of the ISP. Saligram Bhat writes, “In India, scientists have represented most perspectives on space exploration and hope to make national legislation in due course based on national experience”.<sup>54</sup> A result of this in legislation would be a pan-temporal appropriateness and a sufficiency in the cultural phenomena that India is.

Ranjana Kaul explains the Indian position on outer space vis-à-vis international law: “The requirement to harmonize international treaty obligations is inherent in the international treaties [on space law]. Harmonization thus represents the essential physical link, as it were, between a nation’s universally declared stand in the international arena on outer space (or any other matter) and its national application. In its spatial context harmonizing treaty obligations with national law demonstrates the continuing resolve of a country to support the imperative need for collective measures to manage international affairs in such a way as to ensure that outer space does not become yet another battleground for nations”.<sup>55</sup>

While India’s space operations are effectively managed by the Indian Space Research Organisation (“ISRO”), the defence sector of space technology gets maintained by Defence Research and Development Organisation (“DRDO”). The two have worked in tandem to inaugurate two major military priorities, that which India’s technology is capable of – first is the ‘improvement of satellite reconnaissance abilities’<sup>56</sup> and second is an ‘integrated aerospace defence command’.<sup>57</sup> Accordingly, these efforts were pushed further for fruitful outcomes after China’s ASAT test.<sup>58</sup>

Quite recently, in March 2019, India conducted its own anti-satellite (ASAT) test<sup>59</sup> carried out by DRDO, titled “Mission Shakti” incorporating the three-stage Ballistic Missile Defence (BMD) Interceptor. The essential status borne out of the test is that India gets placed in an exclusive group of countries which have successfully presented their ability to interdict and intercept a satellite in outer space, as the aim of its Kinetic Kill Vehicle becomes to strike and shatter the

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<sup>54</sup>Saligram Bhatt, “Inspiration to Humankind from Space Law and Science and Experience in India” 35 *J. Space L.* 291 (2009).

<sup>55</sup> Ranjana Kaul, “Does India Need National Space Laws?” National Space Legislation: A Blueprint for India, Regional Space Conference on Bringing Space Benefits to the Asia-Pacific Region, Bangalore, June 27–29, 2005.

<sup>56</sup>Soumya Shekhar and Purushottam Anand, “India and Outer Space: India and Militarisation of Outer Space” *Current Developments in Air and Space Law*, National Law University Delhi Press 402 (2012).

<sup>57</sup>K.S. Jayaraman, “Indian Government set to create Aerospace Command” *Space News*, Oct. 31, 2005, available at: <https://spacenews.com/indian-government-set-to-create-aerospace-command/> (Visited on July 16, 2019).

<sup>58</sup>“India in Aerospace Defence”, *BBC News*, Jan. 28 2007, available at: [http://news.bbc.co.uk/2/hi/south\\_asia/6307875.stm](http://news.bbc.co.uk/2/hi/south_asia/6307875.stm) (Visited on July 16, 2019).

<sup>59</sup>“10 things you need to know about ASAT, India’s new space slayer” *The Economic Times*, Mar. 28, 2019, available at: <https://economictimes.indiatimes.com/news/defence/10-things-you-need-to-know-about-asat-indias-new-space-slayer/articleshow/68594835.cms?from=mdr> (Visited on March 28, 2019).

target satellite. Unlike China's ASAT test in 2007 that produced a debris field of approximately three thousand objects which will take decades to decompose, India's test seems to have produced some 400 fragments which are reported to decay in weeks.<sup>60</sup> Despite this, the test claims to have shaken the international community possessed by fear<sup>61</sup> that more such debris-producing tests shall be executed with less apprehension in the future, while reports now claim that the consequent debris cloud by India's test extended beyond its parent object orbit, climbing into the upper reaches of the orbit and endangering other satellites.<sup>62</sup> Exorbitant disdain is professed by Dr. Marco Langbroek on Twitter,<sup>63</sup> stating that despite India's claims of the debris decaying within 45 days of the test, barely 40% of the 'tracked debris had re-entered' as of 15 June. His article titled 'Why India's ASAT Test was Reckless'<sup>64</sup> in *The Diplomat* sheds more light with factual reports on the issue. Similar tweets, inclusive of detailed reports, are being made by other experts as well, including Jonathan McDowell.<sup>65</sup> Witness to the debate ongoing in the aftermath of India's ASAT test, one point that emerges is that India's efforts to build its space technology to combat militarization of space is commendable. Yet, concern must be shown over the environmental impacts of such defence mechanisms.

As has been pointed out by scholars, a demand for national space legislation in India is based on two misconceptions. The first is that domestic legislation is a tool for market access and market integration. A legislation of such nature is very much capable of restricting the state's pursuit to attain its domestic purposes. The second is that international space law continues to have a normative relevance for states, and hence any effectuation of those norms through domestic enactments would make the states better off; the misconception being that the very historicity of the said norm formation has been criticized.

Despite these, when lawmakers formulate an analysis to check whether the cost of such legislation outweighs the present policies, they realize the lacunae present in the contemporary space policies and aspire to fill these by making stringent laws that would hold agents liable.

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<sup>60</sup> Ashely J. Tellis, "India's ASAT Test: An Incomplete Success" *Carnegie Endowment for International Peace*, Apr. 15, 2019, available at: <https://carnegieendowment.org/2019/04/15/india-s-asat-test-incomplete-success-pub-78884> (Visited on April 15, 2019).

<sup>61</sup>Ibid.

<sup>62</sup> "How Much Space Debris From India's ASAT Test is Still in Orbit" *The Wire*, Jun. 18, 2019, available at: <https://thewire.in/space/how-much-of-space-debris-from-indias-asat-test-is-still-in-orbit> (Visited on June 18, 2019).

<sup>63</sup>[https://twitter.com/Marco\\_Langbroek/status/1140279394730160128](https://twitter.com/Marco_Langbroek/status/1140279394730160128).

<sup>64</sup> Marco Langbroek, "Why India's ASAT Test was Reckless" *The Diplomat*, Apr. 30, 2019, available at: <https://thediplomat.com/2019/05/why-indias-asat-test-was-reckless/> (Visited on April 30, 2019).

<sup>65</sup><https://twitter.com/planet4589/status/1132782858244898822>.

### **Conclusion**

In conclusion, it has been settled that there exists an international responsibility of organisations involved with projects related to outer space, not only to inhabitants of the Earth but also to the environment beyond this sphere. Such a responsibility runs parallel to laws being framed on an international and national level for the same purposes. States and private agencies must conform to the same in their exploration and utilization of outer space for peaceful purposes, keeping in mind international cooperation and ecological sustainability as a mandatory concern.

With space having constantly been the talk of the town for centuries now, it is inescapable to confront the issue that human greed has brought up: of ownership and 'right'. The outer space along with its celestial bodies does not belong to anyone, and this has been constantly brought up in various papers, articles, speeches, literary texts and even court cases. More than a 'right' in the sense of having a birthright of possession and ultimate utilization of it, space is a responsibility that humans owe to the habitat in which they live.

To fulfil this responsibility, legislation must step up and direct specific guidelines, principles and laws that are binding in nature to achieve cooperation, harmony and peace. There has been a growing demand for legislation to formulate space laws, and research on the topic is a complex read, but one that must be accomplished with going into great depths for making the most practical and ethical of laws.

## THE CONUNDRUM OF ARTICLE 35A OF THE CONSTITUTION OF INDIA: A CRITICAL ANALYSIS

Dr. G. Vaishnav Kumar\*

*The State of Jammu & Kashmir has always been at the center of the controversies due to its 'special constitutional' status in India. This peculiarity can be attributed to Article 370 of the Constitution of India. The article enables the President of India to apply the provisions of the Constitution of India to the state with concurrence of the State legislature. It further enables the President of India to carry out any alterations or modifications of the Constitution while applying the provisions to the State of J&K. As a consequence, the President had issued The Constitution (Application to Jammu and Kashmir) Order, 1954 wherein the subjects of J&K were conferred with the Indian citizenship along with this, Article 35A was inserted in the Constitution of India which conferred special rights and privileges to the 'Permanent Residents' of the State of J&K. The Article provides immunity to the special provisions and lays down that they cannot be challenged as violative of the Fundamental Rights. Recently PILs were filed in the Supreme Court of India challenging the constitutional validity of Art. 35A since it violates the basic human rights of the citizens of India more particularly the of the immigrants from West Pakistan, women and Dalits hailing from the Valmiki Community. The functioning of the Article shows discrimination meted out to various stakeholders. Therefore, it is suggested in this paper that the legislature, judiciary and executive must show due sensitivity to the issue and make suitable changes in governance to protect and preserve the human rights. The judiciary while interpreting Art.35A must apply a human rights-oriented approach in interpreting the constitutionality rather than a pedantic approach.*

**Keywords:** Article 35A; Article 370, citizens of Kashmir, Permanent Residents, Jammu and Kashmir.

*“Agar firdaus bar roo-e zameen ast, Hameen ast-o hameen ast-o hameen ast”*

*Translation-* If there is heaven on earth, it is here, it is here-

- AMIR KHUSRO

### 1. Introduction

The State of Jammu and Kashmir is strategically located in the Indian subcontinent and due to its extremely crucial location, the state has long been the focal point for the geopolitics in the Indian subcontinent, be it during the times of the Kushanas, the Emperor Akbar or the reign of

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Dogra rulers. Later, in 1947, the circumstances in Jammu and Kashmir were volatile in the backdrop of the Indian Independence. The State of Jammu and Kashmir which was then known as the “Riayasat of Jammu and Kashmir” was in two minds when it came to the question of its accession with India, it was during this time that the state came under the vicious attacks by the ‘qabaili’ – the tribals from the North Western Kashmir supported by the Pakistani troops. The attack forced the then Maharaja of Kashmir – H.H. Hari Singh to signed the instrument of accession and accede the State of Jammu Kashmir to India on the 27<sup>th</sup> October, 1947<sup>1</sup>.

Since Independence, the State of Jammu and Kashmir has been mired in controversies, due to the controversies related to its statehood, frequent invasive attacks originating across the border, wars like Kargil War of 1999, Surgical Strikes, information blackouts, frequent encounters and terrorist attacks on the state & central police forces bases with the dastardly attack on the CRPF security personnel in the state being the recent one. In addition to this an issue pertaining to the constitutional validity of the Article 35A of the Constitution of India, 1949 had cropped up. If a student, academician, jurist or for that matter a layman opens and flips through the pages of the Constitution, he will not be able to find this article anywhere in the main text but only in the appendix. Many members of the legal fraternity and lawyers, law students may even ignore this article altogether since it is not discussed in many textbooks and commentaries. It is in this light that this paper tries to give a legal insight into the conundrum of Article 35A of the Constitution of India and legal issues relating to the same. This article examines the genesis of the Article 35A in detail and moves to trace out the dynamics of the Art. 35A i.e., it deals with the various aspects of the unfolding of the article in the current socio-politico scenario. The legal issues, more particularly the constitutional questions pertaining to the validity of the Art. 35A are dealt in the later part of the article.

## 2. Genesis of Article 35A

The State of Jammu & Kashmir was a princely state at the time of the Independence of India in 1947. The state was then ruled by H.H. Maharaja Hari Singh of the Dogra Dynasty. The subjects of the State of Jammu and Kashmir were the subjects of the then princely state and not British subjects. Due to the political dynamics of that time the Maharaja of Jammu & Kashmir intended to protect the state and its subjects from the outside settlers as a consequence of which he

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<sup>1</sup> Exclusive: For the First Time, a True Copy of Jammu & Kashmir's Instrument of Accession, The Wire, *available at*: <http://thewire.in/history/public-first-time-jammu-kashmirs-instrument-accession-india> (last visited Jan 12, 2019).

passed the Hereditary State Subject Order in 1927<sup>2</sup> and in the year 1932<sup>3</sup> this defined the “state subject” and conferred these state subjects with exclusive privileges such as the right to acquire or purchase immovable property, right to employment under the Government of Jammu and Kashmir, eligibility for government aid and scholarships. These notifications stated that a permanent citizen of the Jammu and Kashmir had included those who were born in the State in the year or before 1911 and had been living there since then and those who had legally purchased the property in the state.

Further, due to the impending invasion of the state by the tribal forces in the year 1947, the Maharaja of the state had formally signed the Instrument of Accession with the Government of India and ceded his authority w.r.t. Defence, External affairs and Communication to the Government of India. At the instance of the Government of India, the final decision as to the ratification of the accession was to be taken by the Constituent Assembly of Jammu and Kashmir. Meanwhile in the interregnum period i.e., from the execution of the Instrument of Accession to the ratification by the Constituent Assembly of the State, temporary provisions were made in the Constitution of India by incorporating Article 370<sup>4</sup>. The essence of Article 370 states that with regard to the State of Jammu and Kashmir, in addition to the subjects of Defence, External Affairs and Communication, the Parliament of India can legislate upon the subjects in the Union list and the Concurrent list but only with the concurrence of the State Government thus giving a special status to the state. In addition to this, in order to give effect to the provisions of the Constitution of India in the State of J&K. The President had to issue Presidential Orders whereby he was empowered to alter or modify the provisions of the Constitution of India while applying it to J&K<sup>5</sup>.

In the year 1952, the Government of India summoned a delegation from Jammu and Kashmir to discuss the constitutional relation between the Government of India and the State of J&K. The delegation from Jammu and Kashmir led by Mirza Afzal Beg and others came to Delhi in 1952. After due deliberations and consultations an agreement was signed between the Indian Government and the State of J&K. The main features of the said agreement<sup>6</sup> are summarized as follows:

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<sup>2</sup>State Subject Definition, Notification Dt: 20<sup>th</sup> April, 1927, No. I-L/84, Sanctioned by H. H. the Maharaja Bahadur of Jammu & Kashmir.

<sup>3</sup>Notification Dt: 27<sup>th</sup> June, 1932, No. 13-L/1989, Sanctioned by H.H. the Maharaja Bahadur of Jammu& Kashmir.

<sup>4</sup>Jagmohan, *My frozen Turbulence in Kashmir*, 231 (Allied Publishers Limited, Bombay, 1991).

<sup>5</sup>The Constitution of India, art.370, cl.1(d).

<sup>6</sup>Justice Adarsh Sein Anand, *The Constitution of Jammu & Kashmir, Its Development and Comments*, 149-152 (Universal Book Traders, Delhi, 2<sup>nd</sup> edn., 1994).

- i. The residuary powers to legislate shall vest in the State of J&K unlike other states where the residuary powers are vested in the Union government.
- ii. It extended the Indian Citizenship to the persons domiciled in the J&K but the state legislature was given powers to make laws conferring special rights and privileges to the 'state subject'.
- iii. The provisions relating to the President of India vide Arts. 52 to 62 of the Constitution of India were made applicable to the state.
- iv. It was agreed that the state can have its own flag in addition to the national flag.
- v. The Sadr-i-Riyasat / Governor the state shall be elected by the State Legislature and will be appointed by the President of India.
- vi. Fundamental Rights as enshrined in the Part-III of the Constitution of India could not be made applicable to the state.
- vii. With regard to the Supreme Court of India, it was agreed that the Supreme Court of India will exercise only appellate jurisdiction with respect to the State of J&K.
- viii. With regard to the application of emergency under Article 352 especially in the case of internal disturbances, emergency can be proclaimed with the request or with the concurrence of the Government of the state

We can see that the Delhi Agreement of 1952 dealt with many aspects of the State and Center relations; inter alia it also dealt with the aspect of citizenship of the persons domiciled in J&K. It is this clause which later on gave birth to Article 35A of the Constitution of India.

Subsequently to the President of India in 1954 issued The Constitution (Application to Jammu and Kashmir) Order of 1954, whereby the Indian Citizenship was extended to the persons domiciled in the state and a new article i.e., Article 35A was inserted<sup>7</sup> into the Constitution of India which conferred powers to the State legislature of J&K to define "permanent residents" and to outline their entitled privileges.

According to the Constitution of Jammu & Kashmir, a 'permanent resident' is defined as a person who was a 'State subject' on 14<sup>th</sup> May 1954 or a resident of the state for 10 years

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<sup>7</sup> Inserted by The Constitution (Application to Jammu & Kashmir) Order, 1954, dated 14 May 1954.

preceding the date and who has lawfully acquired the immovable property in the state or who migrated after the 1<sup>st</sup> March, 1947 and has gone within the present Pakistan border area but has come back with resettlement permit (Ijazatnama) in the state. A citizen of any other state can neither buy property in J&K nor can he become a permanent resident of the state.

### 3. The Working Dynamics of Article 35A

The text of Article 35A in its very essence states that no existing law in force in the State of J&K and no law hereafter enacted by the legislature of the state which defines the classes of persons who are, or shall be permanent citizens of the State of J&K or conferring special rights and privileges upon the permanent citizens or imposing upon other persons any restrictions in respect of:

- i. Employment under state government;
- ii. Acquisition of immovable property in the state;
- iii. Settlement in the State or
- iv. Right to Scholarships and other forms of government aid from state government

shall be invalid on the grounds that it is inconsistent with or takes away or abridges any rights of other citizens of India by any provisions of Part –III of the Constitution.

The term ‘permanent resident’ was not defined in the Presidential order and for interpretation of the phrase, the notifications issued by the erstwhile Maharaja of the state read with the provisions of the Constitution of the State of J&K were to be taken into consideration. The plain interpretation of the article shows that special privileges and status has been granted to the permanent residents of the state which is violative of the principle of equality as enunciated in the Constitution of India. However, it is argued by a section of jurists that the special treatment was provided to the residents of J&K in order to protect them from the outside world since Kashmir happened to be backward in both economically and educationally.<sup>8</sup>

However, the practical functioning of Article 35A shows a very different picture which may not have been intended by the law makers themselves while inserting the same in the Constitution. Firstly, during the year 1947, there was a large influx of refugees mainly the Hindu refugees from

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<sup>8</sup> Justice Adarsh Sein Anand, *The Constitution of Jammu & Kashmir, Its Development and Comments*, 263 (Universal Book Traders, Delhi, 2<sup>nd</sup> edn., 1994).

then West Pakistan in the State of Jammu and Kashmir. The refugees had settled in the state since 1947 but due to the restrictive definition of “permanent resident” as per the Constitution of J&K, the said refugees could not be treated as permanent residents as they did not settle prior to the stated cutoff date and were not given any permission or Ijzatnama from the State Government. Despite generations of these refugees living on the soil of J&K they were denied many of the basic rights such as Right to Vote in State elections and elections in the Panchayat and Urban Local Bodies. They are not given any kind of financial aid from the State Government, they are barred from employment in the State Government and they are deprived of Right to Acquire immovable property in the state.

Secondly, the position of women in the state was also under doldrums. A combined reading of the definition of “permanent resident” along with the provisions of Art. 35A says that – If a woman who is a permanent resident of the J&K marries another permanent resident or descendant of the permanent resident she will retain her status as the permanent resident of the state but if she marries any male who is not a permanent resident of the state then subsequent to her marriage she loses her status as the permanent resident. As a consequence of this, she loses her Right to Ownership in the property and subsequently her legal heirs cannot claim inheritance from her. The legal provisions proved draconian for the women but the position has changed after the judgement of the High Court of J&K in *State of Jammu & Kashmir v. Dr. Susheela Sawhney & Ors*<sup>9</sup>. It was held that a daughter of a permanent resident marrying a non-permanent resident will not lose the status of permanent resident of the state of Jammu and Kashmir but it was clearly laid down that her children will not have any right to inherit the property from her. However, the position with respect to man is not the same i.e., once he is a permanent resident of the state, it does not matter whether he marries a non-resident or permanent resident / daughter of permanent resident, he retains his status and his legal heirs can inherit from him.

Thirdly, the position of Valmikis (a Dalit community) in the state is pitiable. It was in 1957, when local sweepers/safai karamcharis in the Jammu and Kashmir had gone on an indefinite strike which continued for months leading to accumulation of piles of garbage in the cities of Jammu and Kashmir. Seeing the gravity of the situation, the then Chief Minister of the state Ghulam Mohammad had taken decision to bring the workers from the neighboring state of Punjab for the purpose of clearing the garbage. As a consequence, many workers belonging to the Valmiki community were taken from the northern districts of Amritsar and Gurdaspur to perform the

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<sup>9</sup> *State of Jammu & Kashmir v. Dr. Susheela Sawhney & Ors*, AIR 2003 J&K 83.

duties of sweepers in the state<sup>10</sup>. The workers were brought on the pretext of being provided with better facilities, government jobs and financial aid. They were, in fact provided with small plots for construction of their houses and were appointed as sweepers in the government service of Jammu and Kashmir. They were given the assurance that they will be accorded the status of the 'Permanent Resident' by relaxing the rules. But this assurance turned out to be an illusion, Citing the special legal provision of 35A, the Valmiki community were not granted Permanent Resident Certificate despite the fact that there were nearly four to five generations of Valmiki community who had settled in the state since 1957. The picture today is that the people of Valmiki community, despite being well qualified, are relegated to do the job of only sweepers as they are not eligible for any other kind of government employment. Further the young talented students from the Valmiki community are not eligible for admissions into professional courses like MBBS, Engineering, etc. The Valmiki community is a notified Schedule Caste community in India but the Government of Jammu & Kashmir does not issue schedule caste certificates because they are not the permanent residents of the state as per the legal provisions. The colonies where the Valmiki Community people are living are not at all regularized by the State Government. Further due to no employment opportunities for the Valmiki Community youth, the chances of male members getting married are also getting slim with no girls ready to marry them due to job insecurity<sup>11</sup>. In toto, we can say that the legitimate rights of the Valmiki community are not at all fulfilled by the State Government which is nothing but against the constitutional mandate and the spirit of the Constitution of India. Further the democratic right to vote of all the non-permanent residents of the state is severely restricted for they can vote in the Parliamentary elections of India but not in state elections or the elections to the urban local bodies.

From this, the true image of the efficacy of Article 35A can be seen. The staunch supporters of the Article 35A often place a smoke screen in before the outside world in order to cover the sinister design of perpetuating discrimination in the state under the guise of 35A.

#### **4. Article 35A: Legal Issues Involved**

The recent controversy relating to the Article 35A has arisen when PILs were filed before the Hon'ble Supreme Court of India in 2018 challenging Article 35A as violative of basic structure of Constitution of India. The Article as contended by the Petitioner violates the Fundamental

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<sup>10</sup> Article 35A and human rights of Valmiki community, Dailyexcelsior.com (2018), available at: <http://www.dailyexcelsior.com/article-35-human-rights-valmikis/> (last visited Jan 12, 2019).

<sup>11</sup> Tribune Service, Without jobs, no one ready to marry Valmiki boys in Jammu -The Tribune (2019), available at: <https://www.tribuneindia.com/news/jammu-kashmir/community/without-jobs-no-one-ready-to-marry-valmiki-boys-in-jammu/162027.html> (last visited Jan 12, 2019).

Rights as enshrined in the Part III of the Constitution. The Article is specifically hit by the Article 14, 15, 16, 19 & 21 i.e., it confers arbitrary powers upon the government enabling it to distinguish between the permanent residents and non-permanent residents on frivolous grounds. The impugned Article creates a class of citizens within the Indian Citizens. It places the non-permanent residents at a severe disadvantage since they are not eligible for public employment. Further it restricts the freedoms available under Article 19 such as freedom of profession, freedom of movement and residence and ultimately it breaches the Right to life and liberty of the aggrieved such as non-permanent residents, people from Valmiki community, women, etc.

The matters are sub-judice and are posted for hearing, nevertheless the legal issues pertaining to the Article 35A need to be discussed in detail.

#### **4.1 Why the need to make amendments to the Presidential Order was not felt even after 6 decades of time lapse**

It must be seen that Article 35A of the Constitution was kept closely guarded by its parent Article 370. In fact, Art. 35A acts as teeth to the Art. 370. The ruling elite along with the vested interests under the impression of protecting the state residents were in fact trying to keep the state isolated and preventing the trickling down of the benefits of welfare schemes to the state's residents. Whenever the debate arises w.r.t Article 370 of the Constitution of India, often wide spread incidents of violence, law and order follow in the State. Meanwhile in Delhi, both the houses of Parliament witness frequent disruptions in the debate ultimately resulting in the frequent adjournments. Article 370 is treated as a "*Lakshman Rekha*", which should not be crossed in any debate, discussion whether legislative or academic circles. Even if academicians, legislators and intelligentsia find an opportunity to discuss the Article it always leads to emotional outbursts and provocative statements being exchanged from both the sides. The embers of the Kashmir and its disputes are always being stoked by the self-serving politicians and other vested interests to gain political mileage. This might be a reason that the amendments to the Presidential Order was never sought for or for that matter never conceived by the governments at the center.

#### **4.2 Is Article 35A violative of Articles 14, 15, 16, 19 & 21 of the Constitution**

In the preceding paragraphs, we have seen the working of Article 35A of the Constitution. It confers special treatment, privileges and rights to the permanent residents of the state. The Article essentially violates the Art. 14 of the Constitution of India since it showcases arbitrariness. The plain construction of the provisions of the Article implies that the permanent residents of the State of J&K enjoy special Fundamental Rights and privileges in the State and

also in any part of India whereas a citizen of India who does not belong to the State of J&K enjoys fundamental rights in any part of India except the State of Jammu & Kashmir. The refugees from West Pakistan enjoy the rights as the Citizens of India but cannot avail the rights in the State whereas the provisions pertaining to the citizenship in the Indian Constitution does not create any kind of distinction between categories of Citizenship. The artificial classification created by Article 35A has no rational backing and nexus to the ideal of equality as enunciated in the Constitution<sup>12</sup>. It creates a class of citizens within the class of Citizens of India. With regard to the status of women, their right to marry the person of their choice is violated since they are placed at severe disadvantage when they marry a non-permanent resident of the State and their children cannot inherit their property. The position of the Dalit community i.e., the Valmiki community also shows open discrimination meted out to them. The persons belonging to Schedule Caste community need state protection to prevent them from being exploited and to improve their social and economic conditions. Contrary to this, the provisions of the Constitution are being used to prevent them from realizing their rights. Prima Facie, the Article 35A does not seem compatible neither with the basic spirit of the Constitution of India nor with the internationally recognized Human Rights.

The impugned Article clearly comes into conflict with Article 15, which clearly prohibits any kind of discrimination on the grounds of religion, race, caste, sex or place of birth. The whole criteria of classifying the residents on the basis of definition of permanent resident is nothing but a clear discrimination perpetuated by the state on the ground of place of birth. As such Article 35A is deemed to be antithesis of Article 15. On the other hand, if we take into consideration regarding the fact that the people belonging to the Valmiki Community, non-permanent residents of the state are not eligible for the appointments in the state government, one can clearly come to a inference that the impugned Article is purely violative of Article 16 which explicitly provides for the equality of opportunity in the matters of public employment.

Furthermore, the bundle of freedoms enjoyed by an ordinary citizen of India under Article 19 are severely restricted for non-permanent residents of Jammu and Kashmir. In other words, the Freedom to Reside and Settle in any part of India is not available to the non-permanent residents who are prohibited from acquiring immovable property in the state. Ironically the permanent residents of the state can reside and settle in any part of the state as well as in the whole territory of India. In addition to it, non-permanent residents are placed at a severe disadvantage when it

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<sup>12</sup>K.L. Bhatia, "Article 35A: A Mishmash of the Textual Constitution of India" (2014), *available at*: <https://klbhatia.wordpress.com/2014/04/17/article-35a-a-mishmash-of-the-textual-constitution-of-india/> (last visited Jan 12, 2019).

comes to the realization of their Right to practice any profession or carry any occupation, trade or business in the state since all the trade licenses, permits, etc. are only provided for the permanent residents. On the whole the impugned Article strikes at the core of the Right to Life and Liberty as enunciated in the Constitution since in its functioning the Article is spelling doom to the non-permanent residents, women and people of the Valmiki Community.

#### **4.3 Does the Article 370 empower the President of India to insert new Article in the Constitution of India?**

Article 370 of the Constitution of India empowers the President of India to apply the Constitutional Provisions to the State of Jammu and Kashmir with necessary modifications or alterations but nowhere has it empowered the President of India to bring constitutional amendment by inserting a new article, such as Article 35A. The constitution clearly elaborates over the amending procedure under Article 368 which was not followed while inserting Article 35A. It was added via an annexure by alienating and superseding the Parliamentary process. The Constitutional Amendment Bill for inserting Article 35A was not at all introduced in either of the two houses of the Parliament<sup>13</sup>. It is evident that the then President of India had bypassed the express provisions for amending the constitution to insert Article 35A.

#### **4.4 Whether the Article 35A violates the Basic Structure of the Constitution of India.**

The Doctrine of Basic Structure in the Indian constitution was laid down by the Hon'ble Supreme Court of India in the landmark case of *Kesavananda Bharathi v. State of Kerala*<sup>14</sup>, wherein the Supreme Court held that there are certain essential features in the Constitution which cannot be taken away or abridged and any law violating the basic structure of the Constitution is liable to be struck down to the extent of inconsistency. The functioning of the Article 35A clearly shows that it tries to perpetuate arbitrariness, violates equality, violates the rights of the women, creates dual citizenship, etc. In fact, the Hon'ble Supreme Court of India has formulated this as the core issue for consideration in the hearing of the case i.e., whether Article 35A is violative of the basic structure of the constitution.<sup>15</sup>

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<sup>13</sup>Ians, Article 35A inserted by Presidential Order, can be struck down (IANS Exclusive)Business Standard(2019), [https://www.business-standard.com/article/news-ians/article-35a-inserted-by-presidential-order-can-be-struck-down-ians-exclusive-119060501128\\_1.html](https://www.business-standard.com/article/news-ians/article-35a-inserted-by-presidential-order-can-be-struck-down-ians-exclusive-119060501128_1.html) (last visited Jun 8, 2019).

<sup>14</sup> Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr. (1973) 4 SCC 225.

<sup>15</sup>Mehal Jain, 'Article 35A Was Not Incorporated In The Constitution Yesterday': SC Adjourns Hearing Of Petitions To August 27, Livelaw.in (2018), available at: <https://www.livelaw.in/article-35a-was-not-incorporated-in-the-constitution-yesterday-sc-adjourns-hearing-of-petitions-to-august-27/> (last visited Jan 12, 2019).

## 5. Judicial Interpretation of Article 35A

There have been a few instances where the judiciary had to analyze the provisions of the Article 35A of the Constitution. The judicial interpretation by the constitutional courts in India can be summed up as follows:

### I. **Puranlal Lakhanpal v. The President of India & Others**<sup>16</sup>.

In the instant case the Hon'ble Supreme Court of India held that the expression "modification" used in Art. 370(1) must be given the widest meaning in the context of the Constitution. In that sense it includes an amendment and it cannot be limited to such modifications as it does not make any "radical transformation". In short, the Hon'ble Supreme Court has said that the power of the President as conferred under Article 370 of the Constitution includes the power to amend the provisions of the Constitution. In other words, the power of the President under Article 370 to amend the constitution is coextensive with the power of the Parliament to amend the Constitution.

### II. **Sampat Prakash v. State of J&K and Anr**<sup>17</sup>.

In the instant case the Hon'ble Supreme Court of India while reiterating the law as laid down in *Puranlal Lakhanpal v. The President of India*<sup>18</sup> stated that the object of enacting Art. 370(1) was to confer special position on the State of Jammu and Kashmir and to enable the state to retain the position by giving power to the President to apply the provisions of the Constitution to J&K with exceptions and modification as he may specify by order. Further the power to make exceptions implies that the President can declare that a particular provision of the Constitution would not apply to the State. The Court further observed that if the Constitution provided power to the President to efface effect of any article then it seems that the President is also conferred with the power to make modifications. These "modifications" must be given the widest meaning while constructing and the power to modify includes the power to amend the provisions.

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<sup>16</sup> *Puranlal Lakhanpal v. The President of India & Others* 1962 SCR (1) 688.

<sup>17</sup> *Sampat Prakash v. State of J&K and Anr.* 1970 SCR (2) 365.

<sup>18</sup> *Ibid* 16.

### III. **Bachan Lal Kalgotra v. State of Jammu and Kashmir**<sup>19</sup>

The instant case was filed on behalf of the Refugees from West Pakistan in the state complaining about the discrimination meted out to them as per Article 6 of the Constitution of India and Article 35A. The Hon'ble Supreme Court while sympathizing with the refugees had observed that the petitioners in the instant case have a justifiable grievance. They enjoy anomalous rights within the state. Further the Citizens of India can enjoy various fundamental rights in the parts of India other than the State of J&K. More particularly in the State of J&K a citizen of India cannot enjoy many rights which are exclusively conferred upon the permanent residents of the State despite the fact that they are domiciled in the State for the past four decades. In view of this peculiarity in the constitutional position in the state it is left for the legislature to take suitable actions i.e., both legislative, executive to enable these persons to enjoy the citizenship to a great extent. Since they constitute seven to eight percent of the state population they need to be protected by the State and the Union of India is under an obligation to make some provisions for the advancement of cultural, economic and educational rights of these persons. The Supreme Court instead of taking a pedantic approach in interpreting the provisions of Article 370, 35A has in fact realized the ground realities and recommended the legislature to take affirmative action in this regard.

### 6. **Conclusion and Suggestions**

From the above discussion we can notice the infringement of the several fundamental and constitutional rights of the non-permanent Kashmiri residents this clearly shows, how a particular class of citizens are given the double and special advantage of being the Citizen of India and Permanent Resident of the State in sharp contrast to the other citizens of India who are deprived of their basic human rights. Due to this discriminatory nature of Article 35A of the Constitution, the all-round development of the State is getting obstructed. The industrial and private business sectors cannot thrive in the state due to excessive property ownership issues. The children of long domiciled citizens are deprived of their bright future. The non-permanent residents do not even have a voice in local state government and local governments as they do not enjoy the right to vote. The women are placed at a disadvantageous position as they are not able to enjoy their right to marry a person of their choice. Moreover, the Inheritance Rights of their legal heirs is also affected to a great extent.

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<sup>19</sup>Bachan Lal Kalgotra v. State of Jammu and Kashmir 1987 SCR (2) 369.

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In the recent past we have seen concerns being raised by the activists and other stakeholders such as Kashmiri women, members of Valmiki community and others who opined that the Government of India must take an affirmative action to prevent perpetuation of discrimination under the garb of constitutional provisions. In consequence thereof the Government of India has repealed Art. 370 and 35-A of the Constitution and further bifurcating the composite state into Union Territory of Jammu and Kashmir and Union Territory of Ladakh. In the initial days of repeal, there were many apprehensions by the fringe elements, separatists and those who were not optimistic about a backlash on the Government of India. Consequently, a lot of positive gestures are required by the government to instill confidence into the minds of all the stakeholders.

There is a heavy onus on the Union Government and it must be borne in the minds of the legislators that there must be a human-rights oriented approach rather than a pedantic application and interpretation of Articles and legal provisions. We must not forget that law ought to be dynamic and not stagnant. The ultimate aim of law is the welfare of the people. The approach in tackling this conundrum lies in true statesmanship of the legislature and all the possible efforts towards achieving “Insaniyat, Jamuhriyat and Kashmiriyat” (Humanity, Democracy and Identity of people of Kashmir) should be made in both letter and spirit. We must strive to make the region a true paradise and thus impart some meaning to the word *Jannat*.

## ARBITRAL CONFIDENTIALITY AND DISCLOSURE IN COURTS

Gibran Naushad\*

*The assurance of confidentiality becomes a vital factor in deciding to arbitrate a dispute, especially when such dispute involves corporations that have global presence and depend heavily on mechanisms that bottle up information and prevent leakages, particularly distorted leakages. Accordingly, it becomes important to analyze the Indian legal regime in relation to confidentiality in arbitration proceedings. This paper attempts to do such an analysis. An attempt would be made to assess certain rulings by Indian courts in relation to confidentiality while contextualizing it in a scenario involving arbitration. Additionally, a comparative analysis would be done in relation to arbitral rules applicable globally so as to get a better picture of the confidentiality regime that operates at the international level.*

### Introduction

Arbitration has clearly become one of the most sought-after mechanisms for settlement of disputes. Amongst the many advantages that this mechanism provides, confidentiality is one of the most important. Conflict resolution through arbitration ensures that the information pertaining to the dispute does not get dissipated to the outside world. This becomes particularly significant in disputes involving large corporates and multinationals where any leakage of information could be extremely damaging to the parties involved. This is a stark contrast to the court system in India where, in most cases, the information in relation to the matter, including information that might be distorted sometimes, reaches the public even before a final decision is reached in the matter.

Such comparative benefits presumably explain the growth in preference for arbitration in recent times. With over twenty-four million cases pending in the Indian courts, the demand for this speedy and exclusive mechanism will only be growing over the years to come.<sup>1</sup> Confidentiality, however, remains an ambiguous domain when it comes to arbitration in India. Section 75 of the Arbitration and Conciliation Act, 1996, as amended (the 'Act') provides for confidentiality in

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<sup>1</sup>Nick Peacock, Donny Surtani and Kritika Venugopal, Arbitration in India: Dispute Resolution in the World's Largest Democracy, available at: <https://www.herbertsmithfreehills.com/latest-thinking/arbitration-in-india-dispute-resolution-in-the-worlds-largest-democracy> (Last Modified July 11, 2017).

conciliation proceedings. The Supreme Court in *Moti Ram (D) Tr. Lrs. v. Ashok Kumar*<sup>2</sup> has stressed on mediation proceedings being confidential in nature. Similar thoughts have been echoed in the Delhi High Court judgment of *Smriti Madan Kansagra v. Perry Kansagra*<sup>3</sup> and the decision of the Central Information Commission, New Delhi in *Rama Aggarwal v. PIO, Delhi State Legal Service Authority*.<sup>4</sup> The Supreme Court in appeal in *Perry Kansagra v. Smriti Madan Kansagra*,<sup>5</sup> however, clearly mentioned that the ‘*principle of confidentiality will not apply in matters concerning custody or guardianship issues.*’ The Court mentioned that such departure from confidentiality was consistent with the underlined theme of the Act, particularly Section 12 of the Act.<sup>6</sup> With no specific provision for confidentiality in arbitration in place, the Arbitration and Conciliation (Amendment) Bill, 2018 (the ‘Bill’) proposed to introduce a non-derogable, exclusive provision on confidentiality of arbitral proceedings. The Bill proposes to add section 42A which seeks to ensure confidentiality:

*42A: Notwithstanding anything contained in any other law for the time being in force, the arbitrator, the arbitral institution and the parties to the arbitration agreement shall keep confidentiality of all arbitral proceedings except award where its disclosure is necessary for the purpose of implementation and enforcement of award.*

Accordingly, confidentiality is only allowed to be surpassed in cases of disclosure required by legal duty, for the protection or enforcement of a legal right, or for the enforcement or challenge of an award before a court or judicial authority.<sup>7</sup> The report of the High Level Committee, which preceded the Bill, makes it clear that there being no express provisions for confidentiality in the present regime, the parties seeking confidentiality have to fall back to the arbitration agreement or the arbitral rules of the administering institution.<sup>8</sup> Additionally, the report also noted that different jurisdictions had different legal positions on confidentiality and there is no uniform framework that is available for reference when it comes to confidentiality in arbitration.<sup>9</sup>

The recent decision in *Republic of India through Ministry of Defence v. M/S Agusta Westland International*<sup>10</sup> becomes important in this context. While deciding whether the mandate of the

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<sup>2</sup>(2011) 1 SCC 466; (2011) 1 SCC (Civ) 334.

<sup>3</sup> C.M. APPL. 42790/2017; 42791/2017 in MAT.APP. (FC) 67/2016.

<sup>4</sup>CIC/SA/A/2015/000305.

<sup>5</sup> SLP (Civil) No. 9267 of 2018.

<sup>6</sup>Ibid.

<sup>7</sup> Report of the High Level Committee to Review the Institutionalization of Arbitration Mechanism in India, p. 6, available at: <http://legallaffairs.gov.in/sites/default/files/Report-HLC.pdf> (Last Modified July 30, 2017)

<sup>8</sup>Ibid., p. 7.

<sup>9</sup>Ibid.

<sup>10</sup>2019 SCC OnLine Del 6419; (2019) 257 DLT 171.

Arbitral Tribunal ought to be terminated in light of the nature of allegations raised,<sup>11</sup> the Delhi High Court stipulated that for it to decide on allegations of fraud and corruption, it needed the arbitral record to be placed before it, and accordingly directed for the same.<sup>12</sup> The court, however, did not stipulate on the law on arbitral confidentiality. Accordingly, it becomes worthwhile to assess the legal dimensions of arbitral confidentiality in situations where disclosure is required in Indian courts, i.e. if such confidentiality requirements trump the disclosure obligations in Indian courts, and under what circumstances.

### **The Indian Landscape: Assessing the Legal Regime in India**

There is no direct legal authority in India dealing with arbitral confidentiality and disclosure in courts. However, some provisions of the Indian law become relevant. Order XI Rule 12 of the Code of Civil Procedure, 1908 (the 'Code') provides for an application for the discovery of documents:

#### *12. Application for discovery of documents*

*Any party may, without filing any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the suit, or make such order, either generally or limited to certain classes of documents, as may, in its discretion be thought fit:*

*Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.*

Additionally, Order XI Rule 14 of the Code gives the power to the court to order production of documents in relation to any matter pertaining to the suit:

#### *14. Production of documents*

*It shall be lawful for the Court, at any time during the pendency of any suit, to order the production by any party thereto, upon oath of such of the documents in his possession or power, relating to any matter in question in such suit, as the Court shall think right; and*

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<sup>11</sup>*Ibid.*, p. 36.

<sup>12</sup>*Ibid.*, pp. 41-42.

*the Court may deal with such documents, when produced, in such manner as shall appear just.*

Accordingly, a party can make an application for the production and discovery of documents. However, such production and discovery are subject to certain parameters that it needs to adhere to. The case of *M.L. Sethi v. R.P. Kapoor*<sup>13</sup> becomes important in this context. The case entailed an application for permission to sue in *forma pauperis* in accordance with Order XXXIII of the Code. While deciding on the application for discovery of documents for a decision on the status of *forma pauperis* of the applicant, the Supreme Court stipulated that the High Court was wrong in holding that the Trial Court's order for the production of documents when such documents were not specified was illegal.<sup>14</sup> The Supreme Court held:

*Nor do we think that the High Court was right in holding that the documents ordered to be discovered were not relevant to the inquiry. The documents sought to be discovered need not be admissible in evidence in the enquiry or proceedings. It is sufficient if the documents would be relevant for the purpose of throwing light on the matter in controversy. Every document which will throw any light on the case is a document relating to a matter in dispute in the proceedings, though it might not be admissible in evidence. In other words, a document might be inadmissible in evidence yet it may contain information which may either directly or indirectly enable the party seeking discovery either to advance his case or damage the adversary's case or which may lead to a trial of enquiry which may have either of these two consequences. The word "document" in this context includes anything that is written or printed, no matter what the material may be upon which the writing or printing is inserted or imprinted. We think that the documents of which the discovery was sought, would throw light on the means of the respondent to pay court-fee and hence relevant.*<sup>15</sup>

Accordingly, the documents need to be relevant for the court to order their discovery. Similarly, in *Basangouda v. S.B. Amarkhed*,<sup>16</sup> the Supreme Court dwelled upon Order XI Rule 14 of the Code and stipulated:

*The Court, therefore, is clearly empowered and it shall be lawful for it to order the production, by any party to the suit, such documents in his possession or power related to*

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<sup>13</sup>AIR 1972 SC 2379.

<sup>14</sup>Ibid., p. 6.

<sup>15</sup>Ibid., p. 9.

<sup>16</sup>AIR 1992 SC 1163.

*any matter in question in the suit provided the court shall think right that the production of the documents are necessary to decide the matter in question. The court also has been given power to deal with the documents when produced in such manner as shall appear just. Therefore, the power to order production of documents is coupled with discretion to examine the expediency, justness and the relevancy of the documents to the matter in question.*<sup>17</sup>

Similar observations can therefore be seen in both the judgments, thereby making relevancy of the document to decide the dispute an important factor in assessing whether the document needs to be produced. However, it needs to be remembered that none of these cases entail the presence of an arbitral confidentiality clause. There is no express confidentiality requirement that the Court had to deal with in these cases, and accordingly these cases hold relevance only to the extent that the general conditions of discovery are to be decided upon in a dispute. The Delhi High Court, ruling in *Mr. M. Sivasamy v. Vestergaard Frandsen A/S & Ors*, comes closest to an assessment of confidentiality and discovery requirement.<sup>18</sup> A division bench of the Delhi High Court was deciding on whether the plaintiff was entitled to seek production of the defendant's confidential information, which included its trade secrets, under Order XI Rules 12 and 14 of the Code. The interesting element in this case was that some of the documents that were sought to be produced in the Delhi High Court had been permitted by the English Court to be disclosed in the proceedings before it. However, such documents could only be accessed by a confidential club. The Delhi High Court rejected the assistance of the proceedings in foreign courts and held that:

*“We may state that before the Learned Single Judge, and as reflected from the impugned order, reference has been made by the parties to proceedings between the parties in Courts of U.K., Denmark and France and help sought from such proceedings for the disposal of the subject application. However, according to us, with respect to the litigation in India, the Courts in this country would be guided by the provisions of the Laws as applicable in this country and the pleadings in the suit in this court and not by any orders or decisions of the foreign court, unless, the decision of the foreign Court becomes final and so that it can operate as res judicata between the parties and operate in the parameters of Section 13 and Section 44-A of the Code of Civil Procedure, 1908. No useful purpose will be served in making reference to various orders of the Courts in the different countries as one does not know what are the ingredients/requirements of causes of action of the different laws of those countries and what were the pleadings of the cases in*

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<sup>17</sup>Ibid., p. 7.

<sup>18</sup>(2009) 113 DRJ 820 (DB).

*the foreign courts. In fact, we do feel that none of the parties can contend or plead on the basis of orders of the Courts in foreign jurisdiction (particularly interim orders) as there is no finality (including by disposal of appeals) with respect to findings in such orders/judgments, especially in regard to whether the plaintiffs or the concerned defendants are the owners of the product or whether the products are same or different and so on. The orders/judgements in such proceedings having not achieved finality, according to us are not relevant and cannot be relied upon by either of the parties, particularly so where some orders (or portion thereof) are said to be in favour of one party and some in favour of the other. [...] Nothing further therefore needs to be said on this aspect as the same cannot be said to be final one way or the other and the litigation is continuing.”<sup>19</sup>*

Accordingly, it follows from the above that in cases where documents pertain to an arbitration whose confidentiality has been established abroad, the Indian courts may not necessarily follow such confidentiality parameters and would subject the production of such documents to the parameters of discovery and production set in Indian law, i.e. Order XI Rules 12 and 14 of the Code. While stipulating that the documents should be disclosed as they were relevant to the matter in controversy, the Delhi High Court directed the Single Judge to devise a procedure for confidentiality so that a mechanism could be created through which documents could be disclosed while at the same time their confidentiality remains protected. The Court held that:

*In the English Courts, the counsel for the parties agreed that production of the relevant material and documents was subject to a confidentiality agreement, a ‘confidential club’ of certain persons if the same may be so called, because only the lawyers of the plaintiff and expert of the plaintiff were (who were subject to confidentiality agreement), allowed to look at such documents. We may note that the Learned Single Judge has also directed production of documents in this regard only in a sealed cover. However, no purpose will be served merely by filing the same in the Court because such exercise will be of no effect because to ascertain whether such documents contain the exclusive proprietary information of the defendants or the same are only a copy of the confidential information of the plaintiffs, is a vexed question, and the Learned Single Judge may not be equipped to compare and contrast the technical proprietary information relating to the two products and decide on his own whether the two products are the same and whether the defendants product is the copy of the plaintiffs’ product or that the defendant’s product is different than that of the plaintiffs’. It is, therefore, necessary to decide first the complete procedure for ensuring that the confidentiality which the defendants claim in their product is kept,*

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<sup>19</sup>*Ibid.*, p. 5.

*before directing production of such documents, whether in the Court in a sealed cover or before any competent authority or person who would examine the confidential information, in order to determine the respective claims and contentions of either parties. The Court will necessarily have to devise a detailed procedure before directing production of the documents in a sealed cover because, as already stated, filing of documents in the Court in a sealed cover will serve no purpose unless and until a further procedure is devised with respect to the comparison and analysis of the confidential information of both the parties and as to an issue of 'confidentiality club' with its requirements, including constitution, which is to be first decided by the Learned Single Judge.<sup>20</sup>*

### **International Comparative Perspective: Assessing the Global Arbitration Framework**

The arbitration framework that one adopts becomes an extremely important factor in ensuring confidentiality. Confidentiality, however, does not figure largely in most of the arbitral regimes. If one looks at the International Chamber of Commerce (the 'ICC') Rules, we would find certain broad parameters for confidentiality. Article 3 stipulates that only after the approval of the arbitral tribunal and the parties, the persons not involved in the proceedings shall be admitted. Article 6(2) states that by agreeing to arbitration under the ICC Rules, the parties are deemed to have accepted that the arbitration will be administered by the Permanent Court of Arbitration (the 'PCA'). Consequently, Article 6 of Appendix I relating to *Statutes of the International Court of Arbitration* becomes important. Article 6 states:

*The work of the Court is of a confidential nature which must be respected by everyone who participates in that work in whatever capacity. The Court lays down the rules regarding the persons who can attend the meetings of the Court and its Committees and who are entitled to have access to materials related to the work of the Court and its Secretariat.<sup>21</sup>*

Additionally, Appendix II talks about the *Internal Rules of the International Court of Arbitration*. Article 1(4), 1(5) and 1(6) of Appendix II stipulate that:

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<sup>20</sup>Ibid., p. 18

<sup>21</sup> Article 6, Appendix I, Statutes of the International Court of Arbitration, available at: <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/> (Last Modified March 1, 2017).

4) *The documents submitted to the Court, or drawn up by it or the Secretariat in the course of the Court's proceedings, are communicated only to the members of the Court and to the Secretariat and to persons authorized by the President to attend Court sessions.*<sup>22</sup>

5) *The President or the Secretary General of the Court may authorize researchers undertaking work of an academic nature to acquaint themselves with awards and other documents of general interest, with the exception of memoranda, notes, statements and documents remitted by the parties within the framework of arbitration proceedings.*<sup>23</sup>

6) *Such authorization shall not be given unless the beneficiary has undertaken to respect the confidential character of the documents made available and to refrain from publishing anything based upon information contained therein without having previously submitted the text for approval to the Secretary General of the Court.*<sup>24</sup>

In the United Nations Commission on International Trade Law ('UNCITRAL') Rules, one would again find broad confidentiality parameters without any specific stipulation. Article 17(1) of the UNCITRAL Rules states that the arbitration should be conducted in such manner as the arbitral tribunal may consider appropriate. Accordingly, a fair and efficient process needs to be provided for resolution of the dispute. Article 28(3) of the UNCITRAL Rules stipulates that the hearing should be held *in camera* unless the parties agree otherwise. Additionally, Article 34(5) of the UNCITRAL Rules stipulates that the award could only be made public after the consent of all parties *or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.*

The UNCITRAL however, in 2013, came up with Rules on Transparency in Treaty Based Investor State Arbitration (the 'Rules on Transparency'). Article 2 of the Rules on Transparency mandates the publication of information relating to the arbitration on the commencement of such arbitration, i.e. the name of the disputing parties, the economic sector involved and treaty under which the claim is being made. Article 3 of the Rules on Transparency mandates certain documents to be made available to the public, including the statement of claim, the statement of defence etc. Article 6 of the Rules on Transparency stipulates that in ordinary course the arbitral proceedings shall be public, however in case of a confidentiality requirement or to protect the integrity of the arbitral process, arrangement could be made by the tribunal to hold such parts of the hearing in private. Additionally, in accordance with Article 7 of the Rules of Transparency, confidential and protected information, as defined in the Rules of Transparency or in any

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<sup>22</sup>*Ibid.*, art. 1(4).

<sup>23</sup>*Ibid.*, art. 1(5).

<sup>24</sup>*Ibid.*, art. 1(6).

agreement between the parties, should not be made available to the public. Further, Article 7(5) of the Rules of Transparency ensures that the respondent state is not mandated to make such disclosures that it considers contrary to its essential security interests.

The London Court of International Arbitration (the 'LCIA') and the Singapore International Arbitration Centre (the 'SIAC') it seems, are the only arbitral mechanisms that entail an express provision for confidentiality. Article 30 of LCIA deals with confidentiality and stipulates:

*30.1 The parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority.<sup>25</sup>*

*30.2 The deliberations of the Arbitral Tribunal shall remain confidential to its members, save as required by any applicable law and to the extent that disclosure of an arbitrator's refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal under Articles 10, 12, 26 and 27.<sup>26</sup>*

*30.3 The LCIA does not publish any award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal.<sup>27</sup>*

When one looks at the SIAC Rules 2016, Rule 39 expressly deals with confidentiality and stipulates that all aspects relating to the proceedings and the Award are to remain confidential. Any disclosure to a third party can only be done with the consent of the parties except in certain exceptional circumstances.<sup>28</sup>

Accordingly, it becomes clear that there is no uniformity when it comes to the aspect of confidentiality in arbitration rules that are preferred at the global level. The best strategy, therefore, to ensure confidentiality of the arbitration proceedings would be to have a separate confidentiality agreement which would then guide the confidentiality of the arbitration.

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<sup>25</sup>London Court of International Arbitration Rules 2014, art. 30.1.

<sup>26</sup>London Court of International Arbitration Rules 2014, art. 30.2..

<sup>27</sup> London Court of International Arbitration Rules 2014, art. 30.3.

<sup>28</sup> The Singapore International Arbitration Centre Rules 2016, rule 39.

The Indian legal regime provides an ambiguous and complicated mechanism in relation to confidentiality. While the Indian courts haven't specifically dealt with the aspect of confidentiality of arbitral proceedings, it appears on the basis of provisions of the Code and case law, that establishing confidentiality would entail tackling the 'relevancy' test, i.e. whether the document is relevant in deciding the dispute. Case law on this subject matter also indicates that Indian courts may not always tend towards decisions in foreign jurisdictions relating to similar subject matter. Accordingly, confidentiality enforced in a foreign jurisdiction might not always be upheld in the Indian legal regime, and therefore establishment of confidentiality in a foreign jurisdiction might not always prove to be fruitful in India.

With the Bill expected to be passed in the near future, should the parties choose Indian law as their governing law, the confidentiality of their proceedings would remain intact. Until such enactment takes place, the adjudication of this issue in Indian courts could go either way. Confidentiality being one of the major advantages of the arbitration regime, any issues arising in relation to enforcement of confidentiality would severely hamper the development of this regime in India and its popularity as a preferred forum for dispute resolution. Accordingly, a substantive ruling on this aspect is much needed to ensure clarity, particularly in view of the increase in the number of international arbitrations having related proceedings in India.

## THE FALLIBLE COMMERCIAL COURTS IN INDIA

Labeeb Faaeq\*

*Law has forever been intertwined with political exigencies, and many a times to an unrecognizable extent. Indian attempts at refining and re-structuring corporate laws especially with regards to the Commercial Courts have been discouraging so far. Over the years, law commissions have made potent recommendations on the basis of cogent analysis. But the subsequent governments have surprisingly missed redressing the actual issues and have only erred in pretending to care for development by establishing commercial courts. They have done so only to use this as a tool to raze political publicity. To understand the scope and extent of this failure, it is paramount to consider the interplay of the new courts with the existing civil structure, because the fallibility of the latter seeps into corrupting the efficiency of the former. This is more so because the legislature has not separated both the court systems but has merely added one to the pre-existing structure. This article studies the inherent advantages and disadvantages of the new 'The Commercial Court, Commercial Division and Commercial Division of High Courts (Amendment) Bill, 2018'. It does so while considering its interplay with the civil system. There are suggestions made, procedural as well as substantive, to make efficient the commercial courts in separation from the civil courts or to make both of them workable together.*

### Introduction

The upsurge of commercial transactions and the hysteria to encourage in-flow of foreign direct investment has moved Indian governments towards reforming the Indian Judicial System— a process which ultimately led to the promulgation of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Bill, 2015 via an ordinance approved by the then President, Mr. Pranab Mukherjee, which later became the Commercial Court, Commercial Division and Commercial Division of High Courts (Amendment) Act, 2018. The Act, though seemingly encouraging, when analysed closely along-with the status quo of the current judicial system, is fraught with many problems that hinder any substantive change to the apparently intended model of business-easy India. Mere procedural reforms seem to miss addressing many substantive and structurally inherent frailties of the Indian legal system itself, without consideration of which any such reforms seem like uneasy and unhelping patchwork to a structure that's dwindling on its pre-existing weak base. This paper will briefly trace the

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legislative history, analyse the changes in the procedures that are in some instances also accommodated in the Civil Procedure Code, and correspondingly critique it.

### **The Problems Ignored**

A trend has developed among foreign courts of undertaking jurisdiction in pre-dominantly Indian commercial disputes, citing forum non-convenience and the 'collapse' of the Indian judicial system because of excruciatingly long delays.<sup>1</sup> In response to such scathing, though valid, attacks and to facilitate trade, the first attempt of the Indian Government at redressal was the Commercial Division of High Courts Bill, 2009. It was not passed because of lack of support and contentions about flaws in the draft. The Law Commission had stated the pendency of 32,256 civil cases, out of which 16,884 were commercial disputes (2015).<sup>2</sup> Ignoring the real structural and infrastructural failures and paying heed to other aspects and exigencies, the 2009 Bill was revised to a great extent and re-introduced as an ordinance by the National Democratic Alliance government in 2015 which was later turned into an Act. The Act lays down the class of subject matters that fall under its jurisdiction and enumerates an exhaustive list.<sup>3</sup> A pertinent flaw in it is its restriction of the scope of disputes arising out of subscription and investment agreements to only those pertaining to the services industry. It leaves out a wide ambit of such disputes that may culminate from manufacturing or other secondary industries. The Act includes immovable property, if related to commercial activities and leaves such determination of jurisdiction to the Commercial courts themselves. These lacunae may further lead to confusion and thus subsequent litigation, paradoxically leading to an increase in unnecessary delays. Usually, new statutes do cause such temporary and necessary problems which may be removed by subsequent jurisprudence. However, the legislation could have avoided this jurisprudential delay. Rather than refining the provisions of subject matter jurisdiction, the Act seems to deal with it by ousting the scope of appeal against a finding where a Commercial Court exerts jurisdiction (S.115 of the Civil Procedure Code, 1908).

There should, however, be appreciation for many reforms made by this Act such as summary judgement. In this, the parties can make their claim on the basis that the other party has no substantial ground. This is done on the basis of a quick judicial determination of documents and

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<sup>1</sup> Prashant Reddy Thikkavarapu, "How the Government Used A Flawed Ordinance to Expedite Cases Dealing With Rs. 1 Crore Or More While Other Cases Remain Pending?" *The Caravan*, Nov. 6, 2015.

<sup>2</sup> Law Commission of India, 253<sup>rd</sup> Report on Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015 (January 2015).

<sup>3</sup> The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, s. 2(1)(c).

arguments, excluding a full-fledged trial and then a concluding decree (which is incorporated in Order XIII-A of the Civil Procedure Code). The Act also provides scope for interim relief. However, some interlocutory injunctions have been excluded from the ambit of being appealed against, to ensure avoidance of delay. This seems to be problematic. Justice does not only suffer death when excessively prolonged but is also choked by hastiness. The intention should not be speedy delivery of judgements anyhow— it should be justice delivery. Furthermore, the Act adopts a policy of discovery of evidence which is similar to the one in US.<sup>4</sup> This lacks regard to policies of confidentiality and privacy. It enforces production of documents on an oath of full disclosure of all relevant evidences. Thus, there is no consideration of privileged documents being ousted. This is not to suggest that documents should merely be granted exclusion from disclosure citing confidentiality, but rather to contend for a considerate evidence discovery rule. For example, a more Irish way of evidence production which involves judicial determination of documents being irrelevant and commercially sensitive.<sup>5</sup> If found so affirmatively, they are excused from being produced.

The Commercial Court, Commercial Division and Commercial Division of High Courts (Amendment) Bill, 2018 sets down a time limit of 120 days of filing defence arguments after which the right extinguishes. A period of six months is recommended to close the trial. There are also provisions in effect to penalise and weed out frivolous claims. These promising claims fall very short in their actualisation, because the necessary basic framework has not been catered to, leave apart being mended (these will be addressed later). Furthermore, the Act does not at all or sets out negligent penalties or repercussions for not following these timelines. Rather, because of these provisions and at the same time their failed attempts of quick redressal, the result leads to many disputes being settled outside courts in arbitrations or foreign courts. This is not to suggest that arbitration is necessarily the wrong alternative, but its prevalence should not be a justification for the Commercial Court system's fallibility. Moreover, sometimes one of the parties may not agree to the process of arbitration.

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<sup>4</sup> V. Srinivasa Raghavan, Avinaash Singh Gautama and Trisha Raychaudhuri, "Analysis of The Commercial Courts, Commercial Division And Commercial Appellate Division Of High Courts Act, 2015" *Induslaw*, Apr. 26, 2016.

<sup>5</sup> "Litigating Commercial Disputes in Ireland" *Matheson*, 2018, available at: [https://www.matheson.com/images/uploads/brexit/business/Litigating\\_Commercial\\_Disputes\\_in\\_Ireland.pdf](https://www.matheson.com/images/uploads/brexit/business/Litigating_Commercial_Disputes_in_Ireland.pdf), (Visited on October 16, 2018).

### Existing structural problems of the judicial system

The Law Commission had suggested an increase to 40,000 judges in India in the year of 1987.<sup>6</sup> In the year 2016, it was still a meagre number of 7,657. Even in the current strength, 4000 judicial positions are vacant.<sup>7</sup> This further gives excuses to lawyers to keep adjourning or delaying matters and the judges to acquiesce because of the excessive burden, thus, worsening whatever potential of improvement was possible by the reform. The Act lays down the establishment of Commercial Divisions and Commercial District Courts in states, the former where High Courts exercise original jurisdiction (Delhi, Madras, Calcutta, Mumbai and Himachal Pradesh) and the latter where the High Courts do not. Moreover, there is also an appellate commercial division. They could have been made separate from the High Court's system, as there were already commercial benches in many high courts, but they were re-created as part of the existing structure. The idea was to ensure speedy justice delivery; it was to be achieved by appointing new judges who were to be experts and trained in commercial disputes.

### Appointment of judges

There is also the problem of efficient dispute resolution. The Act does not explicate, in clear terms, about the eligibility of the judges to be appointed. It just mentions in vague terms, apart from other normal criteria, 'experience in commercial matters', which may hamper judicial efficiency. In the 2015 ordinance, the judges could only be appointed with the 'concurrence' of the Chief Justice of the state. But after the 2018 amendment, the state government can appoint without the said concurrence. This even throws substantial constitutional questions into the fray with regards to judicial independence and separation from the executive. In practice, judges of the already diminished and over-burdened judicial system are re-allocated these posts. Senior Counsel Janak Dwarkadas' observations are apt to describe this situation wherein he states that, "It is unfair to expect the same set of judges to take on additional burden with a requirement of law that it is time-bound. They will give this priority [over other cases]. In England and other countries, there are specialised courts, specialised judges and specialised lawyers (for this). Here, we are all jacks-of-all-trades".<sup>8</sup> The same judicial incapacity was re-iterated by the then Chief Justice of India, Justice T S Thakur, in his speech at the 50<sup>th</sup> Anniversary Event of the Delhi High Court. The grim reality shows mere aesthetic reforms in the commercial arena of dispute

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<sup>6</sup>Law Commission of India, 120<sup>th</sup> Report on Manpower Planning in Judiciary: A Blueprint (July 1987).

<sup>7</sup> Pradeep S. Mehta, "When nothing is resolved in court" *The Hindu (Business Line)*, Jan. 24, 2018, available at: <https://www.thehindubusinessline.com/opinion/columns/when-nothing-is-resolved-in-court/article7404285.ece> (Visited on October 17, 2018).

<sup>8</sup> Sonam Saigal, "Legal Eagles Divided on Commercial Courts" *The Hindu*, Oct. 18, 2016.

resolution, rather than substantive ones. The model of French Commercial Courts, with some modifications, could be taken as something to strive towards. Their courts have been remarkably efficient since the 1560s and still stand the test of time. Judges there are selected on a voluntary basis. Elected judges are not always lawmen but rather tradesmen selected by other tradesmen. This issue may be argued to say that such selection fosters partiality, but the sort of appointment that is being suggested is closer to that of appointments of arbiters (by mutual consent) or by some institution designed for the said task of appointment. The exact specifics are irrelevant, the larger point being that even if the judiciary makes the appointments, focus should be on mercantilist needs.<sup>9</sup> Hence, trade-peers are more inclined towards and aware of specific business needs and practices. However, such an extreme stance should not be adopted. It should be a combination of formal appointment but considerate of specific commercial and transactional acumen.

### Other Glaring Problems

The 2015 Act had initially laid down the pecuniary jurisdiction to be applicable to cases only above Rs. 1 Crore, which led to varying accounts of complaints. Some considered it to be too low, thus betraying any notion of decreasing the burden and therefore delays in dispute resolution,<sup>10</sup> whereas others considered it to be merely ignorant of the sections of societies that engage in business transactions below Rs. 1 Crore, which is a substantial portion of the population in India. The effort should have been in increasing the efficiency of the judicial system, not decreasing the accessibility to it. But rather, in the Commercial Court, Commercial Division and Commercial Division of High Courts (Amendment) Bill, 2018, only the latter was addressed (by reducing the pecuniary value to Rs. 3 Lakhs from Rs. 1 Crore) whereas the former was ignored. While principally correct, this is practically going to worsen the predicament. This pecuniary-value jurisdiction is granted to both the District Court and the District Division (in states where both exist) and there is no differentiation with regards to the specific value. When both co-exist, the value could have been varied vis-à-vis applicability of suits to division courts and district courts, as suits in both fora are appealable to the appellate division. There is also a lacuna with regards to whether *res judicata* is applicable where both the district court and district division try the same dispute, as technically and after a *prima facie* statutory reading, it seems to be that both can. The explicitness of legislative and administrative ignorance by simply blaming

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<sup>9</sup> Nicole Stolowy, "How France's Commercial Courts Stay Relevant through the Centuries" *HEC Paris*, Jun. 14, 2017, available at: <https://www.hec.edu/en/knowledge/articles/how-frances-commercial-courts-stay-relevant-through-centuries> (Visited on October 16, 2018).

<sup>10</sup>N. Sundaresha Subramanian, "Making Commercial Courts Work" *Business Standard*, Jan. 10, 2016.

the legislative culture and judicial laziness of Indian judges throws substantial doubt upon the intent of easing business, as promised by the governments, and does not help the cause.

The new section 12A of the Act lays down provisions of Pre-Mediation processes, in cases where parties are not in a hurry and are ready to clear their disputes by internal amicable solutions. Firstly, this seems like an attempt to re-course such disputes and direct them away from the Commercial Courts system. Secondly, if internal amicable settlements were existing possibilities, why would the parties then take recourse to this provision or any help under the new Act? The former is merely an escapist recourse to neglect or simply deny the problems that prevail and are central to redressing the basic structure of the judicial system, by re-routing the disputes away from it. There is another promising provision that comes from this Act. It is that of mandatory case management hearings that call for setting dates for trial, filing arguments and framing issues in a timely basis, but it remains restricted to being mere recommendatory provisions that doesn't get etched into actual practice. The backlog of cases and many-a-times lawyers' intentional tactics of delaying proceedings to cause harassment to other parties distort beyond reproach this rather promising provision by enforcing uncalled-for flexibility. It has also been pointed out that the legislations and provisions do not contemplate incorporation of e-facilities which would have propelled disputes' determination, and also heightened transparency.

### **Conclusion**

Though the pecuniary limit has been decreased, the elusiveness of the commercial judicial machinery seems to still haunt large masses of the population. The workability of commercial courts depends on its independence from the main-frame judiciary as well as its relationship with it on many instances (transparency, training and expertise). E-resources need to be enhanced and introduced. The judicial strength and accountability have to be increased substantially. The practice of training and appointing commercial-transaction experts should be incorporated. These require actual substantive reform from the legislature rather than mere politically motivated, artificial and superfluous enactments. The other relevant provisions (Arbitration and Conciliation Act, 1996 or the Civil Procedure Code, 1908) have to be streamlined with similar alterations in the Commercial Courts Act. The procedural changes that have been included do bring forth very promising possibilities, but that is subject to repairing the existing basic-structure so as to allow this stream of speedy and efficient justice delivery to flow, or creating a new one, specifically for this. Rather than making further alterations in the procedures (though there is scope for improvement), the focus should be on ensuring the execution of already existing reforms. Only when these structural reforms and the legal machinery have been repaired,

can Commercial Courts be imposed upon it, should we choose to make it part of the same structure. Otherwise, we will end up searching for solutions to factors that are not the problem in the first place and miss paying heed to the actual shortcomings.

## CIVIL PROCEDURE MEDIATION RULES, 2003: REVISITING THE ETHICS OF THE EIGHTEENTH CAMEL IN INDIA

Aman Bahl\*

*With the turn of the century, alternate dispute resolution has become a popular way of settling disputes. Mediation is one such leading method used to reach amicable results. This essay discusses the process by which mediation along with other methods gained popularity over the past decade and the legislatures intent to do so. While mediation is an appropriate mechanism of reaching the end goal of settlement, it is important that the mediator maintains high standard of conduct. Keeping this in mind, it primarily focuses on the ethics of a mediator and the various standards formulated across jurisdictions. Lastly, the author argues for ethics grounded in the context of particular areas, which do not focus on the mediator alone and which remain open to a wider set of social considerations.*

### **A: Introduction:**

#### **The Eighteenth Camel:**

In the western part of India, on the edge of the Thar Desert lived a wise old lady who served as a peacemaker for her village and was frequently consulted when disagreements arose. One day a wealthy camel herdsman died, leaving his seventeen camels to his three sons. The three sons decided to visit the old lady to seek her advice on the terms of their father's will. The will distributed the camels to the sons in specific proportions: one-half to the eldest, one-third to the middle son, and one-ninth to the youngest. Seemingly indecisive of the suitable solution, the lady asked the sons to accept a loan of one camel from her, to go home, think over the specifics of the will again, and return the camel to her on the very next day. Greatly dissatisfied with the solution, the sons decided to take the camel and head home.

On their way home, the youngest son jumped in excitement and stated that they now had eighteen camels. They divided the camels according to the wishes of their father: the eldest son got nine; the second son got six; and the youngest got two, making it a total of seventeen. Once

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they divided the herd, they returned the eighteenth camel back to the wise lady and thanked her for her assistance.<sup>1</sup>

Of the several fables that have existed over the past decades, the Eighteenth Camel is the most popular. First, it illustrates the powerful technique of integrative bargaining and second, it captures the importance of third-party involvement to attain a desirable solution. Through this essay the author seeks to discuss the magnitude of alternate dispute resolution, its history and growth in India with particular focus on mediation. Part B of this essay seeks to state that the ethics of a mediator plays a crucial role for a fruitful mediation. Part C studies three different mediator standards, namely, the Model Standards of Conduct for Mediators, 2005,<sup>2</sup> General Ethical Code<sup>3</sup> and the Civil Procedure Mediation Rules, 2003.<sup>4</sup> The last part of the essay illuminates certain aspects of mediation that need more clarity for its application in India.

### **B: Development of Mediation in India:**

In the last few years, the tremendous increase in the amount and complexity of litigation has overburdened the judicial system in India. This persistent increase has resulted in crowded dockets, delays, and assembly-line adjudication that has put the judicial system under immense pressure.<sup>5</sup> This problem of the “crowded courtroom” syndrome has received the attention of all levels of the judicial system.<sup>6</sup> At first the response to this major problem was an increase in the number of courts, judges and other court-related personnel, however, this immensely drained the public exchequer. The legislators were compelled to consider alternative means to settle disputes through arbitration, mediation and conciliation.

The Law Commission of India studied the problem in detail and issued a working paper specifying the areas of urban litigation where reform is not only overdue but also urgently needed.<sup>7</sup> These concerns were studied by Hon’ble Chief Justice A.M. Ahmadi, and its outcome was implemented in the form of several amendments to the Civil Procedure Code of 1908.<sup>8</sup>

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<sup>1</sup> The story of the 18<sup>th</sup> Camel, a fable from the Middle East has been adapted to express the significance of mediation. Hiram E. Chodosh, *The Eighteenth Camel: Mediating Reform in India* 9 *German L.J.* 251 (2008).

<sup>2</sup> Model Standards of Conduct for Mediators (American Arbitration Association, American Bar Association, And Association For Conflict Resolution) [Hereinafter Standards].

<sup>3</sup> General Ethical Code (Hong Kong International Arbitration Centre) [Hereinafter Code].

<sup>4</sup> Civil Procedure Mediation Rules, 2003 (Government of India) [Hereinafter Rules].

<sup>5</sup> Hiram E. Chodosh, *Indian Civil Justice Reform: Limitation and Preservation of the Adversarial Process* 30 *NYU Journal of International Law And Politics* 1 (1998).

<sup>6</sup> Kenneth J. Rigby, “Alternate Dispute Resolution” 44 *Louisiana Law Review* 1726 (1984).

<sup>7</sup> Law Commission of India, 129<sup>th</sup> Report on Urban Litigation Mediation as Alternative to Adjudication (1988).

<sup>8</sup> The Civil Procedure Code, 1908 (Act 5 of 1908).

Among these amendments, Section 89 and Order X (1A)<sup>9</sup> introduced modes of amicable, peaceful and mutual settlement between parties without the intervention of the court. This amendment empowered the court to refer the parties for settlement wherever it was deemed possible. It was for the first time in India that the court legally recognised the concept of referring parties to alternative dispute resolution processes post litigation. These provisions, drawn from the conciliation provisions of the Arbitration and Conciliation Act (1996),<sup>10</sup> are based on the UNCITRAL model law, itself derived mainly from European practice of conciliation.<sup>11</sup>

Shortly after being implemented, the Tamil Nadu Bar Association brought a constitutional challenge in the case of *Salem Bar Association, In Re*<sup>12</sup> following which the Supreme Court upheld the constitutionality of the law and established a five-person committee to study the reforms and to make recommendations to facilitate their implementation. This committee presented a report known as the Malimath Committee Report which provided for various amendments which included the introduction of the Mediation rules.<sup>13</sup> These rules were later constituted as the Civil Procedure Mediation Rules, 2003.<sup>14</sup> In 2005, The Supreme Court affirmed the decision in *Salem Bar Association*<sup>15</sup> and stated that the newly constituted rules must be applied mandatorily in courts.

The draft rules introduced under clause 4 of section 89 known as Civil Procedure Mediation Rules, 2003 provide for twenty-eight rules, which highlight important regulations that the mediator needs to follow during the mediation process. These regulations include the procedure for appointment of the mediator, validity of other Statues during the resolution process, duties that need to be performed and ethics that need to maintained by the mediator, among other rules. The next part of the essay will focus primarily on the ethics of a mediator should maintain during mediation.

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<sup>9</sup> The Code of Civil Procedure (Amendment) Act, 1999 (Act 46 of 1999).

<sup>10</sup> The Arbitration and Conciliation Act, 1996 (Act 26 of 1996).

<sup>11</sup> The UNCITRAL Model Law on International Commercial Arbitration was prepared by UNCITRAL, and adopted by the United Nations Commission on International Trade Law in 1985. In 2006, the model law was amended to include provisions of interim measures.

<sup>12</sup> *Salem Advocate Bar Association v. Union of India*, (2002) 8 SCC 35.

<sup>13</sup> Malimath Committee Report, Chapter VIII, p. 112 (1990).

<sup>14</sup> *Supra* note 1.

<sup>15</sup> *Salem Advocate Bar Association II v. Union of India*, (2005) 6 SCC 344.

### **C: Ethics of a Mediator:**

Dean Rusk<sup>16</sup> rightly stated that “One of the best ways to persuade others is with your ears — by listening to them.” Mediation is one such process of dispute settlement process wherein a third person interferes between two contending parties with a view to reconcile them or persuade them to adjust or settle their dispute.<sup>17</sup> In other words it refers to voluntary and structured negotiation process where a neutral third party assists the parties in amicably resolving their dispute by using specialized communication and negotiation techniques. In this process, the parties retain their right to decide matters of the dispute among themselves. Mediation being a completely voluntary process, the parties retain control over the outcome of the dispute and the mediator only facilitates their communications and negotiations.<sup>18</sup>

Mediator ethical standards are defined in relation to the mediator’s duties to the parties, to the process, to non-parties, and to other professionals. Several professional dispute resolution organizations currently publish mediator standards. In the United States of America, three organizations—the American Arbitration Association, the American Bar Association, and the Society of Professionals in Dispute Resolution jointly publish a set of ethical standards for mediators called the Model Standards of Conduct for Mediators (hereinafter Standards).<sup>19</sup> Similarly, in Hong Kong there exists General Ethical Code (hereinafter Code) published by the Hong Kong International Arbitration Centre.<sup>20</sup> The Indian Parliament introduced similar ethical standards under rule 27 of the Civil Procedure Mediation Rules, 2003 (hereinafter Rules).<sup>21</sup>

Under the said rule, the mediator should be impartial while performing his duties, his interest should not conflict with either of the parties, he should be competent to oversee the process and he is also expected to maintain confidentiality while upholding high standards of quality during the mediation process. These duties are further discussed below:

#### **Impartiality:**

Impartiality is a concept central to the mediation process. The rule requires the mediator to ‘uphold the integrity and fairness of the mediation process’.<sup>22</sup> The mediator is required to be

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<sup>16</sup> David Dean Rusk was the United States Secretary of State from 1961 to 1969 under presidents John F. Kennedy and Lyndon B. Johnson.

<sup>17</sup> Bryan A. Garner, *Black’s Law Dictionary*, 1098 (Thomson Reuters West, 9<sup>th</sup> ed., 2009).

<sup>18</sup> *Supra* note 6.

<sup>19</sup> *Supra* note 2.

<sup>20</sup> *Supra* note 3.

<sup>21</sup> *Supra* note 4.

<sup>22</sup> *Ibid.*, rule 27, cl. 3.

impartial while performing his duty, failure of which would require him to withdraw from the proceedings. The concept behind this rule is to avoid conduct that is partial or gives the appearance of partiality toward one of the parties. This rule prevents favouritism during the mediation process and further enables a fair and just settlement. It is common to suspect that a mediator's relationship with one or more of the parties can lead to partiality.

The requirement of being impartial is also found in the Standards.<sup>23</sup> They are similarly premised on the belief that in order to have an appropriate self-determined process, the parties must have the requisite physical and mental capacity to engage in a process of dispute resolution.<sup>24</sup> In a situation where there may be a disparity of power or disparity in terms of knowledge, the mediator may have to terminate the mediation if the mediator feels that he is unable to provide assistance in a neutral manner. Similarly, where the mediator discovers that a party has lied or acted fraudulently during the mediation, the mediator may be required to cease the mediation.<sup>25</sup> The Code also states the same under the responsibilities that the mediator has towards the parties.<sup>26</sup>

### **Conflicts of Interest:**

All actual and potential conflicts that are reasonably known by the mediator to cause a conflict and any matter that questions his neutrality should be disclosed by him. Specifically, the mediator is required to disclose any current or past personal or professional relationship with any party or lawyer involved in the mediation.<sup>27</sup> Non-disclosure could directly or indirectly affect the financial or personal interest of the parties or mediator involved. The rule recognizes that mediation is based on principles of self-determination by the parties and that mediation process relies upon the ability of parties to reach a voluntary, undisclosed agreement.<sup>28</sup>

Under the Standards, there exists a continuing obligation by the mediator to disclose relevant information to the parties. The Code interestingly requires that after disclosure by the mediator, the mediator must decline to mediate unless all parties choose to retain him.<sup>29</sup> When compared to the Standards prescribed in the United States and the Mediation Rules in India, this is unique only to the Code.

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<sup>23</sup>*Supra* note 2, standard II.

<sup>24</sup>Loretta W. Moore, Lawyer Mediators: Meeting the Ethical Challenges 30(3) *Family Law Quarterly* 681, 679-726 (1996).

<sup>25</sup>*Ibid.*

<sup>26</sup>*Supra* note 3, s. B.

<sup>27</sup>*Supra* note 4, rule 27, cl. 10.

<sup>28</sup>*Supra* note 6.

<sup>29</sup>*Supra* note 3, rule 2.

**Competence:**

The Rules do not distinguish between mediators from the legal fraternity and other professional mediators in regard to the competence necessary to oversee the mediation process. Under the Rules, any person can be nominated as a mediator provided the parties are satisfied with the mediator's qualifications. The mediator must have at least fifteen years of experience standing at the Bar at the level of the Supreme Court, the High Court, the District Courts or Courts of equivalent status or be an expert in the required field.<sup>30</sup> The Standards require that the mediator must have the training, experience in mediation, skills, cultural understandings and other qualities necessary for mediation. It is the duty of the mediator to attend educational programs and related activities to maintain and enhance his knowledge and skills related to mediation and lastly, make available this information if demanded by the parties.

**Confidentiality:**

One of the most important pillars of mediation is confidentiality. The mediator is required to be faithful to the relationship of trust and confidentiality - "A sense of trust that is necessary to the workings of a mediation proceeding."<sup>31</sup> It is the privacy of mediation that makes possible the exploring of possibilities of settlement. It makes possible the discussion of potentially sensitive information. The expectations of confidentiality depend on the circumstances of the mediation and any agreements the parties make during the mediation process. The Standards require a mediator to meet both sides "reasonable expectations" of confidentiality.<sup>32</sup> The parties are free to make their own confidentiality agreements, however even in the absence of this agreement the mediator is required to maintain reasonable expectations of confidentiality.<sup>33</sup> The Code further adds that the mediator shall inform mediation participants the special confidentiality that attaches to private meetings between either of the parties and the mediator.

**Quality of the Process:**

In order to ensure an effective process, the mediator must commit to ensure quality of the process. This requires a commitment to procedural fairness and an adequate opportunity for each party in the mediation to participate in the discussions.<sup>34</sup> It is his duty to ensure that the

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<sup>30</sup>*Supra* note 3, rule 4.

<sup>31</sup>*Supra* note 4, rule 27, cl. 8.

<sup>32</sup>*Supra* note 2, standard V.

<sup>33</sup> Joshua P. Rosenberg, Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws 10 *Ohio St. J. on Disp. Resol.* 157 (1994).

<sup>34</sup>*Supra* note 2, standard VI.

decisions made by a party must be free of coercion, and at any time the mediator feels that the decisions made by the party are not voluntary, then he may even suspend the mediation process if required. The mediator may also withdraw if he notices that either of the party is unable or unwilling to participate effectively in the mediation process.

It is the duty of the mediator to promote diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants. The Rule states that the mediator is required to satisfy himself that he is qualified to undertake and complete the assignment in a professional manner before undertaking the mediation process.<sup>35</sup> The Code also explicitly states that the mediator shall not engage in any non-meditative role relative to the subject matter of a mediated dispute.<sup>36</sup> The exception to this is when the mediator, by the informed written consent of all participants, engages in a non-meditative role.<sup>37</sup>

#### **D: Conclusion and Suggestions:**

The World Intellectual Property Organisation conducted the 'International Survey on Dispute Resolution in Technology Transactions'.<sup>38</sup> They noted that ninety-four percent of Respondents indicated that negotiating dispute resolution clauses forms part of their contract negotiations. It was observed that Court litigation was the most common stand-alone dispute resolution clause (32%), followed closely by arbitration (30%) and then mediation (12%). Mediation also formed an important part of multi-tier clauses (17% of all clauses) prior to court litigation and arbitration among others.<sup>39</sup>

Considering the increasing popularity of mediation, it is essential that the process is properly governed. When the Rules are compared to the ethical standards maintained in different jurisdictions across the globe, it is noted that they lack in certain ways. They do not provide clarity on the following aspects:

Advertising and Solicitation: The Standards state that a mediator shall be truthful in advertising and solicitation for the Mediation process.<sup>40</sup> However, the Rules are silent on the procedure and

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<sup>35</sup> Civil Procedure Mediation Rules, 2003, rules 3 and 4.

<sup>36</sup> *Supra* note 29.

<sup>37</sup> *Supra* note 3, sec. C, cl. 6.

<sup>38</sup> World Intellectual Property Organisation, International Survey on Dispute Resolution in Technology Transactions Online, available at: <http://www.wipo.int/amc/en/center/survey/results.html> (Visited on Oct 07, 2018).

<sup>39</sup> *Ibid.*

<sup>40</sup> Omer Shapira, A Critical Assessment of the Model Standards of Conduct for Mediators (2005): Call for Reform 100 *Marq. L. Rev.* 81 (2016).

aspects the same. Justice Krishna Iyer rightly stated that “the canons of ethics and propriety for the legal profession totally taboo conduct by way of soliciting, advertising, scrambling and other obnoxious practices”.<sup>41</sup> In the author’s opinion, the Rules should provide for detailed guidelines regarding the advertising and solicitation of the mediation process in order to preserve ethical standards of the mediator.

Abuse and Misuse of Power: A mediator is expected to terminate the mediation if there are reasonable grounds to believe that any party to the mediation is abusing the process. If the mediator notices that the purpose of the mediation process to deliberately delay proceedings, achieve an unfair advantage or pursue an illegal or objectionable purpose, then the mediator should have an ethical duty to terminate the proceedings.<sup>42</sup> If the Rules provided for the same, the mediator would be empowered to carry the process efficiently.

Keeping in mind the two suggestions it is noteworthy that India is a developing country. The developed countries of Germany and France are examples of countries where the access to courtrooms is relatively quick and the need for third-party mediators does not exist.<sup>43</sup> It is logical to conclude that a large number of developing countries will see mediation as one of the primary tools to resolve disputes where the practice has yet to take hold and court cases are slow and expensive.<sup>44</sup> Considering a developing country like India, commercial mediation will experience a slow but steady growth in the next few decades. In these scenarios it is rightly stated that ‘an ounce of mediation is worth a pound of arbitration and a ton of litigation.’<sup>45</sup> Therefore, it is essential that the Mediators give importance to ethical values and help India become a central hub for Mediation in the future.

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<sup>41</sup>Bar Council of Maharashtra v. M. V. Dabholkar, 1976 AIR 242.

<sup>42</sup>*Supra* note 3, s. D.

<sup>43</sup>Helmut Kury & Annette Kuhlmann, Mediation in Germany and Other Western Countries4 *Kriminologijos Studijos* 31, 5-46 (2016).

<sup>44</sup>*Supra* note 1.

<sup>45</sup> Mediation Training Manual of India, Mediation and Conciliation Project Committee, Supreme Court of India, Delhi, iii. available at: <https://www.sci.gov.in/pdf/mediation/MT%20MANUAL%20OF%20INDIA.pdf> (last visited on Oct 15, 2018).

