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PRINCIPAL'S MESSAGE

I am glad to present the 6th annual volume of the ***Abhivyakti Law Journal*** to the legal fraternity.

The boundaries of the law are ever expanding. It regulates the land, high seas and space. A law student is on her journey to explore new dimensions of law to reach the final destination – 'Justice'. Critical analysis of Law, its theory and practice is an inescapable part of the journey. A systematic, scientific critiquing helps reach the final destination.

It is heartening to note that many students have started exploring dimensions of law. Topics like Death Penalty, Cultural Prejudices of Patriarchy, Acid Attacks, Access to Knowledge by Persons with Disabilities deal with various laws in the context of human rights. They have also chosen topics like Arbitration, Competition Law, IPR, Internet which are realities of the commercial global village in which all of us are living.

All student authors deserve a pat on their back for using the platform 'Abhivyakti' – which means 'expression'. No other person will understand the value of freedom of 'expression' better than the law students themselves.

I am sure that student writers will inspire the rest to join their exploration and express themselves.

Thank you.

Smt. Vaijayanti Joshi
Principal, ILS Law College, Pune

EDITORIAL

It gives us great pleasure to present the *"ABHIVYAKTI Law Journal."* It has become a formidable instrument in taking the standard of legal research and writing in ILS up by several notches.

Never willing to rest solely on its laurels and tales of past glory, the ILS Journal has evolved over the years. The Editorial Board has been committed to achieve a higher literary standard with each edition. This edition has short and long works on very significant topic, which is not only interesting but also thought provoking.

Quality legal research and standard publications constitute one of the quintessential of a leading legal institution. At ILS, we believe in inculcating skills of research and clarity of exposition. The primary objective behind the inception of the *ABHIVYAKTI Law Journal* is to provide a forum to writers, enabling them to voice their opinions on all aspects of law, though special emphasis is placed on contemporary developments. Apart from that the Law Journal promotes and endeavours to foster a culture of serious academic research and writing amongst the students through a structured process of mentoring and supervision.

The publication is deeply indebted to our Principal Vaijayanti Joshi who with inimitable generosity pledges undying support to it, year after year. We also extend our heartfelt thanks and gratitude to our Faculty Members, Contributors and well-wishers for their consistent support and contribution to the Journal.

We believe in open access to knowledge and will strive to make the journal as widely accessible as possible. We hope our readers will appreciate reading the Journal as much as we have valued putting it together. We are proud that *ABHIVYAKTI* Law Journal has been registered and assigned ISSN number: ISSN 2348 -5647. We sincerely hope this initiative benefits our students and all readers.

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COPYRIGHT INFRINGEMENT IN CYBERSPACE

*Arnavi Panda & Ritika Chatterjee**

INTRODUCTION

The ability of the computers to share data with other computers has led to a major telecommunication revolution. This concept of networking has led to the advent of cyberspace. With the advent of the internet new problems in the field of intellectual property law has arisen. The cyberspace/internet is the international system for transmission and reproduction of material much of which is protected by copyright and therefore presents many previously unimagined possibilities for copyright infringement. Copyright Law provides long term protection for "original forms of expression".[1] The protection afforded under the copyright law encompasses not only literary, musical, artistic and dramatic works but also includes computer software and materials made available over the internet which includes either material or digital forms of work.[2]

When faced with the issue of copyright infringement it is pertinent to consider the works in which copyright exists. The Indian Copyright Act, 1957 covers these two important aspects under Section 51 and Section 14 and it is essential to read both of them in consonance. Section 14 of the Act specifies "copyright" as an exclusive right to do or authorize to do any act, by storing it in any medium including electronic means and communicating the same to the public.[3] Infringement of a copyright would therefore mean, engaging in activity enumerated under Section 14 without the prior authorization of the owner of copyright.[4] The important aspect that needs to be considered is the meaning of the phrase communication to public. The Indian Copyright Act defines the phrase "communication to the public" as making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display and this definition is broad enough to encompass even the internet.[5] This communication can happen in various forms, some of the most

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1 P.Narayan, *Copyright and Industrial Design*, (Edition), Eastern Law House.
2 Karnika Seth, *Cyber Laws in the Information Technology Age*, 321 (1st Ed., LexisNexis Butterworths Wadhwa, 2009).
3 Copyright Act 1957, Section 14
4 *Supra* note 1
5 Copyright Act 1957, Section 2(ff)

common methods of online infringement and includes linking, framing, uploading and downloading of copyright material.[6]

METHODS OF INFRINGEMENT IN CYBERSPACE

(i) Linking:

Linking is primarily of two types - hypertext linking and inline linking. A hyper-text link usually appears as highlighted text which when clicked by the user gets activated enabling the browsing software to retrieve the website and creating a copy of it before displaying the same on screen. In such cases, connection with the local site terminates the moment the browser establishes a connection with the linked site and URL changes from the local website to the source website.[7] In Shetland Times Ltd v. Wills[8] where the defendant reproduced and published headlines verbatim from the claimant newspaper on his website and the Internet user could gain access to the relative text in the Times, by passing the front page of the Times, the court held this activity was an infringement of literary work in an electronic form.[9] The court granted the claimant an interim interdict for copyright infringement.[10] The explanation 1 to section 2(ff) of the Indian Copyright Act, 1957 provides to include any communication through satellite or cable. Therefore, this definition covers the contents of a web site on internet by virtue of expression "by any means of display". Linking thus also comes within the ambit of Indian copyright law and if it causes detriment to the website, the owner may take recourse to legal remedies under the Copyright Act, 1957. It is therefore essential to take the permission of the owner of the website before linking deep in to any site. Inline linking as opposed to hypertext linking, the local website continues to remain current, the URL does not change and the user is led to believe that the linked image forms a part of the local website.[11] Framing, similar to inline

[6] Lindsay, D., 'Copyright Infringement via the Internet: the Liability of Intermediaries' (Research Paper No. 11, May 2000, Centre for Media, Communications and Information Technology Law-A Specialist Research Centre of the Law School, The University of Melbourne)

[7] Chan, R., "Internet Framing: Complement or Hijack?", (1999) 5 Mich. Telecomm. Tech. L Rev 143 at 146

[8] [1997] F.S.R. 604 (OH)

[9] *Ibid.*, at 606

[10] *Ibid.*

[11] *Supra* note 7

linking allows the designer to incorporate an entire external site or portions of it and modify it to suit his own frame which might be a creation of his own. This would amount to a blatant infringement of the author's adaptation rights as provided under Section 14(a)(vi) of the Act. The practice of in-lining and framing also create moral issues wherein the infringer may mutilate and modify the original content of the owner without any express permission from the owner and this will be considered a violation of section 57(2) of the Copyright Act. In Washington Post Co. v. Total News Inc.[12], Total news operated a website providing links to web-sites of many news purveyors including the Washington Post, Time Cable News Network (CNN), times Mirror, Dow Jones and Reuters. By clicking on the links, the web-sites of these news purveyors were displayed in the frame of Total News. The frame contained the 'Total News' logo Total News URL and advertisements managed by Total News. The claimants brought an action against the defendant alleging copyright infringement and succeeded. Even in the Leslie A. Kelly v. Arriba Soft Corporation (Kelly I), the court held that the defendant's inline linking and framing the claimant's image within its website amounted to communication to public and infringed the claimant's public display rights.[13] The risk with each of these types of linking is therefore, the users are led to believe that either the linked sites are connected or they are unable to identify and often misled regarding the origin of the information.[14] This act clearly amounts to infringement of all existing Copyright Laws.

(ii) Downloading:

Addressing the issue of downloading of copyright material, 'downloading' is the electronic transfer of information from one database to another including that from an online database service through one's own local microcomputer.[15] Since the transmission of copyrighted material is very easy over the internet therefore many internet users conveniently assume that if a material is available

[12] No. 97 Civ. 1190 (PKL), (S.D.N.Y., filed February 20, 1997)

[13] 280 F. 3d 934 (9th Cir. 2002) at 944-947

[14] Cordell, N. and Bellau, K., "Combating online trade mark infringement in the UK", DLA Pipers Technology, Media & Communications Group

[15] http://www.publications.drdo.gov.in/ojs/index.php/djlit/article/viewFile/3227/1676

electronically, this entitles them to upload it to their own websites thus submitting it in the public domain. Once the unauthorized copyright material has been uploaded, it opens a Pandora's Box for innumerable internet users to download this copyrighted material without the authority of the copyright owners which results in duplication of information during the transmission of the information on the internet which subsequently results in creation of a unauthorized copy of the work is created in the RAM of the users computers. The liability for such download is usually pinned on those parties who provide the end users the equipment and the facilities[16] for such infringing activities in the form of illegal software such as online advertisements newsgroups bulletin board service and auction sites. In the landmark case of PlayBoy Enterprises Inc v/s Frena wherein the Defendant's subscribers downloaded unauthorized photographs of playboy enterprises to a bulletin board system, the US Court held that the plaintiff's exclusive right of distribution was infringed by customers of the defendant. Bulletin board operators therefore had an obligation to ensure that their systems were not being used to display and download copyrighted materials by their customers.[17] In A & M Records, Inc. v Napster, Inc.[18], Napster facilitated the transmission of MP3 files between and among its users. The company distributed its file sharing software for free via its website. Through a process called peer-to-peer (P2P) file sharing, its users could search and share MP3 music files that were catalogued on Napster's central server. These files could be downloaded directly from users hard drives over the Internet.[19] The defendant company and other record companies brought copyright infringement action again Napster in the US District Court for the Northern District of California. The court held that Napster users who downloaded files containing copyrighted music directly infringed the claimants reproduction rights.[20] As for contributory infringement, the evidentiary record showed that Napster knew or had reason to know of its users infringement of claimants copyrights. Napster also

[16] Lloyd, I.J., *Information Technology Law*, Oxford University Press, 5th ed., 2008, at 401
[17] 839 F. Supp. 1552 (M D Fla 1993)
[18] 239 F. 3d 1004 (9th Cir. 2001).
[19] *Ibid.*, at 1011-1013
[20] *Ibid.*, at 1013-1014. And Napster users who uploaded file names to the search index for others to copy directly infringed claimants' distribution rights

provided the site and facilities for direct infringement, thus providing the required material contribution necessary to establish contributory infringement.[21] Further, in Metro-Goldwyn-Mayer Studios, Inc. (MGM) v Grokster Ltd[22], Grokster Ltd and Streamcast Networks Inc, two defendants, distributed such P2P software, which enabled users to download music, film or other digital files. MGM and other copyright owners sued the defendants for copyright infringement, alleging that defendants intentionally distributed the software to enable users to reproduce and distribute copyright works without the authorization of the copyright owners. The US Supreme Court relied on the doctrine of inducement and held that there would be an infringement of copyright law where a software developer or distributor provides individual with the means to share copyrighted filed without authorization.[23] Similar was the case even in Universal Music Australia Pty Ltd v Sharman License Holdings Ltd[24] wherein thirty Australian and international record companies brought an action in the Federal Court of Australia against Australian-based operators of the Kazza system for authorizing copyright infringement carried out by end users.[25] The Australian court found the defendants liable for authorizing the infringing acts of Kazaa users under the Australian Copyright Act 1968. Infact, the Dutch Court of Appeals at Amstredam in BUMA & STEMRA v Kazaa[26], also upheld that Kazaa had violated national copyrights by facilitating and encouraging download of copyright protected material without prior authorization by the owner and this was a clear violation of the owner's publication and reproduction right.[27]

(iii) Uploading:

Regarding uploading of copyright material, the landmark of judgment of Sega Enterprises Ltd. v. MAPHIA[28] makes the position of courts abundantly clear. Sherman, a Bulletin Board Operator by the

[21] *Ibid.*, at 1019-1022
[22] 125 S.Ct. 2764 (2005) (Sup. Ct. U.S.)
[23] *Ibid.*, at 2770
[24] [2005] FCA 1242
[25] *Ibid.*, at paras. 3011 and 31-57
[26] *BUMA & STEMRA v Kazaa*, (March 28, 2002), Amsterdam Court of Appeal, Cause list number 1370/01 SKG
[27] *Ibid.*, at para. 4.9
[28] 948 F. Supp. 923 (N.D. Cal., 1996)

name of 'MAPHIA' facilitated the sharing and illicit download of a number of video games of which Sega held copyright. These games on 'MAPHIA' could be downloaded by multiple users.[29] The court held that by facilitating infringing activities, Sherman substantially participated in such infringement and was thus held liable for contributory copyright infringement.[30]

JURISDICTION & LIABILITY

This brings us to two other important controversial aspects of Copyright Infringement in Cyberspace, regarding firstly, the issue of jurisdiction and secondly, the issue of liability which varies based on direct/primary and contributory/secondary infringement.

(i) Jurisdiction:

Addressing the first issue, In the Internet environment, where data moves in a widely diffused fashion, copyright-protected works can be globally exploited. It is quite possible that an uploading dispute has a connection with several different countries. As a result of diversity of citizenship regarding the nature of the dispute coupled with the place of residence of the plaintiff, the defendant and the multiple countries over which the data is transmitted giving rise to multiple places of cause of action, the question arises, which country's court should have jurisdiction? Moreover, if the company owns the copyrights in twenty or thirty different countries, all of his copyrights will be infringed simultaneously due to the global access of the BBS. In such a situation, many countries will have connections with the dispute. The courts of all these countries have conflicting jurisdictions in such a case. This multi-jurisdictional angle of copyright infringement is one of the major challenges that still remains to be controversial despite development of case-law centered legislation.

(ii) Liability:

If a person performs one of the activities that is the exclusive right of the author, the person is potentially infringing on the author's copyright. While this would amount to direct or primary infringement, there also exists the concept of secondary infringement

[29] *Ibid.*, at 926-927
[30] *Ibid.*, at 931-932

which stems from facilitation of primary infringement.[31] This secondary infringement encompasses contributory infringement and vicarious infringement.[32] While a situation of contributory infringement arises, when one "materially contributes" to another's direct infringement, vicarious infringement arises when one benefits financially from another's infringement, and could have stopped that infringement from occurring to begin with.[33] This secondary infringement liability is attributed to service providers in cases of cyberspace infringement.

The landmark judgment which carefully analyzed the concept of secondary infringement was the Viacom v. YouTube[34] wherein, Viacom claimed against Google and YouTube for direct and secondary infringement came as a result of the regular distribution and consumption by YouTube users of copyright-protected materials. Viacom further alleged that Google and YouTube: (1) had actual knowledge of infringing activities but failed to act expeditiously to prevent such infringement; (2) received a financial benefit from the infringing activity; (3) had the right and ability to supervise and regulate the activity; and (4) did not infringe solely as a result of providing "storage at the direction of a user" or other function specified in the Digital Millennium Copyright Act's (henceforth referred to as the DMCA) safe harbor provisions.[35] Google and YouTube argued that they were protected by the safe harbors provided by the DMCA, because Viacom had not provided sufficient notice of the alleged infringing activities.[36]

This brings us to the §512 of the DMCA which expressely enumerates the concept of safe harbors and contemplates the contents of a take-down notice in the event of copyright infringement in cyberspace. The DMCA provides "safe harbors" from copyright

[31] Copinger and Skone James on Copyright, 1, 457, (1st South Asian Ed., Thomson, Sweet & Maxwell Limited, 2008)
[32] *Ibid.*
[33] Pankaj Jain and Pandey Sangeet Rai, *Copyright and Trademark Laws relating to Computers*, (1st Ed., Eastern Book Company, 2005)
[34] Viacom Int'l Inc. v. YouTube, Inc., 718 F. Supp. 2d 514, 518-19 (S.D.N.Y. 2010), aff'd in part, vacated in part, remanded sub nom. 676 F.3d 19 (2d Cir. 2012)
[35] Viacom Int'l Inc., 718 F. Supp. 2d at 516
[36] *Ibid.*, at 516

infringement liability for online service providers, but only if certain conditions are met. These conditions address issues such as the service provider's knowledge of the infringing material, the service provider's control over the infringing material, the financial benefit derived by the service provider from the infringing material and the service provider's response in removing or disabling access to infringing material when notified.[37] The DMCA further lays out requirements for sufficient notice of the claimed infringing activity; such notice must be in writing and include, among other things, "identification of the copyrighted work claimed to have been infringed or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site."[38] The courts however placed tthe burden of policing copyright infringement i.e. identifying the potentially infringing material and adequately documenting infringement, squarely on the owners of copyright.[39] However analyzing the standard of knowledge, one argues that the standard is objective rather than subjective.[40] Knowledge means actual or constructive knowledge of contents of the infringing material which would put a reasonable man on notice.[41] It is no defense that the defendant did not in fact believe the copies to be infringing[42] or for him to say that although he knew the facts he nevertheless believed that as a matter of law no infringement would be committed.[43] The same was even the ruling of the court in the case of Corbis Corp. v. Amazon Inc.[44] where the court held that even if Amazon was not aware of the specific infringing items, it did possess a general awareness of infringing products being sold on its website and this was enough to invoke secondary liability.[45]

[37] 17 U.S.C. § 512(c)(1) (2006)
[38] 17 U.S.C. § 512(c)(3)(A)(ii) (2006)
[39] *Ibid.*, at 523 (quoting *Perfect 10, Inc. v CCBill LLC*, 488 F.3d 1102, 1113 (9th Cir. 2007))
[40] Dr Gupta & Agarwal , *Cyber Laws*, 165 (1st Ed.,Premier Publishing Company,2008)
[41] Karnika Seth, *Cyber Laws in the Information Technology Age*, 514 (1st Ed., LexisNexis Butterworths Wadhwa, 2009)
[42] *Nouveau Fabrics Ltd v Voyage Decoration Ltd*, [2004] EWHC 895, Ch.D.
[43] *ZYX Music GmbH v King*, [1997] 2 ALL E.R 129 CA
[44] *Corbis Corp. v Amazon.com, Inc.*, 351 F. Supp. 2d 1090 (W.D. Wash. 2004)
[45] *Ibid.*, at 1109

Mindful of the shift in the global regime, the Copyright Act, 1957 was also accordingly amended in the year 2012. The newly amended Section 52 read along with Rule 75(1) of the Copyright Rules of 2013 and Section 79 of the Information Technology Act serves as the Indian corollary of §512 of the DMCA. A bare perusal of both sections, incorporates not only the concept of the procedure of a take down notice (NTD) but also similar primary and secondary liability regimes regarding ISPs as provided in the DMCA. Relying on this very provision, websites have recieved NTDs from copyright owners to prevent the infringement of their copyright in cyberspace.[46]

PROGRESSIVE LEGISLATION & THE INTERNATIONAL REGIME

International copyright law has rested on the Berne Convention for the Protection of Literary and Artistic Works and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 1995. Issues relating to sound recordings and performances were addressed in the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961). Since 1974, the international copyright instruments have been managed by a special United Nations agency – the World Intellectual Property Organization (WIPO).[47]

Under Article 9(1) of the Berne Convention, copyright owners are granted "the exclusive right of authorizing the reproduction of these works, in any manner or form". Given that any transmission of protected works over the Internet involves the reproductions transitorily stored in the connected computers' RAM, the question of whether right owners should be granted with the control over all temporary reproductions looms large amid the dematerialized and decentralized nature of the Internet.

Article 10(1) of TRIPS provides for computer programs being protected as literary works under the Berne Convention. Article 10(2)

[46] Nikhil Pahwa, 'MouthShut.com's Tally: Over 790 Takedown Notices, 240 Legal Notices, 11 Court Cases', available at: http://www.medianama.com/2013/08/223-mouthshut-coms-tally-over-790-takedown-notices-240-legal-notices-11-court-cases/
[47] Convention Establishing the World Intellectual Property Organization (Stockholm, July 14, 1967).

further provides that compilation of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Thereby extending the protection of copyrighted products in cyberspace. The WIPO Copyright treaty is also a special agreement within Article 2 of the Berne Convention since it is related to digital technology and the Internet and it covers all kinds of computer programs and not just the object code or source code of computer programs.

With the existence of such international regimes, coupled with changing domestic legislation catering to the need of the hour, the issue of copyright protection in cyberspace and combatting its infringement has evidently been at the forefront of modern copyright protection laws.

DEFENSES & REMEDIES

Section 52 of the Indian Copyright Act provides for exceptions to infringement termed as " Fair dealing" for purpose of private use, including research, criticism, review, and for purpose of reporting current events in a newspaper, magazine, or similar periodical, or by broadcasting or cinematographic film or by means of photographs. Other defenses include reproduction for judicial proceedings, legislative purposes and performances for educational institutions or for benefit of non paying audience or any religious gathering.

Copyright Law in general and The Indian Copyright Act in particular provides for three kinds of remedies in case copyright infringement that is civil remedies, criminal remedies and administrative remedies. Under the civil remedies, the owner of the copyright or the exclusive licensee can claim for (a) injunction (b) damages (c) profits of accounts.[48] Injunction is the first claim made in order to make good for the infringement followed by a claim for damages for any mutilation or lowering of the reputation of the copyright owner. Further, the Act also lays down the criminal remedy for infringement by an infringer who had knowledge or abetted the infringement, in form of imprisonment for a term of not less than six

[48] Copyright Act 1957, Section 55

months but which may extend to three years and fine which shall not be less than Rs. 50,000 but may extend to 2 lacs.[49] Further, knowing use of infringing copy of a computer programme is also punishable with imprisonment for term not less than 7 days but may extend to three years and fine not less than Rs. 50,000 but which may extend to Rs. 2 lacs.[50] However, in both cases, punishment may be reduced if infringements are not made for commercial profit or gain. Section 69 further contemplates the liability of a company in case of infringement whereby every person who is in charge of and responsible for conduct of business of the company, is deemed to be guilty of such offense and liable for punishment unless he proves that the offense was committed without his knowledge or that he exercised due diligence to prevent commission of such an offense. Under administrative remedies, the copyright owner can also appeal to the Registrar of Copyrights to ban the import of infringing copies of work under Section 53 of the Act.

CONCLUSION

In light of the above, it is amply clear that copyright infringement in cyberspace has been and continues to remain an extremely contested issue worldwide. With the constant advancements in the field of technology, the methods to protect copyrighted material need to evolve simultaneously. It is the need of the hour to not only amend but also implement laws in the future as well as the present to curb the uncontrolled infringement of the Intellectual Property of the owners of Copyright. Only in the presence of such feasible and secured environment can one expect creativity to flourish, for the words of the famous Mark Twain should not be proved true that, "Only one thing is impossible for God: To find any sense in any copyright law on the planet."

■

[49] Copyright Act 1957, Section 63
[50] Copyright Act 1957, Section 63B

ANALYSIS OF "ARBITRATION AGREEMENTS": CHANGES IN DOMESTIC LEGISLATION IN LIGHT OF CHANGING INTERNATIONAL ARBITRATION PRACTICE

*Arnavi Panda and Pranay Jain**

INTRODUCTION

"Thus, we decline to examine the merit or otherwise of this contention."[1] These were the exact words used by the Hon'ble Supreme Court of India in conclusion when they examined the correctness of their prior judgment of *Sukanya Holdings Pvt. Ltd.* and the correct exposition of law to that effect.

The judgment by the Supreme Court examining the scope, ambit and pre-requisites necessary for attracting the provisions of Section 8 which are analogous to those of Sections 44 and 45 were iterated by the Supreme Court in the case *Sukanya Holdings Pvt. Ltd. v. Jayesh Pandya*[2]. The same court however held a different view and sought to interpret the analogous provision of Sections 45 in Part II of the Indian Arbitration and Conciliation Act (hereafter referred to as 'The Act') giving it a wider scope in its recent judgment of *Chloro Controls Pvt. Ltd. v. Severn Trent Water Purification Inc. & Ors.*[3] The interpretation of the above sections create inconsistencies with general interpretation and application of the law in disputes that might arise, which may be of a similar nature as in the later case in a domestic scenario, and in such an event, which judgment would prevail.

This Article aims to examine the same proposition of the Supreme Court and the rationale behind the differentiation while interpreting Sections 8 and 45 of the Indian Arbitration and Conciliation Act, even though the former is a constituent of Part I and the latter a constituent of Part II of the Act.

AMBIT OF SECTION 8 AND SECTION 45 OF 'THE ACT'

Section 8 of the 1996 Act makes use of the expression 'parties' without any extension. At this juncture, one may refer to the Latin maxim "ejusdem generis" - a principle of construction, which means "of the same kind or nature" which contemplates that, when general

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1 *Chloro Controls India Pvt. Ltd v Severn Trent Water Purification Inc.*, 2012 (4) Arb LR 1 SC (para 134); (2013) 1 ABR 563.
2 *Sukanya Holdings Pvt. Ltd v Jayesh H. Pandya*, AIR 2002 SC 2252.
3 2012 (4) Arb LR 1 SC; (2013) 1 ABR 563.

words in a statutory text are flanked by restricted words, the meaning of the general words are taken to be restricted by implication with the meaning of restricted words. This is a principle which arises "from the linguistic implication by which words having literally a wide meaning (when taken in isolation) are treated as reduced in scope by the verbal context." This principle is presumed to apply unless there is some contrary indication.[4] Section 45 of the Act however, uses the expression 'one of the parties or any person claiming through or under him'. This fundamental difference between the capacity of persons who can be considered parties to an arbitration agreement is the bone of contention between the two cases cited above. One cannot help but delve into the intent of legislature while interpreting this provision which are so similar yet so different in their scope.

Section 8 is not intended to restrain arbitration proceedings before an arbitral tribunal, infact the objective of this section is to achieve the converse result. It is intended to make arbitration agreements effective and prevent a party from going to court contrary to his own agreement.[5] It is for the very same reason, when, the conditions under the section are satisfied by the party claiming under it, they shall be directed by the court for arbitration. Not only does this uphold the purpose of an arbitration agreement but also prevents the menace of multiplicity of suits in Courts of Law. Further, an interesting point to note here would be, the use of the word'shall' in this section makes it mandatory and not discretionary upon the court to refer parties to arbitration when an arbitration agreement is in existence.

The real purpose of section 45 however is to ensure that at some stage, a judicial authority must decide the validity, operation and capability of the performance of the arbitration agreement.[6]

SCOPE OF THIS ARTICLE

After *BALCO v. Kaiser*[7] - a judgment that completely changed the landscape of arbitration law in India pertaining to international

4 Glanville Williams, 'The Origins and Logical Implications of the Ejusdem Generis Rule' 7 Conv (NS) 119; *Maharashtra University of Health and others v Satchikitsa Prasarak Mandal & Others*, (2010) 3 SCC 786.
5 *Union of India v. Surjit Singh Atwal*, AIR 1970 SC 189.
6 Dr. P. C. Markanda, *Law Relating to Arbitration and Conciliation*, 8th Ed., p. 1133.
7 2012 (3) Arb LR 514.

commercial arbitration, the Hon'ble Supreme Court of India, in yet another landmark ruling has completely revised the way in which international commercial arbitrations now function. The case of *Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc. & Ors.*[8] is one of a kind because the judgment of the Supreme Court is so multi-faceted and the structure of the companies involved in this dispute, so complex.

In this case, the Hon'ble Supreme Court held that 'the expression 'person claiming through or under' as provided under section 45 of the Arbitration and Conciliation Act, 1996 ("Act") would take within its ambit multiple and multi-party agreements making even non-signatory parties to some of the agreements, necessary parties to such proceedings, they can be referred to and can even pray under such agreements.

Further, the same court in *Sukanya Holdings*[9] held that a cause of action cannot be "bifurcated". Applying this rule, the courts held in several cases that a dispute involving several parties, some of whom, who are not parties to the agreement containing the arbitration clause, is not arbitrable.

Both the judgments under consideration in this article take an opposing stand and *prima facie* appear to be contradicting, though rightly decided given the unique facts of the respective case. This is based on the sound jurisprudential concept of judicial precedents that, "applying a precedent to the instant case is a process of matching the fact-pattern of the precedent and the ruling thereon with the fact-pattern of the instant case, if they match, the rule is applied, if not, it is distinguished."[10] However, on close evaluation of the rationale given by the judges and taking into consideration the facts of both the cases it can be understood that both the judgments serve a different purpose. It is amply clear that the earlier judgment of *Sukanya Holdings* cannot be applied to latter cases such as *Chloro Control* given the unique fact pattern.

This article aims to highlight the possibility that the facts that gave rise to the decision of the court in the *Chloro Control* case are not

[8] *Supra* note 1.
[9] *Supra* note 2.
[10] RWM Dias, *Jurisprudence*, 5th Ed., p. 136.

anymore unique and out of the purview of the reality that such organizational structure exist in the India Inc. with more and more FDI reforms and Group of Companies doctrine[11]. The law thus needs to be amended accordingly.

Russell elaborates, "We have already noticed that the language of Section 45 is at a substantial variance to the language of Section 8 in this regard. In Section 45, the expression 'any person' clearly refers to the legislative intent of enlarging the scope of the words beyond 'the parties' who are signatory to the arbitration agreement. Of course, such applicant should claim through or under the signatory party. Once this link is established, then the Court shall refer them to arbitration. The use of the word 'shall' would have to be given its proper meaning and cannot be equated with the word 'may', as liberally understood in its common parlance. The expression 'shall' in the language of the Section 45 is intended to require the Court to necessarily make a reference to arbitration, if the conditions of this provision are satisfied. To that extent, we find merit in the submission that there is a greater obligation upon the judicial authority to make such reference, than it was in comparison to the 1940 Act. However, the right to reference cannot be construed strictly as an indefeasible right. One can claim the reference only upon satisfaction of the pre-requisites stated under Sections 44 and 45 read with Schedule I of the 1996 Act. Thus, it is a legal right which has its own contours and is not an absolute right, free of any obligations/limitations."[12]

Relying on the same, it is sufficiently clear that since Section 45 of Part II of the Act which is analogous to Section 8 of Part I has such a broad interpretation of the word "parties". Further Section 8 also needs to be amended accordingly so as to cast a greater obligation upon the judicial authority to make reference to arbitration under section 8 since the same cannot be covered under the ambit of Section 45 which is applicable only to international commercial arbitrations.

At this juncture, it is pertinent to briefly summarize the facts of the two contradictory judgments that form the prime contention of this article.

[11] Russell, *Russell on Arbitration*, (Twenty Third Edition).
[12] *Supra* note 1, at para 64.

RELEVANT FACTS

a) Facts of Sukanya Holdings Case

One of the partners of Sukanya Holdings Pvt. Ltd. had filed a suit for dissolution of the partnership, settlement of accounts and inter alia challenging the conveyance deed executed by the partnership firm in favour of one West End Gymkhana. Prior to filing of the said suit, five flats were sold to the creditors of the partnership firm in order to repay the loans, and the excess amount from the said sale was paid to the firm from it. The creditors had sold Flat Nos. 401 to 701 to different purchasers. On the same day, when the suit was filed, an arbitration petition was also filed by another partner of the firm who was the Appellant before the Apex Court for referring the subject matter of the suit to arbitration under Section 8 of the said Act. The Court rejected the said arbitration petition on the ground that apart from the relief of dissolution and accounts, the plaintiff in the said suit has also prayed for other reliefs and that all the Defendants to the suit were not the parties to the Arbitration Agreement, and therefore, the said arbitration clause was not binding upon them.

b) Facts of Chloro Controls Case

Chloro Controls was a dispute between an Indian company and an American joint venture partner. Chloro Controls, a company run by the "Kocha Group", was engaged in the business of manufacturing and selling gas and electrical chlorination equipment. Severn Trent agreed to appoint Chloro Controls as its exclusive distributor in India and a joint venture company ["the JVC"] was incorporated in India. The SHA made reference to the other agreements to be executed between the entity and other parties. The difficulty arose because not all parties had signed all the ancillary agreements, and some of the ancillary agreements did not contain an identical dispute resolution clause.

The allegations inter alia were that Respondent No. 1 and 2 were to undertake distribution activities in India solely through Respondent No. 5 i.e. the entity formed due to the joint venture between the Appellant and the Respondent No.1 and 2 and not through any of their group entities. However, Severn Trent

(Delaware) Inc. i.e. the ultimate parent company of Respondent No. 1 and 2 was distributing the products in India also through Respondent No. 4, which through a set of subsidiaries and joint ventures was also alleged to be a group entity of Respondent No. 1 and 2. Thus, the Appellant filed a suit before the Bombay High Court inter alia praying for declaration that the Transaction Documents entered into are valid, subsisting and binding and sought injunction against the Respondents from committing breach of contract by directly or indirectly dealing with any person other than the Respondent No.5 in relation to the products. An application under section 45 of the Act was filed by certain Respondents requesting for the matter to be referred to arbitration in light of the arbitration clause under the SHA. The application was firstly dismissed by the Single Judge and thereafter on appeal, the Division Bench of the High Court allowed the application ("Impugned Order"). Thus, the Appellant filled an appeal challenging the impugned order.

The Appellant inter alia contended that Respondent No. 3 and 4 were necessary and proper parties as substantive reliefs had been claimed against them and as they were not a party to any of the agreements, the dispute was not covered by the arbitration clause. Further, it was stated the expression 'parties' as used under Section 45 of the Act meant all the parties and not some or any of them and referred to the parties to the agreement. In furtherance to this, it was argued that under the Act, it was not possible to refer some parties/or some matters to arbitration while leaving the balance to be decided by another forum and that bifurcation of cause of action was not permissible.

The Respondents primarily contended that the entire dispute revolved around the SHA and that Respondent No. 3 and 4 had been added merely to defeat the arbitration clause. The Transaction Documents executed were in furtherance to the SHA and together formed a composite transaction and their performance was dependent on the performance of the SHA. These were thus composite acts/transactions. Further, it was argued that the Act did not provide for any limitation on reference to arbitration and thus the court, in light of the facts of the case, had the power to refer parties to the arbitration with the aid of the inherent powers of the court as

provided under Section 151 of the Code of Civil Procedure, 1908. Lastly, equating between section 3 of the Foreign Awards (Recognition and enforcement) Act, 1961 (now repealed) and section 45 of the Act, it was contended that under section 45, the applicant seeking reference could either be a party to the arbitration agreement or a person claiming through or under such party.

OBITER DICTA IN SUKANYA HOLDINGS AND IN CHLORO CONTROLS CASE

The Hon'ble Supreme court in *Sukanya Holdings* held that "the suit should be in respect of 'a matter' which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced - "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8. The words 'a matter' indicates entire subject matter of the suit should be subject to arbitration agreement."

In the case of *Chloro Controls* however, the Hon'ble supreme court held that "Normally, arbitration takes place between the persons who have, from the outset, been parties to both the arbitration agreement as well as the substantive contract underlining that agreement. But, it does occasionally happen that the claim is made against or by someone who is not originally named as a party. Arbitration, thus, could be possible between a signatory to an arbitration agreement and a third party. Of course, heavy onus lies on that party to show that, in fact and in law, it is claiming through or under the signatory party as contemplated under Section 45 of the 1996 Act."[13]

The Court also elaborates on the concept of "composite performance" in the same judgment. It specifically mentions that, "the principle of "composite performance" would have to be gathered from the conjoint reading of the principal and supplementary agreements on the one hand and the explicit intention of the parties and the attendant circumstances on the other."[14]

[13] *Supra* note 1, at para 65.
[14] *Ibid*, at para 71.

Lastly, the Court analyses the relevance and consistency of the Section 45 which incorporates the provisions the UNCITRAL Model Law and the New York Convention. The judgment expressly states that, *"Articles II(1) and (3) of the New York Convention have to be read in conjunction with Section 45 of the Act. Both these expressions have to be read in harmony with each other. Once they are so read, it will be evident that the expression "legal relationship" connotes the relationship of the party with the person claiming through or under him. A person may not be signatory to an arbitration agreement, but his cause of action may be directly relatable to that contract and thus, he may be claiming through or under one of those parties. It is sufficient that there should be a defined "legal relationship" between the parties, whether contractual or not and here must be some arbitration agreement to form the basis of the arbitral proceedings. Given the* existence of such an agreement, the dispute submitted to arbitration may be governed by the principles of delictual or tortuous liability rather than by the law of contract.[15]

DISTINCTION BETWEEN SUKANYA HOLDINGS & CHLORO CONTROLS CASE

The law as laid down in the case of *Sukanya Holdings*, was said to hold that, where a dispute involved non-signatories or included subject matter which was not strictly within the arbitration agreement, the matter could not be referred to arbitration. However, the *Chloro Controls* judgment clearly distinguishes between the applicability of Section 45 and Section 8 as held under the *Sukanya* case. *Sukanya Holdings* now applies only to domestic arbitrations where an application under section 8 of the Act is made. Thus, subsequent to the *Chloro Controls* judgment, in international commercial arbitrations, parties claiming through or under a signatory to an arbitration agreement can also be referred or apply for the dispute to be referred to arbitration, whereas in a purely domestic scenario that may not be the case.

As observed in *Sukanya Holdings*, "...bifurcation of suit in two parts, one to be decided by the arbitral tribunal and other to be decided by the civil court would inevitably delay the proceedings. The

[15] *Ibid*, at para 92.

whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two different forums."[16] However, this has led to an additional interpretation, that dispute involving several parties, some of who are not parties to the agreement containing the arbitration clause, is not arbitrable and thus, should be given a wider meaning like that in *Chloro Controls* to encourage the scheme of arbitration and reduce the burden on the judiciary by allowing the parties the benefits of arbitration.

NOT AN OVER-RULING BUT A NEW INTERPRETATION

"... Whereas in so far as Section 8 is concerned, the defining aspect as it were is "subject matter". The said words are absent in Section 45. The words used in Section 45 are "in respect of which the parties have made an agreement referred to in Section 44". Hence, for the applicability of Section 45, the concept of subject matter is completely alien. This probably is the view of the origins and genesis of the two provisions, and the scheme being completely different of the said two provisions..."[17]

The language of Sections 8 and 45 are different. Section 8 is concerned with the concept of "subject matter" wherein the Court has to be satisfied that the subject matter of the suit and the subject matter of the arbitration are the same. In Section 45, the words "subject matter" are absent and has been advisedly excluded. The judgment of the Apex Court in the case of *Sukanya Holdings* therefore cannot be used as a proposition in so far as Section 45 is concerned, since the schemes of the said two provisions that is Sections 8 and 45 are different.

When questioned of the correctness of the *Sukanya Holdings* judgment , The Court deemed it fit to give the following reason as to why they did not feel necessary for to examine the same:

[16] *Supra* note 2.

[17] *Olive Healthcare a partnership firm v Lannett Company Inc. a listed company*, (WRIT PETITION NO. 10473 OF 2011) at para 32.

(i) "Sukanya was a judgment of this Court in a case arising under Section 8 Part I of the 1996 Act while Chloro Control case relates to Section 45 Part II of the Act. As such that case may have no application to the present case.

(ii) In the case of Sukanya Holdings the Court was concerned with the disputes of a partnership concern. A suit had been filed for dissolution of partnership firm and accounts also challenging the conveyance deed executed by the partnership firm in favour of one of the parties to the suit. The Court noticing the facts of the case emphasized that where the subject matter of the suit includes subject matter for arbitration agreement as well as other disputes, the Court did not refer the matter to arbitration in terms of Section 8 of the Act. In the case in hand, there is a mother agreement and there are other ancillary agreements to the mother agreement. It is a case of composite transaction between the same parties or the parties claiming through or under them falling under Section 45 of the Act. Thus, the dictum stated in para 13 of the judgment of Sukanya would not apply to the present case.

(iii) Thirdly, on facts, the judgment in Sukanya's case, has no application to the case in hand."[18]

One cannot help but wonder the difference between this dicta of the court. While interpreting the two Sections differently for different purposes and for a different set of facts, it fails to consider the possibility of a similar situation arising even in the domestic arbitration agreements and negates the situation that has arisen in the *Chloro Control* case.

CONCLUSION AND ANALYSIS

When dealing with the correctness of the case of *Sukanya Holding*, the court gave 3 reasons as to why it did not feel necessary to overrule and argue the correctness of the *Sukanya Holdings* Case. Of the three reasons two pertain to the application of the facts of the earlier case to the latter namely "The Court noticing the facts of the case" and "on facts, the judgment in *Sukanya's* case, has no application". Both these

[18] *Supra* note 1, at para 133.

reasons stem from the jurisprudential concept of judicial precedents and the difference between "ratio decendi" and "obiter dicta".

Referring to jurisprudential concept of judicial precedents, Blackstone's observation is pertinent and noteworthy where he observes that previous decision are established rules and are to be followed unless flatly absurd or unjust.[19]

Another noted observation is that applying a precedent to the instant case is a process of matching the fact-pattern of the precedent and the ruling thereon with the fact-pattern of the instant case, if they match, the rule is applied, if not, it is distinguished.[20]

If the courts were to strictly follow this school of thought the court would have been correct in deciding the *Chloro Control* case differently as compared to *Sukanya Holdings* Case. However, the other Schools of Thoughts on this Topic cannot be ignored.

Considering the other Schools of Thought, the concept of American Legal Realism cannot be ignored given its success. This school of thought contemplates the concept of judge made laws on a case-to-case basis in consonance with the changing needs of the society. The ideology of this school is as follows:

- Judges make and change law.
- Judges should arbitrate (equity) rather than issue judgments (legalistic).
- Law is determined by the practice of judges, who make controversial judgments about the relative importance of competing interests or aims, about what is the best public policy. They often make judgments based on compromises, exceptions, considerations of social advantage. Since judges must make controversial judgments about the public interest in deciding cases, they have a duty to do so well.

"Section 8 has been enacted to avoid conflict between the public tribunal and the private tribunal. It is intended to make arbitration agreement effective and prevent a party from going to court contrary

[19] RWM Dias, *Jurisprudence*, 5th Ed., p. 134.
[20] *Ibid*, at p.136.

to his own agreement. Where parties have agreed to refer dispute to arbitration, the court should, as far as possible, give an opportunity for resolution of dispute through arbitration rather than by judicial adjudication. The court should see that the parties are held to their bargain and promote the sanctity of the contract."[21]

Thus, it appears that the judges have in the past given section 8 an elaborated and expanded meaning and scope, but have, restricted the same through their judgment in the case of *Sukanya Holdings*. Conversely they prefer to give Section 45 a wider scope through the judgment of *Chloro Controls* and further upheld it in *Arasmeta Captive Power Company Private Limited and Anr. vs. Lafarge India Private Limited*.[22]

Further, The principle of 'stare decisis' should be taken into account in such cases. This principle is embedded in latin Maxim 'stare decisis et non quieta movere', firmly entrenched in British system of doctrine of binding precedents.[23] Based on the same principle, landmark judgments like that of *Rylands v. Fletcher*[24] and Donoghue v. Stevenson[25] where the principle of negligence had been first construed find their application. Even though no ratio was given in the said cases the principle laid down in these judgments has developed through its application as judicial precedents[26] and has been subsequently upheld in later judgments even where material facts were different from that of the original judgment.

In conclusion, Section 45 of the Arbitration and Conciliation Act, 1996 reads, "Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer

[21] *Supra* note 6, at p. 249.
[22] Civil Appeal No. 11003 of 2013 (Arising out of SLP (Civil) No. 29651 of 2013), at para 26.
[23] http://www.ijtr.nic.in/webjournal/8.html.
[24] (1868) LR 3 HL 330.
[25] [1932] AC 562.
[26] *Anns v London Borough of Merton*, (1997) 2 All ER 294 (HL); *Hedley Byrne & Co., Ltd. v Haller Partners Ltd.* [1964] AC 465; *Home Office v Dorset Yacht Co. Ltd.* [1970] AC 1004.

the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

The underlined lines above are absent in section 8 of the Act. A bare perusal of the two provisions suggests that the nature of enquiry relating to an application under section 8 is different from that under section 45 of the Act even though they seem to be analogous provisions of Part I and Part II of the same Act respectively.

In conclusion, it is the opinion and submission of the authors that Section 8 should thus be amended accordingly to have the same effect as that of Section 45 so as to advance the practice of arbitration.

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ACCESS TO KNOWLEDGE BY PERSONS WITH DISABILITIES (IN THE LIGHT OF RECENT LEGISLATION)

*Devahuti Pathak**

INTRODUCTION

Delivering Substantive Equality:

"Aerodynamically the bumblebee shouldn't be able to fly, but the bumblebee doesn't know that so it goes on flying anyway"

- *Mary Kay Ash*[1]

This quote emulsifies in the cause for substantive equality for persons with disabilities; to enable them to function as proficiently as if they are without them.

The concept of 'substantive equality' is one that seeks to break the perimeters of identical treatment, to include measures which cushion disadvantage and aid access to equality.[2] It aims to seamlessly bring persons with disabilities to function without being limited by their disabilities. The spirit of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) advocates this very concept.

Disability is a fairly novel notion in the area of human rights and equality that has occasioned with the paradigm veer from viewing the rights of a disabled from a purely medical perspective (that sees disability as a primarily biological drawback) to a more social one (which views their negligence from a perspective of societal ignorance of their deserved rights). One of the most underrated and neglected section of the human resource in any country is the persons with disabilities. Irrespective of the nature of their ailment, such individuals tend to be perceived from a sympathetic point underlined by an affirmative prejudice in their 'incapacities'.

The Americans with Disabilities Act, 1990 (ADA) was one of the first laws that address disability discrimination. In Britain, the Disability Discrimination Act, 1995 (DDA), and the Disability Rights

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* IV BSL LLB

[1] 'A collection of famous and not so famous interesting quotes regarding disability and health related disabilities' *Disabled World News* (July 25, 2009), available at http://www.disabled-world.com/disability/disability-quotes.php#ixzz2LJrrhuxz. (last visited: 25-03-2013)

[2] Jayna Kothari, *The Future of Disability Law in India*, 11 (1st ed. 2012)

Commission Act, 1999 brought at par the rights of persons with disabilities with the substantive law on race and gender of the mid 1970s. These legislations aimed at fighting against the social discrimination and exclusion based on disability. As such, this new outlook towards on the rights of persons with disabilities ushers in a more human-rights based perspective of the rights of persons with disabilities, that gradually started to spread to other parts of the world too.[3]

The need for such a perspective finds a desperate need in a developing cultural and social pot-pourri like India. The Census of 2001 reveals that over 21 million people in India are suffering from one or the other kind of disability. This is equivalent to 2.1% of the population.[4] A leading Indian disability NGO, the National Centre for Promotion of Employment for Disabled People (NCPEDP), argues that 5 to 6 percent of the population has a disability. The World Bank notes that "the real prevalence of disability in India could easily be around 40 million people, and perhaps as high as 80-90 million if more inclusive definitions of both mental illness and mental retardation in particular were used".[5]

Despite all discrepancies in estimation of the proportion of population with disabilities in India, the bottom-line stands that there is a burning need to enable such persons to be able to access the resources of society and utilise their skills in as inclusive and socially seamless manner as possible.

Thus, narrowing from this broad spectrum, this paper seeks to examine the legal facilities available to persons with disabilities in terms of access to knowledge and education.

[3] *Ibid.* p. xx

[4] Government of India, Ministry of Home Affairs, Office of the Registrar General & Census Commissioner, India, *Disabled Population*, available at: http://censusindia.gov.in/Census_And_You/disabled_population.aspx. (last visited: 25-03-2013)

[5] Nidhi Singal, 'Paper commissioned for the EFA Global Monitoring Report 2010, Reaching the marginalized' (2009) available at: http://unesdoc.unesco.org/images/0018/001866/186611e.pdf. (last visited: 25-03-2013)

The advent of legal provisions in terms of access to knowledge and education, by persons with disabilities has been one dotted with significant milestones. The Kothari Commission (1964–66), the first education commission of independent India, observed: "the education of the handicapped children should be an inseparable part of the education system."[6] Thereafter, several legislative events took birth which paved the way for increased access to knowledge.

The Right of Children to Free and Compulsory Education (Amendment) Act, 2012 (henceforth referred to as the RTE Amendment Act), makes a sharp move towards enabling access by bringing children with disabilities to avail the same benefits as their more abled counterparts. By expanding the purview of the 'disadvantaged category' to include children with disabilities, brings them under the umbrella for receiving the benefit of reservation to private schools; this is an important step towards their integrative education with children without disabilities. Moreover, since this integration happens right at the foundation of the schooling ladder, it allows for easier social amalgamation for these children, as well for the other children.

Likewise, the Copyright (Amendment) Act, 2012, ensures persons with disabilities (henceforth, also referred to as PWDs) to receive the correct amenities to enable them the right to use the same material to knowledge as others without disabilities. With the expansion of availability of accessible material by virtue of this amendment as well as the propositioned Draft Rights of Persons With Disabilities Bill, 2012, and the proposed Treaty for Visually Impaired Persons, the resources to enable access to knowledge by persons with disabilities ideally, ought to augment amply, thereby making substantive equality a reality.

As such, the element of substantive equality is being adequately disseminated into the Indian legislative psyche. This is expected to

[6] National Council of Educational Research and Training, POSITION PAPER NATIONAL FOCUS GROUP ON EDUCATION OF CHILDREN WITH SPECIAL NEEDS (2006), available at: http://www.ncert.nic.in/new_ncert/ncert/rightside/links/pdf/focus_group/special_ed_final1.pdf. (last visited: 25-03-2013)

make headway into implementation in society, thereby placing persons with disabilities at the same threshold of opportunities as the other individuals.

THE FUNDAMENTAL RIGHT TO EDUCATION

At the time of formation of the Constitution of India, Article 45 of Part IV (Directive Principles of State Policy) read that the State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years. This discourse on right to education got a new turn with the Supreme Court judgement in *Unni Krishnan v. State of Andhra Pradesh*[7]. In this interpretation of the Constitution, the Supreme Court stated that Article 45 must be read in *"harmonious construction" with Article 21 (Right to Life)* in Part III since Right to Life is meaningless if it is without access to knowledge. Thus, the Supreme Court in 1993 accorded the status of fundamental right to "free and compulsory education" of all children up to 14 years of age (including children below six years of age).

Henceforth, prompted by the Unni Krishnan judgment and a public demand to enforce the right to education, successive governments from 1993 worked towards bringing a constitutional amendment to make education a fundamental right. This subsequently led to the 86th Amendment of the Indian Constitution in December 2002 which inserted, among others, Article 21A that reads:

"21A. The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."

Henceforth, The Right of Children to Free and Compulsory Education Act or Right to Education Act (RTE) was passed by the Indian Parliament on 4th of August 2009. It describes the modalities of the provision of free and compulsory education for children between six and fourteen in India under Article 21A of the Indian Constitution.

[7] 1 SCC 645 (1993)

However, the RTE Act, 2009 failed to adequately address the access of education of children with disabilities. The only mention regarding this was in Section 3(2) of the original Act, which said that education of such children would be governed under the provisions of the Persons with Disabilities (PWD) Act itself. A lacuna which arises from this non-address in the principle Act could be adjudged by studying the provisions of the PWD Act first, as follows.

Provisions for Access to Education under the PWD Act

The PWD Act furthers the spirit of Article 21A of the Constitution and guarantees the right to education to children with disabilities in Section 26, which reads as follows:

26. The appropriate Governments and the local authorities shall-

(a) Ensure that every child with a disability has access to free education in an appropriate environment till he attains the age of eighteen years;

(b) Endeavour to promote the integration of students with disabilities in the normal schools;

(c) Promote setting up of special schools in Government and private sector for those in need of special education, in such a manner, that children with disabilities living in any part of the country have access to such schools;

(d) Endeavour to equip the special schools for children with disabilities with vocational training facilities.

Thus, Article 21A and the aforementioned Section 26 of the PWD Act read together indicate how it is the primary responsibility of the government to ensure all provisions to facilitate free access to education to children with disabilities.

Section 26 of the PWD Act provides a justiciable right of access to education to schools, which the government cannot evade on grounds of lack of facilities or resources to cater to their different needs. This was upheld in *Social Jurist, A Civil Rights Group v. Government of NCT Delhi and Others*[8]. However, as far as implementation of this right

[8] W.P. (C) 6771/2008, (Delhi HC), Order dated 16 September 2009

goes, even after almost two decades of the enactment of this Act, the situation is abysmal, as a large number of disabled children continue to be excluded from public schools.

A major loophole in this provision of the PWD Act is that it places the responsibility of ensuring education to children with disabilities primarily on the government. This automatically excuses the private schools from ensuring appropriate and accessible education to such children.[9] Hence, as the discretion to admit children with disabilities in the private schools is completely up to the school authorities, very few such schools agree to admit them, and children with disabilities, by and large are kept out of the private school periphery.

As such the proportion of access to education for persons with disabilities gets naturally limited by a significant margin.

Thereafter, another important legislative milestone regarding the rights of the disabled was when India ratified the United Nations Convention for the Rights of Persons with Disabilities (UNCRPD). Thereby, it is of significance to examine this legislative document that brought forth a change in disability rights in India.

Role of the UNCRPD in enabling Access to Education to PWDs

The UN Convention on the Rights of Persons with Disabilities (UNCRPD) is an international legal document that aims to ensure that persons with disabilities receive the access to enjoy the same rights as everyone else. It was opened for signature on 30th March 2007. Though India was amongst the 80 countries that signed their acceptance on the very first day, its ratification did not happen on the same day, despite the Union Cabinet having approved the signing and the ratification of the Convention on 29th March 2007, as per the Press Information Bureau Report.[10]

This apprehension took place primarily because of certain indecisions and confusions about how to precisely implement this

[9] *Ibid.* 1, at 64-66

[10] Ratification of UNCRPD by India, UNCRPD INDIA, available at: http://uncrpdindia.org/achievements/ratification/. (last visited: 25-03-2013)

powerful document in a legislatively rich country as ours. This stemmed from when in 1979, the Supreme Court had held that international laws are not barred by local laws, and enrich the rights of individuals seamlessly and are subsequently justiciable in the local courts. Therefore, as soon as the Convention was ratified in India, it was to become enforceable in the Indian Courts.[11]

Thereafter, following several consultations and negotiations among Indian government/ non-government representatives/officials who were involved in the drafting and implementation of the Convention, legal experts, persons with disabilities and others, India ratified the UNCRPD on the 1st of October, 2007, and became the seventh country in the world to ratify UNCRPD.

Article 30 of the UNCRPD recognises the right of persons with disabilities to take part on an equal basis with others in cultural life, and requires the State Parties to take all appropriate measures to ensure that persons with disabilities, among others:

"Enjoy access to cultural materials in accessible formats;

and also mentions that:

States Parties shall take appropriate measures to enable persons with disabilities to have the opportunity to develop and utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of society."

Reading this section of the UNCRPD in the light of access to education in India, the Right to Education Act, 2009 comes under severe criticism for neglecting the needs of children with disabilities.

Thus, arose a storm of criticism from several expert backgrounds, a conclusive essence of which is as follows.

Criticism against the Right to Education Act, 2009

Section 12 of the Right of Children to Free and Compulsory Education Act, 2009 (RTE Act) made it compulsory for every private

[11] National Consultation on the UN Convention on the Rights of Persons with Disabilities in India 27–28 July, 2007, A Report 10, available at: http://uncrpdindia.org/files/reports/National-Consultation-Report.pdf.(last visited: 25-03-2013)

unaided school to admit at least 25% of its entry level class from children belonging to weaker and disadvantaged groups. However, this 25% did not include children with disabilities. As mentioned before, the RTE Act cited that such children shall continue to be governed by the PWD Act, hence completely allowing private schools to palm off its role in participating to provide access to children with disabilities of an education.

Three fundamental flaws were found in the Bill:

- Under the definitions given in Section 2(d), disabled children have been excluded from the definition of children belonging to *'disadvantaged group'*. The term 'disadvantaged' is used as indicative of discrimination based on grounds that are social, cultural, economical, geographical, linguistic and gender, but excludes 'disability'.
- Similarly, Section 2(n) where the term *'school'* is defined, no mention has been made of any kind of special infrastructure or educational amenities meant for the different needs of children with disabilities.
- Further, the definition of *'disability'* has been limited to that given only in the Persons with Disabilities Act of 1995, i.e., only the physical disabilities and excludes those covered under The National Trust Act, 1999, which covers other disabilities like cerebral palsy, autism, multiple disabilities, etc.[12]

Thus, in order to live up to the spirit of enabling an inclusive access to education the RTE Act of 2009 needed amendments to include within its purview, children with disabilities. This was necessary not only to enable them to receive the same benefits as the other children, but also from a socially evolving perspective that requires increased assimilation of children with disabilities with their more enabled counterparts, so that their disabilities are not seen as incapacities, but as something which, though different, is naturally acceptable.

[12] Right To Education, UNCRPD INDIA, available at: http://uncrpdindia.org/achievements/right-to-education/ (last visited: 25-03-2013)

Right of Children to Free and Compulsory Education (Amendment) Act, 2012

Thereafter, the Rajya Sabha, the upper house of the Indian Parliament, on 24th April 2012, passed the Right of Children to Free and Compulsory Education (Amendment) Bill 2010. The primary changes brought about by this amendment include the following:

- Section 2 brings a 'child with disability' within the purview of a "child belonging to disadvantaged group" of Section 2(e) of the original Act, and defines 'disability'.
- Section 3 of the Amendment act, spells out the right of such children (between six and fourteen years of age) with disabilities to the right to free and compulsory education in a neighbourhood school till the completion of his or her elementary education. Further, it also provides that a child with "multiple disabilities" or "severe disabilities" to the right to opt for home-based education.

By virtue of these changes in the original Act, now the following will be effected:

a) Legally all the clauses of the Act, particularly the strong non discrimination clauses would apply to a child with disabilities,

b) Children with disabilities will now come under the 25% category that private schools must admit,

c) Children with 'multiple disabilities' or 'severe disabilities' (as referred to in clause (o) of Section 2 of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999) may opt for home-based education.

d) Parents of children with disabilities will now have to be included in all school management committees (SMCs).[13]

[13] Radhika M. Alkazi & Rajasree V, 'Second Annual Report on the Status of Children with Disabilities Under the Right to Education Act', Aarth Astha Publication (2012), available at:
http://www.scribd.com/doc/94646171/2nd-National-Report-on-the-Right-to-Education-Act-An-AARTH-ASTHA-Publication. (last visited: 25-03-2013)

Thus, this amendment not only enshrines provisions for an inclusive education of children with disabilities, but, also includes a role of their parents, which is a promising step towards a more holistic development of such children.

India is also a signatory to the Salamanca Statement and Framework for Action. Point 3 under the Framework of this Statement reads:

> *"... Schools should accommodate all children regardless of their physical, intellectual, emotional, social, linguistic or other conditions."*

Further, Article 2 reads:

> *"...Regular schools with this inclusive orientation are the most effective means of combating discriminatory attitudes, creating welcoming communities, building an inclusive society and achieving education for all; moreover, they provide an effective education to the majority of children and improve the efficiency and ultimately the cost-effectiveness of the entire education system."*

Thus, it is visible how the RTE Amendment Act moves towards realising this very motive.

This amendment is highly promising and ushers a positive note to the access of education by children with disabilities. The reservation in private schools will cater to a higher proportion of students with disabilities and as such, widening their access to the same.

Criticism of the Amendment Act

The Amendment Act is, however, not devoid of criticism. The option of home based education has been looked at as a conflicting one. Radhika Alkazi, Managing Trustee and Director, Aarth-Astha (a non-governmental organisation working intensely for disability rights) stated in an interview, that the unequal relationship between an economically backward family and the education system will naturally put children with severe disabilities out of the normal school situation if home-based education is legitimised. She emphasised the need for administrative flexibility to integrate children with

disabilities in the education system, putting home based education as an initiating means to a proper school education and not as an alternative to it.[14]

Among others, the following have been suggested as points to take action on, for the successful enabling of access to education to children with disabilities by virtue of the Right to Education Act:

- Demand for convergence of different ministries to ensure effective implementation of the Act.
- Notifications on policy framework for special schools and their curriculum need to be upgraded and made inclusive with the other schools.
- The provision for safe and appropriate transport of children with disabilities to school should be made as a strong commitment by all States.15
- The private schools providing intake of such children under the 25% reservation ought to ensure a smooth integration of these children with the more abled students, and provide infrastructure for the same.

Thus the amendment act is a positive step towards broadening the access of persons with disabilities to education and a significant milestone of this decade in ensuring the same, despite the possible risks and hurdles. If it keeps to the spirit of the UNCRPD, it should go a long way in delivering a much deserved accessibility to children with disabilities to a sound education.

THE RIGHT TO COPY

Need for a change in Indian Copyright Law

Another article of the UNCRPD which has recently found translation in Indian legislation is that of Article 30(3) which states that:

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[14] Radhika Alkazi, 'The option for home-based education should not be there in the law' (March 15, 2012) Volume 9 Issue 1, available at: http://www.dnis.org/interview.php?issue_id=1&volume_id=9&interview_id=182. (last visited: 25-03-2013)

[15] *Ibid.* 11, at 51

"States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials."

Dissemination of education and knowledge requires an adequate mechanism of tools in the translation of books, software and other means to read and learn from, because in a majority of cases, persons with disabilities are not able to access material which are used by other people, printed material needs to be reproduced in formats which are functional for their specific needs (for example, Braille print, larger fonts, podcasts etc.). A lot of such material are heavily protected by copyright laws and thereby, make such forms of reproduction impossible, or in any case, extremely difficult. The Indian Copyright Act, 1957 did not have any provisions to facilitate such reproduction. The Copyright (Amendment) Act, 2012 makes an attempt to bring about a change in this roadblock.

The Role of the Copyright (Amendment) 2012 in broadening access to education for PWDs

This amendment presented the introduction of two new sections regarding exceptions to copyright infringement. They are:

Section 52 (1)(zb), which maintained that the adaptation or reproduction in any publicly accessible format, specially designed for the use of persons with a 'visual, aural or other disability' who cannot enjoy such work in a normal format would not constitute an infringement of copyright.

Another amendment which has been brought about is Section 31B. This section is for reproduction of copyrighted material for access by the disabled, not limiting it to the visually impaired. This section provides that publishing for the benefit of persons with disabilities may be carried out by organisations registered under Section 12A of the Income Tax Act, 1961 and working primarily for the benefit of persons with disability, and recognized under Chapter X of the Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. It also necessitates a strict

compulsory license policy which can only be obtained by the aforementioned organisations and not the intended beneficiaries.

However, these changes are not devoid of shortcomings, unfortunately. The insertion of Section 52 (1)(zb) makes for a narrow provision to bar copyright infringement only for alternate publishing of the nature of Braille and the like. This not only discriminates between visually impaired persons who can and cannot read Braille; but also excludes publishing and reproduction to facilitate any other form of disability, for instance, that which requires a larger font size.

Moreover, in the technologically advanced society today, for most of the visually impaired, the most feasible means are electronic versions of text that can be read out using screen reader software (such as Jaws or Orca). However, such 'electronic' versions that are created by scanning printed text would not necessarily fit the bill of a 'special format' required by Section 52 (1) (zb), and thereby are beyond the scope of protection from infringement of copyright under this exception.[16]

Further, even by providing an exception to infringing copyright by including Section 31B, the scope for broadening access to knowledge to persons with disabilities cannot be said to be much, as it also provides for difficult hurdles in the same.

For conversion to non-specialised formats the amendment proposes a licensing system which will permit only those organizations that work primarily for the benefit of the disabled to apply for a specific license to undertake the necessary conversion and distribution. This will prevent educational institutions, self help groups, other NGOs and print disabled individuals from undertaking such conversion and distribution themselves. Such a provision instead of facilitating and stimulating the creation of such material for the print impaired would only serve to further hinder the production process and add to an already burgeoning dearth of accessible

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[16] Shamnad Basheer and Prashant Reddy, 'Submissions To The Standing Committee On Hrd Re: The Copyright Amendment Bill', available at: http://www.spicyip.com/docs/SubmissionstoParliament.pdf (last visited: 25-03-2013)

material and poses major hurdles and ironically contradicts the governments' very own policies of building inclusive systems such as e-libraries in schools, colleges, and universities.[17]

Dr. Sam Taraporevala, Director, Xavier's Research Centre for the Visually Challenged (X.R.C.V.C.) said, "There are serious shortcomings in the proposed amendments. The copyright exception needs to be format neutral and not place an additional burden on genuine persons and organizations in creating accessible material. We need to focus on the end user rather than the format."[18]

Thus, though the amendment sets out for a positive facilitation of access for persons with disabilities, it falls short of fulfilling the spirit of the UNCRPD, as also the fundamental right to education guaranteed by Article 21A of The Constitution and Section 26 of the PWD Act which requires the government to ensure education for all children with disabilities till eighteen years of age, as aforementioned.

PROMISING LEGISLATION FOR THE DISABLED IN INDIA

The provisions for accessibility introduced by the Copyright (Amendment) Act, are evidently fraught with hurdles in terms of translation into providing the necessary infrastructure needed for such access.

Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled

An interesting event at this juncture is that of the adoption of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled on 28th June, 2013[19]. This treaty brings a positive note to enhance the availability of resources for reading to persons with visual disabilities.

[17] Dr. Sam Taraporevala, 'Limitations of the Licensing System to create Accessible Copies For the Print Impaired: A Policy Paper' available at: http://www.xrcvc.org/pdfs/Concerns_with_Licensing_for_the_Print_Disabled.pdf (last visited: 25-03-2013)

[18] 'Disability sector opposes proposed amendments to Copyright Act, 1957', *D.N.I.S. NEWS NETWORK*, INDIA, available at: http://www.dnis.org/print_news.php? news_id= 1077 (last visited: 25-03-2013)

[19] Diplomatic Conference to Conclude a Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities, available at: http://www.wipo.int/edocs/mdocs/diplconf/en/vip_dc/vip_dc_8.pdf

The treaty holds ample promise to overcome the setbacks of enabling access that exist in India, primarily in the light of the Copyright Amendment Act, and also to facilitate the RTE Amendment Act as well, as it would allow specialist organisations to make accessible copies of books in all signatory countries; and make the import and export of books for visually impaired readers legally feasible.

For instance, Article 5 and Article 9 of the treaty introduce facilities to ensure smooth cross border exchange of accessible format copies. Similarly, Article 2 (b) expands the meaning of "accessible format copy" to also mean such forms that a person with a print disability and not necessarily visual impairment may use. Thereby, reading this with the Copyright Amendment Act, Section 52 (1) (zb) of the Act would be necessitated to include alternate formats for the access of all persons with disabilities, thereby, expanding the availability of resources to read for such persons.

If and when India ratifies this treaty, the implications it will have on the Copyright (Amendment) Act will be significant. One can only anticipate these implications, however it can be hoped that they will move towards the greater cause of access for the disabled.

Thus, India becoming a signatory to this treaty beckons a significant note of possibility regarding access to knowledge by persons with disabilities.

Draft Rights of Persons with Disabilities Bill, 2012

Yet another piece of legislative promise is the Draft Rights of Persons With Disabilities Bill, 2012. The Ministry of Social Justice and Empowerment in a statement mentioned:

> *"The proposed law seeks to repeal the Persons with Disabilities Act of 1995 and to replace it with a comprehensive rights based law in accordance with the provisions of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).*
>
> *The Persons with Disabilities Act, 1995 was proposed to be replaced by a new legislation by the Ministry in the light of the experience gained in the implementation of the Act, developments that have taken place in the disability sector over the years, and also the commitments under the UNCRPD."*[20]

[20] Press Information Bureau, Government of India, available at: http://pib.nic.in/newsite/erelease.aspx?relid=72963. (last visited: 25-03-2013)

This draft puts on the government the responsibility of developing strategies and schemes to enable persons with disabilities to attain and maintain maximum independence, fulfilling their capacities to the maximum, be it regarding the physical, mental, social or vocational ability, and ensure a holistic inclusion and participation in all aspects of life. [21]

Section 21 of this Draft provides for the government to ensure an inclusive education for all children with disabilities with specific emphasis on ensuring infrastructural and pedagogical facilities. Section 22 gives pointers on how to warrant an inclusive education for these children. Another important provision in this Draft is that of providing adult education for persons with disabilities, contained in Section 23.[22]

Thus, concerning access to education, the Draft is observed to have brought with it a developing adoption of the spirit of the UNCRPD and invokes an all-encompassing approach regarding the same. The ratification of the UNCRPD has brought about a paradigm shift in the perspective of the rights of the disabled and requires a socially comprehensive perspective of the dignity and rights of persons with disabilities and the Draft promises the same. It is a welcome move, and rightly conducts India's implementation of the essence of the UNCRPD.

CONCLUSION

Thus, this paper attempts to examine recent legislative reforms that aim to forward the rights of the disabled in India. The Right to Education (Amendment) Act aims at an inclusive education for children with disabilities. The Copyright (Amendment) Act similarly addresses the issue of widening the reserve of accessible material for the disabled. However, for their wholesome implementation it needs some more elements. Some of these are as follows:

[21] Special Correspondent, 'Panel prepares draft to secure rights of people with disabilities'
THE HINDU, September 29, 2012 available at: http://www.thehindu.com/todays-paper/tp-national/panel-prepares-draft-to-secure-rights-of-people-with-disabilities/article3947546.ece. (last visited: 25-03-2013)

[22] The Draft Rights of Persons With Disabilities Bill, 2012, available at: http://socialjustice.nic.in/pdf/draftpwd12.pdf (last visited: 25-03-2013)

- *Teachers' training:* An essential ingredient in making inclusive education for children with disabilities is the availability of adequately trained teachers to provide for the different needs of children with disabilities. "Selection of teachers, their education and ensuring that the system provides best possible instruction all children are keys to quality of education. Millions of children and young people have difficulties in reading, writing and numeracy which may be caused by malnutrition, consecutive poor cognitive development or neurological disabilities. Teachers are unaware of these common difficulties, and without knowledge and skills find it difficult to enable learning."- (McKinsey Report 2007 (Barber & Mourshed))[23] Thus, it can be deduced that provisions for proper teacher training is a step required to widen access to education for children with disabilities.
- *Social awareness*: For substantive equality to materialise, a healthy social awareness of the rights of disabled persons is highly essential. Thereby, dissemination of such awareness through various fora (print/digital media, integrative teaching methods etc.) is a must for realisation of the same.
- *Physical access and learning environment:* It is further necessary to enable suitable physical infrastructure that will facilitate a smooth access to centres of learning for the disabled. The physical environment of such centres, such as the design of the building, the availability of water, electricity and toilet/sewage facilities will either enable or constrain both students to participate and the range of learning activities in and out of classroom and it is imperative to provide for it.[24]

[23] EFA Initiative Right to Education for Persons with Disabilities , *Call For Partners: Meeting* (20 May 2011) available at:
http://www.inclusionflagship.net/CalltoMay20Paris.pdf. (last visited: 25-03-2013)

[24] UNESCO, *Overcoming Exclusion through Inclusive Approaches in Education Conceptual Paper A Challenge & A Vision* (2003) available at:
http://unesdoc.unesco.org/images/0013/001347/134785e.pdf. (last visited: 25-03-2013)

- *Role of private sector:* For the upliftment of any Section of the population, and the successful delivery of a legislation, the law needs to go beyond a vertical application (between the individual and the state), and dispense in a horizontal application (between private individuals) as well.

The PWD Act itself sets a tone for its horizontal application. Section 26 of the Act for instance, puts a responsibility on government to enable education of children with disabilities by establishing special schools for them in the government as well as the private sector, further, Section 28, 29 and 30 emphasize on infrastructural facilities for education of the disabled by the private sector as well, thereby defining their role in fulfilling the purpose of this legislation.

Similarly, the RTE Amendment Act requires the private schools to make amenities and provide admission to children with disabilities (under the 25% reservation plan); this should not be seen as an added burden on schools but they ought to appreciate their role in enabling a broader access education to such children.

Moreover Section 31B of the Copyright Amendment Act permits only particular organisations to obtain a license for production and reproduction of copyrighted material in accessible formats for persons with disabilities. Thus, their role is evidently immense and utterly essential to utilise this amended provision for the benefit of such persons.

Hence, the role of the private sector enterprises in propagating knowledge to persons with disabilities is clearly underlined, specifically in the light of currently flourishing legislation. Thus, the private sector ought to adequately deliver this momentous responsibility.

- *Creasing out flaws in amendments:* As previously discussed, though the legislative amendments brought about an extension of the UNCRPD in India, they are not without shortcomings. Hence, the need arises to eradicate these inadequacies.

  The RTE Act should provide for implementing means to realise an inclusive education. Similarly, the Copyright (Amendment) Act needs to correct its anomalies and enable a more plausible way to enrich accessible material for the disabled.

In conclusion, it can be said that the path is forming progressively in strengthening the rights of persons with disabilities, for their greater learning and growth, though not sans roadblocks. Substantive equality is taking shape in India and such legislative reforms broach a positive future. To close on a realistic note, their future will be bright, however not without a honest, holistic role of the government and the people, irrespective of any form of disability that they may have, be it of the body, or of the mind.

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RIGHTS OF MATERNITY FOR SURROGATE MOTHERS*

Devyani Kulkarni, Rahul Agarwal, Supriti Elizabeth Singh and Surabhi Kaplay

INTRODUCTION

This paper is based on the opinion of the authors and their interpretation of the statutes. It is purely doctrinal in nature. Through this paper we hope to study the various legal aspects that surround the maternity benefits conferred on the Surrogate mother in India. To also scrutinize the terms "maternity benefit" and "woman" as laid down in the Maternity Benefit Act, 1961 as well as the Employees' State Insurance Act, 1948 and to work towards establishing a co-relation between these aspects to see whether the said Acts bring surrogate mothers under their ambit or not.

This paper seeks to study the rights of maternity accorded to surrogate mothers in the light of decisions passed and legislations enacted to deliberate and gain a holistic perspective of the maternity benefits of surrogate mothers in four major jurisdictions namely, India, USA, UK and Canada.

THE HISTORY OF SURROGACY [An overview and evolution of surrogacy over the years]

The concept of surrogacy is as old as human history itself. If we go by the Biblical account in 1910 B.C., Abraham and Sarah entered into an arrangement with their maidservant Hagar, to bear a child for her infertile mistress, she was the first known surrogate mother.

The first legal document that regulated and controlled surrogacy is said to be the Code of Hammurabi (1780 BC) and this document was primarily used to advocate producing male offspring.

Surrogacy was quite common in ancient Egypt too. Many pharaohs used their concubines to produce male heirs to expand their kingdoms. Traditional surrogacy was also common in ancient Greece and Rome.

* This paper is an excerpt of a research paper undertaken by the Centre for Public Law, ILS Law College, Pune.
It is edited by Supriti Elizabeth Singh, III LLB with contributions from Devyani Kulkarni and Surabhi Kaplay both IV BSL LLB and Rahul Agarwal, I BSL LLB.

It is said that in the year 1976, lawyer Noel Keane formulated the first legal arrangement for surrogacy between a set of intended parents and a surrogate mother. The first documented surrogacy was recorded in 1976. It was on 25th July, 1978 that Louise Joy Brown the world's first Test-tube baby was born. And although this was not a surrogacy arrangement it paved the way for gestational surrogacy in the future.[1]

There have also be some remarkable developments in the field of surrogacy in the past couple of years and a few examples of this are, a 58 year old mother, ***Ann Stopler*** giving birth to her twin granddaughters for her daughter, Caryn Chomsky in August 2007 as her daughter was unable to conceive any children of her own due to cervical cancer. In another similar case, a 56 year old mother, ***Jaci Dalenberg*** acted as a gestational surrogate for her daughter Kim, and delivered her own triplet grandchildren in 2008.

Although the in vitro fertilization (IVF) surrogacy is a successful treatment as a cure to infertility, modern society's attitude toward this intervention is contradictory. It is allowed or tolerated in some countries and forbidden in others.

Definition of 'Surrogacy', 'Surrogate Mother' and 'Surrogate Arrangement' as under The Assisted Reproductive Technology (Regulation) Bill, 2010.

"Surrogacy", means an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention to carry it and hand over the child to the person or persons for whom she is acting as a surrogate; [2]

Whereas a "surrogate mother", means a woman who is a citizen of India and is resident in India, who agrees to have an embryo generated from the sperm of a man who is not her husband and the oocyte of another woman, implanted in her to carry the pregnancy to

[1] Sugato Mukherjee, 'Legal and Ethical issues of Commercial Surrogacy In India: an overview', 2011, unpublished research paper, National Institute of Juridical Sciences, West Bengal.
[2] Assisted Reproductive Technology (Regulation) Bill, 2010. Section 2 (aa)

viability and deliver the child to the couple / individual that had asked for surrogacy.[3] And a "surrogacy agreement", means a contract between the person(s) availing of assisted reproductive technology and the surrogate mother.[4]

The Evolution of Surrogacy in India

It is said that surrogacy flourished legally because it is medically not illegal.[5] Legally though the laws related to surrogacy are still in the nascent stage. In the absence of any law to govern surrogacy, the Indian Council of Medical Research (ICMR) issued guidelines to check malpractices of Assisted Reproductive Technology in the year 2005[6]. However, these guidelines issued are neither statutory nor legally sacrosanct, as they are not binding on any of the parties to the surrogacy arrangement.

A codified law is yet to be adopted and implemented. In the past couple of years however, the government of India has been trying to proclaim the coming of a new era in the field of surrogacy and trying to market India as a destination for Commercial Surrogacy. The steps taken to effect this was by drafting the first Assisted Reproductive Technology Bill in 2005 followed by the Assisted Reproductive Technology (Regulation) Bill & Rules, 2010, And just recently a third draft of the Assisted Reproductive Technology (Regulation) Bill & Rues, 2013 to incorporate all the suggestions made by different ministries.[7]

In March 2013, the Madras High Court held that government employees opting for children through surrogacy too would be entitled to 'maternity leave' in the form of 'child care leave'.

[3] Assisted Reproductive Technology (Regulation) Bill, 2010. Section 2 (bb)
[4] Assisted Reproductive Technology (Regulation) Bill, 2010. Section 2 (cc)
[5] Anil Malhotra and Ranjit Malhotra, *Surrogacy in India: A Law in the Making* (Universal Publishing, New Delhi, 2013)
[6] 'National Guidelines for Assisted Reproductive Technology: Ethical issues in Surrogacy'- Paper presented by Dr. R.S. Sharma, DDG (SG), Division of RHN, Indian Council of Medical research, New Delhi at the meeting cum workshop organized by the Ministry of Women and Child Development, Govt. of India on 25th June 2008 at India Islamic Centre, New Delhi.
[7] Aarti Dhar, 'Ministries Consulted on Assisted Reproductive Technologies Bill', *The Hindu* (22 November 2013)

The most recent development in this field is allowing couples to bring frozen embryos to India for infertility treatment. This was announced through separate notifications by the Central Board of Excise and Customs[8] and the Directorate General of Foreign Trade over the period of December 2013 and January 2014. However, there is a security check in place and in order to ensure the quality; such imports will have to carry a no-objection certificate from the Indian Council of Medical Research (ICMR).[9]

The Evolution of Surrogacy in United States of America

In the United States of America in the year 1987, twenty six State legislatures introduced seventy two bills on the topic. In the two subsequent years twenty seven states introduced seventy and sixty three Bills however this rate dropped to twenty eight bills in ten states and by 1992, thirteen bills in seven states. This number only further dwindled in the next thirteen years as no more than nine states introduced surrogacy legislations in any given year.[10]

The case that brought light to the harsh realities of surrogacy was the Baby M. Case[11], on 6th February 1985, William Stern and Mary Beth Whitehead entered into a surrogacy parenting agreement, which provided that through artificial insemination using Mr. Stern's sperm, Mrs. Whitehead would become pregnant, carry the child to term, bear it and thereby deliver it to the Stern's. Mr. Stern agreed to pay Mrs. Whitehead $10,000/- on the child's birth and on delivery to him. On March 27, 1986 Baby Melissa was born. She was handed over to the Stern's but on a request from Mrs. Whitehead, she was returned to the Whitehead couple for a week. However, they absconded and refused to return the baby back to the Stern's. A series of litigation followed in the trial court and eventually reached the Supreme Court of the State of New Jersey. Whereby, it was decided that the best interest of Baby

[8] Circular No. 01/2014-Customs, F. No. 528/110/2011- STO (TU) Government of India, Ministry of Finance (Department of Revenue), Central Board of Excise & Customs Tariff Unit, New Delhi 9th Jan. 2014.
[9] Abantika Ghosh, Surabhi, 'In boost to Infertility Treatment, govt allows import of frozen embryos', *The Indian Express* (16 January 2014)
[10] *Supra* note 7
[11] *Baby M Case*, 537 A.2d 1227 (N.J. 1988)

M, lied with the Stern's and Mrs. Whitehead had to relinquish all parental rights.[12]

However, there is still no consolidated statue that deals with surrogacy throughout the United States of America and each of the 50 states have their own laws governing them, which either allow or prohibit surrogacy. And some statues incorporate surrogacy by means of the courts.

The Evolution of Surrogacy in United Kingdom

It is difficult to trace the history of surrogacy in the United Kingdom. One of the reasons is that there is no data to be collected on surrogacy arrangements generally and, indeed it would be virtually impossible to collect data for private arrangements. In the year 1990, the British Medical Association (BMA) published its report ***Surrogacy: Ethical Considerations***[13] which endorsed a degree of professional assistance in establishing a surrogate pregnancy.

However many cases of surrogacy have been reported since 1995. In the year 1995, 47 surrogacy cases had been reported. There were 40 surrogacy cases in the year 1996 and 39 in 1997.[14] The ***Brazier Report*** had estimated that between 100 and 180 arrangements are made annually in the UK, resulting in 50 to 80 births.[15]

The Evolution of Surrogacy in Canada

The Assisted Human Reproduction Act (AHRA), 2004 is the Act that regulates surrogacy in Canada and though passed in the year 2004, it fully came into effect only in 2007. The Assisted Human Reproduction Canada(AHRC) is the federal regulatory agency that regulates surrogacy in Canada, established in the year 2006 it permits

[12] D. Kelly Weisberg (ed.), *Applications of Feminist Legal Theory to Women's Lives: Sex, Violence, Work and Reproduction* (Temple University Press, 1996)
[13] BMA Publications, 1990
[14] HEFA Report, 1998
[15] Margaret Brazier, Alastair Campbell and Susan Golombok, *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation* (HMSO: London, 1998) Cm 4068 para 6.22 as cited in, E., 2010. *"Medical Law : Text, Cases and Materials"* (2nd Edition, New York: Oxford, p.829)

only altruistic surrogacy, surrogate mothers may be reimbursed for approved expenses but payment of any other consideration or fee is illegal. Quebec law, however, does not recognize surrogacy arrangements, whether commercial or altruistic. The Civil Code of Quebec renders all surrogacy contracts, whether commercial or altruistic, unenforceable. However after much deliberation Royal Assent was given to the *"Assisted Human Reproduction Act."*[16]

The Politics of Surrogacy

Over the past few years India has emerged as a country for providing Assisted Reproductive Technologies to infertile women. This increasing infertility among women coupled with poverty stricken women ready to rent their wombs for the needs of their family has given India the title of a Baby Making Factory. These economically marginalized women, disabled with extreme poverty and who are left for themselves to combat this growing economy make India a promising destination as a booming surrogate industry. And so along with these also the alleged increasing rates of infertility among women, there has seen an emergence of ART providers.

Although surrogacy is an arrangement, it has been included in ARTs.[17]

India has identified this industry as an integral part of our country's increasing economy and medical tourism industry. And thus India is facilitating the growth of the ART Industry by issuing various policies and Visa regulations (as are discussed further in this Paper) particularly with regards to the Surrogate Industry.

According to the National Commission for Women (NCW), there are about 3,000 clinics across India offering surrogacy services to couples from North America, Australia, Europe, and the other continents. These figures reflect the status of India as the most favored destination for commercial surrogacy. In the Indian context, the following factors have created a conducive environment for the expansion of the industry: lack of regulation; comparatively lower

[16] Sonya Norris, *Reproductive Technologies: Surrogacy, And Egg And Sperm Donation* (Revised 9 February 2006)
[17] ART Regulation Bill and Rules 2010

costs in relation to many developed countries [for instance, Canada, the United Kingdom (UK), and the United States of America (USA/US)]; shorter waiting time; the possibility of close monitoring of surrogates by commissioning parents; availability of a large pool of women willing to be surrogates, and infrastructure and medical expertise comparable to international standards. [18]

For instance, a surrogacy arrangement, including In Vitro Fertilization (IVF), costs about $11,000 (approximately Rs. 5,00,000) in India, while in the US, surrogacy alone, excluding ART charges, costs $15,000 (approximately Rs. 6,75,000). A similar arrangement in the UK costs about £10,000 (approximately Rs. 7, 00,000).[19]

In the absence of any kind of regulatory or monitoring mechanism for the ART industry in India it is difficult to arrive at the exact statistics pertaining to the existing surrogacy industry. However, the sharp rise in the number of surrogacy arrangements based on media reports and anecdotal evidence is a significant indicator for estimating the scale and spread of the commercial surrogacy market[20]. An exponential growth in the industry is evident from the comparative figures over the years that estimate it to be an industry worth more than USD 400 million.[21]

THE SURROGATE INDUSTRY

Estimates now show that 25,000 children are being born every year in India through surrogate mothers who now form a part of a 2BN$ industry.

The Politics and The Women

The surrogate industry as of now is running unchecked with the Draft pending for the past two years. With no regulatory body the clinics are let free to work on their own terms and according to their set modes of operation. This leaves the surrogate mother open to

[18] Shilpa Kannan, 'Regulators Eye India's Surrogacy Sector' *BBC World News*, (India Business Report, 18 March 2009)
[19] Sama - Resource Group for Women and Health. (2010). Constructing Conceptions: The Mapping of Assisted Reproductive Technologies in India, New Delhi
[20] Kohli N, 'Moms Market' *Hindustan Times* (3 January 2011)
[21] Warner J, 'Outsourced Wombs' *New York Times* (3 January 2008)

exploitation and abuse at the hands of Doctors, Agents (Surrogate Hostels), and the Commissioning Parents. These are the key players responsible for unregulated business of surrogacy as it happens today and its adverse effects on the docile and desperate women are exploited as surrogate mothers without their even knowing it.

Right from the moment when these women take the most difficult decision of their lives of carrying a child for someone else till the time when they deliver this child, these women go through different phases of exploitation and play different roles.

The Legislation Regarding Surrogacy in Various Jurisdictions

Mostly in all countries surrogacy and surrogate mother's rights are recognized to some extent. Selection of the various options for reform of the law on surrogacy requires a policy decision as to whether the practice should be prohibited, tolerated or facilitated. In all jurisdictions, the central tenet is that a child's welfare and interests must remain paramount. In this context it is important to recognize that some children born as a result of ART may be curious or anxious about their biological identity, require access to genetic information, and may wish to form relationships with their biological parents where possible. Any decision on options for reform must take account of these important issues.[22]

Legislations in various countries regarding surrogacy are as follows.

Surrogacy in India

Commercial surrogacy is legal in India. But it's still unregulated in our country as we don't have a legislation controlling surrogacy. Although the Indian Council of Medical Research (ICMR) has set 'national guidelines' to regulate surrogacy, through 'The Assisted Reproductive Technology (Regulation) Bill, 2010' these are still simply guidelines.

Surrogacy Laws in the United States of America

In the United States of America, the laws relating to surrogacy fall under the jurisdiction of the respective States. Some states have

[22] Victorian Law Reform Commission, *A.R.T., Surrogacy and Legal Parentage: A Comparative Legislative Review*

written jurisdiction while some have developed common law regimes for dealing with the issues.

Surrogacy friendly states tend to enforce both commercial and altruistic contracts and facilitate straightforward ways for intended parents to be recognized as child's legal parents.

Surrogacy in the United Kingdom

United Kingdom surrogacy laws are mainly based on 2 pieces of legislations:

1) Surrogacy Arrangements Act 1985- Restricting arrangement of surrogacy in U.K.
2) Human Fertilization and Embryology Act 2008 (s. 38- s. 55)

United Kingdom has an unusual approach to the issue at hand. The woman who gives birth is always the legal mother of the child.

In the United Kingdom although surrogacy arrangements are permitted by law it is illegal for a woman to make profit by renting out her womb. Any such commercial contract is not permitted and is not legally binding or enforceable. Any person who charges for negotiating a surrogacy agreement or advertising such arrangement will commit a criminal offence under the Surrogacy Arrangement Act, 1985.

Law supports homosexual couples conceiving through surrogacy in U.K. in the same way as it does for straight couples.

Surrogacy in Canada

Surrogacy is legal in Canada. The *Assisted Human Reproduction Act* prohibits the provision or acceptance of consideration to a woman for acting as a surrogate; it is illegal to pay a surrogate mother for her services. However, it is legal to reimburse a surrogate mother for her reasonable expenses arising as a result of the surrogacy.

There are two types of surrogacy: traditional and gestational. Surrogacy in Canada tends to be gestational surrogacy, but both types exist. The main characteristic of gestational surrogacy is that the surrogate is unrelated to the child. Most clinics in Ontario and in Canada require a pre-conception surrogacy agreement to be entered into before the embryo transfer.

The Assisted Reproductive Technology (Regulation) Bill, 2010

In 2010, the Ministry of Health & Family Welfare of the government of India put forward a bill meant to legally codify the use of assisted reproductive technologies (ARTs).[23] In doing so, India joined a small group of countries, including Canada and the UK having a federal ART laws which has already been discussed above.

The 2010 Draft stipulates that payment to the surrogate is to be made in five installments, with the majority, i.e. 75 %, to be made as the fifth and final installment, following the delivery of the child. In the 2008 draft, payment was divided into three installments, with 75% of the payment to be made in the first installment itself. This not only shows a clear priority accorded to the intended parents, but also betrays that the worth of the surrogate's labour, pregnancy, related emotional and physical risks etc. are considered reducible to and meaningless without a tangible reproductive 'output', the baby. The revision, therefore, is highly imbalanced, exploitative and unfavourable to the surrogate.[24]

According to the bill, surrogate mother shall not act as an oocyte donor for the couple or individual, as the case may be, seeking surrogacy. By ruling out genetic surrogacy, the bill seeks to foreclose the possibility of any contesting claims over the baby by the surrogate mother, thus preserving the contract.

A child may, upon reaching the age of 18, ask for any information, excluding personal identification, relating to the donor or surrogate mother. This nonetheless speaks to society's ongoing struggle with its evolving conceptualizations and definitions of motherhood. And while such a struggle correctly lies outside of the purview of law to define, it is unavoidable that any national ART law would be cited to help inform the discussion. Thus, it should be considered when drafting such a landmark bill.

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[23] Ministry of Health & Family Welfare, Government of India, The Assisted Reproductive Technologies (Regulation) Bill, New Delhi, (2010)

[24] Sama: Resource Group for Women and Health, The Regulation of Surrogacy in India: Questions and Complexities, (2011)

The draft Bill states that ARTs will be available to all single persons, married couples and unmarried couples. However, couple is defined as two persons 'having a sexual relationship that is legal in India.

The Government of India's new VISA regulations dated 9th July, 2012 for Commissioning Parents

On 9th July, 2012 a circular had been sent by the Ministry of Home Affairs (MHA) to all the Embassies and Missions in various countries relating to the "Type of visa for foreign nationals intending to visit India for Commissioning Surrogacy" and conditions for granting visa for that purpose.[25] These guidelines came into effect on 15th November, 2012.

On a careful reading of this circular is taken the following inferences can be drawn:

a. That the appropriate Visa required to commission surrogacy in India is not a Tourist but a "Medical Visa."

b. This grant of Visa is further subject to the conditions laid down in the circular, which state that only a heterosexual married couple, i.e. a man and a woman, who have been duly married for a period of two years, shall qualify to commission surrogacy in India. No other individuals, i.e. single men, women or homosexual partners are eligible to commission surrogacy contracts in India post 9th July, 2012.

c. Other conditions laid down by this circular state that 'the couple shall furnish a letter from the Embassy of their country stating that surrogacy is recognized in their country and that the child born out of surrogacy shall be recognized as the biological child of the commissioning couple' and 'an undertaking to the effect that the couple would take care of the child/children born through surrogacy.'

[25] Foreigners division Ministry of Home Affairs, available at: http://www.mha.nic.in; http://boi.gov.in/content/surrogacy, last modified on (Wed 2/27/2013, 17:33)

However, even though these guidelines have been issued there is no stringent law that is in place that effectively tackles the problems that have arisen even after the issuing of such guidelines. There is no authority that has been constituted under any law to check the misuse of these guidelines. What these guidelines have done however is that they have banned single and unmarried couples from entering into surrogacy arrangements in the country.

However, on 5th February, 2013, a limited relaxation in such matters was permitted on a case to case basis till the 31st of September 2013, by the Ministry of Home Affairs only in those cases where by the surrogacy was commissioned before the issuance of the said guidelines. Henceforth though, no surrogacy arrangement can be entered into by single persons, unmarried partners or gay partners in India.

It was further issued in a subsequent circular dated 11th October, 2103 that these guidelines would be strictly adhered to from 1st November, 2013, including those cases where surrogacy had been commissioned prior to 1st November 2013. And no further relaxation in the grant of Medical Visa or Exit Permits shall be granted to any surrogacy arrangements and matters arising out of or in connection with such arrangements.[26]

The applicability of two Indian Legislations to a surrogate mother, namely;

1. **Maternity Benefit Act, 1961.**
2. **Employees' State Insurance Act, 1948.**

For the purpose of this paper we shall look at two Legislations that govern Maternity Benefits in India namely the Maternity Benefit Act of 1961 and the Employees' State Insurance Act of 1948 as these are the two legislations that deal with all matters arising out of and in connection with the maternity rights of women employed in establishments that are governed by these two Acts respectively. Although it does not categorically state whether a surrogate is allowed such maternity benefit under these two acts, it does not also create any restriction if such surrogate is employed in an

[26] www.mha.nic.in

establishment wherein these two laws govern maternity rights of women. Through this research we shall try to establish whether a surrogate can be included within the ambit and definition of "woman" and "insured person" as required by both Acts respectively.

Even the Assisted Reproductive Technology (Regulation) Bill, 2010 is still incompetent to deal with all matters relating to and arising out of Assisted reproductive technology as the issue relating to Maternity benefit of a surrogate mother have nowhere been given completely left out, although section 34 deals with the rights of a surrogate, it does not specifically delegate or confer any maternity right on the surrogate mother.

Whether a surrogate mother falls under the ambit of the word "woman" as provided for under the Maternity Benefit Act, 1961.

The fact that motherhood requires special care and attention is reflected in Article 25(2) of the Universal Declaration of Human Rights, 1948, which say:

"Motherhood and childhood are entitled to special care and assistance. All children whether born in, or out of, wedlock, shall enjoy the same social protection"[27]

Keeping in view the convention of the International Labour Organization and the fact that there was a need for providing maternity benefits, Article 42 of the Constitution of India, directs the State to make provisions for maternity relief.

Although legislations existed prior to 1961, there was no single uniform legislation and this was the need of the hour, to have a single uniform legislation that governed maternity rights of women throughout the territory of India and this led to the enactment of the Maternity Benefits Act 1961, in order to help remove the disparities that existed within the various laws. This Act repealed the Mines Maternity Benefits Act, 1941, and the Bombay Maternity Benefits Act, 1929.[28]

[27] Mamta Rao, *Law Relating to Women and Children*, (Second edition, Eastern Book Company) Chapter VI, page no 395

[28] G. M. Kothari, *A study of Industrial Law*, 1973, page no. 671

The Maternity Benefits Act regulated the employment of women in certain establishments wherein persons were employed for the exhibition of equestrian, acrobatic and other performances. This is a legislation committed to monitoring women in establishments for periods before and after childbirth and providing of maternity benefits to them during those periods.

Section 2 (o) of the Act defines a woman, it states that a woman "means a woman employed, whether directly or through any agency, for wages in any establishment."

The only stipulation the Act does lay down is that the woman needs to be employed, either directly or through an agency for wages. It does not categorically state if she has to be within the bounds or wedlock or single or what purpose for she is bearing the child. Hence on a single reading of the abovementioned section it is clear that a surrogate mother too will fall within the ambit of the said Act, as it appears that there is no intention of the legislature to the contrary or no express exclusion to such effect. The only condition that a surrogate mother needs to satisfy to avail of the benefits conferred by this Act is that she ought to be employed whether directly or through an agency and for wages in an establishment which is governed by the provisions of this Act.

Furthermore, section 5-B of the Act, provides that "every woman" shall be entitled to the payment of maternity benefit under the Act:

(a) Who is employed in a factory or other establishment to which the provisions of the Employees' State Insurance Act, 1948, apply;
(b) Whose wages (exceeding remuneration for overtime work) for a month exceed the amount specified in sub-clause (b) of clause (a) of section 2 of that Act; and
(c) Who fulfills the conditions specified in sub-clause (2) of section 5

Subject to the provisions of the Act, every woman is entitled to, and her employer is liable for, the payment of maternity benefits at the rate of the average daily wages for the period of her actual absence

immediately preceding and including the day of her delivery, and for the six weeks immediately following that day[29].

The maximum period however for which any woman shall be entitled shall be 12 weeks, i.e. six weeks before the date of delivery and six weeks after the date of delivery.[30]

Whether a surrogate mother will be allowed to reap maternity benefit if she is employed in an establishment where the Maternity Benefits are governed by the Employees' State Insurance Act, 1948?

The main object of the Employees' State Insurance Act, 1948 was to evolve schemes for socio-economic welfare and make provisions for the discharge of it.

The Act provides for "periodical payments to an insured woman in case of confinement or miscarriage or sickness arising out of pregnancy, confinement, premature birth of child or miscarriage, such women being certified to be eligible for such payments by an authority specified in this behalf by the regulations, is hereinafter referred to as Maternity Benefits."[31]

The qualifications that an insured woman ought to have to claim maternity benefit shall be such as may be prescribed by the Central Government in the Employees' State Insurance (General) Regulations, 1950.

It is therefore clear from the provisions of this Act that if a woman is employed in an establishment in which the maternity benefit and other benefits are governed by the ESI Act, such woman shall be subject to the provisions laid down there under. There is no definition that has been given in the said Act to define who an 'Insured woman' is, it only defines who an insured person is, it says that an "insured person" means a person who is or was an employee in respect of whom contributions are or were payable under this Act and who is, by reason thereof, entitled to any of the benefits provided by this Act.[32]

[29] The Maternity Benefit Act 1961, section 5
[30] Maternity Benefits Act 1961, section 5(3)
[31] The Employees' State Insurance Act 1948, section 46(b)
[32] The Employees' State Insurance Act 1948, Section 2 (14)

In light of the above mentioned provisions of the said Act, it can nowhere be refuted that if such insured woman is a woman acting as a surrogate, she cannot be denied the right to maternity benefit under such Act, the only stipulation that has been put forward by this Act, is that she has to be employed in an establishment governed by this Act and that she has to been accepted to be an insured woman, so as to be able to claim maternity benefit under the act irrespective of her status of being a surrogate.

CONCLUSION

Surrogacy even though is an age old concept, is still a hot topic of debate and discussion. More often than not the moral and ethical considerations of it are debated. And the law relating to surrogacy is still in its formative years. Through this research we undertook the study of four major jurisdictions, i.e. India, United States of America, United Kingdom and Canada. We hereby deduce and recommend the following.

Codification of the laws related to surrogacy needs to be adopted and implemented. India is one of the few countries to have legalized commercial surrogacy. But if commercial surrogacy keeps growing, some fear it could change from a medical necessity for infertile women to a convenience for the rich.

All the reasons point out conclusively to the fact that a surrogate mother's rights need to be recognized and a comprehensive legislation is to be made in this regard in order to prevent her exploitation.

However, there is an anomaly between the guidelines issued by the Government regarding the Medical Visa Regulations, 2012 and the Assisted Reproductive Technology (Regulation) Bill of 2010 and either this Bill will have to be suitably modified and amended to incorporate the said Medical Visa Regulations or the Visa Regulations will need modification to incorporate the provisions of the Bill, as both cannot exist alongside. Since the Bill is still a draft and has not been effected into a Legislation, and has many legal lacunae therefore it is prudent for the drafters of this Bill to make the necessary changes and amendments to Bill before it is tabled before the Houses of Parliament to be passed as a Law. So that these pitfalls do not become a graveyard for a law yet to be born as surrogacy needs to be regulated by proper statutory law. ■

THE CONTRADICTING CODE

*Kanwardeep Singh Kapany**

INTRODUCTION

There are two aids to understand when the provisions of Section 391of the Companies Act 1956 ("**Act**") can be invoked, one provided by the legislature in the form of Section 390 which puts forth the meanings of expressions such as company, arrangement and unsecured creditors, the other aid provided by the judiciary in the form of judicial interpretation of expressions such as compromise. Moving onto company, it is defined to include any company liable to be wound up, therefore in addition to company as defined in Section 3 of the Companies Act 1956, Section 391 can be applied to unregistered companies, foreign companies, government companies and needless to say even companies which are a going concern i.e. the companies are not to be in actual winding up to attract Section 391. Next is the expression arrangement which already is a term of wide import defined to include reorganisation of the share capital of the company by the consolidation of shares of different classes, or by the division of shares into shares of different classes or by both those methods. However, it will apply only to an understanding or arrangement between the company and its creditors or any class of them, or between the company and its members or any class of them, or between the company and its members or any class of them, which would necessarily mean that it must be an agreement or understanding which affects their rights.[1]Lastly while dealing with unsecured creditors, Section 390 extinguishes the distinction between unsecured creditors who may have filed suits or obtained decrees and other unsecured creditors. As the expression compromise has not been defined by the legislature, we have to look for it to judiciary which construed it in consonance with its popular import as postulating a dispute relating to rights and as a scheme which seeks to be in the nature of a settlement of those disputes.[2] Inevitable conclusion is the special intent in mind of the legislature[3] as it has defined certain terms

* IV BSL LLB

[1] *Bank of India Ltd. v Ahmadabad Manufacturing & Calico Printing Co. Ltd,* [1972] 42 CompCas 211 (Bom)

[2] *Mercantile Investment and General Trust Co. v International Co. of Mexico,* (1893) 1 Ch 484 at 491

[3] *Frontier Bank Ltd.; Re,* (1951) 2 Com Cases 1,5,26 (Punj)

again in Section 390 so that the expressions appearing in Section 391 are read in that light, certain differences which are otherwise good in law have been done away with only while dealing with the situations under Section 391 making the Section attain status of a special provision and the settled law is that a special provision should be given effect to the extent of its scope leaving the general provision to control cases where the special provision does not apply.[4]Another offshoot of this is that Section 391 is termed as a complete code and a provision providing single window clearance as it invests the Court with powers to not only approve or sanction a scheme of compromise or arrangement but also to sanction other things while sanctioning the scheme which otherwise require a special procedure to be followed except for reduction of capital for which rule 85 of Company Court Rules 1959-provides, therefore the company need not resort to other provisions of the Act or to follow other procedures prescribed for bringing about the changes requisite for effectively implementing the scheme, which is sanctioned by the Court. This can be further seen by analyzing Section 391 which lays down in 6 clauses straight the steps to which obedience must be provided while a compromise or arrangement is being entered into so that the sanction of the court can be attained. First clause deals with who can apply, both when a company is a going concern and in liquidation. Second clause provides the slated majority needed before the scheme of compromise or arrangement is provided to the court for its sanction with a proviso stating that until all the material facts are provided to the court, no order sanctioning any compromise or arrangement shall be made. *Clause 3* deals with how to make the order of the court sanctioning the scheme effective. *Clause 4* provides for annexing a copy of every order by which court sanctions the scheme of compromise or arrangement to every copy of the memorandum of the company issued after the certified copy of the order has been filed as stated in clause 3, or in the case of a company not having a memorandum, to every copy so issued of the instrument constituting or defining the constitution of the company. Clause 5 punishes the company and every officer with fine which may extend to one hundred rupees if default is made in

[4] *South India Corporation (P) Ltd. v The Secretary, Board of Revenue, Trivandrum,* [1964] 4 SCR 280

complying with sub section (4) for eah copy in respect of which default is made. Clause 6 provides for staying, both, commencement or continuation of proceedings against the company on terms the court thinks fit until the application is finally disposed of. Clause 7 empowers the aggrieved party to make an appeal against any order made by a court exercising original jurisdiction which is the High Court for sanctioning compromise or arrangement, to the court empowered to hear appeals from the decisions of that court, appeal lying to the court of inferior jurisdiction when more than one court is so empowered. Now another striking characteristic of this code is that it has been to be marred by conflict of judicial opinion in certain spheres. In some cases the Supreme Court has come to the rescue, as was for deciding that state legislature is competent to impose stamp duty on the order of amalgamation[5], meetings can be dispensed with by following the inroads made to it[6]. However some have still been left unresolved, attempt to resolve which have been made in the subsequent section of the paper.

1. Who can apply under section 391(1) when the company is in winding up under the order of the court?

Section 391 (1) reads as follows:

Where a compromise or arrangement is proposed

a) between a company and its creditors or any class of them ; or
b) between a company and its members or any class of them ;

the Court may, on the application of the company or of any creditor or member of the company, or, in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs.

[5] *Hindustan Lever v State of Maharashtra*, (2004) CLC 166
[6] *Miheer H. Mafatlal v Mafatlal Industries Ltd.*, JT 1996 (8) 20

Conflict

The seed of conflict was borne out while understanding upon whom does the Act[7] bestows the right to apply to the court where a compromise or arrangement is proposed while the company is being wound up. Laying rest to this controversy depended upon comprehending the words "in the case of a company being wound up, of the liquidator" mentioned in Section 391 (1).

Judicial Decisions

Following are the judgments which played a role in the arising of the above mentioned controversy.

In *Travancore National & Quilon Bank Ltd. In Re*[8], it was held that even in the case of a company in winding up, an application under this sub-section can be made by a creditor or member as the clause does not restrict the exercise of the right to the official liquidator but only nominates an additional person who may exercise it.

In *RBI v. Himachal Grameen Sanchayaka Ltd*[9] it was ruled to the contrary as the judge stated that a bare reading of Section 391 (1) points out that when the company is in winding up,an application under the Section can be maintained by the liquidator alone.

Critical Appraisal

I would endorse the opinion in *Travancore National & Quilon Bank Ltd., In Re.* foremost thing to be discovered is the status which a member and creditor attain on the winding up of a company under the order of the court. The creditor remains a creditor only, whereas a member, which is defined in Section 41, becomes a contributory as per Section 428 of the Act. A register of members is duly maintained by the companies. The terms member and creditor are not synonymous, former dealing with the status of a legal person prior to winding up of the company, the latter dealing with the status of an individual, or a legal person after the order of winding up of the company. This difference in the status of the two has been used as to formulate the line of argument that as a member becomes a contributory after

[8] AIR 1939 Mad 318
[9] [2004] 122 CompCas 762 (HP)

winding up order and contributories are not enabled under Section 391 of the Act to apply, consequently, the liquidator exclusively has a right to apply under Section 391 of the Act when a company is in winding up. But this argument is faulty primarily due to no mention in the Act as to ceasing of a member to be a member after winding up order is passed, till Section 41 read with Section 150 of the Act continue to be complied with [10].This contention can be buttressed by a reading of Section 536 (2) which states that any transfer of shares in the company or alteration in the status of its members, made after the commencement of the winding up, requires the sanction of the court, pointing members do not cease to be members on a company being wound up nor do they cease to be members on receiving a return of capital. Furthermore Section 511 which deals with a situation which arises after a winding up order has been passed, makes a reference to 'members' again reinforcing that mere winding up does not amount to members ceasing to be a member. Also a reading of Rule 68 of the Company Court Rules, 1959 concerned with compromise or arrangements, which provide for serving a copy of the summons and of the affidavit on the liquidator of the company when the liquidator is not an applicant as recognized in *National Steel & General Mills v. Official Liquidator*[11] reinstates the contention. Any interpretation contrary to the judgment of *Travancore National & Quilon Bank, In Re.* would violate the cardinal principle of harmonious interpretation of statutes as 446(2)(c) of the Act empowers the Court which is winding up the company notwithstanding anything contained in other law for the time being in force to entertain and dispose of any application made under Section 391 of the Act by or in respect of the company in case of liquidation of the company, i.e. it has jurisdiction, so if the liquidator exclusively is interpreted to mean to have a right to move under Section 391 of the Act, and that Company is not to have such a right, there would be a direct conflict between Sections 391(1) and 446(2)(c) of the Act. Even Palmer in his book on winding up, Palmer's Company Precedents[12], observes the same regarding the corresponding section in the English Act. He opines

[10] *Rajendra Prosad Agarwalla and Ors. v Official Liquidator*, [1978]4 8 CompCas 476 (Cal)
[11] [1990] 69 Comp Cas 416 (Delhi)
[12]Palmer, *Palmers Company Precedents, Part II, Winding up* (15th edition), page 906

'The Act expressly provides that the court may, on the application, in a summary way, of the company, or of any creditor or member of the company, or in the case of a company being wound up, of the liquidator, order a meeting, etc.' An argument put forward vehemently against *Travancore National & Quilon Bank, In Re.*, decision is the observation of Supreme Court in *M/s. Great Indian Motor Works Ltd. and another v. Their Employees and others*[13] whereby it said the affairs of the company under liquidation, are placed in charge of the official liquidator and under Section 457, it is only the liquidator who is authorized with the sanction of the Court, to institute any suit or other legal proceedings in the name and on behalf of the company .But this general power does not prevail and take away the special power of the company or member or creditor of the company has granted under Section 391. An appreciation of the fact that the interest that entitled the company, member or creditor to make the application in the case of a going concern subsists even after an order for winding up is made to sustain a similar application even at that stage, further strengthens that the legislature couldn't have intended to overlook this subsisting interest by bestowing exclusive right on the official liquidator to move an application in the case.

2. Whether or not the word proceedings as used in section 391 (6) is wide enough to cover criminal proceedings?

Section 391 (6) reads as follows:

The Court may, at any time after an application has been made to it under this section, stay the commencement or continuation of any suit or proceeding against the company on such terms as the Court thinks fit, until the application is finally disposed of.

Conflict

The seed of conflict was borne out while understanding whether 'stay the commencement or continuation of any suit or proceeding against the company …' includes criminal proceedings

Judicial Decisions

Following are the judgments which played a role in the arising of the above mentioned controversy.

[13] AIR 1959 SC 1186

In *Harish C. Raskapoor and Ors.Vs. Jaferbhai Mohmedbhai Chhatpar, Divya Vasundhara Financiers P. Ltd.,*[14] the court held that the word proceedings is wide enough to include both civil and criminal proceedings.

In *In Re , Uma Investment Private Ltd., State of Tamil Nadu v. Uma Investment Ltd.*[15], it was held that the court has no jurisdiction to stay criminal proceedings

Critical Appraisal

I would endorse the judgment in *In Re, Uma Investment Private Ltd., State of Tamil Nadu v. Uma Investment Ltd.*[16]In addition to what the court held in *Harish C. Raskapoor* case, it is worthy to be aware that the court granted a partial stay on criminal proceedings allowing hearing of the complaint and recording of evidence of the prosecution and also evidence, if any, offered by the defense. Further light on this question is thrown by other different provisions of the Act itself wherein similar expressions have been used. Firstly we need to appreciate that the legislature has used the expression 'suit' or other 'legal proceedings' in Sections 442 and 446 which deal with power of court to stay or restrain proceedings against the company and with suits stayed on winding up order[17], the words "prosecution" or "criminal case" are missing, moreover the Andhra Pradesh High Court's Division Bench affirmed that Section 446(1) of the Act does not cover criminal proceedings.[18] The absence is conspicuous can be seen when under Section 454 of the Act the legislature has empowered the Company Court itself to take cognizance of the offence under sub section (5) of section 454 of the Act and to try such offenders as per the procedure provided under the Code of Criminal Procedure 1974. Furthermore in section 457 (1) (a) of the Act, the legislature has explicitly put forth that the liquidator is empowered to institute or defend any 'suit' or 'prosecution' or' other legal proceedings' civil or criminal in the name and on behalf of company after permission from

[14] *Krishna Texport Industries Ltd. v DCM Limited Hon'ble Judges,* [2008] 114 Comp Cas 113 (Delhi)
[15] (1977) 47 Com Cases 242 (Bom)
[16] (1977) 47 Com Cases 242 (Bom)
[17] *Sudarsan Chits (I) Ltd. v G. Sukumaran Pillai,* (1984) 4 SCC 657
[18] *Pennar Peterson Ltd. v Court of Judicial Magistrate 1st Class,* 2002 (2) ALD 78

the court. Moving onto Section 621(1) a reading of it indicates that the company court has no jurisdiction over other offences except the offence under section 545 of the Act. A similar position exists in Section 542 of the said Act where there is a provision for imprisonment. Similarly Section 633 contains the expression "any proceedings". The Supreme Court[19] considered the scope of the expression "any proceedings" in section 633 of the Act and held that it cannot save directors of the company from liability or prosecution for violating these provisions, observing that such a relief can be granted only in case of proceedings arising under the Act and not under other acts, holding that it must be construed in the light of the penal provisions or else the penal clauses under the various other Acts would be rendered ineffective by application of Section. An analysis of the above Sections of the Act and the authorities cited make it unequivocal that Section 391(6) of the said Act does not envisage stay of criminal cases against the company or its officers.

CONCLUSION

A transaction in the nature of an arrangement or compromise or as commercially known as merger, acquisition, amalgamation, etc is both a commercial and crucial transaction which is growing by leap and bounds in India. Although Section 391 has spelt out the criterion to be fulfilled in order to get sanction of the court for the scheme of compromise or arrangement, what is not spelt out and has been built up by judicial precedents but still we are left with a void at certain places as brought out in the preceding part of the paper, filling which has been attempted but nothing short of the amendment in Section 391 seems to be a solution or else the un-amended provisions as such would facilitate judicial inconsistency. Therefore an amended version of the relevant provisions of Section 391 is being provided with reasoning as to how the amended provisions will act as an antithesis to judicial conflict.

The amendments proposed in Section 391 (1) and (6) are as follows.

Section 391 (1)

Where a compromise or arrangement is proposed

[19] *Rabindra Chamrior v Registrar of Companies,* 1992 (Supp) (2) SCC 10

(a) between a company and its creditors or any class of them ; or
(b) between a company and its members or any class of them ;

the Court may, on the application of the company or of any creditor or member of the company, or, in the case of a company which is being wound up, of the liquidator *'also'*[**], order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs

Section 391 (6)

The Court may, at any time after an application has been made to it under this section, stay the commencement or continuation of any suit or proceeding against the company on such terms as the Court thinks fit, until the application is finally disposed of.

[**]'Explanation- The character of the proceedings should be of pecuniary nature involving money considerations between the company and its creditors or members having a nexus or bearing with the proposal for compromise or arrangement, set afoot for consideration of the creditors or members or both as provided in Sub-section (2) of Section 391.'

The amendments proposed in Section 391 (1) and Section 391 (6) is with the objective of bringing out in a lucid manner that the liquidator is not the exclusive but an additional person who can exercise the right of applying when the company is in winding up under the order of the court and to make known that the court is not empowered to stay criminal proceedings or criminal prosecution against the company or its officers and if this prerequisite is fulfilled then we have to move onto see that whether or not the proceedings which are being stayed is effecting the scheme of compromise or arrangement which is put in front of the members or creditors for their consideration, those proceedings can be stayed i.e. if the proceeding is not of criminal nature and has a direct effect on the scheme of compromise or arrangement presented before the members or creditors or both.

[**] The Proposed amendment
[**] The proposed amendment

THE UBIQUITY OF CULTURAL PREJUDICES IN PATRIARCHY

Madhur Bharatiya[*]

INTRODUCTION

Unlearning the patriarchy can take a long time, if not a lifetime. If we observe carefully, then unless we are consciously making an attempt at not acting in a manner that reinforce cultural stereotypes and institutionalised structures of oppression that work their way into creating an unsafe environment for the marginalised groups, then perhaps we are doing something that is actually leading to this. Stereotyping, somehow or the other, ends up finding a place in all creative domains of human activity and it is hard to escape that. It is there in a popular movie dialogue, a favourite book, done by a favourite writer, a renowned singer; it also comes from close friends and relatives. It is reflected in the scheme of laws, and from the judgments of the highest Court of the land. And of course from us, when we are not questioning enough. This article will be exploring how every day activities and seemingly harmless utterances contribute to the normalisation of violence, which is effectuated by the impact of these various factors that involve our direct participation, and also how our justice system gets largely influenced by them. I will be confining myself here to the stereotyping of women at the cost of exclusion of other marginalised groups.

JOKES/CASUAL REMARKS: WHY IT IS NOT 'JUST A JOKE'

In popular culture, humour represents an important aspect of a person's personality. While a number of things said in the name of humour may not seem harmful on the face of it, but on careful observation it may be found that they are linked with deeply problematic attitudes when directed against women. For example, 'stop crying like a girl', something that boys get told for expressing their emotions, goes on to show that being a girl is probably the worst thing a man can be. Not to mention, it reinforces the notion of women being hyper emotional beings, and it is one of the tropes used to trivialise their experiences. There is this line of 'get back to the kitchen' jokes which reinforces the idea that women are typically meant to feed (the family), the 'reckless women driver' jokes,

[*] I LLM

implying women in general are terrible with cars (because women are not considered to be good at anything predominantly associated with men, which is actually a large number of things). Zilman and Cantor's (1976) disparaging theory of humour suggests that people enjoy jokes that disparage a particular group of people when they have negative attitudes towards that group and/or positive attitude towards the source of disparagement.[1]

What remains a challenge is being taken seriously for feeling offended over the seemingly harmless jokes, because when people make disparaging statements about others in a humorous way, they can leave the question open whether they really meant it or if it was 'just a joke' and the right to feel offended is then no longer with the target group; it is now the one who makes the joke who dictates that.[2] When historically disadvantaged groups, such as minorities and women, began to decry the use of disparaging humour in the workplace and in public discourse generally, others reacted in what they perceived to be an unwarranted restriction on their right to free speech, suggesting that such humour was all in fun and should not be taken seriously at all.[3] If perhaps I sit with Kapil Sharma's fans with a straight face, while he rattles off a series of sexist and misogynistic remarks, I run the risk of being demeaned in the eyes of the audience, well, because it is just a joke and can I not take a joke?

Scholars like Paul Lewis have argued that degrading forms of sexist and racist humour can serve to legitimise and perpetuate negative stereotypes and contribute to a culture of prejudice.[4]

REPRESENTATION OF WOMEN IN POPULAR MEDIA

There is nothing more problematic than the unregulated content exhibition done by mainstream media. Be it the Indian cinema or the advertisements, and also news reporting in a lot of cases, they are all rife with unrealistic and insensitive representation of women. The

[1] Rod A. Martin, The Psychology of Humour: An Integrated Approach 140 (Elsevier Academic Press, United States of America, 2007).
[2] Ibid at p. 141.
[3] Ibid.
[4] Rod A. Martin, The Psychology of Humour: An Integrated Approach 140 (Elsevier Academic Press, United States of America, 2007).

cosmetic industries capitalise on the very idea of a woman's low self-image due to not conforming to the conventional standards of beauty, which equate characteristics like fairness and thinness to beauty. Fair & Lovely advertisements have played a large role in perpetuating the idea that lesser melanin content in the body is the key to success and acceptance. Overweight and fat women are highly unlikely to be seen in a leading role in a daily soap or a movie as compared to fat men.[5] The Kellogg's seven day challenge illustrates how being thin is yet another key to happiness. Then there is the line of anti-ageing products. And the media, it seems, just cannot get over the natural phenomena of ageing. They want us to get rid of our wrinkles even before we have them. Anti-ageing product advertisements for men are unheard of, if not a potential humorous concept. And there would have been nothing wrong with this, but for the reinforcement of a system of beliefs that value women for their appearances, and which punishes them also for not living up to those, if not for trying to do that expressly. 'Natural beauty', prima facie a well meant compliment, insinuates that somehow women who wear make-up do not match up to some standards of looks. Similarly, women who go for surgeries which bring them closer to the image of a conventionally good looking woman, will be slapped the 'fake' tag, if not other, more offensive, synonyms.

The general Indian mentality has internalised much of these Eurocentric standards of beauty and these play themselves out in the general perception that people have of women, which places more emphasis on their appearance, and so their value is largely determined by how closely they fit into the widely accepted standards of beauty. The advertisements also promote these ideas where the use of the product being advertised, which is generally marketed on the oppressive ideas of beauty, automatically saves an otherwise failing marriage. In the bargain, our culture raises daughters who value physical appearance more than any other attribute of human beings (like kindness, intellect, etc.), at least until the point she realises the faults in these ideas and chooses to challenge the gender roles assigned to and ingrained in her. It is not surprising that phrases like

[5] The successful Indian soap 'Bade Achche Lagte Hain' explains this point.

'beauty with brains', 'not just a pretty face' get thrown around as a compliment so often, because a woman could have either been good looking *or* a talented, intellectual person.

Moreover, things conventionally associated with men (because of the system of patriarchy) receive more approval than traditionally feminine attributes. A woman who has an inclination towards sports will be considered to be worthier than a woman who is a fashion enthusiast, the former being closely associated to men in popular culture and the latter to women.

A woman is traditionally required to fit into the role of a homemaker (because the bread earner is the man in a patriarchy). Such notions give rise to words like 'career woman' which has no male equivalent. Such notions punish women for not conforming to the assigned gender roles. A lot of women have to leave their jobs after marriage, and thus the status quo is undeterred.

The roles played by women in popular media[6] is rife with stereotyping. Uma Chakravarti[7] observes that there has been a visible shift in the portrayal of women in the media. While earlier they were selling products, most of which they did not use, now they have become the desirers and active buyers of those goods. Initially women had figured in the ads as buyers mainly in the area of domestic goods; this was particularly so in the celebrated war for possibly one of the largest markets between companies in the soap/ detergent ads (Chakravarti 2000: 13). More recently, there have been a few ad campaigns aimed at debunking the gender stereotypes and conventional standards of beauty. However, the well intended Dove Real Beauty campaign has failed to identify the source of the problem, and thus ended up perpetuating the flawed concepts yet again that associate thinness to beauty. As Golda Poretsky points out, 'a lot of these women's journeys are about learning that parts of their face aren't as big as they thought. From big jaws to big foreheads to fat faces, much of their relief and excitement is centered around finding

[6] I have deliberately left out the critique on daily soaps since I am not up to date with the latest trend.

[7] Uma Chakravarti, "State, Market and Freedom of Expression: Women and Electronic Media", 35 *EPW* 12 (2000).

out that parts of their face aren't that big.'[8] The new Pantene advertisement, on the other hand, showing the contrasting labels between men and women, depicts the negative attitudes against women in general, quite well.

Media plays an important role in determining how women, or people in general for that matter, view themselves, others, and also what an ideal image is or is not. Indhu Rajagopal and Jennifer Gales point out that the power of advertisements and media images has a stronger impact in shaping gender images than what books on feminism and scholarly experiments have on gender equality[9]. These images are absorbed by all- children, adolescents, adults, which also includes our Judiciary.

RAPE CULTURE AND VICTIM BLAMING

There can be various degrees of stereotyping. However the variance is no excuse for perpetuating the same, because the cumulative effect comes to the major differences in the popularly held notions about the various genders, the manner of treatment of the same, and how the former affects the latter. Harmful effects of stereotyping are not only confined to discrimination faced by women in the family as well as workplaces and beyond, to the low self worth among women, but also in the perpetuation of rape culture.

A year back, when people were flocking the streets to protest the rape of a 23 year old paramedical student in Delhi, a lot of public discourse involved discussions relating to how it is wrong to question the circumstances and clothing of a rape victim. And yet, slut shaming is a common phenomenon that manages to find place in day to day conversations and online discussions, in the form of jokes, etc.[10] In popular culture, there are discussions in the media related to 'wardrobe malfunction', a concept that has only been associated with

[8] Golda Poretsky, "Why Dove's Latest "Real Beauty" Video Gets It All Wrong", available at http://www.bodylovewellness.com/2013/04/22/why-doves-latest-real-beauty-video-gets-it-all-wrong/

[9] Indhu Rajagopal & Jennifer Gales , 'It's the Image that Is Imperfect Advertising and Its Impact on Women', 37 *EPW* 3333 (2002).

[10] Most women are conscious about evoking comparison of their appearance with prostitutes and sluts, which is preferably avoided. This is yet another aspect of the pure/impure dichotomy.

women, because dressing 'decently' is a virtue only for women (which finds a mention in the Bible[11] also), so any digression from such notions of virtue is a 'malfunction', and people see nothing wrong with publicly shaming someone who has not adhered to their standards of morality. People only manage to see the wrongness in questioning the choice of clothing of a rape victim, but it somehow becomes okay to make fun of someone often sporting short skirts and dresses, asking them if those are clothes from their childhood, etc.

It is the questioning which is flawed. On the face of it we might be appearing to move in a forward direction, but it is going to take us some time to fully acknowledge the problem areas within the already identified areas, and work towards correcting those. For example, the sense of vindication shared by the public when the trial court sentenced the offenders of the paramedical student, to death[12], is a clear reflection of the absence of the understanding of rape culture, of how it begins, how it is manifest in a lot of things we say and do, and how it is perpetuated and normalised by mainstream media, and that these incidents are not an isolated phenomena. Rape does not happen in a vacuum. Our culture tells men that they are in power and that women are weak. Our culture tries to justify violence by turning the tables at the woman, where it had either been her fault or because she deserved it. The flawed idea of uncontrollable male desire is just another one in the line of victim blaming arguments. Literally, any argument, any question directed against the victim is rape culture, simply because *no one* deserves to be raped.

Kanchana Mahadevan points out, it is both in India and the west, that the psychology of the offenders and the context of patriarchal social structure tend to be missing from mainstream discourses on sexual assault.[13] The law's reference to modesty has often been

[11] "In the same way, that women also adorn themselves in decent clothing, with modesty and propriety…", 1 Timothy 2:9-10.
[12] According to Kanchana Mahadevan, death penalty presumes that loss of chastity is worse than death so that its punishment is equally hard hitting. The endorsement of death penalty overlooks that many women who do register rape cases withdraw due to police deterrence and social stigma.
[13] Kanchana Mahadevan, "The 'Virtuous Woman': Law, Language and Activism" 43 *EPW* 46 (2008).

interpreted in terms of traditional cultural stigmatisation of the victim to make sex crimes vague and justice difficult. This is evident from the characterisation of rape as "deathless shame" or an irrevocable, rather than remediable damage. The attack is ascertained only in narrow physical terms. Such interpretation and understanding downplay the violent aspect of rape, by highlighting its sexual aspect.[14]

While a number of amendments have been made under the IPC recently, addressing a wider range of issues relating to women, the Exception to Article 375 still stands, that is, marital rape is still a lawful act. The origin of the exclusion of marital rape form the purview of criminal law is based on a compilation of law prepared by Sir Matthew Hale CJ, in 1736, entitled *History of the Pleas of the Crown*.[15] Every act of sexual intercourse between a husband and wife is deemed to be consensual.[16] The existence of such an archaic law in the postmodern world is nothing but a reflection of the problematic attitudes still prevalent against women.

The IPC also talks about modesty and outraging of that modesty.[17] Thus, the penal code itself subscribes to the pure/impure dichotomy of a woman.

Mahadevan explains how Pintchman (1993: 148-50) traces the ambivalent mythological connotation of chastity (or purity) and pollution to Hindu goddesses who embody the principles of *sakti* and *prakriti* required for creation. Sakti is a power that makes creation possible and also pervades it, whereas prakriti is creation itself; both can have useful or detrimental effects depending upon whether they can be harnessed. This ambivalence is reflected in the empowerment of *pativrata* who is regulated, in contrast to the disempowered loose woman (ibid: 150-51, 154). Female figures reflect the space between nature and the culture occupied by women (ibid: 151). They are

[14] Ibid.
[15] "The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself this kind unto her husband which she cannot retract." Vol 1, p. 621.
[16] Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* 34 (The Glass House Press, London, 2005).
[17] Section 354- Assault or criminal force to woman with intent to outrage her modesty.

disorderly in expressing nature at work and simultaneously orderly in their cultural capacity as units who reproduce social order (ibid: 154). Hence, women are also referred to as fertile field ('ksetra') (ibid: 152). The woman as matter has to be ordered so that she does not pollute; this is only possible when her husband owns her, any other relation is tantamount to her pollution. The discourse of pollution is connected with preserving a caste-based social order where the woman is the foundational force who ensures that there is no improper mixing of caste.[18]

Ancient Indian folklore plays out the metaphysics of order and disorder and the culture of adulation and abuse, in the unequal figures of Arundhati and Ahalya [Chakravarti 1985: 49-50]. Arundhati prevented her attackers from molesting her by converting them into children, power that was said to be invested in her through her chastity as a wife. Ahalya, on the other hand, had no such luck, she believed god Indra who assumed her husband's form and gave in to him in a moment of weakness. She was injured for not being able to detect Indra's impersonation. Ahalya was converted to stone, while Indra escaped the curse that was pronounced on him for his misdeed. That morally weak women who step outside the domestic ambit deserve rape does appear to have sanction in tradition.[19]

Love, rights and solidarity are patterns of recognition, whose violation can harm the positive image that a person has of herself. The corresponding modes of disrespect at the individual level are corporeal injury, such as rape or the denial of rights as in eve-teasing. At the level of community there could also be denial of the whole group, such as stereotyping of women per se. These modes of derecognition operate together in varying degrees (that are not hierarchical) when it comes to sexual crimes against women. They violate women by refusing to allow them to enter and participate in public places, which is crucial to their development. Feminists have interpreted the law's appeal to social mechanisms to address injury against women as the struggle for public spaces.[20]

[18] Kanchana Mahadevan, "The 'Virtuous Woman': Law, Language and Activism" 47 *EPW* 46 (2008).
[19] Ibid at p. 43.
[20] Ibid at p. 50.

IMPACT ON THE JUDICIARY

The Indian judiciary is well-known for its activism and progressive approach. Yet when it comes to stereotyping and discriminatory attitudes, the decisions given and the observations made by our Judges have not been free from the culture that has been internalised by every individual. That is, however, no justification for decisions like *Tukaram*, that, despite a progressive approach taken by the Indian Judiciary from time to time,[21] leaves a bad taste in the mouth.

The cultural bias against women is not limited to rape trials, but is ubiquitous in nature. In *Alamgir v. State of Bihar*,[22] the Court has observed that the provisions of Section 498 (Indian Penal Code), like those of Section 497, are intended to protect the rights of the husband and not those of the wife. The gist of the offence under S.498 appears to be the deprivation of the husband of his custody and his proper control over his wife with the object of having illicit intercourse with her. The consent of the wife to deprive her husband of his proper control over her would not be material. It is the infringement of the rights of the husband coupled with the intention of illicit intercourse that is the essential ingredient of the offence under S. 498. The court went on to make further observations that in a case under Section 498 IPC, since S. 498 does not purport to protect the rights of women but safeguards the rights of the husbands, consideration that in India, women, whether chaste or unchaste, must be protected, in enhancing the sentence, is not helpful or decisive, when it is clear that the woman is of loose moral character, was dissatisfied with the husband, and was willing to marry the accused.

Kannabiran argues that an important thread in Article 15 jurisprudence on the work place has to do with what she terms as "efficiency rules" and the "relationship rules".[23] The Indian Railways found that women employees are less susceptible to improper

[21] Vishakha v. State of Rajasthan , AIR 1997 SC 3011; Chairman, Railway Board v. Chandrima Das AIR 2000 SC 988.
[22] AIR 1959 SC 436.
[23] Kalpana Kannabiran, "Judicial Meanderings in Patriarchal Thickets: Litigating Sex Discrimination in India" 44 *EPW* (2009).

influence, were more patient and courteous, and less corrupt than male employees and decided to reserve clerical posts in reservation offices for women with a view to increase efficiency.[24] But this view of women's efficiency in paid work, is missing from that taken in *Air India v. Nergesh Meerza.*[25] In this case, the employer's requirement of a four-year bar on marriage was retained as being reasonable and salutary, since generally airhostesses joined service at 19, and the regulation permits them to marry at 23.(Kannabiran: 2009).

"[This] is by all standards a very sound and salutary provision. Apart from improving the health of the employee, it helps a good deal in the promotion and boosting up of our family planning programme. Secondly, if a woman marries near about the age of 20 to 23 years, she becomes fully mature and there is every chance of such a marriage proving a success, all things being equal..."

The second provision on the termination of service on first pregnancy, the court found, shocked its conscience.

"It seems to us that the termination of the services of an AH [air hostess] under such circumstances is not only callous and cruel act but an open insult to Indian womanhood - the most cherished and sacrosanct institution. We are constrained to observe that such a course of action is extremely detestable and abhorrent to the notions of a civilised society ... and is therefore clearly violative of Article 14 of the Constitution."

However, it said,

"The rule could be suitably amended so as to terminate the services of an AH on third pregnancy provided two children are alive which would be salutary and reasonable for two reasons. In the first place, the provision preventing third pregnancy with two existing children would be in the larger interest of the health of the AH concerned as also for the good upbringing of the children. Secondly, ... a bar of third pregnancy where two children are already there [would be acceptable] because when the entire world is faced with the problem of population explosion it will...be...absolutely essential for every country to see that the family planning programme is not only whipped

[24] Charan Singh and Others v. Union of India, 1979 LAB IC 633.
[25] AIR 1981 SC 1829.

up but maintained at sufficient levels so as to meet the danger of overpopulation..."

The observations of the court go on to reflect nothing but the ingrained prejudices prevalent among our judicial officers, camouflaged in rather irrelevant concerns, insofar as their implementation through discriminatory rules is concerned.

Motherhood, pregnancy, childbirth, menstruation and marriage are for the male employer the principal constituents of the identity of women in paid work and determinants of their worth. For courts, these are the constituents of "modesty". The Life Insurance Corporation (LIC) required women candidates to state the following: husband's name in full and occupation; number of children; whether menstrual periods have always been regular and painless; number of conceptions; date of last menstruation; whether pregnant at the time of applying; date of last delivery; and abortion or miscarriage, if any. All completely irrelevant to a woman's employment or capacity or competence at work. If the LIC intended to map the possibilities for a healthy workforce, neither pregnancy nor childbirth, nor menstruation is indicative of ill health or morbidity. Answering these questions is no more painful or "embarrassing" or "humiliating" than having to go through a pregnancy test before appointment. The court however, thought differently. (Kannabiran: 2009).

"The modesty and self-respect may perhaps preclude the disclosure of such personal problems like whether her menstrual period is regular or painless ... etc ... If the purpose of the declaration is to deny the maternity leave and benefits to a lady candidate who is pregnant at the time of entering the service [the legality of which we express no opinion since not challenged], the Corporation could subject her to medical examination, including the pregnancy test."

Emphasis of technical aspects of the case and modesty constitute the retraction from application of the principles of jurisprudence.

The judgments of the court in rape cases that are perceived to be positive, have often reflected conservative notions of the court regarding women and their sexuality. The judicial comments include, "when a woman is ravished what is inflicted is not merely physical

injury but a deep sense of deathless shame..." and "...no woman of honour will accuse another of rape and thereby sacrifice what is dearest to her..." (*Rafia v. State of Uttar Pradesh*[26]) While lamenting the loss of virginity, the courts proclaim during rape trials that "virginity is the most precious possession of an 'Indian' woman",(*Babu v. State of Rajasthan*[27]) thus insinuating that rape of foreigners is not a serious offence.[28]

In the first major decision after the *Vishakha* judgment, the Supreme Court not only broadened the scope of the sexual harassment test, it also delivered a decision that seems to reinforce the policing of women's sexual conduct within the boundaries of traditional, culturally determined sexual behaviour, without remedying women's claims of sexual harassment. In the *AEPC*[29] decision, the High Court held that trying to molest a female employee was not the same as actually molesting her, and that the chairman's conduct could not therefore be impugned. On appeal, the Supreme Court followed the judgment in *Vishakha*, and held that the conduct of the chairman in trying to sit next to the complainant and touching her, despite her protests, constituted 'unwelcome sexually determined behaviour' on his part, and was an attempt to 'outrage her modesty'. His behaviour was against 'moral sanctions' and did not withstand the test of 'decency and modesty', and therefore amounted to unwelcome sexual advances. Moreover, the complainant's pristine conduct, including her lack of knowledge about sex (as she was not married) were factors that redeemed her credibility.[30]

In a number of rape cases, the courts have suggested marriage as a solution for the same, since rape is deemed to have resulted in the loss of value of women. In some cases (including recent ones),[31] the

[26] 1980 Cri LJ 1.
[27] 1984 Cri LJ 74.
[28] Andrew Byrnes, Jane Frances, *et. al., Advancing the Human Rights of Women: Using International Human Rights Standards in Domestic Litigation* 104 (Centre For Comparative and Public Law, The University of Hong Kong, 1997).
[29] Apparel Export Promotion Council v. AK Chopra, 1999 AIR 625 SC.
[30] Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* 39 (The Glass House Press, London, 2005).
[31] Nattu v. State of MP, 1990 Cri LJ 1567; Sukhvinder Singh v. State of Punjab (2000) SCC 204.

Supreme Court has seen compromise as an adequate and sufficient reason to reduce the sentence to the period of incarceration already spent, in the interest of justice. Courts have repeatedly talked about getting married as the most important thing for a woman, says Mrinal Satish, a National Law University professor whose research shows that courts have given shorter sentences to rapists of women judged not to be virgins, compared with rapists of virgins.[32]

More rights do not necessarily equate with more empowerment. Legal campaigns and initiatives on violence against women have done little to displace the dominant sexual norms which inform the law.[33] Unless we are able to trace the main agents of problems, the laws that will be framed are not going to be able to reduce or eliminate the problem.

CONCLUSION

A lot of the problems relating to violence against women and their discrimination in public and private spheres, is because of the failure to acknowledge the problems within ourselves and the direct and indirect consequences of that. The recent public discourse on issues relating to women suggests that we haven't been able to even begin questioning how as an individual we might be contributing to a culture that nurtures prejudices and normalises the discriminatory attitudes against women. For a temporary sense of vindication we can feel relieved over the swift passing of Bills into Acts. Yes, an individual sense of justice can also be sought in retribution. But to be able to share that, we will have to address some extremely discomforting questions.

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[32] Tripti Lahiri and Amol Sharma, "To Wed Your Rapist, or Not: Indian Women on Trial", *The Wall Street Journal*, 17 May 2013, available at http://online.wsj.com/news/articles/SB10001424127887324020504578396790797373784.
[33] Ibid at p. 37.

ASSESSMENT PROCEDURE AS PER INCOME TAX ACT, 1961

*Niva Rungta & Supriti Elizabeth Singh**

INTRODUCTION

In the present day and age the importance of a proper legislation that governs Income Tax is the need of the hour but what is even more important is the explanation and proper understanding of this Act. The Income Tax legislation is a lengthy legislation but what the authors of this article aim to achieve, is to simplify the said assessment procedure as laid down in the Act to constitute a better understanding of the same

The procedure of Income Tax Assessment is contained in Chapter XIV of the Income Tax Act, 1961 (hereafter referred as the I.T Act) covering Sec. 139 to 158 of the said Act.

The various Sections and their importance for the Income Tax proceedings are enumerated below:

SUBMISSION OF RETURN

An Income Tax proceeding starts with the submission of a Return. The Law relating to submission of the Return is contained in section 139 of the I.T. Act. The normal rule is that an assessee having total income exceeding the maximum amount not chargeable to tax in his case has a statutory obligation to file his Return. For example, if a resident individual or HUF, AOP & artificial juridical person has income exceeding Rs.2 Lakhs, he is required to file a Return. However, many tax advisors erroneously advise their clients not to file any Return if no tax is payable by them. There is a difference between the total income and taxable income for the purpose of submission of the Return. The total income of an Individual means the aggregate income from all sources before claiming any deduction u/s 80C to 80U. For example, if a resident individual has total income from all sources amounting Rs.2.50 Lakh and if he deposits a sum of ` 60,000/- to his PPF A/c, his taxable income is Rs.190,000/- and no tax is payable by him. But in such cases, since his total income exceeds the prescribed limit of Rs.200,000/-, he is statutorily required to file his Return.

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However, in the case of some assesses, return has to be filed even when the income is NIL or even loss. A company or a firm is required to file its Return even when it has incurred a loss in any assessment year. Similarly, resident assesse having an asset outside India is compulsorily required to file his return even when he has income below the maximum limit. A University, College and other institutions has also to file a Return even when it has incurred a loss.

Time limit to file the return are prescribed under section 139. Where an assessee has international transactions, it may file its return by 30th November. When the assessee is a company or Firm or where an assessee is required to file Tax Audit Report, the due date for submission of Return is 30th September. In all other cases, Return has to be filed by 31st July. For any reason when the return could not be filed within the prescribed time limit, belated Return can also be filed within one year from the end of the relevant assessment year. If after submission of the Return, the assessee discovers a mistake or misstatement in it, he is entitled to submit a revised Return within one year from the end of the relevant assessment year or completion of his assessment, whichever is earlier. But the revised Return will not be valid unless the original Return was filed within due time as prescribed u/s 139(1).

When an assesse voluntarily as required u/s 139 has not filed a Return, the A.O. may also issue a notice u/s 142(1) of the I.T. Act, to the assessee calling for submission of his Return. On receipt of such a notice, the assessee is required to file his Return even when his total income is below the maximum amount not chargeable to tax. In case of non-compliance, his assessment may be completed by the A.O. to the best of his judgment ex-parte u/s.144 of the I.T. Act.

In case the Return is not filed within the due date, the assessee suffers from certain adverse consequences. Firstly it has to pay a penal interest u/s 234A for late submission of the Return. A penalty of Rs.5000/- may also be imposed u/s 271F if belated Return is submitted after the end of the assessment year. Unless the Return has been submitted within the due date, business loss or capital loss incurred during the assessment year cannot be carried forward for set off in subsequent Assessment Year. If the assessee has failed to file his

Return within the due date, he is deprived from enjoying certain benefit normally admissible to it. In term of Sec. 80 AC of the I.T. Act deductions u/s 10A, 10B, 80IA, 80IAB, 80IB, 80IC, 80ID and 80I are also not admissible. However, CBDT has the power to condone delay if there is a very good reason for late submission of the Return. There is another difficulty if the return is not filed within the due date. The assessee is also not allowed to file a revised return.

Currently, Returns are required to be filed online. This procedure started with the Company Returns. But now, it has been extended to all Returns except the Returns showing income up to ` 5 lakhs. When the Returns are uploaded, the computer generates an acknowledgement. If the Return has been filed with digital signature, no further action is necessary. But where the Return has been filed electronically without digital signature, a copy of the acknowledgement has to be duly signed by the assessee and sent to the Central Processing Centre in Bengaluru within 120 days. It would be advisable to send it through speed post so that an acknowledgement is obtained from the Post Office.

ASSESSMENT

After submission of the Return by the assessee, it is the duty of the A.O. to make an assessment on the basis of the Return. All Returns are first processed u/s.143 (1). This is also unofficially known as 'summary assessment'. In the course of the processing of the Return, the A.O. has the power to make an adjustment of the income disclosed in the Return. Such adjustment is either of arithmetical in nature or an incorrect claim as found in the Return itself. He may prepare an Intimation u/s.143(1) showing the total income and the net tax and interest payable after adjusting taxes already paid by way of TDS, Advance Tax and Self-assessment Tax. Such an Intimation containing demand, if any, is legally treated as demand notice as the assessee is required to make payment of such demand within 30 days of its receipt. If, however, the result of processing the Return in the above manner is a Refund, the A.O. is required to issue the Refund along with interest u/s.244A. However, if neither any demand nor any refund is due, he may not issue an intimation u/s.143 (1) to the assessee.

An Intimation u/s.143 (1) is not an assessment, as held by the Hon'ble Supreme Court in the case of ***Rajesh Jhaveri & Stockbroker Pvt. Ltd.*** [291 ITR 500]. This means that even after receipt of an Intimation u/s.143 (1), it is possible to file a revised Return within one year from the end of the assessment year, if assessment u/s.143 (3)/144 has not been completed.

After processing the Return u/s.143 (1), if the A.O. intends to complete the assessment on a scrutiny basis, he may issue a notice u/s.143 (2) within 6 months from the end of the Fin. Year in which the Return has been filed and direct the assessee to produce the books of accounts and other documents in support of the income disclosed in the Return. Where the notice u/s 143(2) has not been issued and served within the prescribed time, a scrutiny assessment will be treated as invalid. The A.O. is also authorized to call for documents by issuing notice u/s.142 (1) of the I.T. Act. After examining the documents produced by the assessee and after making further enquiries as may be necessary by him, he may complete the assessment by an order u/s.143 (3) of the I.T.Act and issue a copy of the order and demand notice to the assesse.

Self-Assessment U/S 140a

After the end of the financial year every person who is required to file income tax return, should file his return of income. Thus, an assesse himself files his return of income, and pay tax as per the return of income filed. This process of self-calculation of income and tax is called self-assessment. Since the tax and income under return of income is calculated by the assesse himself, it is called self-assessment. The Assessing Officer (AO) only checks the return of income on the face of it and corrects the mistake, if any. If there is any short of tax he may call for it and if there is any excess of tax paid he shall refund the same

Best Judgment Assessment U/S 144

Best Judgment Assessment, as the name indicates Best Judgment Assessment means the computation of income and tax is undertaken by the AO himself, on the basis of the best of his judgment. The Best

judgment Assessment can be made by an AO under the following cases: -

1. Assesse does not file his regular return of income u/s 139.
2. Assesse does not comply with the instructions u/s 142 (1) i.e., notice for filing his return of income or 142 (2A), i.e., notice requiring the assessee to conduct audit of his accounts.
3. Assesse does not comply with instructions u/s 143(2), i.e., notice of scrutiny assessment.
4. AO is not satisfied regarding the completeness of accounts.

Since in all of the above cases either the assesse does not cooperate with the Assessing Officer or does not file the return of income or does not have complete accounts. Thus, the Assessing officer cannot calculate the income and therefore, he has to judge the income on the basis of his best assumptions/judgments. The AO must give a hearing to the assesse before completing the assessment as per best of his judgment. No refund can be granted under best judgment assessment.

Reopening of assessment:

Once the assessment is completed u/s.143 (3)/144 of the I.T. Act, it is not the end of the matter. The A.O. may reopen the completed assessment in terms of section 147 of the I.T. Act and issue a notice to the assessee u/s.148 directing him to file his Return. The power of the A.O. to reopen an assessment is very wide. But he cannot reopen any assessment arbitrarily at his own whims and discretion. Certain restrictions have been prescribed in sections 147, 148, 149 and 151 of the I.T. Act circumscribing his power to reopen a completed assessment.

The primary condition for reopening an assessment is that the A.O. must have reason to believe that any income assessable for that assessment year has escaped assessment. The words 'reason to believe' is very important. It requires that there should be some material on the record on the basis of which the A.O. must draw an inference based on reasons that any income has escaped assessment. It has been judicially held that reason to believe must be honest and not

based on gossip, rumor or conjecture. In other words, 'reason to believe' does not mean 'reason to suspect'. He cannot reopen an assessment merely because he has a suspicion that income has escaped assessment. Moreover, he cannot reopen an assessment merely by a 'change of opinion' as held by the Apex Court in the case of ***Kelvinators India Ltd.***

If a Return has only been processed u/s.143 (1) of the I.T. Act, the A.O. can reopen the assessment if any escapement of income has come to his notice at any time within a period of 6 years. In case the assessment has been completed on scrutiny basis u/s.143 (3), there are more restrictions against reopening the assessment. If the A.O. intends to reopen any assessment after 4 years from the end of the relevant assessment year, he can do it only on one ground that the assessee failed to disclose fully and truly all-material facts necessary for the assessment in the course of the original assessment. This is an important condition, which is very helpful to the assessee against whom any notice u/s.148 has been issued. The A.O. cannot also reopen an assessment if the escaped income has already been a subject matter of any decision by the higher authorities, i.e., CIT (A) / Tribunal or CIT u/s.264.

A few restrictions on the powers of the A.O. to reopen the assessment have also been prescribed in Sec. 149 and 151 of the I.T. Act. No notice u/s 148 could be issued after a lapse of 6 years from the end of the relevant assessment year. Moreover, when the escaped income is less than Rs.1 Lakh, the A.O. cannot also reopen the assessment after 4 years from the end of the relevant assessment year.

In terms of Sec. 151 when the assessment was completed on scrutiny basis, if the reopening has to be made within 4 years from the end of the relevant assessment year an ITO cannot issue notice u/s 148 without the approval of his JCIT (Joint Commissioner of Income Tax). But when the Assessing Officer is ACIT / DCIT, he can issue the notice without the approval of JCIT. After 4 years from the end of the relevant assessment year, the approval of the CIT is necessary for issue of a notice u/s 148.

If however, the Return has been processed u/s 143 (1) only, but no assessment has been made on such Return, reopening of the

assessment may be made by any A.O. without prior approval of his Superior Officer. After more than 4 years from the end of the relevant assessment year, no notice u/s 148 may be issued by any A.O. without the prior approval of the JCIT.

On the basis of several judicial decisions, the law relating to reopening of assessment has been crystallized. Firstly, the A.O. is obliged to record the reasons for reopening the assessment. He may not communicate such reasons to the assessee while issuing the notice u/s.148. By a landmark judgment in the case of GKN Driveshaft India Ltd. (259 ITR 19), the Apex Court has held that once the assessee has filed his return in response to notice u/s.148, he may request the A.O. for a copy of the reason recorded by him before issuing the said notice and the A.O. is duty-bound to furnish a copy of the same. Very often, the A.O. does not supply a copy of the reason recorded by him but briefly explained the reason for which he has reopened the assessment. This is not sufficient. The assessee must always insist on a copy of the reason recorded by him before issuing the notice u/s.148. This is very important because only from the copy of the reasons recorded, some defects may be detected and the reassessment proceeding may be challenged. It may also be noted that once he has supplied a copy of the reason, the A.O. is bound by the reasons recorded by him. It has been judicially held that the A.O. cannot vary or enlarge the scope of the reasons at a later stage. The Apex Court has also held that after the receipt of the copy of the reasons from the A.O., the assessee may submit his objections against reopening of the assessment to the A.O. The nature of objections may vary depending upon the facts and circumstances of the case. While raising the objections, the assessee may also consider whether the conditions prescribed in section 148 relating to timely service of notice and those provided in section 149 and 151 have also been satisfied. The A.O. is obliged to pass a speaking order disposing of such objections. Only thereafter, he may proceed with the reassessment proceeding.

If the A.O. has not satisfactorily explained the objections, two courses are open to the assessee – either he may file a writ petition before the High Court against the reopening the assessment or he may co-operate with the A.O. in completing the reassessment proceeding

and agitate his objections to the reopening of the assessment before the CIT(A)/ITAT, who may examine the assessee's objections and decide whether the reassessment proceeding has been validly initiated by the A.O.

TIME LIMIT FOR COMPLETION OF ASSESSMENT

In Sec. 153 of the I.T. Act, time limits have been fixed for completion of assessments in different situations. The Finance Act 2012 has amended these time limits. After amendment, an assessment u/s 143 for Assessment Year 2010-11 and subsequent assessment year has to be completed within 24 months from the end of the Assessment Year as against 21 months in respect of assessment years 2004-05 to 2009-10. For assessments involving International transaction, which have to be completed u/s 143, and 92CA, the time limit for completion of the assessment has been extended to 36 months as against 33 months from the end of the assessment year previously allowed. Where notice u/s 148 has been issued for reopening an assessment, the re-assessment has to be completed within 12 months from the end of the Financial Year in which the notice u/s 148 was issued. Similarly, when reassessment has to be made for escapement of Income from International transaction, the revised time limit is 24 months from the end of the Financial Year in which the notice u/s 148 was issued. When an assessment has been set aside by the CIT (A) or Tribunal or CIT directing the A.O. to make a fresh assessment, such fresh assessment has to be completed within 12 months from the end of the Financial Year in which the order u/s 250 or 254 or 263 has been received.

ASSESSMENT OF SEARCH CASES

In respect of assessments of cases where Search was conducted u/s 132(1) of the I.T. Act after 31.05.2003, a totally different procedure has been prescribed in Sec. 153A, 153B and 153C of the I.T. Act. In such cases, the A.O. is required to issue notices u/s 153A to the assessee requiring him to furnish Return of Income in respect of each of the assessment years falling within 6 assessment years immediately preceding the assessment year relevant to the previous year in which the Search was conducted. On receipt of notice u/s 153A the assessee is required to submit Return for each of the 6 assessment years within

the time given in the notice. The A.O. thereafter assesses or reassesses the total income of each of these 6 assessment years. If any assessment or reassessment relating to any of the years falling within the period of 6 assessment years was pending on the date of initiation on the Search of u/s 132, such assessments / re-assessment shall abate.

While completing these Search cases, the A.O. will have all the powers as are available to him in completing regular assessments u/s 143. In Search cases, assessment order cannot be passed by the A.O. below the rank of JCIT except with the prior approval of the JCIT. The time limit for completion of such assessments was previously 21 months from the end of the Financial Year in which the last of the Authorisation for Search u/s 132 was executed. The Finance Act 2012 has extended this time limit to 24 months. While completing the Search cases if the A.O. is of the opinion that the assets belong to a person other than the assessee in whose case the Search was conducted, he may pass on the necessary material to the Assessing Officer of such other person. The A.O. in such cases will take steps to complete the assessments of the other person in the same manner as in the case of the assessee in whose case the Search was conducted.

RECTIFICATION OF APPARENT MISTAKE

The last item in the chapter of assessment procedure is rectification of apparent mistakes contained in Sec. 154 and 155 of the I.T. Act. For rectification of any mistake apparent from the record, an application may be made to the Authority in whose order the mistake appears. For example, if the mistakes are in the order of A.O., an application has to be made to him. However, if the mistake is in the order of CIT(A) or Tribunal, an application has to be made to the said Authority. An apparent mistake may also be rectified *suo moto* by the Authority in whose order the mistake appears. An opportunity of being heard is required to be given to the person who may be adversely affected by the order of rectification. The time limit for making an application for rectification of an apparent mistake is 4 years from the end of the Financial Year in which the order sought to be amended was passed.

In terms of Sec. 154, all mistakes cannot be rectified. It is only a mistake which is apparent from the record can be rectified. An

apparent mistake is one which is patent, obvious and which is not dependent on argument or elaboration. Where controversy can be resolved only by way of complicated process of investigation, recourse cannot be taken u/s.154. The mistake may be of fact as well as of law. If it is on a question of law and two views are possible, no rectification can be done by invoking Sec. 154.

Section 155 enumerates a few instances where an extended period of rectification is allowed. For example, the share income of a partner is dependent on the assessment of the Firm in which he is a partner. If the assessment of the Firm is revised, the share income of the partner is also modified. Hence, in such cases the period of 4 years normally allowed u/s 154 is reckoned from the end of the Financial Year in which the final order was passed in the case of the firm. Several other types of cases have been included in sec. 155 where the consequential mistake could be rectified within the extended period of 4 years.

CONCLUSION

Ignorance of law is not a valid excuse in the court of law and this principle extends even to Income Tax Regulations. Individuals found to be concealing income will be charged a penalty and that amount can be anywhere up to 3 times the amount of tax evaded.

The authors hope that the above article has made the concept of Income Tax Assessment more clear and certain.

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DEATH PENALTY: CONTEMPORARY ISSUES 'HOW RARE IS THE RAREST?'

Prapa Ganguly & Ranu Purohit *

Indian society has always held the principle of punitive justice as the beacon of ultimate realization of a crime free world with the constant support provided by the Indian judicial system to the constitutionality of Capital Punishment. The system's relation to its punitive approach towards death penalty has evolved with the evolution of society to serve a completely different meaning as of today. Today, the phrase 'rarest of rare' apparently holds the maximum importance as far as punishment of death penalty is concerned.

Under section 354(3) of the Code of Criminal Procedure, 1974, life imprisonment is the rule and capital punishment the exception, to be resorted to only for special reasons that have to be compulsorily assigned[1]. The Court has the responsibility to see that punishment serves as a social defence which is a validation of deprivation of citizen's liberty. Raping the rapist or murdering the murderer gesticulates towards the collapse of a civilized society. Retributive theory is nothing but vengeance in disguise and it hardens the practice of inhumanity exercised by the society leading to a possible demise of civilization[2]. The principle of *lex talionis*[3] is incongruent in the era of enlightenment since it does not attempt to justify punishment by any beneficial results either to the society or to the person punished[4].

The ancient penal law in India provided death sentence for a good number of offences. Indian epics like *Mahabharata* contains references about the offender being subject to retributive punishment involving punishment of amputation of limbs called *Vadhadand*. In much later years, Mughal as well as the British rulers also used death penalty to eliminate unwanted criminals. However, the Indian criminal jurisprudence has now evolved to focus on the elimination of

* V BSL LLB

[1] *Allauddin Main v State of Bihar*, AIR 1989 SC1456; 1989 CrLJ 1466.

[2] *Lingala Vijayakumar & Ors. v Public Prosecutor, Andhra Pradesh*, AIR 1978 SC 1485.

[3] The Latin term *lex talionis* is sometime trivially referred to meaning the phrase 'an eye for an eye'.

[4] *Bishnu Deo v State of West Bengal*, AIR 1979 SC 1964.

the crime and not the criminal. Under the Indian Penal Code, 1860, there are nine sections which award death sentence to the accused. They are:

1. Section 121- Waging war against the state
2. Section 132- Abetment of mutiny, if mutiny is committed in consequence thereof
3. Section 194- Giving or fabricating false evidence upon which an innocent person is convicted suffers death
4. Section 302- Murder which may be punished with death or life imprisonment
5. Section 303- Punishment for murder by life convict
6. Section 305- Abetment of suicide of a child or insane or intoxicated person
7. Section 307- Attempt to murder by a life convict if hurt is caused
8. Section 364A- Kidnapping for ransom
9. Section 396- Dacoity accompanied with murder

Moreover, various other laws like Explosive Substances Act, 1908, Narcotics Drugs and Psychotropic Substances Act, 1985 prescribe the punishment of death penalty for the offences laid down by them. This is a clear reflection on the current legal position whereby the offences have been strictly compartmentalized and death penalty has not been made a casual punishment; rather the criterion of 'the rarest of the rare' is applied as was evolved in the *Bachan Singh v. State of Punjab*[5]. The majority opined that "Judges should not be blood thirsty. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."[6]

The righteousness of death penalty has always posed a dilemma before the judiciary making it an issue of human rights in relation to the accused drawing a picture of victimization around him while at the same time assessing the gravity of the crime committed and its impact on the society. The established rule of 'rarest of rare' where

[5] AIR 1980 SC 898; 1980 CriLJ 636.

[6] *Bachan Singh v State of Punjab*, AIR 1980 SC 898; 1980 CriLJ 636.

penalty can be awarded was again brought into question in wake of the recent gang rape that took place in Delhi. The unfortunate incident grabbed a lot of media attention and consequently, the public opinion was molded to demand for a death sentence for the accused and for the offence of rape altogether. However, whether it can be classified as a rarest of rare offence or just another brutal and heinous incident of rape among the innumerable cases is a question difficult to answer. The concept of rarest of rare has been open to interpretation over the years. Though the doctrine of 'rarest of rare' has been followed and upheld in subsequent cases such as *Machchi Singh v. State of Punjab*[7], *Dhananjoy Chatterjee v. State of West Bengal*[8], *Laxman Naik v. State of Orissa*[9] and such other cases, the loosely held premises of the doctrine depending upon the factual matrix of a particular case make it subjective and judge centric in application. The phrase 'rarest of rare' should be construed in a manner which ensures uniform and universal application not leaving scope for any dichotomy. In the case of *Bachan Singh*, while considering the question of sentencing for homicide, the Court must have regard to relevant circumstances relating to the crime as well as the criminal. When the offence is of an exceptionally depraved and heinous character and constitutes on account of its design and the manner of its execution a source of grave danger to the society at large, the Court may impose death sentence[10]. These principles were further elaborated upon and enunciated whereby the law took into consideration special reasons and classified it into two parts- (1) aggravating circumstances – Where a Court may impose death penalty in its discretion in cases where murder has been committed after previous planning and involves extreme brutality or exceptional depravity; and (2) mitigating circumstances – Where Court may consider circumstances like extreme mental or emotional disturbance during the commitment of crime, age of the accused, possibility of the accused to be a threat to society or his chances at reformation, his moral justification in the commitment of the crime,

[7] AIR 1983 SC 957; 1983 CriLJ 1457.
[8] (1994) 2 SCC 220.
[9] (1994) 3 SCC 381.
[10] *Shankar Kisanrao Khade v State Of Maharashtra* on 25 April, 2013, (CRIMINAL APPEAL NOs. 362-363 OF 2010).

insanity and such others while awarding the sentence. Furthermore, the case must also suffice the condition that an alternative option of life imprisonment will be futile and would serve no purpose in that present instance. In *Ravji alias Ram Chandra vs State of Rajasthan*[11], the Supreme Court held that it is the only characteristic relating to crime, to the exclusion of the ones relating to the criminal, which are relevant to sentencing in criminal trial. The court further mentioned that it is the nature and gravity of the crime and not the criminal which are germane for the consideration of appropriate punishment in a criminal trial.

Terminologies such as 'extreme brutality' and 'exceptional depravity' used in 'aggravating circumstances' are open to wide interpretations and subjective in nature leaving the fate of the accused to the whims and fancies of the judges. The factors reflected in these 'mitigating circumstances' portray a very dubious take of the judiciary which excuses an accused on very trivial grounds like his state of mind, age or whether he felt 'morally justified' in committing the crime. Thus, the imprecision in identification of aggravating and mitigating circumstances has to be minimized. Further, these criteria have also been incorporated in the defenses available to an accused under the Indian Penal Code which makes the authors question their relevance and inclusion in the so called 'mitigating circumstances' advanced by the judiciary. The *Bachan Singh* case made the degree of brutality in the killings in question the sole criterion for sentencing an accused to death penalty. The potential of the accused to be rehabilitated and reformed should not be absolutely rejected. Death penalty extinguishes the life of an individual and it is imperative to be absolutely sure about it. The Supreme Court preferred the modification of the sentence of death into one of rigorous imprisonment, by partly allowing the appeal to the extent[12].

In *Machchi Singh*, the Court considered factors like the motivation of the perpetrator, the vulnerability of the victim, the anonymity of the crime and the execution while terming it as a rarest of rare case fit to be awarded the death sentence. The Indian judicial system has shown

[11] (1996) 2 SCC 175.
[12] *Santosh Kumar Satishbhushan Bariyar v State of Maharashtra*, (2009) 6 SCC 498.

traits of indecisiveness in relation to cases awarding death penalty. A minute change in the factual scenario of a case may become an aggravating or a mitigating factor and completely vary the balance of the two thereby differentiating it from a case which may *prima facie* seem similar. Thus, as no two cases are completely alike there can never be a proper principle based comparison and the decision shall always be open to judicial discretion. Thus, the whole doctrine of rarest of rare becomes questionable as what may seem rare to one judge may not seem so to the other.

Right from the eighties when the doctrine was first evolved to the present, the society has undergone tremendous change such that the notion of 'rarity' which forms the basis of this doctrine has become ambiguous. For the purpose of understanding, considering a hypothetical situation where two cases are exactly the same, and there is a time gap of twenty years in the occurrence of the two cases, both cannot be weighed in the same scale. While considering whether it is rarest of rare case, in the vast time span, the conception of 'rarest' in itself has undergone a change. We have witnessed in the age of modern warfare, episodes of terrorist attacks, mass killings, brutal and grotesque rapes. Therefore, coming across a monstrously committed murder now hardly seems rare, not to consider rarest. An extreme example of this approach is visible in *Ravindra Trimbak Chouthmal v. State of Maharashtra*[13] where the Supreme Court commuted after the trial court awarded and the High Court confirmed the Death Sentence. The Supreme Court itself had noted that this was a 'murder most foul' where an eight months pregnant woman was killed for dowry. However, the Supreme Court did not uphold the death sentence arguing that dowry deaths had ceased to be 'rarest of the rare' as they had become too frequent.

Criminal law must be construed strictly but when the law itself is uncertain and indeterminate how is a strict interpretation possible. We do not dispute the fact that judicial discretion plays an important role in the administration of justice. However, keeping the life of an individual at the stake of discretion is not the spirit with which Lord

[13] (1996) 4 SCC 148.

Macaulay laid down this Code. In *Swami Shraddhananda*'s case[14], the Supreme Court itself noted the arbitrariness-in-fact prevalent in capital sentencing process with extraordinary candour coupled with the deficiency of the Criminal Justice System in lack of consistency in the sentencing process even by the Supreme Court.[15] In order to understand the situation in an impartial manner, we shall consider the following judgments that took place over a span of two years from 2010 to 2012. In the case of *Rajendra Pralhadrao Wasnik vs. State of Maharashtra*[16], the appellant lured the 3 year old victim with the promise of buying her biscuits, took her to a deserted place and raped her. Thereafter in a bid to destroy evidence he killed her.

The Supreme Court upheld the Trial Court and High Court decision of death sentence for offence of murder and life imprisonment for offence of rape. The case was held to be eligible to fall in the category of 'rarest of rare' to warrant death sentence. The court while affirming the punishment observed that the child whose medical record showed grave injuries on her body must have suffered brutally which shocked the conscience of the society. However, in the case of *Neel Kumar vs. State of Haryana*[17], the father of a 4 year old girl raped her while the mother was visiting her parental house. Thereafter the child victim was killed and the body was concealed. Here, the Supreme Court set aside the death sentence given by the Trial Court and the High Court and ordered for him to serve a minimum sentence of 30 years. The question that haunts the mind is – Is it less shocking for the father to rape his own daughter as compared to a stranger doing the same deed? Who decides the standards to interpret the doctrine of 'rarest of rare'? In the case of *Ramnaresh & Ors. vs. State of Chhattisgarh*[18], the Court opined that it could not be said with certainty that the case fell in 'rarest of rare case'. Hence, such an open ended doctrine is problematic not only to the accused but also the judiciary who are often forced to arrive at a particular decision under the scrutiny of public opinion. While in some cases, the Court

[14] *Swamy Shraddhananda v State of Karnataka*, (2007) 12 SCC 288.
[15] *Santosh Kumar Satishbhushan Bariyar v State of Maharashtra*, (2009) 6 SCC 498.
[16] (Criminal Appeal No.145-146 OF 2011).
[17] (Criminal Appeal No. 523 of 2010).
[18] (Criminal Appeal NOS.166-167 OF 2010).

commutes the death sentence, the misunderstanding of the rarest of rare formulation cannot be ignored particularly given that such a trend allowed other judges who favoured death penalty to equally pay lip service to 'rarest of rare' and continue to award death sentence, merely mentioning the existence of aggravating circumstances and lack of mitigating circumstances without actually noting what these were.[19] Moreover, judges often reverse their judgments coming under such pressure, thus failing to come to an unbiased decision. As can be understood from the New Zealand case of *A-G v. Tonks*[20], an article demanding that the accused 'should meet with the utmost vigour of the law' was held prejudicial to the trial as it shook the public confidence in the judiciary by the creation of suspicion of outside interference. In such a situation, if the judge's decision is in accordance with the newspaper's demands, it will be viewed as influenced by the newspaper. And if not, then resentment against the court has already been aroused. Thus, the doctrine that 'justice should not be merely done, but seen to be done'[21] cannot be achieved.

Nowadays, capital sentencing has become a media spectacle leading to an inevitable media trial. Two major difficulties with the concept of media trial were observed by Andrew Ashworth[22]. First, members of the public have insufficient knowledge of actual sentencing practices and second, there is a significant but much-neglected distinction between people's sweeping impressions of sentencing and their views in relation to particular cases of which they know the facts. And when the public thinks that the courts are too lenient, both these difficulties are usually suppressed. Further, if the source of falling public confidence in sentencing lies in the lack of knowledge, the obvious corrective policy is to explain and educate the

[19] Report of the Supreme Court judgments on Death Penalty from 1950-2006 by Amnesty International India and People's Union for Civil Liberties, *Lethal Lottery: The Death Penalty in India*, (May 2008).
[20] [1939] N.Z.L.R. 533.
[21] *Rex v Sussex Justices, ex parte McCarthy*, 1924 (1) K.B. 256.
[22] Andrew Ashworth, a leading academic in the field of sentencing, mentioned media trial and its problems in the 'Sentencing and the Climate of Opinion' (1996, Criminal Law Review).

masses, rather than adapting a sentencing policy to fit a flawed conception of public opinion.[23]

Finally, the statistics show that there are a number of cases where the judges award death penalty to the accused however the execution is actually not carried out. From the 1990s to the current year of 2013, there have been only two executions, one being that of Dhananjoy Chatterjee and the other being the execution of Ajmal Kasab. Most of these cases are taken to the President seeking clemency of punishment but the standard applied by the executive in granting commutation are not known. Where there is no certainty in execution even after the judgment has been passed by the highest judicial authority then such a situation makes a mockery of the entire system and dwindles the faith of people in justice and the state. The judiciary has clearly failed to interpret the doctrine in a disciplined manner and rendered the 'rarest of rare' doctrine a falsity inevitably leading to the question how rare is the rarest.

[23] *Santosh Kumar Satishbhushan Bariyar v State of Maharashtra*, (2009) 6 SCC 498.

INDIA'S PATENTABILITY CRITERION: A HURDLE TO PHARMA INNOVATION?

*Radhika Gupta**

INDIA'S PATENTABILITY CRITERION: A HURDLE TO PHARMA INNOVATION

The recent Supreme Court verdict in the Novartis Case[1] is being subjected to bitter criticism by the pharmaceutical industry which opines that the judgment brings with it the death of innovation in the country. The pharmaceutical companies are calling it the end of the research in the country for new life saving drugs as the decision has put an end to the only incentive available to these companies for investing huge sums in research and development , that is, patent protection.

The global concerns are evidenced by the recent International IP Index[2] released by the U.S. Chamber of Commerce's Global Intellectual Property Centre which has placed India last in the index. The report goes on further to state that the Indian policy breaches the international standards of protection of innovation and patent rights. The Supreme Court's rejection for grant of patent for its Glivec Drug stems from the strict interpretation of S.3(d) of the Indian Patents Act which makes 'new forms of known substances' non-patentable, thereby setting a higher threshold for patentability. Thus, the question that looms large at the time is that whether Indian patent policy and its strict enforcement by the Supreme Court will work towards hindering innovation in the pharmaceutical industry, as is being argued by the agitated multinationals.

THE NOVARTIS RULING

S.3(d) of the Indian Patents Act, 1970 has long been a subject of controversy and has often been attacked on grounds of its alleged incompatibility with TRIPS provisions as well as its potential to put unreasonable restrictions on patenting, thereby hindering innovation. The discussions and debates have, once again, been sparked by the recent judgment of the Supreme Court in the Novartis case, wherein the court denied patent protection to Novartis for its cancer drug-Glivec.

* IV BSL LLB

1 *Novartis AG* v. *Union of India (UOI) and Ors*, Civil Appeal Nos. 2706-2716 OF 2013.

2 *Charting the course*, GIPC International IP Index, Global Intellectual Property Centre, U.S. Chamber of Commerce.

Brief Background

A compound called "Imatinib" in free base form was invented in the early 1990s. *Jurg Zimmermann*, one of the inventors was granted patent on behalf of Novartis over Imatinib and its derivatives by the United States and European Patent offices. In 2000, Novartis filed for separate patents on the beta crystalline form of imatinib mesylate (the mesylate salt of imatinib) and was granted patent in USA as well as several other countries. Novartis marketed this beta crystalline form of imatinib mesylate as "Glivec", which is said to be very effective against a form of cancer known as chronic myeloid leukaemia (CML). Novartis could not file for a patent on imatinib or imatinib mesylate in India because when the patent application for imatinib and its derivatives was filed in US, India did not confer product patent. The application for grant of patent was filed in India only in 1998 when the Indian patent law was undergoing changes in order to be TRIPS compliant. This application was kept in 'mailbox' and was processed only in 2005 once the amended Patent Act came into force and allowed product patents also.

The patent claim was rejected by the Assistant Controller of Patents and Designs[3] on the grounds that the invention claimed by Novartis was obvious and anticipated. In an appeal[4] before the Intellectual Property Appellate Board (IPAB), the claim was rejected again on the ground that the drug was not a new substance but only an amended version of a known compound. It observed that Novartis had failed to prove increased efficacy of the drug thus, failing the test laid down in S.3 (d) of the Patent Act.

After the rejection of the patent application in 2009, Novartis directly appealed to Supreme Court, which by its judgment dated 1 April, 2013 has upheld rejection of the patent claim on the ground that it failed the test laid down by S.3(d).

Implications of the ruling

The landmark judgment of the Supreme Court is being hailed by the public-health activists and the general public as it will make

3 Order of Assistant Controller of Patents, dated 25 January 2006.

4 *Novartis AG* v. *Union of India*, M.P. Nos 1 to 5/2007 in TA/1 to 5/2007/PT/CH.

available to the poor cancer patients in the country the generic versions of the cancer drug- Glivec at affordable prices. Thus, rejection of Novartis' claim has in effect protected public health interests, though the court was not guided by public health considerations and rather based its judgment on specific technical grounds.

Apart from the implications it brings for the patients and the generic companies, the judgment works to reiterate the stance taken by Indian Patent Law for a higher standard for patentability. This is being claimed by the multinational pharmaceutical companies to have adverse implications on innovation and research.

The press release by Novartis called the ruling a setback for patients that will hinder medical progress for diseases without effective treatment options.[5] Novartis has also declared that it will now restrain itself from investing in drug research in India. It further went on to say that the company's "primary concern of this case was with India's growing non-recognition of intellectual property rights that sustain research and development for innovative medicines." Similar concerns were expressed by other pharmaceutical majors who criticized the judgment as being another example of the deteriorating innovation environment in India.[6]

With such claims being made by the pharmaceutical companies, it is crucial to examine the provision, its interpretation given by the court and the effect it will have on research and innovation in India. The provision is being, attacked on two major grounds. Firstly, the very existence of the provision is challenged by calling it to be TRIPS violative. Secondly, it is argued that the "enhanced therapeutic efficacy" test works to discourage research and innovation in the pharma sector.

[5]Media Release, available at http://www.novartis.com/newsroom/media-releases/en/2013/1689290.shtml

[6] Wall Street Journal article-Novartis Loses Glivec Patent Battle in India; http://online.wsj.com/article/SB10001424127887323296504578395672582230106.html; Pfizer Inc. said it was "concerned about the environment for innovation and investment in India."; The Pharmaceutical Research and Manufacturers of America, a U.S.-based lobbying group, said the decision "marks yet another example of the deteriorating innovation environment in India."

THE "EFFICACY TEST": UNIQUE AND TRIPS INCOMPATIBLE?

S.3(d) is assailed at the outset on the ground that by laying down an additional requirement to patentability, it creates an unnecessary impediment to patent protection.

Championing the higher patentability standard laid down by the Indian Patent Law, the Apex Court, in the Novartis case held that to obtain a patent, the subject is required to satisfy the twin tests of "invention" and "patentability".[7] Thus, invention and patentability are two distinct concepts. While invention refers to a patent eligible subject matter, patentability criterion covers all the conditions that are to be satisfied by an invention to obtain a patent.[8]

In India, the 'patentability criteria' is embodied in Chapter III of the Patents Act which makes certain inventions non-patentable. S.3(d) provides as follows:-

> "Section 3 -- **What are not inventions.—**
>
> The following are not inventions within the meaning of this Act,--
>
> ... .
>
> (d) the mere discovery of a new form of a known substance which does not result in the ***enhancement of the known efficacy*** of that substance or the mere discovery of any new property or new use for a known substance or the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant.
>
> *Explanation*-For the purposes of this clause, salts, esters, ethers, polymorphs, metabolites, pure form, particle size, isomers, mixtures of isomers, complexes, combinations and other derivatives of known substance shall be considered to be the same substance, unless they differ significantly in properties with regard to efficacy."

[7] Supra note 1, ¶ 91.

[8] Shamnad Basheer, *Limiting The Patentability Of Pharmaceutical Inventions And Micro-Organisms: A Trips Compatibility Review*, p.14.

The Apex Court has widened the ambit of the qualification laid down by the provision by ruling that in case of a medicine, the test of enhanced efficacy can only be of "therapeutic efficacy".

To evade the applicability of S.3(d), a contention was made by Novartis that once the tests of "invention" under clause (j) and (ja) of Section 2(1) were satisfied, S.3(d) had no application. It was submitted that S.3(d) operates only as *ex majore cautela*[9], ensuring that mere trifling changes or in the words of the section "discovery of new form of a known substance" can never, by an effort at interpretation of clauses (j) and (ja) of section 2(1), be considered inventions.

Rejecting the contention, the Court highlighted the difference between the twin distinct requirements of 'invention' and 'patentability'.

The court observed-

> *" The duality of the two concepts is best illustrated by section 4 of the Act, which prohibits the grant of patent (either process or product) "in respect of inventions relating to atomic energy falling within sub-section (1) of section 20 of the Atomic Energy Act, 1962", and which has not undergone any change since inception. It is, therefore, fundamental that for grant of patent the subject must satisfy the twin tests of "invention" and "patentability". Something may be an "invention" as the term is generally understood and yet it may not qualify as an "invention" for the purposes of the Act. Further, something may even qualify as an "invention" as defined under the Act and yet may be denied patent for other larger considerations as may be stipulated in the Act."*[10]

It further observed-

> *"Chapter II has the Heading "Inventions Not Patentable" and section 3 has the marginal heading "What are not inventions." As suggested by the Chapter heading and the marginal heading of section 3, and as may be seen simply by going through section 3, it puts at one place provisions of two different kinds: one that declares that certain things shall not be deemed to be "inventions" [for instance clauses (d) & (e)]; and the other that provides that, though resulting from invention, something may yet not be granted patent for other considerations [for instance clause (b)]."*[11]

[9] Out of abundant caution.
[10] *supra* note 1, ¶ 91.

The court observed that two interpretations can be accorded to S.3(d). Firstly, it can be seen as to be embodying the 'patentability test' distinct from the test of invention. Secondly, it can be seen as an extension of the definition of "invention", that is to say, it can be linked with clauses (j) and (ja) of Section 2(1) and in that case it will represent a higher standard in case of medicines, drugs and other chemical substances to qualify as "inventions". The Court did not take a stand as to whether it constitutes the patentability test or an extension of the test of invention but it amply made it clear that S.3(d) forms the ***"second tier of qualifying standards"*** in case of pharmaceutical substances.[12]

Thus, a new form of a known drug will not be granted a patent unless enhanced therapeutic efficacy is demonstrated.

Now, questions are raised against the propriety of this higher patentability threshold set up by the provision. The recently released GIPC Index Report[13] referred to S.3(d) as an additional "fourth hurdle" with respect to inventive step and called this approach to patentability requirements as being inconsistent with the TRIPS Agreement. But the provision seems to very well survive the criticism for the reasons enumerated hereinafter.

The censurers of the provision conveniently argue that it is a provision ***unique*** to Indian Patent Law as no other country made a distinction between patentable and non-patentable pharmaceutical inventions when the provision was introduced in India. Novartis had also challenged the constitutionality and TRIPS compatibility of S.3(d) in a separate litigation before the Madras High Court.[14] While the

[11] *id.*,¶ 92.
[12] *id.*, ¶103-104.
[13] *supra* note 2.
[14] *Novartis AG* v. *Union of India*, W.P. Nos.24759 and 24760 of 2006 available at http://judis.nic.in/judis_chennai/qrydispfree.aspx?filename=11121

court held it to be constitutional, it remarked that it did not have the jurisdiction to decide on the compatibility issue. The often repeated argument is that it violates Article 27 of TRIPS which provides that patents shall be available for "any invention" provided that they are new, they involve an inventive step and are capable of industrial application. But, since, none of these terms are defined in the TRIPS, it affords sufficient flexibility to member states to define patentability criteria in a manner that suits their specific national interests.[15] Thus, TRIPS sets out only the general norms concerning patentability, while the finer requirements are left to be decided by the domestic laws of the member states.

Further, TRIPS Agreement, more specifically Articles 3, 7, 8 and 27 and the DOHA Declaration[16] provides sufficient flexibility to developing member states to control the patent rights keeping in mind public health and access to medicines.[17]

While S.3 (d) is often referred in the academic circles as to be embodying a unique patentability criterion, it in fact can be seen as a tailored patentability criterion designed to cater to the specific problem of evergreening. Various member nations have refined their patentability criteria with respect to specific fields of technology. In certain jurisdictions like Europe and USA, the patentability test for a new salt form is whether the new form displays "unexpected or surprising results". A classic example is the case of *Pfizer v. Apotex*,[18] where the patent on besylate salt of already patented drug was held to be invalid as it failed to satisfy the test of obviousness. It was held that Pfizer failed to prove that the properties of besylate salt over the prior art would have been unexpected to the skilled artisan. Similarly, in 2004, German patent law was amended to limit the patent protection in case of human gene sequences to *'functions disclosed at the time of application.'* This ensures that the researcher who has patented the sequence for a specified function would not enjoy monopoly over a

[15] *Shamnad Bhasheer, The "Glivec" Patent Saga: A 3-D Perspective On Indian Patent Policy And Trips Compliance.*
[16] Declaration on the TRIPS agreement and public health, The Fourth WTO Ministerial Conference, Doha; *adopted on* Nov. 14, 2001.
[17] *id*, Para.3-6
[18] *Pfizer* v. *Apotex*,[18] 480 F.3d 1348 (2007).

second function discovered by another researcher using the same sequence.

On similar lines, Professor Shamnad Basheer is of the view that India's "enhanced efficacy" criterion can be seen as refinement of 'non obviousness' principles—i.e. most forms of existing pharmaceutical substances are deemed obvious, unless they demonstrate increased 'efficacy'.[19] The therapeutic efficacy requirement can also be construed as an extended qualification for the "utility" test, in the sense that the new forms of known substance are not patentable unless enhanced utility is demonstrated in the form of "enhanced efficacy". Illustratively, in the Novartis case itself, the beta crystalline form of imatinib mesylate displayed only better phyiscochemical properties, namely, more beneficial flow properties, better thermodynamic stability, and lower hygroscopicity. None of these beneficial properties would actually contribute to enhanced utility in case of a medicine which claims to cure disease.

Interestingly, soon after *Novartis*, in *Myriad Genetics*[20], the US Supreme Court denied patent protection to a naturally occurring gene sequence. While, the two cases differ fundamentally, both represent limitations that different patent regimes impose on patentability, in keeping with protection of public health and free access to medicines. The Federal Circuit, in this case had held that since an isolated DNA was obtained by severing covalent bonds in the backbone of DNA, it amounted to an invention capable of being patented. But the Supreme Court disagreed and held that 'Myriad did not create anything'. It remarked that *"Groundbreaking, innovative, or even brilliant discovery does not by itself satisfy the §101 inquiry."*[21] The decision, in a way provides an additional basis, in future cases, for distinguishing between "invention" and "mere discovery".[22] Thus, the case

[19] *supra* note 8 at page 46.
[20] *Association for Molecular Pathology* v. *Myriad Genetics*, 569 U.S. 12-398 (2013).
[21] U.S. Patent Act, 35 U.S. Code, § 101 - Inventions patentable: Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.
[22] D. Christopher Ohly, *The Common Heritage of Mankind: Isolated Genes*, available at https://docs.google.com/file/d/0Bxi2TzVXul5ZMnNnOXl2NVFzTFE/edit?pli=1

highlights the point that the member states can adopt tailored patentability criteria that go beyond the trinity requirement laid down by TRIPS so as to suit their social and economic environment.

Hence, as far as the TRIPS incompatibility of S.3(d) is concerned, the argument doesn't hold water.

ENHANCED THERAPEUTIC EFFICACY: DETRIMENTAL TO INNOVATION?

The big pharma companies vehemently argue that the decision is nothing but a reflection of the deteriorating IP environment in India. They constantly maintain that the 'enhanced efficacy' test denies protection to incremental innovations. But the fact is that S.3(d) was designed to curb the practice of 'evergreening' prevelant in the pharma industry. Ever greening occurs when a manufacturer supposedly 'stockpiles' patent protection by obtaining separate 20-year patents on multiple attributes to a single product.[23] Thus, patent is obtained for the same compound by making trivial changes to it. Claims for patent are made on discovery of new derivatives, isomeric forms or new mechanism of action.

In this regard, it is pertinent to note the background in and the object with which the provision was enacted. The section as it stands today is the amended provision as brought about by the Amendments[24] made to the Indian Patents Act in 2005 in order to be TRIPS compliant. The Amendment Act reversed the earlier position of the Patent Act of 1970 which expressly excluded product patents in case of substances to be used as food, medicine or drug or substances prepared or produced by chemical processes and allowed only the methods or the processes of manufacture of such substances to be patented.[25] The reintroduction[26] of product patents in the Indian

[23] *supra* note 15.

[24] The Patents (Amendment) Act, 2005, [4th April, 2005.], available at http://ipindia.nic.in/ipr/patent/patent_2005.pdf

[25] Prior to Amendment of 2005, Section 5 of the Indian Patent Act 1970, provided that in case of food items, drugs, medicine and chemical substances, only methods or process of manufacture were patentable.

[26] Previously the Indian Patents Act, 1911 allowed both product and process patents. It was the Indian Patents Act of 1970 which prohibited grant of product patents in case of food items, medicines etc.

Patent system became a subject of debate. The Parliament discussed at length the risk of creation of private monopolies by multinational pharmaceutical companies. Public health concerns were raised about the denial of access to affordable generic medicines and the possibility of abuse of the patents by means of evergreening practices prevalent in the pharmaceutical industry.

As a safeguard to this, it was proposed to limit the grant of patents for pharmaceutical substance to *new chemical entities* or to *new medical entities* involving one or more inventive steps and Mashelkar Committee was appointed to examine the TRIPS compatibility of the proposed amendments.[27] In its report, the Expert Group opined that limiting the grant of patents only to new chemical entities was not compliant with TRIPS.[28] After a lot of deliberation, the legislators had to take recourse to section 3 which provided for exclusions from patentability. With this background, S.3(d) was recast as it stands today to avoid repetitive patenting on frivolous modifications to drugs.

The question to be addressed is that what effect does a higher patentability threshold has on innovation. A stronger patentability criterion ensures a healthy competition, thereby allowing true and genuine inventions. A study reveals that on relaxing patentability criteria, firms though are able to patent more of their inventions, but at the same time it also becomes easier for the rival firms to obtain patents over minor modifications on the same drug. As a result, the profits earned from a given patent tend to be smaller and may not last long, and hence, the value of the patent declines.[29] This in the long run mars innovation in a twofold manner. Firstly, by making patent available for minor modifications and spurious inventions, it denies incentive to true and genuine inventions. Secondly, when the value of the patent declines, as discussed above, the Research and Development is adversely affected.

[27] Press Release, Government of India Press Information Bureau, Kamal Nath Constitutes Technical
Expert Group on Patent Law Issues (Apr. 6, 2005) available at http://commerce.nic.in/Apr05_release.htm.

[28] Report of the Technical expert panel on Patent Law Issues (Dec. 2006), available at *ipindia.nic.in/ipr/patent/mashelkar_committee_report.doc*

[29] Robert Hunt, *Patent Reform: A Mixed Blessing for the U.S. Economy?*, p.8.

However, some argue that pharma sector is an exception where innovation is not rapid and it takes years of research to actually develop a new drug. Eureka moments are rare and it is very often the "trivial changes" to the drugs that can actually lead to substantial improvement and enhancement of the drug. Time and again, the need for protecting incremental inventions is emphasised. But it is important to distinguish between evergreening and incremental inventions. The developed West has encouraged repetitive patenting by eroding their patent standards in an attempt to protect investments by pharmaceutical majors. But the Indian patent regime chose to defy the trend and highlighted the fine line between incremental inventions and evergreening. The Apex Court amply made it clear that S.3(d) does not bar protection for all incremental inventions. Only the incremental inventions which fail the test of enhanced efficacy are hit by the provision.

The fact that S.3(d) is not aimed against incremental inventions is also evidenced by statistics. Independent studies show that since 2005 within a period of three years alone, 86 patents were granted by the Indian patent office for drugs which were only minor variations of existing products[30].

While S.3(d) has been given a bad press, no mention is made of Section 54 of the Patents Act which provides for *patent of addition* in respect of improvements or modifications to already patented invention. This is probably because S.54 may not serve any good to the multinationals which seek to evergreen their patents as the term of this patent of addition expires along with the main patent.

It is also important to analyse as to how far innovation is connected with patent protection. The popular idea is that huge amounts of investments made and the years of research put in by the companies deserve patent monopoly. We need to question what the real object of granting patents is, whether it is investment protection or protection of new and innovative ideas. Even if the need is felt to protect investments, expenditure incurred on investment is comparatively meagre. For instance, out of the total expenditure of

[30] T.C. James, *Section 3(d) of Patents Act and Indian Pharmaceutical Industry*, p.11.

over Rs. 800 crores incurred by Novartis India in 2012, a paltry Rs. 29 lakhs was for R&D, constituting roughly 0.03 per cent of its entire expenditure in India.[31] One should also note that most of the path-breaking inventions are a result of public funded research. In the book, ***The Truth About the Drug Companies***', Marcia Angell, former editor in chief of the *New England Journal of Medicine* states, "the few innovative drugs that do come to market nearly always stem from publicly supported research."[32] Hence, the much hyped link between greater levels of intellectual property protection and innovation is infact, fallacious.

Hence, the hue and cry that S.3(d) works to hinder innovation comes without any rationale. In fact, Supreme Court's affirmation of India's higher patentability threshold marks a paradigm shift in the patent regimes of the developing world with countries like Brazil, Argentina and Philippines, incorporating similar provisions in their patent laws. This indeed will bring positive changes in the way pharmaceutical innovation works. ■

[31] Saktivel Selvaraj, *Patent Justice*, THE HINDU, Jul. 17, 2013.
[32] *supra* note 30.

TECHNOLOGICAL PROTECTION MEASURES UNDER COPYRIGHT ACT, 1957- AN ANALYSIS

Shashank Mangal[*]

The key of my car is as important as my car and so the law must protect both.

The most important aspect of digital content is that access to the content becomes synonymous with control of the content which added with the low cost of content reproduction and dissemination, causes virtual loss of ownership in terms of the content's ownership value.[1]

1 BRIEF BACKGROUND

1.1 What are Technological Protection Measures?

Technological Protection Measures (hereinafter called TPMs in this section) refer to the use of technology for creating a protective layer around the copyrighted article by the right holder which would act as a safeguard against copyright infringement and would also require to be breached in the first place before the copyright could be infringed. Though the scope of this paper is confined to Indian Law on the TPMs but as it is in its infant stage with just around a year having passed since it came on the statute book and with not even a single decided case law on the point, relevant reference to European Law and US law have been made wherever necessary. As the Indian Law does not define a technological protection measure in its Copyright Act, 1957[2], a reference to the other laws would be of immense assistance in understanding the concept. European Union Copyright Directive, 2001 defines it as,

> *"For the purposes of this Directive, the expression "technological measures" means any technology, device or component that, in the normal course of its operation, is designed to* ***prevent or restrict acts****, in respect of works or other subject-matter, which are not authorised by the right holder of any copyright or any right related to copyright as provided for by law...."*[3]

[*] IV BSL LLB

[1] Report of the Commission on Intellectual Property Rights, *Commission on Intellectual Property Rights, Integrating Intellectual Property Rights and Development Policy* (London, 2003)

[2] The Copyright Act, 1957 (14 of 1957)

[3] European Union Copyright Directive, 2001, Article 6(3)

So, it means that the purpose of TPMs is to prevent or restrict acts in respect of a copyrighted work. This has come to be associated with two kind of TPMs, i.e, one those who prevent acts not authorized by the copyright holder also known as access control measures and the other which restrict acts not authorized by the copyright holder also known as copy control measures. Access control measures aim to prevent someone from viewing, reading, hearing, and/or otherwise perceiving the work without author's consent. Copy control limits whether and to what extent a work can be copied, communicated, viewed or played.[4] Whereas access control measures stifle the very access to a copyrighted work, copy control measures stifles the copying of a copyrighted work by disabling the user from copying printing, recording, saving etc.

Examples of access control measures are password control systems, payment systems, time access controls, encryption measures applied to tapes or disks that only allow access to copyright content. Examples of copy control measures can be a technology that 'locks' documents to prevent them from being copied.[5] De-CSS is one such technology meant to circumvent a protective technology called content scrambling system (CSS) which constitutes a two part interlocking system between the digital video disc (DVD) and the DVD player.[6] A widely- implemented copy control is the Serial Copyright Management System (SCMS). This system prevents the making of digital copies of a digital copy....Other methods include planting a 'worm' in computer programs, which detects efforts to copy the program and counterattacks by erasing the copied files.[7]

[4] International Journal of Emerging Trends & Technology in Computer Science, Page 320-321, Volume 2, Issue 2, March-April 2013

[5] Technological Protection Measures and Copyright Amendment Act 2006; http://www.smartcopying.edu.au/information-sheets/schools/technological-protection-measures

[6] Arathi Ashok, 'Technology Protection Measures and the Indian Copyright (Amendment) Act 2012: A Comment', Journal of Intellectual Property Rights, Vol.17. November 2012, pp 521-531, p 522

[7] International Journal of Emerging Trends & Technology in Computer Science, Page 321, Volume 2, Issue 2, March-April 2013

Though 'access control' has been defined by the 'Digital Millennium Copyright Act, 1998[8]' of United States of America, the definition has not been taken up here as the regime envisioned therein does not fit in the Indian context and the Indian law does not make any express demarcation between access control and copy control measures. The rationale and utility of both these measures and their applicability in the Indian context has been assessed later.

1.2 Importance of Technological Protection Measures

Whilst copyright law can be applied only after infringement has occurred, as it does not work prospectively, technological protection measures work prospectively and can effectively prevent infringement. Also, while copyright law provides authors merely with a right to control the use of their copyright works technological protection measures enable authors to exercise factual control over what users can and cannot do with their works.[9]

2 LAWS RELATING TO TECHNOLOGICAL PROTECTION MEASURES

2.1 WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, 1996

The idea of incorporating "Technological Protection Measures" (hereinafter referred to as TPMs in this section) for safeguarding the rights of a copyright holder from infringement was first propounded by 'World Intellectual Property Organization Copyright Treaty'[10] (hereinafter referred to as WCT), Article 11 whereof laid down as follows;

> *"Contracting Parties **shall** provide adequate **legal protection and effective legal remedies against the circumvention of effective technological measures** that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that **restrict** acts, in respect of their works, which are not authorized by the authors concerned or permitted by law."*

[8] Digital Millennium Copyright Act, 17 U.S.C. § 1201(a)(3)(B) (1998).
[9] International Journal of Emerging Trends & Technology inn Computer Science, Page 320, Volume 2, Issue 2, March-April 2013
[10] WIPO Copyright Treaty, Dec. 20, 1996, WO033EN

But neither the importance of WCT nor that of 'WIPO Performers and Phonograms Treaty'[11], (wherein an analogous article concerned with the TPMs employed by performers and producers of phonograms for safeguarding their work exists) with respect to the ushering in, in India of the era of TPMs' cannot be over emphasized; the reason being that India has neither signed nor acceded to either of these treaties till date. The possible reasons for this could be the challenges posed by the implementation of a system which required technological know-how for enforcement and also the disapproval by the treaties, of admission of reservations to it.[12] Consequently, there was no need for India to assume the obligations under the treaty as imposed by it.[13] But finally India incorporated the provisions regarding the TPM's in its copyright law.[14]

2.2 The Copyright Act, 1957[15]

Section 65A has been inserted into the Copyright Act, 1957 by an amendment to the Act in 2012 to save Technological Protection Measures from circumvention.

Protection of technological measures.

> *"65A. (1) Any person who circumvents an **effective** technological measure applied for the purpose of **protecting any of the rights conferred by this Act**, with the **intention of infringing such rights**, shall be punishable with imprisonment which may extend to two years and shall also be liable to fine.*
>
> *(2) .....*

The prerequisites for liability for circumvention of a TPM are that, firstly the TPM should be *effective* and secondly, there must be an *intention of infringing*.

2.2.1 *Effective*

The protection being granted only to ***'effective'*** TPMs is a welcome step. The intention behind this is to impose a duty upon the

[11] WIPO Performances and Phonograms Treaty, Dec. 20, 1996, WO033EN
[12] WIPO Copyright Treaty art. 22, Dec. 20, 1996, WO033EN
[13] WIPO Copyright Treaty art. 18, Dec. 20, 1996, WO033EN
[14] The Copyright Act, 1957 (14 of 1957) as amended vide The Copyright Amendment Act, 2012 (27 of 2012) w.e.f. 21.6.2012
[15] The Copyright Act, 1957 (14 of 1957)

copyright holder or licensee to avail of a strong TPM,for protecting their copyright from infringement.

The word effective has not been defined in the act. The European Union Copyright Directive 2001[16] defines effective technology measure.

The standing committee report made an attempt at general rationalization for not defining certain terms of section 65A by saying that it was a conscious act having regard to the complexities faced by the developed countries while defining these terms.

In the absence of such a definition, the author attempts to give an illustration to make the point clear.

For instance- John downloads a 1000 page document, from an online database. It cannot be edited, modified, printed, or copied. But by using a circumvention tool which is very easily available on internet and is widely known and which is in use even prior to the date of upload of the document, he is able to print and copy the document and now he intends to reproduce the document in a book to be written by him.

Would the TPM be considered effective in this case?

The author submits that the TPM should not be considered as effective in such a case. Even though the other requirements of punishment for circumvention of TMP, i.e., the factum of circumvention and the intention of infringing the copyright are getting fulfilled (as the right of reproduction of a copyrighted work in a material form is an exclusive right of the copyright owner[17]), the provision would not operate since the TMP itself is ineffective.

However, it remains to be seen how would the courts determine that whether a particular TPM is effective or not as no explanation is appended in Indian copyright law on the probable mechanism to classify a certain TPM as effective or otherwise.[18]

[16] European Union Copyright Directive, Article 6(3), 2001/29/EC
[17] Copyright Act, 1957, S. 14(1)(a)(i)
[18] Betsy Vinolia Rajasingh, 'India enacts law to protect copyright over digital content', Journal of Intellectual Property Law & Practice, Vol. 8, No.4, 266, 265-267 (2013)

2.2.2 *Access Control or Copy Control or both -'...protecting any of the rights conferred by this Act'*

S.65A(1) aligns the protection offered by TPMs to that offered by copyright law itself, for example, protection against copying, communication to the public etc.[19] Though it has been a subject matter of debate that whether the section envisages access control measures or copy control measures, the author submits that it lays down both. The rationale for the same is the literal interpretation of the text adopted by the Parliament. The scope of the section extends to the use of an effective TPM for the purpose of *'protecting any of the rights conferred by this Act'*. Now, such a protection may be as much valid against unauthorized access as against unauthorized copying of the copyrighted article without any discrimination being made between either purposes.

For example- If 'A' uploads his sound recording on internet which can be listened to by either streaming, subject to payment of a certain amount, it would amount to applying of an *access control* TPM.

Now, if a person applies any circumventing tool to bypass the payment gateway and consequently becomes capable of listening to that sound recording, he can be sued under S.65A by the copyright holder provided his intention is to infringe. But intention to infringe will be immaterial if in case the person streams the recording, as streaming of a copyrighted work for personal use will not be said to have infringed any of the rights conferred by the Act on the copyright holder. Thus, in such a case the person can't be held liable under S. 65A of the Act.

But that would not be due to access control measures not being recognized by S. 65A but because streaming of copyrighted content for personal use is not an infringement under the copyright act.

Now, a slight change in the facts of above example, i.e., replacing streaming with downloading, would show that an action would lie under S. 65A for circumvention of TPM (bypassing of the payment

[19] Technological Protection Measures in the Copyright (Amendment) Bill, 2010 Centre for Internet and Society: available at http://cis-india.org/a2k/blog/tpm-copyright-amendment

gateway). If after circumventing the TPM, the person intends to download the sound recording, he can be sued under S. 65A of the Act as intention to download in this case would be intention to infringe.[20]

In contrast to this, if it is argued that access control measures mean that mere circumvention of the TPM to get access should be penalized, then it would indirectly mean that the requirement of intention to infringe should be overlooked, which is a separate ingredient altogether. So, it can be safely deduced that S.65A is applicable in cases of circumvention of access control measures as well and the criticism[21] to the contrary is unfounded.

2.2.3 Intention of infringing

While circumventing a technological protection measure, there must be an intention of infringing any of the rights conferred by the Act. For example- If the copyright holder circumvents a TPM that stops making of multiple copies of a DVD, then the mere fact of such circumvention is not enough for making him liable under the section. It must also be proved that there was an intention on the part of the circumventer to infringe the right of the copyright holder such as intention of making multiple DVDs from the original DVD for sale etc.[22]

Organizations like Indian Broadcasting Federation and Indian Music Industry were of the opinion that the provision should not be qualified by the requirement of intention to infringe rights of the copyright holder. They advocated the situation wherein the act of interference with TPMs *ipso facto* would be an offence. [23]

2.2.4 Exceptions to the offence of circumvention – S. 65A(2)

a. First Exception

"Nothing in sub-section (1) shall prevent any person from,-

[20] Copyright Act, 1957, S.51(a)(i) read with S. 14(e)(i)

[21] Department - Related Parliamentary Standing Committee on Human Resource Development, Two Hundred Twenty-Seventh Report on The Copyright (Amendment) Bill, 2010, para 20.3

[22] Copyright Act, 1957, S. 51

[23] Department - Related Parliamentary Standing Committee on Human Resource Development, Two Hundred Twenty-Seventh Report on The Copyright (Amendment) Bill, 2010, para 20.3, 30.5

(a) doing anything referred to therein for a ***purpose not expressly prohibited*** *by this Act:*

Provided…..; or"

S.65A(1) and S.65A(2) align the exceptions granted by copyright law with the exceptions to the TPM provision.[24]

The provision states that whenever immunity under S. 65A(2)(a) from application of S. 65A(1) is pleaded, then the first thing that must be shown is the purpose for circumvention which must be followed by an averment that such a purpose was not expressly prohibited by the Act.

As the Act nowhere mentions any purpose for which circumvention with an intention of infringing is not prohibited, the section must be read with the exceptions laid down in S. 52 of the Act. It is so because once an act with respect to a copyright is not an infringement under section 52 of the Act, circumventing a TPM developed for the protection of that copyright for carrying out such an act cannot be said to be an infringement of that copyright.

There is a criticism that the exception should have been drafted as;-

"Nothing in sub-section (1) shall prevent any person from doing anything referred to therein for a purpose expressly allowed by this Act."[25]

The author does not subscribe to such a view because this leads to restrictive interpretation of the impugned provision while the present form of the provision allows for a broad interpretation.

Facilitator and Shall maintain

Provided that any person facilitating circumvention by another person of a technological measure for such a purpose ***shall maintain*** *a complete record of such other person including his name, address and all relevant particulars*

[24] Technological Protection Measures in the Copyright (Amendment) Bill, 2010 Centre for Internet and Society: available at http://cis-india.org/a2k/blog/tpm-copyright-amendment

[25] Technological Protection Measures in the Copyright (Amendment) Bill, 2010 Centre for Internet and Society: available at http://cis-india.org/a2k/blog/tpm-copyright-amendment

necessary to identify him and the purpose for which he has been facilitated; or

The proviso to clause (a) of sub-section 2 of section 65A stipulates that the facilitator of circumvention shall maintain a complete record of such other person. It has been a subject of criticism that:

- the term 'facilitating' has not been defined, and
- no penalty has been imposed on the facilitator for not complying with the provision.

But the rationale behind not defining the term facilitating is to keep it wide.

It would be wrong to suggest that since no remedy or punishment has been provided for the violation of the duty cast upon the facilitators, the provision is ineffective. As per the view of the author, punishment has been provided for non-maintenance of such records by the facilitator under section 63(b) of the Act which provides for punishment when a person knowingly infringes ***any other right*** conferred by this act. When a person facilitates circumvention without maintenance of the requisite records, then it can be said that he has knowingly infringed the right of a copyright holder which is the 'right against *circumvention of TPM with an intention of infringing*'. Knowledge of infringement can be said to be there because of the application of *ignorantia juris non excusat* and also because of an adverse inference which can be drawn by the court against such facilitator under the Indian Evidence Act.[26] So, the cause of action in such a case can be violation of 'right of the copyright holder against circumvention of TPM with an intention of infringing'.

But with circumvention devices and services widely available globally on the internet and from sources without any locus in India, it is naïve to think that mere "record keeping" obligations can ever come close to meeting the treaties' obligation to provide "adequate legal protection and effective legal remedies" against circumvention of TPMs.[27]

[26] Indian Evidence Act, 1872, S.114

[27] International Intellectual Property Alliance (IIPA), 2011 Special 301 Report on Copyright Protection and Enforcement, Page 43, Foot note 35

There is one anomaly in S. 65A which the author would explain with the help of an illustration. If 'A' procures a TPM protected copyrighted work lawfully from the market. Thereafter he wants to reproduce that work in a format accessible by his friend who is blind. The use to which his friend would be subjecting the copyrighted work would be for his own educational purpose. But when 'A' tries to reproduce the work, he finds that a copy control TPM has been employed by the copyright holder and the TPM is almost impossible to circumvent without the assistance of copyright holder.

In such a case, though circumvention done would be legitimate[28], but because doing it has been made so difficult by the right holder, the legitimacy of circumvention loses its significance. On the other hand, looking from the perspective of the rights holder, he also cannot be blamed because it would be his aim to use the strongest TPMs available. In such a case the Indian Law should have looked forward to the European Union Copyright Directive, 2001 which places an onus on the rights holder to facilitate circumvention when it has been statutorily excepted.[29]

b. Second Exception

(b) doing anything ***necessary to conduct encryption research*** *using a* ***lawfully obtained encrypted copy****; or*

As the act has not defined what encryption research is a resort may be made to the US law which defines the term may be made.[30] The exception appreciates research in the field of encryption provided that the encrypted copyrighted article whereon the research is conducted should have been procured lawfully. So, if a person 'A' steals a copyrighted article and conducts encryption research on it his case shall not be governed by this exception. The section is in interest of the right holders only as it will lead to research in the field of encryption techniques which would ultimately be exploited by the right holders only.

[28] Copyright Act, 1957, S. 51(1)(zb)(i)

[29] European Union Copyright Directive, 2001, Article 6(4)

[30] Digital Millennium Copyright Act, 17 U.S.C. § 1201(g)(1)(A) (1998)

c. Other exceptions

The other exceptions to the 'circumvention of TPMs with an intention of infringing are as follows;

Nothing in sub-section (1) shall prevent any person from,-

*(c) conducting any **lawful** investigation; or*

(d) doing anything necessary for the purpose of testing the security of a computer system or a computer network with the authorization of its owner; or

(e) operator; or

(f) doing anything necessary to circumvent technological measures intended for identification or surveillance of a user; or

(g) taking measures necessary in the interest of national security.

The exceptions are clear but more clarity is required for any meaningful interpretation of clause (e) to sub-section 2 of Section 65 which, as can be seen above, says that-"Nothing in any sub-section (1) shall prevent any person from operator".

2.2.5 Remedies

The remedy provided for under the act for circumvention of TPMs is imprisonment which may extend to two years and shall also be liable to fine. Most of the stakeholders were opposed to this as they opined that civil remedy in the form of damages shall also be made available to the copyright holder. But to this, the Committee responded in the following words;

Taking note of experience of developed countries in developing laws for prevention of circumvention of technological measures, the Committee agrees with the approach as enshrined in section 65A to give limited legislative guidelines and allow the judiciary to evolve the law based on practical situations, keeping in mind the larger public interest of facilitating access to work by the public. [31]

[31] Department - Related Parliamentary Standing Committee on Human Resource Development, Two Hundred Twenty-Seventh Report on The Copyright (Amendment) Bill, 2010, para 20.7

It is an appreciable move by the legislature as it has restricted itself from absolute precision and exactitude in the absence of the requisite experience and foresight and at the same time it has fulfilled the requirement of an elementary legal framework in the field.

2.3 Difference between S. 65 and 65A

The offence made out under S. 65 is totally different from the one made out in S. 65A and should neither be confused for an anti-circumvention provision nor with a provision that prohibits manufacturing of anti-circumvention devices. The provision refers to 'plates' which has been defined under S. 2(t) of the Act. Since plates are devices which facilitate making of infringing copies and not those which facilitate circumvention (which is a step prior to infringement) this provision is different from S. 65A which is concerned with TPMs. More discussion on plates is beyond the scope of this paper.

3 CONCLUSION

It is good that India has taken its first step towards compliance with the provisions given in WIPO internet treaties, the WCT and WPPT, 1996. The fact that India is not bound to follow these treaties by virtue of being a non-signatory lends more weight to its anticipation of the provisions of these treaties.

It cannot be said that India has taken its law on the subject entirely form US or European Union as requisite changes have been made in the law. An example to illustrate the same would be that mere making, selling etc. of anti-circumvention devices has not been made an offence in by the Act as the 'primarily designed' test of the DMCA Act, 1998 would not be very easy in India. And in such a case if the test is wrongly applied, it may even affect the economy of the country. Simlarly, the requirement of intention of infringement has been given as an ingredient and the mere fact of circumvention of a TPM will not be enough to establish an offence under the Act.

Though morally, ethically and legally it is justified that protection to TPMs is a must but still it is undeniable that it will to a certain extent affect students and research sector of a developing country like India. The debate between the need for stronger IP rights, innovation, and investment and the danger that IP makes information costlier and

adversely affects progress is of special relevance for India, particularly as its economy becomes more knowledge-based. The many points of discussions taken into consideration by the Committee inter alia, also included 'the unintended consequences of these laws resulted in blocking research and development of new technologies'.[32]

Keeping this in mind, a positive duty in this respect should have been imposed upon the copyright holders who employ TPMs. Because presently, though the use of circumvention for acts given as exception under S. 52 of the Act is innocuous yet it might not be possible only if the right holder employs a very powerful TPM. For example:- They should be required to tell their customers that how they can be contacted if the customer wishes to circumvent the TPM for a legitimate purpose and upon being contacted, aid their customer in making use of their rights. Spanish law (in Article 161 of their law) and European Union Copyright Directive in Article 6(4) expressly require that copyright holders facilitate access to works protected by TPM to beneficiaries of limitations of copyright.[33] It is also echoed by one of the observations made by Parliamentary Standing Committee on Human Resource Development when it said that – "The use of TPM had a significant impact on users since the freedom to use the work (fair use of works) permitted by law was considerably regulated through these measures."[34]

Nevertheless, it shall be interesting to see how the judiciary interprets these provisions and maintains harmony between copyright protection and a developing economy.

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[32] Department - Related Parliamentary Standing Committee on Human Resource Development, Two Hundred Twenty-Seventh Report on The Copyright (Amendment) Bill, 2010, Observations/Recommendations ---- At A Glance, XX.

[33] Technological Protection Measures in the Copyright (Amendment) Bill, 2010 Centre for Internet and Society: available at http://cis-india.org/a2k/blog/tpm-copyright-amendment

[34] Department - Related Parliamentary Standing Committee on Human Resource Development, Two Hundred Twenty-Seventh Report on The Copyright (Amendment) Bill, 2010, Observations/Recommendations ---- At A Glance, XX.

PRINCIPLES FOR DETERMINING COMPENSATION APROPOS THE LAND ACQUISITION ACT, 1894 (1 of 1894)

Shashank Mangal*

"I cannot stop you from depriving me of it though its mine, but you ought to do it rightfully."

1 BRIEF HISTORY OF CONSTITUTIONAL VALIDITY OF THE LAND ACQUISITION ACT

Land Acquisition Act, 1894 (1 of 1894) is a pre-constitutional piece of legislation. When the Constitution of India, 1950 commenced, it contained an article 19(1)(f) which laid down that all citizens of India shall have right to acquire, hold and dispose of their property. Now, prima facie the said Act contravened this fundamental right provided for in Part III of the Constitution and thus should have become void from the time of commencement of the Constitution under the provisions of Article 13(2). But this was not the case as Article 31 of the Constitution stipulated that the land could be acquired for public purpose and on payment of compensation to the person whose land was being acquired. So, this Article was the life-blood of the Land Acquisition Act. Moreover, Articles 31(a) and 31(b) brought by the 1st Constitutional Amendment Act, 1951 proved to be the saviour of the State's power to acquire property. This amendment basically reflected the ideal of socialism and doctrine of eminent domain.

2 RELEVANCE OF THE WORD 'COMPENSATION' VIS-À-VIS 'AMOUNT'

The term 'compensation' being discussed here does not exclusively refer to the compensation mentioned under Land Acquisition Act, 1894 but to its use in Article 31 (which was repealed by the 44th Constitutional Amendment Act, 1978).

Here the meaning of the word compensation gains unusual importance as compensation was the only solace a poor citizen had when his land was sought to be acquired by the almighty state.

In *State of West Bengal v. Bela Banerjee*[1], the Supreme Court interpreted the expression 'compensation' as used in Article 31(2) as 'full indemnification'. The Parliament responded to this judgment

* IV BSL LLB

[1] *State of West Bengal v Bela Banerjee*, AIR 1954 SC 170

with the 4th Constitutional Amendment Act, 1955, thereby clarifying that inadequacy of compensation could not be used to challenge laws providing for acquisition of private property. Despite this , the Supreme Court in *P. Vajravelu Mudaliar v. Special Deputy Collector, Madras*[2], as well as some other decisions, held that the expression 'compensation' in Article 31(2) continued to mean 'just equivalent' even after this amendment. Further confusion was caused when the court, in *State of Gujarat v. Shantilal Mangaldas*[3], held that the compensation which was fixed or determined using the principles specified by the legislature, was not open to challenge on the somewhat indefinite plea that it failed to meet the standard of just or fair equivalent.[4] To summarize these extremely important pieces of judicial interpretations by the apex court, it can be safely concluded that compensation means just or equivalent amount to be paid by the state to the person whose land is reserved for acquisition. And on the other side, compensation must be determined according to the relevant statutory principles. But *R.C. Cooper v. Union of India*[5] added a new dimension to it and keeping the meaning of the term compensation paramount, concluded that if the application of the relevant principles do not suggest a just and fair equivalent then those principles are liable to be struck down.

But the State, 'Almighty' as I call it, perceived this provision as a thorn in its flesh and its intolerance seethed and surpassed the limits when the Honourable Supreme Court of India struck down the Banking Companies Acquisition and Transfer of Undertaking) Act, 1969 as the principles governing compensation to be paid under the Act were arbitrary.

For once the State had to re-enact the Act, but justice done by the court was looked down upon by the government as an act of indignation of the government of the day by the judiciary. Finally, waiting for the popular mandate and getting re-elected with a thumping majority, the humane instinct of revenge prevailed over the

[2] *P. Vajravelu Mudaliar, v Special Deputy Collector, Madras*, AIR 1965 SC 107
[3] *State of Gujarat v Shantilal Mangaldas*, (1969) 1 SCC 509
[4] Soli J. Sorabjee and Arvind P. Datar, *Nani Palkhiwala The Courtroom Genius*, (p 68, Fourth Reprint August 2012, The Bank Nationalisation Case)
[5] *R.C. Cooper v Union of India*, 1970 AIR 564

government and it passed 25th Constitutional Amendment Act, 1971. The amendment was criticized for a lot many reasons and as of today most of its provisions stand repealed but at the relevant time in history it had all the elements of taking away the already talked about solace of a poor citizen whose land is being acquired by the government. It replaced the word 'compensation' with the word 'amount'.[6]

But finally in 1978 major changes were made vide 44th Constitutional Amendment. The right to property was taken away[7] from Part III of the Constitution and given a new form and new address, i.e. article 300A, its status thereby reducing from that of a fundamental right to merely a legal right.[8] Consequently Article 31 also stood repealed. But it was ensured that if the land to be acquired was one held within the ceiling limits by its owner or held for personal cultivation, then compensation at market value was a must.[9]

The emphasis over this assertion in the Statement of Object and Reasons of the said Amendment Act is not a mere coincident but a well-conceived bargain, the absence of which would have rendered the amendment dictatorial and ignominious.

Compensation has to be provided because the Land Acquisition Act provides for the acquisition and not for the deprivation of the land.[10]

[6] The word "compensation" is sought to be omitted from article 31(2) and replaced by the word "amount". It is being clarified that the said amount may be given otherwise than in cash. It is also proposed to provide that article 19(1)(f) shall not apply to any law relating to the acquisition or requisitioning of property for a public purpose.
[7] Statement of Object and Reasons, 44th Constitutional Amendment Act, 1978- **3.** In view of the special position sought to be given to fundamental rights, the right to property, which has been the occasion for more than one amendment of the Constitution, would cease to be a fundamental right and become only a legal right. Necessary amendments for this purpose are being made to article 19 and article 31 is being deleted. .....
[8] Statement of Object and Reasons, 44th Constitutional Amendment Act, 1978 5. Property, while ceasing to be a fundamental right, would, however, be given express recognition as a legal right, provision being made that no person shall be deprived of his property save in accordance with law.
[9] Statement of Object and Reasons, 44th Constitutional Amendment Act, 1978 **the right of persons holding land for personal cultivation and within the ceiling limit to receive compensation at the market value would not be affected.**
[10] *Joshi Jayantilal Lakshmishankar v State of Gujarat*, AIR 1962 Guj. 297

3 PRINCIPLES GOVERNING COMPENSATION UNDER THE LAND ACQUISITION ACT

Award of fair compensation is not an algebraic problem which can solved by an abstract formula.[11] The statutory principles governing the determination of compensation in cases of land acquisition under the Land Acquisition Act, 1894 are stipulated under Section 23 which is an exhaustive section as there is an 'and' between the fifth and sixth clauses.

Under Section 23(1) of the Act, compensation has to be determined by taking into consideration the market-value of the land as on the date of the publication of the notification under Section 4(1) of the Act, and the damage, if any, sustained by the person interested, under any of the heads mentioned in clauses second to sixth in Sec. 23(1) of the Act.[12]

Whether fair, reasonable and adequate market-value has been determined is always a question of fact and depends on the evidence adduced, circumstantial evidence and probabilities arising in each case.[13]

3.1 The market value of the land on the date of publication of the notification under section 4(1)

The function of the Court in awarding compensation under the Act is to ascertain the market value of the land on the date of the notification under S.4(1) of the Act. Market value is the price the property may fetch in the open market if sold by a willing seller unaffected by the special needs of a particular purchase.[14] In considering market-value, the disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy should be disregarded.[15] For ex- If a sale of a similarly situated land has taken place at a concessional rate because the vendor was in dire need of money, the sale consideration will not reflect the true market value of

[11] *Nowroli v Government of Bombay*, I.L.R. 49 Bom. 700 (P.C.)
[12] *State of Kerala v P.P. Hassan Koya*, AIR 1968 SC 1201
[13] *Special Deputy Collector v Kurra Sambasiva Rao*, AIR 1997 SC 2625
[14] *Special Land Acquisition Officer v P. Veerbhadrappa*, AIR 1984 SC 774, *Raghubans Narain Singh v State of Uttar Pradesh*, AIR 1967 SC 465
[15] *Thakur Kamta Prasad Singh v State of Bihar*, 1976 (3) SCC 772

the other lands in the area. Similarly, an offer of sale of land to industrialists on concessional rate with a view to induce them to set up their industries in a particular area doesn't reflect the prevailing market-value of the land.[16] It does not only include its value with reference to its condition at the time of the declaration under Section 4 of the Act but also its potential value.[17]. Potential value of the land is related to the future possibilities to which the acquired land may be put in future taking into account its location, development of the immediate vicinity of the acquired land and other possible advantages of the acquired land itself.[18] At the same time, it is not the fancy or the obsession of the vendor but the objective factor, namely, whether the said potentiality can be turned to account within a reasonably near future.[19] Furthermore, it is immaterial for computation of the market value that a particular party due to lack of its ability was unable to develop the land and realize its potential.[20] But there is a caveat here which must be heeded that the land must not be valued as though it had already been built upon…It is the possibilities of the land and not its realized possibilities that must be taken into consideration.[21]

Notwithstanding that assessing of the market value of a land can't be termed as an exact science and the same can't be done with arithmetical accuracy, there must be certain objective standards for evaluation of the same lest this disadvantage render the exercise futile. In this background, the apex court of India and various high courts have concurred upon certain methods to compute the market value of lands being acquired in order to lend transparency and objectivity to the whole exercise. These methods of valuation of market value are:

3.1.1 Expert Opinion Method

The Courts can resort to expert opinion for assessing the market value of the land under acquisition. An expert has been defined as *"a*

[16] *Mahabir Prasad Santuka v Collector, Cuttack*, AIR 1987 SC 720
[17] *Tribeni Devi And Ors v Collector of Ranchi*, 1972 AIR 1417, *Adusumumilli Gopalkrishna v Special Deputy Collector*, AIR 1980 SC 1870, State of Haryana v. Ram Singh, (2001) 6 S.C.C. 254
[18] State of Orissa v. Dunda Oram, AIR 1978 Orissa 74
[19] *Raghubans Narain Singh v State of Uttar Pradesh*, AIR 1967 SC 465
[20] *Tek Chand v Union of India*, 1991 All. C.J. 80
[21] *Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer, Ebrahim Akbaralli v District Deputy Collector, Pandharpur Division, District Sholapur*, (1969) II SCWR 635

person who has made special study of the subject or acquired special experience therein"[22].

An expert, in order to be competent as a witness, need not have acquired his knowledge professionally. It is sufficient so far as the admissibility of the evidence goes, if he has acquired a special experience therein.[23]

Accordingly, expert opinion has been defined as - "The testimony of an expert stating his opinion on a given subject".[24] The practice of seeking expert's opinion by court on a fact in issue or a relevant fact is a conventional one and is also provided for under Indian Evidence Act, 1872.[25]

But as in others cases, this practice also can't be said to be an exercise ensuring utmost accuracy and correctness. Every expert witness has his own set of conjecture of more or less weight according to his experience and his personal sagacity with the result that the enquiry abounds with uncertainty and gives more than ordinary room for guess work. Further, the expert witness sometimes begins with a pre-determined conclusion and tried to adjust his figures, his answers and conjectures to that conclusion.[26]

Examples of expert opinion would include opinions on whether the compensation should be computed at a uniform rate, or as per belting system; whether the rate of compensation is less or excessive etc.

- **Belting**

Valuation by belting means dividing the property artificially into belts or plots on the basis of size, position, depth, road frontage and other factors. In case of agricultural lands, additional factors may be fertility of soil, irrigation facilities etc.

The belting procedure first came to fore in *Prem Chand Board v. Collector of Calcutta*[27] which approved of the same.

[22] P Ramanatha Aiyar, *Concise Law Dictionary*, p 423, (3rd ed. 2010)
[23] *Collector, Jabalpur v Nawab Ahmad Yar Jahangir Khan*, AIR 1871 MP 32
[24] CONCISE LAW DICTIONARY, 423, (3rd ed. 2010).
[25] The Indian Evidence Act 1872, Section 45
[26] *Government v Century Spinning and Manufacturing Company Ltd.*, AIR 1942 Bom. 105
[27] *Prem Chand Board v Collector of Calcutta*, (1876) I.L.R. 2 Cal 103.

It is a settled legal position that depending upon the nature of the land and the location thereof, the belting procedure could be adopted on the principle that no willing buyer in an open market would be prepared to purchase the land abutting the road and the lands beneath the road being a low lying area, at the same rate.[28]

The fear of possible arbitrariness which may be caused if this procedure is resorted to frequently has been allayed by the Supreme Court in *Mathura Prasad Raigharia v. State of West Bengal*[29], saying that- "Where a large area of land in an urban locality is sought to be acquired in determining the market value, the 'method of belting' is appropriate. It is common knowledge that lands having frontage on the main roads in urban areas are always more attractive than the lands which have no such frontage".

3.1.2 Comparable Sales Method

This method, as the name suggests, lays down that the compensation due to be paid for the land acquisition is to be calculated on the basis of other bona fide sale-purchase transactions in respect of the lands situated nearby to the land under acquisition and in similar condition as to vicinity, development, amenities etc. vis-à-vis the land under acquisition. Such sale or purchase must be proximate to the notification of land acquisition under section 4(1).

But the lands which are being used as a yardstick in the foregoing manner must be comparable properties, similarly situate, and possessing the same or similar advantages and subject to the same or similar disadvantages in relation to the lands to be acquired. The locality or vicinity is not always measurable in terms of feet or furlongs; and the reasonable time is not always measurable in terms of days or months.[30]

When this method is followed, the following conditions must be fulfilled;

(A) The sale must be a genuine transaction.

[28] *G. Ramesan v State of Kerala*, AIR 1997 SC 2159
[29] *Mathura Prasad Raigharia v State of West Bengal*, AIR 1971 SC 465
[30] *Rabindradhar Barua v Collector of Kamrup*, AIR 1982 Gau. 17

(B) That the sale deed must have been executed at a time proximate to the date of issue of notification under section 4 of the Act.

(C) The land covered by the sale must be in the vicinity of acquired land.

(D) That the land covered by the sale must be similar to the acquired land.

(E) That the size, position, road frontage, depth of the plot of the land covered by the sales be comparable to the land acquired.

While making a comparison under this method, the following positive and negative factors must be looked into:

Positive factors:

- Smallness of size
- Proximity to a road
- Frontage on a road
- Nearness to developed area
- Regular shape
- Level vis-a-vis land under acquisition
- Special value for an owner of an adjoining property to whom it may have some very special advantage.

Negative factors:

- Largeness of the area
- Situation of the interior at a distance from the road
- Narrow strip of land with very small frontage compared to depth
- Lower level requiring the depressed portion to be filled up
- Remoteness form developed locality some special disadvantageous
- Factors which would deter a purchaser[31]

Where sale deeds pertaining to different transactions are relied on behalf of the Government, that which represents the highest value

[31] *Viluben Jhalejar Contractor v State of Gujarat*, (2005) 4 SCC 789

should be preferred to the rest unless there are strong circumstances justifying a different course.[32]

However, if there is dissimilarity in regard to locality, shape, site or nature of the land between land covered by the sale and the land acquired, it is open to the court to proportionately reduce the compensation for acquired land and that what is reflected in the sales depending upon the disadvantages attached with the acquired land.[33]

The acid test while applying this test would be whether a hypothetical willing vendor would offer the lands and a willing purchaser in normal human conduct would be willing to buy as a prudent man in normal market conditions as on the date of the notification under section (1) of the act; but not an anxious buyer dealing at arm's length nor facade of sale or fictitious sale brought about in quick succession or otherwise to inflate the market value.[34]

Taking an example here, can market value of a large tract of land under acquisition lens be assessed with the help of a sale of a small plot in that area? As simple logic suggests it can be done but in order to arrive at the correct market-value, certain things must be kept in mind. For illustration sake if the small plot has proper electricity, water, drainage arrangements and road connectivity etc. but the large tract of land is devoid of all this at the time of or prior to its acquisition, then while assessing the market value of the land on the basis of the sale of the small plot, deductions must be made in such market value as arrived at by following this method. These deductions are in respect of the various amenities which are there in the small plot. But if in case the land under acquisition is on the same stage of development as the small plot, then this principle of deduction is not to be applied.[35] Furthermore, when a small plot is purchased, the actual rate at which it is purchased may not be very carefully or properly scrutinized, the whole cost of purchase being small. The investment which would be required to be made in the

[32] *Ranee of Vyyur v Collector of Madras*, (1968) 2 SCJ 869
[33] *Shaji Kuriakose v Indian Oil Corporation Ltd.*, (2001) 7 SCC 650
[34] *Special Deputy Collector v Kurra Sambasiva Rao*, AIR 1997 SC 2625
[35] *Bhagwathulasamnna v Special Tahsildar and Land Acquisition Officer, Visakhapatnam, Municipality, Visakhapatnam*, (1991) 4 SCC 506

purchase of a large plot of land would be relatively very much higher and the risk which the purchaser of such a plot undertakes would in its magnitude be also great. It is commonly known that a person who has to sell a large tract of land may not be able to sell it all at once unless there is a brisk market and keen demand for the lands in the locality and as such also the market-value of such land would be less.[36]

Additionally, it must also be kept in mind that though as per the language of the section 23(1), market-value on the date of notification is to be assessed but that doesn't mean that it can't be evaluated with the help of certain post-notification transactions if they are otherwise relevant and offer a fair criterion of the value of the property as on the date of notification.

It is well established that in determining compensation, the valuation fetched for smaller plot of land cannot be applied to lands covering a very large area. The larger area of land cannot possibly fetch the price at the same rate at which smaller plots are sold.[37]

3.1.3 Capitalization of Net Income Method

It has been said by the Supreme court that-"....that the capitalization means the method used to convert future benefits to present value by discounting such future benefit at an appropriate rate of return. It is the process of converting the net income of a property into its equivalent capital value. While capitalizing the income, future income, its duration along with risk factor is to be taken into consideration. Capitalizing rate means a designated rate of return which converts net future benefits to capital value."[38]

In valuing land or an interest in land for the purposes of land acquisition proceedings, the rule as to number of years purchase is not a theoretical or legal rule but depends upon economic factors such as the prevailing rate of interest in money investments. The return which an investor will expect from an investment will depend upon the characteristic of income as compared to that of idle security. The main

[36] *State of Gujarat v Devji Bechar*, 1991 (1) GLH 560
[37] *P.S. Krishna and Company Private Limited v Land Acquisition Officer*, AIR, 1992 SC 421
[38] *Airports Authority of India v Satyagopal Roy*, AIR 2001 SC 1423

features are: (1) Security of the income; (2) fluctuation; (3) chances of increase; and (4) cost of collection etc. The most difficult and yet the most important and crucial part of the whole exercise is the determination of the reasonable rate of return in respect of investments in various type of properties. Once this rate of return and accordingly the rate of capitalization are determined there is no problem in valuation of the property.[39]

The basic factor in applying the method of capitalization of income for ascertaining the market-value of property is the rate of return that an ordinary investor would reasonably get on his investment, having due regard to all the relevant circumstances.[40]

An assessment of the compensation payable for land acquired must take into account several factors, including the nature of the land, its present use and its capacity for a higher potential, its precise location in relation to adjoining land, the use to which neighbouring land has been put and the impact of such use on the land acquired, and so on.[41] It is the submission of the author that these considerations should not be construed as additional conditions being read into section 23 by the Honourable Supreme Court of India but a mere addition or expression of the factors which must be taken into consideration while computing the market value of the land under section 23(1) of the Act.

These methods may be applied together or in isolation or even with other relevant considerations, the sole aim being to reach the correct market value of the land to be acquired.[42]

3.2 The damage sustained by the person interested, by reason of the taking of any standing crops or trees which may be on the land at the time of the Collector's taking possession thereof;

This is a situation where the land which is acquired has trees or crops on it and the acquisition results into added detriment to the owner in the form of loss of those trees/ standing crops. In such a

[39] *Special Land Acquisition Officer v P. Veerbhadrappa*, AIR 1984 SC 774
[40] *Ibid*
[41] *Adusumumilli Gopalkrishna v Special Deputy Collector*, AIR 1980 SC 1870
[42] *Special Land Acquisition Officer, Bangalore v T. Adinarayan Setty*, AIR 1959 SC 429

situation, it is settled law that the collector or the court who determines the compensation for the land as well as fruit bearing trees cannot determine them separately. The market value is determined on the basis of yield. Under no, circumstances, the Court should allow the compensation on the basis of the nature of the land as well as fruit bearing trees. For example, if the land is valued as a forest, there can't be revaluation of the value of the trees besides the valuation of the land as a forest.[43] The reason for this is nothing but the definition of land defined under section 3(9) of the Act where it includes the benefits which may arise from the land.

3.3 The damage (if any), sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of severing such land from his other *land;*

In such cases, the right way is to assess the market value of the portion of the land left out both before and after severance.[44]

An interesting factual matrix appears under this clause whenever the front portion of a piece of land is acquired, it may result in the land loosing the edge it has over other lands in the area because of its location. But that doesn't necessarily mean that in each and every case the person, a portion of whose land is acquired by the State is entitled to get enhanced compensation. For ex- If front portion of a land is acquired by NHAI for expansion of highway, then the new boundary of the land would continue to form the front portion of the land as it would still be alongside the highway as earlier. But on the other hand if the same is acquired for the purpose of building any Government office or the like, then the front of the land gets obstructed by the building and the residential or commercial value of the land gets decreased, thereby making the owner entitled to enhanced compensation.

3.4 The damage (if any), sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of the acquisition injuriously affecting his other property, movable or immovable, in any other manner or his earnings;

[43] *Niranjan Singh v State of Uttar Pradesh*, AIR 1979 SC 1547
[44] *Government v Century Spinning and Manufacturing Co. Ltd.*, AIR 1942 Bom. 105

For a person to be entitled to compensation under this clause, damage must be caused at the time when the Collector takes possession provided the following conditions are fulfilled:

(a) He is required to be a "person interested"[45] in the land that is acquired,

(b) His other property, movable or immovable or his earnings, must have been "injuriously affected" by the impugned acquisition.

At this juncture, a natural question that arises is whether a person whose land has not been acquired but the lands adjoining or in the vicinity of his land have been acquired and the same injuriously affects his land is covered by this clause. The answer lies in a careful reading of the clause which says "by reason of the acquisition injuriously affecting his **other property".** Thrust should be on the phrase "other property" which means that such person would not be entitled to any compensation until and unless some part of his land or an interest upon which he asserts an easement has been acquired.

Since the word 'earnings' has neither been defined in the Act nor in the General Clauses Act, 1897, it is imperative to seek the assistance of general and ordinary meaning of the term, thereby also following the well accepted cannons of interpretation of statutes. Earnings inter alia, has been defined to be *'the reward for personal services'* or *'that which is gained or merited by labour'*.[46]

3.5 Other Principles

- ***If, in consequence of the acquisition of the land by the Collector, the person interested is compelled to change his residence or place of business, the reasonable expenses (if any) incidental to such change;***

If the acquisition of land by the appropriate government compels the person interested to change his residence or place of business,

[45] The Land acquisition Act 1894, Section 2, Clause (b)- "person interested" includes all persons claiming an interest in compensation to be made on account of the acquisition of land under this act; and a person shall be deemed to be interested in land, if he is interested in an easement affecting the land.
[46] P Ramanatha Aiyar, *Concise Law Dictionary*, 370, (3rd ed. 2010).

besides the compensation for the acquisition of land, he is also entitled to receive the reasonable expenses for such change. Due emphasis must be laid on the terms 'compelled' and 'reasonable'.

- ***The damage (if any) bona fide resulting from diminution of the profits of the land between the time of the publication and the declaration under section 6 and the time of the Collector's taking possession of the land.***

This provision basically reflects the intent of the legislature to expedite the acquisition proceedings on one hand and to relieve the affected people, or people whose lands are being acquired, from the delay in the acquisition proceedings, on the other.

- *Solatium*

Solatium is an amount in the shape of damages granted in lieu of the injury and the distress caused to the feelings of the owner. It is a part and parcel of the compensation.

It is a latin term and english equivalent of the term solace. Where citizen is deprived of his property whether by way of acquisition or requisition, as the case may be, in exercise of the State's power of eminent domain, the owner has to be compensated for the loss which he suffers by reason of such compulsory acquisition. In other words, it is an amount which is intended to provide solace to the person whose land has been acquired besides compensating him under Section 23(1).[47]

There is no doubt that for the purpose of determining the solatium only the market-value of the land has to be taken into account and not any other item covered by the clauses "secondly" to "sixthly" to S.23(1) of the Land Acquisition Act. In other words, the additional sum of 15 per cent, is admissible only on the items covered by clause "first".[48]

- **Difference between 'solatium' and 'market value'**

The word "solatium" ordinarily connotes compensation for disappointment, inconvenience or wounded feelings. It is not

[47] *District Collector of Krishna v Pulavarthi Vishvanadam*, AIR 1953 Mad. 867
[48] *Collector, Varanasi v Harbalabh Narain Singh*, 1979, ALJ 507

compensation for the acquired interest in land, but consolatory additional payment, intended to wipe out the disappointment of inconvenience out of and caused by the acquisition. The quantum of such consolatory compensation is no doubt fixed at a certain percentage on the market value of the acquired land, as adjudicated upon or determined, on a consideration of a claim made in that regard. Thus, it will at once be apparent that the determination of the quantum of solatium is not the same as the determination of the market value of the acquired land, though it is one of the components.

4 COMPULSORY NATURE OF ACQUISITION

The question is when the element of compulsion is absent or in other words, when the land is acquired on the basis of an agreement between the owner of the land and the government, whether the provision of S. 23(2) would apply. The payment of additional sum is made because of the compulsory nature of the acquisition as mentioned in S.23(2), the Government will not be bound to pay the additional sum when the acquisition is made not compulsorily against the will of the owner but under an agreement.[49]

5 THE TIDE OF CHANGE AND THE NEW ACT- THE RIGHT TO FAIR COMPENSATION AND TRANSPARENCY IN LAND ACQUISITION, REHABILITATION AND RESETTLEMENT ACT, 2013

5.1 *The New Act*

The principles for computing compensation for land acquisition as discussed above often culminated into calculation of a figure which was unrealistic. An open to abuse 'public purpose' clause supplied the basis for a future social chasm as portrayed by 'Singur', 'Narmada Bachao Andolan', Bhatta-Parsaul and others.

A requirement of a new law was felt. Finally, after much ado and delay, "The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Bill, 2013" was passed by the Parliament in 2013. It received the Presidential assent on 26th

[49] *Lily Ghosh v State of West Bengal*, AIR 1979 Cal. 329

September, 2013 and was notified by the Government of India on 1st January, 2014, thereby repealing the old Act of 1894.[50]

Though the new Act is an extensive legislation covering aspects of Rehabilitation and Resettlement also the scope of this paper in the forthcoming sections has been confined to compensation only.

5.2 Limited Retrospective Application

The new Act would apply not only to all the acquisition from 1st January, 2014 onwards but also to the prior acquisitions wherein award under Section 11 of the old Act has not been passed. It shall also apply to cases wherein award has been made five years or more prior to the commencement of the new act but the physical possession of the land has not been taken or the compensation has not been paid. In such cases, if compensation with respect to the land holdings acquired has not been paid to the majority of the beneficiaries, then all the beneficiaries are entitled to receive compensation in accordance with the new Act.[51]

5.3 Compensation for Acquisition- Comparing the new and old Acts

The new Act in not confined to payment of compensation to land owners only but also provides for the same to be paid to tenants[52] as well.[53] The old Act lacked legislative clarity as S. 23 which laid down the principles for determination of compensation applied to Collectors through S. 15. But the new Act contains an improvement in this regard as S.26 defines the term 'collector' clearly.

Under the new Act, compensation shall be determined on the basis of the following factors;[54]

a. Market value of the land[55]

The new Act clearly lays down the following three distinct criteria for calculation of market value;

[50] The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013, S 114

[51] *Ibid.*, S 24

[52] *Ibid.*, S. 3(c)(ii)- 'tenants including any form of tenancy or holding of usufruct right'

[53] *Ibid.*, First Schedule

[54] *Id.*

[55] The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013, S.26(1)

i. Circle rates of the area, for the registration of the Sale deeds/Agreement to Sell, where the land is situated, or

ii. Average Sale price for the similar type of land, or

iii. Consented amount of Compensation.

In the absence of the above said factors, the State Govt shall specify the floor price or minimum price per unit area of the said land. The highest market value from amongst all the market values arrived at by employing the methods from (a) to (c) shall be the market value for the purposes of computing compensation.

While the old Act also provided for determination of compensation on the basis of market value, it didn't provide any method for arriving at the same and consequently the judiciary evolved certain principles for obtaining a fair market value.

b. Multiplication by Factor[56]

The highest market value shall then be multiplied by a factor of 1 to 2 times in rural areas and by a factor of 1 time in urban areas. No such system was there under the old Act. The rationale behind such a system seems to be that the lands in rural areas are usually under-valued. The discretion to choose the quantum of multiplier in rural areas vests with the appropriate government.

c. Value of assets attached to the land or building,[57]

Under the new Act, it would be determined through following factors:

i. Damages sustained by the person interested for the standing crops and trees;

ii. Damages sustained for severance of land from other lands of the land owner;

iii. Damages to the person interested for any injury affecting his other property, movable, immovable properties and his earnings;

[56] *Ibid.*, S.26(2).

[57] *Ibid.*, S. 29.

iv. Damages to the person interested if he is compelled to change his residence or place of business

v. Damages for shifting residence or place of business and reasonable expenses for shifting;

vi. Damages caused by diminishing of the profits of the land between time of publication and possession.

vii. Any other ground in interest of equity, justice and beneficial to affected families.

This provision is a slight modification over the old legislation as besides (e) and (g), it is a consolidation of the stipulations of the old Act.

d. Solatium

After calculation of the compensation, a solatium amount equivalent to 100% shall be payable.[58]

The rationale behind 100% solatium, i.e. 4 times of market value in rural areas and 2 times of market value in urban areas has not been provided. Under the old Act, solatium used to be 30% of the market value.

e. Payment of Interest

The Act also provides for the payment of interest @ 12% p.a. on the market value of land from the date of publication of the notification of the Social Impact Assessment study under sub-section (2) of section 4 (of the new act) to the date of award or the date of possession, whichever is earlier. A similar provision existed in the old Act also.[59]

f. Impact on cost of land in Urgency Clause

In case where acquisition of land is made invoking the urgency clause, an additional compensation of seventy five percent of the total compensation shall be paid.[60] This provision is a new development as no such provision was there in the old Act.

[58] *Ibid.*, S.30.

[60] *Ibid.*, S. 40(5).

6 CONCLUSION

It is the duty of the State to give the owner as nearly as possible the market-value and failure to do so would result in unjust enrichment of the acquirer on the one hand on the other which be unethical and illegal at the same time.[61] But still the whole process involves certain uncertainty and guesswork as its inevitable parts.

The new Act is definitely a development over the old colonial legislation and the same is suggested by a mere reference to its name and preamble. The principles governing compensation have been laid down clearly and the scope for abuse has been minimized. Though there is a feeling of disappointment among the capitalists due to a very high amount of compensation they might have to shell out for acquisitions henceforth, the author believes that it will bring in social equity in society which is also a much cherished constitutional objective.

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[61] *Rabindradhar Barua v Collector of Kamrup*, AIR 1982 Gau. 17

THE CORRODED DREAMS : ACID ATTACKS *

*Srishti Swati***

INTRODUCTION

"Give me justice or allow me to end my life," these are the words of the acid-attack victim Sonali Mukherjee, who was attacked by three men on the fateful night of 22nd April, 2003, when she was barely eighteen years old, destroying not only her face, vision, hearing and other vital organs, but also her dreams of a beautiful future ahead. The girl suffers from excruciating pain everyday, struggling every single moment for the past ten years to be able to live a normal life, while the perpetrators of the crime have not been brought to justice yet.[1]

However, she is not the only one. The country has seen innumerable such cases where a girl struggles to fight both mental and physical agony because she has been attacked with acid for no reason but the fact that she stood up for herself in this patriarchal society. This makes one wonder if the Indian law is incapable of providing to its individuals their right to live with dignity? If the judiciary is so weak that the victim has to plead for death because justice has been denied to them, while the criminals live a free life?

The insufficiency of the laws in the country in the light of increasing rate of acid attacks and need of stronger laws was felt even by the law makers as evident from the 226th Law Commission of India Report of 2009 and Justice Verma Committee Report of 2012, both of which highlighted the need of making acid attacks a separate crime in the Indian Penal Code (IPC). As a result, the Criminal Law (Amendment) Act, 2013 was passed in March 2013; making acid attacks a specific crime in the IPC.

The purpose of this article is to study the severity of the crime, pre-existing laws that dealt with acid attack, and the lacunae of that legal regime, and whether the new law is strong enough to deal with and curb the ever-increasing cases of acid attacks in the country. This article also studies the specific gender dimension that this crime has in the country, and the regulation for sale of acids in the country.

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[1]http://www.ndtv.com/article/india/give-me-justice-or-allow-me-to-end-my-life-says-acid-attack-victim-sonali-mukherjee-243143 accessed on 25-04-2014 at 2:40am

SEVERITY OF THE CRIME

Acid attacks are among the most terrible crimes possible. Attackers often target the head in order to damage and mutilate the victim's face. Acid violence causes severe physical, psychological and social scarring, and victims are often left with limited access to medical or psychological assistance, and no means to support themselves. The severity of the crime can be understood by the various effects acid has on its victims:

Physical Consequences

In almost all cases, concentrated acid is thrown at the face of the victim. Acid, due to its corrosive nature, causes the facial tissue to melt in the affected areas. Less severe effects of acid contact with the skin would include redness, permanent hair loss and burning. In higher concentrations, it leads to permanent scarring, disfigurement, dissolution of vital body organs, pulmonary disorders, and even death. At times the acid burns through the fat and muscle under the skin and dissolves the bones. Eyelids, lips, and even the nose can burn off completely. An instantaneous danger is breathing failure, as the nostrils may burn and also there is possibility of inhalation of acid vapours. The physical injury is irreparable and becomes the breeding ground for other dangerous diseases because of the risk of infection on the exposed parts.

Psychological and Socio-Economic Consequences

An acid attack totally destroys the life of an individual. Most survivors of an acid attack are compelled to give up their education, their occupation and almost everything else in their lives. This is because recuperating from the trauma and the ordeal takes up most of their time, and because their disfigurement incapacitates and handicaps them in every imaginable way.

The scars left by acid are not just skin deep; victims have to deal with social isolation and ostracisation that further kills their self-esteem and dignity, and totally destroys their future. The trauma of an attack leads to the depression, fear, and in certain cases, psychosis. Living with the humiliation and social stigma of an attack that cannot be concealed from the world usually restrains them to their homes.

The victim's life gets wrecked, because every time she looks in the mirror she is reminded of the degraded condition of her body, her inability to live with dignity in the society, the impossibility of living her dreams and the bleak future lying ahead of her.

Any bodily infirmities resulting from an attack add another dimension to the victims' sufferance. It becomes 'out of the question' for the victims to get employed, earn their living, or even get married. In most cases, the victims become completely dependent for their daily sustenance. An additional encumbrance for the victim's family is the medical expenses that may lie beyond resources. Also, no possible treatment can restore the victim's face in exactness. In conclusion, we must note that the psychological, as well as social and economic effects are as permanent as the physical ones.

SPECIFIC GENDER DIMENSION OF THE CRIME IN THE COUNTRY

It has been observed that acid attack is a crime with a marked gender skew. An analysis of the cases relating to acid attacks shows that the victims are, in most cases, women.[2] As a result, it is impossible to suggest that acid attacks ignore the gender dimension that the crime has taken in the country. In India, this is more of a crime of "gendered sexual violence".[3]

Patriarchy

In a patriarchal society like that of India, it is impossible for a man to accept the fact that a woman who, he believes, is inherently inferior to him, has stood up to him. The various cases in India regarding acid attacks on women have reasons like denial of sex,[4] refusal to grant divorce,[5] suspected adultery,[6] rejection of sexual

[2] Kalantry, Sital and Kestenbaum, Jocelyn Getgen, "*Combating Acid Violence in Bangladesh, India, and Cambodia*" (2011), Avon Global Center for Women and Justice and Dorothea S. Clarke Program in Feminist Jurisprudence, Paper 1, available at http://scholarship.law.cornell.edu/avon_clarke/1

[3] *Burnt not Defeated: Women fight against acid attacks in Karnataka*, areport by Campaign and Struggle Against Acid Attacks on Women (CSAAAW) (2007) available at http://www.lawschool.cornell.edu/womenandjustice/upload/burnt-not-defeated.pdf.

[4] *Devanand v State*, 1987 (1) Crimes 314

[5] *Revinder Singh v State of Harayana*, AIR 1975 SC 856

advances,[7] etc. The Law Commission of India has stated that the majority of acid attack targets are "particularly young women for spurning suitors, for rejecting proposals of marriage, for denying dowry etc. The attacker cannot bear the fact that he has been rejected and seeks to destroy the body of the woman who has dared to stand up to him."[8]

Target to a Female Body

It is believed that for a woman, nothing is more important a part of her identity than her body. Hence, the man, because of his wounded ego, resorts to acid attacks to destroy the woman's appearance and relegate her to a fate worse than death. It has been said that acid "attacks are used as a weapon to silence and control women by destroying what is constructed as the primary constituent of her identity."[9]

STATEMENT OF MALE DOMINANCE AND AUTHORITY

The reason for acid attacks on women can be attributed to numerous issues and feelings. Some offenders use acid to defile and humiliate the victim's body as an expression of conscious anger, and in an attempt to bring disgrace to them in the society. Others nourish their deep-seated feelings of insecurity by expressing authority and supremacy in throwing acid on women. It can, hence, be said that acid attacks are means for a man to create fear in the mind of a woman that he exercises authority and perpetual control over her life and fate.

[6] *Balu v State Represented Inspector of police*, Criminal Appeal No 1078 of 2004 decided on 26 October 2006 (Madras HC)

[7] http://www.stopacidattacks.org/2013/05/laxmi-story-of-braveheart.html accessed on 3/6/2014 at 1:20pm

[8] 226th Report, Law Commission of India, The *Inclusion of Acid Attacks as Specific Offences in the Indian Penal Code and a Law for Compensation for Victims of Crime* (July 2009), Introduction, para.3

[9] *Supra* note 3, p 15

ANALYSIS OF CASES OF ACID ATTACK

	Case	Injuries To Victim	Sentenced Under (IPC)	Punishment awarded	Fine Imposed
.	*Syed Shafique Ahmed v. State of Maharashtra*[10]	Disfigurement of face, loss of vision of right eye	Section 324 and Section 326	3 years	Rs. 5000
.	*State (Delhi Administration) v. Mewa Singh*[11]	Erythema over face and upper eyelids	Section 323	15 days	Rs. 300
.	*State of Karnataka v. Joseph Rodrigues*[12]	Scarred the face, change of colour, appearance, blindness	Section 307	Life Imprisonment	Rs. 2,00,000 (In addition to Rs. 3,00,000 imposed by the Trail Court)
.	*Awadhesh Roy v. State of Jharkhand*[13]	Burn injuries over the left side of her eye, neck and chest	Section 324	3 years	
.	*Revinder Singh v. State of Harayana*[14]	Multiple acid burns on her face and other parts of her body, leading to her death	Section 302	Life imprisonment	
.	*Devanand v. State*[15]	Permanent disfigurement and loss of one eye.	Section 307	7 years	-
.	*Balu v. State Represented Inspector of Police*[16]	Severe burns and death	Section 302 and section 313	Life imprisonment	Rs. 2000

[10] 2002 CriLJ 1403
[11] 5 (1969) DLT 506
[12] Decided on 22/8/2006 by High Court of Kerala
[13] Decided on 12/6/2006
[14] AIR 1975 SC 856
[15] (1987 (1) Crimes 314)
[16] decided on 26/10/2006

	Case	Injuries To Victim	Sentenced Under (IPC)	Punishment awarded	Fine Imposed
.	*RamCharittar v. State of Uttar Pradesh*[17]	Extensive burn injuries on large parts of their bodies including the face, chest, neck leading to death	Section 302/34	Life imprisonment	
.	*Gulab Sahiblal Shaikh v. State of Maharashtra*[18]	Acid burns on left side of face, left hand, left breast and she & her infant daughter(who was in her arms) lost vision, death of victim.	Section 302, Section 326	Life imprisonment under Section 302 and 5 years under Section 326	Rs. 1000 under section 302 and Rs. 2000 under section 326

Cases have been registered under different sections of the IPC particularly the sections relating to hurt, grievous hurt, grievous hurt by corrosive substances and attempt to murder and murder.

In some of the positive cases the accused have been charged with murder, as the purpose of the attacker has been interpreted as an intention to kill the victim even though the intention is at times only the purpose of disfigurement of face to destroy the dignity and pride of the woman. Also, even in these positive cases the amount of fine which has been imposed has mostly been an insufficient and petty amount. The victim has also often not been given the fine imposed in many cases.

[17] Decided on 04-04-2007 by Supreme Court
[18] 1998 Bom CR(Cri)

PRE-EXISTING LAW AND ITS INADEQUACY

The Offences

Before the Criminal Law Amendment Act 2013 there was no separate legislation dealing with acid attacks and cases relating to it were dealt with under Section 320 (Grievous Hurt), Section 322 (Voluntarily causing grievous hurt), Section 325 (Punishment for voluntarily causing grievous hurt), Section 326 (Voluntarily causing grievous hurt by dangerous weapons or means). Under section 320 of the Indian Penal Code, the following kinds of hurt only are designated as "grievous":-

Firstly: Emasculation

Secondly: Permanent privation of the sight of either eye

Thirdly: Permanent privation of the hearing of either ear

Fourthly: Privation of any member or joint

Fifthly: Destruction or permanent impairing of the powers of any member or joint

Sixthly: Permanent disfiguration of the head or face

Seventhly: Fracture or dislocation of a bone or tooth

Eighthly: Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits

However, this definition has been severely criticized by the Law Commission Report for its narrow ambit in dealing with acid attacks. This definition does not take into consideration the deliberate hurt on important parts of a female's body, nor the multiple types of grievous hurt that occurs to a victim due to acid attacks.[19]

Section 322 of the IPC [20] defines voluntarily causing grievous hurt and Section 325 of the IPC[21] provides for punishment for grievous

[19] *Supra* note 8, Introduction, para.8

[20] **Section 322. Voluntarily causing grievous hurt.-** Whoever voluntarily causes hurt, if the hurt which the intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, is said to "voluntarily to cause grievous hurt."
Explanation. - A person is not said voluntarily to cause grievous hurt except when he both causes grievous hurt and intends or knows himself to be likely to cause grievous hurt. But he is said voluntarily to cause grievous hurt, if intending or knowing himself to be likely to cause grievous hurt of one kind; he actually causes grievous hurt of another kind.

hurt. The offence is punishable by imprisonment up to seven years with fine. What is more appalling is the fact that the offence is cognizable, bailable,[22] and compoundable.

Section 326 of the IPC[23] talks about grievous hurt caused due to 'corrosive substances' which includes acids. The punishment under this section is up to ten years with fine or may extend to life imprisonment. It has been argued that the offence of acid attack is far graver than the punishments for the same.

Compensation

Also, another important issue is the compensation awarded to the victims of acid attacks. This is another major area where the law has severe shortcomings. The victim has to incur huge medical expenses in an attempt to recover whatever she can of her physical appearance and other vital organs like sight, hearing etc. in more severe cases. Medical treatment includes plastic and reconstructive surgeries which are very expensive and usually a tremendous burden on the families of the victims. Many of the victims are from rural or suburban areas, where such medical proficiency and facilities are unobtainable. The treatment period is lengthy and the treatment is rarely, almost never completely successful. This increases the financial as well as psychological burden on the victims and their families.

[21] **Section 325. Punishment for voluntarily causing grievous hurt.-** Whoever, except in the case provided for by section 335(Voluntarily causing grievous hurt on provocation), voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[22] The Code of Criminal Procedure, 1973, The First Schedule

[23] **Section 326 Voluntarily causing grievous hurt by dangerous weapons or means-** Whoever , except in the case provided for by section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting , or any instrument which , used as a weapon of offence , is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale , to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Also, there were no directives in Indian Law as to the quantum of compensation to be paid to the victims. Therefore, the quantum payable was erratic, and in most cases, ridiculously insufficient.

Need for separate offence

Also, an analysis of the various cases where acid attack has been used on the victim highlights the dire need of a separate offence because of the way it has been dealt with by the courts. The courts have been given a wide discretion in such cases. As a result, cases in which the injury has been of less severity have been awarded small punishment as well as a small amount as fine that is not even close to the trauma suffered by the victims.

The Law Commission Report as well as the Justice Verma Committee Report hence suggested the need for inclusion of a separate law dealing with acid attack specifically as the existing law was not sufficient to bring to justice the perpetrators of such a severe crime.

REGULATION OF SALE OF ACIDS

One of the instrumental factors of the ever-increasing incidence of acid attacks in India is the fact that there was no law regulating the sale of acid to common people. Hydrochloric and Sulphuric acids were very easily available in medical and other stores. Acid, hence, became a very inexpensive weapon to procure. Acid sales could be regulated only for industrial purposes in India, by the Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989.

The Law Commission of India Report also recommended "that the distribution and sale of Acid should be banned except for commercial and scientific purposes. Acid should be made a scheduled banned chemical which should not be available over the counter. The particulars of purchasers of acid should be recorded."[24]

This shortcoming was brought to light through a writ petition by an acid attack victim Laxmi and, as a result, the Supreme Court passed an order[25] on 18th July, 2013 regarding the regulation of sale of

[24] *Supra* note 8, Conclusions and Recommendations, para. 3
[25] Writ Petition (CRL.) No. 129 OF 2006

acids wherein the states and union territories have been instructed to draft rules regarding the sale of acids in line with the draft model rules framed by the Central Government titled "The Poisons Possession and Sale Rules, 2013" and in the interim the following rules have to be followed:

Over the counter sale of acids has been completely prohibited unless the maintains a log of the following:

1. Details of the person purchasing the acid
2. Quantity of acid procured
3. Address of the person the acid is sold to Acid can be sold to the buyer if the buyer has provided with:

1. A valid photo id card issued by the Government with address of the person purchasing the acid
2. Purpose of purchasing the acid
3. The seller must declare all stocks of acid within 15 Days with the concerned Sub-Divisional Magistrate (SDM)
4. Acid cannot be sold to any person below the age of 18 years.
5. In case of undeclared stock of acid, it will be the decision of the concerned SDM to confiscate the stock and suitably impose fine on such seller up to Rs.50,000/-
6. The concerned SDM may impose fine up to Rs. 50,000/- on any person who commits breach of the above prescribed rules.

THE NEW LEGISLATION

The Criminal Law (Amendment) Act, 2013 has expressly recognised acid attacks as a specific offence and the following sections have been incorporated in the IPC:

Section 326A: Voluntarily causing grievous hurt by use of acid, etc. : Whoever causes permanent or partial damage or deformity to, or bums or maims or disfigures or disables, any part or parts of the body of a person or causes grievous hurt by throwing acid on or by administering acid to that person, or by using any other means with

the intention of causing or with the knowledge that he is likely to cause such injury or hurt, shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and with fine: *Provided* that such fine shall be just and reasonable to meet the medical expenses of the treatment of the victim. *Provided* further that any fine imposed under this section shall be paid to the victim.

Section 326B: Attempt to throw acid: Whoever throws or attempts to throw acid on any person or attempts to administer acid to any person, or attempts to use any other means, with the intention of causing permanent or partial damage or deformity or bums or maiming or disfigurement or disability or grievous hurt to that person, shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liahle to fine.

Explanation I.—For the purposes of section 326A and this section, "acid" includes any substance which has acidic or corrosive character or burning nature, that is capable of causing bodily injury leading to scars or disfigurement or temporary or permanent disability. Explanation 2.— For the purposes of section 326A and this section, permanent or partial damage or deformity shall not be required to be irreversible.'

SALIENT FEATURES OF THE NEW LEGISLATION:

1. Acid has been defined as any substance which causes a physical or bodily injury leading to scars and disfigurement whether of temporary or permanent nature.
2. The offence has been made gender neutral.
3. The injury caused due to such an attack need not be irreversible.
4. The new legislation has made the offence cognizable and non-bailable.
5. The fine imposed on the attacker is to be given to the victim to cater to the needs of medical expenses.

Punishment

Section	Punishment and Fine
326A	Imprisonment not less than ten years but which may extend to imprisonment for life and with fine which shall be just and reasonable to meet the medical expenses and it shall be paid to the victim
326B	Imprisonment not less than five years but which may extend to seven years, and shall also be liable to fine

Other Features

The new law has taken into account the seriousness of acid attack as a crime and now as a separate crime:

The various kinds of injuries because of acid attack can be dealt with without trying to classify it as a specific type of grievous hurt.

The act of administering acid is punishable even when no or little injuries occur to the victim.

The act simplified the problem of the courts to deal with acid attacks as they have been provided with a distinct law to award punishments in such cases.

Henceforth, the courts only require the act of administering acid on someone and not the need to classify it as a specific grievous hurt or simple hurt to take decisions in such cases. Also, the amount of fine imposed depends on the medical expenses of the victim hence really solving the problem of the erratic and inadequate compensation awarded to the victims in most cases.

However, the new legislation has not accepted the recommendation of the Law Commission Report which recommended the inclusion of a separate section under the Indian Evidence Act as to make a presumption against any person if he has thrown or administered the acid on another person that he has done so deliberately.[26]

[26] *Supra* note 8, Conclusions and Recommendations, point 2

RECOMMEDATIONS AND CONCLUSION

The struggle and efforts to live and make the world a better place from women of acid attack victims has been noted and honored by the world in many ways. The US First Lady Michelle Obama has felicitated Indian acid attack victim Laxmi after she won the International Women of Courage Award for successfully leading the campaign against acid attacks on women in India. She is known in the country and the world for standing up and raising her voice against the atrocities inflicted upon her. She serves as an encouragement and inspiration for all the ladies out there that nothing at all should stop them from moving ahead in life and raising their voice against injustice. After her acid attack she became a tireless campaigner against acid attacks.[27]

Acid attacks prompted the revision of the penal code that, among many other measures to address violence against women, finally made acid attacks a distinct offense and made the government to regulate acid sales. The new legislation has fairly dealt with a lot of problems faced previously by the courts in deciding such cases. Also, it has catered to the need of compensation to the victim.

International Obligations

India has both signed and ratified the Convention on the Elimination of All Forms of Discrimination against Women and hence it is obliged to take care that there is no discrimination against women. Acid attacks are one of the worst form of discrimination against women and hence India is obliged to make sure that the crime does not increase and the country becomes a safer place to live.

Constitutional Provisions

The principle of equality and life with dignity are deeply ingrained in the Indian Constitution. The fundamental rights of life with human dignity according to Article 21 of the Indian Constitution and right to equality (Article 14) inherently indicate that women in India have equal right for the same and every care should be taken by

[27] http://timesofindia.indiatimes.com/world/us/Michelle-Obama-felicitates-Indian-acid-attack-victim-Laxmi/articleshow/31459557.cms accessed on 12-3-14 at 11:49pm

the state to make sure that these rights are not violated. Also, Article 51A (e) of the Indian Constitution provides that to renounce practices derogatory to the dignity of women. Hence, the government should make sure to take steps that the crimes of acid attack against women are reduced and women are protected from this heinous crime.

Allocation of Funds for Compensation

Acid attack victims need both short term and long term medical treatment for the various injuries they sustain as a result of the attacks. They need extensive plastic surgeries for the reconstruction of the face and other burnt organs. It is impossible for a family to be able to afford so much expenditure because these surgeries are exorbitantly expensive and not easily available. In this regard the Scheme for the Relief and Rehabilitation of Offences (By Acids) On Women And Children by the National Commission of Women should be considered by the Government which proposes a law for the compensation and rehabilitation of the acid attacks victims.[28] Even the Law Commission Report recommends the "Criminal Injuries Compensation Act" be enacted as a separate Law by the government. To provide both interim and final monetary compensation to victims of certain acts of violence like Rape, Sexual Assault, Acid Attacks etc. and should provide for their medical and other expenses relating to rehabilitation, loss of earnings etc. Any compensation already received by the victim can be taken into account while computing compensation under this Act."[29]

Fast Track Courts and Human Rights Courts

Acid attack is a cruel and inhumane crime, calling for immediate medical treatment to the victim, irrespective of court's decisions. But, the present laws do not take into account the time within which the cases should be dealt with, as many victims are exhausted with running around courts for years together after having to brave a life-long health complication because of the chemical injuries they sustain.

[28] *Scheme for the Relief And Rehabilitation Of Offences (By Acids) On Women And Children* by the National Commission of Women accessed at http://ncw.nic.in/AnnualReports/200809/Eng/Annexure4.pdf on 12-3-14 at 9.54pm

[29] *Supra* note 8, Conclusions and Recommendations, para. 4

Along with specific laws to deal with acid attack cases, there must be a provision for fast track courts too, to deal with the acid attack cases as soon as possible. In this regard, the Human Rights Court in accordance with the The Protection of Human Rights Act, 1993 could be established for the quicker dealing of the offences of Acid Attacks since the offence is certainly a form of gross human rights violation.

Defenders of Acid Attack Victims

It is also recommended to have a separate body of lawyers focusing only on cases of acid attacks as the victims of acid attacks require special treatment. The victims are usually emotionally and psychologically scarred and hence a greater degree of gender sensitization is required to deal with such cases.

Public Education for Societal Change

Though we have stricter laws now, we also need to focus on to bring about a change in the society wherein the male dominance and male ego seek to destroy the any female who dared to deny him his wishes. If society continues to be corrupted with ego, no self-control and chauvinism, then sadly humans are millimeters away from being killers, again and again. This public education needs to be two-fold. There is a need to cultivate feelings among the youth to respect women. There should also be provisions for enhancing self-defense for women. Thus we need not only intellectual awareness but also physical empowerment. We need to bring about a societal change to remove these evils from the society. Only then we can make our country a better place for the women.

Media as a Means for Spreading Awareness

All these steps coupled with increased awareness using media as a medium for raising public and national sentiment against this crime and its perpetrators can lead to the improvement of the situation with regard to acid attack in the country and can lead the country towards a way of making India a safer place for women.

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MERGER ASPECT UNDER INDIAN COMPETITION LAW

*Suryah S G**

INTRODUCTION

A company may decide to accelerate its growth by developing into new business areas, which may or may not be connected with its traditional business areas, or by exploiting some competitive advantage that it may have. Once a company has decided to enter into a new business area, it has to explore various alternatives to achieve its aims.

Basically there can be three alternatives available to it.

i) Formation of a new company.
ii) Acquisition of an existing company.
iii) Merger with an existing company.

MERGER

A merger can be defined as a fusion or absorption of one company by another. It may also be understood as an arrangement, whereby the assets of two or more companies get transferred to, or come under the control of one company (which may or may not be one of the original two companies).

In a merger one of the two existing companies merges its identity into another existing company or one or more existing companies may form a new company and merge their identities into a new company by transferring their businesses and undertakings including all assets and liabilities to the new company. The shareholders of the company or companies, whose identity/identities has/have been merged are then issued shares in the capital of the merged company. The scheme requires approval of the Board of Directors of the respective companies, approval of the shareholders of both the company exercised by means of a resolution with the prescribed majority and in addition the sanction of respective high courts.

MERGER ASPECT UNDER COMPETITION LAW

The year 2011 has been a milestone year for Competition Laws in India. The year was marked with a series of significant developments paving the way towards shaping competition law and policy. The

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much anticipated Merger Control Regime was brought into force by the merger control provisions of the Competition Act 2002 after a series of false starts. India was the last among the BRIC[1] to implement such a regime. This has brought in a wide coverage from local and international community towards the implementation and effects of the provisions which should be factored into the regulatory checklist of every global mergers and acquisitions deal with an Indian nexus.

IMPLEMENTATION OF MERGER CONTROL PROVISION

The Ministry of Company Affairs (MCA) officially announced on the 4th of March 2011, a notification which brought into force the merger-related sections 5, 6, 20, 29, 30 and 31[2] of the Competition Act dealing with regulation of 'combinations'. Section 5 and 6 are the operative provisions of the Competition Act. Section 5 of the Competition Act sets out certain thresholds and parameters for the parties and the groups with regards to the acquisition of an enterprise; or the merger and amalgamation, which if met will then trigger the filing requirements if the jurisdictional thresholds are met. Section 6 of the Competition Act prohibits combinations that cause or are likely to cause an appreciable adverse effect on competition with relevant market in India and treats such transactions as void.

The most important and critical step in the implementation of the Merger Control Regime Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) regulations, 2011 (Combination Regulations) were announced on 11th May 2011 setting out the relevant notice forms, and details for the review process. The Combinations Regulations came into effect on 1st June 2011; these regulations coupled with relevant provisions of the Competition Act completed the implementation of the Merger Control framework in India.

WHAT IS NOTIFIABLE?

The Combinations Regulations cover transactions taking effect after 1st June 2011. These transactions involving the acquisition of an

[1] Brazil, Russia, India and China.

[2] Competition Act 2002, Ss 5, 6, 20, 29, 30 and 31, notified by Notification SO 479 (E) dated 4th March 2011.

entity or the merger, amalgamation of entities that meet or exceed the relevant asset and turnover thresholds, set out in Section 5 of the Competition Act as reversed by the additional delegated legislation[3].

Three types of transactions are required to be notified under Section-5 before the commission for pre-clearance, assuming the thresholds are met by the parties.

Section 5(a) – Any transaction where 'control, shares, voting rights or assets' are being acquired;

Section 5(b) – Transactions where two actual or potential competitors are involved as parties and one is acquiring direct or indirect control over the other; and

Section 5(c) - Merger or Amalgamation

A Merger under the Competition Act requires that such combinations hereafter need clearance from the Commission prior to completion.

APPLICABLE THRESHOLD LIMITS AND EXEMPTIONS

The existing asset and turnover-based filing thresholds under Section-5 of the Competition Act has been raised by 50 percent[4]. These thresholds relate to either the acquirer and the target, or the group to which the target entity belongs to post acquisition.

Also, at the same time Ministry of Company Affairs granted a de minimis target-based filing exemption, for a period of five years, exempting a transaction where the target enterprise has Indian assets of a value of less than 2.5 billion[5] rupees or an Indian turnover is less than 7.5 billion rupees.

The reforms included simplifying of Form 1 and prescribing a list of transactions that would not ordinarily be notified, such as combinations taking place outside India with insignificant local nexus. Filing fee structure was reformed with the sliding scale of fees

[3] The relevant asset and turnover thresholds set out under Section 5 of the Competition Act were enhanced by 50 percent by Notification SO 480 (E) dated 4th March 2011.

[4] Notification SO 480 (E) dated 4th March 2011.

[5] Notification SO 480 (E) dated 4th March 2011 and amended by Corrigendum SO 1218 (E) dated 27 May 2011.

replaced with fixed rates of Rs.50,000 for Form I (Short Form) and Rs.10,00,000 for Form II (Long Form).

ORDINARILY EXEMPT TRANSACTIONS

The Combination Regulations provide that certain transactions are 'ordinarily' not likely to cause an appreciable adverse effect on competition in India in respect of which a notice need not 'normally' be filed with the Commission. These are set out in Schedule-I of the Combinations Regulations.

TRIGGER EVENT AND NOTIFICATION PROCEDURE

The trigger event for the notification of the proposed transaction to the Competition Commission under the Competition Act is within 30 calendar days of either the execution of an acquisition agreement or other binding document to acquire in the case of an acquisition or acquiring of control, or the approval of a proposed merger or amalgamation by the Board of Directors of the enterprise concerned[6].

The obligation to file a notification lies with the acquirer in case of acquisitions and jointly by the parties involved in the case of a merger or amalgamation. The parties may either file Form I (short form) or Form II (long form). The Combinations Regulations provide that Form I is the default option with parties, wherein the Competition Commission is required to arrive at prima facie decision on whether a proposed transaction raises competition concerns within a 30-day period. The Competition Commission has noted that it will endeavour to complete its review of complex transactions in 180 days which are filed in Form-II.

PENALTIES FOR NOT NOTIFYING

Any failure in notifying a proposed combination would have severe consequences. The Competition Commission has the power to impose a penalty which may extend up to one percent of the total turnover of the assets, whichever is higher of the proposed combination[7] and also to look back up to a period of one year to inquire into and if need be, unwind such a transaction. Also, the

[6] Competition Act 2002, Section 6(2).

[7] Competition Act 2002, Section 43A, notified by Notification SO 1230 (E) dated 30th May 2011.

transaction will be deemed void under Indian law if the transaction causes or is likely to cause an appreciable adverse effect on competition.

MERGER CONTROL DECISIONS

The Competition Commission has cleared some merger filings, most of them pertain to the transaction that were simple and did not raise any substantive Competition Law concerns. The Competition Commission's first decision relating to combinations was passed on 26th July 2011; within a period of 18 days from the date of filing, approving the acquisition by Reliance Industries Limited and Reliance Infrastructure Limited, of a 74 per cent equity stake in the joint venture companies Bharti AXA Life Insurance Company Limited and Bharti AXA General Insurance Company Limited[8].

The Competition Commission has given its second approval to the acquisition of UTV Software Communications by Walt Disney (Southeast Asia) Private Limited[9].

The first half of 2011 was focused on several legislative developments of implementing merger control regime in India. The latter half was followed by a series of enforcement decisions by the Competition Commission imposing heavy penalties on the infringing parties especially in the abuse of dominance cases, such as the much talked DLF Limited case.

CONCLUSION

The Indian Competition Law has largely developed its lineage from the developed jurisdictions such as the EU and US and is in fidelity with these laws. The law amongst other provision regarding merger control provides for definite threshold limits, the factors to be taken into consideration before determining the fate of a merger, prescribed time period for merger notification and the remedies. These provisions help the Competition authorities to work towards its

[8] Combination Registration Number- C-2011/07/01
http://www.cci.gov.in/May2011/OrderOfCommission/CombinationOrders/RILOrder270711.pdf

[9] Combination Registration Number – C-2011/08/02
http://www.cci.gov.in/May2011/OrderOfCommission/CombinationOrders/WaltCombOrder250811.pdf

duties of preventing adverse effects on competition, protecting interest of consumers and ensuring freedom of trade. However, there are certain factors which need to be deliberated upon and need further skilled escalation. Importantly, amongst these is a need for lucid and cogent guidelines or strategy principles on types of mergers and their effects. Like the EU or US guidelines of horizontal and non-horizontal mergers, which also prescribe for coordinated and non-coordinated effects caused by mergers, the Indian law should also try to provide for something similar.

An essential facet with regard to merger regulations is with respect to setting of threshold limits. Though the Indian law, being progressive in nature mentions both individual and group while describing thresholds, it needs to mull over the fact that setting monetary thresholds needs timely restructuring, as the economic and commercial factors keep shifting very rapidly in developing countries like India. The developed jurisdiction have clutched the intricacies of changing economies and market structures which is yet to be confronted and brazened out by India. Also, setting out threshold limits could result in a situation, where small merger which do not meet the monetary requirements to be inspected by the Commission, would come into operation with a possibility of having adverse effects on competition. The law needs to ensure that in spite not meeting threshold requirements, if a transaction affects competition, the Commission should have adequate authority to take action against such transactions.

Moreover, the Indian Competition law, like South Africa and other nation's needs to ascertain some crucial concerns of employment, benefits to previously deprived and abandoned entities and very importantly, ability of national entities to compete in international market amongst players from different developed and developing countries. With public interest at roots of every competition law regime, these factors play a very essential role in development and acceptance amongst the market players and consumers. Hence, the Indian Competition Law should deliberate and resolve these issues for smooth and effective functioning. ■

CRITICAL ANALYSIS ON CORPORATE SOCIAL RESPONSIBILITY UNDER THE COMPANIES ACT, 2013

*Suryah SG**

INTRODUCTION

There is a growing perception today among enterprises that sustainable success and shareholder value cannot be achieved solely through maximizing short term profits, but instead through market-oriented yet responsible, sensitive, humane behavior. Companies are aware that they can contribute to sustainable development by managing their operations in such a way as to enhance economic growth and increase competitiveness whilst ensuring environmental protection and promoting social responsibility, including consumer interests.

With Indian Corporate fraternity facing mandatory Corporate Social Responsibility inclusion in laws, there is a greater need to concentrate and analyze on various basic aspects of Corporate Social Responsibility and its provisions.

Corporate Social Responsibility is an evolving concept that currently does not have a universally accepted definition. Corporate Social Responsibility is also called Corporate Citizenship or Corporate Responsibility. Generally, CSR is understood to be the way firms integrate social, environmental and economic concerns into their values, culture, decision making, strategy and operations in a transparent and accountable manner and thereby establish better practices within the firm, create wealth and improve society.

Corporate Social Responsibility can be explained as:

- Corporate – Organized Business.
- Social – Everything dealing with people.
- Responsibility – Accountability between the two.

In the city of Coimbatore, Tamil Nadu in the year 2009 a group of 5 enthusiastic youngsters decided to set up a Non-Profit Organization with definite and revolutionary plans to contribute to the society. The youngsters who were of the age group between 19 & 20 did acquire the necessary experience of working with social service organizations

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before attempting to found one. When they decided to start the legal process of making their desire into a legal entity; they came into contact with document writers in the local Registrar Office.

When an enthusiastic member of the team with no ground reality on how the bureaucratic system in India works enquired about preparing a document called "Trust Deed" the broker replied "One need not prepare!" The youngsters were puzzled and could not comprehend what the broker just said. The youngsters wanted a specific agenda to be included in the document stating their organization's main activities but the broker simply shook his head mockingly. The Broker then patiently explained that such documents are 'ready-made' ones and the same contents are used in almost 90% of the Trust Deeds, replacing only names and addresses of the parties. The group of youngsters encountered the bureaucracy first hand and the rest of the story is irrelevant to our subject here.

Now, the point is that the set up in India is so lenient that anyone can form a Non-Profit Organization, be it a Trust or a Society or a Section.25 Company[1]. At no time can one discount the fact that there are genuine organizations which have contributed immensely towards nation building. Similarly, one cannot deny the presence of thousands of letter-pad organizations who are existent only for various dubious reasons.

In India there is no mechanism to control the Non-Profit Organizations. No authority to regulate and streamline thousands of crores which are being spent by these Organizations. The answer to this would be the same old irritating noise in ears. "It is impossible to control or monitor organizations in the country as big as India". We, Indians are used to this template and by default any attempt to change this mentality will be looked as idiotic, futile and a waste of time.

When I read the Draft **Schedule VII** of the Proposed Draft Corporate Social Responsibility Rules under Section 135 of the Companies Act, 2013, I immediately recollected the standard procedure followed in registering the Non-Profit Organizations in

[1] Companies Act 2013, Section 8.

India in the form of Trust. (The author also doubts if this Draft Schedule is copy pasted from some standard operating format of a Trust Deed).

SCHEDULE VII FURTHER READS

Activities which may be included by companies in their Corporate Social Responsibility Policies

Activities relating to:—

1. Eradicating extreme hunger and poverty.
2. Promotion of Education.
3. Promoting gender equality and empowering women.
4. Reducing child mortality and improving maternal health.
5. Combating human immunodeficiency virus, acquired immune deficiency syndrome, malaria and other diseases.
6. Ensuring environmental sustainability.
7. Employment enhancing vocational skills.
8. Social business projects.
9. Contribution to the Prime Minister's National Relief Fund or any other fund set up by the Central Government of the State Governments for socioeconomic development and relief and funds for the welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women.
10. Other matters as may be prescribed.

The intention of policy makers may be good, that is to report business community's contribution in fulfillment of social, environmental and economic responsibilities. At the same time, where contribution to the local community is a good objective the absence of any specific mechanism makes it vulnerable to dubious entrants.

CORPORATE SOCIAL RESPONSIBILITY UNDER COMPANIES ACT, 2013

The new Companies Act makes it mandatory for profit making companies reporting Rs.5 crore or more profits in the last three years to spend at least two percent of their average profits towards CSR

activities. The new legislation would make India perhaps the first country to have mandated CSR spending through a statutory provision.

The **Draft Guiding Principle of CSR Policy** has been issued by the Ministry of Company Affairs which reads as *"CSR is the process by which an organization thinks about and evolves its relationships with stakeholders for the common good, and demonstrates its commitment in this regard by adoption of appropriate business processes and strategies. Thus CSR is not charity or mere donations".*

CSR is a way of conducting business, by which corporate entities visibly contribute to the social good. Socially responsible companies do not limit themselves to using resources to engage in activities that increase only their profits. They use CSR to integrate economic, environmental and social objectives with the company's operations and growth."

Estimates of annual expenditure under mandatory CSR vary: Rs.6,500 crore is the estimate by Business Standard from companies that sit on the BSE 500. Rs.12,000-15,000 crore is the estimate by Centre for Ethical Life and Leadership (CELL), a new 'Section 25' entity led by Former Chief Election Commissioner SY Quraishi. The ambit for this figure covers 8,000 companies, who will have to conform to the new 2% rule.[2] In short the expected pool of Rs.15,000/- crores would be allocated in any of the activities in the above-mentioned 10 points.

The new Companies Act gives complete freedom to the companies to decide on the factors in which they would like to contribute in the society. The Act does not even talk about any stringent monitoring mechanisms for keeping a check on their activities, rather just mandates the Company to submit Reports[3] on their CSR activities. However the new Companies Act, 2013[4] seeks to provide that every such company shall constitute the Corporate Social Responsibility Committee in their respective Boards. The composition

[2] Rohit Bansal, 'Up Next! CSR INC of Rs. 15,000 Cr.' *The Pioneer* (India, 25 September 2013) http://www.dailypioneer.com/columnists/business/up-next-csr--inc-of-rs-15000-cr.html.

[3] Companies Act 2013, Section 135, Point No. 9 of Part II of Proposed Draft Corporate Social Responsibility Rules.

[4] Companies Act, 2013 Section 135.

of the committee shall be included in the Board's Report. The Committee shall formulate policy including the activities specified in Schedule VII. The Board shall disclose the content of policy in its report and place it on the website, if any of the company. The internal mechanism can't be trusted and one simply cannot expect the internal mechanism to be honest when left unchecked.

Now, anybody who is well acquainted with Company affairs would conclude that this is just another procedure legislated without putting any heart or soul. The loopholes available are many and these procedures are seriously insensitive in nature and so not in touch with the issues in hand. One of the important developments is that the Act gives free hand to the companies to do CSR activities by a third party NGO[5]. The only qualification or eligibility needed to become a claimant for the CSR projects is an established track record of at least three years in carrying on activities in related areas[6]. Again what is "established track record" is not defined and the ambiguity in these words is left for us to decipher and interpret would invite unending disputes.

This provision will now pave the way for mushrooming of dormant NGOs which bit the dust, to suck up the huge money pooled to be siphoned off and lead to massive embezzlement of funds which can otherwise be better streamlined and utilized. The provisions will also lead to unethical activities and since there are no monitoring mechanisms it would largely go unnoticed. We are witness to hundreds of organizations spending huge amount of money in marketing and publicity but only meager sums for actual social cause. A CSR initiative in the cover of eradicating Poverty would squander printing of thousands of colourful brouchers, inviting celebrities, superfluous PR marketing techniques whereas the actual benefit to the needy would be just one square meal to a particular orphanage or old age home.

[5] Companies Act 2013, Section 135, Point No. 4 of Part II of Proposed Draft Corporate Social Responsibility Rules.

[6] Companies Act 2013, Section 135, Point No. 5 of Part II of Proposed Draft Corporate Social Responsibility Rules.

Expected Contribution for CSR by Indian Companies[7]

Name of the Company	Average Profits (of the FY 2009-10, 2010-11,2011-12) (Amt in Rs. millions)	Proposed contribution in CSR (2% of the Average Profits) (Amt in Rs. millions)
GAIL (INDIA) Ltd.	34,516.03	690.32
Hindustan Unilever Ltd.	23,998.00	479.96
Infosys Ltd.	69,053.33	1,381.07
Larsen & Tourbo Ltd	42,633.03	852.66
NTPC Ltd	90,181.73	1,803.63

CONQUERING THE LOOPHOLE - THE CHHATTISGARH WAY

Taking advantage of the loophole in new law[8] which states "Contribution to the Prime Minister's National Relief Fund or any other fund set up by the Central Government of the State Governments for socioeconomic development and relief and funds for the welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women" the Chhattisgarh government has sprung a unique and potentially illegal interpretation of the new Companies Act's mandatory Corporate Social Responsibility (CSR) provision on private sector players in the State, by asking firms to deposit their contributions to the Chief Minister Community Development Fund rather than undertake CSR projects of their own. The Chhattisgarh government has set up this Fund *"for the purpose of holistic development of affected districts/district related with the industries"* under the policy Corporate Social Responsibility Policy 2013 which was published in the Gazette of Chhattisgarh on May 3, 2013[9]

[7] http://indiacp.blogspot.in/2013/01/CSR-Companies-Bill-2012.html

[8] Companies Act 2013, Section 135, Point No.9 of Part II of Proposed Draft Corporate Social Responsibility Rules, Schedule VII

[9] Shalini Singh, 'Chhattisgarh wants all CSR spending to go to CM development fund' *The Hindu* (New Delhi, 15 September 2013) http://www.thehindu.com/news/national/other-states/chhattisgarhwants-all-csr-spending-to-go-to-cm-development-fund/article5131752.ece.

Such an attempt can be adopted by every State Government or even Central Government impeaching the basic idea of Corporate Social Responsibility. The Act doesn't seem to have any legal immunity towards this misuse. Even though it can be challenged, the Act paves room for stepping in of the Courts of Law when events necessitate a judicial interpretation. Poor provisions and absence of any genuine out of the box ideas in drafting laws relating to CSR are the main reasons for this deficit.

INDIA'S FIRST CSR INDEX

In another development towards an effort to facilitate greater corporate participation in corporate social responsibility (CSR) areas, BSE (formerly Bombay Stock Exchange Ltd.), signed a Memorandum of Understanding with Indian Institute of Corporate Affairs (IICA) to collaborate and develop a CSR index and increase awareness about CSR[10]. IICA-BSE will work on capacity building measures to assist companies to meet their agenda of CSR and will conduct awareness programs on CSR.

Again such developments and mechanisms which has no ground level understanding on social services are equal to someone discussing grass root inadequacies from the comfort of their couch in a 7 Star Hotel about eradicating poverty in the remotest corners of the country

CONCLUSION

When one cannot even expect a proper mechanism to monitor the flow of this entire money to the tune of Rs.15,000/- crores the reply would again be the same "It is impossible to control or monitor organizations in the country as big as India". Friedman's formulation that "The business of business is business" has outlived its utility, and social responsibility and being a good corporate citizen are the buzzwords today. In the long run, those organizations or group of persons who do not exercise power in a way which society considers responsible will tend to lose it. Now, the statutory laws which

[10] Special Correspondent, 'India's first CSR index on its way' *The Hindu* (Mumbai, 23 September 2013) http://www.thehindu.com/business/Industry/indias-first-csr-index-on-its-way/article5160871.ece.

mandates such compulsory spending coupled with no heart of spending mechanism will only end up as a miserable failure. Any activity which does not have its heart at the right place will never bear fruits. In what can be a game-changer to develop the social contribution of companies and up-liftment of the downtrodden, the Indian Political class has failed miserably again; this time with a huge price to pay for.

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IS IT RIGHT TO RESTRICT INTERNET? A CRITIQUE ON THE IT LAWS IN INDIA

Sushant Mahajan*

The current paper deals with the IT laws that exist in the Indian legal sphere. First there is a rights vs. restrictions debate keeping in mind the various rights that are guaranteed in the Indian Constitution. Keeping these rights in mind the author has aimed at analyzing the main IT statue that exists in the country namely, the Information Technology Act. Certain ambiguous and controversial sections of the IT Act have been examined. The policies taken up by the Indian government to enforce these laws has also been analysed. Lastly the author has looked into the aspect of the extent of the liability of the Internet Service providers.

INTRODUCTION

Internet has emerged as one of the most life changing discoveries of the modern era. Being able to do all that the internet can, in a click of a button is something one imagined only in dreams and now that it is true it has become a part of our daily routine. The Internet is an international network of interconnected computers. It is the outgrowth of what began in 1969 as a military program called "ARPANET," which was designed to enable computers operated by the military, defense contractors, and universities conducting defense related research to communicate with one another by redundant channels even if some portions of the network were damaged in a war.[1] This soon became a public phenomenon and people were able to utilize it as a medium to exchange information. Internet also came out as a new line of media. Like other modes of media, internet could be used to transmit news to people all over the world. Internet's wide reach soon made it a popular form of media. With the popularity of internet growing day by day it started being used for purposes that were not in the favour of the society. Sites relating to gambling, pornography etc. became very common in the cyberspace. Moreover internet could be used as an unrestricted medium to stir the masses because of its immense reach and thus the governments and rulers became cautious of it. These thoughts formed the basis of the censorship process of internet.

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* IV BSL LLB

[1] *Reno v ACLU*, 521 U.S. 844 (1997).

One of the earliest examples of restriction was the *Communications Decency Act, 1996* enacted in the United States of America. This legislation prohibited the sending of material electronically (in the form of e-mails, forums etc), that was not decent or suitable for minors. This act however met with severe criticism after its inception and resulted in a series of litigations. The Act was declared void in the case of *Reno vs ACLU*[2] on the ground that the legislation was ambiguous and that the current technology available was not sufficient to help in filtering of material that was accessible to minors. This legislation however cleared the intention of the government and made way for new legislations in the field of internet censorship. The abovementioned example being of a legislation that could have been challenged in a court of law which guaranteed the freedom of speech is different from the next scenario, that of the People's Republic of China. China has adopted various policies and techniques to make sure that its citizens do not have access to information that the government feels is not suitable for them. From blocking certain websites to restricting searches China has made its internet more restricted than most of the countries. An important point to be mentioned here is that though the Constitution of China enlists the freedom of speech as one of the basic freedoms, the same cannot be enforced in a Court of Law. In the current paper I have analysed the various laws and policies that exist in India with regard to internet censorship, the role and liability of Internet Service Providers and also discussed the Rights vs Restriction debate from the point of view of the Indian Constitution keeping in mind the role of internet as a form of social media.

FREEDOM OF SPEECH AND EXPRESSION IN INDIA

The Constitution of India says that no law can be made by the state which infringes the fundamental rights guaranteed to a person.[3] One of the rights mentioned in the Constitution is that of Freedom of speech and expression. Article 19(1)(a) grants to all citizens the right

[2] *Ibid.*

[3] Constitution of India, Article 13(2): The State shall not make any law which takes away or abridges the rights conferred by this Part (Part III) and any law made in contravention of this clause shall to the extent of the contravention, be void.

to freedom of speech and expression. The freedom of speech under article 19(1)(a) includes the right to express one's views and opinions at any issue through any medium, e.g., by words of mouth, writing, printing, picture, film, movie, etc. It thus includes the freedom of communication and the right to propagate or publish opinion.[4] But this right is subject to reasonable restrictions being imposed under article 19(2)[5]. The expression "freedom of speech and expression" in Art. 19(1)(a) has been held to include the right to acquire information and disseminate the same. It includes the right to communicate it through any available media whether print or electronic or audio-visual, such as, advertisement, movie, article or speech, etc. This freedom includes freedom to communicate or circulate one's opinion without interference to as large a population in the country, as well as abroad, as is possible to reach.[6]

The Indian Judiciary has adopted a very wide ambit of the freedom of speech and expression and it being one of the basic human rights has made sure that it should be protected under all circumstances. But this approach is not universally applied to all cases and the restrictions mentioned in article 19(2) of the Indian Constitution such as public order, morality, sovereignty and integrity of the State etc. are given due importance. Keeping this in mind internet being a mode of exercising the freedom of speech and expression, the State has to be careful while censoring the internet. An interesting case to be mentioned here is that of *Sakal Papers*[7], in this case the Government passed an order under which it sought to regulate the number of pages of a newspaper according to the price charged, the number of supplements and the amount of space to be allowed for advertising keeping in mind the other news items that will appear. The Central Government pleaded that with the help of

[4] M.P. Jain, *Indian Constitutional Law* 1079 (6th ed. Reprint 2011).

[5] Constitution of India, Article 19(2): Nothing in sub-clause (a) of clause (1) shall effect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with Foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

[6] M.P. Jain, *Indian Constitutional Law* 1081 (6th ed. Reprint 2011).

[7] *Sakal Papers v Union of India*, AIR 1962 SC 305 at 314.

the regulation it only aimed at regulating the commercial aspect of the newspapers and did not intend to curtail the freedom of speech of individuals. It was held that there are two aspects of a newspaper, namely, the commercial one and the distribution of news. The business aspect is subject to restrictions under article 19(6)[8] and the news aspect is subject to restrictions under 19(2) and the government cannot seek to place restrictions on the business by directly and immediately curtailing any other freedom of the citizen guaranteed by the Constitution and which is not susceptible to be abridgement under article 19(6).

The stature given to the freedom of speech in the Indian Constitution from the point of view of media freedom is amply highlighted in the above mentioned case. These same principles should hold true when one is trying to regulate or censor the internet. Thus the policies taken up to check the use of internet should adhere to the Constitution, it being the basic law of the land. A law cannot violate the freedom of speech and expression on any ground but for those mentioned in Art. 19(2). An analysis of the existing cyber legislations will help us understand how far these principles have been adopted by the Indian Parliament.

CYBER LEGISLATIONS IN INDIA

In India the legislation governing or rather regulating the use of the internet is the Information Technology Act, 2000. The Act received the assent of the President on 9th June, 2000 and has since been dealing with all aspects of internet. The Act especially focuses on digital signatures, electronic records and electronic governance. The

[8] Constitution of India, Article 19(6): Nothing in sub clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub clause, and, in particular, nothing in the said sub clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

important feature from the point of view of internet censorship is the part of the Act that deals with offences. Cyber-crimes such as hacking, tampering with computer source documents, publishing offensive material, misrepresentation are some of the crimes mentioned in the Act. The Act was further amended in the year 2008 to add new provisions and make the existing provisions more clear; also the punishment for certain offences was reconsidered. This Act has come under some scrutiny on the grounds that legislation on such an important subject was passed in haste and thus is not effective enough.

In this paper I would like to deal with Sections 67 and 69 of the Information Technology Act. Section 67 prohibits the publishing of any material that is obscene while Section 69 gives the government the right to intercept any signal transmitted online if it feels that such has to be done in the interest of the nation. Dealing with the Sections one by one, Section 67 reads as:-

"Whoever publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years and with fine which may extend to five lakh rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to five years and also with fine which may extend to ten lakh rupees."[9]

The section therefore calls for severe punishment for a person who publishes or transmits material that is sexually obscene or lewd. This section was also one of the sections amended in 2008, it earlier punished the same offence with imprisonment upto 5 years and fine up to one lakh in the first instant and imprisonment up to 10 years and fine up to two lakhs in the second instant. After the amendment the section punished the same offence in the first instant with imprisonment up to 3 years and fine up to 5 lakh and in the second

[9] Information Technology Act 2008, Section 67.

instant with imprisonment up to 5 years and fine up to ten lakh. After the amendment there was also addition to the section in the form of sections 67A, 67B and 67 C. Section 67A[10] specifically made punishable the transmission or publishing of material that was sexually explicit with imprisonment up to 5 years and fine up to ten lakhs in the first offence and imprisonment 7 years and fines again up to ten lakhs if it was the second offence. Section 67B[11] provides for the same punishment for transmission or publishing or child pornography or material that involves children in any sexual relationship etc.

The wording of the sections mentioned above is very confusing as the offences have neither been clearly defined nor differentiated between. For example, section 67 punishes the transmission and publishing of material that is *'lascivious or appeals to the prurient interests'*. Lascivious means 'Feeling or revealing an overt and often offensive sexual desire' and Prurient means 'Having or encouraging an excessive interest in sexual matters.' Both the terms therefore refer to material that interests a person's sexual interests. Section 67A punishes the publishing or transmission of *'sexually explicit'* material.

[10] Information Technology Act 2008, Section 67A: Whoever publishes or transmits or causes to be published or transmitted in the electronic form any material which contains sexually explicit act or conduct shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees.

[11] Information Technology Act 2008, Section 67B: Whoever,- (a) publishes or transmits or causes to be published or transmitted material in any electronic form which depicts children engaged in sexually explicit act or conduct or
(b) creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form depicting children in obscene or indecent or sexually explicit manner or
(c) cultivates, entices or induces children to online relationship with one or more children for and on sexually explicit act or in a manner that may offend a reasonable adult on the computer resource or
(d) facilitates abusing children online or
(e) records in any electronic form own abuse or that of others pertaining to sexually explicit act with children, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with a fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees.

The scope of punishment under section 67A is graver than that given in section 67, however, the differentiation between the acts punishable under the two sections is very vague. While one section makes it punishable to transmit material that appeals to the sexual interests of a person the other punishes transmission of material that is sexually explicit. This vagueness makes us question that under which section would the publishing of pornography be punishable, if it is punishable under 67 then the extent of punishment is lesser, if the punishment is under section 67A then the punishment is graver. Furthermore the confusion and ambiguity in the wordings of Section 67 act as a deterrent to the freedom of people to express themselves as they are unaware of what is punishable and what is not, and what might or might not qualify as 'lascivious' or 'appealing to the prurient interests' of a person. As was the situation with the Communications Decency Act, 1996 in the case of *Reno vs. ACLU*[12] where the internet censorship law was struck down for being ambiguous and therefore resulting in people checking their speech and acting as a restraint to their freedom of speech. In the above mentioned case Section 223(a)(1)[13] was challenged and subsequently struck down. The court observed that *"Given the vague contours of the coverage of the statute, it unquestionably silences some speakers whose messages would be entitled to constitutional protection."* Therefore when a statue even though made for the public good curtails one of the freedoms of an individual, the legislators should make sure that such a law is not vague and defines in clear terms the restrictions on the rights of an individual. The law in the present case should carefully define what lascivious material is and what material is the one that appeals to the prurient interests of the society which the law has been unable to do in the present case. The haziness of this section makes it difficult to enforce as well as difficult for the public to understand and respect it.

[12] Reno, *supra* note1.

[13] Communications Decency Act, 47 U.S.C., Section 223(a)(1): Whoever —(1) in interstate or foreign communications —. . . . .(B) by means of a telecommunications device knowingly -- (i) makes, creates, or solicits, and (ii) initiates the transmission of,any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication.

Now coming to section 69 of the Information Technology Act, 2000, Section 69 reads as:

"(1) Where the central Government or a State Government or any of its officer specially authorized by the Central Government or the State Government, as the case may be, in this behalf may, if is satisfied that it is necessary or expedient to do in the interest of the sovereignty or integrity of India, defense of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above or for investigation of any offence, it may, subject to the provisions of sub-section (2), for reasons to be recorded in writing, by order, direct any agency of the appropriate Government to intercept, monitor or decrypt or cause to be intercepted or monitored or decrypted any information transmitted received or stored through any computer resource.

(2) The Procedure and safeguards subject to which such interception or monitoring or decryption may be carried out, shall be such as may be prescribed.

(3) The subscriber or intermediary or any person in charge of the computer resource shall, when called upon by any agency which has been directed under sub section (1), extend all facilities and technical assistance to –

(a) provide access to or secure access to the computer resource generating, transmitting, receiving or storing such information; or

(b) intercept or monitor or decrypt the information, as the case may be; or

(c) provide information stored in computer resource.

(4) The subscriber or intermediary or any person who fails to assist the agency referred to in sub-section (3) shall be punished with an imprisonment for a term which may extend to seven years and shall also be liable to fine."

Section 69(1) confers upon the Government the power to intercept, monitor or decrypt information transmitted or received or

stored in any computer resource. This power however is to be exercised only in certain circumstances that are mentioned in the same section namely in security, sovereignty and integrity of India, public order, in the interest of foreign relations of the State etc. These restrictions are similar to those mentioned in Art. 19(2) of the Constitution of India. Looking at these restrictions from a constitutional point of view therefore makes this law a rightful one as the restrictions conform to those mentioned in the Constitution. However the debate on this section does not end here, the section still confers very wide powers on the Governmental agencies. The Government may be right in blocking some websites in some cases but the problem is that this provision has the potential of being misused by political powers in the regime to silence political dissent, criticism and debate.[14] Similarly section 69A confers on the government the power to block public access to any computer resource while section 69B allows the government to collect any data or information from a computer resource for cyber security. On the lines of this section the Indian Computer Emergency Report Team (CERT-IN) was established to fulfill the purpose of restricting the access to websites that were against the law. It is the national nodal agency for responding to computer security incidents as and when they occur. In the recent Information Technology Act, 2008 CERT-IN has been designated to serve as the national agency to perform the following functions in the area of cyber security:-

1. Collection, analysis and dissemination of information on cyber incidents.
2. Forecast and alerts of cyber security incidents.
3. Emergency measures for handling cyber security incidents.
4. Coordination of cyber incident response activities.
5. Issue guidelines, advisories, vulnerability notes and white papers relating to information security practices, procedures, prevention, response and reporting of cyber incidents.
6. Such other functions relating to cyber security as may be prescribed.[15]

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[14] Sandeep Dikshit, 'Bid to block anti-India website affects users' *The Hindu*, (New Delhi, 23 September 2003).

[15] http://www.cert-in.org.in/

Here reference is required to certain cases that have been undertaken by the Indian Government relating to interception or blocking of online material. The first ever blocking of a website under the Information Technology Act was done in the year 2003 when the Yahoo Groups website was blocked causing problem to millions of Indian users. In this case there was one group in the Yahoo Groups website that put forward the cause of Meghalaya's Khasi tribe. As the Internet Service Providers (ISPs) lacked the technical finesse to block one sub-group, they blocked all Yahoo groups or URLs, inconveniencing the users. The official reason of the blocking was that the material was against the Government of India and the State Government of Meghalaya.[16] This blockage was met with severe criticism and the mass population which was not aware of the powers that the government exercised through the Information Technology Act was made conscious of the draconian provisions of law.

Likewise in the year 2006 after the Mumbai train blasts a similar blocking was undertaken by the Indian Government. This time the targeted websites were certain blogs. Indian government directed local Internet service providers to block access to a handful of outlets that host blogs, including the popular "blogspot.com". This time unlike the last incident the Government did not inform about the blocking and in consequence did not give any reasons for blocking the websites. This incident too created a lot confusion and anger in the minds of Indian bloggers, who accused the government of censorship and asked the Government to give reasons for the blocking of websites.[17] The Indian political effect was also seen on social networking sites when in May, 2007 Orkut entered into an informal agreement with the Mumbai Police to block all defamatory content about Dr B R Ambedkar, Chhatrapati Shivaji and Shiv Sena chief Bal Thackeray. The Police officials can now, due to the agreement, not only block the defamatory content but can also get to know the IP addresses of persons who post such content.[18]

[16] *Supra* note 14.
[17] Somini Sengupta, 'India Blocks Blogs In Wake Of Mumbai Bombings' *The New York Times* (New Delhi, 18 July 2006).
[18] 'Orkut's tell-all pact with cops', *The Economic Times* (TNN, 1 May 2007).

The "IT Rules 2011," which poses a threat to online free expression, was adopted in April 2011 as a supplement to the 2000 Information Technology Act (ITA) amended in 2008. These regulations notably require Internet companies to remove any content that is deemed objectionable, particularly if its nature is "defamatory," "hateful," "harmful to minors," or "infringes copyright" within 36 hours of being notified by the authorities, or face prosecution.[19] An annulment motion was launched against the IT Rules, 2011 in the Rajya Sabha (MP) P Rajeev but this motion was not carried but discussion on it raised the points of the Information Technology Act, 2000 being a draconian law.

In similar context Reliance Communications (one of the leading ISPs in India) availed a John Doe Order[20] from the Delhi High Court for stopping the piracy of the film 'Singham', which means that any individual caught watching the film illegally will be slapped with a law suit.[21] This order lead to blocking of a number of file sharing websites including the famous torrent websites. However the Madras High Court, on an appeal filed by a conglomerate of Internet Service Providers (ISPs), passed an order saying that entire websites cannot be blocked on the basis of "John Doe" orders. The order of interim injunction dated April 25, 2012 clarified that the interim injunction is granted only in respect of a particular URL where the infringing movie is kept and not in respect of the entire website. Further, the applicant is directed to inform about the particulars of URL where the interim movie is kept within 48 hours.[22] So the Courts are taking a viewpoint by which only specific material which is in violation of the law is blocked and other material which might have the same origin will not be subject to the blocking. There is however a lot of scope of discussion on the enforcement of the Information Technology Act being used as a medium to block websites also the use of CERT-IN as the authority to do so is questioned by many on the grounds that from

[19] Internet Enemies Report, *Reporters Without Borders*, 2012.
[20] The names "John Doe" are used as placeholder names for a party whose true identity is unknown or must be withheld in a legal action, case, or discussion.
[21] Kunal M. Shah, 'Singham on piracy alert' *Mumbai Mirror* (Mumbai, 24 July 2011).
[22] 'ISPs get court relief, blocked websites may be history: Report' *NDTV Gadgets* (20 June 2012).

which legislation CERT-IN derives its authority is not clear, even if one accepts that the government has the right block websites, CERT-IN is not the correct authority to exercise such right.

LIABILITY OF INTERNET SERVICE PROVIDERS (ISPS)

"Give him tending, he brings great news." So says Lady Macbeth on receiving the news of her husband's victory in battle and imminent return home from a weary messenger, dispatched by Macbeth himself. Had the news been bad, the messenger would have been severely beaten, as was the custom at that time. This tradition has, of course, long since died out in practice: in general, we no longer hold the intermediaries responsible for the content when they are simply passing on a message. With, however, the arrival on internet, or more specifically the World Wide Web, as a mass media in the early 1990s, it became often impossible to at least very difficult to track down the person from whom offending content originated. Whether that content be obscene publications, copyright infringements, or defamation posted to online newsgroups, the issue began to arise whether an ISP should, in certain circumstances, be held liable to remove or to block offending material. Is this fair? Is the ISP a co-conspirator who should face responsibility or a mere conduit who cannot be blamed for the content?[23]

Conceptually speaking there are three categories of Internet Service Providers. ***Access Providers,*** these are those service providers who just provide the general public with access to cyberspace, they are easy to keep a watch over as individuals can be tracked with the help of access providers. Then there are ***Content Providers,*** these are those service providers that have their own content and give access to that content to the internet users. Content providers are liable under the law in the same way as an individual providing material is liable. Lastly there are ***Hosting Providers,*** these host others content and internet censorship is easily possible through them. However, too many sanctions to hosting providers discourages them leading to less hosting providers on the internet.

[23] Gavin Sutter, *"Don't shoot the messenger?" The evolution of liability for third party provided content in the UK,* 17th BILETA annual conference April 5th-6th, 2002, Free university Amsterdam.

In India as we have seen above the main legislation that regulates the use of internet in the Information Technology Act, 2000. Though in the case of service providers there are other laws such as the Copyright Act, which speaks about the liability of the ISPs in case there are copy right infringements, for the purpose of this paper focus is limited to the provisions Information Technology Act, 2000. Section 79 talks about the liability of Internet Service providers, Section 79 reads as:-

> *"For the removal of doubts, it is hereby declared that no person providing any service as a network service provider shall be liable under this Act, rules or regulations made thereunder for any third party information or data made available by him if he proves that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention.*
>
> *Explanation.—For the purposes of this section, —*
>
> *(a) "network service provider" means an intermediary;*
>
> *(b) "third party information" means any information dealt with by a network service provider in his capacity as an intermediary;"*[24]

This section is one of the few sections of the Information Technology Act that protects the interests of a party and gives it a greater scope to grow without fear of harsh measures against it. Section 79 prevents the prosecution of any ISP which provides access to any third party information or data if it proves that the offence committed was done without its knowledge or that it had taken all measures necessary to prevent such offence from being committed. The Section needs to be appreciated for the balance of rights and restrictions that it entails. The Section does not prohibit the prosecution of all ISPs if they were not diligent enough to have control over the material they provided access to, but it protects the interests of those ISPs who have taken all measures to curb illegal practices nevertheless certain cases still could not have been prevented.

[24] Information Technology Act 2008, Section 79.

Mention to intermediaries such as ISPs is also given in sections 67C, 69, 69A and 69B. Section 67C reads as:-

> *"(1) Intermediary shall preserve and retain such information as may be specified for such duration and in such manner and format as the Central Government may prescribe.*
>
> *(2) Any intermediary who intentionally or knowingly contravenes the provisions of sub section (1) shall be punished with an imprisonment for a term which may extend to three years and shall also be liable to fine."*[25]

The section calls on an intermediary to preserve and retain such information on the request and according to the guidelines of the Central Government. It further punishes an intermediary who refuses to comply with Government directions under sub-section (1) with imprisonment up to three years and also makes the intermediary liable to fine. Section 69 gives the Government the power to intercept and decrypt any information if it feels that it is necessary to do for to maintain peace and security, sub-section (3) and (4) of Section 69 reads as:-

> *"(3) The subscriber or intermediary or any person in charge of the computer resource shall, when called upon by any agency which has been directed under sub section (1), extend all facilities and technical assistance to –*
>
> *(a) provide access to or secure access to the computer resource generating, transmitting, receiving or storing such information; or*
>
> *(b) intercept or monitor or decrypt the information, as the case may be; or*
>
> *(c) provide information stored in computer resource.*
>
> *(4) The subscriber or intermediary or any person who fails to assist the agency referred to in sub-section (3) shall be punished with an imprisonment for a term which may extend to seven years and shall also be liable to fine."*

[25] Information Technology Act 2008, Section 67C.

This section also like the previous section asks the intermediary to comply with the Government instructions, in this case to intercept, monitor and decrypt information, and on non-compliance punishes the intermediary with fine and punishment which may go up to 7 years. Sections 69A and 69B punish the non-compliance relating to blocking of websites with imprisonment of up to seven years and non-compliance to provide access etc. to traffic data or information with imprisonment up to three years, respectively. These laws impose certain restriction on the ISPs and makes sure that they are under the control of the Government therefore making the Section 67 a safe guard that is merely limited to its literature and does not have any practical effect. This curtails the freedom with which the ISPs function and as a result these laws act as a restraint to the right of an individual to have access to information on the internet.

The Information Technology Act does provide the ISPs certain safeguards when it comes to third party content however the ISPs can be held liable if they do not conform to the policies and decisions taken by the Central Government with respect to censorship of material online. This liability does not go a long way in helping the interests of the Internet users who are dependent on the ISPs as a medium to access information online. The Government's scope for misuse of laws, for exercising full control over content, is very wide as per the legislation and this needs to be addressed to make sure that Internet Censorship takes place only through a transparent and legal process.

CONCLUSION

The analysis of the constitutional provisions and the various laws that exist for exercising control over an individual's access to internet as well as regulating the working of the ISPs leads us to the conclusion that the balance of power is in favour of the Government rather than being in favour of internet users. The users are subject to vague laws which have very strict punishments. Internet censorship is conducted through agencies which do not have any statutory powers. The service providers are subject to indirect supervision though they are dissolved of any third party liabilities. Keeping these points in mind the future of Internet censorship in India seems very harsh and

mismanaged. In a recent report it was it was disclosed that the Indian Government had made 255 requests to Google Inc. asking for online content censorship. These complaints included 133 YouTube videos, including 10 made on national security considerations and 77 on defamation, besides 26 web searches and 49 blogs. It was also disclosed that there was an increase in complaints by a stark 49% from last year.[26] Seeing the increase in the material that Government finds objectionable it is hard to say that one can expect a bright future from this point onwards. The Internet Censorship laws and policies need to be revisited so as to make sure that the society enjoys the benefits of an invention that has changed our experience of life. The legislators need to give thought to the various laws that exist in other countries and then prepare an Indian model that suits the requirements of the Indian society. Thus the way forward for internet censorship needs to be paved with a mortar that contains a mixture of respect for rights as well as Governmental control.

■

[26] 'Internet censorship in India up by 49%:Google', *The Indian Express* (New York, 18 June 2012).

EXPLOSIVE REMNANTS OF WAR A CRITICAL APPRECIATION OF PROTOCOL V

*Sushant Mahajan**

INTRODUCTION

Ron Run is a plantation farmer in Snoul District of Cambodia. Run explains that he, his wife Von Tha, brother-in-law Kith Ol and two nephews Ann Yong and Et En, arrived to work at the farm in Kratie's Snoul District a few days before the accident. The family stood around a fire, cooking dinner after a long day in the fields, when flames suddenly engulfed the group. The explosion was caused when the heat detonated an explosive remnant. All five people needed medical treatment. Tha and her brother Ol were standing the closest and were critically injured. Run and his two nephews, Yong and En, were standing further back, but were still badly burnt and their skin was shredded by shrapnel.[1]

This is a report of 'The Diplomat' (A leading magazine of Asia-Pacific). Such reports about the accidents which are a result of Explosive Remnants of War are not uncommon. Explosive Remnants of War (ERW) are a consequence of each and every conflict that has ever taken place in history or will ever take place in the future.

Explosive Remnants of War are those explosive ordnances which were used during the war but due to certain factors could not perform their desired function and therefore did not explode. After the war is over these explosives still remain in the warzone and cause huge medical and developmental hazards. The deaths and injuries caused due to these remnants are not easily traceable but are numerous in each and every affected area. On explosion, ERW typically projects hundreds of shrapnel fragments which can kill or severely injure anyone in range. If a victim survives, he or she may suffer the loss of limbs, burns, puncture wounds, ruptured eardrums, and blindness.[2] To tackle the problem of clearing war zones of ERW the *Protocol on Explosive Remnants of War*, Protocol V to the *Convention on the*

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[1] Gemima Harvey, 'Cambodia's Most Dangerous Job?' (*The Diplomat*, 30 May 2012) <http://the-diplomat.com/2012/05/30/cambodias-most-dangerous-job/> accessed 30 May 2012.

[2] 'Explosive Remnant of war' (*Mine Action Canada*) < http://www.minesactioncanada.org/tools/factsheets> accessed 25 May 2012.

Prohibition or Restriction of Certain Conventional Weapons (CCW), was adopted by the Meeting of the States Parties to the CCW on 23rd November 2003.

Protocol V is an instrument which explains the definitions of terms involved with the subject of ERW. It further goes on to lay down the precautions that are to be taken into account while using weapons and also puts light on the responsibility of the parties that take part in active hostilities. This Protocol forms the basis of International Humanitarian Law on ERW. In this Essay the author's main aim is to look at the definition put forward by Protocol V and discuss certain additions that can be made to include more terms under the heading of ERW. Furthermore, the author discusses the role that is played by the Non-State Actors to take responsibility under the present Protocol.

The most important part of the Protocol is the definition of ERW and subsequently of the various terms that are engulfed in ERW. The Protocol defines ERW as:

"*Explosive Remnants of War* means unexploded ordnance and abandoned explosive ordnance."[3]

It furthers goes on to define Explosive Ordnance, Unexploded Ordnance and Abandoned Explosive Ordnance as follows:

"*Unexploded Ordnance* means explosive ordnance that has been primed, fused, armed, or otherwise prepared for use and used in an armed conflict, but may have been fired, dropped, launched or projected and, should have exploded but failed to do so."[4]

"*Abandoned explosive ordnance* means explosive ordnance that has not been used during an armed conflict, that has been left behind or dumped by a party to an armed conflict, and which is no longer under control of the party that left it behind or dumped it. Abandoned explosive ordnance may or may not have been primed, fused, armed or otherwise prepared for use."[5]

[3] Protocol On Explosive Remnants of War, Protocol V to the Convention on the Prohibition or Restriction of Certain Conventional Weapons.
[4] ibid.
[5] ibid.

"*Explosive ordnance* means conventional munitions containing explosives, with the exception of mines, booby traps and other devices as defined in Protocol II of this Convention as amended on 3 May 1996."[6]

These definitions were the result of countless debates and discussions that took place while the Protocol was still being prepared. While addressing the definitional aspect of the problem of ERW, the delegates took the definition given by International Mine Action Standards (IMAS) [7]as the starting point and then worked on the various loop holes that they could find. All agreed that the Protocol should deal only with the explosive remnants of war from conventional weapons and not address the post-conflict problems arising from the use of biological, chemical or nuclear weapons.[8] This forms the first and foremost highlight of the shortcomings of the Protocol. The definition left out the biological, chemical and nuclear weapons from the definition of Explosive Ordnance and thus remnants of such a nature were not to be subjected to the clauses of the Protocol.

NUCLEAR, CHEMICAL AND BIOLOGICAL WEAPONS

Nuclear, Biological and Chemical Weapons top the list of the most undesirable threats that the society is facing currently. Its long terms effects range from causing life threatening diseases like cancer to contamination of the land, air and water resources. The remnants of such wars have the most bitter of the effects than any other explosive material can possibly have. These weapons are designed in a way so that they cripple the future of the enemy and leave no room for development or even survival in some cases. Treaties such as the

[6] ibid.
[7] *Unexploded Ordnance:*-"Explosive ordnance that has been primed, fused, armed or otherwise prepared for use or used. It may have been fired, dropped, launched or projected yet remains unexploded either through malfunction or design or for any other reason."
Explosive Ordnance: - "All munitions containing explosives, nuclear fission or fusion materials, and biological and chemical agents."
[8] Louis Maresca, 'A new protocol on Explosive Remnants of War: The history and negotiation of Protocol V to the Convention of Certain Conventional Weapons' < http://www.icrc.org/eng/resources/documents/misc/692f2w.htm> accessed 27 May 2012

'*Nuclear Proliferation Treaty* (NPT)' and '*Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*' do play an important role in restricting the use of such weapons. However, there is no stopping in a situation, in which a party to a conflict goes on to produce and use such weapons. The damage caused by these weapons is not only momentary but has very long lasting effects. In the aftermath of Hiroshima-Nagasaki, an estimated of 140,000 people died due to acute sickness as a result of the lasting effects of the radiations of the nuclear waste that was remnant. This did not end here and incidence of malignant tumors such as thyroid cancer, breast cancer, lung cancer, and salivary gland tumor generally increased from around 1960.[9]

Additionally if there are any abandoned nuclear or biological weapons it can instill fear in the minds of the people inhabiting the nearby areas making the development of such areas almost impossible. The risk of these remnants is not only limited to diseases but these remnants can also be explosive in many cases, for example when they are exposed to high pressure, heat etc. Another reason why nuclear, chemical or biological weapons form a bigger problem is because unlike other remnants whose blast would result in a momentary explosion, these weapons apart from the initial explosion also ooze out toxic substances that lead to polluting of the environment.

It might seem redundant to include these weapons in the definition of ERW in Protocol V because of the various treaties that restrict their use but in a situation that a war involving use of such weapons does take place, the remnants of such war can result in widespread killings and that too at a very fast rates. While including such remnants in the definition of explosives, the responsibilities of rehabilitation and development of the parties, in case of use of such weapons, should also be clearly laid down. Thus, including chemical, biological and nuclear weapons in the definition of explosives will go a long way in fulfilling the humanitarian goal of removing all remnants of war that can be harmful to the society and its development.

[9] Hiroshima Day Committee ,'Hiroshima and Nagasaki Bombing', < http://www.hiroshimacommittee.org/Facts_NagasakiAndHiroshimaBombing.htm>

IMPROVISED EXPLOSIVE DEVICES (IED'S)

Protocol V defines explosive ordnance (the common characteristic of all ERW) as "conventional munitions containing explosives, with the exception of mines, booby traps and other devices as defined in Protocol II of this Convention as amended on 3 May 1996." This means that mines, including Anti-Personnel Mines (APMs) and Anti-Vehicle Mines (AVMs), booby traps and manually emplaced munitions/other devices including improvised explosive devices are excluded from Protocol V on ERW and legally are not defined as ERW.[10]

The second aspect not included in the definition which requires considerable attention is the exclusion of Improvised Explosive Devices (IEDs). IED is a device placed or fabricated in an improvised manner incorporating destructive, lethal, noxious, pyrotechnic or incendiary chemicals and designed to destroy, incapacitate, harass or distract. It may incorporate military stores, but is normally devised from non-military components.[11] IEDs are extremely diverse in design, and may contain many types of initiators, detonators, penetrators, and explosive loads. Antipersonnel IEDs typically also contain fragmentation-generating objects such as nails, ball bearings or even small rocks to cause wounds at greater distances than blast-pressure alone could. IEDs are triggered by various methods, including remote control, infra-red or magnetic triggers, pressure-sensitive bars or trip wires (victim-operated). In some cases, multiple IEDs are wired together in a daisy-chain, to attack a convoy of vehicles spread out along a roadway. IEDs have been around since World War II. The Mujahedeen used them in Afghanistan when they fought the Soviets. The Viet Cong used them in Vietnam. They have been the largest killer of American forces in Iraq and Afghanistan.[12]

[10] Daniele Ressler. 'A Primer on Explosive Remnants of War' (2006) 10.1 Journal of Mine Action <http://maic.jmu.edu/journal/10.1/feature/ressler/ressler.htm> accessed on 27 May 2012

[11] Explosive Ordnance Disposal - Centre of Excellence, '*EOD IOD terminology database*' < https://www.eodcoe.org/data_web/editor_data/file/terminology%20posledne.pdf>

[12] 'Improvised Explosive Devices', (*The New York Times*, Times Topics) < http://topics.nytimes.com/topics/reference/timestopics/subjects/i/improvised_explosive_devices/index.html> accessed on 30 May 2012

Today the Improvised Explosive Device is seen as an effective and thus favoured weapon in the arsenals of insurgents and terrorists. It is inexpensive to produce, easy to construct, and causes those against whom they are targeted to expend huge efforts and resources in attempting to defeat the IED. Its employment is preferable in head to head combat operations with conventional military forces, where the terrorist or insurgent may well be at a disadvantage in terms of tactics, firepower and manpower.[13]

The annual global total of casualties from mines, IEDs, and all forms of explosive remnants of war (ERW) declined from 7,328 in 2005 to 4,191 in 2010. However, during this same period, victim-activated IED casualties increased. In 2010, victim-activated IEDs caused *18%* of the total casualties where the explosive item type was known *(684)*, the same percentage as in 2009, but a startling increase as compared to 2% in 2005.[14] The wide usage of IED's has affected the lives of thousands of individuals all over the world. These weapons often remain after a war ends as they sometimes fail to explode due to their faulty design. IED's though not included in the definition of ERW, have a very strong effect in rehabilitation of war affected areas. These devices are usually planted without keeping any record of them and therefore are even more difficult to locate and remove once the hostilities are over.

The point remains open as to whether IED's are a kind of booby trap[15] and therefore their use is governed by Protocol II of the CCW but, it is clear that IED's do not fall within the legal definition of ERW and therefore they are not governed by Protocol V. The inclusion of IED's in the definition of Explosive Remnants of War thus becomes important as, IED's not only hinder the social and economic growth of the affected areas but also have an adverse effect on the national

[13] Rob Hyde-Bales and Edith Wilkinson, 'How can information sharing between the UK Military and Civil organisations be improved?' < http://www.cranfield.ac.uk/ds/cisr/ied%20cranfield%20university%20may%202012.pdf>

[14] Landmine and Cluster Munition Factsheet, November 2011 < www.the-monitor.org>

[15] "Booby-trap" means any device or material which is designed, constructed or adapted to kill or injure and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act.

security of a country. Consequently, including IED's in the definition of ERW will go a long way forward in furthering the humanitarian thought that Protocol V puts forth.

NON-STATE ACTORS

Each Article of the Protocol V (Protocol on the Explosive Remnants of War) starts with the phrase "*Each High Contracting Party and party to an armed conflict….*", This phrase engulfs in it not only the states that are signatories to the Protocol but also the Non-State Actors that are party to an armed conflict. Essentially this includes all the insurgent groups that function all over the world and put upon them an equal responsibility as is put on a state for clearance of ERW. The number of insurgent groups in the world is numerous and their motives vary from, forming their own state to creating unrest in the governmental system that exists. These motives often lead them to take up violent methods and the result is a war like situation within the country.

The problem arises with enforcing the Protocol with Armed Non-State Actors (ANSAs). Armed Non State Actors are organized armed entities that are primarily motivated by political goals, operate outside effective state control and lack the legal capacity to become party to relevant international treaties. This includes armed groups, de facto governing authorities, national liberation movements, and non or partially internationally recognized States.[16] ANSA's includes groups like the Al-Qaeda, Indian Mujahedeen etc. ANSAs are engaged in a day to day warfare with the security forces of a state and these mini-wars are more often than not in areas of high civilian population. This exposes the civilians to a first-hand risk. The risk does not end here, the ANSA's are mostly mismanaged and lack knowledge and awareness of the laws that exist in the international sphere. Therefore these actors leave behind ordnance that is still capable of use. The munitions left without any security ends up in the hands of civilians who, unaware of the nature of munitions and the way in which they are to be handled, are frequently killed or injured. This situation leads to a number of casualties worldwide each year. The presence of ERW

[16] Geneva Call, 'Annual Report 2010' < http://genevacall.org/resources/annual-reports/annual-reports.php>

which includes unexploded ordnance and abandoned ordnance, in ANSA-controlled areas can also pose significant threat to local communities as well as to post-conflict humanitarian assistance efforts. ERW is left on the battlefield and Ordnance is looted from armories and store rooms by ANSA's. ANSA's have also been known to leave ordnance behind wherever they were manufacturing IED's.[17] This further enlarges the risks that the civilian population is exposed to.

Taking into consideration the respect that is fostered to international law these days by states and the global effects of undertaking a war, there are very few states that are capable to use weapons whose use is restricted by International Law. Therefore nuclear, chemical and biological weapons and other types of explosives, whose use is restricted under International Law, are more likely to be used by the ANSA's. The implementation of the articles of Protocol V to the Non-State Actors becomes even more important in the light of these facts.

The efforts to enforce the Protocol to Non-State Actors have not been very encouraging but one worth mentioning is that of a neutral and impartial humanitarian organisation called *'Geneva Call'*. Geneva Call was launched in March 2000 for engaging Non-State Actors towards compliance with International Humanitarian Law and International Human Rights Law. The organization focuses on NSAs involved in situations of armed conflict that operate outside effective State control and are primarily motivated by political goals. These include armed movements, de facto authorities, and non-internationally recognized States. Geneva Call encourages ANSAs to be active participants in processes towards increased protection of civilians. Geneva Call's innovative methodology to achieve this is the Deed of Commitment, which serves as a unique entry point towards engagement with ANSAs. The Deed of Commitment provides ANSAs with a standard, universal and recognizable mechanism by which they formally pledge to respect humanitarian norms and are held

[17] Geneva Call, Experience Engaging Armed Non-State Actors On Improvised Explosive Devices And Explosive Remnants Of War - Geneva, Switzerland, 8 April 2011

accountable for their commitments. The Deed of Commitment is countersigned by the Government of the Republic and Canton of Geneva, which acts as its custodian. After a signature, Geneva Call supports and monitors the implementation of the signed Deeds.[18] The efforts of such organizations show that the involvement of Non-State Actors is not an impossible task but efficient steps have to be taken into this direction to ensure that there is compliance of the laws.

CONCLUSION

Protocol V has indeed gone a long way in ensuring safety of civilians worldwide but its implementation still needs improvement. The definitions given are not all inclusive and are confusing when they are to be applied practically. The inclusion of IED's and Nuclear, Chemical and Biological Weapons are some of the ideas that have been put forward by the author. If these weapons are included within the definition of explosives then the Protocol will be much more useful as it caters to the future and these weapons are the likely choice in modern warfare. In the present scenario all these weapons and their use are synonymous with the activities of Armed Non-State Actors. Their lack of knowledge about the laws that exist in the international sphere or their willful ignorance of the laws makes it very difficult to legally bind them to such protocols. Keeping in mind the mass presence of the groups the implementation of this Protocol on these parties becomes imperative.

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[18] Geneva Call, 'Annual Report 2010' < http://genevacall.org/resources/annual-reports/annual-reports.php>

DIRECT TAX IMPLICATIONS UNDER JOINT DEVELOPMENT AGREEMENTS

*Tanvi Kishore**

JOINT DEVELOPMENT AGREEMENT: BUSINESS MODEL

One of the options available to the owner of a piece of land or property is to enter into a joint development agreement with a developer or builder. Many instances of such an agreement are seen in today's world as it provides a viable option for land owners who cannot undertake big construction projects on their land but look to benefit from such construction on their property. The key feature of a joint development agreement ("JDA") is that the land owner contributes land and the developer undertakes the responsibility of obtaining approvals, property development, marketing the project with the financial resources available to him.

The consideration for such land given up for development is generally discharged in the form of upfront payment (refundable or non-refundable deposit), sharing of revenue, sharing of built-up area or a combination of all three. Rights to develop the property and enter the land are passed on to the developer by the land owner. For this purpose the land owner has to execute an irrevocable general power of attorney ("GPA") in favor of the builder or developer and such GPA is registered (on a stamp paper of appropriate value) along with the JDA. The share of the developer's and owner's plot is identified and allocated. Generally, the land owner gets between 25 to 40 per cent share in the built-up area, however, the exact share depends on the terms of the JDA.

IRREVOCABLE GENERAL POWER OF ATTORNEY[1]

As mentioned earlier, in relation to a Joint Development Agreement, the site owner has to execute an irrevocable general power of attorney (GPA) in favor of the builder, authorizing and empowering him to carry out the following:

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[1] " The knitty-gritty of Joint Development Agreements" – N.C.S Raghavan and Arvind Raghavan (Published in the online edition of The Hindu, Dec 2nd 2006)

- To represent the owner before appropriate statutory authorities and to obtain necessary permission, approvals and clearances.
- To enter into agreements for the sale with the prospective buyers of the developer's share of the built-up area together with corresponding undivided share and interest in the land.
- To execute and register the deeds of absolute sale and conveyance in favor of prospective buyers in pursuance of the agreements entered into with them with a clear stipulation that this power will be exercised after the owner's share of construction is completed and handed over to the owner with occupancy rights.

In explanation of the last point, it is to be noted that the developer is generally not given any power to execute sale deeds in favor of the prospective buyers. Once the developer completes the construction of the specified built-up area for the owner as per the agreed specifications and dimensions, and on handing over the same to the owner with `occupancy' rights (being granted by the competent statutory authorities), the sale deeds are executed by the owner himself in favor of the prospective buyers.

Alternatively, only at that stage the owner may give a separate General Power of Attorney to the developer to execute and register the sale deeds on behalf of the owner to and in favor of the prospective buyers.

However, at no stage before the actual sales are affected are the prospective buyers put in possession of the specified built-up area sold to them.

⇨ Necessity of GPA

Generally, a GPA is executed to protect the rights of the developer. However, in case there is a breach of contract on the part of the builder/developer, either financially or otherwise, the site owner has a right to revoke the GPA. In case the builder breaches the joint development agreement, the site owner can revoke the general power of attorney.

In the case of Jasbir Singh Sarkaria[2] in the Authority of Advance Rulings ("AAR"), the necessity of the terms of GPA was highlighted by the bench and it observed the necessity of having an "irrevocable" GPA. In the given case it was held that the relevant GPA unequivocally grants to the developer a bundle of possessory rights and does not constitute a mere license. Power of control of land was granted to the developer under the said GPA.

The bench observed, *"the owner's limited right to enter the land and oversee the development work is not incompatible with the developer's right of control over the land which he derives from the GPA. Exclusive possession, as already pointed out, is not necessary for the purpose of satisfying the ingredients of clause (v) of section 2(47). We are therefore, of the view that the irrevocable GPA executed by the owners in favor of the developer must be regarded as a transaction in the eye of law which allows the possession to be taken in part-performance of the contract for transfer of the property in question".*

⇨ **Registration of GPA**

The GPA must be registered with the appropriate registration authorities of the State Government under the Registration Act, 1908. Such entry will ensure that there is a public notice to these GPAs.

As the GPAs are given to the developer for `consideration', they will become irrevocable as such a move will be treated as creating an agency coupled with interest to come within the purview of the provisions of Section 202 of the Indian Contract Act, 1872.

There will be a suitable clause in the GPA to indicate that the same is irrevocable. The total cost of stamp duty and registration fee payable on these documents may vary from State to State but is generally nominal in all the States.

DIRECT TAX IMPLICATIONS ON JOINT DEVELOPMENT AGREEMENT

In this regard, an important question which arises is whether such income is in the nature of capital gain or business income. In addition, it is also to be seen in which year the tax liability arises

[2]In re (2007) 294 ITR 196 (AAR)

(whether at the time of signing the JDA or at the time of receiving the built-up area or at the time of sale of plots to the ultimate buyers of property). Tax liability normally arises in the year of transfer therefore it is necessary to determine two issues-

(i) Whether or not there was a transfer,
(ii) If there was a transfer, then at what time such transfer took place.

It is generally observed that problems in this respect arise due to the ambiguity of the terms of JDA as well as the ambiguous tax laws in this regard.

Analysis of Section 2(47) (v) of Income-Tax Act read with Section 53A of Transfer of Property Act:

As mentioned earlier, it is important to determine the existence and year of transfer to determine the tax liability. For this purpose, it is important to look at Section 2(47) of the Income-Tax Act which defines "transfer" in relation to capital assets relevant to the purpose of the Act. Sub-section (v) specifically provides for transfer of immovable property, which is relevant in regard to Joint Development Agreement.

Section 2(47)(v) was introduced in the Act from the assessment year 1988-89[3] because prior thereto, in most cases, it was argued on behalf of the assessee that no transfer took place till execution of the conveyance. Consequently, the assessees used to enter into agreements for developing properties with the builders and under the arrangement with the builders, they used to confer privileges of ownership without executing conveyance and to plug that loophole, Section 2(47)(v) came to be introduced in the Act.

The section provides *"any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A, 25 of the Transfer of Property Act, 1882 (4 of 1882)"* [w.e.f. 1.4.1988]. Therefore, under this section possession will amount to transfer only if conditions of Section 53A of the Transfer of Property Act are satisfied.

[3] CBDT Circular No. 495 dated August 22, 1987

Section 53A of the Transfer of Property Act deals with provisions relating to Part-performance and states that -

"Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, nd the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

PROVIDED that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

On breaking down the provisions of Section 53A, the following essential elements are observed-

a) Existence of a contract,
b) Such contract is in respect of a 'transfer' only,
c) Terms necessary to constitute the transfer must be ascertainable with reasonable certainty,
d) The transferee has performed or is willing to perform his part of the contract (such willingness by transferee to be judged by series of actions of transferee and not one isolated event)

In the case of Chaturbhuj Dwarkadas Kapadia vs. Commissioner of Income-Tax[4], the Bombay High Court laid down guidelines as to application of Section 53A. It observed that the necessary conditions

[4] (2003) 180 CTR Bom 107

which must be fulfilled in order to attract provisions of Section 53A are as follows-

- There should be a contract for consideration,
- Such a contract must be in writing,
- It must be signed by the transferor,
- Such contract must pertain to transfer of immovable property,
- Transferee should have taken possession of property,
- Transferee should be ready and willing to perform his part of the contract.

In addition, the Court observed that even arrangements confirming privileges of ownership without transfer of title could fall u/s 2(47) (v).

This decision of the Bombay High Court came to be referred to as the authority in disputes regarding applicability of Section 53A of the Transfer of Property Act and the consequential applicability of Section 2(47) (v) of the Income-Tax Act.

Tax Liability in the hands of the owner and the developer:

To answer the above mentioned issues it is important to look into the circumstances of individual cases and the intention of the parties. The tax implications need to be looked at both from the point of view of the land owner as well as from the point of view of the developer. Thus, for the sake of convenience, tax implications may be analyzed with respect to the following set of situations.

1) ***In the case of the land owner when there is sharing of built-up area [Area-sharing model]:***

In light of Section 2(47)(v) and Section 53A as analysed above, it is seen that normal profit arising under a JDA is taxable as Capital Gains in the hands of the land owner. Such tax liability arises in the year in which such transaction is entered into, even if the transfer of the immovable property is not effective or complete under the general law. However, tax liability depends upon facts of individual cases and intention of parties, also the terms of the JDA.

If such development agreement enables passing of control of immovable property by granting an irrevocable authority or licence then the date execution of such agreement shall be considered as date of transfer of the capital asset. Thus, the point of taxability is when the 'possession' is given in pursuance of an agreement to transfer– [as seen in Chaturbhuj Dwarkadas Kapadia vs. CIT[5]]

Thus, proper drafting and wording of the JDA plays an important role. The intention and action must be carefully thought out.

The charging section in this regard is Section 45 of the Income-Tax Act. According to S.45 (1) of the Income Tax Act, any profits or gains arising from the transfer of a capital asset effected in the previous year shall be chargeable to income-tax under the head "Capital gains", and shall be deemed to be the income of the previous year in which the transfer took place.

However, S.45(2) of the Income Tax Act, gives certain exemptions so as to not treat certain assets as capital assets like any stock in trade, consumable stores or raw material held for the purposes of business or profession. Therefore, if a capital asset is converted into stock-in-trade, the capital gain is taxable in the year in which such stock is sold, and the fair market value of the asset on the date of such conversion shall be deemed to be the full value of consideration received or accruing as a result of the transfer. Thus, the tax liability gets postponed to year of sale of such stock-in-trade.

In the case Sathappa Textilers P. Ltd. v. CIT[6], the assessee claimed that by passing the resolution it had converted land into stock-in-trade and therefore, there was business income. Court held that the resolution was not genuine and it was capital gain only.

2) ***In the case of the developer when there is sharing of built-up area [Area-sharing model]:***

In case of developer the profit arising on sale of built up area will be in the nature of business income. This is because S.45(2) of Income Tax Act, gives certain exemptions to not to treat certain assets as capital assets like any stock in trade, consumable stores or raw

[5] (2003) 180 CTR Bom 107
[6] 263 ITR 371 (Mad.)

material held for the purposes of business or profession. And as the Developer is engaged in Construction business, for him constructed property is stock-in-trade. It cannot be treated as a "capital asset". Any surplus that is generated by developer on sale of stock-in-trade would be chargeable to tax as business income. Therefore, Developer is not liable to pay capital gains tax. However, in the hands of the developer the tax liability arises in year of sale of his share of the built-up area to the ultimate buyer.

3) ***In the case of sharing of revenue between the owner and the developer [Revenue-sharing model]:***[7]

In this case the position mentioned above (in case of sharing of built-up area) can be taken. However, the Income-Tax Authorities can take the view that such arrangement is in the nature of an Association of Persons ("AOP") or a Partnership, thereby treating the income as business income. In this case land owner would be deemed to have converted his asset into stock-in-trade on the date of entering into the joint venture contract and accordingly, till that time profit would be in the nature of capital gain on the basis of fair market value of the land as on that date. Subsequent thereto profit will be in the nature of business income.

However, it can alternatively be claimed that the arrangement is not in the nature of an AOP or partnership, and that the contract is on principal to principal basis and the intention of the land owner is to share the proceeds so as to get better sale consideration. In this case the profit of land owner and that of developer are chargeable to tax separately.

In case the assesses claim that they have constituted partnership firm or AOP for the purpose of carrying on the activities of development and the land owner has contributed his land to the partnership firm or AOP, then after constitution of such firm or AOP income would be in the nature of business income from the activities of development.

In the latter case, it is important to note, that the provisions of Section 45(3) of the Act will be applicable which provides that in a

[7] V.P.Gupta , Direct Tax Implications In Real Estate Development Contracts

case where a person transfers his personal property to the firm or AOP, capital gain shall be chargeable to tax as income of the previous year in which such transfer takes place. This section makes a specific provision to the effect that capital gain will be determined with reference to value of the capital asset recorded in the books of the firm or AOP. As such, the Assessing Officer will have no discretion to disregard such value and adopt some other value for the purpose of computation of capital gain. Hence, in a way it is beneficial to constitute a partnership firm or AOP and pay tax on capital gain determined accordingly by the partner in certain cases.

It is important to note that in case of sharing of revenue, as the revenue cannot be recognized in the year of signing the JDA it is likely that the stamp duty evaluation will be the consideration.

VALUATION OF TAX LIABILITY IN THE HANDS OF THE OWNER AND THE DEVELOPER:

- **In the hands of the owner-**

Cost of acquisition of proportionate land right transferred in exchange of built up area will be determined as per Section 55(2) of the Act and will also be indexed as per Section 48 of the Act. Fair market value as on 1.4.1981 will be adopted in case of land/property acquired prior to above date. In case the land / property has devolved on the present owner by any of the modes specified in Section 49(1) of the Act, cost of previous owner will be taken. In case of corporate entities also when asset has been acquired on merger, demerger or succession, cost of acquisition of earlier company may have to be adopted.

Consideration for exchange of land rights will be fair market value of built area acquired by the owner of the land, which can be reasonably determined on the basis of proportionate cost incurred by the developer on construction. Accordingly, capital gain would arise at the stage of transfer of proportionate land rights based on fair market value of proportionate built-up area received after excluding therefrom cost of acquisition of proportionate land rights transferred by the owner to developer.

Cost of acquisition of the land owner for capital asset acquired / remained i.e. built-up area along with remaining land rights will be fair market value of built-up area plus cost of acquisition proportionately of remaining land rights..

In case land owner also transfer / sell his portion of built-up area, capital gain would arise as and when sale takes place. It can either be immediately or after a gap of time. Profit arising on transfer of his part would also be capital gain in case owner continues to hold the same as capital asset.

Profit so arising can, however, depending upon circumstances be treated as "profit or gain from business and profession". In that case profit upto the stage of acquiring built-up area on exchange will be capital gain and thereafter, it will be business income.

- **In the hands of the developer-**

In case of developer cost of acquiring built up area would be the amount spent by the developer in construction of total area, including the area transferred to the land owner in exchange of land right.

Business receipts would be the actual sale price obtained by the developer from the sale of the property. All the expenses incurred by the developer in connection with sale etc. would be business expenses.

In case, however, the developer does not intend to sell the property. In other words his intention is to hold the same for long term, it can be claimed that built up area acquired by him is capital asset. In that case cost of acquisition of the property would be the actual cost incurred by the developer. Date of acquisition would be the date on which property was ready and exchange between the land right and built up area has taken place.

CONCLUSION

In light of the issues discussed in this paper, it is clear that the existing laws regarding tax implications under Joint Development Agreements are ambiguous and the decided case laws on the matter create an impractical situation for the assessee where he is expected to pay tax on the transaction before he has received the actual consideration for it. It naturally follows that the funds required to

make good such tax liability may not be available to the assessee at such time.

Even in the case of Jasbir Singh Sarkaria[8], the bench took into consideration this point of concern where it was observed that-

"We have to advert to one aspect which has caused some concern to us. What will happen if during the year following the one in which the deemed transfer took place, the proposed venture collapses for reasons such as refusal of permissions, the developer facing financial crunch etc. By that time, the owner would have received only a part of the agreed consideration, but he is obliged to file the return showing the entire capital gain based on the full sale price whether or not received during the year of deemed transfer. In such an eventuality, hardship may be caused to the owner who would have paid full tax. No doubt, such a situation could be avoided if the contention of the applicant is accepted. On deep consideration, however, we find that the construction of relevant provision should not be controlled by giving undue importance to such hypothetical situations. Normally, the owner executes power of attorney or does similar act to let the transferee take possession only after the basic permissions are granted and is satisfied about the ability of transferee/developer to fulfill the contract. Inspite of that, if such rare situations take place, the owner/transferor will not be without remedy. He can file a revised return and make out a case for exclusion or reduction of income. However, if the time-limit for filing revised return expires, the difficulty will arise. It is for the Parliament or the Central Government to provide a remedy to the assessee in such cases."

The guidelines laid down by the honorable Bombay High Court in the case of Chaturbhuj Dwarkadas Kapadia vs. CIT[9] are generally followed in cases regarding taxability under JDA. What needs to be seen is whether the decision of this case is the ultimate stance taken by the courts on the relevant laws, or whether there is any scope for alternative interpretation of such laws.

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[8] In re (2007) 294 ITR 196 (AAR)
[9] (2003) 180 CTR Bom 107

SOVEREIGN DEBT RESTRUCTURING AND INVESTOR STATE DISPUTE –IMPACT OF THE ABACLAT AWARD

*Urvashi Mishra**

INTRODUCTION

On August 4, 2011, the Tribunal at the International Centre for Settlement of Investment Disputes(**"ICSID"**) set a new precedent for the arbitration world with its decision on jurisdiction in the case of *Abaclat (and others) v. The Argentine Republic*. In its award on jurisdiction the Tribunal held that the claims brought 60,000 Italian nationals against the Republic of Argentina in respect of the Sovereign bonds issued to them was within the jurisdiction of ICSID. The *Abaclat* award was the first decision in the field of international arbitration to hold that an arbitral tribunal has the legal authority to hear claims of parties wherein the breach of a bilateral investment treaty (**"BIT"**) has been triggered by sovereign default and debt restructuring. This award is likely to have a significant impact on the drafting of arbitration clauses and the future course adopted by State in sovereign debt restructuring.

ICSID AND SUBJECT MATTER JURISDICTION

ICSID today is one of the most sought after international arbitration institution devoted to Investor-State dispute settlement and plays significant role in the field of international investment and economic development. From its establishment, ICSID has registered 390 investment dispute cases. The attractiveness of ICSID can be attributed to its unique feature of allowing private investors to expeditiously settle their claims against foreign States at an impartial international forum. However, this unique feature has been balanced by the drafters to avoid the abuse of the ICSID mechanism by carefully defining the jurisdiction of ICSID[1]. Thus, a transaction which does not fulfil the requirements as provided by the drafters will be outside the jurisdiction of ICSID even if it falls within the ambit of the investment definition agreed to by the parties to the BIT.

* V BSL LLB
[1] J.D.M. Lew, L.A. Mistelis and S.M. Kroll, *'Comparative International Commercial Arbitration'*, The Hague: Kluwer, 2003 at 329.

Article 25 of the ICSID Convention lays down the jurisdiction *ratione materiae* of ICSID i.e the jurisdictional requirements as to the nature of the dispute.[2] Article 25(1) of the ICSID Convention provides that the "jurisdiction of the Centre shall extend to any legal dispute *arising directly out of an investment*". Thus, a bare reading of Article 25 makes it amply clear that ICSID does not enjoy jurisdiction over ordinary commercial transactions and that the question of whether the tribunal has the jurisdiction to entertain a certain claim is solely dependent upon the fact as to whether the particular dispute in question can be categorised as an investment.

However the term 'investment' has not been defined anywhere in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. A perusal of the Report of the Executive Directors on the Convention indicates that *no attempt was made to define the term 'investment' given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make know in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).*[3] This clearly evidences that the drafters consciously and deliberately restrained themselves from defining the term investment as they feared that the assignment of a concrete meaning to the term would limit its scope and would give rise to a number of unnecessary jurisdictional problems[4]. The only limitation imposed by the drafters can be found in the first sentence of the preamble of the Convention which limits the jurisdiction of the Tribunal to disputes arising out of private investments which bear a direct nexus with the economic development of the State. Therefore, given the undefined nature of the term investment in the Convention, the approach adopted by the Tribunal in interpreting Article 25 becomes even more crucial as the question of whether dispute falls within the ambit of Article 25 depends primarily upon interpretation followed by it. Accordingly, it

[2]Michael Waibel, *Opening Pandora's Box: Sovereign Bonds in International Arbitration*, 101 Am. J. Intl. L. 711 (2007), p. 718.

[3] 1965 Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, ¶ 27.

[4] David A. Lopina, *'The International Centre for Settlement of Investment Disputes: Investment Arbitration for the 1990s'*, Ohio State Journal on Dispute Resolution 107(1988) at 114.

has been provided that a liberal and teleological approach must be adopted by the Tribunal when deciding whether or not jurisdiction exists in a particular case[5].

SOVEREIGN BONDS AND DEBT RESTRUCTURING

Sovereign bonds are one of the means by which a State raises capital from private investors. They are issued by both by developed and developing countries alike, as a means of financing long term project undertaken by the State, both domestically and internationally. A State may offer its bonds to both national as well as foreign private investors.

Sovereign bonds are essentially a contract between the State and the private investors wherein the State acknowledges its indebtedness and promises to repay both the principal amount and the interest to the investor in return for an earlier advancement of money.[6] Sovereign bonds are at the heart of public finance and play a central role in the development of capital markets.[7] In the sovereign debt market, countries enter into the shoes of private borrowers and the States routinely waive immunity from jurisdiction in favour of foreign municipal courts[8]. In 2009, the international debt market amounted to an estimated $82.2 trillion[9]. However one of the greatest threats which the private investors face when investing in Sovereign bonds is the risk of the State restructuring its debts.

Sovereign debt restructuring refers to the various techniques adopted by the States to alter the original payment terms of debt instruments favourable to it when facing a financial crisis.[10]

[5] C.F. Amerasinghe, *'Jurisdiction Ratione Personae under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States'*, 47 BYI1L 227(1974-75) at 231.

[6]Frederick Pollock & Frederic William, Maitland, *'The History Of English Law Before the Time Of Edward I'*, (1899) at 207; Edwin Borchard & William H, Wynne, *'State Insolvency And Foreign Bond Holders'* (1951).

[7]Michael Waibel, *Opening Pandora's Box: Sovereign Bonds in International Arbitration*, 101 Am. J. Intl. L. 711 (2007), at 711.

[8]*Id*, at 712.

[9]Outstanding World Bond Market Debt from the Bank for International Settlements via Asset Allocation Advisor, Original BIS data as of March 31, 2009.

[10]Federico Sturzenegger & Jeromin Zettelmeyer, *'Debt Defaults and Lessons from a Decade of Crises'*, (2006), at 3, defines debt restructurings as "changes in the originally envisaged debt service payments, either after a default or under the threat of default."

Restructuring of sovereign debts is not a new phenomenon. Public debts have been routinely restructured by States having unsustainable debt burdens. In the 1980's, Latin America suffered a decade-long debt crisis, widely known as the *'La Década Perdida'*, meaning the lost decade. During this phase, the Latin American countries reached a point wherein their debt obligations far exceeded their earning power. Similarly, Mexico had failed to repay its foreign debts in the year 1995. Three years later, East Asia underwent a severe financial crisis with countries like Thailand, Indonesia and South Korea suffering the most. In 1998, Russia was hit by the *'Rubble Crisis'*. Russia was forced to devalue the rubble and as a result defaulted on its debt. However, it is Argentina which beginning from the mid-1990s, suffered from the worst economic crisis in Latin American history. In the year 2001, it defaulted on approximately U.S $100 billion in private debt which is the largest in largest sovereign debt default in history.[11]

FACTUAL BACKGROUND OF THE ABACLAT DISPUTE

In the early 1990s, the government of Argentina in an attempt to restructure its economy to boost economic growth and to reduce debt and inflation, entered into various BITs. In May 1990, it entered into a BIT with Italy, namely the *"Agreement between the Argentine Republic and the Republic of Italy on the Promotion and Protection of Investments"* (**"Argentina-Italy BIT"**).[12] From 1991 to 2001 Argentina placed over USD 186.7 billion in sovereign bonds. By means of these bonds, Argentina raised an estimated USD 139.4 billion in international capital markets.[13] Out of the 179 bonds issued, the *Abaclat* Claimants had purchased about 83 bonds which were listed on the various international exchanges and were governed by the laws of different jurisdictions.[14]

[11]Andreas F. Lowenfeld, International Economic Law 566–616 (2002), surveys sovereign debt crisesin the 1980s and 1990s. Federico turzenegger&Jerominettelmeyer,btDefaultsandlessonsfrom A Decade Of Crises (2006), provides insight into the crises during 1998–2005.

[12]According to SICE Foreign Trade Information System, Argentina entered into fifty-seven bilateralinvestment treaties between 1990 and 2000. *See SICE Foreign Trade Information System*, (2012), http://www.sice.oas.org/ctyindex/ARG/ARGBITs_e.asp.

[13]*Abaclat and Othersv.The Argentine Republic*, ICSID Case No.ARB/07/5, Decision on Jurisdictionand Admissibility, ¶ 50 (Aug. 4, 2011), *available at* http://italaw.com/documents/baclatDecisiononJurisdiction.pdf [hereinafter *Abaclat*].

[14]*Id.* ¶ 50.

However, by the late 1990's the signs of Argentina entering a severe economic recession were apparent. By December 2001, it was undergoing severe financial crisis. What followed was an unprecedented default and a controversial restructuring scheme[15].

Argentina's 2001 debt crisis can be attributed to various facts. The primary among these was Argentina's own economic policies in furtherance of which it over borrowed. Its situation was compounded by questionable policy advice given by the International Monetary Fund (IMF).The other relevant factors was the recession which hit the world economy, and international credit markets determined to chase high-yielding debt with inadequate regard to risk[16].

At the time of Argentina's default, approximately 600,000 bondholders were Italian nationals. The value of the bonds held by them was an estimated USD 13.5 billion.[17] In September 2002, eight major Italian banks[18] joined hands to represent the interests of the Italian bond holders and established the Task Force Argentina ("TFA").[19]

However, despite the efforts of the TFA, the government of Argentina publicly announced that it was not willing to negotiate and would offer all foreign bondholders only a one-timebond exchange option on a take-it-or-leave-it basis.[20]

In 2005, Argentina opened the exchange offer on over USD 100 billion in principal and interest. According to the United Nations Committee on Trade and Development, Argentina succeeded in

[15] J. F. Hornbeck, *'Argentina's Defaulted Sovereign Debt: Dealing with the "Holdouts"'*, CRS Report for Congress, February 6, 2013, available at https://www.fas.org/gp/crs/row/R41029.pdf.

[16]Jessica Bess & Chrostin, *'Sovereign Debt Restructuring and Mass ClaimsArbitration before the ICSID, The Abaclat Case'*, Harvard International Law Journal, 53, 2, 2012, at 506.

[17]*Id*, ¶64.

[18] The eight Italian banks were Banca Antonveneta, BancaIntesa, Banca Sella, BNL, Iccrea Banca, Monte dei Paschi di Siena, San Paolo, and Uni Credito.

[19]*Abaclat*, ICSID Case No.ARB/07/5,¶ 65.

[20]UNCTAD, *Sovereign Debt Restructuring and International Investment Agreements*, IIA Issues No. 2, 5 (July 2011), http://www.unctad.org/en/docs/ebdiaepcb2011d3_n.pdf.

restructuring bonds of approximately USD 62 billion[21]. However, numerous investors unhappy with the terms offered rejected Argentina's exchange proposal and instead took recourse to litigation to settle their claims against Argentina .In toto, these investors filed more than 158 suits in various U.S. courts.[22] Of these the TFA, in September 2006, after receiving authorization from over 180,000 Italian bondholders to bring their claims as a group claim[23] filed a request for arbitration to the ICSID under the Argentina-Italy BIT. In February 2007, this claim was registered by the Secretary-General of the ICSID as *Giovanna A Beccara and others v. The Argentine Republic*. It was subsequently renamed as *Abaclat and others v. The Argentine Republic*.

In 2010, the government of Argentina decided to open another bond exchange to deal with remaining holdouts, on terms slightly less favourable than before. By this second offer the government succeeded in reducing its outstanding defaulted debt by another $12.4billion. Following this exchange offer the number of claimants pursuing the *Abaclat* arbitration claim decreased to approximately 60,000.[24]

THE ABACLAT CLAIM

The primary substantive argument of the *Abaclat* claimants was that the restructuring of the sovereign debt by Argentina amounted to expropriation and therefore constituted a breach under the provisions of Argentina-Italy BIT. Against this claim Argentina had raised several objections the most fundamental being the jurisdiction of the Tribunal to hear the dispute. Thus the Tribunal decided to first address the challenges raised by Argentina with regard to the jurisdiction of the tribunal, before hearing arguments on the merits.

While neither parties contested that the *Abaclat* arbitration was a "legal dispute" within the meaning of Article 25 of the ICSID Convention, the two most crucial objections raised by Argentina

[21]Id.
[22]Id.

[24]*Abaclat*, ICSID Case No.ARB/07/5, ¶ 216.

which went to the core of the dispute was that the bonds in question did not qualify as an *'investment'* under Article 25(1) of the ICSID Convention and secondly that the claimants were too far removed from the actual investment to claim protection under the Argentina-Italy BIT.

It was argued by Argentina that for a transaction to constitute an investment it must satisfy the test formulated by the Tribunal in *Salini Construttori S.p.A. and Italstrade v. Kingdom of Morocco*.[25]

In the *Salini* case, two Italian companies, Salini Costruttori S.P.A. and Italstrade S.P.A., had brought a claim of breach of the Morocco-Italy bilateral investment treaty (**"Morocco-Italy BIT"**) before ICSID against the Kingdom of Morocco. The two companies, in the year 1994, had been awarded a joint tender for the construction of a section of a highway in Morocco by the Société Nationale des Autoroutes du Maroc (**"ADM"**), which operated highways and various road-works on behalf of the State. As per the terms of the tender, the companies were required to complete their section of the highway within a period of 32 months; however the construction could only be completed after a period of 36 months. While several attempts were made by the companies to explain the delay, their claims were rejected by ADM's head engineer. Following this, the companies sent a memorandum of the final accounts to the Minister of Infrastructure, however neither the Minister of Infrastructure nor ADM responded to the same. Consequently, the companies filed a Request for Arbitration against Morocco with ICSID alleging breaches of the Morocco-Italy BIT. While the companies claimed that the contract qualified as an investment within the meaning of Articles 1(c) and 1(e) of the Morocco-Italy BIT, Morocco argued that the Tribunal lacked the requisite jurisdiction to hear the claim as under the Moroccan law a contract for the construction of a highway was merely a contract for services. The Tribunal in this case to address the objections raised by Morocco formulated a fourfold test which popularly came to be known as the *Salini* test. It held that for a transaction to constitute an investment it must have four essential elements, namely (a) a contribution, (b) a certain duration over which the project is

[25]ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 51–52 (July 23, 2001)

implemented, (c) sharing of the operational risks and, (d) contribution to the host State's development.[26] Post the *Salini* case, the test formulated by the Tribunal became the most important and most consistently relied upon standard for deciding whether the subject matter of a claim qualified as an investment.

Argentina relying on the *Salini* test argued that the criteria laid down by the Tribunal defined the outer limits of the concept of investment for purposes of Article 25(1) of the ICSID Convention. Further, it was contended that the investments made by the claimant were not in *'the territory of Argentina'* as expressly required by Article 1 of Argentina-Italy BIT. Thus it was alleged that the claimants who had purchased the bonds from Italian banks which had originally purchased the bonds, were too far removed from the actual investment to claim protection under the Argentina-Italy BIT.[27]

This was the primary bone of contention which the Tribunal was required to address at the outset before deciding the merits of the case. The responsibility of the Tribunal to accurately answer these question was of utmost importance as in case the dispute was merely a contractual claim it would not fall under the four corners of the jurisdiction of the Tribunal as the BIT was not intended to act as a substitute for the regular contractual remedies[28]. To address this issue the Tribunal adopted a prima facie standard to enquire if the circumstances alleged by the claimants amounted to a breach of the terms of the Argentina-Italy BIT.

While the Tribunal accepted that Argentina's failure to fulfil the terms of the bond instruments raised contractual claims, it held that they could not be characterised as purely contractual. The Tribunal believed that Argentina's conduct post its default *"derives from Argentina's exercise of sovereign power. Thus, what Argentina did, it did based on its sovereign power; it is neither based on nor does it derive from any contractual argument or mechanism."*[29] Thus the Tribunal reached the conclusion that Argentina's act of unilateral modification of the

[26] Id.
[27] *Id*, ¶ 341(ii), 373
[28] *Abaclat*, ICSID Case No.ARB/07/5,¶ 316.
[29] Id, ¶ 323.

terms of its payment obligations under the bond instruments was an expression of State power, and was not in exercise of its contractual rights and obligations.

While the Tribunal acknowledged the value of the *Salini* decision, it held that the test laid down in the *Salini* case must not create a limit on the types of transactions which may be recognised as an "investment".[30] By its decision the Tribunal moved away from the test laid down in the *Salini* case and instead focused on the intent of Argentina-Italy BIT and the ICSID. It instead developed the *'double-barreled'* test.[31] The Tribunal held that the subject matter of ICSID's jurisdiction must be assessed by way of a twofold test i.e. (a) first, whether the dispute constitutes an investment under Article 25 of the Convention and (b) second if the dispute satisfies the definition agreed to by the parties under the BIT.

However, the Tribunal clarified that it was not necessary for the definition in the BIT to fall within the scope of the ICSID Convention.[32] Therefore, it was contended by the Tribunal that even if the BIT's investment definition differed in scope from the one provided under the ICSID Convention, an economic transaction could still fall within the ambit of both.

While applying this test, the Tribunal observed that the parties by way of the definition of *'investment'* under Argentina-Italy BIT seemed to have intended to include financial instruments such as bonds within the scope of the definition. Further, the Tribunal held that in light of the aim and object of the ICSID Convention i.e. – *to encourage private investment and to provide parties to an investment with the tools and flexibility to specify what kind of investment they want to promote* – it would be contrary to the policy and values of the ICSID Convention to deny protection to the claimants as the parties clearly intended to be within the scope of the Argentina-Italy BIT.[33]

[30] *Id*, ¶ 364
[31] *Id*, ¶ 344
[32] *Id*, ¶ 351
[33] *Abaclat*, ICSID Case No. ARB/07/5, ¶ 364

Lastly, the Tribunal while addressing the second issue of whether the investments were made *'within the territory of'* Argentina, rejected Argentina's contention that the claimants were too far removed from the investment. The Tribunal observed that for determining the question of the place where an investment must be made, one has to enquire as to whether the funds invested ultimately reached the host state and whether the funds so raised have contributed in any way to the state's economic development.[34] The Tribunal held that in the present case there was no doubt that the funds generated from the issuance of the concerned bonds were ultimately made available to Argentina. Therefore, the Tribunal held that the bond instruments held by the claimants qualified as an investment made *within the territory* of Argentina.[35]

Therefore, it was held that the claims brought by the claimants were well within the scope of the Argentina-Italy BIT. The Tribunal further clarified that as long as the dispute arose from an *'investment'* as defined under Article 1 of the Argentina-Italy BIT read with Article 25(1) of the ICSID Convention, the Tribunal would have requisite jurisdiction to hear the same.[36]

POTENTIAL IMPACT OF THE DECISION

While there is a possibility that Argentina may seek to have the award annulled after the Tribunal decides on the merits of the case, the decision of the Tribunal on jurisdiction has had a significant impact upon the manner in which the arbitration clauses of BITs are being drafted. Drafters in the future are likely to incorporate more narrowly tailored arbitration clauses which may explicitly prohibit recourse to arbitration for claims related to sovereign debt restructuring.

The *Abaclat* award is the first decision to challenge a sovereign government's handling of a default and restructuring pursuant to an investment treaty. By its award, the Tribunal has created a precedent to allow individual investors and creditors to bring claims to ICSID

[34]Id, ¶ 374
[35]Id, ¶ 378
[36]Id, ¶ 333.

against a defaulting sovereign. This will considerably influence the conduct of the States in cases of default and will alter the manner in which nations approach sovereign debt restructuring in times of economic crisis.

The decision is also significant as the Tribunal has for the first time departed from the widely accepted *Salini* criterion which is considered to be the most important authority for determining the question of whether a particular financial transaction constitutes an "investment."[37]While the *Salini* test was a reliable tool for the tribunals when deciding the nature of the subject matter of the dispute, however on numerous occasions grievances were raised by the parties alleging that the test was too narrow and strict. Many a times the parties found it extremely difficult to demonstrate how their transaction effectively satisfied all the four requirements and the rigid framework of the test left no room for interpretation for the tribunals to aid such parties. As a result, in many cases, despite having a genuine claim the parties were unsuccessful in getting a relief. However, the Tribunal in the *Abaclat* award, by rejecting the *Salini* test and formulating the *double-barreled* test has broadened the definition of the term investment which is likely to expand the types of claims which may be brought under ICSID jurisdiction. The test due to its flexible nature not only provides relief to the parties who may bring a claim in the future but also equips the tribunals with adequate scope for interpretation to assist parties having a genuine claim.

However the most crucial contribution of the award lies in the acceptance of the Tribunal to address claims arising from sovereign debt restructuring. This step is likely to encourage more investors to take recourse to arbitration rather than litigation in courts. The likelihood of the same is increased in light of the fact that decisions of arbitral tribunals are generally easier to enforce than judicial decisions of foreign courts. Further the rules for enforcement of arbitral awards are more favourable than the court procedures in countries which are

[37]Matthew Gearing et al., *Abaclat and others V the Argentine Republic*, Allen Overy (Dec. 2011),*available at* http://www.allenovery.com/AOWEB/AreasOfExpertise/Editorial.aspx?contentTypeID=1&contentSubTypeID=7944&itemID=64707&countryID=18693&aofeID=302&practiceID=40484&prefLangID=410.

signatories to the New York i.e. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 or ICSID Convention.

Thus together with the Tribunal's expansion of the definition of "investment," and the relative ease in enforcement of arbitral judgments, it is likely that foreign investors will opt to bring their claims to arbitral proceedings as opposed to foreign courts.

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I, Principal Vaijayanti Joshi, hereby declare that the particulars given above are true to the best of my knowledge and belief.

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ILS Law College, Pune