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Articles
Interview
Presentations
Legislations: Highlights
Judicial Pronouncements: Highlights

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Principal's Page

I am privileged to present to you the annual volume of ILS *Abhivyakti* Law Journal for the academic year 2014-15.

'*Abhivyakti*' is 'Expression'. Expression is the most crucial competency for a lawyer. This law journal offers a platform to all those who wish to express themselves.

The editorial team led by Dr. Nilima Bhadbhade has very thoughtfully deviated from the pattern of earlier volumes. In addition to articles and interview, this volume includes for the first time case notes, legislation comments, and presentations.

Overwhelming response from students to this maiden effort is a clear indication that the team has succeeded in motivating students to write. Fifty students have contributed their writing on a variety of legal topics of their choice. We hope that their ignited interest in legal writing will be transformed into a passion for more serious, well researched, analytical, scholarly legal writing. This journal will inspire many more students to write.

I am confident that this volume will make interesting reading, not only for students, but for the entire legal fraternity.

Congratulations to Nilima Bhadbhade and her team !!!

Vaijayanti Joshi
Principal

Editorial

We bring to you, with pride and happiness, the ILS *Abhivyakti* Law Journal 2015.

This Journal is entirely a student effort. Through this Journal we provide a forum for their clear articulation. This platform promotes scholastic integrity, analytical originality, academic enquiry and thoughtful research. And it is for you to judge how far we have succeeded. The Journal reflects the current legal landscape, and the analytical and logical interpretations from the student's imagination. The cutting-edge of the intellectual property and competition domain co-exists with an exploration of criminality and constitutionality.

This year, we have introduced three new sections of short writings: a section highlighting judicial pronouncements, a section reviewing the year's legislations, and a section on student presentations. The reason for the introduction of case-notes and legislation comment is two-fold. One is to motivate the hesitant novice writer to exercise the skills of analysis and critique that are so essential to success in their chosen field. Then, the year's defining legal moments are captured, so that the Journal is a living document, a record of the burning issues and problems of current times. Further, presentations on issues not expressly part of the syllabus, but aspiring to a deeper understanding of the subject, have been retained, as a mark of student initiative. We also include an interview of the eminent political personality Shri Mani Shankar Aiyar, which covers a wide range of opinions on subjects such as the Judicial Appointment Commission, Marxism in India, a personal acquaintance with Pakistan, and his view as ex-Minister of Development for the North-Eastern Region.

It is hoped that ILS *Abhivyakti* Law Journal 2015 marks a new stage of evolution in ILS's reading culture and provides an illuminating and instructive experience to our readers.

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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.

Vaijayanti Joshi
Principal
ILS Law College, Pune

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BCCI violates Competition Law- A Critical Analysis of the Recent CCI Judgment

-Shashank Mangal[*]

The judgment in the BCCI case[1] was delivered by the Competition Commission of India ('CCI') on 8 February, 2013. The informant Surinder Singh Barmi, alleging violation of Competition Act, 2002 ('the Act') by the Board of Control for Cricket in India ('BCCI') in running the Indian Premier League ('IPL'), filed a complaint under the Act before the 'CCI' on 2nd November, 2010.[2]

The complainant disclosed the following allegations of abuse of dominance by the BCCI:

a. Irregularities in the grant of franchise rights for team ownership.
b. Irregularities in the grant of media rights for coverage of the IPL.
c. Irregularities in the award of sponsorship rights and other local contracts related to organization of IPL.[3]

The complaint comprising of the above allegations fulfilled the '*prima facie* satisfaction' requirement of the CCI regarding the merits of the allegations.[4]

Enquiry by Director General

Thereafter, the Director-General ('DG') was appointed for carrying out the inquiry in the matter.[5]

Since before proceeding to deal with these issues, certain preliminary questions whose answers would affect the very maintainability of the informant's complaint were required to be answered, the DG added those questions to the ones raised by the allegations of the informant.

Thereafter, he submitted a report to the CCI in February, 2012.[6] In his report, he found BCCI guilty of abusing its dominant position.[7]

Findings of the CCI and its Critical Analysis

Whether the BCCI is an 'enterprise' as envisaged under the Act? The CCI said that the BCCI is covered under the definition of 'enterprise' as envisaged under

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[*]V B.S.L, LL.B.
[1]*Surinder Singh Barmi* v. *Board for Control of Cricket in India*, 2013 Comp LR 297 (CCI).
[2]The Competition Act, 2002, s. 19 (1) (a).
[3]*Ibid.* s. 4.
[4]*Ibid.* 26 (1).
[5]*Ibid.*
[6]The Competition Act, 2002, s. 26 (3).
[7]The Competition Act, 2002, s. 4.

the Act. It augmented its finding by referring to a judgment of the Delhi High Court[8] and a similar case decided by the European Commission.[9]

The author supports the findings of the CCI and submits that BCCI very well fits within the definition of enterprise as provided under the Act. On analyzing the definition of *'enterprise'* given under s. 2(h) of the Act, it becomes clear that it includes *inter alia- "a 'person' who or which has been engaged in any activity relating to the provision of services, of any kind, either directly or through one or more of its units or divisions or subsidiaries."*

The term *'person'* has been defined in s. 2(l) of the Act as follows;

> *(l) "person" includes—*
> *(i) ...;*
> *(v) an association of persons or a body of individuals, whether incorporated or not, in India or outside India;*
> *(ix) a local authority;*
> *(x) every artificial juridical person, not falling within any of the preceding sub-clauses;* (emphasis supplied)

It is quite clear from the above that the Act doesn't expressly or impliedly create an exception for not-for-profit societies which the BCCI argues to be the case. The definition of 'person' makes it clear that for an entity like BCCI, there is no way out to escape from the strict provisions of the Act.

But the author respectfully disagrees with the reliance placed by the CCI on *Hemant Sharma* v. *Union of India*[10]('All India Chess Federation Case'), a recent judgment of Delhi High Court and on *Motosykleetistiki omospondia Ellados NPID (MOTOE) v. Ellinkiko Dimosio* ('ELPA Case'), a case decided by the European Court of Justice. The author also feels that while determining the applicability of the Act to the BCCI, the CCI should also have looked into the kind of 'services' BCCI provides.

While the CCI has relied upon All India Chess Federation Case[11]and the Delhi High Court has seemingly accepted *'All India Chess Federation'* to be an enterprise under the Act, the author submits that such reliance by CCI is misplaced because the last paragraph of that judgment says that all the observations made by the Court regarding Respondent No. 2 were only prima facie and required the CCI to inquire into them independently.

[8]*Hemant Sharma* v. *Union of India*, 186 (2012) DLT 17.
[9]*Motosykletistiki Ospondia Ellados NPID (MOTOE)* v. *Ellinkiko Dimosio*, [2008] All ER (D) 02 (Jul).
[10]*Hemant Sharma* v. *Union of India*, 186 (2012) DLT 17.
[11]*Ibid.*

> *"It is made clear that observations made by me in relation to the case of respondent no.2 are only prima facie, and shall not prejudice their case and the Commission shall enquire into the same independently."*[12]

Moreover, reliance placed upon by the CCI on ELPA Case[13], is in the opinion of author, an aberration. It was not required to be cited at all because as noted explicitly in that judgment the European Union ('EU') Competition law doesn't define 'undertaking', thereby making it an issue in that case whether or not sport regulatory bodies are 'undertakings'; but in case of Indian legislation, as 'enterprise' (counterpart of 'undertaking' in EC law) has been defined clearly in the Act itself, the CCI was not required to proceed in the same way the ECJ did.[14]

Moving on, the Act defines ***'services'*** as follows;

> *(u) "service" means service of <u>any description</u> which is made available to potential users and <u>includes</u> the provision of services in connection with business of any industrial or commercial matters such as banking,...., <u>entertainment,.....and advertising</u>;*[15](emphasis added)

From amongst all the activities of an enterprise which, if not carried on in accordance with the provisions of the Act, would attract liability to the enterprise, *'provision of entertainment services by BCCI'* is in issue in the present case. But again express reference to the same is missing in the judgment.

Whether BCCI is in a dominant position?

The judgment suffers from lack of clear expression and reference to the statutory provisions.

The judgment is not clear in its assessment of relevant market and relevant product market; it seems from the judgment that the market providing entertainment services is taken to be the former and the market comprising enterprises providing entertainment services (sports being the subject matter of such services) has been termed as the latter.[16] For assessing 'relevant product market'[17], the judgment relies upon cricket being preferred over other sports and

[12]*Ibid.*, para 36.
[13]*Motosykletistiki Ospondia Ellados NPID (MOTOE)* v. *Ellinkiko Dimosio*, [2008] All ER (D) 02 (Jul).
[14]*Ibid.*, para 21.
[15]The Competition Act, 2002, s. 2 (u).
[16]"CCI's Googly or No Ball?, *available at:* http://thefirm.moneycontrol.com/story_page.php?autono=826159 (last visited on March 15, 2015). (Charles Balmain, Partner, White & Case: *"You would have expected fairly detailed and probing analysis of the relevant market- a detailed review of the alternatives available, consumer preferences and why is it that IPL represents such a unique product. It seems that the CCI almost assumed that it was the case."*).
[17]The Competition Act, 2002, s. 2 (t).

sources of entertainment but it nowhere discloses the statutory basis of this discussion which is provided under the Act as 'consumer preferences'.[18]

Moving further, for the issue whether the BCCI is a dominant enterprise in the relevant product market [the market being the market comprising of enterprises providing entertainment services (sports, being the subject matter of such services)], the commission relied upon substitutability of cricket by other sports, and arrived at a decision that cricket is not substitutable by other sports[19], which is,with utmost respect for the judgment of the Commission, not only a highly erroneous conclusion but also an unwarranted one.[20] The CCI could have opted for a more suitable alternative route and yet would have been able to attach liability to BCCI. The Indian law doesn't brand an undertaking as dominant only when it is so dominant that its products or services are not at all substitutable by other products in the relevant product market. If such a factual matrix arises it is definitely a manifestation of dominant position[21], but there is another contemplation given under the Act which is not as tough to satisfy as the earlier one because it merely requires the enterprise to affect the competition in the market in its favour and not to fully eliminate or drive out the competitors.[22] The CCI should have easily fitted BCCI's position within the latter contemplation instead of pushing the dominance of BCCI beyond the limits to bring it within the former.

Thereafter, the judgment delves deeper into the aspect of dominant position of BCCI by narrowing down the relevant market to the market for organization of private professional league events. As a matter of the pyramid system, the BCCI assumes a regulatory role in this system. This is a dominance envisaged under an express provision of the Act.[23] But it is unfortunate that CCI nowhere alludes to this while assessing the dominance of the BCCI in the relevant market. This is more glaring in the light of the statutory mandate cast upon CCI to consider the relevant factors from amongst all the factors provided for under the Act.[24]

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[18] The Competition Act, 2002, s. 19 (7) (c).

[19] *Surinder Singh Barmi* v. *Board for Control of Cricket in India*, 2013 Comp LR 297 (CCI) at para. 8.38.

[20] "CCI's Googly or No Ball?", *available at:* http://thefirm.moneycontrol.com/story_page.php?autono=826159 (last visited on March 15, 2015). (Rahul Singh, Counsel, Trilegal: *"Application of SNIPP test, for instance, would mean you would conduct a practical survey among the consumers and ask them if the prices of say Set Max channel is increased by 'x%', would you still watch IPL matches or would you start watching something else. I think that's the manner in which SNIPP test is actually employed in practice. The problem with BCCI's order is that the Competition Commission assumes that this is the end result of SNIPP which they are going to get without actually indulging in the experiment that should have preceded the analysis and the final outcome which they have mentioned in the BCCI's order."*).

[21] The Competition Act, 2002, s. 4, Explanation (a) (i).

[22] *Ibid.*, s. 4, explanation (a) (ii).

[23] *Ibid.*, s. 19 (4) (g).

[24] *Ibid.*, s. 19 (4).

Lastly, the doctrine of overlapping functions as propounded by the CCI for finding BCCI guilty of abusing its dominant position could have been supported or buttressed with the argument that the BCCI was using its dominant position in one market to protect another relevant market.[25] It is because what BCCI is doing is in other words using its dominant position in the 'market of organizing and regulating India's International cricket matches' to protect the other relevant market of 'Private Professional Cricket Leagues'.[26] The CCI could have compared this situation with the MCX Stock Exchange Ltd. case wherein NSE was held guilty of using its position in the non-Currency and Derivatives Segment to protect its position in the Currency and Derivatives Segment.[27] It would not be out of place to recollect the following part of that judgment,

> *"The Indian Competition Act recognizes leveraging as an act by an enterprise or group that "uses by its dominant position in one relevant market to enter into, or protect, other relevant market. Nowhere does the Act indicate that there has to be a high degree of associational link between the two markets being considered for this sub section. This is so because competition concerns are much higher in India than in more mature jurisdictions because of the historical lack of competition laws."*[28]

Whether BCCI has abused its dominant position under the Act? The CCI has found that the activities of BCCI have resulted in denial of market access not only to ICL but to any prospective Private Professional Cricket league that might have come up in the future as clause 9.1(c)(i) of its media rights agreement with MSM consists of a restrictive covenant to this effect.[29]

The author completely agrees with the findings of the CCI but is perturbed at the fact that certain critical findings of the DG have not been considered by it.

The judgment doesn't explain the stand of the CCI on other findings submitted by the DG in his report to the Commission, the gravest among them being the following;

a. The DG had found BCCI-IPL liable for bid rigging in the auction of franchise rights[30].
b. The DG had found that media rights were granted to Sony/MSM and WSGI in an arbitrary, opaque and a collusive manner.[31]

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[25] *Surinder Singh Barmi* v. *Board for Control of Cricket in India*, 2013 Comp LR 297 (CCI) at para. 8.58.

[26] The Competition Act, 2002, s. 4 (b) (e).

[27] *MCX Stock Exchange Ltd.* v. *National Stock Exchange of India Ltd., DotEx International Ltd.* and *Omnesys Technologies Pvt. Ltd.*, 2011 Comp LR 0129 (CCI), at para. 10.91.

[28] *Ibid.*, para. 10.80.

[29] The Competition Act, 2002, s. 19 (4) (g).

[30] *Surinder Singh Barmi* v. *Board for Control of Cricket in India*, 2013 Comp LR 297 (CCI).at para. 4.3.

[31] *Ibid.*, para 5.7.

c. The DG had also found BCCI in contravention of law when it *facilitated* the contracts for transport, event management, catering, tickets etc.[32]

These are critical findings as they could have even taken into its fold the IPL franchise holders, media right awardees and grantees of other rights and could have expanded the scope of matter from just being an Abuse of Dominance case to an issue of Anti-Competitive Agreements. Notwithstanding the fact that since such a collusion would not qualify as a horizontal agreement (as also pleaded by BCCI-IPL in their submissions to the DG) and consequently the question of attaching a per se liability as contemplated under the Act would have been a legal impossibility, a proper probe could still have been made so as to ascertain the existence of any vertical agreement(s).

Conclusion

The judgment has reached the right verdict but leaves much to be desired.

While the reliance placed upon the judgment of the Delhi High Court in the Chess Federation case is improper, that placed on the ECJ's judgment in the ELPA case is unwarranted. Since the Indian Competition Act is the only one drafted in 21st Century when compared to the US Anti-Trust legislations and the European Union Competition Law, we have had the advantage of analyzing the workability and success of existing legislations on the subject in other jurisdictions. That might be one reason that while European Competition Law doesn't define an undertaking, Indian law does. So, going back to comparative jurisprudence for finding whether a society is included in the definition of an undertaking in European Union Competition law, a thing which is there in our law in a form, explicit, express and clear would amount to giving of undue primacy to foreign precedents over and above the bare text of our law.

An attempt at further elaboration of the concept of a dominant enterprise abusing its position in one relevant market to protect other relevant has been foregone.

Also, the CCI should have commented upon the other findings of the DG and if not satisfied with them, it should have caused a further enquiry to be conducted before ignoring the findings. Legally, the CCI may not be bound to do so and may argue that prima facie violation of a provision does not always mean that it has been in reality violated or disobeyed. But it is also a reality that prima facie violation of a provision nonetheless gives the adjudicatory body a ground to pursue the matter further. It is not submitted that the other findings of the DG were absolutely true but it is merely this author's suggestion that it would have been a harmless exercise to give it some thought, as had the CCI came to a conclusion that BCCI was not guilty on those counts, then the reasoning given for the same would have given a much needed impetus to the development of the Competition Law Jurisprudence in India.

■

[32] *Surinder Singh Barmi* v. *Board for Control of Cricket in India*, 2013 Comp LR 297 (CCI).at para. 6.1.

Aveek Sarkar: Revisiting the Law of Obscenity

*Thulasi K. Raj**

"*No society can do without intolerance, indignation and disgust; they are the force behind the moral law*" - Lord Devlin

The question of separation of law from morality has always given way to intellectually enriching debates in jurisprudence. In fact, Mark Tebbit identifies that all the problems and disputes in contemporary jurisprudence and philosophy concern the perennial attempt to clarify the conceptual relation between morality and law.[1] One of the most apparent stations where law and morality comes into conflict with each other is on the concept of obscenity, one of the most difficult terms to legally define.

The judgment of the Supreme Court of India delivered on 3 February, 2014 in *Aveek Sarkar* v. *State of West Bengal*[2] crystallised the alternative reading of s. 292 of the Indian Penal Code.[3] The *Hicklin* test, held by *Ranjith Udeshi* v. *State of Maharashtra*[4] as the litmus for determining obscenity under s. 292 was expressly held by the court to be obsolete. The test was to be replaced with the 'community standards' test.

A better understanding of s. 292 and study of Indian jurisprudence is necessary to appreciate the ruling in its entirety. s. 292(1) lays down that a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene, *if it is lascivious or appeals to the prurient interest or if its effect, the effects of any one of its items, is, if taken as a whole, 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. S. 292(2) makes punishable sale, exhibition, circulation etc. of obscene material. Explicit exceptions have been provided. The nature of the offence is cognizable, bailable and non-compoundable. The provision has been criticised as equating the immoral to the traditional Judeo-Christian notions of sexuality.

The test of obscenity as laid down by s.292 is thus whether a matter is (a) lascivious, (b) appealing to the prurient interest or (c) tends to deprave and corrupt persons who are likely to be exposed to it. The cardinal rule of interpretation of criminal statutes is that the provision has to be strictly construed[5] which is why a clear understanding of the term is important. The provision is drafted in similar lines with the celebrated *Hicklin* test laid down by

*V B.S.L, LL.B.

[1] Mark Tebbit, *Philosophy of Law: An Introduction* (Routledge Taylor & Francis Group, London and New York, 2nd edn., 2005).

[2] AIR 2014 SC 1495: (2014) 4 SCC 257.

[3] The Indian Penal Code (Act 45 of 1860).

[4] AIR 1965 SC 881.

[5] Sam J. Friedman, "Criminal Law, Strict Construction of Penal Statutes" *La. L. Rev.* 20 (1960).

Justice Cockburn in *R* v. *Hicklin.*[6] The determinative factor was the tendency of the matter to *deprave and corrupt those, whose minds are open to such immoral influences* and into whose hands a publication of the sort may fall. Therefore, the question is if the most vulnerable will be depraved of the matter, and not if a reasonable man will. This aspect is particularly problematic as pointed out by the Apex Court in *K. A. Abbas* v. *Union of India*[7] that 'our standard must be so framed that we are not reduced to a level where the protection of the least capable and the most depraved amongst us determines what the morally healthy cannot view or read'.

Aveek Sarkar is clearly a culmination of various judicial interpretations on obscenity since 1950. An attempt to narrow down the scope of s.292 can be comprehended. The subjective and changing nature of the concept of obscenity is well recognised. The prevalence of sexual puritanism in India in spite of the explicit sexual depictions in Khajurao and Konark is peculiar to the country.[8] Although in *Ranjit Udeshi* the court rejected the argument that *Hicklin* test has become outdated or is inapplicable to the native conditions, it envisaged a prospective reconsideration of itself while remarking, "*[t]he world is now able to tolerate much more than formerly, having become indurate by literature of different sorts. The attitude is not yet settled.*"[9] In *Chandrakant Kakodar* v. *State of Maharashtra,*[10] the Court reiterated that the standards of contemporary society in India are fast changing. *Samaresh Bose* v. *Amal Mitra*[11] sought to clearly distinguish obscenity from vulgarity or anything unconventional. This was similar to the English decision in *R* v. *Secker and Warburg.*[12] In 2007, *Ajay Goswami* v. *Union of India*[13] acknowledged that the test had become outdated especially in the context of the internet age. In *Avinish Bajaj* v. *State,*[14] a classic case on intermediary liability, the video of a girl engaging in sexually explicit acts was uploaded by her boyfriend on a website. The Delhi High Court did not seem to depart from the Hicklin test. The argument was that the video clip was transferred directly from the seller to the buyer without the intervention of the web site and mere listing will not amount to obscenity under s. 292. The Court rejected this argument and held that "*[p]rima facie it appears that the listing itself answered the definition of obscenity since it contained words or writing that appealed "to the prurient interest"* or if taken as a whole was "*such as to tend to deprave or corrupt persons, who are likely to read, see or hear the matter*

[6](1868) LR 3 QB 360.
[7](1970) 2 SCC 781.
[8] Vishnu D. Sharma and F. Wooldridge, "The Law Relating to Obscene Publications in India" 22 (Issue 4) *International and Comparative Law Quarterly* 632-647 (1973).
[9]*Ranjit Udeshi v State of Maharashtra*, AIR 1965 SC 881.
[10]1969 (2) SCC 687.
[11]AIR 1986 SC 967.
[12][1954] 1 WLR 1138.
[13]AIR 2007 SC 493.
[14]116 (2005) DLT 427.

contained or embodied in it." The listing contained explicit words that left a person in no doubt that what was sought to be sold was lascivious.

The question in *Aveek Sarkar* was whether an article with a picture of Boris Becker, a famous Tennis player, posing nude with Barbara Feltus, that first appeared in a German magazine (and later reproduced in the Indian press) was obscene or not. It was alleged that the picture tends to corrupt young minds, both children and youth of this country and is against the cultural and moral values of our society. The appellants submitted that the publication should be considered as a whole and that obscenity has to be judged in the context of contemporary social mores, current socio-moral attitude of the community and the prevalent norms of acceptability. There was nothing vulgar or lascivious in the photograph.

The court took a cue from *Roth* v. *United States*[15] and importantly, *Regina* v. *Butler*[16], which held community standards test to be the dominant test. The court held that obscenity is to be determined by ascertaining the particular posture and the background of the matter from the point of view of an average person, by applying contemporary community standards. The 'message and context' of the matter was held to be different from what it was alleged. The picture speaks the language of love battling racism. The attempt is to promote love leading to marriage between a white-skinned man and a black-skinned woman. The court held that there is nothing in the photograph to attract the provisions of s. 292.

The distinction between the *Hicklin* test and the community standards test is very crucial as the former focuses on the isolated or extracted parts of an entire work and its effect on the most susceptible members of the society whereas the latter emphasises on the message and context of the matter in question and its effect on an average person, by applying contemporary community standards.

The approach towards an alternate test propounded by the court began in the United States with *Roth* and developed in *Miller* v. *California*[17] and *Memoirs* v. *Massachusetts.*[18] *Aveek Sarkar* refers to *Roth* which was later overruled by the United States Court in its subsequent judgments especially by the one in *Miller.* In fact, the United States Supreme Court in *Miller* laid down the three-prong test involving the following questions: (a) whether "*the average person, applying contemporary community standards*" would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

[15]354 U.S. 476 (1957).
[16][1992] 1 S.C.R. 452 (Canada).
[17]413 U.S. 15 (1973).
[18]383 U.S. 413 (1966).

However, the judgment in *Aveek Sarkar* was well called for and represents the liberal approach of the court. The *Hicklin* test is no more applicable even in the United Kingdom from where it was adopted into the Penal Code.

Obscenity and the Internet

The relevant provision in the Information Technology Act, 2000 is s. 67 titled 'publishing of information which is obscene in electronic form'. It states: 'whoever publishes or transmits or causes to be published in the electronic form' any obscene material shall be punishable with either description for a term which may extend to five years and with fine which may extend to one lakh rupees.[19]

Application of the Supreme Court ratio laid down above over the material in the internet poses certain difficulty. The community standards test in essence postulates that the matter alleged is not obscene if it does not appear to corrupt and deprave the minds of an average person, taking into consideration the contemporary community standards. This determination varies majorly from society to society as each possesses distinct moral standards. The most appropriate example would be the Indian Court ruling in *Ranjit Udeshi* holding 'Lady Chatterley's Lover' obscene; whereas the same book was held to be not obscene by the Court of the United Kingdom in *R* v. *Penguin.*[20] This is exactly how absence of the definition of obscenity is justified and rather replaced by the 'obscenity tests' as found in s.292 and several domestic and foreign judicial decisions.

Now the test presupposes an identifiable community to determine the obscene nature of the material charged. However, in case of the global network there is absolutely no identifiable community. For instance, publishing of a material online renders it available to the users throughout the world. We need to appreciate that different mediums demand different tests of obscenity. The real question would be if the community standards test will be applicable to this medium where there is an uncontrollable flow of information especially when the court's conclusion in *Aveek Sarkar* did not touch upon this aspect at all (of course since it was not called for). The argument that on a case to case basis, obscenity will be determined on the basis of the territorial jurisdiction of the court which determines the issue does not appear to be sound. Or the other question would be if there is a need to invent another test for the material published on or circulated over the internet. It can be seen that there is substantial jurisprudence in the United States on obscenity over the Internet, the latest being *Reno* v. *ACLU*[21] and *Ashcroft* v. *Civil Liberties Union.*[22] A similar development in India is unfortunately absent and that leaves a criminal void in determination of obscenity on the internet.

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[19] The Information Technology Act, 2000, s. 67.
[20] [1961] Cri LR 176 (UK).
[21] 521 U.S 844 (1997).
[22] 535 U.S 564 (2002).

The Bali Declaration, and India's Curious Stand at the WTO

-Rudraneel Chattopadhyay[*]

In July 2014, India decided to block the Trade Facilitation Agreement (TFA) at the World Trade Organisation (WTO) General Council meeting in Geneva. India stood alone in this decision, and this was especially disconcerting. India's position on the TFA was condemned worldwide.

On second thoughts, India's stand seemed to be warranted. Developed countries were trying to rush the TFA at the expense of pending issues, such as food security, that are important for developing and lesser economically developed countries. This article discusses the Bali Declaration, India's curious stand at the WTO, and areas that need attention.

WTO and the BALI Ministerial Conference

The WTO is a multilateral organisation run by its member governments. All major decisions are made by the membership as a whole, either by ministers (who meet at least once every two years) or by their ambassadors or delegates (who meet regularly in Geneva). Decisions are normally taken by consensus. When WTO rules impose disciplines on countries' policies, then that is the outcome of negotiations among WTO members. The rules are enforced by the members themselves under agreed procedures that they negotiated, including the possibility of trade sanctions. But those sanctions are imposed by member countries, and authorized by the membership as a whole.[1]

The topmost decision-making body of the WTO is the Ministerial Conference, which usually meets every two years. It brings together all members of the WTO, all of which are countries or customs unions. The Ministerial Conference can take decisions on all matters under any of the multilateral trade agreements.[2]

At the Ninth Ministerial Conference, held in Bali, Indonesia, from 3 to 7 December 2013, ministers adopted the "Bali Package", a series of decisions aimed at streamlining trade, allowing developing countries more options for providing food security, boosting least-developed countries' trade and helping development more generally. They also adopted a number of more routine decisions and accepted Yemen as a new member of the WTO.[3]

[*] V B.S.L, LL.B.
[1] "Whose WTO is it anyway?", *available at:* https://www.wto.org/english/thewto_e/ whatis_e /tif_e/org1_e.htm (last visited on March 15, 2015).
[2] "Ministerial Conferences", World Trade Organisation, *available at*: https:// www.wto.org /english/thewto_e/minist_e/minist_e.htm (last visited on March 15, 2015).
[3] "Ninth WTO Ministerial Conference", Ministerial Conferences, *available at*: https:/ /mc9.wto.org (last visited on March 15, 2015).

Understanding the Bali Package

The Bali Ministerial Declaration (the Declaration) and accompanying ministerial decisions, known informally as the Bali Package, were adopted at the Bali Ministerial Conference on 7 December 2013. Subsequent decisions related to the Bali ministerial outcomes were adopted by the General Council on 27 November 2014.[4] The accord includes provisions for lowering import tariffs and agricultural subsidies, with the intention of making it easier for developing countries to trade with the developed world in global markets. Developed countries would abolish hard import quotas on agricultural products from the developing world and instead would only be allowed to charge tariffs on amount of agricultural imports exceeding specific limits. Another important target is reforming customs bureaucracies and formalities to facilitate trade.

The Declaration reached a deal on some of the following areas of negotiations: a package for Least Developed Countries (LDCs), Trade facilitation, and Agriculture. The Bali Ministerial was preceded by intense negotiations in Geneva on the Doha Round. As a result of disagreements on trade facilitation and agriculture, no 'Bali package' was in sight even as the conference dates drew near.The goal for Bali was, therefore, to find a 'safe landing zone' on all three areas of negotiations. The outcome of Bali was to be measured not just on whether such a landing zone was found but, more importantly, whether it allowed the negotiations to take-off again and reach their final destination: the conclusion of the Doha Development Round.

The LDC package was the least controversial of the three negotiation areas, largely because the contents of the package were best practices rather than binding commitments. WTO members reaffirmed their commitment to duty free, quota free (DFQF) market access for LDCs. But the actual developmental benefits remained questionable. If tariffs fell rapidly, then the benefits of DFQF would also be eroding rapidly. Improvements in rules of origin and non-tariff barriers would have been more beneficial to LDCs as these are the barriers that really block market access. A 15-year service waiver (WTO members can provide preferential markets access on trade in services to LDCs without having to do the same to the rest of the membership) was agreed at the 2011 WTO Ministerial Conference in Geneva, and Bali helped to set the course for its operationalisation.

Negotiations on trade facilitation (TF), for reducing the cost of trading, entailed making binding commitments in customs procedures and regulations. Improvements in TF did not require much deliberation, however, one needed to distinguish between 'improvements' and 'commitments'. Commitments made in the WTO are binding and subject to legal action if they are not adhered to. Meeting trade facilitation commitments will require investment, and many will

[4] "Bali Package and November 2014 decisions", *available at:* https://www.wto.org/english/thewto_e/ minist_e/mc9_e/balipackage_e.htm (last visited on March 15, 2015).

be capital intensive. Developing countries, and in particular LDCs, will need finance and technology to upgrade and improve TF. S. 2 of the Bali Declaration provides assurance that developing countries and LDCs will be supported in building capacities to implement the agreement.[5] Bali has also presented an opportunity for the future of Aid for Trade to be more streamlined and more focused on addressing the high cost of trading in LDCs.

Negotiations on agriculture, more specifically on food-stock holding, presented the main action in Bali. There were two viewpoints on the price benchmark for the valuation of the volume of food stocks countries can legally hold. India's position was to use current prices, which would mean amending the agriculture agreement of the Uruguay Round and would not be acceptable to other members. Alternatively, India proposed an interim arrangement until a more permanent solution is found. Here, the United States proposed a 'peace clause' of four years – a time-line that India did not accept. A final deal was struck to have an interim mechanism until a permanent solution is found, which means that more negotiation is still required to find a permanent solution.[6]

India at Bali

The issue at WTO was about production subsidies and not consumption subsidies, so it did not affect the poor consumers. India's principled stand seeking parallel progress on trade facilitation and food security agreements, including development issues, at the WTO was a right step. The history of trade negotiations shows rich countries push their agenda and indulge in dragging issues of poor countries to tire them out by endless talk.

In the run up to the WTO ministerial at Bali in December, three issues were intertwined. At Bali, India ensured that public stockholding of food did not lose its spot in the way forward for the accord. It was adopted as one of the priority items of the long-drawn Doha Round. Trade facilitation (TF) and LDC (least developed country) concerns were the two others. TF was one of the four Singapore issues agreed to be negotiated at Doha in 2001, others being investment, competition and transparency in government procurement, which were dropped at Cancun in 2003.

At Doha 2001, three declarations were adopted.[7] The main text to liberalise trade with the enticing label of development, second to clean up the problems with the WTO agreements and third, an agreement to waive obligations under TRIPs

[5] "Agreement on Trade Facilitation", Draft Ministerial Decision WT/MIN(13)/W/8, World Trade Organization, *available at:* https://mc9.wto.org/system/files/documents/w8_0.pdf (last visited on March 15, 2015).

[6] Records of Plenary Meetings at the Ninth Ministerial Conference of the WTO, *available at:* https://mc9.wto.org/ (last visited on March 15, 2015).

[7] Ministerial Declaration No. WT/MIN(01)/DEC/1 adopted at the foruth session of the Ministerial Conference, Doha, 2001, *available at:* https://www.wto.org/english/thewto_e/ minist_e/min01_e/ mindecl_e.pdf (last visited on March 15, 2015).

(trade-related aspects of intellectual property rights) on grounds of public health. Over time, the main Doha accord on liberalising trade caught pace but the one on implementation problems did not move much. Due to the logjam in the Doha Round, the US pursued preferential trade agreements such as Trans-Pacific Partnership with many countries in Asia and the Pacific but without China or India, and a Trans-Atlantic Trade and Investment Partnership with the European Union.

India and almost 40 developing countries, fearing a challenge to their issues relating to subsidies for producing staple food items, made a condition for the Bali accord. They argued that the limit for production subsidies agreed to in the WTO Agreement on Agriculture needed correction because international prices had gone up hugely, as it was based on international prices of the late 1980s. Since domestic prices offered to the farmers had also gone up as a result of increasing international prices, the difference between current domestic price and previous price on the basis of which the farm agreement calculated aggregate measurement of support had also grown over time, threatening to breach the subsidy limit which was allowed to countries like India. This formula had to be reframed. Knowing very well the tricks of the rich countries to talk and talk, India pushed for a permanent solution to be found by the WTO ministerial in 2017 rather than leaving it unclear. Till the time a permanent solution was found, India and other such WTO members were not to be impugned at the WTO on this matter. In Bali, India agreed to this peace clause as per an assurance by the developed countries that there is, and will be, a balance among all three pillars of the Bali accord. Therefore, India took this position on pushing forward the protocol on trade facilitation beyond end-July 2014 unless there was some demonstrated traction on food security.[8]

July 2014 standoff at WTO

On 31 July 2014, at the WTO's General Council meeting in Geneva, India refused to sign the TFA. Since the WTO works through consensus, the meeting collapsed without any agreement. India's stand was harshly criticised across the world. Global disapproval of India's action was heightened especially because the TFA was a part of the Bali Declaration, to which India is a signatory. The Bali Declaration of December 2013 was the first agreement reached as part of the 12-year-long Doha Round of trade negotiations. However, only the TFA was picked out from the original Doha package while all the other components of the 'Doha Development Agenda' – such as agriculture, cotton trade, and market access for agricultural products, among other issues – were deferred.

[8] "Confusion galore on India and WTO", *available at:* http://www.livemint.com/Opinion/JXsdZ9NZrXNHEA0OrSF0cP/Confusion-galore-on-India-and-WTO.html (last visited on March 15, 2015).

After Bali, the 'Peace Clause' promise was soon forgotten.[9] Most of the WTO meetings prior to July were focused on expediting the TFA, without paying much attention to seeking a permanent solution to agricultural and other pending issues. It led India to believe that developed countries were only interested in getting the TFA signed, and subsequently they were likely to abandon the Doha Round. India insisted that it was not opposed to the TFA per se, but wanted WTO members to also keep their promise of discussing a permanent solution to food security issues. In fact, India has already implemented many of the TFA's requirements.

India further insisted that the WTO must change its method of calculating government support to farmers. The WTO is using the average global food grain prices of the 1986-88 period as the external price benchmark. India's contention was that prices have risen seven-fold since then. And during 1986-88, the U.S. and Europe were dumping food grains on the world market, leading to a fall in the price of rice and wheat. This makes the benchmark doubly suspect. India also contended that the entire system of food procurement through the payment of a minimum support price to farmers is focused on the domestic market and, therefore, cannot be considered as "trade distorting."[10]

Finally, India found itself isolated at Geneva with even traditional supporters among developing and poor countries crossing the floor on the TFA.

The Road Ahead

The Bali Package has certainly helped to breathe life into the Doha Development Round. The symbolism of the Bali declaration has perhaps been more important than the outcome, as it covers only a small portion of the Doha Development Agenda and much ground still needs to be covered.

While developed countries pushed for an ambitious trade facilitation agreement, G-33 (India is a member) countries wanted adequate safeguards to run their food security programmes. LDCs had their own four-point agenda which included duty and quota free market access, operationalisation of the waiver concerning preferential treatment to services and service suppliers of LDCs, preferential rules of origin and establishment of monitoring mechanism for special and differential treatment. The Bali Declaration delivered on all three pillars.

From the industry perspective, an agreement on trade facilitation is the biggest hope. Industry in India was in full support of a balanced but an ambitious agenda that would help build greater market access opportunities for them. Specifically, it supported a good Trade Facilitation Agreement that can cut transaction costs and help make Indian industry more competitive. The simplification of customs

[9] Arun Jaitley, "Bali Declaration not in India's interest", *available at:* http:// www.niticentral.com/2013/12/18/bali-declaration-not-in-indias-interest-170162.html (last visited on March 15, 2015).

[10] "Confusion galore on India and WTO", *available at:* http://www.livemint.com/Opinion/JXsdZ9NZrXNHEA0OrSF0cP/Confusion-galore-on-India-and-WTO.html (last visited on March 15, 2015).

procedures envisaged in the deal is expected to add $1 trillion to the world economy.[11]

Another positive is the simplification of transit documents pertaining to exportation and importation. Recently, India had to face problems at European ports while sending its consignments to Latin America, particularly in case of exports of generic drugs. India would need to simplify and facilitate its own domestic customs procedures in line with the WTO requirements. Given that the Doing Business report[12] of the World Bank ranks India at 132 of 189 economies under 'Trading across Borders', there is much work to be done to make trade in India facilitative and aligned to global best standards. From the development perspective, the agreements on LDC package and food security are path-breaking. Importantly, the deal at Bali reinforces the potential in the multilateral negotiations under the Doha Development Round, in progress for well over a decade.

The Bali Package covers only a selection of issues from the much broader and ambitious Doha Development Agenda. All eyes would now turn towards the remaining unresolved issues of the Doha agenda, which includes Non-Agricultural Market Access (NAMA), and services. Both these issues are extremely important for Indian industry. In services sector in particular, where India has offensive interest, a select group of WTO members is trying to negotiate a plurilateral agreement. India is not a member of this group.

As for the road ahead for India, it will have to introspect on the proximate causes for the isolation at Geneva in July 2014, including a review of its communication policy. It is likely that it was overly focusing on food stockpiling at the expense of other development issues, giving its allies reason to feel that it too was interested in a single-point agenda. India will have to adapt a three-point strategy to not only counter the global tide of bad publicity but also as a bargaining chip for allowing the TFA. One, improve the training schedule of its trade negotiators. Two, push for a change in the external benchmark of 1986-88. Three, bring back the issue of freer cross-border movement of professionals back to the trade agenda.

For the rest of the WTO members, the next logical step is to work out a post-Bali roadmap with an aim to conclude the Doha round. Although the Bali Ministerial represents a collective victory for global negotiations process, for the rules-based multilateral trading system, and for integration of poor countries into the world trading system, there is a long way to go before trade can truly be equitable for all.

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[11] "Bali WTO: A triumph of multilateralism", Economic Times, *available at:* http://articles.economictimes.indiatimes.com/2013-12-13/news/45162502_1_ldcs-market-access-trade-facilitation-agreement (last visited on March 15, 2015).

[12] The World Bank and International Finance Corporation (IFC), Report: *Doing Business-Smarter Regulations for Small and Medium-Size Enterprises* (2013), *available at:* http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB13-full-report.pdf (last visited on March 15, 2015).

The Essential Practices Doctrine: Doctrinally Essential?

*-Parashuram Ajjampur Lakshman**

The Indian Republic has always adopted the 'equal respect' theory—where the State respects and tolerates all religions. *Sarvadharma sambhāva* (goodwill toward all religions) and *dharma nirpekshatā* (religious neutrality) became the defining words of India's views on religion.

The Constitution (42nd Amendment) Act, 1976 added the word 'Secular' to the Preamble of the Constitution, with a view, probably to 'reiterate' the position of the Republic of India with respect to religion and religious establishments.

As a consequence of elevating the right to religion to the status of a fundamental right, *albeit* with opposition in the Constituent Assembly regarding the same, the door of the Supreme Court of India has continuously been knocked ever since its establishment, with matters concerning the right to religion of individuals or religious groups. These matters of religion have posed a challenge to the Supreme Court and have required it, more often than not, to balance the right to religion with the other rights provided for in Part III.

As Art. 25 is 'sandwiched' between restrictions, the Supreme Court carved out a doctrine – the essential practices doctrine - so as to provide protection to the core values of a particular religion. What constituted an 'essential part of religion', was shielded from the interference of the State and what was 'unessential' could be subject to State intervention.

The defenders of the essential practices doctrine place their reliance upon the statement of Dr. B. R. Ambedkar,[1] in the Constituent Assembly during debates on the proposed codification of Hindu law:

> *"The religious conceptions in this country are so vast that they cover every aspect of life from birth to death. . . . There is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend it beyond beliefs and such rituals as may be connected with ceremonials which are essentially religious."*

After independence, it was first articulated in *Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshimindra Thirtha Swamiar of Sri Shirur Mutt*,[2] (the *Shirur Mutt* case), wherein the Supreme Court, applying this doctrine, held certain provisions of the Madras Hindu Religious and Charitable Endowments Act, 1951 as ultra vires Arts. 19, 25 and 26 of the Constitution.

*V B.S.L, LL.B.

[1] Constituent Assembly Debates (Proceedings) Vol. VII, at 781.

[2] AIR 1954 SC 282.

This doctrine has, since its incorporation, never been questioned and has remained undiminished. Subsequent cases have only added to the doctrine but have hardly reconsidered the doctrine of essential practices.

Germination and Transformation

In the *Shirur Mutt*[3] case Justice Mukherjee extended the meaning of protection of religion by bringing into its ambit not only religious beliefs but also religious practices that correspond to such beliefs. However he laid down in no unequivocal terms that it was the proponents of the religion itself who could determine what practices are essential, and that no outside authority could claim otherwise.

From this broad approach adopted by the Court towards the protection of religion, the Court, from here on, traversed a path, which would only tantamount to circumscribing religious practices that would be protected.

In *Devaru case*,[4] the Court was faced with a petition against the Madras Temple Entry Authorization Act that intended to permit persons considered to be from the lower caste to enter into temples that were believed to be restricted to the Brahmins. A conflict therefore arose between Arts. 25 and 26. The Court applied the essential practices doctrine and upheld the provisions of the Act. More importantly, the Court went on to demonstrate that it was the Court that would decide the essentials of a religion and the ruling in the *Shirur Mutt* case that the community was to decide its essential practices was sidelined.

In the *Durgah Committee* case,[5] The Durgah Khwaja Saheb Act, 1955 that circumscribed the rights of the *khadim* in administering the affairs of the Durgah was challenged as infringing Arts. 25 and 26.In light of this doctrine, the Court noted that the Durgah had always been administered by a representative of the State and thus, upheld the Act. Justice Gajendragadkar's statement, which was made with reference to the earlier decisions of the Court in *Devaru* and *Shirur Mutt* cases, essentially made clear the renowned fervor with which the Supreme Court would look at cases relating to religion. Far from the position enunciated in the Shirur Mutt case, the Court took upon itself the power to decide what constitutes religious practice and what are 'superstitions'. Thereby, a paradigm shift can be seen in the approach of the Court whereby the Court took upon itself this additional power by which, in subsequent cases the Court would apply standards deemed suitable by it, to come to the conclusion that a practice, although claimed by the followers of a religion to be an essential practice, was not really essential, but was only 'superstition'.

[3]*Ibid.*
[4]*Sri Venkatramana Devaru* v. *State of Mysore,* AIR 1958 SC 255.
[5]*Durgah Committee* v. *Hussain Ali,* AIR 1961 SC 1402.

Senior Advocates Rajeev Dhawan and Fali Nariman[6] opine their disagreement with this shift in the role of the Court as:

> "With a power greater than that of a high priest, maulvi or dharmashastri, judges have virtually assumed the theological authority to determine which tenets of a faith are 'essential' to any faith and emphatically underscored their constitutional power to strike down those essential tenets of a faith that conflict with the dispensation of the Constitution. Few religious pontiffs possess this kind of power and authority."

In *Govindlalji's* case,[7]the bone of contention was the constitutionality of the Nathdwara Temple Act. The petitioner claimed that the administration of the Nathdwara Temple by the *Tilakayat* was an essential practice and therefore, the Act, which attempted to subsume the powers of the head of the temple, infringed upon Arts. 25 and 26. Justice Gajendragadkar expressed that the Court would not blindly accept every claim of a community to be a religious practice. This is a colossal indicator of the leap the Supreme Court had taken.

Therefore, it can be observed that the formative purpose behind the essential practices has been effaced and the doctrine has undergone a sea change. The essential practices doctrine was meant to be inclusive so as to give protection to religious practices as enunciated under the Constitution. However, it transpires that it evolved to become exclusionary so that practices of a religion could be excluded that did not conform to the Court's notion of what constituted the core of a religion. The Court went on to apply the ideologies of a modernist state to determine the essentiality of a religion rather than to accept religion as represented by its practitioners.[8]

In *Acharya Jagdishwarananda Avodhuta* v. *Commissioner of Police, Calcutta,*[9] while deciding whether the *tandava* dance constituted an essential practice of the Ananda Margis, Justice Bhagabati Prasad Banerjee of the Calcutta High Court opined that, at this rate, religious practice would become what the courts wish the practice to be.

The Alternate Viable Path

It must be noted that the judges did not disagree on the essential practices doctrine, but disagreed to the extent to which it should be applied. Though resorted to by the Court over the decades to settle conflicts with respect to

[6]Rajeev Dhavan and Fali Nariman, "The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantaged Communities." in B. N. Kirpal, Ashok H Desai, Gopal Subramanium et al. *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* 259 (Oxford University Press, 2000).
[7]*Tilkayat Sri Govindlalji* v. *State of Rajasthan,* AIR 1963 SC 1638.
[8]Ronojoy Sen, "The Indian Supreme Court and the quest for a 'Rational' Hinduism" *South Asian History and Culture* 1(1): 86-104 (2010).
[9]AIR 1990 Cal 336.

religion, the birth, existence and the continuation of the essential practices has come to be highly questionable.

The right to religion under Arts. 25 and 26 emphatically and clearly lays down the position that the fundamental right to religion has been accorded in the Constitution. The right, unlike any other fundamental right, commences with restrictions and is followed by further limitations. The intention of the Constituent Assembly behind enacting the Articles – to give a miniscule status to the fundamental right to religion when placed against other fundamental right - can be deciphered from the express limitation of 'subject to other provisions in this Part' provided in Art. 25.

Art. 26 does not contain the limitation of 'subject to other provisions of this part'. This however does not put Art. 26 on a different footing than Art. 25 as Art. 26 draws its existence from Art. 25 itself. Art. 26 is only an extension of Art. 25 and is therefore a specific right whereas Art. 25 is the general foundation for the right to religion. It follows that any restriction upon the general provision, would *ipso facto* apply to the specific provision. Art. 26 lays down the permissible rights that religiously like-minded persons can exercise as a collective. As a religious denomination is nothing but a conglomeration of individuals who enjoy their right to religion under Art. 25, the rights under Art. 26 cannot be held superior or encompass rights that are not provided for under Art. 25. The said conclusion is inevitable, as a combined reading of the two provisions otherwise would lead to the conclusion that the individuals exercising their right to religion will be subject to greater restrictions and the said restrictions would disappear as soon as they form an association. This conclusion would be absurd as the same would be amounting to negating the express provision of 'subject to other provisions of this part' provided in Art. 25. The same would amount to empowering individuals to do indirectly what they are expressly disallowed to do i.e., exercise their right to religion without the restriction of it being subject to other fundamental right, merely upon forming an association and exercising their individual rights collectively.

The Court would, anyway, be empowered, in the first place, to decide if any practice is religious or not. The Courts, thereby, are empowered to reject the protection to all those claims by individuals or denominations that are not truly religious. Though Justice Gajendragadkar, in *Govindlalji's* case,[10] admitted that this approach may present some difficulties, since sometimes practices, religious and secular, are inextricably mixed up, he was confident that the Court would be able to distinguish between what was a religious matter and what was obviously a secular matter.

The right to religion is to be guaranteed only when there exists no conflicting claims of public order, health or morality. The same result would follow when the right to religion is at loggerheads with other fundamental rights. Therefore,

[10]*Tilkayat Sri Govindlalji* v. *State of Rajasthan*, AIR 1963 SC 1638.

the practices of a religion, whether essential or not, would have to give way to the express conditions as laid down in the constitution.

However, in the *Excommunication* case,[11] Justice Ayyangar, declared unconstitutional the Bombay Prevention of Excommunication Act of 1949 on the ground that the power of excommunication was essential to every religious denomination. He opined against reading Art. 25 in this manner:

> *"In this connection it [is argued] that limitations imposed on religious practices on the ground of public order, morality or health have already been saved by the opening words of Art. 25(1) and the saving would cover beliefs and practices even though considered essential or vital by those professing the religion. I consider that in the context in which the phrase occurs, it is intended to save the validity only of those laws that do not invade the basic and essential practices of religion, which are guaranteed by the operative portion of Art. 25(1) for two reasons: (1) To read the saving as covering even the basic essential practices of religion, would in effect nullify and render meaningless the entire guarantee of religious freedom – a freedom not merely to profess, but to practice religion, for very few pieces of legislation for abrogating religious practices could fail to be subsumed under the caption of "a provision for social welfare or reform". (2) If the phrase just quoted was intended to have such a wide operation as cutting at even the essentials guaranteed by Art. 25(1), there would have been no need for the special provision as to "throwing open of Hindu religious institutions" to all classes and sections of Hindus since the legislation contemplated by this provision would be par excellence one of social reform."*

Justice Ayyangar believes that a majority of legislations purporting to 'abrogate' religion could be blanketed under social welfare or reform. However, this apprehension expressed by Justice Ayyangar seems to be ill founded, for the court would scrutinize any legislation, which would aim to abrogate religion in the name of welfare or reform. The court would uphold only those legislations, which would in fact serve the purpose of social welfare or reform. The court is required to uphold a religious practice only as long as the same is not in contravention of the State's ideology of welfare or reform. However, the Court is not bound to accept the State's views on reforms if it believes the same to be sinister or if the same is believed to be of an ulterior motive or clad with mala fide intentions. Therefore, the Court is required to, in first preference, give effect to provisions of social welfare or reforms provided the same is bona fide, and only the residue of practices must be given protection under the right to religion. The same is the case when the court is balancing between the right to religion and the restrictions provided in the opening words of Art. 25 – public order, morality and health. The textual matrix of Art. 25 contemplates for the right to be subverted for the purpose of order, morality and health. Therefore, the purpose of

[11]*Sardar Syedna Saifuddin Saheb* v. *State of Bombay*, AIR 1962 SC 853.

public order, morality and health is to be preferred over any religious practice, whether essential or not.

A reading of Art. 25(2)(b) can bring out the same. Art. 25(2)(b) provides for the opening of Hindu institutions to the public. The same is an absolute restriction on the right to religion provided under 25(1). Not reading the provisions in this manner would give rise to absurd results. Art. 25(2)(b) is a congruent provision of Art. 17, which abolishes untouchability and the same is elevated to the status of a fundamental right. If Art. 25(2)(b) would not be given primacy over the right provided under Art. 25(1) and if exceptions can be carved out in the name of 'essential practices', the same would amount to not giving effect to Art. 17, which incidentally is put on a higher footing than Art. 25 as right to religion is made subservient to other fundamental rights by the use of the words: "*subject to ... other provisions of this part*". Ironically, the court fails to recognize this very concept in *Devaru's* case.

The claim that the essential practices doctrine draws its legitimacy from the words of Dr. B R Ambedkar is based on faulty grounds. His statement does not suggest for the reading of an additional doctrine or altering the footing of right to religion different from the position contemplated by the express provisions. Dr. B R Ambedkar's statement is reiterating that only those practices that are really religious must be protected under Art. 25 and not other practices that are economical or secular. The secular practices clothed in religious color must be distinguished and must be excluded from the provisions of Art. 25. Dr. Ambedkar, in no terms, provided for giving supremacy to one religious practice over the other. His statement would, in effect, mean that all religious practices (as distinguished from other secular practices) are, subject to the restrictions, to be accorded the protection provided under the Constitution. The Court seems to have interpreted the statement as "...religiously essential" and not "essentially religious" and thereby has come to a conclusion distinct from what was intended.

Moreover, religion can be understood to be the best mechanism for regulating social behavior and for effecting social change. No religious practice can be given protection that is contrary to social order and welfare. In any circumstance, no religious practice can ever be termed to be essential if the same is against morals, public welfare, public order; because religion can be understood to facilitate the good of mankind and not to stand in its way. In any case, religion must always give way to human development. Religion should not stunt the growth of man and must allow him all leverage to break free from its shackles, if any, for the betterment of his life. Religion should always act as a catalyst or a facilitator of progress and not its obstacle. This is what appears to be the true intention behind the right to religion under the Constitution. The framers provided for the protection of all religious practices provided they yielded to human betterment at requisite times. Therefore, the essential practices doctrine is a nullity for practices need not be classified into essential and non-essential. All practices would, anyway be protected under the right to religion, unless the same

came in conflict with the express restrictions – provided the restrictions are bona fide; in which case, the right to religion has to, in all circumstances, budge.

An analogy can be drawn with the rights conferred under Art. 19 of the Constitution, which provides for express restrictions. The rights conferred under Art. 19 are exercisable to the extent that they are not in the sphere of restrictions. The Courts have in no case provided for a doctrine or otherwise by which, although a case would fall under the restrictions under Art. 19, the fundamental right would be protected by claiming any act to be 'essential' or on other grounds. In other words, the court would give effect to the fundamental freedoms absolutely only as long as they are not restricted by the limitations and in no further fashion. When Art. 25 is subject to express limitation like Art. 19, notwithstanding an additional restriction of being subject to other fundamental rights, it would lead to constitutional impropriety to not mete out the same treatment to Art. 25.

Further, it is a settled principle of interpretation that no additional doctrines or rules are to be read when the express provisions are clear and unambiguous. When the provisions of Arts. 25 and 26 along with its restrictions are clear and would cause no conflict, there is absolutely no need to read into Arts. 25 and 26 additional provisions in the name of essentiality that were not contemplated for.

In *Saraswati Ammal's* case,[12] the question was whether a woman could set up a trust to provide for rituals to be performed in the burial place of her husband. This case provides a certain example in view of the above proposition. In this case, Justice Jagannadhadas exercised the right of the Court to decide whether a practice was a Hindu practice or not. He, however, did not proceed to decide the matter upon the question of essentiality or non-essentiality. Rather he preferred to scrutinize if the alleged practice was in fact, a Hindu practice. For this purpose, he made a reference to the Hindu scriptures. The Court, in this case, seemed to be in the mood that if a practice could be shown to have a true religious sanction, based on its scriptures, the Courts, irrespective whether the practice was essential or unessential, would indemnify the same. It is submitted, however, that the limitations provided under Arts. 25 and 26, if invoked, need to be given an overriding effect over these practices, without a distinction being made between essentiality and non-essentiality.

Conclusion

In conclusion, the courts now need to exercise only a two-pronged test to determine the extent of protection to be conferred – firstly, to determine if the alleged practice is, in fact religious and if it could be shown to have a valid religious existence based upon scriptures and other like sources; secondly, if a bona fide claim can be made out of any of the express restrictions provided in the Articles i.e., public order, health and morality, and if a valid claim of any other

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[12] *Saraswathi Ammal v. Rajagopal Ammal*, AIR 1953 SC 491.

fundamental right exists, and if the restrictions under Cl. 2 of Art. 25 can be satisfied.

The essential practices doctrine, belonging to an illegitimate origin, cannot be legitimized by subsequent reiteration by judgments. That the doctrine has already been stretched to confer unbridled powers is only an indicator of what is to come. The suitable option would be to discard this doctrine that has caused nothing but dubiety and uncertainness, and embark upon the path of deciding cases on the lines of the clear and unambiguous words of the Constitution.

■

Rights of Lyricists and Scriptwriters: Changing Contours

-Kabir Sagar Ghosh,[*] Yojit Pareek[#]

The law in India with regards to the rights of lyricists and scriptwriters has often been surrounded by turmoil. Constant tussles between artists and producers are a norm in the Indian entertainment industry, with disputes arising out of a multitude of issues, such as future rights in copyright or structure of royalty-sharing agreements. The past decade, particularly the last couple of years, has seen interesting developments in copyright law, especially the law governing the rights of lyricists and scriptwriters. The year 2012 in particular has seen our Parliament bring about revolutionary changes to Indian copyright law despite stiff opposition from powerful music labels and film production houses.[1]

Contemporary copyright law, as we understand it, protects rights of authors i.e. the 'creators' of intellectual property (such as literary, musical, artistic works, cinematographic films and sound recordings etc.). However, with the development of technology, it is now possible to create new avenues and forms of intellectual property, which are often altered from the original forms. A movie is a classic example of how a bundle of copyrights is brought together in order to achieve a single result. Thus, when it comes to ownership rights in a song or script used in a movie, legal and ethical waters tend to get murky. Although there are some basic copyright laws in place, establishing the ownership of any creative work can often be fraught with peril.

In the following paragraphs a systematic approach to the evolution and recognition of lyricist rights has been adopted by way of a comparative study of the law pre and post the 2012 amendment to the Copyright Act.[2]

Rights of Lyricists: Pre-Amendment Position

Across the world, the rights of lyricists and scriptwriters have been regulated either through contracts[3], or statutes.[4] In India, before the enactment of the Copyright (Amendment) Act 2012, this relationship has largely been one of a contractual nature, the terms of which are decided solely between parties to the contract.

[*]V B.S.L, LL.B; [#]III B.S.L.

[1]Shawn Fernandes, "Amendment to Indian Copyright Act Passed in Parliament", *available at:* http://rollingstoneindia.com/amendment-to-indian-copyright-act-passed-in-parliament (last visited on March 15, 2015).

[2]The Copyright (Amendment) Act, 2012 (Act 27 of 2012).

[3]Paul Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox* (Stanford University Press, California, 2003).

[4]Jean-Luc Piotraut, "An Authors' Rights-Based Copyright Law: The Fairness And Morality of French and American Law Compared" 24 *Cardozo Arts & Entertainment Law Journal* 549, 555 (2006).

S. 13(1)(a) and s. 17(a) of the Copyright Act provide protection to *"original literary, dramatic, musical and artistic works*[5]*"* and state that the "author" shall be the first owner of copyright.[6] However prior to the amendment, s. 17(b) & (c) of the Act, as interpreted by the Supreme Court in *Indian Performing Right Society* v. *Eastern India Motion Pictures Association,*[7] stated that all music or lyrics created for the purpose of a cinematograph film would be deemed to be owned by the producer of the film, unless there was a contract to the contrary.

Hence, it was possible for composers and lyricists to retain their copyrights by entering into contracts stating the same.[8] Some composers and artists such as A.R. Rahman and Lata Mangeshkar appear to have entered into such contracts to retain a share in the royalties earned by the producers due to their standing in the industry.[9] However, a vast majority of Indian scriptwriters and composers do not enjoy the same bargaining power as Rahman or Lata Mangeshkar.[10] Given the lack of any individual or collective bargaining power, members of the artist community have been forced to sign one sided contracts through which they unconditionally assign all rights in their copyrighted works to the producers for eternity. This aspect of exploitation of authors has also been recognised and mentioned in the report of the Parliamentary Standing Committee[11] which stated as follows:

> *"The Committee also takes note of the fact that independent rights of authors of literary and musical works in cinematograph films are being wrongfully exploited by the producers and music companies by virtue of Supreme Court judgment in Indian Performing Rights Society v. Eastern India Motion Pictures Association which held that the film producer is the first owner of the copyright and authors and music composers do not have separate rights."*

The second issue arising from the current situation is about contracts which force authors to licence away their rights for future technologies. The earlier law permitted authors to assign all rights in their work to the producer, unconditionally and forever. Thus, by virtue of contract, the author was paid a certain consideration for the rights to a work of which the producer became the absolute owner. This ownership encompassed not only present modes of

[5]The Copyright Act, 1957, s. 13(1)(a).
[6]The Copyright Act, 1957, s. 17(a).
[7]1977 SCR (3) 206
[8]*Prashant Reddy T.*, "The Background Score to the Copyright (Amendment) Act, 2012" 5 *NUJS L. REV.* 469 (2012).
[9]Bharathi S. Pradhan, "The Big Royalty Showdown", *available at:* http://www.telegraphindia.com/1100228/jsp/7days/story_12160826.jsp (last visited on March 15, 2015).
[10]Sangeetha Kandavel, "Music Directors Slam Labels for "stealing royalty", Signing fake agreements", *available at:* http://articles.economictimes.indiatimes.com/2013-07-17/news/40635208_1_gv-prakash-sony-music-music-labels (last visited on March 15, 2015).
[11] Standing Committee, Report on the Copyright (Amendment) Bill, 2010 (November, 2010).

exploitation, but all future modes of exploitation not anticipated at the time of the agreement. This aspect gained importance with the advent of mobiles and ringtones which provided a whole new market for the music industry. Given that there are almost 700 million subscribers in India for cellular phones, even a small percentage of subscribers downloading ringtones would open up substantial sources of revenue.[12]

The issue of mobile ringtones of works composed before the invention of ring-tones was a subject of significant conflict. A recent example is when the producers of the super-hit film *Sholay* sued both, the assignee-music label and a telecom company, on the grounds that the original licensing agreement transferring music rights to the music label in the late seventies did not extend to ringtones, since the technology was not even invented in the seventies.[13]

Post-Amendment Position

The core purpose of the amendments to the Act is to remedy the weak bargaining power of authors. With the enactment of the Copyright (Amendment) Act, 2012, there has been an attempt to remedy this by shifting the relationship of the producers with the artists from acontractual one to a statutory one. The three most significant amendments made are regarding: (a) prohibiting contracts which force authors to licence away their rights for even future technologies;[14] (b) making royalty sharing in copyright contracts mandatory even after the copyright is licensed away; and (c) mode of assignment. These aspects are discussed below:

Prohibition of Contracts for Future Possible Means of Exploitation: S. 18(1) permits the owner of a copyright in any work or prospective owner of a future work to assign such copyright.[15] The first proviso to this sub-s. clarifies that in the case of future work, assignment will come into force only when the work comes into existence.[16] To this the amendment has inserted another proviso stating:

> *"Provided further that no such assignment shall be applied to any medium or mode of exploitation of the work which did not exist or was not in commercial use at the time when the assignment was made, unless the*

[12]"The Story of India's Telecom Revolution", *available at:* http://www.livemint.com/Opinion/biNfQImaeobXxOPV6pFxqI/The-story-of-Indias-telecom-revolution.html?facet=print (last visited on March 15, 2015).
[13]*Sholay Media & Entertainment Pvt. Ltd.* v. *Vodafone Essar Mobile Services Ltd.*, CS (OS) No.490/2011 before the High Court of Delhi.
[14]*Prashant Reddy T.*, The Background Score to the Copyright (Amendment) Act, 2012 5 *NUJS L. REV.* 469 (2012)
[15]The Copyright Act, 1957, s. 18 (1).
[16]Zakir Thomas, "Overview of Changes to the Indian Copyright Law", 17 *Journal of Intellectual Property Rights* 324-334 (2012).

assignment specifically referred to such medium or mode of exploitation of the work:"[17]

It is thus clear from the proviso that such assignment shall not apply to any mode of exploitation that did not exist or was not known at the time the assignment was made. If in the future some mode of exploitation of the work is developed through technological advancement, the rights to such exploitation shall remain with the author. The amendment thus aims to secure the rights of the author for future modes of exploitation which might not have arisen yet. In the eighties and early nineties the most common form of music and videos available was in the form of cassettes and video cassette recorders (VCRs). However, with the advent of the internet and the rapid development of technology, new models of exploitation of the works have come into existence. It is thus reassuring that the question as to the rights of such possible future use has been settled in order to avoid further legal hassles.

Mandatory Royalty Sharing Provisions: The last two provisos inserted under the amendment in s. 18(1) deal with mandatory royalty sharing.

> *"Provided also that the author of the literary or musical work included in a cinematograph film shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright for the utilization of such work in any form other than for the communication to the public of the work along with the cinematograph film in a cinema hall, except to the legal heirs of the authors or to a copyright society for collection and distribution and any agreement to contrary shall be void:*
>
> *Provided also that the author of the literary or musical work included in the sound recording but not forming part of any cinematograph film shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright for any utilization of such work except to the legal heirs of the authors or to a collecting society for collection and distribution and any assignment to the contrary shall be void"*[18]

These two provisos provide that the author shall not assign or waive the right to receive royalties, which are to be shared on an *equal basis* with the assignee of copyright in any form other than as a part of the film or sound recording.[19] The proviso also states that such contract, which deprives the author of his share of royalty, shall be void.[20] Thus, for example if the producer or the final owner of the copyright in the music and lyrics earned Rs. 3 crores in royalties by licensing

[17]The Copyright Act, 1957, s. 18 (1), proviso.

[18]*Prashant Reddy T.*, "The Background Score to the Copyright (Amendment) Act, 2012" 5 *NUJS L. REV.* 469 (2012).

[19]Zakir Thomas, "Overview of Changes to the Indian Copyright Law", 17 *Journal of Intellectual Property Rights* 324-334 (2012).

[20]*Prashant Reddy T.*, "The Background Score to the Copyright (Amendment) Act, 2012" 5 NUJS L. REV. 469 (2012).

the rights in the work to a third party, (say, a radio station or a TV channel) the composer and the lyricist would be entitled to share the Rs. 3 crore *equally* with the producer, i.e. this would mean the composer, the lyricist and the producer would be entitled to Rs. 1 crore each. Any contract contrary to this provision would be void.

In addition to the above, the amendments have also preserved the right of the author to a certain extent by inserting a new proviso under s. 17 of the Act. The proviso shields authors from clauses (b) and (c) of the s., 'with respect to works incorporated in cinematographic works.'[21]

Mode of Assignment: The Copyright (Amendment) Act, 2012 also seeks to determine the mode of assignment of copyright. S. 19 deals with the mode of assignment of copyright. Under s. 19, sub-s. 9 reads:

> *"No assignment of copyright in any work to make a cinematograph film shall affect the right of the author of the work to claim an equal share of royalties and consideration payable in case of utilization of the work in any form other than for the communication to the public of the work, along with the cinematograph film in a cinema hall."*[22]

Similarly, sub-s. 10 has also been inserted which applies to sound recordings under s. 19. Thus the work may be assigned, but the royalties cannot. The work may be used through other mediums, but there cannot be any assignment of royalty.[23]

In furtherance of the above provisions and to ensure their implementation, provisions pertaining to Copyright Societies have also been amended. S. 33 of the Act which deals with registration of copyright societies has been amended and a proviso has been added:[24]

> *"Provided further that the business of issuing or granting licence in respect of literary, dramatic, musical and artistic works incorporated in a cinematograph film or a sound recording shall be carried out only through a copyright society duly registered under this Act;"*

A further proviso inserted under s. 33(3A) states that the registration granted to a copyright society under sub-s. 3 shall be for a period of five years and may be renewed from time to time before the end of every five years;[25]

> *"Provided that the renewal of the registration of a copyright society shall be subject to the continued collective control of the copyright society being*

[21]The Copyright Act, 1957, s. 17, proviso.

[22]The Copyright Act, 1957, s. 19 (9).

[23]Rajya Sabha, Debates on the Copyright (Amendment) Bill, 2010.

[24]The Copyright Act, 1957, s. 33 (1), proviso.

[25]The Copyright Act, 1957, s. 33 (3A).

shared with the authors of works in their capacity as owners of copyright or of the right to receive royalty:"[26]

It has thus been ensured that as far as possible, the copyright societies which collect the royalties, share the same equally with the authors. Additional provisions have also been added under ss. 33 and 35 of the Act so as to ensure that there is a healthy representation of both the authors as well as the owners in the copyright societies[27] and the Central Government may, if it is satisfied that a copyright society is being managed in a manner detrimental to the interests of the authors and other owners of right, cancel the registration of such society after such inquiry as may be prescribed.[28]

Comparative Position Of Law

United States: As a matter of general practice, the writer and the composer grant a music publisher rights over the work. This is done either by transfer of the work, or in the form of a work-contract, in return for which the publisher provides a cash advance and specified on-going royalties. Clause (a) of s. 1006, read with Clause (c) of the copyright law[29] explicitly states that royalty payments deposited by any person engaged in the digital audio recording, analogue musical recordings or dissemination to the public by transmissions of the song recording or musical work pursuant to s. 1005, shall be distributed to interested copyright parties. Clause (b) of s. 1006 calls for the royalty payments to be divided between two groups, namely the Song Recordings Fund and the Musical Works Fund and explicitly states that one half of the 33.33 percent of the royalty payments allocated to the Musical Works Fund shall accrue to the writer who is the lyricist of the work and the other half shall remain with the music publisher.[30]

United Kingdom: Under the provisions of English Copyright Law, copyright subsists in original literary works [31] and vests in the person who creates it unless the same is made by a person in the course of his employment. Such a copyright, by virtue of s. 90 (of the English Act), is transmissible by assignment, by testamentary disposition or by operation of law. In cases where an agreement concerning the production of a film is entered into between the author and a producer, there is a presumption of transfer of any rental right in relation to the film by virtue of inclusion of a copy of the author's work in the film.[32] However, the right to royalty for rental continues and the same cannot be assigned by the author except to a collecting society. Such a right is only transmissible by testamentary disposition or by the operation of law.

[26]The Copyright Act, 1957, s. 33 (3A), proviso.
[27]The Copyright Act, 1957, s. 35 (1) to (4).
[28]The Copyright Act, 1957, s. 33 (4) & (5).
[29]Copyright Act, 1976 (17 USC 1006).
[30]*Ibid.*, s. 201 (d).
[31]Copyright, Designs and Patents Act, 1988, U.K, s. 1 (1) (a).
[32]*Ibid.*, s. 93A.

Thus, in both UK and US, royalties accruing by exploitation of a copyrighted work in a film are the legitimate right of the composer or song-writer. However there are differences in the manner in which they are distributed to the author.

France: The French Copyright law also provides adequate safeguards to an author at the time of assignment of copyright. Such assignments need to be in writing and it is mandatory for the agreement to state the copyrights assigned as well as their intended use.[33] Most importantly, royalties of the author must be in proportion to the revenue arising out of the exploitation of the copyright so assigned.[34]

Germany: German law, on the other hand does not contain a specific provision to this effect. It differs from most countries of continental Europe in that it follows a 'monist' approach to author's rights.[35] Under this approach, the author's economic and moral rights are considered to be so thoroughly intertwined that the economic aspect of the right cannot be dissociated from the personality aspect of the right.[36] German copyright laws allow authors to licence the *right to use the work* in exchange for royalties[37] and also have statutory provisions which entitle authors to receive 'adequate remuneration'.[38] Under German law, if the author feels that he has not received adequate remuneration, he can claim the same before a court of law, which shall then make an adequate determination to that effect.[39] Further, German Copyright law also has a 'bestseller provision' which permits the author to claim a share in the profit in the event that his work generates profits much higher than expected.[40] A further safeguard in German Copyright law also safeguards authors' rights to royalty arising out of profits from forms of exploitation which were not contemplated or contracted upon at the time of assignment.[41]

Conclusion

The need for strong pro-lyricists legislation has been long due in the Indian copyright law regime. The exclusive and independent right of lyricists to royalty has been recognised across the world[42] and this makes the Copyright

[33]Directorate-General of the European Commission's Internal Market, "Study On The Conditions Applicable To Contracts Relating To Intellectual Property In The European Union", *Institute for Information Law* 63 (May, 2002).
[34]"Code de la propriété intellectuelle", Article L.132-25, *available at:* http://www.celog.fr/cpi/lv1_tt3.htm (last visited on March 15, 2015).
[35]Stef van Gompel, "Formalities in Copyright Law: An Analysis of Their History, Rationales and Possible Future" *Kluwer Law International* 284 (2011).
[36]Schricker G, Verlagsrecht Kommentar, VERLAG C H BECK MÜNCHEN, 2001, p. 553.
[37]Dorothee Thum, *Copyright Throughout the World* chap. 16 6:29 (a) (Silke Von Lewinski, 2011)
[38]*Ibid.*, chap 16 16:32 (a).
[39]*Ibid.*
[40]*Ibid.*, chap 16-16:32 (b).
[41]*Ibid.*, chap 16-16:32 (c).
[42]*ABKCO Music Inc.* v. *Stellar Records Inc.*, 96 F.3d 60, 64(2nd Cir 1996).

(Amendment) Act, 2012 a welcome and a much required law for the effective exercise of rights by scriptwriters, lyricists and composers over producers, production houses and music labels. However, there are serious doubts regarding the actual implementation of the amended provisions, more so in the light of certain baffling judgements[43] which have failed to recognise the rights of lyricists in the light of the amended provisions. However the final outcome of the Copyright (Amendment) Act, 2012 largely depends on the extent to which the community of scriptwriters and lyricists are able to enforce their rights before the judiciary and in particular, the Copyright Board.[44] It is also safe to assume that the amendments are sure to change the prevalent business practices in the entertainment industry with an underlying concern for authors' interests. There are also welcome reforms to the administration of copyright societies which give the amendments an overall reformist outlook.

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[43] *IPRS* v. *Aditya Pandey & CRI*, FAO (OS) No. 423-424/2011 before the High Court of Delhi, decided on 8 May, 2012.

[44] *Prashant Reddy T.*, "The Background Score to the Copyright (Amendment) Act, 2012" 5 *NUJS L. REV.* 469 (2012).

Ushering in the Group of Companies Doctrine in India

*-Poornima Balasubramanian**

Arbitration is regarded as a matter of consent, and no one can be forced into it unless agreed. Consent is the cornerstone of any arbitration process since submission of disputes to arbitration presupposes the existence of a valid consent-based agreement between the parties

The definitions of an 'arbitration agreement' in the UNCITRAL Model Law[1] and the New York Convention[2] require that parties shall willingly submit their disputes to arbitration, and that an arbitration agreement in writing signed by all parties involved is the best evidence of such consent. However, there are exceptions to the general rule that only parties to an arbitration agreement can submit and resolve their disputes by arbitration.

In international arbitration, situations may arise where non-signatories to an arbitration agreement are bound by them, whether they benefit from them or not. Over the years, a number of theories have developed that support the proposition that arbitration agreements shall also bind non-signatories such as incorporation by reference, assumption, agency, piercing the veil, *alter ego*, estoppel, guarantees, group of companies and third party beneficiaries.[3]

This article specifically deals with the 'Group of Companies' doctrine, its origin, acceptance in different jurisdictions and most importantly, its acceptance by the Indian judiciary. It analyses the grounds laid down for application of this doctrine in the international sphere as well as by the Indian Judiciary.

Origin of the Doctrine

The 'Group of Companies' doctrine suggests that an arbitration agreement entered into by a company, being one within a group of companies, can bind its non-signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to so bind them. This theory has been applied in a number of arbitrations so as to justify a tribunal exercising jurisdiction over a party who is not a signatory to the contract containing the arbitration agreement.[4] The most significant factor to be established for extending the scope of arbitration to non-signatory parties is the 'intention of the parties'.

*V B.S.L, LL.B.

[1] UNCITRAL Model law on International Commercial Arbitration,1985, art. 7 (1), option 1.

[2] Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958.

[3] *Thomson-CSF, SA* v. *American Arbitration Association* 64 F. 3d 773 (2^{nd} Cir.) 1995.

[4] *Chloro Controls (India) Private Limited* v. *Severn Trent Water Purification Ltd* (2013) 1 SCC 641.

In an early case, *Dow Chemicals v. Isover Saint Gobain,*[5] the ICC Tribunal introduced and applied the 'Group of Companies' doctrine. In this case, the ICC Tribunal was called upon to decide whether the arbitration clause in a contract between a member of a group of companies and a third party was binding upon other companies of that group who had not signed the contract, but had participated in the formation, performance and termination of the contract.

In this case, Dow Chemical (Venezuela) entered into a contract in 1965 with Isover Saint Gobain for the distribution of thermal isolation equipment in France. This contract was later on assigned to Dow Chemical A.G., a subsidiary of Dow Chemical Company. In 1968, a second distribution agreement was made between by Dow Chemical (Europe), a subsidiary of Dow Chemical A.G., and Isover Saint Gobain for the distribution of the same products in France. Although the two agreements were signed only by the parties to the respective contracts, both provided that deliveries could be made by Dow Chemical (France) or any other subsidiary of the Dow Chemical Company. Each of the agreements had an ICC arbitration clause. Subsequently, Isover Saint Gobain brought several actions before the French courts against companies of the Dow Chemical Group relating to difficulties in connection with one of the products called "Roofmate". In answer to these actions, the companies of the Dow Chemical Group invoked the ICC arbitration clause and initiated arbitration proceedings against Isover Saint Gobain. The question that arose before the Tribunal was whether it was competent to render an award in an arbitration proceeding between Dow Chemical (France) and Dow Chemical Company, both non-signatories to the two distribution agreements, and Isover Saint Gobain.

After analysing the clauses in the contracts, the Tribunal came to the conclusion that Dow Chemical France, although a non-signatory, played an important role in the termination of both agreements and must therefore be regarded as a party to each of the contracts and consequently to the arbitration clauses. With respect to Dow Chemical Company, the Tribunal opined that the company by reason of its ownership of the trademarks under which the products were marketed and its absolute control over its subsidiaries was directly involved or could have become involved in the conclusion, performance, or termination of the distribution agreements, and must therefore be regarded as a party to the contract.

The Tribunal further held that irrespective of the fact that each member of the group of companies has a distinct juridical identity, the group of companies as a whole constituted *une realité économique unique*, that is, one and the same economic reality. Thus, in conclusion, the ICC Tribunal held that it could exercise jurisdiction not only over the signatories to the contracts, namely, Dow Chemical A.G. and Dow Chemical Europe, but also on non-signatories, namely, Dow Chemical France and Dow Chemical Company, by virtue of them being actively involved in the performance and termination of both agreements.

[5] ICC Award No. 4131, YCA 1984, at 131 et seq.

Group of Companies Doctrine in Foreign National Courts

France, being the founder of this doctrine, its national courts have inevitably adopted the same in several cases. In *KIS France SA v. SA Societe Generale,*[6] two parties entered into an agreement on behalf of their respective subsidiaries, and the non-signatories were held as bound by the arbitral award by virtue of application of the Group of Companies doctrine. In *Kornas Marma v. Durand Auzias,*[7] the Paris Court of Appeal held:

> *"an arbitration clause contained in an international contract has its own validity and effectiveness which require its extension to all parties directly involved in the performance of the contract and in the disputes which may arise therefrom, once it has been established that their situation and their activities enable to presume that they were aware of the existence and the scope of the arbitration clause, even if they were not signatories of the contract containing it."*

Thus, it is clear that there has been absolute recognition of this doctrine in the jurisdiction of France.

English courts do not consider the Group of Companies doctrine as part of English law.The Petersons Case is illustrative. In *Peterson Farms Inc. v. C&M Farming Limted,*[8] Peterson Farms Inc. (referred as Peterson) a company registered under Arkansas Law, made an application to the High Court under s. 67 of the English Arbitration Act, 1996 to challenge the findings of an ICC Arbitration Award in favour of C&M Farming Limited (referred as C & M), a company incorporated in India. The arbitration involved a claim for damages by C&M against Peterson arising out of the sale of live poultry by Peterson under a Sales Right Agreement that had an arbitration clause which reads as follows:

> *"All disputes [. . .] which may arise between the parties out of or in relation to or in connection with this agreement or for the breach thereof should be finally settled by the International Chamber of Commerce, UK."*

Subsequently, C&M realised that the poultry sold by Peterson was infected with avian virus, resulting in severe losses for the entire C&M group. This led to ICC arbitration proceedings by C&M claiming damages for losses suffered by itself, as well as losses suffered by the other C&M group entities.

The Arbitral Tribunal applied the 'Group of Companies' doctrine and held that since Peterson was aware of the fact that it was contracting with and would have obligations to all the C&M Group companies, and that such an agreement with C&M would have an impact on the operations of all the C&M Group, it had intended to enter into and perform under a contract with all the entities forming

[6] *KIS France SA* v. *SA Societe Generale* (France) Courd'Appel, Paris, 31 October 1989.

[7] Tang, Edward Ho Ming, "Methods to extend the scope of an Arbitration Agreement to Third Party Non-signatories", *City University of Hong Kong Institutional Repository* 8 (2009).

[8] *Peterson Farms Inc.* v. *C&M Farming Ltd* [2002] EWHC121 (Comm).

the C&M Group. Thus, looking into the mutual intention of all the parties to the Agreement, the Tribunal awarded damages to the entire C&M group entities for the alleged losses, far exceeding the losses suffered by C&M itself.

However, in appeal to the High Court, Justice Langley found the Tribunal's approach "seriously flawed in law". He was of the opinion that since the law applicable to the agreement as determined from the common intent of the parties was English law and Arkansas Law, it was necessary for the Court to determine whether the 'Group of Companies' was a part of such law. In this regard, he held: "*English law treats the issue of jurisdiction as one subject to the chosen proper law of the Agreement and that excludes the doctrine which forms no part of English law.*"

Group of Companies Doctrine in Indian Courts

In India, in *Chloro Controls (India) Private Limited v Severn Trent Water Purification Ltd*,[9] the Supreme Court was required to decide whether a non-signatory to the arbitration agreement would be bound by the arbitration clause contained in one of the many agreements entered into the parties. In this case, Capital Control Co. Inc., an American company, entered into a Joint Venture Agreement with Chloro Controls (India) Private Ltd., the Appellant company run by the Kocha Capital Controls group and Mr. M.B. Kocha, for constituting a joint venture company namely, Capital Control (India) Pvt. Ltd. The purpose of the joint venture company was to design, manufacture, import, export and market gas and electro-chlorination equipments. In order to achieve this object, the aprties made a network of several interlinked agreements: the Principal Agreement, i.e., the Shareholders Agreement and several other ancillary agreements such as the Financial and Technical Know-how License Agreement, the International Distributor Agreement, Exports Sales Agreement, Trademark Registered User License Agreement, Managing Director's Agreement and the Supplementary Collaboration Agreement. All parties to the Principal Agreement had not signed the ancillary agreements. The dispute resolution clause in each of these agreements was different. For example, the Principal Agreement contained an ICC arbitration clause, whereas the International Distributor Agreement contained a litigation clause in favour of the courts of Pennsylvania, USA.

When disputes arose under the Joint Venture Agreement, Chloro Controls filed a derivative suit in the Bombay High Court against the Capital Controls Group, the joint venture company and its directors. It also impleaded two other parties who were not signatories to the Principal Agreement. The Respondents then filed an application under s. 8 of the Arbitration and Conciliation Act, 1996, praying to refer the suit to an arbitral tribunal in accordance with the arbitration agreement contained in the Principal Agreement.

[9] *Chloro Controls (India) Private Limited* v. *Severn Trent Water Purification Ltd* (2013) 1 SCC 641.

The issue before the Supreme Court was when there are several contracts entered into between different parties and each of the contracts do not contain identical arbitration clauses, can the disputes arising out of these agreements be referred to arbitration and can non-signatories be bound by such arbitration agreements. Alternate sentence: The issue before the Supreme Court was whether, when there were several contracts subsisting between different parties which did not have identical arbitration clauses, disputes arising out of those agrrements could be referred to arbitration, and whether non-signatories were bound by such arbitration agreements.

The Appellant contended that the expression "parties" used in s. 45 of the 1996 Act would necessarily mean all the parties and not some or any one of them. If the expression "parties" is not construed to mean all parties to the action and the arbitration agreement, it will result in multiplicity of proceedings, frustration of the intended one-stop remedy and may cause further mischief. Therefore, inclusion of parties who were not parties to the arbitration agreement and against whom there arises no cause of action is "bad" in law. Further, only some matters and some parties in a suit cannot be referred to arbitration leaving the rest to be decided by another forum. Thus, bifurcation of a cause of action and of parties is not permissible under the provisions of the 1996 Act as held by the Supreme Court itself in the case of *Sukanya Holdings Private Limited v. Jayesh H. Pandya.*[10]Such bifurcation if allowed may result in conflicting decisions, resulting into a colossal waste of time.

The respondent looked into the nature of the multiple agreements entered into between the different parties. Since all agreements were executed between the parties were in furtherance to the Shareholders Agreement and were intended to achieve only one object, i.e., constitution and carrying on of business of chlorination products by the joint venture company in India, and since the performance of the ancillary agreements were solely dependent upon the Principal Agreement, the arbitration clause contained in the Principal Agreement shall be binding on all the parties. With regards to the *Sukanya Holdings* Case, it was contended that this judgment was applicable only to cases falling under Part I of the 1996 Act, and not to those exclusively covered under Part II of the 1996 Act. Further, a bare analysis of s. 45 of the 1996 Act clearly suggests that the applicant seeking reference under this section can either be a party to the arbitration agreement or a person claiming through or under such party.

The Supreme Court looked into various factors, one of them being the Group of Companies doctrine, and held that the arbitration clause contained in the Principal Agreement bound all the signatories as well as the non-signatories, and that the matter must therefore be referred to arbitration.

The Supreme Court while deciding the matter adopted a liberal approach towards interpreting S 45 of the 1996 Act and was of the opinion that the expression "any

[10] (2003) 5 SCC 531.

person" clearly refers to the legislative intent of enlarging the scope of the words beyond the "parties" who were signatories to the arbitration agreement. Thus, it is clear that the applicant must either be a party or should claim through or under the signatory party. Once this link is established, then the Court shall refer them to arbitration. While interpreting this section, the Supreme Court also acknowledged the fact that there is a greater obligation upon the judicial authority to make such reference under the 1996 Act in comparison with the 1940 Act.

Further, the Supreme Court applied the "Group of Companies Doctrine", and held that if mutual intention was shown,non-signatory affiliates and sister and parent concerns were indeed bound.. Another aspect examined by the court was the fact that the transaction in question is one of composite nature, where performance of mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements and therefore, the fact that a party was a non-signatory to one or other agreement may not be of much significance.

The Group of Companies doctrine was applied in *Rakesh S. Kathotia v Milton Global Ltd.*[11] In this case, an appeal was directed against an order made by the learned Single Judge of the Bombay High Court in an Arbitration Petition dismissing an application under s. 9 of the Arbitration and Conciliation Act, 1992, on the primary ground that there was an absence of 'identity' of the parties to the arbitration agreement.

In this case, a Joint Venture Agreement was entered into by the Subhkam Group and the Vaghani Group, consituting a joint venture company Milton Global Limited with each group holding 49.99% and 50.01% of the total issued and paid up capital respectively. The management of this company was vested in the hands of the Board of Directors jointly appointed by these two groups. The main dispute arose between the parties under the Joint Venture Agreement that the Vaghani Group set up a competitive company called the Hamilton Housewares Private Limited and siphoned the business of the Joint Venture Company, thereby breaching the terms of the said agreement. The Appellant filed a petition in the Bombay High Court under s. 9 of the Arbitration and Conciliation Act, 1996 in order to seek interim measures in nature of restraining Hamilton Housewares from manufacturing and marketing the 'goods' as defined under the JV Agreement.

However, the Single Judge did not dwell on merits of the case and dismissed the petition on the ground that the parties to the arbitration agreement were not adequately identified and that the interim measures claimed were against entities who were not parties to the arbitration agreement. The judge applied the principle

[11] *Rakesh S. Kathotia v. Milton Global Ltd*, Appeal No. 366 of 2014 in Arbitration Petition No. 66 of 2014 before the High Court of Bombay.

laid down in *Sukanya Holdings Private Limited v. Jayesh H. Pandya*[12] that bifurcation of multiple causes of action or parties was not permissible. He dismissed the application for interim measures under s. 9 of the Act.

In appeal, the Division Bench of the Bombay High Court analysed the definitions of the expressions, namely the Subhkam Group and the Vaghani Group as provided for in the JV Agreement and held that these definitions must be construed in a broad manner and must include not merely the individuals or entities, but also their immediate relatives and entities controlled by them or their immediate relatives, whether directly or indirectly. Does this case really contribute anything not covered by the earlier judgement?

Conclusion

Although Indian courts have referred to and given credence to the Group of Companies doctrine, none of the above mentioned cases have decided a case solely on the application of this doctrine. The Supreme Court took into consideration other elements such as the nature of the agreements entered into by the parties, intention of the parties to jointly resolve their disputes, etc. Moreover, the three judge Bench of the Supreme Court deciding the *Chloro Controls* case did not overrule the *Sukanya Holdings* case. Indian courts are thus hesitant to apply the Group of Companies doctrine as the only determinant for binding non-signatories to an arbitration agreement.

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[12] *Sukanya Holdings Private Limited* v. *Jayesh H. Pandya* (2003) 5 SCC 531.

Anti-Competitive Agreements under the Competition Act, 2002

-*Vidushi Gupta*[*]

Most nations in the world have adopted laws relating to competition to protect their free economies. The primary economic rationale of competition law is efficiency creation that results in price reduction and thereby enhances consumer welfare. The present competition law can be viewed as a system of rules which are designed to allow markets to function properly, and to prohibit the abuses of market power. The underlying intent of the statute is for businesses to compete on merit, and not with the aid of anti-competitive agreements. The advantages of perfect competition are three fold, namely, allocation efficiency, production efficiency and dynamic efficiency.

Before going into a detailed study of provisions of the law, it becomes important to understand the meaning of the term 'competition'. 'Competition' may be defined as the process by which economic agents, acting independently in a market, limit each other's ability to control the conditions prevailing in that market. Typically, competition law has three major elements: Anti-competitive Agreements, Abuse of Dominance, and Combination Regulations

Anti-competitive agreements are those agreements which restrict competition, or are said to adversely affect competition in the market. In the competition laws of various nations including India, anti-competitive agreements are declared to be void. s. 3 of the Competition Act, 2002 (the Act), which expressly deals with anti-competitive agreements, is the focus area of this paper. The Act includes the Appreciable Adverse Effect on Competition (AAEC) test as the extensive legal standard for evaluating anti-competitive behavior.

Competition law in India prohibits all agreements which restrict freedom of trade and cause harm to consumers by limiting production and distribution of goods and services. The Act envisions the constitution of a Commission to deal with the provisions of ss. 3 and 4 read with s. 19. Competition Commission of India (General) Regulations, 2009 has been framed by the Commission under s. 64. Also the Act is extra-territorial and enjoys jurisdiction over acts done outside India that may affect a market within India.[1] The act came into effect in parts. The provisions dealing with anti-competitive agreements and abuse of dominance came into effect from the year 2009, while the combination provisions were notified in 2011.

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*IV B.S.L, LL.B.

[1] The Competition Act, 2002, s. 32.

Development of Competition Law

In India, freedom to trade or practice any occupation is a fundamental right.[2] As per the Constitution, only the Parliament has the power to impose reasonable restrictions on this right. Constitution also provides for curbing concentration of economic power, so that the common good is not adversely affected.

Identifying the association between trade and economic growth, the Government of India, in the early 90s took steps to unite the nation's economy with that of the world. India enacted its first anti-competitive legislation in 1969, known as the Monopolies and Restrictive Trade Practices Act (MRTP Act). However, post 1991, finding the domain of MRTP Act unsatisfactory for fostering competition in the market and eradicating anti-competitive practices, the Government appointed a committee to put forward a modern competition law. Pursuantly in October 1999, a high level committee on Competition Policy and Law (the Raghavan Committee) was constituted. After exhaustive discussions on committee reports, the Parliament enacted the Competition Act, 2002[3], which revoked the existing MRTP Act, 1969.

The object of the Act as given in the Preamble is to provide for the establishment of a Commission, keeping in view the economic development of the country and to provide a law relating to competition that will ensure healthycompetition among enterprises.

Anti-Competitive Agreements

The Act under s. 2(b), gives an inclusive definition of the term 'Agreement'. It defines an 'agreement' to include any arrangement, understanding or action in concert whether or not formal or in writing or is intended to be enforceable by legal proceedings. The Act defines 'agreement' in broader terms as compared with the definition given under the Indian Contract Act. An agreement need not be formal or in writing or justifiable in a Court of law to be dealt with under competition law. Thus, even an informal agreement to fix prices will be hit by provisions of competition law. The concurrence of parties and the consensus amongst them can, therefore, be gathered from their common motive and concerted conduct.[4]

According to Organization for Economic Cooperation and Development (OECD)[5], anti-competitive practices refer to a varied range of business practices

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[2] The Constitution of India, art 19 (1) (g).

[3] The Competition Act, 2002 as amended by the Competition (Amendment) Act, 2007 and the Competition (Amendment) Act, 2009.

[4] *NeerajMalhotra* v. *Deustche Post Bank Home Finance Ltd*, No. 5/2009 decided by CCI on 2 December, 2010, at para 69 of dissenting opinion of P. N. Parashar.

[5] Organisation for Economic Co-operation and Development, "Glossary of Industrial Organization on Economics and Competition Law" 12 *available at:* http://www.oecd.org /regreform /sectors/2376087.pdf (last visited on March 15, 2015)

that a firm or group of firms may engage in order to restrict inter-firm competition to maintain their relative market position and profits.

The MRTP Act mainly concentrated on restricting monopolies in the market. But with the dawn of competition laws, the focus shifted from curbing monopolies to encouraging competition. A contrast of s. 33 of the MRTP Act, 1969 with the corresponding provisions as treasured in s. 3 of the Competition Act, 2002 would show that the anti-competitive agreements particularized in sub-s. 3 of the Act are somewhat parallel to restrictive trade practices specified in s. 33(1) of the MRTP Act, 1969.

The provisions relating to anti-competitive agreements were notified on 20th May, 2009. The range of s. 3 is extremely wide as it not only includes the express agreements, but also entraps implied agreements. The term 'anti-competitive agreements' has as such not been defined by the Act, however s. 3 prescribes certain practices which will be anti-competitive. Competition law as it exists globally places anti-competitive agreements in two categories namely- horizontal agreements and vertical agreements. Horizontal agreements are generally accorded more weight as compared to the vertical agreements. The Act does not use the terms horizontal and vertical agreements, but the language used suggests that agreements referred to in s. 3(3) are horizontal while the one referred to in s. 3(4) are vertical agreements.

As per s. 3(3), once if it is established that an agreement under s. 3(3) exists, it will be presumed that such an agreement has an AAEC. S. 19(3) specifies the following factors that the CCI must have due regard to while determining whether an agreement has AAEC under s. 3:

a. Creation of barriers to new entrants in the market;
b. Driving existing competitors out of the market;
c. Foreclosure of competition by hindering entry into the market;
d. Accrual of benefits to consumer;
e. Improvements in production or distribution of goods or provision of services;
f. Promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

S. 19(3) seems to be a mandatory provision and the Commission is bound to apply the abovementioned factors for arriving at AAEC.

General Prohibition under S. 3(1)

S. 3(1) acts as a general prohibition on any agreement relating to the production, supply, distribution, storage, acquisition or control of goods or provision of services by enterprises, which causes or is likely to cause an AAECwithin India.[6]

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[6]T. Ramappa, *Competition Law in India: Policy, Issues and Developments* 57 (Oxford University Press, 2nd edn, 2009).

On a close reading of s. 3(1), it is clear that if an agreement does not have any AAEC within India, then it will remain out of the purview of this section.

A broader understanding of s. 3(1) suggests that it can be invoked independently.[7] Anti-competitive agreements that do not fall under sub-ss. 3 and 4, are covered by sub-s. 1. Since sub-s. 1 does not enumerates a list of anti-competitive practices that would restrict competition, the question will have to be determined each time on the facts of the particular case by applying rule of reason.

The key essentials for application of clause 1 are agreements between enterprises and its AAEC within India. Also by virtue of s. 32, if an agreement that has been entered into outside India, the Competition Commission of India has powers to investigate into such an arrangement if it has an AAEC in India.

S. 3(2) declares all the agreements in contravention of clause 1 to be void.

Horizontal Agreements under S. 3(3)

The Act has not used the term 'Horizontal Agreement' but the phrasing of clause 3 clearly submits that the provisions thereunder relates to horizontal agreements. Horizontal agreements are agreements between competitors in market wherein producers, at a same level in production chain, enter into an agreement. To attract the provisions of law, the products must be substitutes and the parties to the agreement must be all producers or wholesalers or retailers.

The most pernicious form of such agreements is cartels. When competitors agree to fix prices or share consumers or do both, the agreements are 'cartel' formation agreements. The objective of a cartel is to raise price above competitive levels, resulting in loss to consumers an economy. Cartelization results in higher prices, poor quality and less choice in goods and services for consumers. Horizontal agreements including cartels are presumed to have appreciable adverse effect on competition and thus, are anti-competitive and void. The Supreme Court in *Sodhi Transport Co. v State of UP*[8] as interpreted 'shall be presumed' as a presumption and indicative of on whom burden of proof lies.

Once existence of the prohibited agreement, practice or decision enumerated under s. 3(3) is established, there is no further need to show an AAEC because in such a case, a rebuttable presumption of law is drawn that such conduct has an AAEC and is therefore anti-competitive.[9]

S. 3(3) mentions the following types of horizontal agreements, having an AAEC in India:

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[7]*Consumer Online Foundation* v. *Tata Sky Ltd*, No. 2/2009 decided by the CCI on 24 March, 2011.
[8]AIR 1986 SC 1099.
[9]*In Re Bengal Chemist and Druggist Association*, Suo moto Case No. 2 of 2012, decided by CCI on 11 March 2014.

Agreements that directly or indirectly determine purchase or sale prices: Agreements that directly or indirectly define purchase or sale prices may be referred to as price- fixing agreements. The term 'price fixing' has been applied to actions by competitors having a direct effect on price and includes a number of agreements such as agreements on price, on credit terms, etc..[10] Price fixing agreements adversely affect competition as they prevent prices from being determined by the competitive forces in the market.

In *Bengal Chemist and Druggist Association* case,[11] it was held by the CCI that the activities of trade association, inter alia, to direct its members to sell drugs only at their MRP is a palpable anti-competitive conduct which cannot be justified on the ground that most of its members would be ruined if competitive forces are allowed to operate in the market.

Limits or controls production, supply, technical development or provision of services: Agreements that limit or control production, supply, technical development, or provision of services are also considered to be anti-competitive. An agreement limiting production, for instance, may lead to a rise in prices of the concerned product. The limiting and controlling production and supply in the market in a concerted manner through common understanding by the members of trade associations was held to be in contravention of the provisions of s. 3(3)(b) of the Act.[12]

Shares the market or source of production or provision of service: Agreements that share market or source of production or provision of service are referred to as market sharing agreements. These agreements may be either to share markets geographically or in respect of consumers or categories of consumers. Such agreements reduce the choice available to customers in a competitive market and thus are anti-competitive.

Directly or indirectly results in bid rigging or collusive bidding: As per the explanation to s. 3(3), bid rigging means any agreement between the enterprises or persons engaged in identical production or trading of goods or provision of services, which has the effect of reducing competition for bids or unfavorably influencing the process for bidding. An example of bid rigging may be where a group of firms agree to file bids in such a way that one of them wins the bid. Thus such agreements hinder competition as the winner of the bid to be submitted is already decided by the parties.

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[10] World Bank and OECD, "A Framework for the Design and Implementation of Competition Law and Policy" 22 *available at*: http://www-wds.worldbank.org /external /default /WDSContentServer /WDSP /IB/2000/02 /24/000094946_99030406234268 /Rendered/PDF /multi_page.pdf (last visited on March 15, 2015).

[11] *In Re Bengal Chemist and Druggist Association*, Suo moto Case No. 2 of 2012, decided by CCI on 11 March 2014.

[12] *In re Indian Sugar Mills Association case*, Case No. 38 of 2011 decided by CCI on 31 October 2014.

Vertical Agreements under S. 3(4)

Vertical Agreements, as per clause 4, are agreements between persons at different levels of the production chain such as an agreement between a manufacturer and a distributor. Vertical agreements relating to activities referred under s. 3(4) have to be analyzed in accordance with the rules of reason analysis under Competition Act and thus are anti-competitive only if they cause or are likely to cause an AAEC in India, unlike horizontal agreements which are presumed to be anti-competitive.

S. 3(4) deals with the following specific vertical agreements:

Tie-in arrangements: Explanation (a) defines 'tie-in arrangement' as any agreement requiring a purchaser of goods (tying product), as a condition of such purchase, to purchase some other goods (tied product). This practice is often resorted to by the enterprises to use the popularity of the tying product to promote the sale of less popular products.

For instance, Microsoft faced allegations in the US and the EU that it used its dominance on personal computer operating systems to push the sale of its other products, specially its internet browsers and media player systems.[13]

Exclusive supply agreements: Explanation (b) defines 'exclusive supply agreement' as any agreement restricting the purchaser in the course of his trade, from acquiring or otherwise dealing in any goods other than those of the seller or any other person. Such agreements may be anti-competitive if they create barriers to entry by not allowing other manufacturers to enter the market.

Exclusive distribution agreements: Explanation (c) defines 'exclusive distribution agreement' as any agreement that restricts or withholds the output or supply of any goods or allocates any area or market for the disposal or sale of the goods.

For instance, withholding supply of goods may lead to a rise in the price of goods which would be harsh to consumers.

Refusal to deal: Explanation (d) defines 'refusal to deal' as any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought. Refusal to deal is anti-competitive, if a dominant firm to enforce anti-competitive practices such as selective distribution agreement, practices it. According to OECD, 'refusal to deal may arise if the purchaser is at a bad credit risk, does not carry sufficient inventory or provide adequate advertising, display, etc.'.

In *Tutikoran Alkali Chemicals* case,[14] the agreement amongst the manufactures to supply goods only to large buyers and to ignore the small buyers was held to be anti-competitive on account of it being refusal to deal.

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[13] *Unites States* v. *Microsoft Corporation* 258 F. 3d (DC Cir, 2001).

Resale price maintenance: Explanation (e) defines 'resale price maintenance' as any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller, unless it is clearly stated that prices lower than those prices may be charged. Accordingly, the final price charged to consumers is not set by the distributor but levied by the producer.

Rules governing Anti-competitive Agreements

The process of classifying an agreement and then judging it as anti-competitive has always been a grey area in competition law cases. Consequently the courts have invented the following two approaches to evaluate violations of anti-competitive agreements:

The Rule Of Reason: This is a legal tactic where efforts are taken to evaluate the pro-competition features of the restrictive business practice against its anti-competitive effect in order to decide whether or not the practice should be barred. This approach assesses the reasons of a certain action taken and the economic benefits and costs of that action before coming to a decision. It mandates an elaborate enquiry into the reasonableness of the challenged business practice. The effect on competition is found on the facts of a particular case.[15] Initial burden is on the plaintiff to show that the alleged combination or agreement produced adverse, anti-competitive effects within relevant product and geographic markets.[16] If the plaintiff meets this initial burden, the burden then shifts to the defendant to show that the challenged business practice promotes a sufficiently pro-competitive objective.

The Per se Rule: '*Per se*' is a Latin phrase which means, 'in itself'. In legal terms, it means that the courts will regard a certain action to always be detrimental. The US courts have explained the basis of per se rule in a number of cases. In *Northern Pacific Railway Company v. United States*,[17] the Supreme Court observed that there are certain agreements which because of their malicious effects on competition and lack of any compensatory virtue are confusedly presumed to be unreasonable and therefore illegal without any elaborate analysis as to the exact harm they have caused. However, in India, there is no concept of the*per se* rule under competition law.

Exceptions under S. 3(5)

S. 3(5) provides for the following exceptions to the provisions of s. 3:

Protection of certain IPRs: The Act recognizes the value of Intellectual Property Rights as a reason for originality and economic growth. S. 3(5)(i) provides

[14](1995) 16 CLA 196 (MRTPC).
[15]*Mahindra and Mahindra* v. *UOI* (1979) 2 SCC 529.
[16]*Tunis Bros. Co.* v. *Ford Motor Co.* 952 F.2d 715, 722 (3d Cir, 1991).
[17]356 U.S 1 (1958) .

exemption from the application of s. 3 to the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of the rights which have been or may be conferred upon him under the Copyright Act 1957, the Patents Act 1970, the Trade and Merchandise Marks Act 1958 or the Trade Marks Act 1999, the Geographical Indications of Goods (Registration and Protection) Act 1999, the Designs Act 2000, and the Semi- conductor Integrated Circuits Layout Design Act, 2000.

Agreements related to exports: S. 3(5)(ii) exempts the right of any person to export goods from India up to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

Joint Ventures: Proviso to s. 3(3) relieves any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, acquisition or control of goods or provision of services. The term 'joint venture' has not been defined under the Act. But in general terms it means an association of firms or individuals formed to undertake a specific business project.

Impact of Anti-Competitive Agreements

Competition in market enhances consumer welfare and leads to effective allocation of resources. Government and statutory regulations are well placed to take steps to rectify adverse effects of monopolization of markets by few. Small and medium sized businesses are very important for economic growth as the very existence of such businesses indicates the promotion of competition in markets.

It is believed that developing economies are more susceptible to anti-competitive agreements. There are many reasons for such belief, namely, high "natural entry barriers" due to inadequate business infrastructure; asymmetries of information in both product and credit markets; and a greater proportion of local non-tradable markets. Thus it becomes vital to protect consumers in developing countries against cartels, monopoly abuses and creation of new monopolies.

Anti-competitive agreements are prohibited keeping in view the interest of consumers and the promotion a healthy competition in the market,. These prohibitions act as a check on enterprises or persons who may indulge in anti-competitive agreements or have tendency to manipulate the market.

Powers of Competition Commission of India (CCI)

The Competition Act provides for the constitution of a Commission to adjudicate on the matters invoking the provisions of s. 3 and 4.

S. 19(1) provides that the CCI may enquire into any alleged contravention of s. 3(1) suomotu or on receipt of any information from any consumer or trade association upon payment of the fees and the manner prescribed. The CCI may also act if a reference is made to it by the Central Government or a State Government or any statutory authority. The CCI proceeds with enquiry only when there exists a prima facie case and then it instructs the Director General to cause an investigation in the matter. In cases where after enquiry the CCI finds that the agreement is anti-competitive and have an AAEC, it may pass all or any of the following orders:

a. Directs the parties to discontinue and not to re-enter in such agreement;
b. Impose such penalty as it may deem fit which shall not be more than 10% of the average of the turnover for the last three preceding financial years upon each of the party;
c. In case of a cartel, each producer, seller, distributor, trader or service provider included in that cartel, can be imposed a penalty up to three times its profit for each year of the continuance of such agreement or 10% of its turnover for each year, whichever is higher;
d. Directs to modify the agreement in the manner as specified in the order of the CCI;
e. Pass any such order as it may deem fit.

Also, s. 48 provides that where a contravention of the provisions of the Act has been committed by a company and it is proved that the contravention has taken place with the consent of or is attributable to any neglect on the part any director, manager or any other officer of the company, then such officer in default shall also be liable to be proceeded against and punished accordingly. The same was applied in *Bengal Chemist and Druggist Association* case,[18] where it was held that since BCDA was a company registered under s. 25 of the Companies Act, 1956, the office bearers and executive members of the BCDA were also guilty of the contravention and were liable for punishment.

The Act also prescribes for imprisonment for a term which may extend upto 3 years, in the event of a person not complying with the directions issued by the CCI within the specified time period.

Conclusion

Competition allocates productive resources to their best use and causes firms to develop new products, services and technologies, giving consumers greater selection of products. The positive effect of competition in enhancing efficiencies, incentivizing innovation and increasing consumer welfare is well known.

The Act aims to prevent practices by parties that have AAEC in India. This will ensure freedom of trade and would protect the interest of all the parties. But such an aim would not be achieved unless the parties doing business follow the principles laid down in the Act. It is important for the parties to keep a check on retaining any anti-competitive element in the agreements between them. Enterprises should be active and diligent to identify the existing anti-competitive

[18] *In Re Bengal Chemist and Druggist Association*, Suo moto Case No. 2 of 2012, decided by CCI on 11 March 2014.

elements from their current agreements. The employees can be trained to understand the repercussions of anti-competitive agreements and how to avoid that.

It is also believed that the Commission's proactive role in revealing anti-competitive agreements would go a long way in encouraging fair market practice and deepen competition. The orders of commission reflect the strength of the system as well as confidence to stem out the anti-competitive practice from markets in India.

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Disproving Legitimacy: Revisiting the Law under s. 112 of the Indian Evidence Act

*-Senjuti Mallick**

"Law must be stable, yet it cannot stand still."

- Roscoe Pound

The underlying principle upon which s. 112 of the Indian Evidence Act, 1872 is built, is that when a particular relationship, such as marriage, is shown to exist, then its continuance must *prima facie* be presumed.[1] This section contemplates the fact that, when any person is born during the continuance of a valid marriage between his mother and any man, it shall be conclusive proof that he is the legitimate son of that man unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten. It reproduces the rule of English law that it is undesirable to inquire into paternity of child when mother is a married woman and husband had access to her. Additionally, adultery on her part will not justify finding of illegitimacy if husband had access.[2] Thus, it is clear that s.112 is based on presumption of public morality and public policy which was seconded by the Supreme Court in its decision in *Sham Lal v. Sanjeev Kumar.*[3]

According to the legislative intent and spirit behind s.112, once the existence of a valid marriage is proved, there is a strong presumption about the legitimacy of children born from that wedlock. The presumption can only be rebutted by strong, clear, satisfying and conclusive evidence of non-access. The presumption cannot be displaced by mere balance of probabilities or any circumstances creating doubt.[4]

This article is an attempt to address the fundamental issue regarding the admissibility of DNA tests in cases where s. 112 of the Indian Evidence Act is attracted. With the growth in science and technology, the use of many scientific data such as DNA profiling, fingerprint analysis, odontology, serology, handwriting analysis etc have arisen sharply. They are used in the Courts of law to prove or disprove facts. It would therefore be incorrect to not accept the DNA test results in Court, in isolated cases, especially when the test is accepted and applied in many other legal systems. The article considers the challenges posed to the admissibility of DNA test result and offers solution to the problem that DNA test result is facing. The spirit of the article is essentially to give a comprehensive and adequate analysis of the subject matter. As we know, tendering and taking of evidence is unavoidable in court proceedings, therefore,

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*IV B.S.L, LL.B.

1 *Bhima* v. *Dhulappa*, (1904) 7 Bom LR 95.

2 *Sham Lal* v. *Sanjeev Kumar*, (2009) 12 SCC 454.

3 *Ibid.*

4 Ratanlal & Dhirajlal, *The Indian Evidence Act* 551 (LexisNexis, 25th Edition, 2013).

this article is set to focus on the result of DNA fingerprinting in paternity disputes, its importance and effect in our judicial system

Presumption as to legitimacy of child

Proof of a valid marriage is the *sine qua non* for invoking the presumption of legitimacy. The presumption under this section arises only in matters relating to the child of a married couple. The presumption is also applied where actual marriage has not been proved, but marriage is presumed from a long cohabitation.[5] The burden of proving marriage and birth lies on the person claiming legitimacy..[6]

Shall be conclusive evidence

S.112 attracts the 'shall presumption' in the nature of 'conclusive proof'; it stands quite differently in comparison to other provisions with the same presumption. A 'shall' presumption can be rebutted by any fact or facts. But in s. 112, the presumption can be rebutted only by proof of the fact mentioned within it. It states that in order to dispel the conclusive presumption, it must be shown that no chance of sexual intercourse existed at any point in time so near to the birth of the child as to render paternity impossible. This stance was upheld by the Supreme Court in the case of *Perumal Nadar* v. *Ponnuswami Nadar*,[7] where it was observed that if a valid marriage is accepted between P and A, and the plaintiff was born during its subsistence, a conclusive presumption would arise that he was the son of P, unless it was established that at the time when the plaintiff was conceived, P had no access to A.

S.112 contemplates the rebuttable presumption of legitimacy of a child born during the subsistence of a valid marriage between his mother and any man or within 280 days after its dissolution, the mother remaining unmarried. The section enables the party disputing the parentage of the child to rebut the presumption of legitimacy by proving non-access of that man to his mother at any time when the child in question could have been begotten. When once the party disputing the paternity fails to prove such non-access, the aforesaid rebuttable presumption becomes irrebuttable presumption of law, and would conclusively prove the legitimacy of the child. Since this presumption is essential to ensure the social fabric of the society, it cannot be rebutted lightly.

"Access", "Non-access" - Meaning of

The terms "access" and "non-access" mean no more than existence or non-existence of opportunities for marital intercourse.[8] It need not be proved at any particular moment but during the whole span of time when the conception

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5 *S.P.S Balasubramanayam* v. *Surattayan*, AIR 1952 SC 756.

6 *Thakur Amjal* v. *Nawab Ali Khan*, (1906) 9 Bom LR 264 (PC).

7 *Perumal Nadar* v. *Ponnuswami Nadar* AIR 1971 SC 2352.

8 *Venkateswarlu* v. *Venkatanarayan* AIR 1954 SC 176.

according to ordinary course of nature could have possibly taken place.[9] This means, the requisite of the section is not to show "non-access" exactly "at the time when the child is begotten", but is still more arduous. The opposing party will have to show non-access "at any time" when the child "could have been begotten". It is only then that the presumption shall stand displaced. Stephen, the pioneer of Evidence law, also held that the presumption under this section could be rebutted only on one ground,

> ".......*unless it can be shown, either that his mother and her husband had no access to each other at any time when he could have been begotten, regard being had both date of birth and physical condition of the husband, or that the circumstances of their access (if any) were such as to render it highly probable that sexual intercourse took place between them when it occurred".*

The legislature had therefore chosen to permit rebuttal of the said presumption solely on the account of "non-access" during the period the child in question could have been begotten.

DNA Evidence

DNA fingerprinting profiles are exclusive to every human being. When adequate number of DNA patterns in two unrelated individuals are compared, the chances of complete similarity are 1 in 30 billion, i.e. half the population of the world.[10] In DNA based paternity testing, DNA samples from the putative father, the child and the mother are taken and a DNA profile is generated. Then the child's bands and the mother's bands are matched, leaving only the bands inherited by the child from the biological father and the bands produced by the putative father's DNA. These are called the obligatory bands. If interpretation yields a child's band not found in the putative father's bands, then he is excluded. If not, a Probability of Paternity maybe calculated depending on the gene frequency of the specific probe. The more bands assigned to the biological father that matches those of the putative father, the lower the probability that anyone else could be the child's father. The probability of a random man having the same band pattern as the biological father is often so small that if the putative father's bands match there is almost no chance that he is not the child's father.[11] Therefore, the high level of exclusion possible with DNA tests can successfully recognize an alleged father as the natal father. The result of DNA test is thus marked by strong accuracy.

However, the Courts in India have a forked opinion when it comes to application of this test in purview of S.112. For instance, if husband and wife were living

[9] *Tushar Roy* v. *Shukla Roy*, 1993 Cri LJ 1659 (Cal).
[10] Dr. Jaising P. Modi, *A Textbook of Medical Jurisprudence and Toxicology* 276 (LexisNexis, 24th edn., 2011).
[11] Abhijeet Sharma, *Guide to DNA Tests in Paternity Determination & Criminal Investigation: A Lawyer's Handbook* 212 (LexisNexis India, 1st edn., 2007).

together during the time of conception but the DNA test revealed that the child wasn't born to the husband, the conclusiveness in law would remain irrebuttable.[12] On the other hand, it has also been observed that instead of relying upon the presumption under s.112, Evidence Act alone, paternity can be decided by adopting new scientific technology with reference to the DNA test.[13] This case further observed that a person who refused to undergo DNA test would be disentitled to dispute the paternity. But the Supreme Court favoured the DNA test in *Patangi Balaram Venkata Ganeshi* v. *State of Andhra Pradesh*[14], where it held that DNA test was proof of paternity, but any order directing the same of the child, without hearing mother and child, would violate the principles of natural justice.

Agreed that the concepts of Deoxyribonucleic acid (DNA) and Ribonucleic acid (RNA) were far from the catchment area of the legislature at the time s. 112 came into force but with change in time, there ought to be change in law. It is sad to note that while India accepted and adopted the laws made by the British with great agility, they lacked the promptness to incorporate the changes in the same law with change in circumstances. Even the Supreme Court made the following observations in *Kathi Kalu Oghad* v. *State of Bombay* thereby strengthening the credibility of DNA finger printing:

a. Court must be convinced that DNA analysis is capable of producing accurate and credible results so that it can be safely relied upon.
b. Court must be convinced that the tests were conducted in well-equipped laboratories by experienced persons.

Moreover, DNA is like an architectural blueprint regarding the characters of the organism. They are sequences which are extremely individualistic in nature. Even Dhanu and Sivarasan, the assassins of late Prime Minister Rajiv Gandhi, were identified by DNA profiles. This was again in use when the Supreme Court affirmed the order of the Delhi High Court that N.D. Tiwari shall undergo DNA test in a paternity case keeping its findings in secrecy unless required. Further, using this technique, the Federal Bureau of Investigations formally concluded on 17 August 1998, the day of Mr. Clinton's testimony before the grand jury, with regard to the Monica Lewinsky sexual harassment scandal, that the stain on the dress contained Mr. Clinton's DNA, saying that there was only a one in 7.87 trillion chance that it was not.[15]

In the light of massive and rapid scientific advancements, this technology should be used to provide valuable assistance to the Courts. The development of science in this field brings high level accuracy and provides for unswerving evidence of

[12] *Sangitha* v. *State of Kerala*, 2002 (3) KLT 762 (Ker).
[13] *Bommi* v. *Munirathinam*, 2004 (3) MLJ 537 (Mad).
[14] (2009) 14 SCC 607 (618); *Sunil Trambake* v. *Leelavati Trambake* 2006 AIHC 1668 (1670) Bom.
[15] Dr. Jaising P. Modi, *A Textbook of Medical Jurisprudence and Toxicology* 277 (LexisNexis, 24th edn., 2011).

biological and true parentage. Even the Law Commission in its 185th Report has proposed certain amendments to s.112 which are yet to be given teeth. The Commission recommended three more exceptions, namely, (i) medical tests to prove impotency, (ii) blood tests, (iii) DNA test. This showcases an undercurrent of change passing through the intention of law makers. Thus, DNA testing ought to be allowed in evidence to invalidate the statutory presumption of legitimacy. It is also believed that the precision of this test makes it so strong that no other evidence of corroboration maybe required, in the event of proper medical examination, correct sampling of body fluids and quality forensic examination.[16]

English law versus Indian law

In the English law, this presumption was not conclusive, but could be displaced only by a strong preponderance of evidence, and not by a mere balance of probabilities.[17] After the decision of the House of Lords in *Blyth v. Blyth*[18], the position became uncertain, because the decision indicated that the presumption might be rebutted on the balance of probabilities. The position is now governed by S.26 of the Family Law Reforms Act, 1969, which provides that the presumption is rebuttable on the balance of probabilities in civil proceedings.[19] Thus, in *S. v. S.*[20], Lord Reid said,

> *"That means that the presumption of legitimacy now merely determines the burden of proof. Once evidence has been led, it must be used without using the presumption as a make-weight in the scale of legitimacy. So even weak evidence against legitimacy must prevail if there is no other evidence to counterbalance it. The presumption will only come in at that stage in the rare case of the evidence being so evenly balanced that the Court is unable to reach a decision on it."*

While the English law changed and gave scope to other rebuttals in 1969, Indian law has not adapted to these changes.

Conclusion

S. 112, as already observed, uses the words, "conclusive proof" and refers to "non-access" as the sole exception. Therefore, as the language of the section stands, no other evidence except non-access is permissiblefor proving that a person is not the father. This negates the possibility of a scientific result, such as DNA, being used as a rebuttal. This gives rise to a clash between the rule of law

[16] Sarkar, *Law of Evidence* 2065 (LexisNexis India, 17th Edition, 2010).
[17] *Preston Jones* v. *Preston Jones* (1951) AC 391.
[18] (1966) AC 643 (HL).
[19] Family Law Reforms Act, 1969, s. 26: *"Any presumption of law as to the legitimacy or illegitimacy of any person may in any civil proceedings be rebutted by evidence which shows that it is more probable than not that the person is illegitimate or legitimate as the case maybe and it shall not be necessary to prove that fact beyond reasonable doubt in order to rebut the presumption."*
[20] *Phipson on Evidence*, 70 (71) (Sweet and Maxwell, 15th Edition, 1999).

on one hand and results based on scientific reasoning on the other. It is strange that scientific evidence cannot be given for deciding issues of legitimacy, a time when the Indian Evidence Act gives weightage to forensic sciences, such as, serology, odontology, DNA tests, fingerprint analysis, handwriting analysis etc. while deciding criminal cases. In India, as well as world over, DNA samples are used to (a) prove guilt by matching DNA profiles and linking suspect to crime scene, (b) exonerate innocent persons, (c) paternity testing, (d) identification, (e) studying the evolution of human population, (f) studying inherited disorders.[21] Thus, amidst such wide acceptance being granted to the science of DNA, existence of s. 112 as it is, is enormously contradictory.

DNA profiling is an unambiguous branch of science with high accuracy it is relied on by the Courts of law for the same reason. It must therefore be used in evidence to the fullest for achieving the most desired results in cases of maternity/paternity disputes to. It is necessary to amend s. 112 of the Indian Evidence Act, 1872.

It is suggested that the prevailing section must be amended to include a mandatory presumption in place of the conclusive presumption. This will enable the defendants to disprove the presumption by giving evidence of other facts. However, these rebuttals must include results which are highly accurate and scientifically sound. In other words, it is suggested that, DNA testing or blood group tests or impotency or any of such like, should be admitted as strong piece of evidence to rebut the statutory presumption arising under s. 112 of the Indian Evidence Act.

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[21] Law Commission of India, 69th Report on the Review of the Indian Evidence Act, 1872 (1977).

Manual Scavenging – A Socio-Legal Paradox

-Krishna Muralidharan and Harish Adwani[*]

The Indian caste system is one of the oldest forms of stratification in human history. It discriminates people solely on the basis of their birth, thereby creating an impenetrable hierarchy in society. Although many other forms of discrimination exist, the caste system is the only one providing a pre-determined and unchangeable fate to a person's systematic ranking and unequal access to valuable resources like wealth, income, power and prestige.

The bottom-most rung of the caste system was occupied by the Dalits or Untouchables. They were placed at the bottom of the caste hierarchy and were bound to do those jobs which people from other castes refused to do. Dalits were considered to be impure and untouchable due to the stigmas attached to them by virtue of their occupational position in the caste system. They received outrageously inhuman treatment at the behest of those occupying a higher position in the arbitrary caste hierarchy.

Since comparison and discrimination are inherent human traits, the Dalits fragmented and created nearly 900 Dalit "sub-castes"[1] among themselves. The object of this paper is to exhaustively deal with the current issues in relation to those Dalits who occupy the lowest rung not only among all the castes, but also among the Dalits themselves: the Manual Scavengers.

A 'manual scavenger' means a person engaged or employed by an individual, a local authority, an agency or a contractor, for manually cleaning, carrying, disposing of, or otherwise handling in any manner, human excreta in an insanitary latrine or in an open drain or pit into which the human excreta from the insanitary latrines is disposed of, or on a railway track or in such other spaces or premises, as the Central Government or a State Government may notify, before the excreta fully decomposes in such manner as may be prescribed, and the expression 'manual scavenging' shall be construed accordingly.[2]

After humanity lost the ethical idea of civilization, as witnessed in the Indus Valley civilization, subsequent Indian societies did not have the intellect of building efficient sanitation mechanisms. Waste generated by humans and livestock was required to be physically disposed of, often by carrying it in a basket on the head, to the outskirts of the human settlements. This proved to be a regressive step, as society detached itself from technological advancements and imposed this patently undesirable occupation upon the manual scavengers.

In the context of inhumane practices among Indians, Sati was the most outright violation of human rights, where the widow was to ascend her husband's pyre

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*III B.S.L, LL.B.

[1]Prem Kumar Shinde (ed.), *Dalits and Human Rights* 54 (Isha Books, Delhi, 2005).

[2]The Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, s. 2 (1) (g).

and force her way to death. Manual scavenging on the other hand, does not offer such a quick release from life; it forces practitioners to engage in the practice throughout their miserable lives with no sign of respite. Manual scavenging is an alarming social issue as its prevalence, even in today's world, renders human society powerless and ineffective. At the same time, its prevalence is a gross violation of fundamental and statutory rights.

Fundamental rights are basic civil rights of freedom which are guaranteed to every Indian citizen. Originating from human rights jurisprudence and principles of natural justice, these inalienable rights are mandatorily required to be protected by every agent of the State. Their peculiarity lies in the fact that they are interlinked and a violation of one would inevitably lead to the violation of another. In particular, manual scavenging violates the fundamental right to –

a. Equality before law,[3]
b. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth,[4]
c. Abolition of untouchability,[5]
d. Freedom to practise any profession, or to carry on any occupation, trade or business,[6]
e. Protection of life and personal liberty[7] and
f. Prohibition of traffic in human beings and forced labour.[8]

The unforgiving clutches of the caste system prevent manual scavengers from enforcing their rights as they are not left in a position to approach judicial fora. Lack of education, awareness and opportunity only adds to their plight. Broadly speaking, the practice affects three dimensions of the Indian society: caste and community, health and welfare and rehabilitation.

Caste and Community

The caste system has been a characteristic feature of the Indian society since its inception. It was only post-independence that untouchability was officially recognized as a social evil and illegalized by the Indian State. Despite its identification, the caste system continues to thrive and dictate the lives of people; creating a wide gap between persons belonging to different castes. All other caste-affected societies have witnessed a decline in the significance of the institution of caste over time as a result of the evolution of the society or due to other factors such as the Industrial Revolution in Britain or the Communist Revolution in Russia. But as the industrial revolution never hit India with full strength, and because the rise of communism in India was localised, this

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[3]The Constitution of India, art. 14.

[4]*Ibid.*, art. 15.

[5]*Ibid.*, art. 17.

[6]*Ibid.*, art. 19 (1) (g).

[7]*Ibid.*, art. 21.

[8]*Ibid.*, art. 23.

necessary step of evolution from the primitive society never took place in India as compared to the other caste-affected societies of the world. Consequently, a person's social standing was measured by the position he occupied in the caste hierarchy, depending on his occupation and wealth. This reveals a patent nexus between the deteriorating caste system and the abominable practice of manual scavenging and becomes an obvious tool of discrimination against its victims.

The practice of manual scavenging leads to the entrapment of these people in a vicious circle of untouchability, social exclusion and forced labour, each stage being in violation of a fundamental right. Due to the notion of impurity attached to the practice of manual scavenging, coupled with the age-old caste prejudices, manual scavengers are constant victims of untouchability despite it being expressly prohibited by the Constitution.[9] As a result of the said untouchability, they are socially excluded and denied opportunity, education, and access to health, wealth and social standing. Due to this social exclusion, they are denied their right under Art. 19(1)(g) to follow the vocation of their choice which entails forced labour as mentioned under Art. 23.

Health

According to the 2011 census, 7,50,000 Indian families are still forced into manual scavenging. Among these scavengers, almost 92% are women and girls. Therefore such women and children are exposed to various diseases as a result of working under extremely unfavourable and unhygienic conditions; thereby posing an impending risk to their health.

Art. 21, in its extended interpretation, gives each citizen the right to health[10] along with the right to life and personal liberty. In *Paschim Banga Khet Mazdoor Samity* v. *State of West Bengal*,[11] the Supreme Court widened the scope of Art. 21, and held that in a welfare state, the primary duty of the government is to secure the welfare of the people. Providing adequate medical facilities for the people is an obligation undertaken by the government in a welfare state. The government discharges this obligation by providing medical care to the persons seeking to avail of those facilities.

However, what is most appalling is the utter refusal to offer any governmental or private medical assistance to manual scavengers; simply because they are viewed as untouchables by the caste conscious society. It therefore causes a gross violation of their right to equality *inter alia* in terms of access to medical treatment.

[9] *Ibid.*, art 17.
[10] *State of Punjab* v. *Mahinder Singh Chawla*, AIR 1997 SC 1225.
[11] (1996) 4 SCC 37.

Welfare and Rehabilitation

India has adopted the ideal of welfare state and is fully committed to its realization.[12] In order to ensure the welfare of the people, the State has a duty to preserve the right of a person to live with human dignity,[13] which is a corollary of the right to life provided under Art. 21. Manual scavengers across the country continue to suffer from various socio-economic difficulties.

When the manual scavengers are compelled to do such demeaning work, they do it at the cost of their dignity and other basic rights. Violation of the rights of these individuals has a resounding impact on the functioning of the State and society as they are among those belonging to the lowest strata of society who require the most attention on the part of the State pursuant to its duties towards them.

To ensure quality of life of manual scavengers, a mere provision of protection of their rights is not sufficient. The State should accumulate substantial amount of resources towards pulling them out of this practice by *inter alia* providing them with alternative and dignified forms of employment. This will eventually obliterate their lingering dependence upon the society for livelihood and recognition; instead they will receive both from the State. Concurrently, the State should also focus on uprooting the very idea of manual scavenging by establishing technologically advanced sanitation mechanisms in every village across this country. Only in this way can the State ensure that the life of this downtrodden section of the society is uplifted from its deplorable condition.

Relevant Legislations in India

In an intensely caste-affected society, the Parliament deserves to be commended for taking cognizance of the malpractices faced by manual scavengers. The post-independence era witnessed the enactment of several laws in order to curb and eradicate the stigmas attached to caste and caste-based discrimination. Laws such as The Untouchability (Offences) Act, 1955, The Protection of Civil Rights Act, 1955, The Bonded Labour System (Abolition) Act, 1976, The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 supported the views and sentiments of these groups, but failed to exclusively deal with the subject of manual scavenging.

The Parliament has undertaken to concentrate on this pressing issue in the past 20 years and has enacted two statutes: the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993 and the Prohibition of Employment of Manual Scavengers and their Rehabilitation Act, 2013. These enactments directly target the predicament of manual scavenging and hence, need

[12] William A. Robson, "India as a Welfare State" 25 (2) The Political Quarterly 116 (1954).
[13] *Francis Coralie* v. *Administrator Union Territory of Delhi*, (1981) 1 SCC 608.

detailed scrutiny. A critical analysis of the two enactments needs to be made by comparing the important elements of the Act of 1993 and the Act of 2013.

Firstly, the Act of 1993 focuses on the sanitation and hygiene aspect of society, whereas transitionally, the Act of 2013 pushes the agenda and focuses on the dignity and value of life of a manual scavenger.

Secondly, the Act of 1993 only prohibits the construction and continuance of dry latrines, while the Act of 2013 encompasses sewage systems, railway tracks, septic tanks, etc.

Thirdly, the item under which the Act of 1993 falls is included in the State List of Schedule VII of the Constitution of India, whereby only the State can make laws on the subject. The Act of 2013 is passed under the Concurrent List wherein the Centre as well as the State can make laws on the subject. This expands the horizons of executing the law, and facilitates in deracinating the problem of manual scavenging.

Fourthly, the Act of 2013 extends the focal points of concern and addresses labour welfare, right to dignity, working conditions and rehabilitation as against the Act of 1993.

Fifthly, the Act of 2013 widens the scope by replacing the word 'dry' latrines with 'insanitary' latrines from the Act of 1993.

Sixthly, the Act of 1993 has been strengthened and a wider scope for higher penalties is created by the Act of 2013 by regarding manual scavenging to be a cognizable and non-bailable offence with imprisonment up to five years.

The Act of 2013, with all its advancements and alterations, in theory, prevails over the Act of 1993 and strengthens its legal skeleton. However, the enforcement of the Act of 2013 in the current situation portrays a different picture altogether. The new enactment has the following drawbacks which restrict the effective implementation of its promising structure:

The Act of 2013 fails to address the issues relating to women. Nearly 95% of the manual scavengers are Dalit women.[14] The Act has overlooked this fact and proved to be gender biased as far as rehabilitation[15] and availing of benefits under the various schemes to eradicate manual scavenging are concerned.

Both enactments have failed to identify the actuality that various Muslim communities like Haila, Bhishti, Mochi, Fakir, Sheik Mehtar, Kasai etc. have been exploited just as much as the Hindu Dalits by the practice of manual scavenging.

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[14] Human Rights Watch, Report on Cleaning Human Waste: "Manual Scavenging" Caste and Discrimination in India (August, 2014).

[15] 'Provisions for Rehabilitation', See Chapter IV, The Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013.

The Act of 2013 allow the Indian Railways (if they use safety gear and maintain toilets well) to decide when they want to issue the notification on implementation of the Act in the Indian Railways. The legislators have failed to appreciate that even though these people are provided with safety equipment, their rights remain violated. No person or body, governmental or otherwise, should be exempt from these legislations and any mechanical updating that may be required should be implemented.

Another glaring error pertains to the provision for the offences to be tried summarily. Offences under the Act of 2013 entail imprisonment up to five years; something that is contradictory to s. 260[16] of the Criminal Procedure Code, 1973.

It has been made the 'duty' of every local authority to use appropriate technological appliances for cleaning. However, no time period, funds or other directive has been given for such transition in methods of cleaning. There exist various self-defeating government programmes like the scholarship[17] for the children of families engaged in manual scavenging which require the parents to be employed as manual scavengers for at least 100 days in a year for the wards to avail the scholarship. This scholarship scheme provides a perverse incentive to Dalit households to continue in this occupation.

No legislation is perfect, but these drawbacks are rather fundamental and need to be addressed at once. The purpose of a statute is fulfilled only after the successful implementation of the prescribed rules. Serious corrections need to be made regarding the execution of these laws. The law making and law enforcement bodies should complement each other so as to safeguard the interests of these oppressed groups.

The year 2014 witnessed a ground-breaking Apex Court ruling in *Safai Karmachari Andolan* v. *Union of India.*[18] The Petitioners had filed a PIL under Art. 32 of the Constitution of India alleging violation of the fundamental rights guaranteed under Arts. 14, 17, 21 and 23. They prayed for complete eradication of Dry Latrines, declaration that the continuation of the practice of manual scavenging and the operation of Dry Latrines as violative of fundamental rights, and a direction to Central and State Governments to issue necessary directives for the strict implementation of the provisions of the Act and to file periodical Compliance Reports.

The Petitioners also claimed the violation of the provisions of various International Conventions such as the Universal Declaration of Human Rights (UDHR), Convention on Elimination of Racial Discrimination (CERD) and the

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[16] S. 260 (1) (c) (i) provides for offences to be tried summarily that are not punishable with death, imprisonment for life or imprisonment for a term exceeding two years.

[17] Pre-Matric Scholarships to the Children of those Engaged in "Unclean" Occupations", *available at*: http://socialjustice.nic.in/prematscd.php (last visited on March 15, 2015).

[18] 2014 (4) SCALE 165.

Convention for Elimination of all Forms of Discrimination Against Women (CEDAW).

The Court in its judgement directed all the State Governments and the Union Territories to fully implement the same and take appropriate action for non-implementation and to take action against the violators. It also guaranteed that the persons aggrieved would henceforth be permitted to approach the authorities concerned at the first instance and thereafter the High Court having jurisdiction.

International Conventions

The rights of manual scavengers have also been recognized on a global level in the international covenants and conventions. Part III of the International Covenant on Civil and Political Rights (ICCPR) purports that every human being has an inherent right to life which shall be protected by law.[19] It aims to safeguard the interest of the deprived by treating them with humanity and respecting their inherent right to dignity.[20] It also states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[21]

This covenant is of paramount importance as it treats all persons as equal before the law and entitles them, without any discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, to the equal protection of the law.[22]

The UDHR is also instrumental in preserving human rights. It affirms that everyone has the right to life, liberty and security of person.[23] It maintains that all are equal before the law and are entitled to, without any discrimination, equal protection of law[24] by way of an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law.[25] It ensures holistic protection of human rights where everyone has the right to a standard of living adequate for the health and well-being of himself and of his family.[26]

The CEDAW is often described as an *'international bill of rights for women'* as it is based on the principle of equality and an agenda to end the discrimination against women. This convention is of greater importance as nearly 95% of manual scavengers are Dalit women and recognition of their rights is vital for the total eradication of manual scavenging.

[19] International Covenant on Civil and Political Rights, art. 6.
[20] *Ibid.*, art. 10.
[21] *Ibid.*, art. 7.
[22] *Ibid.*, art. 26.
[23] Universal Declaration of Human Rights, art. 3.
[24] *Ibid.*, art. 7.
[25] *Ibid.*, art. 8.
[26] *Ibid.*, art. 25.

The International Covenant on Economic, Social and Cultural Rights is the pillar of human rights protection within the United Nations. The rights envisaged in the covenant aim to promote social progress, favourable working conditions and better standards of living. Incidentally, India has signed and ratified all these international conventions and covenants and owes a duty of allegiance towards the international society by observing the underlying principles of humanitarianism. The unabashed existence of manual scavenging is in blatant contravention of the spirit of these conventions and covenants and will invite severe criticism from its co-signatories unless it is cautiously addressed and redressed. Hence, it is evident that manual scavenging is not an issue that contravenes only the laws of India, but it also affects international human rights and is therefore a matter of global significance.

Conclusion

Despite there being multiple legislations expressly prohibiting the practice and there being a gross violation of various fundamental rights, the evil persists without any sign of abatement. Despite being looked down upon by educated professionals and progressive citizens it continues to thrive. Hence, manual scavenging is an entrenched socio-legal paradox.

It thrives on the prejudices in society and the loopholes in the legislations. It dictates the social lives of those performing this degrading and undignified labour. This can be best explained by Dr. B.R. Ambedkar's quote, "For in India a man is not scavenger because of his work. He is a scavenger because of his birth, irrespective of the question whether he does scavenging or not." It is the responsibility of every Indian citizen to bring an end to this barbaric tradition.

How can one remorselessly infringe another's rights? How can one separate them from mainstream society? How can one deny them equality, dignity and freedom? How can one discriminate on the basis of caste? These questions remain unanswered even today.

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Reportability of *Sub-judice* Matters in India

Senjuti Mallick[*]

Mere physical presence and biological existence is not the essence of a human life. Man must have a meaningful life touching on all facets of dignity; liberty being the most important element for attaining this. Thus, life and liberty are inseparably entwined. It is obvious that freedom of speech and expression, one of the most fascinating and important dimensions of liberty, is an indisputable human right. These ideas of freedom of speech and thought have been contemplated right from the Vedic period. The famous verse *samgacchadhvam samvadadhvam* etc., in the Rigveda, calls for people to come together and exchange views freely and harmoniously. The growth of dissenting schools of thoughts such as Jainism, Buddhism etc and their co-existence with the Vedic schools points towards a society which was tolerant to free thinking and intellectual freedom. Being reminded of Socrates who was accused of polluting the youth of Greece or of Galileo being incarcerated by the Church for going against the cosmological theories of the Bible, one realizes that such respect and acceptance for divergent views had been prevalent in the Indian society ever since the Vedic ages. This spearheaded the expansion of freedom of speech and expression from words of mouth to print media and electronic media.

In today's world various laws governing numerous lands include this aspect as one of its primary rights. The United Nations Charter has also recognized this basic fundamental right.[1] At the national front, Art. 19(1)(a) of the Indian Constitution guarantees to all the citizens right to freedom of speech and expression subject to reasonable restrictions in the interest of national security, friendly relations with foreign States, public order, decency, morality, contempt of court, defamation or incitement to offence. Though this provision does not explicitly talk about the freedom of speech and expression being extended to the media, media falls well within the purview of Art. 19. On this point, the Supreme Court has opined that even though a right may not be explicit, it may yet be implicit in the various clauses of Art. 19.[2]

Freedom to Media

Free press has always been at the heart of India's polity. Long before India attained independence, Pandit Jawaharlal Nehru, the first Prime Minister of independent India, while voicing his disapproval against the Press Act 1910, asserted, "I would rather have a completely free press with all the dangers involved in the wrong use of that freedom, than a suppressed or regulated press"[3] The Media is said to be the fourth estate after the Legislature, Executive and the

*IV B.S.L, LL.B.

[1]Universal Declaration of Human Rights, 1948, art. 19.

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

[3]K.M Joshy, "Press Freedom vs Blasphemy: An Indian Perspective" *available at:* http://www.ocrpl.org/?p=15 (last visited on March 15, 2015).

Judiciary. In the case of *Sakal Papers Ltd. v. Union of India*[4], the Supreme Court held that "freedom of speech and expression carries with it the right to publish and circulate one's ideas, opinions and views". This encompasses freedom of press to be a vital element in a democracy.

Of late, the media has been extremely proactive in reporting and commenting on matters, right from the very occurrence of the crime, investigations, inquiry, information with regards to the accused and motive behind such an act; very often this happens much before the actual investigation is completed, and the facts ascertained by the police. Probing into the private lives of individuals, even when uncalled for, has become synonymous with the functioning of media. Such acts contravene journalistic ethics by infringing upon the privacy and dignity of the person being commented upon. Arushi Talwar murder case, Gopal Kanda case, Priyadarshini Mattoo case and Jessica Lal murder case are stark examples which drew criticism against the media. The privilege of presumption of innocence of the accused gets blurred as the general public believes in the involvement of the person hauled up by the media.

However, it also needs to be noted that by and large, it is due to the continual vigilance of media reporting that the concerned criminals are prosecuted and penalized, particularly those who are economically or politically powerful and would otherwise have gone scot-free. The media thus plays a vital role in ensuring that justice is not only done but is seen to have been done as well. It acts as a watchdog to see that transparency in judicial system is not affected.

'Sub judice' Matters – Clash between Media and Judiciary

While it is justified to compliment the commendable role of media, it is also to be borne in mind that the truth regarding the over-enthusiasm and unethical practices that they engage should not be discarded. This aspect has remained a bone of contention between the judiciary and the media for a while now. While the judiciary perceives media coverage as meddling in administration of justice, the media invokes the fundamental right under Art. 19(1) in reporting or commenting about court cases. This heralds the debate on reasonableness of restrictions on reporting *sub-judice* matters. A Constitutional Bench set up for deciding this matter failed to frame guidelines after many months of debates, discussions and deliberations. Therewere the famous interim applications 4 and 5 in the *Sahara v. SEBI* case,[5] where the latter had disclosed the contents of the personal letter addressed to the counsel for SEBI while the matter was still *sub-judice*. It was prayed before the court to give appropriate directions with regards to reporting of matters which are *sub-judice*.

It is important to note the meaning of *sub-judice* at this stage. In Latin, it stands for 'under judgment'. This rule regulates the publication of matters which are

[4]*Sakal Papers Ltd.* v. *Union of India*, AIR 1962 SC 305.

[5]*Sahara India Real Estate Corp. Ltd.* v. *Securities and Exchange Board of India.*, C.A. No. 9813 of 2011 and C.A. No. 9833 of 2011.

under contemplation by the court. Matters are considered to be *sub-judice* once legal proceedings become active.[6] However, the phrase '*sub judice*' is not used in any provision/s of law. It is referred to with respect to 'pending proceedings', 'under judgment'. It may therefore be safely assumed to be synonymous with the aforementioned.

Explanation to s. 3 of Contempt of Courts Act 1971 which defines 'pending proceeding' as ajudicial proceeding –

a. when it is instituted by the filing of a plaint or otherwise, in the case of civil proceeding,
b. under the Code of Criminal Procedure, 1898 (5 of 1898), or any other law in the case of a criminal proceeding –
   i. which relates to the commission of an offence, when charge sheet is filed or Court issues summons, against the accused and
   ii. when a competent appeal or revision is heard and finally decided or, when no appeal or revision is preferred, until the expiry of the prescribed limitation period.
   iii. The submission of the charge sheet in a criminal proceeding marks the initiating point of the pendency of the matter in a criminal case.

S. 4 of the Contempt of Court Act directs and shields fair and accurate reporting of a judicial proceeding at any stage.

S. 5 protects criticism of a judicial decision because the public has a concern in the proper management of justice. This provision in s. 5 is an exception to the class of contempt by scandalizing a court as mentioned in s. 2 (c) (i). This provision gives recognition to the basic principle enunciated by the British Court in *R. v. Gray*[7]: "Judges and courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or public good, no court could or would treat that as contempt of court". In the commonly known *Umaria Pamphlet case*,[8] the Supreme Court indicating the parameter of fair criticism has held that if the criticism is likely to interfere with due administration of justice or undermine the confidence which the public rightly response in the courts of law as court of justice, the criticism would cease to be fair reasonable criticism as contemplated by s. 5 but would scandalize courts and substantially interfere with administration of justice.

S. 7 refers to proceedings of Court held 'in camera'. In such cases, there are quite a few categories of prohibited publications, namely, i) where it is contrary to the provisions of any Act for the time being in force; b) where the court expressly

[6]Pinsent Masons, "The Sub Judice Rule and Contempt of Court" *available at:* http://www.out-law.com/page-9742 (last visited on March 15, 2015).
[7]*R.* v. *Gray*, I9001 2 Q.B. 36 at p. 40; [1900-031 All E.R. Rep. 59 at p. 62; also mentioned in *R.* v. *Metropolitan Police Commissioner, Ex parte* Blackburn (No. 2).
[8]*Ram Dayal* v. *State of UP*, AIR 1978 SC 921.

injuncts against the publication of all information relating to the proceeding; c) where publication is prohibited on grounds of public policy; d) where the Court sits in chamber or in camera; e) where there are reasons connected with the public order and the security of the State; f) where the information relates to secret process; g) discovery or invention which is the subject matter of such proceeding.

Sub-s. (2) of s. 7 also provides that a person shall not be guilty of contempt of court for publishing the text or a fair and accurate summary of an order made by a Court sitting in Chamber or in camera, unless the Court has prohibited such publication on grounds as aforementioned.

Of the hundreds of cases being heard at court every day, most matters before judges are simply 'in court' and not necessarily *sub-judice* to the extent that public opinion would call for contempt charges. It is thus most desirable that the courts, which comprise of extremely knowledgeable, learned and experienced judges, the torchbearers of justice, be able to distinguish between the two. The leading case on this issue is *Naresh Mirajkar v. State of Maharashtra*[9] decided by the Supreme Court which held that, "where the ends of justice would be defeated by a public trial, a court has an inherent jurisdiction to hold the trial in camera". The court has also opined that the power to hold the trial in camera must include the power to hold a part of the trial in camera or to prohibit excessive publication of the proceedings held at such trial. Thus, in my opinion, laws are quite clear, accompanied by precedents with respect to the matter at hand.

Existing Statutory Provisions

It is submitted that there are enough statutory provisions prohibiting and restricting the publication of court proceedings. They are well defined and clearly laid down provisions which can serve the purpose of restricting very well if properly implemented. Separate guidelines need not be penned down as the current legal provisions are simple; without multiple interpretations. A few of such specific statutory prohibitions are as follows-

a. S. 228A of Indian Penal Code, prohibits the publication of the name of a victim of a sexual offence and publication of proceedings relating to such an offence, or any matter with respect to such like offences, without the permission of the court.
b. S. 22 of the Hindu Marriage Act, 1955 states :
   i. a proceeding shall be conducted in camera if either party so desires or if the court so deems fit. It shall be unlawful to print or publish any matter in relation to any proceeding except with the prior permission of the court.

[9]*Naresh Mirajkar* v. *State of Maharashtra*, AIR 1967 SC 1.

ii. printing or publishing any matter in contravention of the above provision shall be punishable with fine extending Rs 1000.

c. S. 33 of the Special Marriage Act, 1954 requires that proceeding under the Act shall be conducted in camera, if either party desires or if the District Court so thinks fit to direct.

d. S. 43 of the Parsi Marriage and Divorce Act, 1936, provides that in every suit, the case shall be tried within closed doors, if either party so wishes.

e. S. 53 of the Indian Divorce Act, 1869, provides that the whole or any part of the proceedings under the Act may be heard behind closed doors. This Act is applicable only to Christians.

f. S. 14 of the Official Secrets Act, 1923, provides that trial court may exclude the public from proceedings on the ground that the publication of any evidence given or statement made would be prejudicial to the safety of the State. But the sentence must be passed in public.

g. S. 30 of the erstwhile Prevention of Terrorism Act, 2002, permitted the holding of proceedings in camera where life of the witness was in danger.[10]

Suggestions

In my opinion, situations where contempt has arisen may be neutralized by steps such as postponement of trial, re-trials, change of venue and, in exceptional cases, grant of acquittals in cases of excessive media interference. The idea behind executing such steps is to protect the judicial process from getting distorted, prejudiced or meddled with. Such mechanisms will help balance the presumption of innocence which now has a human right parameter. It is interesting to note that this is not just a theoretical façade, but also a practically possible solution. This is evident from the course of proceedings that were advanced with regard to the infamous Delhi gang rape case which has haunted the country since December 2012. Firstly, the fast track court invoked s.372(2) Cr.P.C. as a result of which the inquiry and proceedings were to be held in camera. Secondly, the Magistrate also invoked s.372(3) by way of which there was a complete ban on media reporting.[11] However, On 22nd March 2013, the Delhi High Court lifted the ban on media, but imposed certain restrictions on the manner of reporting of the day to day proceedings such as respecting the privacy of the victim, the family, witnesses or complainants, allowing access to only one journalist from each of the accredited national dailies, restricting the entry of electronic and foreign media.[12] By this means, apathetic reporting could be curbed and trial be conducted in a more free and fair manner.

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[10] Prevention of Terrorism Act, 2002 has been repealed with effect from 21 September, 2004.

[11] *Vijay Singhal* v. *Govt. of NCT of Delhi*, W.P. (C) 195/2013 before the Delhi High Court, decided on 22 March, 2013.

[12] *Ibid.*

Previously, the Supreme Court has concluded[13] that if, as an incidental consequence of the order, the proceedings could not be reported, there could not be said to be any constitutional infirmity in the order. In the same case, Justice Tarkunde ordered that the witness's deposition should not be reported in newspapers on a request made by him, on the ground that earlier publications of his deposition has caused loss to his business. It was further held that the law empowering the court to prohibit publications of proceedings was within the reasonable restrictions contemplated by Art. 19(2) which includes restrictions in relation to contempt of court. In *Kartar Singh* v. *State of Punjab*,[14] a challenge to the TADA Act on the ground that s. 16 of the Act destroyed the guarantee of an open trial was dismissed by the Supreme Court. The Court held that while open trials were in the public interest, in exceptional circumstances, a departure could be permitted as contemplated under s. 237(2) of the Criminal Procedure Code. If their identities were easily disclosed, witnesses would be unwilling to come forward to depose against persons accused of being terrorists. It was bearing this in mind that Parliament thought it fit to protect witnesses whose life may be in danger. Hence, it is apparent that on prior occasions, the Court has indeed exercised its rightful power and discretion in apt cases with respect to reporting of sub-judice matters. The continuance of such isolation of cases based on subjectivity would enable a symbiotic existence of the judiciary and media. The correct implementation of the statutory provisions would also add to the same.

Conclusion

The media, in my opinion, can function in a dependable manner under the umbrella of fundamental right of freedom of speech and expression which is granted to it by the Constitution. However, no right is absolute; it comes with the package of a corresponding duty. The duty is to not to destabilize the very ethos of democracy but to maintain and strive for equilibrium amongst the various limbs of democracy. In such a situation, there is bound to be differences arising between various organs, however, the solution is not to have a race to prove power supremacy but to work towards an integrated synchronized whole. Lackadaisical reporting, for the "fun element" and increasing TRP's by spicing up the facts is careless and irresponsible. Such casual and unrestrained reporting in the name of freedom of speech and expression is bound to suffer irrevocable damages. I believe that the media should confine itself to the news as it is and not transgress into areas which are the domain of the courts, as has also been stated by Justice Rajiv Shakdhar. However, my stronger belief lies in the view that defiance to the public interest in the case would be acting like an ostrich, whose head is buried in sand. Therefore, I contend that even though the line of distinction between reportable and non-reportable sub-judice matters is thin, it is well defined. Every case opens and proceeds on an emotional scale. It is for the judge to command and the media to retract, both based on where the case stands

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[13] *Naresh Shridhar Mirajkar* v. *State of Maharashtra*, AIR 1967 SC 1.

[14] *Kartar Singh* v. *State of Punjab* (1994) 3 SCC 569.

on the scale. Openness is an imperative safeguard against judicial error, however, the media also holds an equivalent duty to report responsibly and to steer clear of superfluous sensationalism which would only hamper and belittle the process of administration of justice. Therefore, based on the severity and merits of the matter, it must be met, either, with an empathetic outlook rather than with prying eyes; or with hawk eyes rather than a languid approach. It should neither transgress its boundaries nor have its head buried. Occasional friction between the media and judiciary are but natural to a democracy but it would be a sad state of affairs if respect is gnarled. Therefore, it is the requirement of the hour, an amicable understanding and a bilateral appreciation between the judiciary and media which should determine the boundaries and demarcate the realms of power execution.

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International Media Law: Blasphemous Videos and Internet Service Providers

*-Neelam Akiwate, Prachi Tadsare**
Aishwarya Salvi#

The essence of Media Law manifests itself in issues integral to the society; democratic values, national identity, encouragement of creativity and most importantly the expression of thoughts. Over the years, the rapid advancement of the Internet is challenging the core concepts on which Media Law is based. The conventional media laws did not see the distinction between the journalist (Speaker) and the newspaper (Platform) through which the views were expressed. The Internet shatters this premise by drawing a clear distinction between the roles played by the Speaker and the Platform. However, this distinction has not been recognized in law when the question of 'liability' arises.

With the advent of new technology, the process of decision making and of negotiation surrounding Policy framework changes drastically. In this article, we will touch upon the alternative modes and changing standards of governance in the area involving Freedom of Speech and Expression in relation to new technology, that is, the Internet. We seek to answer the most basic and debatable questions about the fundamental right of Freedom of Speech and Expression. The first question being, to what extent can the State curtail an individual's exercise of Free Speech and Expression on the Internet with respect to religion. And subsequently, the question regarding the liability of the Internet Service Provider through whose services such impugned speech is being exercised.

Limits on Freedom of Speech and Expression with Respect to Laws Prohibiting Religious Speech.

In this article, firstly we seek to establish when and how a governmental authority exercises its powers of restricting speech specifically in the case of religious speech.

The International Covenant on Civil and Political Rights having acquired the status of *jus cogens*[1] is the foremost instrument which acts as the basis for evaluation of domestic laws which restrict exercise of freedom of speech and expression on religious grounds – more commonly known as blasphemy laws. Art. 19(1) protects all opinions including the one of religious nature.[2] Art. 19(2) enumerates all kinds of freedoms including the freedom to 'impart information

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1 Scott J. Catlin, "Proposal for Regulating Hate Speech in the United States: Balancing Rights under the International Covenant on Civil and Political Rights", 69 *Notre Dame L. Rev.* 771 (1994) *available at:* http://scholarship.law.nd.edu/ndlr/vol69/iss4/4 (last visited on March 15, 2015).

2 UN Human Rights Committee (HRC), *CCPR General Comment No 34,* art. 19: Freedoms of opinion and expression, (September, 2011) (No. CCPR/C/GC/34).

and ideas of all kinds'; the freedom to 'seek and receive them regardless of frontiers'; and 'in whatever medium...'[3]

However, Arts. 19 (3)[4] and 20[5] provide the parameters for reasonable restriction of speech in certain cases.[6] Over the years, judicial decisions have also established a three-part test to evaluate the applicability of these restrictions as follows:

The restrictions should be provided by law: The restrictions should be provided in legislation and not in traditional, customary or religious law.[7] And should also be made with sufficient precision to allow individuals to alter their conduct accordingly and should not confer unfettered discretion on those charged with its execution,[8] and the restrictions must be compatible with the aims and objectives and principles of the Covenant.[9]

The restrictions should be necessary for a legitimate purpose: Art. 19 (3) requires that the restrictions be 'necessary' to achieve a legitimate purpose. The test to determine the question of 'necessity' is whether the legitimate purpose could be achieved in other ways that do not restrict the freedom of expression.[10]

The restrictions should be proportionate: The restrictions must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function.[11]

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[3]International Covenant on Civil and Political Rights,1976, 999 UNTS 171 (ICCPR), art. 19 (2).

[4]*Ibid*, art 19 (3).

[5]*Ibid*, art 20.

[6]*Ibid*, art 19 (3).

[7]UN Human Rights Committee (HRC), *CCPR General Comment No 34*, art 19: Freedoms of opinion and expression, 12 September 2011 (No. CCPR/C/GC/34/24); UN Human Rights Committee (HRC), *CCPR General Comment No. 32*, art 14, Right to equality before courts and tribunals and to fair trial, 23 August 2007 (No. CCPR/C/GC/32).

[8]UN Human Rights Committee (HRC), *CCPR General Comment No 34*, Article 19: Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34/25; UN Human Rights Committee (HRC), *CCPR General Comment No. 27*, Article 12 (Freedom of Movement), 2 November 1999, CCPR / C / 21 / Rev.1 / Add.9, *available at:* http:// www.refworld.org /docid/45139c394.html (last visited on March 15, 2015).

[9]UN Human Rights Committee (HRC), CCPR *General Comment No 34*, Article 19: Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34/26; see, Communication No. 488/1992, *Toonen* v. *Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994) (HRC).

[10]UN Human Rights Committee (HRC), *CCPR General Comment No 34:* Article 19 Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34/34; *Ballantyne, Davidson and McIntyre* v. *Canada* Communication No 359/1989, UN Doc CCPR/C/47/D/359/1989 and Communication No 385/1989 UN Doc 385/1989/Rev1 (1993) (HRC).

[11]UN Human Rights Committee (HRC), *CCPR General Comment No 34:* Article 19: Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34/27.

The majority of these laws are used in order to suppress the minority religious opinions[12] and to establish a democratized theocracy.[13] One of the most common catch-phrases to have evolved through such legislative practices are the terms 'hurts religious sentiments' and 'defamation of religions'.[14]

Recently, the prosecution of certain critics of religion and other persons talking about religion has been justified by asserting that a community or a theocratic state 'has a right to be hurt' due to speech critical of a particular religion or ideology and therefore any measures to halt such criticisms are valid.[15] Looking at the various international law instruments protecting thought, conscience and belief, however, there does not exist such a right to be hurt.[16]

Although, there have been several attempts to pass the 'defamation of religions' resolutions at the international forum by theocratic states, these have been continuously opposed and rejected by the majority of the international community featuring democracies.[17]

The right to freedom of religion or belief does not include the right to have a religion or belief free from criticism or ridicule[18] and defamation of religions may offend people and hurt their religious feelings but it does not necessarily or

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[12]*People ex rel Moss* v. *Pate*, 30 Ill 2d 271 (1964) (US) 273.

[13]Council of Europe, Report No. 47, 'Science and Technique of Democracy: Blasphemy, Insult and Hatred – Finding Answers in a Democratic Society' (March, 2010).

[14]Reporters without Borders for Freedom of Information, 'Blasphemy Information Sacrificed On Altar of Religion' (2013) *available at:* http://en.rsf.org/religions/pdf/EN_RAPPORT_BLASPHEME_BD.pdf (last visited on March 15, 2015).

[15]David Little, *Essays on Religion and Human Rights* (Cambridge, New York, 2015) available at: https://books.google.co.in/books?isbn=110707262X (last visited March 15, 2015)

[16]International Covenant on Civil and Political Rights, 1976, 999 UNTS 171 (ICCPR); Universal Declaration of Human Rights, 1948; International Covenant on Economic, Social and Cultural Rights, 1976, 993 UNTS 3 (ICESCR); International Convention on the Elimination of All Forms of Racial Discrimination, 1969, 660 UNTS 195 (ICERD); Convention on the Prevention and Punishment of the Crime of Genocide, 1951, 78 UNTS 277; UNGA Res 36/55 (1981) GAOR 36th session Supp 51, 171; UNGA Res 34/180 (1981) GAOR 34th session Supp 46, 193.

[17]UNGA Res 7/19 (27 March 2008) UN Doc A/RES/7/19; UNGA Res 7/19 (27 March 2008) UN Doc A/RES/7/19; UNGA Res 60/150 (6 December 2005) UN Doc A/RES/60/150; UNGA Res 61/164 (19 December 2006) UN Doc A/RES/61/164; UNGA Res 62/154 (18 December 2007) UN Doc A/RES/62/154; UNGA Res 63/171 (18 December 2008) UN Doc A/RES/63/171; UNGA 64/156 (18 December 2009) UN Doc A/RES/64/156; UNGA 65/224 (21 December 2010) UN Doc A/RES/65/224.

[18]UN Human Rights Council, 'Joint Report of the UN's Special Rapporteur on Freedom of Religion or Belief'(2006), Asma Jahangir and the Special Rapporteur on Contemporary Forms of Racism, 'Racial Discrimination, Xenophobia and Related Intolerance', Doudou Diene, further to Human Rights Council Decision 1/107 on Incitement to Racial and Religious Hatred and the Promotion of Tolerance (20 September 2006) A/HRC/2/3 *available at:* http://www.refworld.org/docid/45c30b640.html (last visited on March 15, 2015).

at least directly result in a violation of their rights, including their right to freedom of religion.[19]

Therefore, it is our submission that a law based on such terminology is unfair, unjust, arbitrary, and most importantly, it contravenes rules of international law.

Conceptualizing the Scope of Liability of Internet Service Providers.

In this article, we seek to establish the parameters regarding the liability of Internet Service Providers (ISPs) in relation to the Third Party Content and its relation to the right to Free Speech and Expression. Predominantly, it is United States jurisprudence that has been a pioneer in establishing the liability of ISPs. United States jurisprudence has been responsible for drawing the distinction between an ISP and Interactive Service Provider and their respective liabilities. A plethora of cases is responsible for revolutionizing and widening the scope of Free Speech and Expression on the Social Media Forum.

What is important is to integrate the new evolving technologies and the forum to exercise Free Speech with the conventional framework of law and in times of conflict, the Policymakers must widen the scope of the law so as to encompass the importance of Social Media as a platform of Free Speech.

Contribution of United States Jurisprudence: The United States Policymakers have been the first to defuse the liability of ISP in relation to the content put up on their forum by enacting and subsequently amending the Communication Decency Act[20] from which the celebrated case of *Zeran v AOL*[21] has been adjudged. The judicial decision of *Reno v ACLU*[22] has laid down the basic three tier test to accord immunity and restrict the scope of liability on ISPs in relation to content being uploaded to their forum.

For an Internet Service provider to be immune[23] from any liability for the content it provides, a three tier test has been laid down.[24] Firstly, the entity in question should be an Interactive Service Provider.[25] Secondly, the postings at issue should be information provided by another information content provider[26] (Third Party Content). Thirdly, it must be seen whether the provider is a publisher or speaker of third party content (Cause of Action).

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[19]*Ibid.* 36, 37.

[20]Communications Decency Act, 1996 (US).

[21]*Zeran* v. *America Online*, Inc. 524 US 937 (1998).

[22]*Reno* v. *ACLU* 521 US 844 (US).

[23]*Zeran* v. *AOL* 129 F 3d 327 (4th Cir. 1997) (US) 330; *Blumenthal* v. *Drudge* 992 F Supp. 44 (D.D.C. 1998) (US) 49-53; *Batzel* v. *Smith* 333 F 3d 1018 (9th Cir. 2003) (US); *Green* v. *AOL* 318 F 3d 465 (3rd Cir 2003) (US); *Barrett* v. *Rosenthal*, 40 Cal 4th 33 (2006) (US).

[24]Communications Act, 1934 (US), s. 230(c) (1); Communications Decency Act, 1996, s. 223(1) (h) (2).

[25]*Ibid.*

[26]*Ibid.*

Interactive Service Providers: The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.[27]

Video sharing sites like YouTube, Vimeo, etc. are interactive computer service providers[28] where videos, data can be shared and uploaded.[29] Video hosting or sharing sites is exempted from the liability as they are unable to filter the enormous data.[30] Therefore, a pattern is evident, and the courts have zealously granted immunity to video sharing sites like YouTube pursuant to the First Amendment Rights.

Information Content Provider: The term ''information content provider'' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.[31]

A website which is just the recipient of the information provided or uploaded by another information content provider will not be responsible for that specific content[32] and thus does not attract liability under law.[33] Video sharing sites like YouTube have always been at loggerheads with the State whenever objectionable content is aired on the site. This prong of the test clearly absolves such sites from being responsible for any such content.

There can be no cause of action[34] against the provider if he is not a publisher or speaker of the content alleged to be in violation of the law.

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[27]Communications Act, 1934 (US), s. 230 (f) (2); Communications Decency Act, 1996 (US), s. 223(1) (h) (2).

[28]*Ibid.*

[29]Martha L. Arias, 'Internet Law-Interactive Websites and The Issue of Liability' *available at:* http://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=2070 (last visited on March 15, 2015).

[30]*Dailymotion* v. *Nord Ouest Production* (1st Civ, February 17, 2011, Appeal no 09-67896, Bull 2011, I, No 30) (France).

[31]Communications Act, 1934 (US), s. 230 (f) (3); Communications Decency Act, 1996, s. 223(1) (h) (2).

[32]*Fair Housing Council* v. *Roommate.com* LLC 521 F 3d 1157 (9th Cir 2008); Communications Act, 1934 (US), s. 230 (c); Communications Decency Act, 1996 (US), s. 223(1) (h) (2).

[33]*John Doe* v. *Franco Productions* 2000 U.S. Dist. LEXIS 8845 (ND Ill. June 21, 2000) (US), *Nemet Chevrolet Ltd.* v. *Consumeraffairs.com* Inc 591 F 3d 250 (4th Cir 2009) (US) 252; *Dimeo* v. *Max* 433 F. Supp. 2d 523, 529 (ED Pa 2006) (US); *Carafano* v. *Metrosplash.com* Inc. 339 F 3d 1119 (9th Cir. 2003) (US) 1123; *Parker v Google*, Inc 422 F Supp 2d 492 ED Pa 2006 (US) 500-01.

[34]*Ben Ezra, Weinstein, and Co.* v. *America Online Inc.* 206 F 3d 980 (10th Cir. 2000) (US) 986; *Parker* v. *Google Inc* 422 F Supp 2d (US) 500-01.

The Doctrine of Chilling Effect: Imposing sanctions on such service providers produces a chilling effect[35] as screening for problems from millions of users is impossible.[36] It is important to note at the outset that governmental actions against internet speech may be subject to challenge under the freedom of expression clauses in international and regional human rights treaties, which clearly apply to the internet.[37]

The Existing International Framework

Currently, in the world, there are many countries where bans on internet speech through legislation and customary religious laws for protecting people from 'religious hurt' are widely imposed. For example, Pakistan has the highest number of 'Blasphemy prisoners' in the world, with its legislation permitting even capital punishment.[38] Around 22% of the governments around the world have a blasphemy law, and the number is the largest in the Middle East with around 70% of the Middle-Eastern countries criminalizing blasphemy including the use of sanctions against Internet Service Providers.[39] Such impositions of sanctions clearly defy the right of free speech and expression as enshrined by various international covenants such as the International Covenant on Civil and Political Rights[40], the Universal Declaration of Human Rights[41], the African Convention on Human and Peoples' Rights[42], the American Convention on Human Rights[43], the European Convention on Human Rights.[44]

Furthermore, another common feature of these legislations is the lack of safe harbor provisions for ISPs that they exhibit. In Turkey and Malaysia, Internet Service Providers can specifically be held liable for speech insulting religion regardless of their involvement.[45] This practice is followed even in liberal

[35] *Zeran* v. *American Online* Inc. 129 F 3d (4th Cir.1997) (US) 327.
[36] *Reno* v. *ACLU* 521 US 844 (US).
[37] UN Human Rights Council, 'Report of the UN's Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression', A/HRC/14/23 (2010), *available at:* http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.23.pdf at 12-16 (last visited on March 15, 2015).
[38] United States Commission on International Religious Freedom, 'Pakistan Leads the World in Blasphemy Prisoners', *available at:* http://www.uscirf.gov/reports-briefs/ perspectives/ pakistan-leads-the-world-in-blasphemy-prisoners (last visited on March 15, 2015).
[39] Doug Bernard, 'More Governments Using Internet to Enforce Blasphemy Laws' (January, 2015), *available at*: http://www.voanews.com/content/article/2596619.html (last visited on March 15, 2015).
[40] International Covenant on Civil and Political Rights, art 19.
[41] Universal Declaration of Human Rights, art 19.
[42] African Charter on Human and Peoples' Rights, art 9.
[43] American Convention on Human Rights, art 13.
[44] European Convention on Human Rights, art 10.
[45] European Commission, 'Regulation of Publications on the Internet and Suppression of Crimes Committed by Means of Such Publications', Law No 5651, Turkish Official Gazette No 26030 (23 May 2007) (Turkey); Computer Crimes Act BE 2550 (2007) (Malaysia);

democracies with a harrowed history, like Germany and Israel, where an individual's religious sentiments are protected from all forms of ridicule and all types of degrading speeches against religion are prohibited and punishable.[46]

In India, ISPs have been under constant scrutiny to pre-screen and censor such content as may be likely to hurt religious sentiments and there has been a high level of 'flagging' and government overview of ISP activities with respect to internet speech about religion.[47] This leads to thinning of the line between the duty to monitor content by ISPs and the threshold of non -involvement required for not incurring liability; and thereby completely dissolves any protection that is afforded by the 'safe-harbour' provisions in the legislation.[48] This in turn gives rise to excessive censorship and creates a chilling effect.

Conclusion

The present outlook therefore is such that it neglects technological impact, and is still bent towards protection of belief systems rather than rights. As a result, there is not only a dampening effect on effective assertion of rights but also on the complete utilization of human abilities through technological progress.

Summing up, it is proposed that a national law that restricts the freedom of speech and expression especially over the internet needs to be drafted keeping in mind two things – firstly that, it has to adhere the conditions and principles put forth by international law and secondly, that it has to make provisions for exemption of liability of intermediary providers who act merely as platforms. This proposition has become even more relevant today because the advent of social media has brought the same freedoms, rights, abilities and empowerments in a new light; and has led to a challenge being posed to the conventional definitions in law.

Hence it is the need of hour that the scope of law keeps abreast with technological progresses, as this will decide the course for the forseeable future in how we utilise technology for the betterment of our species.

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Akdeniz and Altiparmak, 'Internet: Restricted Access: A Critical Assessment of Internet Regulation and Censorship in Turkey' (25 October 2008); S. Tavernise, 'Turkey to Alter Speech Law', New York Times (25 January 2008), *available at:* http://www.nytimes.com/2008/01/25/world/europe/25turkey.html (last visited on March 15, 2015); Jeffrey Rosen, 'Google's Gatekeepers', New York Times (28 November 2008), *available at:* http://www.nytimes.com/2008/11/30/magazine/30google-t.html (last visited on March 15, 2015).
[46] Strafgesetzbuch, 1998 (StGB) (Germany), s. 130, 166; Israel Penal Law, 1996 (Israel) Law No 626/1996.
[47] Melody Patry, 'India: Digital freedom under threat? Online censorship' *available at:* http://www.indexoncensorship.org/2013/11/india-online-report-freedom-expression-digital-freedom-1 (last visited on March 15, 2015).
[48] Information Technology Act, 2000, s. 79.

Bolar Exemption- Does S. 107A of the Patent Act Require a Fresh Look?

-Ishita Agarwal*

Can pre-clinical tests for generic versions of patented drugs be conducted during the duration of a pharmaceutical patent?

Can generic companies use the original producer's data to obtain their own regulatory approval while the patent is still in force?

The answer to these questions lies in the Bolar Provision.[1]

In order to procure a marketing authorization for a new product, the producer of the product must submit data to prove the safety and efficacy of the product. This data is generated by conducting clinical trials and tests. Sometimes, manufacturers of generic products may depend on data submitted by the original manufacturer while applying for authorization for their products. However, in doing this, they leave themselves susceptible to an infringement action if the original product has patent protection. To address this legal uncertainty, Bolar provisions have been inserted in the legal regimes of various countries. These Bolar provisions establish the right of generic pharmaceutical manufacturers to utilize the technology of a patented product before the patent expiry date and without the consent of the patent holder, for the purpose of engaging in preparatory acts with a view to procuring marketing sanction from drug regulatory authorities upon expiry of the patent. Such use facilitates the entry of generic competition in the market immediately after the date of patent expiration; otherwise a generic competitor would be able to start its bioequivalence only after patent expiry, which would result in a*de facto* extension of patent protection. The Bolar Exception System was applied first by the United States.

Providing research exemption from infringement is as imperative as granting exclusive rights to inventors. While exclusive patent rights encourage innovation by providing economic incentives, research exemptions boost competitive spirit and promote further progress in technology. A suitable balance must be struck between the patentee's rights and the exemption granted.[2]

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[1]The provision takes its name from *Roche Products Inc* v. *Bolar Pharmaceutical Co Inc*, 733 F. 2d 858 (Fed. Cir. 1984). The Patents Act, 1970, s. 107A is the corresponding provision in Indian law.

[2]Kalyan Chakravarthy and Nandan Pendsey , "Research Exemptions in Patent Law" 9 *JIPR* 332- 341 (2004).

Generic Drugs- Need of Bolar Provision

A generic drug[3] is a drug which is identical to a branded drug in dosage form, safety and strength, route of administration, quality, performance characteristics and intended use. It is a drug containing the active ingredients of but not necessarily the same excipient substances as the pioneer drug marketed under the brand name.[4]Despite the generic medicines being chemically indistinguishable from their branded counterparts, they are ordinarily sold at considerable discounts from the branded cost because companies do not incur the costly process of discovering a new molecule; instead they reverse-engineer the present drug molecule that may or may not be patented. They also do not have to prove the safety and efficacy of the drugs through clinical trials.[5]These generic medicines cost about 5% of the price of identical drugs sold by US and EU pharmaceutical companies.[6] Needs of majority of the poor population suffering from fatal diseases in India, before the ratification of TRIPS agreement were quenched by these generic drugs. In the competitive Indian generic market, it is imperative to harmonize the individual interest (patentee's rights) and societal interest (need for economical access of products to the society). The Bolar provision under Indian Patent regime would permit generic producers to compete among themselves, securing continued availability of drugs at low costs for both domestic and international market.[7]

Establishment of the Concept

United States: In 1984, the United States Congress enacted the Drug Price Competition and Patent Term Restoration Act, also called Hatch-Waxman Act,[8] which amended the Federal Food Drug and Cosmetics Act. Its objective was to harmonize the contradictory interests of the patent owners in obtaining partial restoration for time lost on the patent tenure due to regulatory delays in the FDA approval on one hand and the interests of generic drug companies on the other hand.

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[3]U.S. Department of Health and Human Services, "What are generic drugs?" *available at:* http://www.fda.gov/Drugs/ResourcesForYou/Consumers/ BuyingUsingMedicineSafely/UnderstandingGenericDrugs/ucm144456.htm (last visited on March 15, 2015).

[4]Bryan A. Garner(ed.), *Black's Law dictionary* 535 (Thomson West, USA, 8th edn., 2004).

[5]Soumya Prakash Patra, "Critical Appraisal of Bolar Exemption with Respect to Indian Patent Act, 1970" *available at:* http://papers.ssrn.com/sol3/papers.cfm? abstract_id=1262712 (last visited on March 15, 2015).

[6]International. Centre. for Trade and Sustainable Development, "Indian Parliament Approves Controversial Patents Bill", *available at:* http://www.ictsd.org/weeklv/ 05-03-23/storvl.htm (last visited on March 15, 2015).

[7]Vikas Asawat, "Access to Affordable Medicines in the Current Patent Regime: An Indian Perspective" *available at:* http://papers.ssrn.com/sol3/papers.cfm? abstract_id=1808605 (last visited on March 15, 2015).

[8](1984 Act), 98 Stat 1585.

The Hatch Waxman Act was passed by the US Congress in response to the decision of the Court of Appeal for Federal Circuit in *Roche Products Inc. v. Bolar Pharmaceutical Co Inc.*[9] where the court held the competitor's use of a patent for FDA approval of its generic version to be infringing in spite of the fact that the generic drug was not to be marketed until the expiration of the patent.

The Act introduced a process for a new drug application (NDA) that extended the patent tenure after the grant of FDA approval and created an abbreviated new drug application (ANDA) for generic manufacturers to obtain FDA approval.[10] S. 156 provides for extension of the patent term for compensating the time lost in FDA approval. By virtue of s. 271(e)(1), generic companies were permitted to conduct research on patented drugs before expiration of the patent, till the experiments were "*reasonably related* to the development and submission of information under a Federal law which regulates the manufacture, use, or sale of drugs or veterinary biological products". However, the interpretation of the term "reasonably related" in this bolar provision was very subjective and was brought before the US Supreme Court in *Merck KGaA v. Integra Lifesciences I, Ltd*,[11] which clarified that "Section 271(e)(1)'s exemption from infringement extends to all uses of patented inventions that are reasonably related to the development and submission of any information under the FDA," and that "this necessarily includes preclinical studies of patented compounds that are appropriate for submission to the FDA in the regulatory process." The Court held that s. 271(e)(1) applies to preclinical in vitro and in vivo studies intended to obtain information on the "pharmacological, toxicological, pharmacokinetic, and biological qualities of the drug in animals". The Court in this judgment interpreted the term "reasonably related", establishing that generic manufacturers are allowed to carry out various preclinical tests on patented drugs in order to collect data for FDA approval, so as to prove the safety, efficacy and various qualities of the drug.

In India, the manufacture, sale and import of drugs is regulated by Drugs & Cosmetics Act, 1940. Unlike the Hatch Waxman Act, the Drugs & Cosmetics Act contains no special provision for approval of generic versions of patented drugs or for extension of the patent term for compensating the time lost in FDA approval.

Canada: Following the US, Canada also took significant steps in this direction by introducing the "regulatory review exception" and the "stockpiling exception" in s. 55 of the Canadian Patent Act. The Canadian law was challenged by the EU through a complaint to the WTO. WTO however upheld the Bolar exception to

[9] 733 F.2d 858 (C.A. Fed., 1984).
[10] The Patents Act, 1970, s. 107A.
[11] [2005] 545 U.S.193.

be in conformity with TRIPS.[12] S. 55.2(1), or the "regulatory review exception", of the Canadian Patent Act permitted all activities related to the development and submission of information required to obtain marketing approval for pharmaceutical products, carried out by a third party without the consent of the patent holder at any time during the patent term. Ss. 55.2(2) and (3), or the "stockpiling" exception allowed manufacturing and stockpiling of pharmaceuticals during the six months immediately before the expiration of the 20-year patent period. Under stockpiling exceptions, competitors are permitted to manufacture patented products during a certain period before the patent expires, however the products cannot be sold unless the patent expires.

The findings of the panel adjudicating this dispute was that while the "regulatory review exception" i.e., s. 55.2(1) of the Canadian Patent Act, was consistent with Canada's obligations under TRIPS, ss. 55.2(2) and (3), the stockpiling exception, violated the TRIPS provisions, since it amounted to excessive restriction on the patent owner's exclusive rights.[13]

TRIPS Agreement: Art. 30 of TRIPS allows member nations to impose certain restrictions on exclusive right of a patentee. Art. 30 states:

"Parties may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with the normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties."

The Doha Declaration emphatically declared that TRIPS does not restrict Members from taking actions to safeguard public health[14]. Arts. 7 and 8 of TRIPS necessitate that WTO Members must ensure that the laws give due consideration to issues like preservation of public health and nutrition and do not solely serve the interests of intellectual property owners.

Bolar Provision in India

The Patent system in India is governed by the Patent Act of 1970. The Patent (Amendment) Act 2002 expressly provides that it would not be infringement if a patented product is used for generating data for submission to an authority, if required under any law. The Bolar provision was approved by the Government to meet the mandates posed by ratification of TRIPS[15]. S. 107A was incorporated in

[12] World Trade Organization, Report of the Panel: "Canada- Patent Protection of Pharmaceutical Products", WT/DS114/R, para 7.3, *available at:* http://www.wto.org/english/tratop_e/dispu_e/7428d.pdf (last visited on March 15, 2015).
[13] Ricardo Melendez Ortiz and Pedro Roffe (eds.), *Intellectual Property and Sustainable Development- Developing Agendas in a Changing World* 110-111.
[14] Doha WTO Ministerial Declaration, WTO Doc. WT/Min (01)/DEC/1 (November, 2001).
[15] Agreement on Trade-Related Aspects of Intellectual Property Rights, *Marrakesh Agreement Establishing the World Trade Organization*, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (Apr. 15, 1994).

the Act, so as to administer a research exemption which was in conformity with the leverages given under TRIPS[16]. Subsequently, the 2005 Act brought even the act of 'importing' within the ambit of this provision.

S. 107A(a) of the amended law states:

> *"Any act of making, constructing, using, selling or importing*[17] *a patented invention solely for uses reasonably related to the development and submission of information required for the time being in force, in India or in a country other than India, that regulates the manufacture, construction, use, sale or import of any product shall not be considered as an infringement of patent rights".*

India being a developing country and one of the highest manufacturers of generic medicines, the Bolar provision can be justified by the Doha Declaration and continuous need for providing economical medicines. However, regard must also be had to certain US decisions where Court rejected the defence of Bolar exemption when the sole motive was to earn profit and not to satisfy curiosity or intellectual demand.[18]

Recent Developments in India

Lately there have been numerous cases regarding the grant of marketing approvals for generic versions of patent drugs. DCGI (Drug Controller General of India) granted marketing approval to Cipla for the generic version of an anticancer drug *Tarceva* for which Roche held an Indian patent. Following the receipt of marketing approval, Cipla launched the generic drug in the market in violation of the patent rights of Roche. This judgment marks a significant watershed in Indian patent history.[19] The judge acknowledged that while Roche had established a strong case, the public interest and lower pricing of Cipla's drug tilted the balance in Cipla's favour.

In another case, Cipla applied for marketing approval of generic version of Bayer's cancer drug *Nexavar*. The DCGI however rejected Cipla's application in an ex-parte order. Cipla sought revocation of the order and the division bench ruled against Bayer, thus paving the way for launch by Cipla.[20]The argument made by Bayer was that DCGI cannot grant an approval for any drug which is likely to violate an existing patent right. Interestingly, in India there is no provision that links the patent office with the offices of health and regulatory

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[16]Aakshita Bansal, "Critical Evaluation of Bolar Exemption in Indian Patent Law" (1) (Issue 3) *Law Mantra Journal* (2013).

[17]As amended by the Patents (Amendment) Act, 2005.

[18]*Madey v. Duke University* 307 F.3d 1351.

[19]*F. Hoffmann-La Roche Ltd and OSI Pharmaceuticals, Inc. v Cipla Ltd* CS (OS) No. 89/2008 and C.C.52/2008 before the Delhi High Court, decided on 10 September, 2012.

[20]*Bayer Corporation* v. *Union of India*, L.P.A 443/2009, *available at:* http://lobis.nic.in /dhc /SMD /judgement/09-02-2010/SMD09022010LPA4432009.pdf (last visited on March 15, 2015).

authorities. Hence, DCGI cannot be restrained from granting approval for generic versions of patented drugs. Moreover, s. 107-A distinctly exempts from infringement, any act of making, using or importing a patented invention, in so far as such act is essential to acquire information for drug regulatory application before the DCGI. The Delhi High Court correctly stated that if Bayer's plea was accepted, it would undermine the very spirit of the Bolar provision. Hence introduction of a patent linkage system would be in clear abrogation of the provisions of s. 107A.[21]The Supreme Court too dismissed Bayer's appeal against the Delhi High Court's decision on Bayer's plea for patent linkage.

Here, it is important to discuss what 'patent linkage' means. Patent linkage means linking generic drug market approval with the original drug's patent status. If a patent exists, marketing approval is not granted to its generic version until the patent has expired or is discovered to be invalid.Till now, DCGI used to grant marketing approvals, authorizing goods to be marketed in India without investigating whether such goods infringed a lawfully granted patent. Lately MNCs in India have been demanding to harmonize laws, so that drug patents granted under the Patents Act are not undermined by marketing approvals under the Drugs and Cosmetics Act during the patent tenure. DGCI would consequently be required to deal with patent issues while handling drug approval applications.

In another similar case, generic company Hetero Pharma sought regulatory approval from DCGI for the generic version of *Dasatinib*, an anticancer drug for which Bristol-Myer Squibb (BMS) held a patent. BMS moved courts in India seeking ex parte relief to restrain Hetero from pursuing their application before the DCGI. The Delhi High Court stayed Hetero Drugs Ltd. from making, selling, distributing or exporting the medicine.[22] The decision created unrest amongst various generic companies, essentially raising the question whether this was a judicial manner of enforcing the much debated patent-linkage system.

Need of Review

Though the Bolar exemption is predominantly aimed at generic companies, it extends to activities relating to submission of data under any law. S. 107A provides an exemption, for meeting requirements under foreign laws also, making the immunity too wide and unnecessary. Inventors would get an excuse to encroach a patent under the pretext that their activities are required under some remote law in a remote country. The pitfall of a broad research exemption is that it dilutes patent protection and takes away the motivation to produce, invest and invent. A model law on research exemption should distinctly define the confines of such exemption. The exemption would be ideal if it is confined to precise

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[21]Anshul Mittal, "Patent Linkage in India: Current Scenario and Need for Deliberation" 15 *JIPR* 187-196 (2010).

[22]*Bristol-Mayers Squibb v Hetero Drugs Ltd.* before Delhi High Court, ex parte order passed on 19 December 2008.

activities that abet in securing information essential for drug approval under a particular law. The exemption should be restricted to drug approval within the country as patent protection is territorial and rights under it would be undermined if exemption is allowed with regard to a foreign law.[23]

Because of the Bolar provision, even if there is a product patent for a drug molecule, generic drug manufacturers can utilize the patented invention for getting marketing approval for their version of that drug molecule. To balance this provision, the Indian Government is considering amending the law to provide data exclusivity provisions to those who seek marketing approval for drugs.[24]

Data exclusivity refers to the time period after approval of a new drug before a competitor can use the data submitted in the original approval process, for its drug approval application.[25] Hence, data exclusivity essentially prolongs the tenure of monopoly rights of the patentee. It becomes imperative because the most inventive products normally take extremely long to come to market due to lengthy pre-marketing product development, clinical tests and regulatory approvals. The patentee is unable to utilize its entire patent tenure to recover the cost of developing that product, making the extension of patent tenure essential for the patentee. However, the Indian Patent Act does not offer data exclusivity. This lack of data exclusivity enactment might discourage the Indian pharmaceutical industry in investing in research and development of drugs and might also engender clashes between pharmaceutical companies and local generic companies[26].

Art. 39(3) of TRIPS implicitly provides for the data exclusivity shield by providing for protection of such data against unfair commercial use and disclosure.[27] Hence, the Indian law ignoring data exclusivity protection, while providing for Bolar exemption has come in for criticism by drug companies and developed countries. Data exclusivity systems in the US and countries in the EU, for both medicines and agrochemicals were adopted before the TRIPS agreement. Absence of data exclusivity is one of the primary threats to the Indian patent system since its nonexistence is leaving the branded pharmaceutical industry unguarded. Hence, for fulfilling international requirements, appropriate amendments to the law need to be made, so as to ensure protection of patent rights, resulting in encouragement for research and development, and growth of

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[23]The Patents Act, 1970, s. 107A.

[24]International. Centre. for Trade and Sustainable Development, "Indian Parliament Approves Controversial Patents Bill", *available at:* http://www.ictsd.org/weeklv/ 05-03-23/storvl.htm (last visited on March 15, 2015).

[25]Ludwig S R, "The Medicine Chest: Data Exclusivity- A Necessary Form of Intellectual Property", *Intellectual Property Today*, August 7, 2007.

[26]Agreement on Trade-Related Aspects of Intellectual Property Rights, *Marrakesh Agreement Establishing the World Trade Organization*, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (Apr. 15, 1994).

[27]*See* TRIPS Agreement, art. 39 (3).

genuine drug industries. A balance has to be created, so that a perfect base of equity is proved, for the company to reap benefits and also for the society to use the invention for development in the field.

Moreover, monitoring the abuse of Bolar exemption has become increasingly hard. The term 'uses reasonably related to the development' in s. 107A is a subjective expression not defined in any statue. An argument can be put forward as to what a reasonable use is. Can production of exorbitant quantity of drugs and subsequent stockpiling be permitted under the pretext of 'uses reasonably related to development'? Can regulatory authorization be granted for a drug that has more than 10 to 15 years of patent tenure left? Sometimes, generic companies after acquiring marketing approvals ultimately launch the product in market, infringing the patentee's rights. Hence, Indian patent law raises many issues that must be addressed.

Conclusion

The amendment that introduced the Bolar provision into the Indian patent regime[28] was a very welcome modification. The Bolar provision aspires to harmonize contrasting interests of multiple stakeholders, including domestic generic manufacturers, domestic research and the developing society, foreign multinational pharmaceutical companies, civil community groups and intellectual property lawyers. However, the absence of judicial analysis on the matter is raising manifold criticisms against the provision. The problems of data exclusivity, stockpiling are a few of them. Development of a drug and marketing it takes a long time, owing to delays caused in procuring approvals from the authorities. Even before a pharmaceutical company can reap the benefits of its discovery, generic manufacturers obtain approvals for their cheap bioequivalent of the drugs based on preclinical test data done by the patentee pharmaceutical company, putting genuine drug companies in a disadvantage. So, we have to see the importance of data exclusivity here. A balance has to be created,probably in the manner enforced under the US Patent laws as has been discussed earlier, so that a perfect base of equity is proved for the company to reap the benefits and also for the society to use the invention for development in the field.

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[28]The Patent (Amendment) Act, 2002.

Analysis of TRIPS with Special Reference to its Impact on the Health Sector in India

-Mukta Sathe*

TRIPS or the Trade Related Aspects of Intellectual Property Rights is an agreement seeking to bring uniformity in the national laws of the member states regarding protection of intellectual property. The TRIPS Agreement is annex 1C of the Marrakesh Agreement establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.[1] Ratification of TRIPS is a compulsory precondition for membership of the WTO. The TRIPS agreement deals with protection of intellectual property rights with emphasis on minimum standard of protection and enforcement measures to be adopted by all member states by making modifications in their national laws.

The matter of application of the TRIPS agreement to inventions of crucial medicines has been a matter of great controversy. There are serious differences between the developed and the developing countries on this subject, with the developed countries demanding greater compliance by the developing countries with the patent registration norms in this field, and the developing countries resisting this demand on grounds of public health. This concern led to the Doha Declaration in November 2001.

The generic drugs industry in India is one of the largest in the world. Any change in India's policy will impact this generic drug industry. Any change in policy will also impact thousands of patients in India and also in other developing countries.

This article seeks to analyse the impact of TRIPS on the health sector. With that aim it first deals with the objectives of patent protection. It then goes on to discuss in detail the adverse impact of the agreements relating to patents. The utility of the exceptions to the implementation of patent norms mentioned in the TRIPS is then discussed in detail. Finally a brief glimpse of the legal position in India is provided.

Relevant provisions of TRIPS

The relevant articles relating to Patents in TRIPS can be classified broadly into three groups-

a. Arts. 27, 28, 29 and 33 deal with subject matter, process of application, rights conferred and term of protection. Art. 34 deals with burden of proof.

b. Arts. 65 and 66 deal with transition period.

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* III B.S.L, LLB.

[1] *Available at*: www.wto.org/english/docs_e/legal_e/27-trips_01_e.html (last visited on March 15, 2015).

c. Arts. 27(2), 30 and 31 deal with exceptions.

Patent Protection

The objective of TRIPS is to promote 'effective and adequate protection of intellectual property rights' and to 'reduce distortions and impediments to international trade'.[2] Thus TRIPS seeks to promote technological innovation in order to increase transfer of technology which in turn is expected to enhance social and economic welfare. Art. 29 of the agreement makes a provision for framing national laws of member states, requiring the applicant to disclose the invention in such a manner that it can be carried out by any person in that field. Thus, instead of keeping secret the discoveries made and the processes used, the applicant is expected to disclose this information in such a manner that it is possible for others in the field to simulate the process. The strict enforcement of patent rights ensures that the commercial interests of the inventor are protected. Conferring of exclusive rights induces inventor to disclose his discoveries and it rewards the inventor and encourages research.

Art. 27 interprets the meaning of 'patentable subject matter' and includes both processes and products without any discrimination on the basis of any variable factors. This provision is dealt with in greater detail in the next section. But it is pertinent to mention here that it provides for a wide application of patent protection.

Art. 28 deals with the 'Rights Conferred on Patent holders' which include certain exclusive rights. These rights in case of product patents include the right to prevent third parties not having the owner's consent from the *'acts of making, using, offering for sale, selling, or importing for these purposes that product.'* In case of process patents, patent holder has the right to prevent third parties not having the owner's consent from the *acts of using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process*. Thus strong measures are included for the protection of rights of patent holders. These measures are intended to encourage innovation.

Sometimes there may be a second or third invention succeeding the first that improves the quality or applicability of the first or which increases efficiency in production. The TRIPS agreement makes it obligatory for these successive innovators to acquire the consent of the patent holder in order to develop the new product.

India is one of the countries from the developing world which has over time developed a strong pharmaceutical sector. The laws relating to patent in India have historically given a narrower application to intellectual property rights allowing pharmaceutical companies to make modifications in the manufacturing process to prevent application of patent restrictions. These companies are usually

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[2] *Ibid*.

secondary innovators whereas pharmaceutical companies from the developed countries are the primary innovators.

Broad application of IPR tends to provide incentive to the primary innovators and curtail the freedom of the subsequent ones. By giving this broad interpretation, TRIPS provides incentive to pharmaceutical companies to be primary innovators instead of secondary ones. It is also claimed that pharmaceutical companies from the developing countries indulge in what is called 'reverse engineering' of products produced to find out the process and ingredients and do not invest in Research and Development which allows them to sell the same at very low prices. This leads to large amount of losses to the primary innovators and discourages research. The TRIPS agreement intends to rectify this anomaly. The modifications of Indian patent laws made for conforming to the TRIPS will thus have a serious impact on the pharmaceutical sector. Whether this sector will be able to make a transformation from being secondary innovators to being primary ones remains to be seen.

Adverse impact

One of the important objections to the agreement relating to patent is that it would create monopoly leading to price rise, and would hinder access to lifesaving drugs to millions of people who are unable to pay such high prices. It has been observed: '[i]t is true that under any kind of intellectual property right, the price of that particular commodity will be high. This is due to the reason that monopoly price is always higher than perfect competition prices.'[3] Art. 27 states that- 'patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.'[4] It further goes on to state that- 'patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced'.[5] Thus the patents are now made available for both products and processes.

Further patent shall be granted irrespective of place of invention and place of production. This insures uniformity, non-discrimination and protection of intellectual property rights globally. But its application in case of crucial, life saving drugs raises certain problems.

[3]Shyama V Ramani, Augustin Maria, "TRIPS: Its Possible Impact on Biotech Segment of the Indian Pharmaceutical Industry", *EPW* 675-683 February 12-18 *available at:* http://www.epw.in/special-articles/trips-its-possible-impact-biotech-segment-indian-pharmaceutical-industry.html (last visited on March 15, 2015)

[4]Trade Related Aspects of Intellectual Property Rights, annex 1C to the Marrakesh Agreement establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.[4]

[5]*Ibid.*

The patent holders under this agreement have no obligation to invest in the country in which they apply for the patent. This has led to change in the concept of 'working of patent'. 'There is now no obligation on patent holders to produce the product in the country granting the patent. The patentees may thus prefer to import the drugs.'[6] The author believes that the principal objection to this is that imported drugs are usually more costly as compared to their local counterparts.

An extension of this argument is to view whether the proceeds and profits earned by the patent holders are utilised for development of drugs to fight diseases. This is an area of concern for the developing countries as they claim that adequate research is not done by big pharmaceutical companies in developing drugs for fighting diseases prevalent in these countries. It is observed: '[i]ncreased profits are not utilised for doing research into poor people's diseases. Thus there is no benefit.'[7]

Another important aspect is the period of patent protection. Art. 33 relates to the term of protection. It states that- 'The term of protection available shall not end before the expiration of a period of twenty years counted from the filing date.'[8] This increased period of protection is considered to delay the availability of low cost medical aid to the poor. The impact of reduced choice of sources of pharmaceuticals is an issue of concern. The basis of this criticism is that indigenous firms or generic companies will be prevented from manufacturing the patented drugs for a longer period of time. 'TRIPS agreement obliges all countries, irrespective of whether they are rich or poor to grant patent protection for twenty years. The poor countries suffer from inadequate medical staff, inadequate infrastructure, and lack of state financed health care and health insurance schemes. This will further delay availability of inexpensive drugs on which the health services of the developing countries and poor people depend.'[9]

Another important provision relates to reversal of burden of proof in civil cases as provided by Art. 34 of the agreement. Art. 34 provides that-" For the purposes of civil proceedings in respect of the infringement of the rights of the owner referred to in paragraph 1(b) of Art. 28, if the subject matter of a patent is a process for obtaining a product, the judicial authorities shall have the authority to order the defendant to prove that the process to obtain an identical product is different from the patented process. "[10]

[6]Dr. S.V. Pulla Reddy, "Trade Related Intellectual Property Rights (TRIPS); Need to impose obligations on the patentees of pharmaceutical products" Vol. 29 (1) *IBR* 15-22 (2002).

[7]*Ibid.*

[8]*Ibid.*

[9]*Ibid.*

[10]*Ibid.*

'The onus of proving that the process used by enterprise is totally different from the patented process would lie on the defendant and he will have to prove that he is not guilty of infringement.'[11]

Lastly it has been noted that many pharmaceutical companies engage in 'ever-greening' which means updating patents to receive extended monopoly. Slight changes are made in the product and it is presented as new in order to enhance term of patent protection. However in India attempts of ever-greening have been restricted by the existence of s. 3(d) as affirmed by the Supreme Court in the NOVARTIS case.

NOVARTIS case

On April 1, 2013, the Supreme Court upheld[12] the Intellectual Property Appellate Board's decision to deny patent protection to Novartis's application covering a beta crystalline form of imatinib —the medicine Novartis brands as Glivec and which is very effective against the form of cancer known as chronic myeloid leukaemia (CML).[13] Novartis lost a six-year legal battle after the court ruled that small changes and improvements to the drug Glivec did not amount to innovation deserving of a patent.[14]

The Court considered that the application for patent fell under the concept of ever-greening on the basis that the drug was not significantly different from the older version as required under s. 3(d) of the Act. This decision was hailed by activists working in this field for ensuring access to lifesaving drugs to poor people, and criticised by those in the pharmaceutical industry on the basis that it discourages innovation.

Transition Period

Art. 65 of the said agreement provides for a transition period after which it is obligatory on member countries to enforce the patent norms laid down. In case of developing countries this transition period is five years which may in some cases extend to ten years. In case of LDCs it is ten years. This is to enable them to make amendments in their national laws and to set up the requisite infrastructure to enforce these provisions and also to prevent the burden that would otherwise be cast on them had there not been such a provision. However it also needs to be noted that there has been no substantive change in the standard of living of poor people in these countries; and thus the transition period does not reduce the concerns about the impact of rise of prices of life saving medicines. It can also be argued that ten years is far too short a period for the underdeveloped countries to

[11] *Ibid.*

[12] *Novartis AG* v. *Union of India*, AIR 2013 SC 1311.

[13] "Why Novartis case will help innovation" *available at:* www.thehindu.com/ opinion/... novartis-case.../article4617473.ece (last visited on March 15, 2015).

[14] "Novartis denied cancer drug patent in landmark Indian case" *available at:* www.theguardian.com/.../novartis-denied-cancer-drug-patent-india (last visited on March 15, 2015).

attain a level of development whereby their citizens would be able to pay the higher prices envisaged, even if it were assumed that these countries have a high rate of growth. In reality, many of the LDCs suffer from political instability making a high rate of growth impossible.

Further the provisions of this article are made valueless due to other articles which require acceptance of product and process patent applications with immediate effect and which state that term of protection commences from date of filing of patent. It has been observed: '[t]his provision for transitional period has been virtually invalidated by the provisions in Art. 70.8 of the TRIPS agreement which insists member countries to provide for means for acceptance of product patent applications with immediate effect.'[15]

Even though India was not required to comply with the product patent requirements of TRIPS until 2005, it was mandated to create a mailbox for the filing of patent applications that would be examined when the 2005 changes came into effect.[16] Further countries are required to provide 'Exclusive Marketing Rights' to patent holders for five years.

Exceptions to application of TRIPS: are they actually Useful

The agreement provides for certain exceptions. Art. 27.2 authorises members to exclude from patentability those inventions preventing the commercial exploitation of which is necessary to protect human, animal or plant life or health etc. There is however debate on how this provision is to be interpreted. It has been argued that medicines such as drugs for AIDS should be subject to exceptions under the TRIPS since these products are necessary to protect public health. However, rejoinders have been voiced arguing that Art. 27.2 simply means that dangerous products should be excluded from patentability.'[17]

Further Art. 30 deals with Exceptions to Rights Conferred, and states: 'Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.'[18]

However there is no illustrative list of conditions in which intellectual property rights can be curtailed. Thus there is great ambiguity in the interpretation of this provision.

[15] *Ibid.*

[16] V. K. Unni, "Indian Patent Law and TRIPS: Redrawing the Flexibility Framework in the Context of Public Policy and Health" *available at:* www.mcgeorge.edu / documents /.../ globejune2012_indianpatentlaw.pdf (last visited on March 15, 2015).

[17] Saurabh Chandra, "Impact of TRIPS over Indian Patent Regime vis-à-vis Indian Pharmaceutical Industry" 2 *GJLS* 2321 (2013).

[18] *Ibid.*

The Doha Declaration of 2001 further seeks to address some of these problems. The Preamble states- 'The Doha Declaration recognises the gravity of the public health problems affecting many developing countries and Least Developed Countries (LDCs) especially those relating to HIV/AIDS, TB, Malaria and other epidemics.'[19] It provides an extended period till January 2016 to the LDCs to implement these provisions. This is a welcome extension but is still not adequate to address the public health problems which wait to occur. It only seeks to delay the occurrence of the same.

Further the declaration states that- 'We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health...'[20] further it states that- 'Each member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted.'[21]

Compulsory licensing is the granting of a license by a government to an applicant allowing him to use a patent without the patent-holder's permission. The government can grant licenses for patent use in situations where the patent-holder is either not using the patent within the country or is not using it adequately.[22]

However this provision relating to compulsory licensing is subject to the provisions of Art. 31 of the TRIPS agreement. Art. 31 deals with 'Other Use Without Authorization of the Right Holder'. Clause (b) of this Art. states that 'such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of national emergency or other circumstances of extreme urgency or in cases of public non-commercial use.'[23] Further, clause (f) states that- 'any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use;'[24]

This provision restricts compulsory licensing predominantly to domestic use. Parallel imports of generic drugs are not allowed. Thus many developing countries in which generic drugs are not produced, but which depend heavily on the import of these goods will be severely affected by the provisions of this article. India being a primary supplier of generic drugs to many developing countries will not be able to export large quantities of drugs which will adversely impact the generic drug industry in India. The production capacities of these generic drug industries will be adversely affected, leading to a rise in the prices of drugs in domestic markets.

[19] *Ibid.*
[20] *Ibid.*
[21] *Ibid.*
[22] Ford Sara M., "Compulsory Licensing Provisions Under the TRIPS Agreement: Balancing Pills and Patents" 15 *AUILR* (2000) at 941-974.
[23] *Ibid.*
[24] *Ibid.*

Legal position in India

The first amendment was made to the Patents Act, 1970 in 1999 followed by an amendment in 2002. The transitional period in case of India got over in 2005, and the Patent (Amendment) Act, 2005 was introduced. It brought in some changes with respect to application and term of patents with the purpose of ensuring compliance with the TRIPS agreement. The changes include provisions for product and process patenting, longer term of patent protection i.e. 20 years, and changes in provisions regarding compulsory licensing. Before this amendment, Indian process patents granted in the field of pharmaceuticals lasted for only five years from sealing, or seven years from the date of the patent, whichever was earlier, but the term of all other patents was fourteen years from the date of the patent.[25] There was also no provision for product patents for pharmaceutical, food and chemical-based products. These sectors were only covered by process patents.

As India is a primary supplier of generic drugs to other developing countries in Asia and Africa, this amendment will also impact poor people living there who depend on these drugs.

However, as has been already noted, ever-greening is discouraged in India, attempts to indulge in the same are scrutinised and patent is not to be granted in any case where ever-greening is suspected.

Conclusion

The TRIPS is an agreement seeking to promote innovation by providing strict enforcement of intellectual property norms. However its application to life-saving drugs is an issue of concern as it prevents many people from having access to the same. A balance needs to be brought about between the need to encourage research and the protection of the right of millions of people to access affordable medication. Taking into consideration the different levels of development in different countries resulting in a vastly inequitable distribution of wealth and a major gap in purchasing capacities, it would be unjust to apply a uniform legislation for protection of patent rights in this field. The agreement provides for some degree of flexibility in the drafting of legislation in this field. The Doha declaration also addresses some of the concerns. But the provisions are inadequate as has been illustrated in detail in this article. Thus it would be advisable either to carve out an exception with respect to patent protection in case of life saving drugs as a category or to expect different levels of patent protection in different countries making more specific provisions which give autonomy to member states to make certain exceptions taking into consideration the special circumstances and the health policy in the country.

One aspect that needs to be discussed but has not been discussed as it does not lie squarely within the purview of the topic is the impact of TRIPS on drugs which are not essentially life-saving but which are essential to maintain health in the

[25] The Patents Act (Act 39 of 1970).

long term. Non- availability of such drugs can lead to severe medical injury in the long term.

With respect to India it can be said India has amended its IP laws to bring them in conformity with the TRIPS in order to fulfil it obligations. However attempts are being made in India to protect the rights of the patients. In the Novartis case the Supreme Court made it clear that any attempt of ever-greening shall not be successful.

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Cyber Squatting: The Internet Shakedown

*-Aanchal Lamba**

How often does one visit the internet? The answer to this question makes us realize our dependence on the internet. This growing use of the internet has not only influenced all sectors of the society but also caused a drastic change in the timeworn business trends. The internet is used by brands as well as individuals to advertise, sell, promote and introduce new products and services in the cyber market. Moreover, various business models are introduced via the internet, and it also acts as a catalyst for business growth. As a result of these opportunities that the internet provides us, the world is witnessing a new change in the field of communications and connection. Along with this opportunity of limitless growth, the cyber space also has to bear the brunt of cybercrimes and unlawful activities. Cybercrimes and Cyber piracy encompass many forms of deceptive internet practices that aim for profiting at the expense of online users. Cybersquatting is an example of such practice.

Cyber-squatting: Background

For the purpose of understanding cybersquatting, it is essential to comprehend the technical background on which this crime breeds. While finding information on the internet, the address that one keys in for reaching a website is the domain name. Domain names are words or phrases (e.g.: www.google.com) that substitute for and correspond to IP addresses. IP addresses are a string of numbers separated by a period, e.g., 192.168.0.2. These numbers are like addresses that provide a signal to the computer that tells it where to look for the information being requested. Since it is difficult to remember these numerical sequences, domain names are used. The IP addresses and their corresponding domain names conjointly comprise the Domain Name System (DNS). Domain Name System is administered by the Internet Corporation for Assigned Names and Numbers ("ICANN"). ICANN is an internationally organized, non-profit corporation that has responsibility for Internet Protocol (IP) address space allocation and domain name system management.[1] ICANN manages and coordinates the domain name system by overseeing the distribution of unique IP addresses and domain names. However, actual domain name registration is handled by numerous domain name registries situated in various countries around the world. Domain names are registered on first-come-first-served basis. This allows opportunists to "squat" over domain names.

Cybersquatting entails purchasing domain names that include another's trademark, in the hope that the trademark owner will purchase the domain from the squatter, i.e., the person who acquires the domain name, for a price much

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* IV B.S.L, LL.B.

[1] Archives, The Internet Corporation for Assigned Names and Numbers, *available at:* http://archive.icann.org/ tr/english.html (last visited on March 15, 2015).

beyond the amount that the squatter paid for registration. In simple words, cyber-squatting is the act of registering a domain name that is the same as, or confusingly similar to, the trademark of another with the intention of selling (at a profit) the domain name to the trademark owner.[2] It is "an act of obtaining fraudulent registration with intent to sell the domain name to the lawful owner of the name at a premium."[3] The domain squatter tries to take undue advantage of the reputation of another and his business by registering a domain name. This can also deceive internet users.

Typo-squatting, also called URL[4] hijacking or fake URL, is another form of cyber-squatting. It rests upon the mistakes, such as typographical errors, that Internet users are likely to make when keying in a website address into a web browser; for example, 'Goggle.com', the typo-squat of Google.

Remedy of passing-off or infringement

Cyber-squatting is actionable as the common law tort of "passing off" that protects the goodwill of a trader from misrepresentation. The ingredients of this tort are: goodwill, misrepresentation and damage to goodwill.[5] Goodwill is an asset, and it is necessary to protect its encroachment. This tort prevents one trader from falsely inducing a person or public to believe that certain goods or services are the goods and services of another trader, or has some association or connection with another trader. The trader tries to influence those interested in the goods and services being misrepresented. The law of passing off can be used to enforce and protect the rights of registered and unregistered trademark owners as well as others involved in regular course of trade. However the law relating to passing off prevents misrepresentation, but cannot confer monopoly rights.

Yet another protection against cyber-squatting lies in the trademark law, one object of which is to prevent unfair competition by protecting the use of a symbol, word, logo, slogan, design, etc. that uniquely distinguishes the goods or services of a trader. It is also intended to avoid consumer confusion and preventing companies from adversely affecting the reputation of other firms. The trademark law includes domain names in the ambit of its protection that it provides to prevent unfair competition.

Role of ICANN

The ICANN implemented the Uniform Domain Name Dispute Policy (UDRP) in 1999, which enabled resolution of disputes about rights over domain names. All registrars of a domain names are under an obligation to follow the UDRP. The UDRP is designed to solve disputes which usually arise when registrant has

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[2]Roger Leroy Miller, Frank B. Cross, *The Legal Environment Today: Business in its Ethical, Regulatory, E-Commerce, and Global Setting* (South-Western College Publishing, 7th Edition, 2002).

[3]*Manish Vij* v. *Indra Chugh* AIR 2002 Del 243.

[4]Uniform Resource Locator.

[5]*Reckitt & Colman Products Ltd* v. *Borden Inc* [1990] 1 All E.R. 873.

registered a domain name identical or confusingly similar to the trademark with no rights or legitimate interests in the name, and has registered and used the domain name in bad faith.[6] Such a dispute alleged to have arisen under the UDRP can be resolved by agreement, court action, or arbitration before a registrar. An order to cancel, suspend, or transfer a domain name can be given against an abusive domineer. Further, to invoke the policy, a trademark owner should either (a) file a complaint in a court of proper jurisdiction against the domain-name holder or (b) in cases of abusive registration submit a complaint to an approved dispute-resolution service provider, who is then under an obligation to conduct expedited administrative proceedings.[7] Five approved dispute resolution service providers accept such complaints: the Asian Domain Name Dispute Resolution Centre (established in 2002), the National Arbitration Forum (established in 1999), the World Intellectual Property Organisation, WIPO (established in 1999), the Czech Arbitration Court (established in 2008), and the Arab Centre for Dispute Resolution (established in 2003)

The jurisdiction of these service providers is international in nature, and the procedure followed is time-saving and cost-effective. Each provider follows the UDRP as well as its own supplemental rules, and the procedures lack uniformity.

Some cyber-squatting disputes

In *World Wrestling Federation Entertainment v. Michael Bosman*[8], the first case under the UDRP, the US-based World Wrestling Federation (WWF) commenced proceedings against a California resident who had registered the domain name "worldwrestlingfederation.com", and had offered to sell it to WWF at a huge dividend a few days later. It was held that the domain name registered by the respondent was identical or confusingly similar to the trademark of WWF, that the respondent had no legitimate rights or interests in the domain name, and that the same was registered in bad faith. Therefore the respondent was ordered to transfer the registration of the domain name to the complainant, WWF.

Much earlier, in *Intermatic v. Toeppen,*[9] the plaintiff had a registered trademark 'Intermatic'. Mr Toeppen, the respondent registered the domain name "www.intermatic.com". The US court observed that such conduct of Mr. Toppen caused dilution of Intermatics trademark. It was held that according to the

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[6]"The Uniform Domain Name Dispute Resolution Policy", para. 4 (a) *available at:* https://www.icann.org/resources/pages/rules-be-2012-02-25-en (last visited on March 15, 2015).

[7]The Internet Corporation for Assigned Names and Numbers, Uniform Domain Name Dispute Resolution Policy *available at:* https://www.icann.org/ resources/pages/help/dndr/udrp-en (last visited on March 15, 2015).

[8]WIPO Arbitration and Mediation Centre, Administrative Panel Decision No. D99-0001, *available at:* http://www.wipo.int/amc/en/domains/decisions/html/1999/ d1999-0001.html (last visited on March 15, 2015).

[9]947 F. Supp. 1227 (N.D. Ill. 1996).

Federal Trademark Dilution Act,[10] the "term 'dilution' meant the lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of competition between the owner of the famous mark and other parties, or likelihood of confusion, mistake or deception."This case prompted enactment of the "Anti Cybersquatting Consumer Protection Act, 1999 (ACPA)."[11] This Act creates civil liability for bad-faith registration of domain names with the intention to profit from those domain names that are identical or confusingly similar to someone's trademark. The Act also provides for remedies which include injunction, forfeiture or cancellation of domain name, actual damages or profits, or statutory damages[12]. A trade mark owner can file an "in rem" action against the domain name itself (as opposed to the registrant of the domain in a case where the registrant cannot be found after notice or the registrant had provided fake information of himself while registration).[13] However, the remedies available in an "in rem action" are limited to forfeiture, cancellation or transfer of the domain name[14].

To claim under this Act, the defendant should have registered or used a domain name that (i) is identical or confusingly similar to a distinctive mark or famous mark or (ii) is a trademarked word or name.

The plaintiff should prove that the defendant registered the domain name with a bad faith or an intention to make profit. An internet domain name resembling a trademark, will not prima-facie establish the mala fide intention of the defendant. Unfortunately, the Act does not provide a trademark owner with any remedy to enforce his rights over his trademark, in a case where he is unable to prove the bad intention of the registrant.

In India, there is no law prohibiting cybersquatting.

In *Yahoo! Inc. v. Akash Arora,*[15] the plaintiff was the owner of the trademark 'Yahoo!' and domain name 'Yahoo.Com', which were very well-known and had distinctive reputation and goodwill. The defendant adopted the name "yahooindia.com" for providing similar services as that of the plaintiff. Referring to *Marks & Spencer v. One-in-a-Million*[16] it was held that trademarks and domain names are not mutually exclusive, and there is an overlap between the trademarks and services rendered under domain names. However, applying the principle of passing-off, it was held that in such a case there is every possibility and likelihood of confusion and deception being caused in the mind of an internet user. The court issued an injunction in favour of the plaintiff. The case was not decided with reference to the Trade and Merchandise Marks Act 1958.

[10] 15 U.S. Code § 1125 supplanted by the Trademark Dilution Revision Act of 2006 (TDRA).
[11] 15 U.S.C. § 1125 (d).
[12] 15 U.S.C § 1116 of ACPA & 15 U.S.C § 1117 of ACPA.
[13] 15 U.S.C § 1125 (d) (2) of ACPA.
[14] 15 U.S.C § 1125 (d) (2) (D) (i) of ACPA.
[15] 1999 IIAD Delhi 229, 78 (1999) DLT 285.
[16] 1998 FSR 265.

In *Satyam Infoway Ltd v. Sifynet Solutions (P) Ltd,*[17] the respondent had registered domain names which were similar to the plaintiff's domain name *www.sifynet.com*. The plaintiff had considerable reputation and goodwill in the market and the word "Sify" was first coined by the plaintiff. The Supreme Court observed that domain names may have all the features of trademark.

Maruti Udyog Limited v Maruti Infotech,[18] was a complaint relating to the domain name, under UDNDRP filed with WIPO - Arbitration and Mediation centre by Maruti Udyog, the well-known car manufacturer and owner of the trade mark "Maruti". The respondent registered the domain name "www.maruti.org". The respondent intended to sell the domain name to the plaintiff for a price. The respondent was ordered to transfer the domain name to the plaintiff without any consideration.

In *Hero Honda Motors v. RaoTella,*[19] the domain name "herohonda.com" was registered by Mr. Tella, the defendant, a person based in the United States of America, claimingthat it was registered for a website dedicated to fans of Honda. However, Mr. Tella had not activated the website. The WIPO panellists held that such passive holding of the domain name was indicative of the fact that its registration was in bad faith, and ordered that since the domain name was identical to the trade mark of the complainant, it should be transferred to Hero Honda Motors.

In *Google Inc.* v. *Herit Shah,*[20] an Indian teenager Herit Shah (Shah), who had been using the domain name 'googblog.com', was ordered to transfer the rights of the domain to Google Inc.

.IN Dispute Resolution Policy

".in" is India's Top Level Domain (TLD) on internet. A domain name dispute concerning this TLD is governed by the .IN Dispute Resolution Policy (INDRP) and is overseen by the National Internet Exchange of India (NIXI). The INDRP remains unique and is distinct from the UDNDRP even though it follows the same procedures.

A complaint under INDRP complainant should satisfy the following conditions:

a. The domain name must be similar to the complainant's trademark;

[17] AIR 2004 SC 3540.
[18] WIPO Arbitration and Mediation Center, Administrative Panel Decision No. D2000-0520, available at: http://www.wipo.int/amc/en/domains/decisions/html/ 2000/d2000-0520.html (last visited on March 15, 2000).
[19] WIPO Arbitration and Mediation Center, Administrative Panel Decision No. D2000-0365, available at: http://www.wipo.int/amc/en/domains/decisions/html/ 2000/d2000-0365.html (last visited on March 15, 2015).
[20] WIPO Arbitration and Mediation Center, Administrative Panel Decision No. D2009-0405, available at: http://www.wipo.int/amc/en/domains/decisions/html/ 2009/d2009-0405.html (last visited on March 15, 2015).

b. The registrant of the domain name that is in dispute does not have rights or legitimate interests in respect of the domain name;
c. The domain name must be registered and/or used in bad faith.

The object of the INDRP is to counter cybersquatting, and hence it is imperative that a complainant satisfies all three conditions while seeking a remedy. These conditions are interpreted conjunctively. The UDRP proceedings are governed by the UDRP Policy, and supplemental rules, while under the INDRP, the arbitrator is appointed who has to conduct the proceedings in accordance with the INDRP Policy and Rules of Procedure and the Arbitration and Conciliation Act, 1996.

Need for Legislation in India

In the absence of a statutory remedy, cyber-squatting is counteracted under the law of passing off or trademarks; and disputes are taken up under the Uniform Domain Name Dispute Resolution Process (UDNDRP) devised by ICANN and WIPO. The law relating to trademarks is not structured to deal with complex disputes constantly emerging in cyberspace. The Information Technology Act 2000 is silent about cybersquatting. The pressing need of the hour in India is legislation about cybersquatting.

Moreover, efforts should be made to curb cyber-squatting at the registration level and back-ground check should be a must before registration of domain names.

Predatory Pricing: Are Online Markets Flouting Competition Law?

Mayura Shetty[*]

Electronic commerce (or e-commerce) is becoming increasingly popular for a variety of reasons. It provides numerous benefits to consumers in the form of lower prices and wider choices, and saves time. People can buy goods, book tickets, pay bills, book hotels etc. at the click of a button without leaving their home. The changes brought about by online markets have the potential to increase competition by increasing consumers' choice of products and traders. They also enable firms to improve their efficiency as they move from high cost paper-based transactions to low cost electronic transactions. At the same time, it must be ensured that the opportunities for competition in the online space are not hindered by anti-competitive issues. With increasing number of people opting for online transactions, the traditional brick-and-mortar shops are raising complaints about the pricing strategies of such online retailers.

Flipkart earned $100 million dollars in 10 hours on its Big Billion Day Sale on October 6, 2014. Online retailers like Flipkart, Amazon, SnapDeal etc. offer discounts to consumers throughout the year. This results in complaints from traditional retail traders that such e-retailers are guilty of predatory pricing. The question arises whether these low prices offered by online markets is fair aggressive pricing (an important component of competitive markets) or unfair pricing which may slowly lead to the death of the traditional retail system.

Predatory pricing is a pricing strategy where a dominant enterprise offers products or services at a very low price intending to drive competitors out of the market or to create barriers for entry to potential new competitors. Price predation occurs when a dominant firm charges a price lower than the cost of production, making it difficult for equally efficient firms to operate. Predatory conduct seeks to reduce competition on some basis other than efficiency, maximising profit onlybecause of its exclusionary tendencies. It reduces profit margins through steep discounts. The rationale behind predatory pricing is that once the competitors are driven out of the market, the predator will raise his prices and recoup all his losses. Hence, the predator suffers short term losses to attain long term profits. In India predatory price has been defined under s. 4 of the Competition Act, 2002[1] (the Act) in the following words:

> "Predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by the regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.'

[*] IV B.S.L, LL.B.
[1] (Act 12 of 2003).

"Cost" has been defined to mean the 'average variable cost' under the Regulations[2]. India has adopted AVC as the standard to measure price predation. AVC is used as a substitute to marginal cost, which is difficult to calculate. The Commission also has the discretion of adopting any other cost standard (such as avoidable cost, long run incremental cost, or market value), if it considers it fit to do so.

The tests for determining whether an enterprise is guilty of predatory pricing are as follows:

Dominance test: The primary test is determining whether or not the enterprise holds a dominant position in the relevant market. An enterprise can be said to be guilty of predatory pricing only if it is dominant in the relevant market. Dominant position is explained under the Act to mean a position of strength enjoyed by a firm which enables them to operate independently of the competitive forces prevailing in the market, and also to affect the competition, consumers or the relevant market in its favour.3 A widely acclaimed legal test for dominance was laid down by the ECJ in *United Brands v .Commission*[4] in the following words:

> *'The dominant position ... relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers, and ultimately of its consumers'.*

Therefore, the test for dominance has two elements- the ability to act independent of consumers and competitors and the ability to affect competition (through influencing consumers or competitors).

Relevant market test: Relevant market, in simple terms, identifies the particular product produced or service rendered in a given geographic area. A relevant market can be classified into relevant product market and relevant geographic market.[5] The product market describes the goods or services. The geographic market describes the locations of the producers or sellers of the goods or services. For instance, if consumers consider two goods to be close substitutes of each other, those two goods are considered to be in the same relevant product market. A geographic market is defined by the consumers' view of substitutability of products made or sold at various locations. For example, if purchasers of a product sold in one location would, in response to a significant

[2]The Competition Commission of India (Determination of Cost of Production) Regulations, 2009, regulation 3.

[3]The Competition Act, 2002, s. 4, explanation II.

[4]*United Brands Company and United Brands Continental BV* v. *Commission of the European Countries* [1978] ECR 207, [65].

[5]'Relevant market', 'relevant geographic market' and 'relevant product market' are defined in clauses (r), (s), (t) of s. 2 respectively.

increase in price switch to buying the product sold at another location, then those two locations are said to be in the same geographic market, with respect to that product.[6] A firm has to be dominant in the relevant market to be guilty of predatory pricing.

The answer to the question of whether online retailers are guilty of predatory pricing is in the negative. Aggressive pricing including massive discounts are not anti-competitive per se. The Act only makes predatory pricing by a dominant player punishable. Hence, selling below cost is not prohibited by Indian competition laws for other players. If you are not a dominant player you can sell below cost to stay competitive or to increase your market share. It is only when you are dominant that the question of predatory pricing arises and is punishable. It is the essence of competition that firms should compete for business by reducing prices. Discounts, rebates and similar practices are essential components of the competitive process and the law should not condemn practices that are pro-competitive.[7] The law on predatory pricing must maintain a fine distinction between competitive behaviour and anti-competitive conduct. Practices that increase competition must be encouraged. As long as online retail companies are not flouting any rules, their pricing strategies must be lauded because they provide benefits to the consumers.

The reasons as to why online retailers are not guilty of infringing competition laws can be laid out as follows:

No single e-commerce player is dominant in the combined retail space: So far in India, online and offline markets are not considered as separate markets but they are recognised as different platforms for selling the same products. The Competition Commission of India (CCI) in a case[8] said, "Both offline and online markets differ in terms of discounts and shopping experience; buyers weigh the options available in both markets and decide accordingly. If the price in the online market increases significantly, the consumer is likely to shift towards the offline market and vice versa. Therefore, the Commission is of the view these two markets are different channels of distribution of the same product, not two different relevant markets". At present in India, online retailers only account for $3.1 billion of the $500 billion of annual retail sales[9]; that is, online sales are just a small percentage of the total annual retail sales. Considering this information, it is impossible that a single e-commerce player can be dominant in the retail area

[6]Dr. S. Chakravarthy, "Relevant Markets in Competition Law Analyses" *available at* http://circ.in/pdf/relevant_ market-in-competition-case-analyses.pdf (last visited on March 15, 2015).

[7]Richard Whish and David Bailey, *Competition Law* (Oxford University Press, 7th edn., 2008).

[8]Ashish *Ahuja v. SnapDeal,* Case No. 17 of 2014 decided by the Competition Commission of India on 19 May 2015.

[9]Surabhi Agarwal and Anusha Soni, "Tech brands lock horns with e-com firms over 'predatory' pricing" (February, 2014), *available at:* http://www.business-standard.com / article / companies / tech-brands-lock-horns-with-e-com-firms-over-predatory-pricing-114021901026_1.html (last visited on March 15, 2015).

or that e-tailers can even be considered as a threat to offline markets. Offline sales still dominate the retail sector and this may take years to change. As long as online retailers hold only a small percentage of the market share they cannot be considered as having any significant effect on competition.

The e-commerce space itself has many competitors, none of whom is dominant: Even if only online markets are considered, no one e-tailer can be considered to be dominant in the online space. There are various online retail companies like Flipkart, Amazon, SnapDeal etc. all of whom enjoy a considerable market space. Normally, a company needs to have more than 50% of the market share to be considered dominant. As long as there are numerous competitors in the online space, all of whom enjoy a considerable market share, no single one of them can be considered dominant.

E- commerce players are merely platforms and not retailers: E-retailers which operate through the marketplace model are merely platforms for retailers to sell their products and they are not retailers themselves and hence they cannot be held responsible. This has been upheld by the CCI in *Ashish Ahuja v. SnapDeal*.[10] In this case, the complainant was a retailer who was selling SanDisk products through the online portal SnapDeal. Later, SnapDeal stopped the sale of his products claiming that he was not an authorised partner of SanDisk. The complainant argued that SnapDeal and SanDisk were collaborating to force him to become an authorized dealer of SanDisk which would prevent him from offering competitive prices to his customers. The CCI held that SnapDeal could not be a dominant player because it was not purchasing and selling the device itself; it was merely an intermediary which allows sellers to sell their products through its portal for commission. Hence, as long as e-retailers are merely allowing other retailers to sell their products and they themselves are not engaged in the purchase and sale of these products, such online retail companies cannot be held responsible for predatory pricing.

Predatory pricing is punishable only if it is done with a view to eliminate competitors: Online markets thrive on the low prices and various discounts offered by e-retailers. Low prices are seen as an advantage of good competition. Generally, when discounts are offered by one online retail company, the other companies also follow suit. Around the time of the Big Billion Day sale of Flipkart, Amazon and SnapDeal also offered huge discounts on a variety of products. This practice of offering discounts is not aimed at eliminating competitors or at thwarting competition. To be considered as anti-competitive, deep discounts should have an 'appreciable adverse effect on competition'. The issue of predatory pricing does not arise here since it is not a case of a dominant player eliminating competitors. The discounts offered by such e-retailers are in no way preventing other firms from entering this market. While looking at cases of predatory pricing, competition law investigators consider the sustainability of

[10] *Ashish Ahuja v. SnapDeal*, Case No. 17 of 2014 decided by the Competition Commission of India on 19 May 2015.

such pricing strategies and how the discounts are funded. For this reason, a stock clearance sale or discounts offered by a retailer to mitigate losses is not considered anti-competitive even if the retailer is selling below cost. Hence, predatory pricing is punishable only when it is done with a view to eliminate current competitors or to prevent new competitors from entering the market.[11] In the online space all retailers offer huge discounts throughout the year and no one of them can be said to be indulging in unfair pricing.

Conclusion

As per the current scenario in India, an online retailer cannot be held responsible for predatory pricing even if, like in Flipkart's case, they sell products for one rupee. Online retailers who offer products at throwaway prices are not trying to reduce competition and hence there is no intention on their part to infringe competition laws. The CCI was correct in holding that online and offline retailers are not separate markets but they are merely different channels of distribution of the same products. For consumers, both markets are interchangeable. They compare prices in both markets and then choose the market where the product is available at a cheaper price.

Online markets still have a long way to go before they can be considered as having any appreciable adverse effect on competition. In India, online retailers are still in their nascent stage and cannot be thought of as having an impact on offline retailers. The discounts which are being offered by online retail companies encourage healthy competition in the online space and this provides benefits to the consumers at large. As long as they are upholding the spirit of competition, they should not be accused of anti-competitive conduct.

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[11] The Competition Act, 2002, s. 4, explanation II.

Right to be Forgotten- *cui bono?*

-Ayush Agarwal[*]

"Gossip isn't inherently good or evil—it has its virtues as well as its vices. On the Internet, however, gossip is being reshaped in ways that heighten its negative effects and make its sting more painful and permanent"[1]

It must be asked: What does it mean to be 'forgotten'? Where do we draw a line as to when are we forgotten? Does it mean not being linked to certain search engine results or does it means that being able to Google yourself is being 'remembered'? Does being identified and 'remembered' help the future generations with the knowledge and information or will that information be wrongfully utilized by malicious actors such as revenge porn websites?

These are some of the many questions that arose after a debatable judgement passed by Court of Justice of the European Union in the case of *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González*[2]. Through this article we will understand the scope of this judgement and the various concerns that arose. But before I go on to elucidate the enigma behind these questions, there is need to understand this concept *ab initio.*

Right to be forgotten is based on this definition, as the right as viewed by an individual is "to determine the development of their life in an autonomous way, without being perpetually or periodically stigmatized as a consequence of a specific action performed in the past[3]". Simply put, any 'information' that is irrelevant, devoid of purpose, excessive, out-dated and/or damaging, or 'that can hamper present transactions, should be 'delisted' from the search results.

The two words *Information* and *Delist* have been highlighted because these words create ambiguity as to how this right is to be made enforceable. Right to be forgotten is now considered to be an extension of privacy law which is enumerated in European Data Protection Directive No. 95/46/EC[4] on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Though this Directive is a current legislation, a new unified law to address the growing global concerns like privacy infringement through cloud computing and social networks is planned to be

[*] V. B.S.L, LL.B.

[1] Daniel J. Solove, *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet* (Vail-Ballou Press, USA, 2007).

[2] ECLI:EU:C:2014:317.

[3] Mantelero, Alessandro, "The EU Proposal for a General Data Protection Regulation and the roots of the 'right to be forgotten;" *Computer Law & Security Review*: 229–235 (2004).

[4] "Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data" *Official Journal L 281* 0031 (1995), also *available at:* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML (last visited on March 15, 2015).

adopted by 2015 and enforced from 2017 , namely the long pending General Data Protection Regulation (GDPR)[5], more specifically Art. 17 of the Regulation.

As stated before, the case of *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González*[6] led to change in the European Directive; it's therefore pertinent to understand this case in depth. In 2009, Mario Costeja González requested to remove or alter two postings on a major Spanish newspaper website dated March and January of 1998. The postings were related to real-estate auction for the recovery of social security debts owed by him. He contended that as the issue is resolved, the articles are no longer relevant but in turn are damaging his reputation. Secondly he requested Google Spain to remove or conceal his personal data so that data did not appear in the search results. As the publication was part of Government requirements for an auction sale, the posts were not taken down. The Agencia Española de Protección de Datos (Spanish Data Protection Agency, the AEPD), rejected the complaint and the action was brought before Audiencia Nacional (National High Court, Spain), which in turn referred the case to Court of Justice of the EU.

The ECJ[7] constructively interpreted the following three legal ambiguities in Directive 95/46/EC,[8] namely

a. Art. 2 (b) –'processing of personal data'
b. Art. 2 (d) – 'controller'
c. Territorial scope of the Directive though ' establishment'

The ECJ found that pursuant to the Directive, whenever any third party websites data is available through search engines, the operator of the search engine 'collects', 'records', 'retrieves' and 'organises' the data through indexing which & then 'stores' on its servers and then 'make it available' to the users in the form of list of results. This route of data broadcast, therefore, constitutes 'processing'. The court went on to say that even if there is no distinction between search and retrieval of information other than personal data[9], the operator's action falls within the ambit of the Directive. This entails that whatever search results are showed; whether in the name of just information and not actual personal data, it will be 'processing of personal data' and hence such data can be requested to be

[5] European Parliament Legislative Resolution dated 12 March, 2014 on the proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)", No. *COM (2012) 0011 – C7-0025-/2012 available at* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0212+0+DOC+XML+V0//EN (last visited on March 15, 2015).

[6] ECLI:EU:C:2014:317.

[7] European Court of Justice

[8] Mantelero, Alessandro, "The EU Proposal for a General Data Protection Regulation and the roots of the 'right to be forgotten;" *Computer Law & Security Review*: 229–235 (2004).

[9] As defined by the Directive, personal data means "any information relating to an identified or identifiable natural person (data subject)".

taken down. Therefore, Google's contention that it was not a 'controller' was not accepted by ECJ.

As far as territorial scope of the Directive is concerned, the Court observed that even though the data processing was done outside Spain, a member state, it was done for the purposes and 'in the context of the activities' of that establishment in Spain. Also as Google Spain is a subsidy of Google Inc., the advertising activities done by Google Spain are linked to the processing of data done outside Spain. Therefore it is an 'establishment' and both activities being connected and extension of each other, the processing activities of Google in the US comes under the purview of AEPD.[10]

These interpretations by the ECJ effectively made Google liable for data indexed by it even outside the member state jurisdiction. Google now has the responsibility of filtering information published on third party websites and remove them from search results so that any person's image is not distorted by building of a selective profile through disseminated moments of life captured through some binary mechanical logic.

This judgement gives a lot of power to the member state privacy protection agencies. Hence this judgement was widely criticized in US for being against the freedom of speech and free flow of information enshrined in the First Amendment.[11] This widens the cultural and legal tension between the free speech of US and ever-expanding individual privacy protection in the EU.

Another observation made by the Court raises more questions and complicates the matter. The Court said that while appraising the takedown request, the operator of the search engines must weigh the purpose for which a specific data was processed and the time that has elapsed. For such request, if not granted, there should a justifying 'preponderant interest of the public in having access to such information. This creates a moral, technical and legal dilemma as to what constitutes public interest. Can any individual judge as to whether taking down of certain information is not going to effect the information as there is no 'preponderant public interest' in that particular matter?

Various anomalies and objections

The preponderance of public interest is negated as this ruling is solely about the prominence of information displayed in the search results and not whether privacy protection includes deletion of source material.[12] Whenever we search anything or anyone on the internet, we click on the search results. This is

[10] Agencia Española de Protección de Datos (Spanish Data Protection Agency).
[11] First Amendment to the U.S. Constitution, ratified on 15 December, 1791.
[12] Julia Powells, "How Google determined our right to be forgotten" *available at:* http://www.theguardian.com/technology/2015/feb/18/the-right-be-forgotten-google-search (last visited on March 15, 2015).

measured through the CTR (Click-Through Rate). As per studies[13], the internet traffic in the time 90% look only at the first page of Google search in which top 3 searches on that page amount to 58%. These prominent searches are also affected through advertisement and payment. So if any third party websites advertises more on Google, there is a high chance of its link being appearing in the top 3. So this so called public interest is basically limited and confined to the first search page because as the Google Organic CTR Study[14] concludes, the general web browsing global community doesn't go to page 2 or page 3. The obvious question that comes to the mind is that if this indexing of data is ensured through advertisement, is there any actual free speech? Or if such right to be forgotten can be bought off, why go on to declare the existence of such law?

Global perspectives of cultural variations have been exposed in the name of privacy and content adjustments.[15] The European and U.S perceptions are greatly divided. The U.S describes this concept as "the right to silence on past events in life that are no longer occurring"[16] i.e. the power to change the information from private to public just by a request. Such is the view of the right to be forgotten in U.S. more popularly known as 'concept of oblivion' or 'rewriting history' or 'history revisionism' (negationism). Right to oblivion or the state of complete forgetfulness is impossible in the current Digital Age. Through this right the data subject is given a chance to remove/deny links about personal information effectively altering history for personal gain. This was evident when two German murderers, Wolfgang Werléand Manfred Lauber, convicted in 1993, tried utilizing this right to remove their names from English language Wikipedia citing German privacy laws. They had already succeeded in their requests to various websites including German language Wikipedia.[17] Though the request was turned down for the English language site citing integrity of history, the problem here is that such requests are coming through and being entertained. Does this so called 'right' allow someone to remove themselves from a horrific historical occurrence[18] such as murder? Should search engines be confined in the chains of hypocrisy through sanctioned historical events? Should history be left to become a mere fiction? Hopefully this was not the intention behind the ruling of ECJ.

[13] Danny Goodwin, "Top Google Result Gets 36.4% of clicks" *available at:* http://searchenginewatch.com/sew/news/2049695/top-google-result-gets-364-clicks-study (last visited on March 15, 2015).
[14] Google Organic CTR Study, 2014, *available at:* http://www.advancedwebranking.com/google-ctr-study-2014.html (last visited on March 15, 2015).
[15] Meg Leta Ambrose, "It's about time: Privacy, Information Life Cycles, and the Right to be Forgotten" 16 *Stanford Technology Law Review* (2013).
[16] Giorgio Pino, *The Right To Personal Identity In Italian Private Law: Constitutional Interpretation And Judge-Made Rights, In The Harmonization Of Private Law In Europe* 225, 237 (M. Van Hoecke & F. Osts, 1st edn., 2000).
[17] Bundesgerichtshof [BGH] [Federal Court of Justice], No. VI ZR 346/09 (Feb. 1, 2011); BGH, No. VI ZR 114/09 (Feb. 1, 2011); BGH, No. VI ZR 245/08 & 246/06 (Apr. 10, 2010).
[18] Niuala O'Connor, "To Forgive or Forget" *available at:* https://cdt.org/blog/to-forgive-or-forget (last visited on March 15, 2015).

Internet obliterates geography. It knows no boundaries. The information matrix flows without limitation. Considering this, the Google Advisory Council issued its formal report to tackle the issue of scope of application of this right. The ruling, as stated before, tried to connect the global arena to local versions of Google through the word 'establishment' and local privacy laws. The report[19] asserted through data "that over 95% of all queries originating in Europe are on local versions of the search engine" finally concluding that local-only delisting will protect the rights of the data subject adequately.[20] This finding is relevant and logical as the EU cannot impose on countries like Brazil or India its ideas as to what their domestic privacy laws should be. On the other hand, the EU is of the opinion, that the right to be forgotten would be circumvented because by simply searching the same query on google.com, the delisted results blocked on local versions can be easily seen even in the local jurisdiction of countries like Germany. Here both the sides of the question as to whether the scope of application should extend to google.com or should remain in the territorial limits like Google.de are potentially correct. This 'jurisdictional dilemma' in its all probabilities has no answer right now, which needs to be addressed in the future.

It would be unjust not to mention jurisprudential concerns raised by Mayer-Schönberger in his book 'Delete'.[21] He has addressed the issue as to how digital technology has deteriorated the society's ability to forget, replaced by perfect memory. Through ages, humans had devised ways to remember, to preserve the knowledge be it photographic films, cave paintings etc. But today in this digital millennium, it is easier to keep everything. The overabundance of cheap storage on hard disks means that it is no longer economical to even decide whether to remember or forget.[22] This inability to forget has shifted the balance. With the help of widespread technology, forgetting has become an exception, and remembering the default.[23] Mayer-Schönberger therefore, discussed seven legal responses how to mitigate the pitfalls of this omnipresent digital memory.

Digital abstinence: Based on the choice, preferences and behaviour of an individual, digital abstinence is to stay away from digital interactions as much as possible. However, the innovative and beneficial use of information would not

[19]Google Advisory Council, Report on the Right to be forgotten (February, 2015) *available at* https://www.google.com/advisorycouncil (last visited on March 15, 2015).

[20]Greg Sterling, "The Thorny Dilemma at the heart of the "Right to be Forgotten" Delisting Debate" *available at:* https://www.searchengineland.com/thorny-dilemma-heart-right-forgotten-delisting-debate-214478 (last visited on March 15, 2015).

[21]Viktor Mayer-Schönberger, *Delete: The Virtue of Forgetting in the Digital Age*, (Princeton and Oxford, Oxfordshire, 1st edn., 2009).

[22]Stuart Jeffries, "Why we must remember to delete– and forget– in the digital age" *available at:* http://www.theguardian.com/technology/2011/jun/30/remember-delete-forget-digital-age (last visited on March 15, 2015).

[23]Greg Sterling, "The Thorny Dilemma at the heart of the "Right to be Forgotten" Delisting Debate" at pp. 2, *available at:* https://www.searchengineland.com/thorny-dilemma-heart-right-forgotten-delisting-debate-214478 (last visited on March 15, 2015).

have been possible if personal information shared by users themselves was not there. The information which is to be shared will come through civic and moral sense.

Information Privacy Rights: The concept here is that information is your property and therefore there should be control over every aspect of the shared details. However, this is difficult to enact due to overlapping shared spaces, catalogued search engines and web archives. Certain procedural measures like shifting the burden of proof on data collector that the individuals themselves have consented to share data.[24]

Digital privacy rights infrastructure: Any new technological infrastructure that is capable of making decisions that keep an eye on how protected information of data subject is used by users can help mitigate the risk. However, care should be taken that such infrastructure doesn't create hostile surveillance or a panopticon[25] to the data itself.

Cognitive adjustment: An ambitious expectation by the author through which he explains that change comes not through law or technological advances, but through changes in the civic sense itself in relation to digital memory i.e. the society in itself should mature through time.

Information Ecology: This concept has been there for years, insisting on slowing down the process of information collection and storage thereby creating a harmonious balance. However, such concept suffers from inflexibility and the political pressure not to introduce such an idea.

Perfect contextualization: This approach explores the possibility of applying the knowledge of technical systems to remember certain information and then limit data collection which are out of context thereby protecting the sensitive facts and figures pertaining to an individual.

Expiration Dates on Digital Data: Simply put, through this any individual can set expiration dates at any given moment for certain statistics or data links on the web. This can be done by developing algorithms which calculate as to when and how and what kind of information becomes crucial. This 'expiration dates' can be different for two different parties and need to be negotiated so that duration of digital memory can be corresponded just like any other contractual issue.

However, the introduction of this concept is challenging because this requires a skilled engineer or software to delete the information once expiry date is reached. The vast amount of data constantly being uploaded on social networking websites pose difficulties in practice.

[24]Greg Sterling, "The Thorny Dilemma at the heart of the "Right to be Forgotten" Delisting Debate" at pp. 134, *available at:* https://www.searchengineland.com/thorny-dilemma-heart-right-forgotten-delisting-debate-214478 (last visited on March 15, 2015).

[25]A prison system designed by Jeremy Bentham in which guards can watch the prisoners from anywhere, while the prisoners are unknown to the fact that they are being watched.

Lastly, I would like to substantiate the concerns raised by Mayer-Schönberger about expiration dates and accountability through the effect time has on any kind of information or what is the lifespan of any digital content. A research[26] conducted by Daniel Gomes and Mario Silva that delved into the persistence of content, found that 85% of the content disappears in a year and 59% disappears in a week. This signifies decrease in the life span of data uploaded on the web.[27] It can be concluded that the Web cannot be self-preserving.[28] Even though this is the case such information can become misinformation even though the value deteriorates through time. Through aging, the information in turn protects its availability for other needs in future. Therefore, time is the essence of this right which was not observed by ECJ and the draft E.U Regulation grants much more control than is needed. This active control has led to various takedown requests which are worrisome. One example is where a doctor from UK requested Google to remove more than 50 links to newspaper articles about a botched procedure.[29]

The object here is not to forget but to limit; and the requests should be weighed against the need for that information to remain in the public forum so that there is no rewriting of history as explained before. The statutory language of Art. 17 of the draft General Data Protection Regulation should be such that it addresses these concerns to mitigate the impact of this far reaching right to be forgotten and protect privacy of users. Indeed the right to be forgotten is not absolute, but each unique evaluation should not be solely done on the basis of reputation and privacy infringement of the user but there should be equal importance given to the essence of the information itself.

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[26] Daniel Gomes & Mario J. Silva, "Modelling Information Persistence on the Web" *ICWE '06 Proceeding of the 6th International Conference on Web Engineering* 193 (2006).

[27] Google Organic CTR Study, 2014, *available at:* http://www.advancedwebranking.com/google-ctr-study-2014.html (last visited on March 15, 2015).

[28] Julien Masanès (Ed.), *Web Archiving: Issues and Methods* (Springer, 2006).

[29] Thomas Burrows, "More than six thousand people have their pasts erased from Google: Sex criminals and danger doctors are trying to use 'right to be forgotten'" *available at:* http://www.dailymail.co.uk/news/article-2789081/more-6-000-britons-persuade-google-remove-web-links-controversial-right-forgotten-ruling-attacks-free-speech.html (last visited on March 15, 2015).

S. 309 of the Indian Penal Code: The Journey to Decriminalization and Beyond

-*A Ramya Hasita, Suhail R Bhat*[*]

The phrase "attempt to suicide" is an amalgam of two independent terms i.e. attempt and *suicide*. What constitutes an 'attempt' is a mixed question of law and fact, depending largely on the circumstances of a particular case.[1] 'Attempt' defies a precise and exact definition. In sum, it is an overt act that is done with the intent to commit a crime that falls short of completing the crime.[2] The Indian Penal Code, 1860 criminalizes an attempt to commit a crime.

On the other hand, 'suicide' (also termed *self-killing, self-murder, felony-de-se, death by one's own hand.*) [3] in itself is nowhere defined in the Indian Penal Code. However, 'sui' means 'self' and 'cide' means 'killing', thus implying an act of self-killing. In short, a person committing suicide must commit it by himself irrespective of the means employed by him in achieving his object of killing himself.[4]

An attempt to commit suicide has every ingredient to be dressed in the robes of an 'attempt' except for one fact- suicide itself is not a crime or an offence. Only the attempt to suicide is. Suicide was the only crime for which a person was punished if he failed in his attempt, a great irony. If such an act is accomplished, there would be no offender to punish. This in itself was a pointer to the outrageous nature of the law. "It seems a monstrous procedure to inflict further suffering on even a single individual who has already found life so unbearable, his chances of happiness so slender, that he has been willing to face pain and death in order to cease living. That those for whom life is altogether bitter should be subjected to further bitterness and degradation seems perverse legislation."[5]

Legislative March of S. 309, IPC

In ancient India suicide was regarded as permissible in some circumstances. In the chapter on "The hermit in the forest", Manu's Code says- "Or let him walk, fully determined and going straight on, in a north-easterly direction, subsisting on water and air, until his body sinks to rest".[6] The practice of *sati*, involving voluntarily giving up one's own life, was tolerated till 1829, and is still tolerated and justified in some cultures. The Indian Penal Code, 1860 has its roots in British Regime. After independence India continued to follow this law even though Britain had decriminalized attempt to commit suicide by 1961.

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[*] I LL.B.

[1] *State of Maharashtra* v. *Mohd.Yakub*, 1980 SCR (2) 1158.

[2] Bryan A. Garner (ed.), Black's Law Dictionary, (West Group, 9th edn., 2009).

[3] *Ibid.*

[4] *Gangula Mohan Reddy* v. *State of Andhra Pradesh*, AIR 2010 SC 327.

[5] H. Romilly Fedden, *Suicide* 42 (Antipodean Books, London, 1938).

[6] F. Max Muller, *Sacred Books of the East* Vol 25 204 (Routledge, 1967).

In 1971, the Law Commission of India found the provision harsh and unjustifiable, and recommended[7], inter alia, repealing of s. 309 IPC. The Indian Penal Code (Amendment) Bill, 1978 that followed the Report was passed by the Rajya Sabha, but before it could be passed by the Lower House, the then Lok Sabha was dissolved. The Bill lapsed. In 1997, following the decision in Gian Kaur's case[8], the Law Commission recommended retention of s. 309 IPC.[9]

In 2008, after a detailed analysis about the issue, the Law Commission again recommended repeal of s. 309 from the Indian Penal Code.[10] The report also said that it was very important to understand that suicide is not a manifestation of criminal instinct since there is no mens rea. It suggested that to take care of suicide-prone persons, wise counselling of a psychiatrist is needed and not harsh treatment by a jailor. It further opined that the provisions contained in s. 309 were inhuman, irrespective of whether they were constitutional or unconstitutional. Subsequent to the Report, the Ministry of Health introduced the Mental Health Care Bill, 2013 in the Rajya Sabha. S. 124 of the Bill aimed to decriminalize the attempt to suicide, and laid down certain duties to be followed by the Government in such cases. The Union Minister of State for Home Affairs of India told the Lok Sabha that the Government was in the process of effacing s. 309 of the IPC and hence, decriminalizing the attempt to suicide.[11]

With the debate on the validity of the s. 309 refusing to cool down, on the 10th of December 2014, India woke to news of tolerant winds. The Government decided to decriminalise s. 309 of IPC.[12]

Judicial March of S. 309, IPC

The said provision whenever deliberated upon by the Supreme Court has included the infringement of Fundamental Rights. Art. 21[13] of the Constitution of India deals with the right to life and liberty. Now, the main issue that has been dealt by the Supreme Court again and again is whether or not right to life guaranteed under Art. 21 of the Constitution of India includes in it a right not to live a forced life, and consequentially, a right to die. Therefore, s. 309 would also be declared unconstitutional and void if Right to die was read into Art. 21.

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[7] Law Commission of India, 42nd Report on the Indian Penal Code (1971).
[8] *Gian Kaur* v. *State of* Punjab, AIR 1996 SC 1257.
[9] Law Commission of India Report, 156th Report on the Indian Penal Code (1997).
[10] Law Commission of India, 210th Report: "Humanization and Decriminalization of Attempt to Suicide" (2008).
[11] "Modi govt. plans to decriminalize attempt to commit suicide" *available at* http://timesofindia.indiatimes.com/india/Modi-govt-plans-to-decriminalize-attempt-to-commit-suicide/articleshow/39689034.cms (last visited on March 15, 2015).
[12] Bharti Jain, "Government decriminalizes attempt to commit suicide, removes section 309" *available at* http://timesofindia.indiatimes.com/india/Government-decriminalizes-attempt-to-commit-suicide-removes-section-309/articleshow/45452253.cms (last visited on March 15, 2015).
[13] *"No person shall be deprived of his life or personal liberty except according to procedure established by law."*

In 1985, Delhi High court observed that "the continuance of s. 309 I.P.C. is an anachronism unworthy of a human society like ours." [14] In 1987, in the case of *Maruti Shripati Dubal v. State of Maharashtra*[15] the Bombay High Court struck down s. 309 IPC as ultra vires of Art. 21 and said that right to life includes in itself a right not to live. s. 309 IPC was also struck down on the ground that it is violative of Art. 14[16] as it is discriminatory as it does not take into account circumstances of each case, and is arbitrary as it does not clearly lay down what constitutes an 'attempt' and is thus, very vague. The Court also held that since two persons may attempt to commit suicide for very different reasons, they should not be put on an equal footing[17] and there has to be some sort of intelligible differentia in the punishment provision. The Court further held that since the said provision does not categorically lay down what constitutes an 'attempt' to commit suicide, it is very vague and hence, arbitrary as each judge may interpret any action of a person as an 'attempt to commit suicide' as he thinks fit. Thus, there is too much subjectivity involved and hence, the law is arbitrary and violative of Art. 14.

However, in 1988, a Division Bench of the Andhra Pradesh High Court rejected the challenge to the constitutional validity of s. 309 IPC in the case of *Chenna Jagadeeswar* v. *State of Andhra Pradesh.*[18] It was held that right to life under Art. 21 cannot be construed to include right to die. As a result, s. 309 IPC was held to be not in violation of Art. 21. It was also held that since the section provides ample discretion to the courts in terms of awarding punishment, they have all the power to see to it that unwarranted harsh punishment is not given to any victim of circumstances who needs care and attention. Thus, it is not violative of Art. 14 either and is not unconstitutional.

In *P. Rathinam* v. *Union of India,*[19] the petitioner had unsuccessfully attempted to commit suicide and was charged under s. 309 IPC for the offence of attempt to commit suicide. He filed a writ petition in the Supreme Court challenging the constitutional validity of s. 309 IPC saying that the said provision was in violation of Arts. 14 and 21 of the Constitution. The Court upheld this contention only on the basis that s. 309 was in violation of Art. 21. The court upheld the judgement in *Maruti's case*[20] saying that if right to speak involves right not to speak[21] and right to do business includes right not to do business[22] then right to

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[14] *State v. Sanjay Kumar Bhatia*, 1986 (10) DRJ 31.
[15] *Maruti Shripati Dubal* v. *State of Maharashtra* , (1987) Cr LJ 743.
[16] *"The State shall not deny to any person equality before the law and equal protection of the laws within the territory of India." See also, State of West Bengal* v. *Anwar Ali Sarkar*, AIR 1952 SC 75.
[17] *Ibid.*
[18] *Chenna Jagadeeswar* v. *State of Andhra Pradesh*, (1988) Cr LJ 549.
[19] *P. Rathinam* v. *Union of India*, AIR 1994 SC 1844.
[20] *Maruti Shripati Dubal* v. *State of Maharashtra*, (1987) Cr LJ 743.
[21] *MRF Ltd.* v. *Inspector, Kerala Government*, (1998) 8 SCC 227 at para 13.
[22] *Kochuni KK* v. *State of Madras*, AIR 1960 SC 1080.

life also includes right not to live a forced life. Therefore, the Supreme Court struck down s. 309 IPC as unconstitutional and *ultravires* of Art. 21.

After *P Rathinam's* case[23] till the judgement of *Gian Kaur* v. *State of Punjab*[24], a person had a right to die at his will as long as he did not infringe another's rights. However, *Gian Kaur's* judgement changed the position of law. Overruling *P Rathinam's case*, it made the said provision valid. This judgement, being the latest law of the land, needs a detailed examination. The Constitution Bench in this case negated all the arguments given in the previous judgment.

With regard to Art. 21, the Supreme Court held that s. 309 of IPC does not violate Art. 21. The Supreme Court differentiated between right to life and other fundamental rights by saying that for other rights like right to speak, the negative aspect of the right does not require doing of a positive or overt act but is by implication. However, when a person commits suicide, he has to do an overt act to end his life. Thus, an analogy cannot be drawn between right to life including right to die and other rights including their negative aspects. The court thus held: *'Article 21 is a provision guaranteeing protection of life and personal liberty and by no stretch of imagination can extinction of life be read to be included in 'protection of life'*. Further, the Court held that right to life under Art. 21 is a natural right which is inherent in each and every person and is not a conferred right. But, suicide is an unnatural termination of life and therefore, does not fall under the purview of right to life. The Court also held that right to life may include any aspect of life which makes it dignified but not that which extinguishes it. Therefore, the right to die cannot be included as a part of right to life under Art. 21.

With regards to Art. 14, the Court held that whatever be the reasons of attempting to commit suicide, the law cannot be differentiated as suicide in all cases involves intentionally taking one's own life. Moreover, it is open to the accused to prove that his act does not amount to attempting to commit suicide. Also, the circumstances related to each case are taken into account by the judge while awarding punishment to the accused.

The court also held that the debate on desirability of retaining such a penal provision which punishes someone whose only offence is that he/she, being in such a state of despair that the person does not want to live any more, attempts to end his life, which includes the recommendation of the 42nd Law Commission to remove this provision, is not a basis for saying that s. 309 is unconstitutional. For holding a provision to be unconstitutional, it has to be proved that the provision is violating a constitutional provision. On the basis of the above reasons, the Supreme Court held s. 309 IPC to be constitutionally valid.

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[23] *P. Rathinam* v. *Union of India*, AIR 1994 SC 1844.
[24] AIR 1996 SC 1257.

Has Euthanasia been given a life?

With the debated offence of suicide finally consigned to the dustbin of history, the decriminalization of the attempt to suicide has rekindled the debate on euthanasia. Euthanasia or mercy killing is an act of death which will provide relief from a distressing or intolerable condition of living. It is intervention of another human agency to end life. Euthanasia and suicide can be distinguished: suicide is an act of killing oneself without any assistance from others, whereas euthanasia is done by a third person on the request of the deceased. Therefore the Bombay High Court held that euthanasia was homicide.[25]

Euthanasia can be active, involving a doctor injecting a lethal medicine to trigger cardiac arrest; or passive, where doctors, with consent from concerned persons (usually relatives), withdraw the life support system of a person being kept alive with the help of machines. India's tryst with the sensitive issue of euthanasia dates back to 1973 during the *Aruna Shanbaug* case,[26] wherein she plunged into a permanent vegetative state following a tragic incident. A petition was filed in the Supreme Court citing violation of Aruna's right to live with dignity. Several arguments related to the issue of mercy killing were analysed ethically, culturally and medically. A set of rules were laid down following the verdict in the case. It was decided to legalize passive euthanasia whilst making it mandatory for euthanasia pleas to be approved by a court.

With diversities across religious groups, educational levels, and cultures, a debate on a topic like euthanasia in a country like India becomes even more confusing. But by decriminalizing the attempt to commit suicide, whether we have taken the first step in a journey of a thousand miles remains to be seen.

Conclusion

Human life is priceless. However, there are conditions due to which a person's life is scripted using a knife on a rock rather than in smooth ink on an immaculate piece of paper.[27] Presently, humanitarianism is the throbbing principle of legislation.[28] An act might deserve to be a criminal wrong under the Indian Penal Code when the Indian Society perceives it to be a moral wrong; however, notions of 'right' and 'wrong' are not based upon any specific truth, but solely upon the perception of the moment and are totally transient in the eye of the beholder: the legislature. It is essential to preserve the 'dignity' of the individual.

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[25] *Maruti Shripati Dubal vs. State of Maharashtra* (1987) Cr LJ 743.
[26] *Aruna Ramchandra Shanbaug* v. *Union Of India*, AIR 2011 SC 1290.
[27] Munish Kumar Raizada, "Euthanasia: A never-ending debate " *available at:* http://timesofindia. indiatimes.com/ nri/ contributors/ contributions/ munish- kumar-raizada/ Euthanasia- A-never-ending-debate/articleshow/39156608.cms (last visited on March 15, 2015)
[28] Kartar Singh Mann, "Working of Legislatures in the matter of legislation" 493-495 *Journal of Parliamentary Information.*

National Judicial Appointments Commission

-Ayusmita Sinha, Sonali Bhardwaj, Mohona Thakur*

Is it the loss of a unique, independent Judiciary, or creation of one?

The National Judicial Appointments Commission Act, 2014 (NJAC Act) has made many question its legitimacy as well as debate some of the fundamental features of the Indian Constitution. Though prima facie the NJAC Act aims at bringing the Executive and the Judiciary at par as regards appointment of judges, there is widespread antagonism to the excessive domination of the Executive.

The National Judicial Appointments Commission (NJAC) came into existence after the Constitution (Ninety-Ninth Amendment) Act, 2014 which inserted Arts. 124A, 124B and 124C after Art. 124. This amendment created a committee comprising the Chief Justice of India, two other senior Judges from the Supreme Court next to the Chief Justice, the Union Minister in-charge of Law and Justice and two other eminent persons who shall be nominated by a yet smaller committee consisting as its members, the Prime Minister, Chief Justice of India and the Leader of Opposition.[1]

This amendment is complemented by another small piece of legislation of merely 14 sections: the National Judicial Appointments Commission Act, 2014. This Act seeks to regulate the procedure to be followed by the six-member committee while making recommendations to the President of India for the appointment of the Chief Justices and other judges of the Supreme Court of India and the High Courts. It shall also make recommendations for transfers of such Judges and make rules and regulations for other incidental matters.

While the Constitution (Ninety-Ninth Amendment) Act establishes this body, the National Judicial Appointments Commission Act is described as merely regulatory in nature, restricted in its legislative powers only to the laying down of procedure for its proper functioning. But a careful scrutiny of the Act reflects otherwise.

Constitutional Framework

Arts. 124 (2) and 217 (1) of the Constitution provide a well-balanced system for appointment of judges to the Supreme Court and High Courts, where both, the executive and the judiciary, have been given a balanced role. This can be interpreted from the fact that the drafters of the Constitution did not give complete discretion to either the executive or the judiciary in the participatory or consultative process for appointment of judges. The Constituent Assembly after

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* IV B.S.L, LL.B.

[1] The Constitution of India, 1950, a. 124A inserted by the Constitution (Ninety-Ninth Amendment) Act, 2014.

the deliberations, preferred the word 'consultation' to 'concurrence' in the process of the appointment of judges.[2]

The provisions of Arts. 124 (2), 217 (1) and 222 (1) have been interpreted by the judiciary from time to time under Art. 141 of the Constitution. The First Judges Case[3] held that a plain reading of Arts. 124 (2) and 217 (1) provided that the appointment of judges to the Supreme Court and High Court is to be made by the President. This clearly shows that the appointment is an executive and not a quasi-judicial function. Moreover, the Chief Justice of India and the Chief Justice of the High Courts and other judges of the High Courts and Supreme Court are merely constitutional functionaries having a consultative role, whom the Central Government may consult if it deems it necessary. Hence the opinion of the Chief Justice of India did not have primacy in matter of appointments. The primacy lies with the Central Government which shall take decision after consulting all constitutional functionaries. The government is not bound to act in accordance with such opinion. This was the scenario until a nine-Judge Bench of the Supreme Court overruled the majority view of the First Judges Case in the Second Judges Case,[4] and held that the recommendation of the Chief Justice of India for appointment and transfer of judges to the higher judiciary was binding on the executive. This upset the delicate system of checks and balances envisaged in the Constitution.

This was upheld in the Third Judges Case,[5] which laid down the guidelines for the appointments and transfer of judges. This case also changed the composition of the 'collegium', increasing its members (including the Chief Justice of India) from three to five.

This collegium system has been in place for more than two decades. But it suffers from opacity and non-accountability. It also keeps the executive completely outside the collaborative and consultative exercise for appointment of judges.

The National Judicial Appointments Commission Act and the Constitution (Ninety-Ninth) Amendment Act, 2014 have therefore been enacted to counteract the effect of the Three Judges' cases that had established the collegium system. The objective sought thereby is to replace the collegium system, which anyway had no constitutional backing.

National Judicial Appointments Commission

In India, the need for judicial independence is enhanced by the fact that India has a written Constitution with a scheme of Fundamental Rights, a system of Judicial Review and a Federal system. Art. 50 that constitutes the 'conscience of the

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[2] 64th Report, The Judicial Appointments Commission Bill, 2013 presented to the Rajya Sabha on 9 December, 2013.

[3] *S.P. Gupta* v. *Union of India*, AIR 1982 SC 149.

[4] *Supreme Court Advocates on Record Association* v. *Union of India*, (1993) 4 SCC 441.

[5] *Re. Presidential Reference*, (1998) 7 SCC 739.

Constitution',[6] gives meaning to the concept of 'separation of powers', that is the division of governmental authority into three branches - Legislative, Executive, Judicial – each with specified duties on which neither of the other branches can encroach. To this is applied the Constitutional doctrine of checks and balances by which the people are protected against tyranny.[7]

Art. 124A of the Constitution provides for establishment of a six-member Commission consisting that will recommend persons for being appointed as judges, and transfers of judges. Three of the six members shall be : the Union Minister in-charge of Law and Justice, and two eminent persons to be nominated by the Prime Minister, Chief Justice of India and the Leader of the Opposition Party in the House of the People. This tilts the decision making power in favour of the executive.

It is therefore feared that giving an upper hand to the Executive for the appointment of judges would lead to a new class of 'committed judiciary.'[8] It would be impossible for such judges to take an impartial view of the case if they were to feel responsible for the success of one side or the other. It would be equally impossible for such judges to take an impartial view of a case against the Executive, if they knew that their posting, promotion, and prospects generally depended on their pleasing the Executive.[9]

Under the NJAC Act, the Commission has the sole authority to decide on the appointment of judges. Though the Act provides that recommendation in writing will be sought from the Governor of the State and the Chief Justice, the final decision making power vests with the Commission itself. An important feature is the *veto*, by whichany two members of the Commission may veto a recommendation. Once vetoed, that nomination will not be considered for appointment.[10]

There is no denying that an independent, non-political Judiciary is crucial to sustain the democratic political system adopted in India.[11] But if the Commission is actually to be implemented, there are chances that the Executive may veto all the nominations recommended by the other members and finally appoint only those judges who are to their liking.

Delegation of powers

S.s 5, 6 and 12 of the NJAC Act delegate complete power to the Commission to determine the policy for selections as well as frame regulations for such appointments to higher judiciary. This delegation is excessive.

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[6] *Union of India* v. *Sankalchand*, AIR 1977 SC 2328.
[7] Black's Law Dictionary 1572 (West Group, 10th edn., 2014)
[8] Nani A. Palkhivala, *Our Constitution Defaced And Defiles* (Macmillan Co. of India, 1974).
[9] Durga Das Basu, *Commentary on the Constitution of India* 4178 (III) (LexisNexis ButterWorths Wadhwa, 8th edn., 2008).
[10] National Judicial Appointments Commission Act, 2014, s. 6 (6).
[11] *Subhesh Sharma* v. *Union of India*, AIR 1991 SC 631.

Delegated legislation is that which proceeds from any authority other than the sovereign power, and is therefore dependent for its continued existence and validity on some superior or supreme authority.[12] This term is used in two senses: (i) the exercise by a subordinate agency of legislative power delegated by the Legislature; or (ii) the subsidiary rules themselves which emanate from the subordinate agency as a result of the exercise of power as mentioned in (i).[13]

Though the Legislature has wide powers of delegation, it is subject to one limitation: it cannot delegate uncontrolled power.[14] This rule flows from the concept that, if any of the three organs try to expand their jurisdiction, it would follow an unavoidable conflict and affect the harmonious efficacy of the tripartite system of Government.

The permissibility of delegation is further restricted only to the 'mode of implementation'. The function of subordinate legislation is merely an ancillary one, to make the policy functional, rather than making policy choices.[15] However in the present case, there is no policy that can guide the determination of selection criteria because the entire discretion has been left to the Commission. On a plain reading, the only guidance given is that the recommendation procedure should have greater 'transparency, accountability and objectivity.'

Contrary to the established mechanism under the Constitution, the executive becomes incessantly arbitrary, when it acquires through a position of a sub-delegate, the powers to affect the life, liberty, property of individuals, without the democratic restraints of a debate in the legislature.

Delegated legislation must be laid before the Legislature. 'Laying' before the legislature is an important means to keep a check on the exercise of delegated powers.

"There are three types of 'laying' procedures: Simple laying, laying subject to negative resolution and, laying subject to affirmation. Simple laying is a mere formality where the Parliament does not have any control over the delegated legislation, except for subjecting it to a parliamentary debate. In negative laying, the Parliament has the power to annul or modify the rules once it is put before it under this procedure. However, the actions already taken under the rules will not be affected by parliamentary modification or annulment. In the third type of laying procedure, the draft rules are put for the parliamentary scrutiny and they do not come into force, until the Parliament affirms them."[16]

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[12] *Agricultural Market Committee* v. *Shalimar Chemical Works Ltd*, (1997) 5 SCC 516.
[13] M. P. Jain & S. N. Jain, *Principles of Administrative Law* 55 (LexisNexis India, 7th ed., 2011).
[14] *Ibid.*, at 58.
[15] *Ibid.*, at 55.
[16] *Atlas Industries Ltd.* v. *State of Haryana*, AIR 1979 SC 1149.

Of all three types of laying procedures, only the third is mandatory; the others are directory.[17] Ss. 5 and 6 of the NJAC Act empower the Commission to make recommendations for the appointment of judges based on criteria like ability, merit or suitability as may be specified by regulations. These regulations are to be enacted by the NJAC itself.[18] The laying procedure prescribed in the NJAC Act[19] is of the second type i.e. laying subject to negative resolution. It is submitted that, since the NJAC Act performs the important function of appointing the Constitution's gatekeepers, not adopting the third type of laying procedure amounts to arbitrariness as it gives unguided, uncontrolled power to enact essential policies for appointments.

By leaving the appointment of Judiciary in the hands of the Executive[20] the threat is not only in terms of arbitrariness during appointment of judges, which is unjustified to those who may not be appointed on unreasonable grounds, but it also derogates from a very important facet of the Indian Constitution i.e. equal protection before the law.[21] This 'committed judiciary' would naturally be more sympathetic and inclined towards the government, since such judges would owe their appointment to the Executive. The judiciary not only determines the rights between two or more individuals but also between the individuals and State. Since the government is the most recurrent litigant[22] in the cases brought before courts, conferring such power on the Commission is not only unconstitutional by the virtue of it giving uncontrolled discretion to the NJAC, but also poses an imminent threat to the most fundamental right of the citizens of India of equal protection before the law.

The task of legislating has been entrusted to the Legislature as a representative of the people. However, the same is not the case of the Executive. The power to whose judgment, wisdom, and patriotism, this high prerogative has been entrusted cannot relieve itself of its responsibility of legislating by choosing other agencies upon which the power shall be devolved.[23]

Further, in the provisions of the Act itself, the only other policy guidelines are the phrases: 'if he is considered fit to hold the office'[24]; 'ability, merit and any other criteria of suitability'.[25] S. 12 of the Act leaves a wide ambit of powers in the domain of the Commission whereby it gives the Commission the power to make regulations for almost all essential determinants- the criteria of suitability with respect to appointment of judges[26], procedure and conditions for selection[27], manner of eliciting views of Governors and Chief Ministers[28], procedure for transfer of judges[29] and other rules as it may prescribe.

Further, ss. 5 and 6 of the NJAC Act, 2014 give unlimited and unguided power to the Commission to recommend Judges for appointment in the Supreme Court and High Courts, whereby they also exercise the power to regulate such appointments by being the sole authority to determine the criteria for such an appointment. In the absence of any guidelines, such unguided and uncontrolled discretion on the NJAC puts the Act beyond the scope of Art. 124C of the Constitution of India.

Conclusion

Though the National Judicial Appointments Commission Act only seeks to remedy the defect of the collegium system that came into being after the Three Judges' case, it does not quite fulfill its oft repeated proclamation. The legislators of the Act, who have time and again harped on their keenness to bring the judiciary at par with the executive, and restore the power of the Executive while allowing the Judiciary to have an equal say, in actuality, they have failed to achieve their proposed goal. The power to veto recommendations regarding appointments as well as creation of a parallel legislation due to excess delegation upon the National Judicial Appointments Commission may lead to dominance of the executive.

Therefore, the net result of bringing in the National Judicial Appointment Commission has been a mere shift of primacy of opinion for selection of judges to the higher judiciary, from the judiciary (as under the collegium system) to the executive as has been enumerated by highlighting some of the features of the abovementioned Act.

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[17] *Ibid.*
[18] National Judicial Appointments Commission Act, 2014, s. 12.
[19] *Ibid.*, s. 13.
[20] *Ibid.*,, ss. 5, 6 & 12.
[21] The Constitution of India, 1950, art. 14.
[22] Thirteenth Finance Commission, Report: (Finance Commission of India, 2009) *available at* http://fincomindia.nic.in/writereaddata%5Chtml_en_files%5Coldcommission.html/fincom13/tfc/13fcreng.pdf (last visited on March 15, 2015).
[23] Cooley's *Constitutional Limitation* 224 (Vol. I) (Little, Brown, and Company, 8th edn. 1927).
[24] National Judicial Appointments Commission Act, 2014, s. 5 (1).
[25] *Ibid.*, ss. 5 (2), 6 (1).
[26] *Ibid.*, s. 12 (2) (a).
[27] *Ibid.*, s. 12 (2) (b).
[28] *Ibid.*, s. 12 (2) (e).
[29] *Ibid.*, s. 12 (2) (g).

Tax Evasion and Tax Avoidance: The Fine Line

Shilpa Shenoy, Sanjana Bhatnagar*

With the advent of globalization in 1991, the Indian market began to open up and various business enterprises began to have cross border transactions. This gave rise to the requirement of introducing various rules to regulate such transactions.

One such concern was tax evasion by the transfer of property between related enterprises. The price at which two enterprises of the same group transfer their goods or services is called transfer price, which need not always be at the price derived by the market forces. Such prices can be arbitrarily dictated by the participating enterprises thereby affecting their profits and tax liabilities. Governments around the world lose large amounts of money each year to tax evading schemes. Such financial losses incurred by governments become burdensome for those paying their fair share of tax as well.

In order to ensure that such practises are curbed, the Finance Act, 2001 introduced the law of transfer pricing in India in s.s 92A to 92F of the Indian Income Tax Act, 1961 and Rules 10A to 10T of the Income Tax Rules, 1962. These lay down norms for computation of transfer price, and suggest detailed documentation procedures. Under these rules, the price at which goods or services are transferred between associated enterprises (AEs) must be at arm's length price, that is, at a price at which independent enterprises would transact.[1] However, lack of uniformity in tax laws worldwide and exemptions granted by tax friendly countries have to a large extent made these rules redundant in practise.

Tax Avoidance v. Tax Evasion

Multinational corporate entities structure their transactions to reduce their tax liabilities. There is a very thin line to determine those that are acceptable and those that are not. For instance, Company X purchases a valuable asset for Rs. 200 which it sells to its subsidiary Company X1 at a price of Rs. 400. This price is not determined by market forces. X1 in turn sells this asset to an independent enterprise Company Y for Rs. 600. In this example, X ends up earning only Rs. 200 as profit instead of Rs. 400, which it would have earned had it not routed the transaction through its subsidiary, X1. In this manner, the profit of Rs. 200 and the resultant tax liability on it has been shifted to the country of X1 which can be located in a low tax haven.

In principle, taxpayers are not deterred from designing their income in order to pay minimum taxes. The freedom to present one's income within the legal range in such a form that the least tax is to be paid is defined as tax avoidance; this results in tax savings. The principle of freedom of income presentation ends

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[1] Income Tax Act, 1961, s. 92.

where taxes are circumvented, that is, where 'creativity' of designing taxes is against the spirit and purpose of the law. While tax circumvention will not be fined, taxpayers are obliged to modify their tax files and pay taxes. Tax evasion results if tax law is deliberately violated. Evasion implies conscious illegal tax reduction, this is liable to prosecution and fines.[2]

Although transfer pricing regulations have been keeping a check on transactions between related enterprises to prevent tax evasion, many multinational companies have devised clever strategies which reduce their tax liabilities. Difficulties arise when companies claim such schemes as methods of 'tax planning', while governments see these as methods of 'tax evasion'.

One such notable strategy is commonly referred to as the 'Double Irish Dutch Sandwich'. Under such structures, a parent company incorporates a wholly owned subsidiary in Ireland that will be wholly managed and controlled from tax havens such as Bermuda or Cayman Islands. For tax purposes in Ireland, such a subsidiary is regarded as a Bermudian company. This Ireland subsidiary creates a subsidiary in Netherlands which in turn creates another subsidiary in Ireland. For saving tax, the parent company transfers its property to the first Ireland subsidiary. The same is licensed by the subsidiary to the Dutch company which sub-licenses it to the second Ireland subsidiary which ultimately exploits it. All profits are therefore earned by this subsidiary. However, since the property is sub-licensed by the Dutch company, most of the profits from the sales are paid as royalty to it. No withholding tax is paid on this royalty since the tax treaty between Ireland and Netherlands exempts the same. Again, since the Dutch company had licensed the property from the first Irish subsidiary, most of the receipts are paid by the Dutch company to it as royalty. This royalty also escapes withholding tax since the same is exempted on royalty payments as per Dutch domestic tax laws. Since the first Irish subsidiary is regarded as a Bermudian company, the royalties received by it are not taxable since Bermuda does not impose a corporate income tax. There is considerable tax saving.

Although these transactions are carried out at an arm's length price, rendering the scheme inherently legal, such structures cause losses to the country where the parent company is situated. It deprives such countries of taxes that they would have legitimately earned because of resources used to create the property that is transferred internally by a multinational group.

One of the biggest losers in this context has been the U.S. government that has lost taxes due to exploitation of such structures by companies like Google, Apple, Microsoft etc.[3] The U.S. government protested that these taxes were unfairly being diverted to tax havens. Since these structures were possible only

[2] Erich Kirchler, *The Economic Psychology of Tax Behaviour* (Cambridge University Press, Cambridge, 2009).

[3] "Double Irish with a Dutch Sandwich", *available at:* http://www.nytimes.com/interactive/2012/04/28/ business/Double-Irish-With-A-Dutch-Sandwich.html?_r=0 (last visited on March 15, 2015).

due to the favourable tax policies in Ireland, the U.S. and other affected governments pressurised the Irish government to modify their tax laws to prevent further formation of such structures during the G20 Summit held in Australia in November 2014.[4]

Pursuant to this, the Irish government proposed an amendment in its tax laws, more specifically, their policy regarding tax residency. While earlier, a corporation operating in Ireland having its control and management in a tax haven was regarded as a resident of the latter, the proposed amendment requires all companies operating within Ireland to be an Irish tax resident irrespective of the location of their control and management.[5] The implication of this is that profits arising from the entire structure which ultimately ends up as the income of the first Irish subsidiary becomes liable to Irish corporate tax at a rate of 12.5%.[6] this is one of the lowest tax rates in the world.

However, for those companies already exploiting this 'double Irish Dutch structure', this modified law will come into force only in 2020, meaning thereby that governments will continue to incur losses for 5 more years.[7] By then, most of these companies would have evolved other means of exploiting tax laws in their favour for reducing their tax burden. Additionally, Ireland has introduced this law as a 'default tax residence' rule, which implies that there would either be alternative rules, or that the default rule will be subject to exceptions. Hence, it remains to be seen whether this law will be strictly implemented to prevent tax evasion. In effect, this new law would not curb the formation of such structures because these companies still have the incentive of exploiting the low corporate tax rate of 12.5% applicable in Ireland as opposed to 35% in the U.S., 21% in U.K and 33.99% in India.[8]

The way forward

The need of the hour is to reform tax laws in a way that enables governments to look through intra-group tax avoidance transactions and treat a corporate group

[4]Robert W. Wood, "Ireland Corks Double Irish Tax Deal, Closing Time for Apple, Google, Twitter, Facebook" *available at:* http://www.forbes.com/sites/robertwood/2014/10/14/ireland-corks-double-irish-tax-deal-closing-time-for-apple-google-twitter-facebook, (last visited on March 15, 2015).

[5]Department of Finance, France, "Competing in a Changing World: A Road Map for Ireland's Tax Competitiveness", *available at:* http://budget.gov.ie/Budgets/2015/Documents/Competing_Changing_World_Tax_Road_Map_final.pdf (last visited on March 15, 2015).

[6]Department of Revenue, Irish Tax and Customs, "Corporation Tax", *available at* http://www.revenue.ie/ en/tax/ct (last visited on March 15, 2015).

[7]Robert W. Wood, "Ireland Corks Double Irish Tax Deal, Closing Time for Apple, Google, Twitter, Facebook" *available at:* http://www.forbes.com/sites/robertwood/2014/10/14/ireland-corks-double-irish-tax-deal-closing-time-for-apple-google-twitter-facebook, (last visited on March 15, 2015).

[8]"2014 Worldwide Corporate Tax Guide", *available at:* http://www.ey.com/GL/en/Services/Tax/Worldwide-Corporate-Tax-Guide---Country-list (last visited on March 15, 2015).

as one single enterprise, thereby taxing the group's profits in the home country by applying the principle of lifting of the corporate veil.

The courts in India have been upholding the tax authority's right to disregard any device employed by companies to evade payment of legitimate taxes which would be due in the ordinary course, but for such devices. Tax authorities can overlook the form of the transaction and take into account its substance having regard to facts and circumstances of the case.

It has been held in *Karumuthu Thiagaraja Chetty & Co.* v. *CEPT*[9] that where the business transaction is arranged to divert the profits out of taxable territory and if such a transaction is affected with the dominant object of avoiding tax liability, it would be competent for the tax authority to go behind the transaction, and assess the profit which might have been received but for the transaction. In *Juggilal Kamlapat* v. *CIT*[10], it was held that the tax authority was entitled to pierce the veil of corporate personality and to look at the real transaction. The court has powers to disregard the corporate entity if it was used for tax evasion or to circumvent tax obligations or to perpetuate fraud. Similarly, in *McDowell & Co. Ltd* v. *CTO*[11], the Supreme Court upheld the tax authority's right to disregard the sham transaction and look at its substance, if it was undertaken as an anti-avoidance tool.

This rule was recently made more concrete in the much talked about Vodafone case.[12] This case discussed concepts of tax planning and tax evasion in detail. There was a transaction of sale of shares from one group of companies to another that took place outside India. The transferor company had, through various intermediate companies and contractual arrangements, majority rights in an Indian subsidiary. Hence, as an effect of this sale, there was transfer of interest in the subsidiary of the transferor company to the transferee. However, since no part of the sale took place within India, a huge amount of tax that would have been taxable under Indian tax laws, had the sale taken place directly in India, was avoided. Indian tax authorities sought to impose tax liability on the transaction contending that the entire complex structure was merely a tax avoidance measure and hence must be looked through.

The Supreme Court referred to many landmark judgements while discussing the issue of tax avoidance. Firstly, it discussed at length cases of *Azadi Bachao Andolan*[13] and *Mc Dowell.*[14] The former had upheld the Westminster Principle that "given that a document or transaction is genuine, the court cannot go behind it to some supposed underlying substance"; and the latter held that tax planning could be legitimate, provided it was within the framework of law. But it

[9](1961) 42 ITR 788 (Mad).

[10]AIR 1970 SC 529.

[11]AIR 1986 SC 649.

[12](2012) 6 SCC 613.

[13]*Union of India* v. *Azadi Bachao Andolan*, AIR 2004 10 SCC 1.

[14]*McDowell & Co. Ltd* v. *CTO*, AIR 1986 SC 649.

disallowed colourable devices as part of tax planning. Therefore, the Court held that both the judgements were in consonance, meaning thereby that although a parent and its subsidiary are regarded as separate legal entities, revenue authorities can invoke the principle of lifting of the corporate veil if, while looking at the transactions in a holistic manner, it is revealed that dubious methods were adopted to evade tax. The decisive criteria is whether the parent company's management has such steering interference with the subsidiary's core activities that the subsidiary can no longer be regarded to perform those activities on the authority of its own executive directors. The court opined that a transaction will be considered sham if it lacks any legitimate economic or commercial purpose.

Related party transactions are also being more closely monitored by virtue of the new Companies Act, 2013. Various amendments have been introduced in light of large corporate frauds that happened in the past 20 years like Satyam, Sahara, and Enron. In such a scenario, it is an opportune time to introduce legislation regarding the tax liability arising out of such transactions.

Hence, according to well settled jurisprudence on this issue, tax authorities can resort to the principle of lifting of corporate veil to attack fraudulent structures and transactions. However, there is a need of a concrete legislation on the same to effectively curb such tax evading measures.

Advance Pricing Agreements

While the application of the doctrine of lifting of the corporate veil allows revenue authorities to bring fraudulent taxpayers to book, it may also encourage futile litigation against innocent tax payers having legitimate motives behind transactions with their AEs. To steer clear of such tedious litigation and to ensure tax certainty, innocent taxpayers have recourse to the recently introduced Advance Pricing Agreement Regime vide the Finance Act 2012.[15]

Advance pricing agreements (APAs) offer taxpayers with a significant way to reach better assurance with respect to international transactions which attract transfer pricing provisions. An advance pricing agreement is basically a pre-decided agreement which will finalize the arm's length price of an international transaction and the method used to compute this. It involves the process of negotiation between a taxpayer and a tax authority, the intention being to end in a workable proposition for both. According to the OECD framework, an APA is an arrangement that determines in advance of 'controlled transactions' (i.e. transactions between two enterprises that are AEs with respect to each other), an appropriate set of criteria (example - comparables, methods and appropriate adjustments thereto etc.) for the determination of the transfer pricing for those transactions over a fixed period of time.[16]

Mr. Pranab Mukherjee, erstwhile Finance Minister of India, said in his budget speech -"In a globalized economy with expanding cross-border production chains and growing trade within entities of the same group, Advance Pricing Agreement (APA) can significantly bring down tax litigation and provide tax certainty to foreign investors. Though the provision for APA has been included in the DTC Bill, 2010, I propose to bring forward its implementation by introducing it in the Finance Bill, 2012."[17]

The introduction of APAs in India is definitely a welcome step towards assuring tax certainty and mitigating the vast number of transfer pricing disputes in the country. The Indian APA regime is at par with global regimes when it comes to pre-filing consultations. Elaborate rules exist coupled with the fact that it is free indicate the importance being given to this key first step in the process. This will encourage companies to attempt to enter into an APA rather than having to undergo litigation.

The current relations between companies and revenue authorities with respect to transfer pricing is adversarial in nature, with the companies under the impression that the Revenue authority is constantly trying to increase the company's tax liability, while the Revenue authorities undertake the audit with the pre-conceived notion that the transaction is not at arm's length price. Introduction of APAs will provide a platform for the taxpayer and the authorities to negotiate the methodology for a transaction in a non-adversarial atmosphere.

On the other hand, being a relatively recent programme as compared to the well-established programmes of the U.S. and Japan, India's programme has a long way to go. The APA regime is not bereft of loopholes. For instance, under the current scheme, the Central Board of Direct Taxes has the power to cancel an APA if the taxpayer has not complied with certain terms and conditions.[18] However, neither the Act[19] nor the applicable rules lay down a procedure to appeal against this decision of cancellation.[20] Cancellation of an APA not only makes the entire procedure and efforts put in by the taxpayer futile but also seriously affects the certainty that the APA regime was intended to provide. In the absence of a statutory right to appeal, the only recourse that a taxpayer has is invoking his fundamental rights under Art. 14 which strikes at arbitrary decisions by administrative authorities. However, it must be kept in mind that under writ

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[15] "Provisions Relating to Direct Taxes", *available at:* http://indiabudget.nic.in/ub2012-13/mem /mem1.pdf (last visited on March 15, 2015).

[16] OECD, Report: *Advance Pricing Agreements- Approaches to Legislation* (October, 2012).

[17] Budget Speech of Pranab Mukherjee, Minister of Finance (2012-2013) *available at:* http://indiabudget.nic.in/ ub2012-13/bs/bs.pdf (last visited on March 15, 2015).

[18] Income Tax Rules, 1962, r. 10R.

[19] Income Tax Act, 1961, s. 253.

[20] Central Board of Direct Taxes, "Advance Pricing Agreement Guidance with FAQs", *available at:* http://www.itatonline.org/info/wp-content/files/CBDT_Transfer_Pricing_ APA_FAQ.pdf (last visited on March 15, 2015).

jurisdiction, courts may only look at legality of the decision and cannot decide on merits. Hence, it is imperative that a taxpayer has a right to appeal to the ITAT against such decisions of the CBDT.

Conclusion

There is a very thin line between tax planning and tax evasion. While it is acceptable for a taxpayer to reduce his tax liability within the framework of law, colourable devices cannot be a part of tax planning. Since tax evasion schemes employed by multinationals are fuelled mainly by lenient tax policies of certain countries, it is essential for these countries to eliminate the loopholes in their policies that are being exploited by taxpayers to evade tax liability.

In this scenario, jurisprudence dictates that tax laws worldwide should address this issue by disregarding the separate legal entity principle and considering the profits of the corporate group as that of a single entity. However, to nip the problem at its bud, it is critical for legislators to attend to this issue by way of a comprehensive legislation on tax evasion and planning.

As regards innocent taxpayers undertaking related party transactions, the APA acts as a sigh of relief as it ensures certainty with respect to tax liability thereby reducing chances of being dragged into costly and time consuming futile litigation.

The difference between tax planning and tax evasion has been diminishing over the years with companies evading huge amount of taxes in the garb of tax planning. This menace needs to be curbed to protect those taxpayers who pay their due share of taxes and in furtherance of the larger public interest.

Antitrust Effects of Reverse Payment Settlements in Patent Infringement Litigation

*-Ritvik M. Kulkarni**

The pharmaceutical industry is one of the vital establishments in the field of healthcare and constant innovation in medication is the world's never-ending requirement. There is a desperate need for effective drugs, but branded drugs are sold at high prices is because of the high investment required in drug discovery. More than USD 100 billion is spent every year in the effort to discover and launch a new drug. According to PricewaterhouseCoopers (PWC) in 2010, India will join the league of top 10 global pharmaceuticals markets in terms of sales by 2020 with value reaching US$50 billion.[1]

Such enormous investment is incentivized by strong patent protection which grants a monopoly to the patentee for 20 years. Despite such strong protection, pharmaceutical patentees have made agreements that overreach the legitimate extent of the patent grant. Such circumstances call for intervention of antitrust or competition law for deciding the legality of such agreement(s). However, in most jurisdictions, enforcement of intellectual property rights is excepted from antitrust scrutiny due to their inherent exclusive nature.

In light of this inherent tussle between competition and patent laws, the object of this paper is to assess the legality of settlements which involve payment of large sums of money (often in cash) made by drug patent holders (Plaintiffs) to potential infringers (Defendants) in patent infringement litigation. Since the law on this issue has emerged (and developed) in the US the paper will derive more support from commercial and judicial responses towards such reverse payment settlements in the USA.

Innovation and Competition in the Pharmaceutical Industry

Drug discovery is a process whereby a drug candidate or lead compound is identified and partially validated for the treatment of a specific disease.[2] The target and validation process[3] is different for each drug depending on its inherent characteristics. Pre-clinical and clinical trials over three phases complete the

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* III B.S.L., LL.B.

[1] PricewaterhouseCoopers, "A Brief Report of Pharmaceutical Industry in India" *available at:* http://www.pwc.in/press-releases/its-india-calling-for-global-pharmaceutical-companies.jhtml (last visited on February 14, 2015).

[2] Rebecca Goulding and Emily Marden, "An Overview of Drug Discovery and Drug Development", *Centre for Social Innovation and Impact Investing Resources*, Sauder School of Business, (May, 2009), also *available at*: http://www.sauder.ubc.ca /Faculty/ Research_ Centres/ISIS/Resources/~/ media/ 0887B95B94684BB4805BBB09C4E7B876.ashx (last visited on March 15, 2015).

[3] Ibid.

process of drug development; after which the novel drug is ready to undergo the administrative process of approval.

In order to place it on the market, an innovating company has to make an investment of millions of dollars on each drug before it reaches the market. Once the drug is put up for sale, the ultimate goal of the company is to recover, within the 20-year monopoly period granted by the patent, every last dime spent on inventing it. This role of the pharmaceutical innovator is performed by what the pharmaceutical world calls a brand manufacturer or company.

While the Goliath of corporate pharma may account for pharmaceutical innovation, many Davids fiercely compete with the former to increase accessibility of drugs to those who truly need them. This socio-economic role is played by generic drug manufacturing companies. A generic drug is *"a drug product that is comparable to brand/reference listed drug product in dosage form, strength, route of administration, quality and performance characteristics, and intended use"*.[4] Since generics have to merely reverse-engineer branded drugs, it saves them from conducting fresh clinical trials that are required to obtain regulatory approvals. The Hatch-Waxman Act allows accelerated FDA approval of a generic drug through an Abbreviated New Drug Application ("ANDA") upon showing that it is "bioequivalent" to an approved drug.[5] This leads to a sharp rise in the availability of drugs which have similar therapeutic efficiency but a comparatively much lower price than that of a branded drug.

Ideally, a generic manufacturer must wait for the brand's patent to expire before he can introduce the generic variant in the market. This ensures the brand a twenty-year window to exploit its monopoly over the patented drug and earn the maximum return. Once the patent expires, it can adjust the price to effectively compete with its generic version. This is a win-win scenario for brands, generics, as well as consumers.

Paragraph IV Litigation under the Hatch-Waxman Act

The Orange Book[6] contains the drug and patent information of a certified New Drug Application (NDA) (read branded drug). A generic company has to obtain certification from the ND applicant for an approval. It must state one of the following:

(i) the required patent information relating to such patent has not been filed;

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[4] "Generic Drugs", Center for Drug Evaluation and Research, U.S. Department of Health and Human Services, *available at*: http://www.fda.gov/downloads/Drugs/DevelopmentApprovalProcess/SmallBusinessAssistance/ucm127615.pdf (last visited on March 15, 2015).

[5] 21 U.S.C. § 355 (j).

[6] Information on the Approved Drug Products with Therapeutic Equivalence Evaluations (Orange Book), U.S. Department of Health and Human Services, *available at* http://www.fda.gov/Drugs/ InformationOnDrugs/ucm129662.htm (last visited on March 15, 2015).

(ii) such patent has expired;
(iii) the patent will expire on a particular date; or
(iv) such patent is invalid or will not be infringed by the drug, for which approval is being sought.

If applied under Para IV, the statute requires that ANDA Applicants certify to the patents listed, provide notice to the NDA holder and patent owner, and, if patent infringement litigation is filed, it imposes a 30-month stay on the approval of an ANDA.[7] If the NDA patent is genuine, the ANDA Applicant is likely to pay damages and be liable for patent infringement. On the other hand if the patent is weak, it may be invalidated by the Court if challenged by the Generic Applicant.

In either situation, both parties are bound to spend a considerable amount of time and money on litigation (and attorneys' fees) before the last Court reaches the final verdict. Even if the patent is invalidated the challenger will have gained nothing, because no damages will be awarded and the 30 month stay would still have operated. The brand's weak patent now faces invalidation and hastened competition.

There is only one apparent escape: a settlement agreement. In exchange for a delayed entry and an agreement to not challenge the patent thereafter, the brand offers an amount much larger than the profits that the generic version could have made in the period agreed upon for delay. In nearly every case in which generic entry is contemplated, the profit that the generic anticipates will be much less than what the brand stands to lose from the same sales.[8] Such an agreement has the following effect:

a. The brand's patent survives until expiration
b. Generic competition is effectively eliminated, enabling the brand to earn supernormal profits
c. Costs and efforts for litigation are averted by both
d. The generic company is assured supernormal profits

As harmlessly profitable as it may seem, such reverse-payment settlements can potentially hurt the market. If both parties would have litigated towards invalidation of the weak patent, the generic company would be able to enter its drug earlier than expiry of the brand patent. For this lessened number of years, the consumer would save on medical expenses because generic drugs will be cheaper.

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[7] Statement of Daniel E. Troy, Chief Counsel, USFDA (Before the Senate Committee on the Judiciary, August 1, 2003) *available at:* http://www.fda.gov/newsevents/testimony/ucm115033.htm (last visited on March 15, 2015).

[8] Roundtable on Generic Pharmaceuticals- Contribution by the Delegation of the United States, OECD Doc. DAF/COMP/WD(2009)116 *available at:* https://www.ftc.gov/ sites/ default/ files/ attachments/us-submissions-oecd-and-other-international- competition-fora/ genericpharma.pdf (last visited on March 15, 2015).

The successful generic challenger will be awarded the costs of litigation, leaving incentive for other generics to follow suit. Brands will not be disincentivized from making pharmaceutical investments since the invalidated patent was a bogus claim *ab initio*. On the contrary, they will be deterred from filing weak drug patents. Both innovation and competition would remain intact in absence of reverse-payment settlements.

Generic competition following successful patent challenges involving just four major brand-name drugs is estimated to have saved consumers more than $9 billion.[9] But in the wake of reverse-payment settlements, the balancing effect the generic companies have had on the market is being lost. This not only allows brands to unfairly expand their monopoly, but also substantially increases consumer expenditure on healthcare. In a recent study conducted by the Federal Trade Commission (FTC), it was found that a ban on reverse-payments will add approximately $3.5 billion to consumers' annual savings.[10] The litigating parties effectively agree to share consumer savings which would accumulate if they had actually competed.

FTC Litigation against Reverse-Payment Settlements

In recent years, the FTC has commenced litigation against numerous brand and generic pharmaceutical companies involved in reverse payment settlements. It believes that such agreements are *presumptively* anti-competitive because they cause elimination of competition among the brand and generic manufacturers and therefore greatly harm annual consumer savings. In light of increasing instances of such collusion, the US Congress enacted a requirement that all such settlements be filed with the FTC and the Department of Justice, giving the FTC access to this information. This filing requirement enables FTC staff to review all settlements of patent cases brought under the Hatch-Waxman Act.[11] However, there have been various occasions in which courts have upheld the legality of reverse-payment settlements.

In 2003, the FTC filed a suit[12] in a similar matter against a brand manufacturer named Schering-Plough Co. ("Schering"). Schering settled with Upsher-Smith Laboratories, Inc. ("Upsher") and American Home Products Corporation

[9]"Generic Pharmaceuticals Marketplace Access and Consumer Issues: Hearing before the Senate Commerce Comm", 107th Cong. (Apr. 23, 2002) (Statement of Kathleen D. Jaeger, President & CEO, Generic Pharmaceutical Ass'n) at pp. 12, *available at* http://commerce.senate.gov/ hearings/042302jaeger.pdf (last visited on March 15, 2015). This figure is vigorously disputed by Pharmaceutical Companies.

[10]See Jon Leibowitz, Speech at Center For American Progress, "Pay-for-Delay Settlements in the Pharmaceutical Industry: How Congress Can Stop Anticompetitive Conduct, Protect Consumers' Wallets, and Help Pay for Health Care Reform (The $35 Billion Solution)" at pp. 12, *available at:* http://ftc.gov/speeches/leibowitz/090623payfordelayspeech.pdf (last visited on March 15, 2015).

[11]*Ibid.*

[12]In the Matter of *Schering-Plough Corp., Upsher-Smith Labs., and American Home Products Corp.*, Docket No. 9297.

("AHP"), its generic competitors, to delay the entry of the generic version of its K-Dur 20 drug. Schering paid USD 60 million to Upsher and USD 5 million to AHP to delay entry of their generic variants of K-Dur in the market. The FTC claimed that this agreement constituted a violation of s. 5[13] of the FTC Act, and wanted to declare the agreement void.

The Respondents successfully appealed to the Eleventh Circuit.[14] It observed that an act of entering into an agreement to prevent patent infringement is well within the exclusionary scope of the patent right and would therefore not constitute an agreement in restraint of trade. *"The court ruled that a payment by the patent holder, accompanied by an agreement by the challenger to defer entry, could not support an inference that the challenger agreed to a later entry date in return for such payment, even if there was no other plausible explanation for the payment".*[15] Furthermore, no person (read generic competitor) can be forced to see her patent challenge to the end; for eventually litigation itself is a calculated risk. Consequently, an unchallenged patent remains legally valid, even though it is in fact too weak to stand the test.

In his statement,[16] the FTC Commissioner J. Thomas Rosch opined:

> *"almost all, if not all, reverse payment agreements do that insofar as they delay generic competition longer than it might otherwise occur. He claimed that even though it may theoretically be possible to justify such a backward payment, it is hard to see how, and, in any event, the participants in such a settlement certainly should bear a heavy burden of proof on that score".*[17]

Recently, in *Federal Trade Commission v. Actavis,*[18]the FTC brought a suit against Solvay Pharmaceuticals Inc. and its two generic competitors, Watson and Paddock for entering into a backward payment settlement. Watson successfully filed an ANDA to the FDA in 2003 for approval to market the generic version of

[13]S. 5 prohibits entities from engaging in unfair or deceptive acts or practices in interstate commerce. It states, in pertinent parts:-
"(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.
(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, [except certain specified financial and industrial sectors] from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."

[14]Schering, 402 F.3d, at 1058.

[15]*Ibid.* at p. 1076.

[16]Statement of Federal Trade Commissioner J. Thomas Rosch, Pay-for-Delay Press Conference, January 13, 2010 *available at:* http://www.ftc.gov/ sites/ default/ files/ documents/ reports/pay-delay-how-drug-company-pay-offs-cost-consumers-billions-federal-trade- commission-staff-study/100113stmtroschpfd.pdf (last visited on March 15, 2015).

[17]*Ibid.*

[18]*FTC v. Actavis*, Inc., No. 12-416 before the Supreme Court of the United States, decided on 17 June, 2003, *available at:* http://www.supremecourt.gov/opinions/12pdf/12-416_m5n0.pdf (last visited on March 15, 2015).

Solvay's testosterone-replacement drug AndroGel. As Solvay's patent is due to expire in August 2020, it settled with Watson and Par by paying them a share of its profits in exchange for delay of the generic version entry until 2015; thereby preventing a considerable loss of profit. This was seen by the FTC as an illegitimate method to eliminate competition by buying out competitors. This suit was dismissed by the District Court as well as the Eleventh Circuit on grounds that the FTC could not show that the reverse payment excluded more competition than the patent normally could have.

However on appeal, the Supreme Court in 2013 overturned the decision of the Eleventh Circuit to hold that such agreements were not exempt from the purview of anti-trust law. Delivering the Majority Opinion of the Court, Justice Breyer provided an illustration to aid the Court's findings:

> *"Company A, the patentee, agrees to pay B many millions of dollars. Because the settlement requires the patentee to pay the alleged infringer, rather than the other way around, this kind of settlement agreement is often called a "reverse payment" settlement agreement. And the basic question here is whether such an agreement can sometimes unreasonably diminish competition in violation of the antitrust laws."*[19]

It observed that such agreements may lie outside the exclusionary scope of a patent because:

a. Even though a patent holder can exclude competition, antitrust law can interfere when the market is disrupted due to patent enforcement.
b. The conclusion of a patent challenge is not the only indicator of its validity; an excessively large settlement payment to a challenger is a strong and acceptable presumption to believe otherwise.

However the Supreme Court disagreed with the FTC's contention that such agreements should be presumed to be anti-competitive until proven otherwise. It unequivocally refused to apply the *"quick look"* test. Instead, it laid down that every such settlement agreement will be individually assessed by the Court on its own merit after applying the *"rule of reason"* test instead. The case was remanded back to the lower courts to determine the antitrust effects, if any, of this the impugned agreement.[20]

This decision has left a major impact on the pharmaceutical industry. Experts suggest that unable to settle, the brand manufacturers will litigate to conclusion of the suit. Not only will this cause a reduction in incentive for innovation, but also nevertheless delay the entry of the generic drugs after all. Despite its probable negative impact, the pharmaceutical industry will surely see a decline in

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[19] *See, e.g.*, The Sherman Antitrust Act, (15 U.S.C. § 1); *Cf. Palmer* v. *BRG of Ga., Inc.*, 498 U. S. 46 (1990).

[20] *FTC v. Actavis*, Inc., No. 12-416 before the Supreme Court of the United States, decided on 17 June, 2003, *available at:* http://www.supremecourt.gov/opinions/12pdf/12-416_m5n0.pdf (last visited on March 15, 2015).

the instances of reverse payments in patent infringement cases. It also pressurizes the brand manufacturers to make authentic and strong patent claims in order to discourage ANDA filing in Paragraph IV.

Conclusion

Recently it was reported[21] that the Competition Commission of India (CCI) is conducting investigations into settlement agreements between Hoffman-Law Roche and Cipla in a patent infringement suit over the former's drug erlotnib and between US based Merck Sharp and Dohme Corp. and Indian generic manufacturer Glenmarck Pharmaceuticals Ltd. over delay of the generic variant of an anti-diabetes drug named Sitgliptin. So far, the Indian antitrust watchdog has not come out with any specific statement with regards to any liability invoked against any of the aforementioned parties; but intimation is highly awaited by lawyers, law firms, pharmaceutical companies and analysts across the country.

Since horizontal agreements are presumed under s. 3 of the Competition Act 2002 to have adverse effects on competition, it is expected that the Competition Commission of India (CCI), working in concert with the Indian Patent Office (IPO), will strictly assess these deals for any instance of any harm to the Indian consumer. To aid its prosecution, it can rely upon the US Supreme Court's decision to hold reverse payments to be outside the exclusionary scope of a patent right. Directly conflicting with this judicial position is s. 3(5)(i) of the Competition Act 2002 provides a plausible defence and exception to antitrust liability under s. 3 to patent (and other IP) owners for acts done to prevent infringement.

Keeping in mind the difference in the social-economic dynamics of markets in India and the US, the CCI and the IPO are likely to show extremely low tolerance towards agreements possessing anticompetitive tendencies. It is only a matter of time before the CCI decides the legality of settlements in patent infringement litigation, especially those that include withdrawal of challenges to a pharmaceutical drug patent. The high probability of this position stems from the fact that India is still a developing country where generic competition to foreign brand manufacturers is necessary to meet the growing needs of the comparatively weaker Indian consumer.

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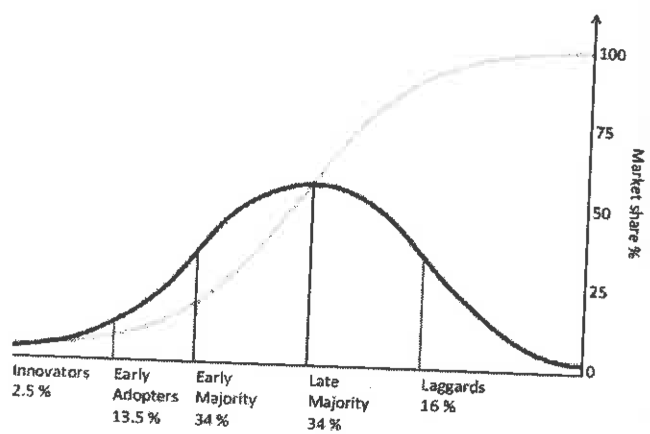
[21] C. H. Unnikrishnan, "CCI to scan drug patent settlements" *available at:* http://www.livemint.com /Companies /RVVDhRh7oTfpqlIphkb6jM /CCI-to-scan-drug-patent-settlements.html (last visited on March 15, 2015)

All Bits are Created Equal - Why a Law Enforcing Network Neutrality is Fundamental

-Prachi Tadsare*

A Technical Introduction

The adoption of technology typically occurs in an S shaped curve called the 'Everett Rogers curve of diffusion of innovations', but due to the incessant shifting of the 'early adopters' and the 'early majority' to the left, the adoption rate of the digital infrastructure of the Internet was two to five times faster than the recorded rate of infrastructure adoption in the case of electricity and telephone networks.[1]



Ernst and Young, Report: 'The Digitisation of Everything – How Organisations must adapt to changing consumer behaviour'.[2]

This becomes infinitely more important when it is understood that the Internet has become a medium of accelerating the diffusion of new, innovative technology- as seen from the difference in adoption rates for social networking websites Facebook and Google+. The latter took only 16 days to reach 10 million users to the former's 852. A combination of the increased adoption rates of the internet with the accelerated diffusion of technologies that the Internet makes available is essentially a multiplication of exponentials. Consequently, the Internet has become the primary medium of technology introduction, human

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[1]Ernst and Young, Report: "The Digitisation of Everything– How Organisations must adapt to changing consumer behavior" *available at:* http://www.ey.com/Publication/vwLUAssets/The_digitisation_of_everything__How_organisations_must_adapt_to_changing_consumer_behaviour/$FILE/EY_Digitisation_of_everything.pdf (last visited on March 15, 2015).

[2]*Ibid.*

interaction, empowerment, communication, trade and commerce, and knowledge dissemination, with extraordinary speed and effectiveness; and this, in turn, demands unprecedented foresight and pace from the legal system. Failing this, we would see the very basics of our laws being challenged. A classic example of this is the manner in which the concept of carriers, competition, resources and accessibility are challenged by internet and its access – that is, net neutrality.

Network neutrality or net neutrality as it is known, has been, and to some extent, still is, a debate which is assumed not to concern the average Indian. However, in December 2014, in an unprecedented move, Bharti Airtel brought the debate to Indian shores by launching a plan for differential pricing of certain internet services.[3] The lack of legislation and the lack of an informed debate in India were highlighted by this incident.

In view of this lack of debate and information on net neutrality, this article seeks to answer three main questions – Firstly, where India stands with respect to regulation of ISPs for maintaining the neutrality of Internet networks; secondly, if India needs a legislation in this respect, what then will be the characteristics of such a law.

In order to effectively address these questions, this article is divided into 5 parts. The first part deals with the explanation of the concept of Net Neutrality, the second part deals with the leading arguments for and against net neutrality. The third part analyses the salient features of the existing legislations on Net Neutrality. The fourth part analyses the Indian scenario in this respect. The article concludes in the fifth part consolidating certain characteristics that the Indian law should incorporate.

The Concept of Net Neutrality

The Internet, as we understand it, is a network of computers joined together with backbone structures owned principally by telephone companies and cable operators.[4] When an end user who is accessing the internet enters a command to access a certain website, this information is converted into a packet and then relayed via various routers through this grid of interconnected computers.[5]

[3]"Bharti Airtel to charge for using VoIP services", *available at:* http://in.reuters.com/article/2014/12/24/bharti-airtel-rates-idINKBN0K20SU20141224 (last visited on March 15, 2015).

[4]Peter J Pizzi & Stephen Elliot, "A Primer on Net Neutrality", *available at:* http://www.connellfoley.com /sites/default/files/pjp_net_neutrality_11-07.pdf (last visited on March 15, 2015).

[5]Rus Shuler, "How Does the Internet Work?", *available at:* http://web.stanford.edu/class/msande91si /www-spr04/readings/week1/InternetWhitepaper.htm (last visited on March 15, 2015).

The concept of network neutrality is interlinked to this concept of internet access due to the fact that this 'Last Mile' connection[6] between one end (user) and another (website or the wider internet) is governed by an Internet Service Provider (ISP).

The concept of net neutrality is thus in essence, a principle of non-discrimination of content on the internet by broadband providers[7] (ISPs); that is, all internet traffic should be treated equally[8] except in cases where the non-discrimination would lead to 'public harm' or be 'publicly detrimental'.[9]

The word 'network neutrality' was first coined by Tim Wu – then an Associate Professor at Virginia Law School. He describes:

> *"Network neutrality is best defined as a network design principle. The idea is that a maximally useful public information network aspires to treat all content, sites, and platforms equally.... The theory behind the network neutrality principle, which the Internet sometimes gets close to, is that a neutral network should be expected to deliver the most to a nation and the world economically, by serving as an innovation platform, and socially, by facilitating the widest variety of interactions between people. The Internet isn't perfect but it aspires for neutrality in its original design."*[10]

There are therefore two aspects to the concept of network neutrality – first, that there shall not be any blocking of content by ISPs; and second, that there shall not be any prioritizing of certain type of data over the other.[11]

The Debate For and Against Net Neutrality

The argument for net neutrality is largely based on the grounds of competition,[12] digital rights,[13] prevention of leverage,[14] preservation of the end to end

6 "Last Mile Connections", *available at:* http://itlaw.wikia.com/wiki/Last_mile (last visited on March 15, 2015).

7 Tim Wu, "A Proposal for Network Neutrality", *available at:* http://www.timwu.org/OriginalNNProposal.pdf (last visited on March 15, 2015).

8 "Inside Net Neutrality: Is your ISP filtering content", *available at:* www.macworld.com/article/1132075/netneutrality1.html (last visited on March 15, 2015).

9 Tim Wu, "A Proposal for Network Neutrality", *available at:* http://www.timwu.org/OriginalNNProposal.pdf (last visited on March 15, 2015).

10 Tim Wu, "Network Neutrality, Broadband Discrimination", *available at:* https://cdt.org/files/speech/net-neutrality/2005wu.pdf (last visited on March 15, 2015).

11 Edward W Felton, "Nuts and Bolts of Network Neutrality" 3, *available at:* http://regulation2point0.org/wpcontent/uploads/downloads/2010/04/php9e.pdf (last visited on March 15, 2015).

12 Tim Wu, "Network Neutrality, Broadband Discrimination", *available at:* https://cdt.org/files/speech/net-neutrality/2005wu.pdf (last visited on March 15, 2015).

13 Lawrence Lessig & Robert W. McChesney, "No Tolls on the Internet", *available at:* http://www.washingtonpost.com/wp-yn/content/article/2006/06/07/AR2006060702108.html (last visited on March 15, 2015).

principle,[15] and interestingly, the effect of habituation and the effect due to increased impatience among habituated users on abandonment rates.[16]

The proponents of network neutrality draw attention to the fact that the concept of network neutrality is derived from the 'evolutionary model' of internet development[17] whereby the internet as a platform serves to promote the 'survival of the fittest' competition among developers. In essence, the internet is the perfect arena for competition between products for the attention of the end-user.[18] As a result of this technological Darwinism, it is argued that content should be available to access without any discrimination.[19]

The negation of a level playing field in the above case results in total control and content filtering, leading to misuse of this responsibility, thereby turning the ability to filter content into a weapon of leverage and making corporations shell out larger amounts of money to get their content delivered faster.[20] This argument is substantiated by the fact that the telecommunication industry currently, is a controlled monopoly[21] of sorts with the telecommunication corporations operating in specific zones,[22] carrying out price fixing[23] and there

14 "Against Fee-Based and Other Pernicious Net Prejudice: An Explanation and Examination of the Net Neutrality Debate", *available at:* https://www.scribd.com/doc/938752/Against-Fee-Based-and-other-Pernicious-Net-Prejudice-An-Explanation-and-Examination-of-the-Net-Neutrality-Debate (last visited on March 15, 2015).

15 Lawrence Lessig & Robert W. McChesney, "No Tolls on the Internet", *available at:* http://www.washingtonpost.com/wp-yn/content/article/2006/06/07/AR2006060702108.html (last visited on March 15, 2015).

16 Krishnan & Sitaraman, "Video Stream Quality Impacts Viewer Behavior", *available at:* http:// www.akamai.co.jp/enja/dl/technical_publications/video_stream_quality_study.pdf (last visited on March 15, 2015).

17 John Ziman, *Evolutionary Models for Technological Change, in Technological Innovation As An Evolutionary Process* 3 (John Ziman ed., 2000); Richard Nelson, *Understanding Technical Change as an Evolutionary Process* (Elsevier Science Ltd, 1987).

18 Tim Wu, "Network Neutrality, Broadband Discrimination", *available at:* https://cdt.org/files/speech/net-neutrality/2005wu.pdf (last visited on March 15, 2015).

19 Tim Wu and Lawrence Lessig, "Ex Parte Submission in CS Docket No. 02-52 to the FCC" 5-6, *available at:* http://timwu.org/wu_lessig_fcc.pdf (last visited on March 15, 2015).

20 "Against Fee-Based and Other Pernicious Net Prejudice: An Explanation and Examination of the Net Neutrality Debate", *available at:* https://www.scribd.com/doc/938752/Against-Fee-Based-and-other-Pernicious-Net-Prejudice-An-Explanation-and-Examination-of-the-Net-Neutrality-Debate (last visited on March 15, 2015).

21 "Telecom's Big Players Hold Back the Future", *available at:* http://www.nytimes.com/2013/05/20/business/media/telecoms-big-players-hold-back-the-future.html?pagewanted=all&_r=0 (last visited on March 15, 2015).

22 "Understanding Wireless Telephone Coverage Areas", *available at:* http://www.fcc.gov/guides/understanding-wireless-telephone-coverage-areas (last visited on March 15, 2015).

23 "Telecom Regulatory Authority of India may review telcos freedom to fix mobile rates", *available at:* http://www.bgr.in/news/telecom-regulatory-authority-of-india-may-review-telcos-freedom-to-fix-mobile-rates (last visited on March 15, 2015).

being absolutely no alternative[24] for the end user – especially in the case of internet pricing and services.

The internet of today is based on the end-to-end principle[25] with there being absolutely no value addition by the ISPs. Basically, the role of the ISPs (eg. Airtel) is limited to accessing the information stored locally (eg. in the Indian servers) by the content provider (eg. Google) and transferring this information to the end user. Therefore the role of the ISP is limited to this Last Mile connecting and thus, creating an over-arching role for ISPs in the form content-filtering, differential pricing and fast-laning of specific services will fundamentally change user consumption patterns.[26]

Furthermore, studies on consumption patterns substantiate the argument for net neutrality due to the fact that user habituation to faster speeds leads to higher abandonment.[27]

Fast-laning of content by ISPs completely tips the scales against those services who can't afford to pay higher charges for favouring their content thus leading to a completely disproportionate and biased dissemination of information to the public at large.

It is also argued that free internet is the best means to the realisation of individual rights and freedoms, fostering freedom of speech and greater participation in democracy.[28]

On the other hand, the argument against net neutrality is on the grounds that network neutrality can hamper future innovations to the internet by preventing prioritization of activities,[29] the inherent nature of the internet not being neutral in the first place[30] and the prevention of over-use of bandwidth.[31] It is argued by the detractors, Christopher Yoo being one of the foremost, that net neutrality hampers the ability of ISPs to screen out malware at the opportune moments.[32]

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[24] "Wireless subscriber market share in India by service provider company from 2013 to 2014, by month", *available at:* http://www.statista.com/statistics/258797/market-share-of-the-mobile-telecom-industry-in-india-by-company (last visited on March 15, 2015).

[25] "The End-to-End Principle", *available at:* http://cs.stanford.edu/people/eroberts/cs181/projects/2010-11/NetNeutrality/Articles/Proponents.html (last visited on March 15, 2015).

[26] Lawrence Lessig & Robert W. McChesney, "No Tolls on the Internet", *available at:* http://www.washingtonpost.com/wp-yn/content/article/2006/06/07/AR2006060702108.html (last visited on March 15, 2015).

[27] *Ibid.*

[28] *Ibid.*

[29] Hart Jonathan D, *Internet Law* (BNA Books, 2007) 750.

[30] Tim Wu, "Network Neutrality, Broadband Discrimination", *available at:* https://cdt.org/files/speech/net-neutrality/2005wu.pdf (last visited on March 15, 2015).

[31] Bret Swanson, "The Coming Exaflood" *available at:* http://www.wsj.com/articles/SB116925820512582318 (last visited on March 15, 2015).

[32] Christopher Yoo, "Free Speech and the Myth of the Internet as an Unintermediated Experience" (78) *George Washington L. Rev.* 697, 703-704 (2005).

enabling users to choose for themselves the content they want to prioritize[33] and answering bargaining problems with respect to charges paid by users.[34]

However, the most important drawback of these counter arguments is that the choice of the end user is completely disregarded and the control is in the hands of ISPs with Zero Value Addition.

Comparative Analysis of Features of Net Neutrality Legislations

In order to assess whether a legislation is indeed required in India and further, to isolate the features to be embodied in an Indian Legislation, it is essential to study the features of Net Neutrality legislations in other countries.

Netherlands:[35] ISPs will not restrict the speed of the content to the end-user unless it is required due to congestion whence equal types of content will be treated equally. Certain types of content can be restricted in cases of security threats, when specifically ordered by the Court or specifically approved by the end user. There are particular regulations on the approval and the format of the approval by the end user. In case of a security threat, the user will be notified of the threat and can take measures to combat the same at the earliest, and if in order to combat the threat, measures are taken by the ISP then the end-user shall be notified as soon as possible.

Slovenia:[36] In addition to the features exhibited in the Dutch legislation, Slovenia has clearly and well defined the goals it expects to achieve via the legislation namely, preservation of the open and neutral character of the internet and the access to and dissemination of information or the use of applications and services of the choice of end users. The ISPs cannot slow, delay or restrict data at the application level and nor can they implement measures for their evaluation.

Chile:[37] In addition to the essential clauses, Chile has a specific clause prohibiting ISPs from restricting content in a manner which affect or may affect free competition. Furthermore, no restrictions imposed by the ISPs should arbitrarily affect providers of internet services and their applications. The end-user can demand information about the nature and guarantees of the service and these important details have to be displayed by ISPs on their websites at all times.

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[33] *Ibid.*

[34] *Ibid.*

[35] Dutch Telecommunications Act, art. 7.4a, *available at:* http://en.jurispedia.org/index.php/Art._7.4a_of_the_Dutch_Telecommunications_Act (last visited on March 15, 2015).

[36] Electronic Communications Act (Slovenia), art. 230d, *available at:* https://www.ip-rs.si/index.php?id=504 (last visited on March 15, 2015).

[37] Martin Pleiss, "Legal Case Study: Chilean Net Neutrality", *available at:* http://www.hiig.de/en/legal-case-studies-moya-garcia (last visited on March 15, 2015).

The Indian Scenario with respect to Net Neutrality

The most recent incidents to trigger the net neutrality debate in India has been the differential pricing plan introduced by Bharti Airtel with respect to Voice over Internet Protocol (VoIP) services like Skype.[38] What brought this incident to the limelight was the fact that the Telecom Regulatory Authority of India (TRAI) accepted that this move by the largest telecom operator in India[39] was in violation of the principles of net neutrality[40] but that in the absence of a legislation on this subject, no action could be taken by the authority.[41]

Following great criticism on social media, Airtel retracted its plan, stating that it would wait for the consultation paper by TRAI on the same before launching its plans.[42] Although this incident raised the question of net neutrality and brought it from the annals of academics into the wider public enquiry, it is not an isolated incident. Further violation of net neutrality rules in India has occurred by demands of ISPs for differential pricing for popular services like Facebook and Whatsapp,[43] blanket declarations of illegality with respect to VoIP services[44] as well as provision of special services to certain applications.[45]

This scenario gives rise to two main questions – whether, under the current system, any legal recourse is available, and whether legislation is required to combat the lacunae.

38 "Bharti Airtel to charge for using VoIP services", *available at:* http://in.reuters.com/article/2014/12/24/bharti-airtel-rates-idINKBN0K20SU20141224 (last visited on March 15, 2015).

39 "Airtel crosses 200 million mobile customer mark in India", *available at:* http://www.airtel.in/about-bharti/media-centre/bharti-airtel-news/corporate/airtel-crosses-200-million-mobile-customer-mark-in-india (last visited on March 15, 2015).

40 "Can't Fault Airtel on VoIP rates: TRAI Chief Rahul Khullar", *available at:* http://www.financialexpress.com/article/industry/companies/cant-fault-airtel-on-voip-rates-rahul-khullar/23513/ (last visited on March 15, 2015).

41 *Ibid.*

42 "Bharti Airtel drops move to charge more for VoIP calls" *available at:* http://in.reuters.com/article/2014/12/29/bharti-airtel-rates-idINKBN0K70A920141229 (last visited on March 15, 2015).

43 "Facebook, WhatsApp, others must be taxed: Vodafone" *available at:* http://timesofindia.indiatimes.com/tech/tech-news/Facebook-WhatsApp-others-must-be-taxed-Vodafone/articleshow/44820006.cms (last visited on March 15, 2015).

44 "As debate over Net telephony rages, Govt to re-examine services offered by Skype, Google", *available at:* http://www.thehindubusinessline.com/industry-and-economy/info-tech/as-debate-over-net-telephony-rages-govt-to-reexamine-services-offered-by-skype-google/article4404537.ece (last visited on March 15, 2015).

45 "TRAI examining Bharti Airtel's special deals on Facebook and WhatsApp" *available at:* http://articles.economictimes.indiatimes.com/2014-11-25/news/56455517_1_net-neutrality-mobile-data-services-uninor (last visited on March 15, 2015).

Currently, there is no legislation in India with respect to net neutrality; however, the recourse does exist in the form of the Unified License Agreement[46] which is signed by the Department of Telecommunications and ISPs. The license is granted on the condition that the terms of the agreement shall be strictly adhered by the ISPs, failing which the Central Government is empowered to revoke their license.[47] Clause 2.2 of the License Agreement provides for ISPs to provide access to all content available on the internet to their consumers.[48] Further, clause 10.7 makes it the responsibility of the ISPs to maintain the Quality of Service (QoS)[49], and under clause 25.1 of the License Agreement, ISPS are to adhere to the QoS Regulations as prescribed by the TRAI.[50] Furthermore, it is the responsibility of the ISPs to ensure the Quality of Service, and thus, under the terms of the license, ISPS are obliged to clearly define the scope of service to the subscribers at the time of contracting with them.[51] Clause 16.1 of the Agreement imposes an obligation on ISPs to comply with TRAI's pricing provisions.[52]

However, the major drawback is that as of date, no action has been taken against any ISP on the basis of this Agreement.The government had indeed taken steps towards gauging the industry reaction regarding network neutrality through a consultation paper in 2006, however, no concrete results emerged from the same.[53] It is very surprising that while dealing with the recent Airtel incident, the government (TRAI) has openly accepted the lack of any provisions under which ISPs violating the net neutrality principle can be prosecuted.[54] As stated earlier, due to a great hue and cry over social media, the Airtel incident was not without repercussions. While Airtel Management retracted the policy[55], TRAI announced that it would put forth another consultation paper in this regard.[56]

It is therefore the submission of the author that a strong legislation on net neutrality is indeed required in India and therefore, along with the foundation laid

46 License Agreement for Unified License, issued by Department of Telecommunications, Ministry of Communications & IT, Government of India, *available at:* http://www.dot.gov.in/sites/default/files/Amended%20UL%20Agreement_0.pdf (last visited on March 15, 2015).

47 *Ibid.*, clause 3.

48 *Ibid.*, clause 2.2.

49 *Ibid.*, clause 10.7.

50 *Ibid.*, clause 25.1.

51 *Ibid.*

52 *Ibid.*, clause 16.1.

53 Telecom Regulatory Authority of India Consultation Paper on 'Review of Internet Services', No 19/2006, *available at:* http://www.trai.gov.in/WriteReaddata/ConsultationPaper/Document/consultation27dec06.pdf (last visited on March 15, 2015).

54 "Can't Fault Airtel on VoIP rates: TRAI Chief Rahul Khullar", *available at:* http://www.financialexpress.com/article/industry/companies/cant-fault-airtel-on-voip-rates-rahul-khullar/23513/ (last visited on March 15, 2015).

55 "Bharti Airtel drops move to charge more for VoIP calls" *available at:* http://in.reuters.com/article/2014/12/29/bharti-airtel-rates-idINKBN0K70A920141229 (last visited on March 15, 2015).

56 *Ibid.*

by the TRAI consultation paper of 2006, the forthcoming TRAI consultation paper too will play a major role in shaping internet consumption and advancement in India.

Features of Indian Legislation

A strong legislation is indeed required in India in order to achieve its goal of utilizing the Internet's capabilities to enhance its social, economic and political conditions.

Therefore, the author would like to put forth the following as salient features -

a. ISPs should be banned from restricting and filtering internet traffic.
b. Specific circumstances in which ISPs can restrict content need to be outlined and properly defined. Due care must be taken to avoid ambiguous and wide terms.
c. ISPs should specifically display the quality of their services, traffic management policies, and other important specifications on their websites as well as make it available to end-users as and when requested.
d. Proper implementation and enforcement of these rules should be carried out efficiently and effectively. Penal provisions should be strictly adhered to.

It is extremely important that in an era where we are moving to the Internet of Things[57] and where Internet is gaining an ever important role in our lives - especially in India, with the second largest number of Internet subscribers[58] and increasing)- we need to look at our laws and change with the changing technology. The current approach of fitting a round peg in a square hole will not only increase our misconceptions about technology but massively slow down the advancement of society brought on by technological progress. And, therefore, it is a fundamental necessity to implement strong, well defined and forward-looking legislation on network neutrality so that we can not only brave the tides of technology but also ride them towards a horizon of progress.

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[57]"Are you ready for the Internet of Things" *available at:* http://www.theinternetofthings.eu/ (last visited on March 15, 2015).

[58]"India's massive e-commerce opportunity and the explosion of mobile" *available at:* http://www.forbes.com/sites/afontevecchia/2014/07/07/indias-massive-e-commerce-opportunity-and-the-explosion-of-mobile (last visited on March 15, 2015).

Doctrine of *rebus sic stantibus*

-*B. A. Sujay Prasanna*[*]

The doctrine of *rebus sic stantibus* confers upon a party to an agreement the right, which is contractual in nature, to terminate such agreement when there exists a fundamental change in circumstances. This doctrine has been recognised as a ground for termination of an agreement by the International Court of Justice[1], various other tribunals[2] and municipal courts[3] around the world. The universal acceptance of this doctrine is further substantiated by the consent of all the member nations of the United Nations to the codification of the said doctrine in the Vienna Convention of Law of Treaties (VCLT) which governs the contractual relationship among the nations. Just as many systems of municipal law recognize that, quite apart from any actual impossibility of performance, contracts may become inapplicable through a fundamental change of circumstances, so also treaties may become inapplicable for the same reason.[4]

Reason for existence

The doctrine is based on the principle that parties to an agreement are not bound to adhere to an obligation which they have not consented to. Such consent is based on the nature of subject matter of the agreement and the consideration which the parties seek to achieve. The change in the circumstance which determined the nature of the subject matter existing at the time of formation of the agreement negates the consensus arrived by the parties. It would result in graver injustice to the parties if they are compelled to discharge their obligations under the treaty or agreement (by applying the doctrine of *pacta sunt servanda)* despite the existence of change in the circumstances which is fundamental in nature, and is not within their contemplation, nor was it consented to expressly or impliedly by the parties.

Art. 31 of VCLT, which speaks about the general rule of interpretation of treaties, states that the provision of the treaty must be read in accordance with the intention of the parties. Intention of the parties shall be derived from the circumstances existing at the time of signing the agreement.[5] Hence it can be

[*] V B.S.L LLB

[1] *Fisheries Jurisdiction Case*, [1974] I.C.J. 3; *Case Concerning Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, International Court of Justice, 25 September 1997.

[2] *A. Racke GmbH & Co. v. Hauptzollamt Mainz. Case* C-162/96, Court of Justice of the European Communities, June 16, 1998.

[3] See for example, the decision of the *Tribunal Constitucional* dated 17 March, 1994 (RTC 1994, 89); See also, *SAP* Vizcaya of 7 July 2001 (*JUR 2001, 38716*), *SAP* Tarragona of 10 January 1992 (*AC 1992, 360*).

[4] Report of the Commission to the General Assembly, Year Book of the International Law Commission, 1966, Vol. II, ¶ 1, 256- 60.

[5] Decision regarding the Delimitation of the border between Eritrea and Ethiopia (n 34), 34 at [3.4]. Also: Boundary Dispute between Argentina and Chile Concerning the Delimitation of the Frontier Line between Boundary Post 62 and Mount Fitzroy (n 94), 76 at [157].

inferred that the change in circumstance which was prevailing at the time of formation of treaty alters the obligations deemed to be undertaken by the parties.

As a consequence of fundamental change in circumstance, there is imbalance in promises, i.e., rights and obligations yet to be performed by the parties to an agreement. A treaty may remain in force for a long time and its stipulations come to place an undue burden on one of the parties as a result of a fundamental change of circumstances. Then, if the other party were obdurate in opposing any change, the fact that international law recognized no legal means of terminating or modifying the treaty otherwise than through a further agreement between the same parties might impose a serious strain on the relations between the states concerned; and the dissatisfied state might ultimately be driven to take action outside the law.[6] The doctrine of *rebus sic stantibus* is thus formulated as a safety-valve to terminate the treaty without disrupting the peaceful relationship between the parties. Moreover, the fundamental change in circumstances entices the doctrine of unequal treaties as described in the Aminoil case,[7] and in the Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties which acknowledges that economic pressure is a form of force.[8] Furthermore, unequal treaties imply unequal relationships, a concept which is directly opposed to the Charter of the United Nations.

Scope

The applicability of the doctrine of *rebus sic stantibus* to all agreements was a matter of controversy in the first session for the drafting of the Vienna Convention of Law Treaties. It was the submission of few of its members that the doctrine is applicable only to agreements of perpetual nature, but the session ended up in a finding that the doctrine is an implied clause in all agreements irrespective of the duration of the agreement.[9] Oppenheim has confined the application of this doctrine to executory agreements because executed agreements are beyond reach of such demand.[10] Art. 62, paragraph 2 (a) of the VCLT provides that this doctrine shall not be applicable to a treaty establishing a boundary, not because they were executed provisions but because it was intended by the parties to create a stable position.[11] This position is against the principle of

[6]Report of the Commission to the General Assembly, Year Book of the International Law Commission, 1966, Vol. II, ¶ 6, 256- 60.

[7]*The Government of the State of Kuwait* v. *The American Independent Oil Company* ('Kuwait v Aminoil'), award rendered by the Ad hoc Arbitral Tribunal dated 24 March 1982.

[8]Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of the Treaties, Final Act of the United Nations Conference on the Law of Treaties, Art. 52.

[9]*Ibid.* 5, ¶7, 258; Summary records of the plenary committee of the United Nations Conference on the Law of Treaties, First Session, Vienna, at 479- 80.

[10]Oppenheim, *International Law: A Treatise*, (Vol 1) (The Lawbook Exchange Ltd., 3rd Ed., 2005) 689.

[11]Yearbook of the International Law Commission 1966, Volume 1, Report of the 835th meeting *available at:* http://legal.un.org /ilc/ publications / yearbooks / Ybkvolumes%28e%29 / ILC_1966_ v1_p1_e.pdf, at 14, 86 (last visited on March 15, 2015).

self-determination, for the reason that cession of State on the ground of change in circumstance resulting from self-determination cannot be entertained based on this doctrine. Moreover, if the asserted change is caused by the conduct of the party invoking this doctrine, this doctrine is inapplicable.

Conditions for Application

The doctrine being an exception to the universal norm i.e., *pacta sunt servanda* must be resorted to only as an exception and not as a general rule, subject to the existence of the conditions enumerated in Art. 62 of the VCLT.[12] The burden of proof vests on the party invoking this doctrine. The provision (Art. 62 of VCLT) mandates the fulfilment of four conditions to invoke this doctrine as a ground for terminating the agreement. The conditions are: (i) the change must be fundamental in nature, (ii) the change must be unforeseen, (iii) the circumstance that has changed should have been one of the essential elements of consent, and (iv) the change should radically transform the extent of the obligations to be performed under the agreement.

The above mentioned conditions have been subject of many judicial pronouncements which have laid down the extent and scope of these conditions.

As regards the first condition, i.e. the change must be fundamental in nature, the International Court of Justice in *Fisheries Jurisdiction Case* has observed that the change which affects the vital interest of a party to the agreement must be fundamental in nature.[13]

The second condition lays down that that the change should be unforeseen, which means the parties to the agreement had zero prospect of anticipating such change; the risk involved in the normal course of the business or the possible outcomes of the business transaction cannot be construed as an unforeseen event. In *Gabcikovo Nagymoras* case,[14] the International Court of Justice devised a concrete method to test the element of unforeseeability. The Court founded that if the agreement accommodated the change in circumstances, it should be construed as a foreseeable event. Furthermore, it reasoned the same by stating that the agreement providing space for adoption of the change is a proof in itself that the said change is foreseeable.[15]

The third condition demands change in the circumstances which were prevalent at the time of signing the agreement and which have further acted as an element that moved the parties to consent to the agreement. President Sir Muhammad Zafrulla Khan of the International Court of Justice, in the *Fisheries Jurisdiction Case*, has denied the submission made by Ireland that the agreement must be

[12]Aust, *Modern Treaty Law and Practice*, (Cambridge University Press, 1st Ed., 2000) 240.

[13]*Fisheries Jurisdiction Case*, [1974] I.C.J. 3, 20; Oppenheim, *International Law: A Treatise*, (Vol 1) (The Lawbook Exchange Ltd., 3rd Ed., 2005) 689.

[14]*Case Concerning Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, International Court of Justice, decided on 25 September 1997.

[15]*Ibid.*, at 120.

terminated on the ground of change in circumstance which was a motivating factor relying upon which Ireland has consented to the agreement. His Excellency held that mere disappearance of the factor that moved the party to consent to the agreement is insufficient, the change must be of such extent that it must affect the *raison d'etre* (the reason for existence) of the agreement.[16]

The nations of the world have formulated an objective test to determine the party's compliance to the second and third condition. The test stipulates that, if the changed circumstance existed at the time of signing the agreement, would the parties consent to the same terms of the treaty? If no, the parties have fulfilled the said conditions.

Fourth and the final condition is that there must be transformation of obligation to be performed by the party to the agreement. In order to establish the transformation in obligation, it is essential to ascertain the obligations undertaken by the parties at the time of signing the agreement and the obligation yet to be performed after the asserted change in circumstance. If the court finds that the above mentioned conditions are satisfied it is fit to terminate the agreement on the ground of *rebus sic stantibus*.

Illustration: For instance, A and B entered into an agreement for lease of a building complex, for a period of 25 years at an annual rent of Rs. 50,000. Due to the shutdown of the military institution and commercial development in the area where the complex is located, during the early period of the lease, the rental value of the building has increased many fold. In this situation, A has no option but to adhere to the contractual obligation. The doctrine of *rebus sic stantibus* serves as a ground to terminate the agreement by A. There is no justifiable requirement to protect the interest of B because the benefit received by B is unexpected; but it is an obligation upon A to compensate for the losses which B would suffer because of termination of the agreement. The compensation should be estimated, on the premise of the loss suffered by B on the assumption that there is no fundamental change in circumstances.

Procedure

As in the statement of ICJ, this doctrine never operates so as to extinguish a treaty automatically or to allow an unchallengeable unilateral denunciation by one party; it operates to confer a right to call for termination.[17] The party that intends to invoke this doctrine and terminate the agreement must notify the other as to the measures proposed to be taken and the reason thereof. On account of the other party disagreement with the settlement proposed, settlement procedure in accordance with Art. 33 of the United Nations Charter must be carried out. If the dispute persists, it must be submitted to a competent third party to determine whether the conditions for the operation of this doctrine are present. About the progress of unilateral termination of the agreement on failure of the above

[16] *Fisheries Jurisdiction Case*, [1974] I.C.J. 3, ¶ 32, 34.
[17] *Fisheries Jurisdiction Case*, [1974] I.C.J. 3, ¶ 44, 22.

mentioned procedure, there has been a consistent controversy by the two different schools of thought. The positivists have always believed in termination of agreement by mutual consent, whereas the others have been reluctant to accept this approach, taking into consideration the consequence of the obligation arising from the agreement which threatens the peaceful relationship between the parties. The proposed measure must be taken without lapse of time; if not, such lapse would deem that the State has acquiesced the change in circumstance and hence cannot make a claim later.[18]

Instances

In the *Fisheries Jurisdiction Case (Germany* v. *Iceland)*[19], Iceland invoked the doctrine of *rebus sic stantibus* as ground for termination of the agreement but the Court considered that the doctrine is not applicable because the change did not transform the obligations yet to be performed by the party.

In the *Gabcikovo Nagymoras Case (Hungary* v. *Slovakia)*[20], the defence of fundamental change in circumstance was not accepted. The Court held that the change was foreseeable as the treaty accommodated the change.

In *A. Racke GmbH & Co.* v. *Hauptzollamt Mainz*,[21] the European Court of Justice admitted that the termination of the agreement is lawful on the ground of *rebus sic stantibus* and further laid down that there is no requirement for impossibility of performance of the obligation for invoking this doctrine; rather radical transformation of the obligation yet to be performed is sufficient.

Conclusion

On termination of the agreement, the parties are bound by the consequences as provided in Art. 70 of the VCLT which states that parties are released from the performance of further obligations but executed obligations prior to the termination are to remain untouched. Observing this doctrine does not result in the miscarriage of justice which jurists attempt to portray, rather, it acts as a check to prevent unexpected benefit that could possibly lead to disruption of peaceful relationship between States. The doctrine of *rebus sic stantibus* has evolved not to serve as a tool to terminate agreements but rather to act as a safety valve in a treaty thereby regulating the peaceful relationship between the parties. ■

[18] *Case of the Free Zones of Upper Savoy and the District of Gex*, Permanent Court of International Justice, decided on 7 June 1932.
[19] *Fisheries Jurisdiction Case*, [1974] I.C.J. 3.
[20] *Case Concerning Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, International Court of Justice, decided on 25 September 1997.
[21] Case C-162/96, Court of Justice of the European Communities, decided on June 16, 1998.

Sources of International Law (Treaties and Custom)

-Jahnavi Pandey[*]

The sources of International Law are generally recognised as ones which have been codified under Art. 38 of the Statute of the International Court of Justice.[1] Broadly speaking, the sources are divided into two kinds: primary and secondary sources. While the hierarchical value of the sources may be subject to academic debate due to the development of the judicial decisions of various international courts and tribunals,[2] primary sources are generally understood to mean treaties and custom (and according to some, general principles of law)[3]. The present note will cover treaties and custom as sources of International Law.

The Law of Treaties

The irony of modern treaty law, is that its codification came about through the crystallization by the International Law Commission (the chief interpreting and codifying body of the United Nations), of the rules of customary international law on treaty-making.[4] The draft articles proposed by the Commission were adopted at the Vienna Conference of 1969 and the Vienna Convention on the Law of Treaties (hereinafter VCLT) entered into force on 27 January 1980.

What is a treaty? : The VCLT defines 'treaty' as an 'international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.[5] The decisive element in determining whether or not an international instrument is a treaty, is the intention of the parties to 'create international legal rights and obligations.[6] Instruments other than treaties, devoid of a binding legal character may be concluded by a State by way of a memorandum of understanding, unilateral statements, the so-called 'gentleman's agreement[7] or a declaration.[8]

*V B.S.L, LL.B.

[1]Statute of the International Court of Justice, art. 36.

[2]For instance, see, Mohammed Shahabuddeen, *Precedent in the World Court,* (CUP, 1997) at 15.

[3]G. Schwarzenherger, *A Manual of International Law* (Stevens & Sons, London, 1967).

[4]McNair, *Law of Treaties,* (OUP, 1986).

[5]Vienna Convention on the Law of Treaties (adopted May 23, 1969), 1155 UNTS 331, art. 2.

[6]Oppenheim, *International Law* vol. 1.pts.2-4 (Robert Jennings & Arthur Watts eds., 9th ed., OUP, 1996) at 1202.

[7]*Id.* at 1203.

[8]See for example, Stockholm Declaration on the Human Environment, UN Doc. A/CONF.48/14/ Rev, (adopted June 16, 1972); Rio Declaration of the UN Conference on Environment and Development UN Doc. A/CONF.151/26/Rev.1 (vol. 1), (adopted June 14, 1992).These instruments may also be termed as 'soft-law' instruments and taken together have now come to be recognized as a part of the corpus of customary international law.

Consent: Consent of the parties is the pre-requisite of treaty formation and may be expressed by various means, some of which include: signature, exchange of instruments, ratification, acceptance, approval or accession.

Effect of treaties

Only the parties to a treaty may be bound by the said treaty.[9] Additionally, a party cannot invoke the existence of its internal laws as an excuse for the non-performance of its obligations under the said treaty.[10]

Rule against retroactivity: A treaty does not bind a party retroactively i.e. in relation to an act before the entry into force of the treaty or prior to that state's acceptance of the treaty.[11]

Effect on third parties: A treaty may be made enforceable as regards third parties under certain exceptional circumstances, some of which are set out below:

a. Where the treaty contains a 'most-favoured nation' clause.
b. Where a rule set out in a treaty becomes a recognised rule of customary international law.[12]
c. Where the treaty establishes a regime or status valid *erga omnes.*[13]

Interpretation of treaties

There are three modes of interpretation of treaties, covered extensively under arts. 31 to 33 of the VCLT. Art. 31 lays down the fundamental rules of interpretation and has been seen as reflecting customary international law.[14] The general rule of interpretation takes a textual colour, by providing that a treaty is to be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[15] It is generally understood that the 'context' of a treaty also includes its preamble,[16] annexes and any other instrument made by one or more parties. In addition to these it is also important to take into account the subsequent practice of the states with regard to their obligations under the said treaty.[17]

[9]*Certain German Interests in Polish Upper Silesia* (1926), PCIJ, Series A No. 7, pp 27-9; *Free Zones of Upper Savoy and the District of Gex* (1932) PCIJ, Series A/B, No. 46, p 141.

[10]Vienna Convention on the Law of Treaties, art. 27.

[11]*Id.*, art. 28. See also: *Mavrommatis Palestine Concessions* case, PCIJ, Series A, No. 2, 1924.

[12]R. R. Baxter, "Multilateral Treaties as Evidence of Customary International Law" (1965), 41 British Ybk Intl L, 275.

[13]Also known as *erga omnes partes.* For an extensive discussion, see: Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, Report of the ILC on the Work of its Fifty-Third Session, UN Doc. A/56/10.(2001), art. 48.

[14]*Case Concerning Sovereignty over Pulau Ligitan and Pulau Siapadan,* (Indonesia v. Malaysia), [2002], ICJ Rep. 625 para. 37.

[15]Vienna Convention on the Law of Treaties, art. 31(1).

[16]Gerald Fitzmaurice, "Treaty Interpretation and Other Treaty Points" (1957) 33 British Ybk Intl L, 203.

[17]*Right of Passage over Indian Territory (Portugal v. India),*]1960], ICJ Rep. 6, 40.

Supplementary means of interpretation: Supplementary means of interpretation are provided for under Art. 32. These may be resorted to "where the interpretation according to the provisions of Art. 31 needs confirmation or determination since the meaning is ambiguous or obscure or leads to a manifestly absurd or unreasonable result.[18] It is important to remember that supplementary means of interpretation are not an alternative but 'an aid to interpretation in accordance with the general rules.'[19] These methods include the preparatory works of a treaty (also referred to as *travaux preparatoires)* or the circumstances of a treaty's conclusion.

Doctrine of *in dubio mitius* in interpretation of treaties: This doctrine has evolved primarily through the jurisprudence of the PCIJ. The Court has held that, "If the wording of a treaty provision is not clear, in choosing between several admissible interpretations, the one which involves minimum obligations for the parties should be adopted."[20]

Customary International Law

"Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.[21] From this, we may cull out two essential elements required to prove the existence of a customary norm: i) state practice and ii) a sense of legal obligation, otherwise known as *opinion juris.* The other aspect of the definition is 'general and consistent' practice. It is important to note that neither generality nor consistency in terms of duration necessarily take the one-size fits-all approach. This will be evident from the discussion on state practice and *opinio juris* below:

State Practice

Consistency and generality of practice: The ordinary route taken by the World Court in deducing custom is that of continuity and repetition in practice. For example, in the Asylum Case[22] the Court took the view that custom must be 'in accordance with a constant and uniform usage practised by the States in question.' However, the Court has also cautioned as to the degree to which this principle must be applied, in the Nicaragua Case wherein it held that it was not necessary that the practice in question had to be in 'absolutely rigorous conformity' with the rule and that so long as the state conduct was 'generally consistent,[23] the said practice can be regarded as amounting to a customary rule.

[18] Malcolm Shaw, *International Law,* (CUP, 2005), at 838.

[19] ILC Commentary (Treaties), YBILC (1966), art. 28, para. 19.

[20] *Frontier Between Turkey and Iraq,* (1925) PCIJ (Advisory Opinion), Series B, No. 12, p. 25.

[21] American Law Institute's Restatement of the Law, Third, The Foreign Relations Law of the United States, §102(2) (American Law Institute Publishers, 1987); Statute of the International Court of Justice, art. 38(1)(b).

[22] *Asylum Case (Colombia v. Peru),* [1950] ICJ Rep. 266.

[23] *Military and Paramilitary Activities in and against Nicaragua* (Nic. v. U.S.), [1986] ICJ Rep 14, 432.

However, certain rules do not require a long-standing, consistent practice. For instance, the law relating to airspace sovereignty which developed in the period immediately preceding and through the duration of World War I.[24] Yet another case of 'instant custom' is that of the law relating to the Outer Space.[25]

Evidence of State Practice: Evidence of state practice may be found in diplomatic correspondence, policy statements, press releases, the opinions of official legal advisors, official manuals on legal questions, e.g. manuals of military law, executive decisions and practice, etc., comments by governments on the drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other national instruments, a pattern of treaties in the same form, the practice of international organizations, and resolutions relating to legal questions in the UNGA.[26]

Opinio Juris: The principle of *opinion juris* has most succinctly been conveyed in the decision of the ICJ in the North Sea Continental Shelf Cases wherein the Court noted that:

> *"..for a new customary rule to be formed, not only must the acts concerned 'amount to a settled practice', but they must be accompanied by the opinion juris sive necessitatis. Either the States taking such action or other states in a position to react to it, must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the opinion juris sive necessitatis." Reliance by a state on a novel right or an unprecedented exception to the principle might, if shared by other states tend towards modification of customary international law."*[27]

Conclusion

The above text is only an overview of how treaties and custom operate or are expected to operate. In practice, the two sources along with the secondary sources are often inextricably intertwined. Questions as to precisely when a treaty might be said to assume the character of a custom, or how precisely must one infer *opinion juris* from a given practice, still remain unanswered and are still subject to diverse doctrinal and academic debate.

[24] Malcolm Shaw, *International Law* (CUP, 2005), at 77.

[25] For more discussion on this, see: Bin Cheng, *Studies in Outer Space Law* (OUP, 1997).

[26] James Crawford, *Brownlie's Principles of International Law* (OUP, 2013) at 20.

[27] *Military and Paramilitary Activities in and against Nicaragua* (Nic. v. U.S.), [1986] ICJ Rep. 14, 349.

Synchronised Trading - In Sync with Law?

Kanwardeep Singh Kapany, Mitravinda Chandar#*

The on-line trading system that we have on the stock exchange is a blind trading system which maintains complete anonymity of the persons trading on it. It does not permit the buyers and sellers to have any interaction except through the trading system. Stock brokers execute the trades, buy or sell, for their clients. A buy order placed on the system matches with a sell order and a trade comes to be executed and this matching is done by the system on a price time priority basis.[1] Despite the anonymity of the system, it has been alleged before the Securities & Exchange Board of India, Securities Appellate Tribunal and other competent original and appellate jurisdictions (collectively called 'competent forums') that market players and intermediaries, either individuals or corporate entities, have thwarted the checks and balances innate in the system by executing manipulative trades ('alleged contravener') which in turn aids market rigging. This paper deals with one such *modus operandi* called as a 'synchronised trade' which can transpire only in the secondary market and not at all in the primary market. Synchronised trading, in certain situations, is found to violate and therefore is punishable under the Securities & Exchange Board of India Act, 1992[2] ('SEBI Act'), Securities & Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices) Regulations, 2005[3] ('PFUTP Regulations'), as well as Securities and Exchange Board of India (Stock Brokers and Sub - Brokers) Regulations, 1992[4] ('Broker Regulations') (collectively called the 'Act and Regulations'). This treatment being meted out to synchronised trading is in line with the single pointed objective[5] of the SEBI Act, which is to protect the interests of investors in securities and to promote the development of securities market by regulating it. The said objective is imbibed by both PFUTP Regulations as well as Broker Regulations as the former prohibits manipulative, fraudulent and unfair trade practices[6] and the latter mandates brokers to maintain

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[1] "Trading System", National Stock Exchange, *available at:* http://www.nseindia.com/products/content/debt/wdm/trading_system.htm (last visited on March 15, 2015); "Trading and Settlement in BSE", Bombay Stock Exchange, *available at:* http://www.bseindia.com/markets/debt/tradingandsettlement.aspx?expandable=2 (last visited on March 15, 2015.

[2] Securities and Exchange Board of India Act, 1992, s. 15-HA.

[3] Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003, regulations 3 & 4.

[4] Securities and Exchange Board of India (Stock-Brokers and Sub-Brokers) Regulations, 1992, sch II, clause A.

[5] Securities and Exchange Board of India Act, 1992, Preamble.

[6] Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003, regulations 3 & 4.

high standards of integrity, promptitude, fairness and to exercise due skill, care and diligence in the conduct of its business.[7]

Meaning of a Synchronised Trade

A synchronised trade is a trade wherein buy and sell orders are placed simultaneously for the same amount and at the same price[8] ('legal synchronisation'). Synchronised trades *per se* are not illegal and they have been sanctioned by the Securities and Exchange Board of India with respect to Negotiated Deals.[9] All Negotiated Deals are permitted only if they are executed on the screens of the exchanges in the price and order matching mechanism of the exchanges just like any other normal trade. The said fetter is provided so that Negotiated Deals do not avoid transparency requirements and rather contribute to price discovery and therefore fulfill the basic concept of stock exchanges of bringing together a large number of buyers and sellers in an open manner.

However, synchronised trades can be executed with a view to manipulate the price or the volumes of the traded scrip or both or with some ulterior purpose ('illegal synchronisation'), therefore violating provisions of the aforementioned Act and Regulations. Whether an illegal synchronisation has been undertaken will have to be gathered from the intention of the parties[10] for which there would seldom be any direct or foolproof evidence. The reason for the same being that the intention of the parties concerned would be within their special knowledge.

Factors demonstrating Illegal Synchronisation

The intention of the parties to indulge in illegal synchronisation manifests in the form of certain overt acts. One has to appreciate that these factors, as enlisted below, in the very nature of things cannot be exhaustive, as any one factor may or may not be decisive and it is from the cumulative effect of these that an inference will have to be drawn.

Connections inter se clients / inter se brokers / inter se clients and brokers: The fact that certain clients are connected to each other ('connected clients') can be established by pointing out the presence of certain circumstances. Such circumstances include existence of a personal relationship, either by blood or otherwise, between or amongst clients; one person arranging flow of funds[11] in favour of another person without there being any legal obligation to do the same;

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[7] Securities and Exchange Board of India (Stock-Brokers and Sub-Brokers) Regulations, 1992, sch II, clause A.

[8] *Ameera Associates Limited* v. *SEBI*, [2010] 100 SCL 507 (SAT) before the Securities Appellate Tribunal, Mumbai, decided on 12 February, 2010.

[9] SEBI Circular on Negotiated Deals, *No. SMDRP/POLICY/CIR-32/99* dated 14 September, 1999.

[10] *Grishma Securities Private Limited* v. *SEBI*, Appeal No 151/2013 before the Securities Appellate Tribunal, Mumbai, decided on 28 October, 2013.

[11] *SEBI* v. *Dresdner Kleinwort Benson Securities (India) Ltd.*, before the Securities and Exchange Board of India, decided on 29 April, 2004.

various companies operating from a common address;[12] relationship shared between or amongst companies, such as the kind shared between or amongst associate companies;[13] when various corporate or non corporate bodies have the same individual holding, such a position which empowers the position holder to have an authoritative say on matters which can aid in the execution of illegal synchronisation.[14] One such position is that of a director which is held by an individual.[15] An individual can be a director on the board of various companies ('common director').[16] However, merely one being a Common Director is not sufficient to draw the conclusion that certain companies are Connected Clients.[17] Therefore, aid of other attendant circumstances is necessarily required. These attendant circumstances include inability of such companies to present their case in the absence of such Common Director when called upon to do so by a Competent Forum or testimony of witnesses, which goes to show that the Common Director was the one who would give instructions to brokers, on behalf of companies, for execution of trades which are subsequently alleged to have contravened the Act and Regulations.

The connection between or amongst brokers ('connected brokers') can be established by applying the same principles with which Connected Clients are identified. Additionally, Connected Brokers can be identified, when brokers constituting Connected Brokers, either individually or in concert, are the only common thread running through various trades which have taken place between or amongst clients constituting Connected Clients,[18] such as being the major counter party broker with respect to orders placed by a broker or brokers belonging to the same group of Connected Brokers.[19]

The connection between Connected Brokers and Connected Clients can be established by demonstrating that trades on behalf of Connected Clients were executed by Connected Brokers and both the party and counter party with respect to the trades in question happen to be those clients and brokers who are constituents of the Connected Clients and Connected Brokers. Further, there could also be a connection or relation between brokers and clients belonging to the opposite sides of a trade. The principles with respect to identifying Connected Clients or Connected Brokers, as provided for above, can be applied *pari passu*.

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[12]*Ketan Parekh* v. *SEBI*, Appeal No 2/2004 before the Securities Appellate Tribunal, Mumbai, decided on 14 July, 2006.
[13]*SEBI* v. *Accord Capital Markets Limited*, before the Securities and Exchange Board of India, decided on 28 August, 2007.
[14]*SEBI* v. *Krishvi Securities Private Limited*, before the Securities and Exchange Board of India, decided on 5 July, 2013.
[15]The Companies Act 2013, s. 149 (1).
[16]*Ibid.*, s. 165.
[17]*Ketan Parekh* v. *SEBI*, Appeal No 2/2004 before the Securities Appellate Tribunal, Mumbai, decided on 14 July, 2006.
[18]*SEBI* v. *Krishvi Securities Private Limited*, before the Securities and Exchange Board of India, decided on 5 July, 2013.
[19]*Ibid.*

There are two propositions of law common to all the connections mentioned above. Firstly, for the purpose of concluding presence or absence of the aforementioned connections, Competent Forums lift the corporate veil,[20] if circumstances so merit.[21] Secondly, once any or all of the aforementioned connections are established, then on noticing matching of such trades day after day and trade after trade, one can safely infer that the matching is happening not by the trading system, but by manipulation.[22]

Price, Quantity and Time Test: Price, Quantity and Time test ('PQT Test') is used to identify wash trades,[23] which leads to Illegal Synchronisation. These are trades between connected or related parties wherein sale and purchase of securities are matched with each other in terms of price, quantity and time. The said test becomes reliable if the time difference between buy and sell orders is either negligible or of a few seconds only.[24] Especially when the shares of the company are highly liquid at the time of trades, then PQT matching will exceptionally take place in the absence of any specific understanding or arrangement between the parties. Similarly, in a situation of high volatility, wherein prices of the shares can change dramatically over a short period in either direction, it is extremely improbable that the client could be in a position to give a price range which would match only with a particular counter party broker at a particular quantity.[25] Higher the rate of recurrence of such matching of trades amongst the same set of Connected Clients through Connected Brokers on either side of the trade, lesser the chances of it being a mere coincidence, and greater the inevitability of a pre-planned device.[26]

No Change in Beneficial Ownership: A beneficial owner is a natural person or persons who ultimately owns, controls or influences a client and/or persons on whose behalf a transaction is being conducted. It also incorporates those persons who exercise ultimate effective control over a legal person or arrangement.[27]

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[20]*Ketan Parekh* v. *SEBI*, Appeal No 2/2004 before the Securities Appellate Tribunal, Mumbai, decided on 14 July, 2006.
[21]*Delhi Development Authority* v. *Skipper Construction Company Private Limited*, AIR 1996 SC 2005.
[22]*SEBI* v. *A Nitin Capital Services Limited*, before the Securities and Exchange Board of India, decided on 24 May, 2007.
[23]*Nirmal Bang Securities Private Limited* v. *SEBI*, Appeal No 54/2002 before the Securities Appellate Tribunal, Mumbai, decided on 31 October 2003.
[24]*SEBI* v. *Biyani Securities Private Limited and Shri Harish Biyani*, before the Securities and Exchange Board of India, decided on 27 January, 2005.
[25]*SEBI* v. *Accord Capital Markets Limited*, before the Securities and Exchange Board of India, decided on 28 August, 2007.
[26]*Angel Broking Private Limited* v. *SEBI*, Appeal No 25/2013 before the Securities Appellate Tribunal, Mumbai, decided on 22 October, 2013.
[27]SEBI Master Circular on Anti Money Laundering Standards/Combating the Financing of Terrorism/Obligations of Securities Market Intermediaries under the Prevention of Money Laundering Act, 2002 and Rules framed there under, *No. CIR/ISD/AML/3/2010, available at*: http://www.sebi.gov.in/circulars/2010/cirisdaml2010.pdf (last visited on March 15, 2015).

When on the execution of a trade there is no change in the beneficial ownership it is called a self trade. A self trade occurs when one person buys and sells shares from himself. Such trades are frowned upon as they are fictitious, and meant to operate as devices to inflate, depress, or cause fluctuations in the market price of securities.[28]

Large Trading Concentration in a Scrip: The expression 'concentration' in the realm of the Act and Regulations means one's share in the execution of trades with respect to a particular scrip or various scrips. For Illegal Synchronisation to be successfully carried out, the Alleged Contravener has to be in a position which enables one to drive up, deflate or cause sudden rise and fall in the market price of the scrips listed on the stock exchange.[29] The said position of influence cannot be reached by market players and or intermediaries by executing miniscule trades when compared to the total trades executed with respect to the said scrip.

Substantial Unwinding of Long Positions, Short Sale Positions: Taking a long position in a scrip means the buying of a security to hold onto the same as the owner of scrip has the expectation that the said asset will rise in value.[30] Short Selling means selling of a stock that the seller does not own at the time of trade by complying with the conditions laid down by SEBI in this regard.[32] Unwinding refers to undoing or going back on a previous action or conduct. Unwinding of long positions refers to the owner of scrips deciding not to hold onto the scrip, or to hold for a time period which is lesser than the one initially thought. The said action of unwinding long positions and/or short selling is not *per se* illegal until and unless it can be demonstrated that the aforesaid transactions were carried out with the intention to carry out Illegal Synchronisation[33] such as artificially putting sale pressure on the scrip to cause a fall in the price of the scrip.

Lack of Business Prudence: The expression 'business' refers to a commercial enterprise carried on for profit.[34] The expression 'prudence' refers to 'being circumspect or judicious in one's dealings.[35] Therefore 'business' and 'prudence' read together mean such behavior which exhibits caution while conducting business. Therefore, intention to undertake Illegal Synchronisation can be ascribed to Alleged Contraveners when they are found indulging in acts such as

[28] *SEBI* v. *Pravin V Shah Stock Broking Private Limited*, before the Securities and Exchange Board of India, decided on 6 September, 2007.

[29] *In Re: GHCL Ltd.*, before the Securities and Exchange Board of India, decided on 25 April 2007.

[30] *SEBI* v. *First Global Stock Broking Private Limited and Vrudhi Confinvest (I) Private Limited*, before the Securities and Exchange Board of India, decided on 14 February, 2009.

[31] "FAQ's on Secondary Market" *37*, available at: http://www.sebi.gov.in/faq/smdfaq.html (last visited on March 15, 2015).

[32] Securities Lending Scheme, 1997.

[33] *SEBI* v. *First Global Stock Broking Private Limited and Vrudhi Confinvest (I) Private Limited*, before the Securities and Exchange Board of India, decided on 14 February, 2009.

[34] Bryan A Garner (ed.), Black's Law Dictionary (8th edition) at pp. 211.

[35] *Ibid.* at pp. 1236.

heavily buying a scrip which has weak fundamentals[36] or is otherwise an illiquid scrip,[37] or placing of buy orders at incremental prices i.e. at prices higher than previous day's closing prices[38]. In order to establish lack of business prudence with respect to trades being undertaken, comparison can be drawn with the price movement of certain scrips of certain companies. The said companies being used as comparables should be similarly placed *inter alia* in terms of size.[39]

Violation of Code of Conduct for Stock Brokers: A stock broker is expected to carry out execution of trades as per the instructions of the client. While implementing the said instructions, the broker has to conduct his business in compliance with the Broker Regulations. The said regulations require the broker to maintain integrity, exercise due skill and care, not indulge in manipulative, fraudulent or deceptive transactions, not undertake malpractices such as creating false market or contravening statutory requirements as specified in Broker Regulations[40]. The said checks on the conduct of a broker are put in place to prevent a situation from arising wherein a market intermediary itself gets embroiled in contravening the Act and Regulations by becoming a party to the mischief of Illegal Synchronisation.

Defences

What amounts to commission of Illegal Synchronisation had been a moot point for quite a while. However, with the passage of time and development of jurisprudence on the said subject, not only have factors that point towards the said contravention crystallised, but also the defenses. If successfully pleaded, these defenses will either act as a mitigating factor, as they will be considered for imposition of reduced penalty, or in certain situations, if the facts warrant, vitiate the proceedings in relation to Illegal Synchronisation *in toto*.[41]

Inordinate Delay in Filing of Show Cause Notices: Expeditious disposal of proceedings wherein allegations of market manipulation are involved should be the foremost concern as this alone ensures that SEBI is carrying out its duty effectively to protect the interest of investors in securities and to promote the development of and regulating the securities market as mandated by the SEBI

[36] *In Re: Sawaca Business Machines Limited*; *SEBI* v. *Rajesh N. Jhaveri*, before the Securities and Exchange Board of India, decided on 09 October 2004.

[37] *In Re: Orient Trade Link Limited*; *In Re: M/s MLD Securities Private Limited*, before the Securities and Exchange Board of India, decided on 13 April 2012.

[38] *HIP Securities Private Limited* v. *SEBI*, Appeal No 11/2013, before the Securities Appellate Tribunal, Mumbai, decided on 14 October, 2014.

[39] *Ketan Parekh* v. *SEBI*, Appeal No 2/2004 before the Securities Appellate Tribunal, Mumbai, decided on 14 July, 2006.

[40] Securities and Exchange Board of India (Stock-Brokers and Sub-Brokers) Regulations, 1992, sch II, clause A.

[41] *In Re: Genus Commu-Trade Limited*; *In Re: The shares of Birmingham Thermotech Limited*, before the Securities and Exchange Board of India, decided on 31 August, 2009.

Act.[42] Inordinate delay in conducting inquiries and in punishing the delinquent not only permits market manipulators to operate in the market, it also has a demoralizing effect on the market players who are ultimately found not guilty, but the 'Damocles sword' of inquiry keeps hanging over them for years together from the date of starting of investigation by SEBI to the date of completion of inquiry proceedings.[43] Time and again Competent Forums have expressed that SEBI must undertake necessary steps to ensure that inquiry proceedings against market manipulators are completed expeditiously and guilty persons are punished in a time bound manner[44] so as to prevent violation of principles of natural justice[45] which occur when such proceedings are delayed without any fault on the part of the Alleged Contravener.

No Access to Documentary Evidence or Witnesses: The materials upon which SEBI may rely in order to prove contravention of the Act and Regulations are *inter alia* details, records and statements such as order logs and trade logs. An Alleged Contravener necessarily would require access to the said materials for presenting an effective defense. Therefore, an opportunity to peruse and inspect the said materials has to be mandatorily provided to the Alleged Contravener.[46] However, if by not providing certain material, which formed the basis of an order, the Alleged Contravener is not at all prejudiced, then such an omission will not be fatal to the continuation of proceedings. Also, on certain occasions, if testimony of certain individuals has been relied upon[47] to come to a certain finding, in such cases, an opportunity to cross examine such individuals has to be mandatorily provided to the Alleged Contravener.[48]

Discrimination: Differential treatment presupposes discriminatory conduct. When contraveners are meted out different punishments, some with softer and others with harsher, this is not at all sufficient to establish existence of discriminatory conduct on the part of the Competent Forum. For pleading discrimination what has to be clearly brought out is the factum that the Competent Forum has gone ahead and provided different punishments where the role played by all the Alleged Contraveners is homogeneous. Also, presence of discernible reasons for reaching a conclusion is considered to be fair and non arbitrary[49] as reason is the heartbeat of fair play. Therefore, absence of reasons in an order passed by a Competent Forum wherein similarly placed Alleged Contraveners are treated differently will squarely fall within the ambit of discriminatory conduct.

Merely Carrying out Directions of Client: This is a broker specific defense. The broker is expected to carry out the directions of the client such as executing trades for the client.[50] The trading system in place is designed to maintain complete anonymity. Until it cannot be shown that the broker was aware that the client intends to undertake Illegal Synchronisation, or that the client and the broker had colluded to do the same, or that the broker had individually undertaken to do the same, merely Synchronisation will not at all be sufficient to hold the broker in contravention of the SEBI Act, PFUTP Regulations or Broker Regulations.

Conclusion

Illegal Synchronisation is not just an *actus reus* based contravention, it necessarily also requires the presence of *mens rea*. Across the board, Illegal Synchronisation is considered to be a serious offence. The impact of such an adverse finding is wide, more so in the case of a large public company having large number of investors. Therefore, evidence merely probabalising and endeavouring to prove the fact on the basis of preponderance of probability is not sufficient to establish such a serious offence. Also, mere conjunctures and surmises are not adequate to hold a person guilty of such a serious offence. What will be required is the presence of reasonably strong evidence.[51] Another pertinent aspect, which is a continuation of the burden of proof aspect, is whether merely establishing Illegal Synchronisation is enough or does it have to be shown that investors actually got influenced by such contravention of the Act and Regulations. When an Alleged Contravener takes part in or enters into transactions relating to securities with the intention to artificially raise or depress the price, innocent investors in the market are thereby automatically induced to buy or sell their stocks. The buyer or the seller is invariably influenced by the price of the stocks and if that is being manipulated, the Alleged Contravener doing so necessarily influences the decision of the buyer or seller thereby inducing them to buy or sell depending upon how the market has been manipulated. Inducement to any person to buy or sell securities is the necessary consequence of manipulation and flows therefrom.[52] SEBI is just burdened with establishing Illegal Synchronisation. Once that is established, it will necessarily

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42 *Shri Ashok K. Chaudhary* v. *SEBI*, before the Securities and Exchange Board of India, decided on 5 November 2008.

43 *Subhkam Securities Private Limited* v. *SEBI*, Appeal No 73/2012, before the Securities Appellate Tribunal, Mumbai, decided on 25 July, 2012.

44 *Prashant J. Patel* v. *SEBI*, Appeal No 108/2012, before the Securities and Exchange Board of India, decided on 12 November, 2012.

45 *Libord Finance Limited* v. *SEBI*, before the Securities Appellate Tribunal, Mumbai, decided on 31 March, 2008.

46 *Purshottam Budhwani* v. *SEBI*, Appeal No 91/2013 before the Securities Appellate Tribunal, Mumbai, decided on 15 January, 2015.

47 *Ketan Parekh* v. *SEBI*, Appeal No 2/2004 before the Securities Appellate Tribunal, Mumbai, decided on 14 July, 2006.

48 *Triveni Managaement Consultancy Services Limited* v. *SEBI*, Appeal No 33/2012, before the Securities Appellate Tribunal, Mumbai, decided on 13 November, 2013.

49 The Constitution of India, art 14.

50 *Amera Associates Limited* v. *SEBI*, [2010] 100 SCL 507 (SAT) before the Securities Appellate Tribunal, Mumbai, decided on 12 February, 2010.

51 *Sterlite Industries (India) Limited* v. *SEBI*, Appeal No 20/2001 before the Securities Appellate Tribunal, Mumbai, decided on 22 October, 2001.

52 *SEBI* v. *A Nitin Capital Services Limited*, before the Securities and Exchange Board of India, decided on 24 May, 2007.

follow that the investors in the market had been induced to buy or sell and that no further proof in this regard is required. The market is so widespread that it may not be humanly possible for SEBI to track persons who were actually induced to buy or sell securities as a result of manipulation and law can never impose a burden which is impossible to be discharged.[53] While SEBI is drawn to the task of establishing that the Alleged Contravener has indulged in illegal Synchronisation, by presenting evidence that meets the aforementioned standard, it need not wait for the final outcome of the said *lis*. SEBI is very well empowered, for the purpose of protecting the interest of investors[54] in securities market, to issue directions[55] as is appropriate in the interests of investors in securities and the securities market, and SEBI has made judicious use of the said power on previous occasions.[56]

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[53] *Iridium v.Motorola Case,* AIR 2011 SC 20.

[54] Securities and Exchange Board of India Act, 1992, s. 11.

[55] Securities and Exchange Board of India Act, 1992, s. 11B.

[56] *In the matter of Blessing Agro Farm India Limited and its Directors* before the Securities and Exchange Board of India, decided on 15 December 2014; *Order in the matter of M/S* [illegible] *Capital Services Private Limited,* passed on 19 December, 2013, by the Securities and Exchange Board of India.

Judicial Application of the Parol Evidence Rule

*-Namit Oberoy**

The Indian Evidence Act, 1872 does not categorically discriminate between oral and documentary forms of evidence in terms of weight and credence. As long as the evidence administered by a party is primary in nature, and demonstrates the 'best evidence' of the fact it seeks to prove, the courts have no manifest reason to outweigh documents or testaments over oral testimonies.[1] The 'Parol Evidence Rule', embodied in Chapter VI of the Act, forms an important exception to this equal treatment of the two forms of evidence. S. 91[2] of the Indian Evidence Act echoes the principle that where a written document exists as a proof of certain transactions, oral proof cannot be substituted in the place of written documents.[3] This article analyzes the need for such favouritism, and attempts to highlight a few inevitable difficulties Courts have often faced in the implementation of the rule.

The courts apply their minds in admitting the best available evidence of a fact, as a matter of both policy and law. S. 91 and 92[4] collectively seek to lay out a broad policy for the courts to exclude evidence of 'prior' or 'contemporaneous' agreements, when an *integrated* written contract between the parties is shown to exist. For instance, where an agreement provides "interest rate chargeable on loans" to be, say, 8%, any verbal evidence that attempts to show that the interest was discounted would be squarely excluded by S. 92. Similarly, where the scope of a insurance policy was limited to goods X and Y, S. 92 would exclude all verbal evidence which attempts to prove that goods P and Q were also covered by the policy.

The law accords this privilege to documents because of the presumption that a written document is the best evidence, an exclusive memorial, of the contemplation of the parties, as to the terms and warranties of their contract. The principle is thus founded on what is known as the 'Best Evidence Rule'.

*IV B.S.L, LL.B.

[1] *[illegible]setty* v. *Hingamma*, AIR 1992 Kant 160.

[2] ***91. Evidence of terms of contracts, grant and other dispositions of property reduced to form of documents*** *- When the terms of a contract, or of a grant, or of any other disposition of property have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions herein before contained.*

[3] *Bishwanath Prasad Singh* v. *Rajendra Prasad,* AIR 2006 SC 2965.

[4] ***92. Exclusion of evidence of oral agreement*** *- When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms…*

S. 91 and 92 envisage cases where a bar may be imposed, since the documentary proof tendered is presumably the best evidence of the understanding between parties to a contract (or grant or other disposition of property), and empowers courts to exclude 'parol' evidence against the same set of facts. The succeeding sections[5] of the Chapter are guiding aid to the courts in excluding or admitting parol evidence in dissimilar circumstances. Such circumstances largely comprise of situations where the documentary evidence is shown not to be a truly integrated contract, and it is argued that the contract has more to it than recorded, hence necessitating a careful consideration of the parol evidence by the courts.

Objectives of the Exclusion of Parol Evidence

Protection to sanctimonious contracts: The parol evidence rule is based on both principle and policy considerations. A contract is primarily recorded in a written form so that it alone can be given in proof of such transaction. Documents then being a display of contemplation on part of the parties, and a deliberate agreement to reduce terms, warranties, promises and representations in written form, deserve special protection of law to honour the intention and interests of the parties. Impeaching the written document with collateral evidence of the terms of the writing would be attended with great danger, as the document would be exposed to risks of various contemptuous challenges, ceasing to exist as the lasting proof of its contents.

The following words of Peacock, C.J. aptly and amply describe the need of such protection:-

> *"If a man writes that he sells absolutely, intending by the writing that he intends to sell absolutely, he cannot by mere verbal evidence show that [at the time of the agreement both the parties intended that their contract] ...should not be such as their written words express, but that which they expressed by their words to be an absolute rule... If mere verbal evidence is admissible to contradict a written contract, it would apply to every other case, and a man who wrote one thousand intending to write one thousand, might prove that by a verbal agreement the words one thousand were not intended to mean one thousand but only one hundred. Nothing would be more dangerous than the admission of such evidence."*[6]

Stability in commercial dealings: According to Wigmore, the *only* proper function of the rule is to give legal effect to an intention to make the writing the final and complete repository of the understanding.[7] Yet, the functions of commercial law include efficient commodity distribution, ensuring fairness in

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[5]Indian Evidence Act, 1872, ss. 93-99.
[6]*Kashinath Chatterji* v. *Chandi Charan Banerjee*, 5 WR 68 FB.
[7]John Henry Wigmore, *A Treatise on the system of evidence in trials at Common Law* 2425 (Little, Brown and Company, Boston, 1908).

dealings pivotal to such distribution.[8] The rationale behind such immense protection could well be appreciated in light of its role in ensuring the stability and certainty in commercial transacting.

Hence, where A agrees to discharge his debt due to B before the 31st of March, A is prohibited from adducing oral evidence that the date was agreed to be 15th April, while simultaneously maintaining that the contract remains valid, subsisting and binding. As in this case, when parties have recorded their agreement into written form after conscious deliberation, it must be conclusively presumed that they intended it to form a final statement of their intentions, one which should be placed beyond the reach of future controversy, and treacherous memory.[9] The only plausible way of furthering A's case would be by attempting to assail the contract on grounds of fraud, error or incapacity.

Facets of Interpretation: Contemporary Issues

As discussed earlier, the principle idea behind s. 92 is the best evidence rule, a cardinal rule in the law of evidence that the best available evidence should be brought before the court.[10] However, the process of holding a contract to be a truly integrated one is an intricate matter, requiring careful, in fact rather cautious consideration by the court. Under s. 92, parties are not entitled to lead oral evidence if the written instrument *appears* to contain the whole terms of the contract.[11] This appearance, as is further discussed, is a matter of judicial scrutiny, which may bear grave consequences on solemn contracts as well as the rights of the parties.

Discovery of nature of the transaction: For instance, where it was specifically pleaded by the plaintiff in the trial court that the impugned sale deed was only a sham and bogus document, and that what was recorded in the sale deed was of no consequence whatsoever, the prime question that lay for determination before the court was whether to permit the plaintiff to lead oral evidence in order to prove such fact, and attempt to discover the real nature of the transaction.

The Bombay High Court, in second appeal, relying on *Gangabai* v. *Chhabubai*,[12] reckoned that the bar on introduction on prior oral or documentary evidence would not be applicable if the parties never intended to act upon the document in question. As a result, the Court admitted both oral as well as documentary evidence such as records of Municipal Council and Town Planning Authority, holding that the trial court judgment suffered from 'gross mis-appreciation of evidence' in not considering the aforesaid oral and documentary evidence.[13]

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[8]Llewellyn, "On Warranty of Quality and Society: II", 37 *Columbia Law Review* 341 (374) (1937).
[9]*Roop Kumar* v *Mohan Thedani* AIR 2003 SC 2418.
[10]*Pradeep Kumar Agarwal* v. *State*, 1995 Cri LJ 76 (Orissa).
[11]C D Field, *Commentary on Law of Evidence* 275 (Delhi Law House, India, 13th edn).
[12]AIR 1982 SC 20.
[13]*Shankarlal* v. *Balmukund*, 1999 (2) MhLJ 569: 1999 (2) All MR 85.

Sanghi J., in a recent ruling,[14] dealt with similar questions. The plaintiffs alleged that pursuant to the execution of a registered sale deed, the defendant who was the sole owner of the suit property, denied possession to the plaintiffs citing reasons like ill-health and urgent work commitments. Subsequently, the matter was amicably resolved and unencumbered possession was given to the plaintiffs. Allegedly, one day after the *Greh Pravesha* ceremony, the defendant forcibly took back possession of the suit property, compelling the plaintiffs to vacate the property under duress, and without consent. The plaintiffs sought peaceful and vacant possession of the property, along with damages.

In his case, the defendant vehemently denied that the real nature of the transaction was that of a sale, submitting that it was executed to secure the loan taken by the defendant from the plaintiffs. It was further alleged that the suit property values more than Rs. 15 crores, and it is highly improbable that the defendant would have 'sold' the property for a petty consideration of Rs. 1.165 crores. The defendant sought to enunciate the terms and warranties as agreed between the parties, citing interest rates, expenditure regarding registration, court fees etc., further alleging that no receipts of the interest paid by the defendant could be obtained from the plaintiffs.

While the single judge considered the abovementioned cases at great length, he refused to admit the oral agreement alleged by the defendant, holding that the execution and registration of the sale deed is clear and unequivocal. In a strongly worded ratio, the sale was held to be "absolutely clear and incapable of being construed in any manner except as a sale". Unlike the judgment in *Shankarlal v. Balmukand* (supra), the defendant's plea was observed to be a challenge against the *terms* of the contract, thus liable to be inadmissible in view of s. 92.

The interpretation of intention of the parties, as observed, becomes a tedious matter when a party alleges the document to be a false record of a term(s) in the contract, bringing several apprehensions to the fore. It would be open to the party disaffected from the execution of an agreement, to set up a case that though the document may *appear* to be a true integration of the understanding, the parties in fact agreed to record false consideration in order to avoid, for instance, tax liability, and thus true intention may be deciphered only upon consideration of prior and contemporaneous agreements.

To illustrate, say parties agree to clothe a transaction of sale into a gift deed in order to manipulate legal ramifications. To accomplish this end, an agreement devoid of any ambiguities is cleverly drafted by the parties. Would the defendant be barred from adducing evidence, on the ground that the contract appears to be a truly integrated writing of the understanding of the parties? The transaction, as in the above case, may be "absolutely clear and incapable of being construed in any

[14] *Karan Madaan* v. *Nageshwar Pandey,* CS(OS) 1633/2012 and CC 18/2013 and I.A. Nos. 10623/2012 and 16134/2012 before the High Court of Delhi, decided on 26 March, 2014.

other manner", but the judge in enforcing the contract is not enforcing the true intention of the parties, and allowing the plaintiff to benefit merely from the craft of the agreement.

Such a situation, in the author's mind, poses a predicament for effective judicial interpretation, leaving ample room for judicial discretion.

Moreover, it is noteworthy that what the Apex court upheld in *Gangabai* was the permissibility of parol evidence when the *entire* document in question is a sham, and when there exists 'some other agreement altogether, not recorded in the document'. The judgment, in fact, has the effect of distinguishing the admissibility of prior agreement in two cases: when the *nature* of the document is in question, and when its constituent *terms* are. For instance, an attempt to prove that sale consideration as recorded in the deed is undervalued for underlying and hidden purposes, is nothing but contradicting a term of the contract, rendering it inadmissible. On the other hand, challenging the nature of transfer altogether would be a challenge to the nature of the contract.

Principle of 'non est factum': A plea of mistake of material fact in an agreement renders it void where the mistake had been as to the character of the agreement, and voidable where it was to its contents.[15] Courts in England as well as India had long been guided by the principle enunciated in *Foster* v. *Mackinnon,*[16] that for a successful plea of *non est factum*, there should be a mistake as to the character of the document, as against its contents.

However, Lord Denning M.R. in *Gallie* v. *Lee*[17] limited the application of the above test, holding that the "distinction between class, character and contents offered by the cases is "in the area of overlapping meaningless and it does not make sense". The House of Lords even further opined that the doctrine if applied, is likely to result in unreasonable results.

The application of the doctrine of *non est factum*, and its effect on the parol evidence rule, came to be much discussed in India as well. The case of *Harmesh Kumar*[18] arose out of circumstances where one Maya Bai, who was an illiterate lady, was made to sign a general power of attorney, so that the defendant-respondent can carry out litigation proceedings on her husband's death. Allegedly, the general power of attorney was fabricated, and the defendants-respondents went ahead to alienate Maya Bai's land property. While raising the plea of *non est factum*, it was alleged that the fact that the lady is illiterate is unimpeachable, and the contract is rendered void on that ground. On the other hand, the respondents' collective case was that since the misrepresentation is limited to the contents of the document alone, the power of attorney is only voidable and not *void ab initio*.

[15] *Thoroughgood* v. *Cale*, 1582 (2) Co.Rep. 9A.
[16] *Foster* v. *Mackinnon*, (1869) LR 4 CP 704.
[17] *Saunders* v. *Anglia Building Society* [1970] UKHL 5.
[18] *Harmesh Kumar* v. *Maya Bai*, AIR 2006 P&H 1.

Upon consideration of cases dating back to more than two hundred years ago, the court opined that it is extremely difficult in practice to demarcate 'character', 'nature', and 'contents' of the document. In the court's opinion, if fraud is found to affect any document materially, it transcends all presumptions. The difficulty is to be resolved on a case by case basis on the facts of each case and not by appealing to any principle of general validity.[19]

Integrating Clauses

Integration clauses (also, 'merger' clauses, 'whole agreement' clauses and 'entire' agreement clauses) are now one of the most widely employed boilerplate clauses in commercial contract drafting, which are incorporated in order to extinguish parties' liability with respect to statements and representations made in pre-contractual stages. A well-drafted integration clause has the effect of further strengthening the presumption that the contract is the sole decider of the parties' rights and obligations, and no other representation whatsoever, apart from what may be contained in the contract, can be used to affect what the parties expressly provide for themselves to do.

Thus, an integration clause would prevent an employee from claiming more remuneration than what is prescribed in the employment contract and prohibit him from adducing any evidence in support of that fact. Similarly, a customer would be prevented from relying on any representations of a salesman other than the ones enunciated in the final contract. An example of such a clause could be:-

> "This purchase agreement is the entire agreement between the parties herein and supersedes all earlier and simultaneous agreements regarding the subject matter, including, without limitation, any invoices, forms, purchase orders, proposals, tenders or quotations."

For better protection, parties often tend to expand the scope of integration clauses by include a set of other clauses. One example is a 'non-reliance statement', which attempts to exclude liability for misrepresentations, especially pre-contractual misrepresentations. A standard non-reliance statement would provide that the parties have not relied on any representations, including pre-contractual representations, other than those which are specifically set out in the contract.

Additionally, a non-reliance statement may provide that parties are not entitled to any remedies for prior representations, other than those for breach for the contract. A sample clause is reproduced below:-

> *"Each party agrees and acknowledges that, in entering into this Agreement, it is not relying on any representation, warranty, undertaking, covenant or assurance of any nature whatsoever (whether or not in writing) made or given by any person (whether or not a party to this Agreement) which is not expressly set out in this Agreement and waives all remedies and rights of action which, but for this Clause, might otherwise be available to it in respect of any such representation, warranty, undertaking, covenant or assurance."*[20]

[19] Professor Hugh Beale, *Chitty on Contracts* 992 (Sweet & Maxwell, UK, 30th edn.).

Conclusion

Public policy in commercial transacting would dictate that no court must attempt to investigate the intention of the parties if it is manifestly clear, since the parties alone could have mutually known their expectations from the arrangement. However, the courts would hardly have any business in entering that territory if the parties' intentions were enunciated as clearly as their thoughts, and contracts were drafted with the foresight of escaping all potential disputes merely by predicting what words are ideal for the said purpose.

For the same reason, the implementation of the parol evidence rule has been extremely difficult in practice, and in the author's understanding, there is hardly any room for the courts to make any generalized guidelines in that regard. As a result, avoidance of prospective and forthcoming litigation by informed and vigilant contracting, as well as thorough, wholesome and lucid drafting remain to be, essentially, irreplaceable means of guaranteeing performance.

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[20] K&L Gates LLP, "Warranties, Indemnities, Liability & Insurance: Key legal issues, practical lessons and case studies" (K&L Gates LLP, New York, 4th October 2012) *available at:* http://www.klgates.com /files /Publication /2e05401a-2ff8-4a71bc6a0906316c1735/ Presentation/ PublicationAttachmen t/ee04fb20-41b0-498a-9da910401b1ad6c1 / Warranties _ Session _ Presentation.pdf (last visited on March 15, 2015).

Interview*

Shri Mani Shankar Aiyar,
Member of Parliament, Rajya Sabha.

Shakul – Sir, to begin with, what is your relationship with Pakistan, (i) as you were born in British India; and (ii) you were appointed as the first Consul General at Karachi. Sir, as a diplomat and in a personal capacity, what do you have with Pakistan?

M. Aiyar – Well, my father fled caste discrimination in Tamil Nadu, because as he was a Brahmin, he was not able to get a job. So when he graduated in 1927, finding that he could not be employed in Tamil Nadu, he took a train and got off at Lahore, and he lived in Lahore for the next 20 years. He got married while he was there and I was born in Lahore. But I was only a very, very young boy when Partition came, and almost all my memories are India-related rather than Pakistan-related. But, there is always an emotional link to the place of your birth. Then I had the opportunity of meeting a few Pakistanis when I was at Cambridge and got on quite well with them. Then I was very keen on going as the Union Consul General to Karachi because it was like an ambassadorial post at a relatively junior State and I was very lucky that I got the posting. I arrived in Karachi in December, 1978 and I stayed there for the next three years, and I made so many friends in Pakistan that I have often said that I have more friends in Pakistan than I have enemies in India. It is a very large number and I have been visiting to Pakistan after that so frequently in the last thirty years, I must have visited Pakistan at least 30 times. When my eldest daughter got married, we had as many as 46 Pakistani guests at the wedding. So I am very well disposed towards Pakistan. I find Pakistanis are very easy to get on with. I find them to be a very sympathetic kind of people, I find them to be very healthy-cultured, highly intelligent, and I find most of them to be very disposed towards India. I really do think that the differences between India and Pakistan are not of such a nature as to freeze this relationship in austerity. I am deeply convinced that through a process of an uninterrupted and uninterruptible dialogue, we will be able to quite easily resolve all the outstanding issues, settle those that can be settled and postpone to a future generation those problems that cannot be and get on with having a normal relationship between the two countries. The Pakistanis love to give the examples of Canada and Mexico. I don't, because I don't want to be a big brother to the Pakistanis. I think it should be a relationship with equality and mutual respect.

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* By Shakul Ghatole V BSL LLB, on 14th September 2014 at ILS Law College, Pune.

Shakul – So, Sir, are we heading in the right direction with respect to improving the Indo-Pak relations? Your comment as a diplomat.

M. Aiyar – Well, I think we are heading in the wrong direction- the stupidity of first fixing up talks at the foreign secretary level and then cancelling it on the 8th of August when on the 10th of August they knew the Huriyat was coming to India. I think it is those kinds of missteps that cause the biggest damage. We should structure an uninterrupted and uninterruptable dialogue and let it continue for a year, two years, ten years, however long it takes, to resolve what can be resolved and to postpone to a future generation, what cannot be resolved.

Shakul – Sir, going back to your first tenure as the Panchayati Raj Minister, could it be said that to counter insurgencies within India a proper Panchayati Raj would be helpful ?

M. Aiyar – No, it would not be 'helpful', it is absolutely necessary. It is the only way in which Naxalism can be combated. Because if you use the provisions of the Panchayats Extension to Scheduled Areas Act, 1996 (PESA) and send several thousands crore rupees to the peripheral areas where there is some Naxalism but not too much, it will send a message directly to villagers in the Naxal areas that there is a real alternative to Naxalism. There are so many opportunities and so many resources for self government and so I think money we are putting into carbines and khaki shops is almost wasted. What we need is an intelligent panchayat-based response to Naxalism, then we can solve the problem.

Shakul – Sir, you were also the minister for the development of the North-East region, but the state of affairs of the North-Eastern States is still the same, it has not really changed.

M. Aiyar – No, it is very unfortunate that it has not. We produced a document in 2007 for North-East Region Vision-2020. Unfortunately, my successors have not attempted to implement that document. That document provided for the growth rate in North-East India to catch up with the rest of India by about the mid 2020s based on the doubling of capital investment by the Central Government through the plans, in each successive plan from 2007 up till about 2023. Unfortunately, that has not happened. We were supposed to try and open up the borders, to implement foreign policy aimed at making the world realize that North-East India is where South-East Asia begins, especially working with Bangladesh to be able to have free access, economic access from the rest of India into the North-East, softening the borders with Myanmar in order to be able to link up with ASEAN in South-West China, and making life easier for the Arunachalis where approximately two out of every six families have relatives across the border in Tibet. We have done none of these. So the North-East remains a prisoner of its frontiers until these fundamental things are changed, and a huge amount of local self-government, Panchayat Raj were possible, like, I must add, in Arunachal Pradesh, or other forms of local government like in Nagaland, Meghalaya and Mizoram. I should have added Tripura in the first category. Tripura has done outstandingly well in Panchayat Raj. So, until we do all this, I am afraid that the

present situation will continue. It is ridiculous that the valley which is endowed with the largest amount of water in India- the Brahmaputra valley- is importing fish from Andhra Pradesh. They should be exporting fish all over the world. It is amazing that in such a fertile territory, they have one crop. Tamil Nadu has three. So these fundamental, elementary things are not being addressed and nobody is attempting to address that. And putting a General, a Former Chief of Army Staff in-charge of the North-East is, I think, the most hideous mistake that could be there because it amounts to saying that….. you think upon it, you know the North-East as an insurgency area. What does General V.K. Singh- well, it is a good question- what does V.K. Singh know about the army? He seems to know only about his birth certificate but he certainly knows nothing about development, and this *Patti-parade* manner of trying to sort out development problems is a wrong one.

Shakul – Sir, you were the minister of that region. Why didn't you try doing anything to revoke AFSPA?

M. Aiyar – I am not sure that AFSPA is the problem. If you call in the army, they go in to insist on being protected because you are trained in the army to kill. It is the paramilitary forces, the police force, security forces- they are the ones who are suppose to handle internal insurgency. When they fail, bring in the army, and you are not going to change the army and suddenly make them into policemen. So I don't think that the army would be called at all, but if they are called, I am afraid they will have to protect themselves.

Shakul – Sir, when it comes to internal insurgency, there are certain sections in the society that say that they are being supplied with ammunitions and arms from Nepal, China- via that way, and it is said that their ideology is Leftist with Marxist ideologies. Sir, you were a member of the Marxist community when you were at Cambridge…

M. Aiyar – Ya, ya. I was. I am not denying that.

Shakul – Your experience there and your understanding of Marxism, Leftists and the politics being done within India with respect to the political party.

M. Aiyar – See, the only Marx, I think, who got it right, was Groucho Marx. So although I was a Marxist, I am not one now. But, I think a great deal of what Marx said, especially his ethical principle, have a continuance in recent times-that is point number one. Second, yes, there is infiltration and supply of arms. Well, we should take this up through forms of dialogue and instead of making wild assertions and allegations, we should produce the proof. In any case it is for us to stop smuggling into our country rather than expect others to stop smuggling from their side. If officially they are supplying these things; it was true of many, many decades ago. I don't think it is true now and if we have any proof of it being true, we have channels of communication through which we can bring it to their notice.

Shakul – Sir, your comment on the Left parties in India, having worked with them.

M. Aiyar – Well, they have lost their moorings. I can say that about the Congress Party also. But the Lefts have lost their morals and they need to make themselves relevant to Indian politics by at least recapturing their traditional basis in West Bengal and Kerala. But, they are not. They are now reduced to being the regional party of Tripura.

Shakul – Sir, recently after the 2014 Lok Sabha election results were out, the present government tried to, and they did it also, change all the Governors of Congress-ruled States. Your take on that.

M. Aiyar – I think it is a non-issue. We have also changed the governors. They should have listened to some of the norms that have come out since. But the issue is now over and I don't think I have anything useful to add.

Shakul – Sir, when it comes appointment of Judges, it is being mooted that the Judicial Appointments Commission should be there.

M.Aiyer – Well, we just had the Judicial Accountability Bill, which is being unanimously passed in the Parliament. Let's see how that works. I have many reservations about it and I am influenced by what Kapil Sibal has to say, but legislation is the armed books and we have to wait and watch to see how that legislation is implemented.

Shakul – Sir, about the Judicial Appointments Commission. Now they are mooting not to have a Collegium system for appointment of judges, but instead to have a statute through which they will be appointed…

M. Aiyar – I agree with people like Fali Nariman who stressed the importance of the independence of the judiciary and the independence begins from appointments. So, I, without being an expert on the subject, would just suggest that it should be fair, it should be transparent and it should ensure that the government sycophants don't get in because of either their sycophancy or their potage of sycophancy, and that is where I go back to your previous question. I strongly condemned the appointment of Sathasivam as the Governor of Kerala.

Shakul – I was about to come to that question Sir. Is the government in a way trying to send some sort of message to other Chief Justices?

M. Aiyar – I think that is such a very, very wrong precedent. Well, they are telling them that if you let off Amit Shah, he will make you Governor.

Shakul – Sir, as you have contested the student elections at Cambridge, your views on student politics in India. In Maharashtra we don't have elections like the ones we have in Delhi…

M. Aiyar – Really? I did not know that. Well, I think, Delhi elections- I am very proud that St. Stephen's College refused to be a member of the Delhi University Students' Union, because those are not the elections of students. They are

surrogated actions of political parties and I wouldn't be proud of what happens there. But it is, I think, absolutely essential that there be very lively political discussion. Take cases to students' communities, and if that can be accompanied by the kind of elections we had at Cambridge where no canvassing was allowed…no canvassing was allowed. You vote because you have seen the performance in the union society of different candidates. That would be sensible. What we see in Delhi University does not give us much confidence in the democratic process.

Shakul – Sir, with respect to reforms in the political laws in India…after the recently concluded Lok Sabha elections, a petition is pending in the Supreme Court that a person should not be allowed to contest from two seats simultaneously, and then that the amount of spending that is done in the elections is too high. In the recently concluded elections, we were the second largest spending nation in the world next only to the U.S.

M. Aiyar – What was the Election Commission doing? They are stopping me from pasting posters on walls that have always been there even when there were no elections. Instead of spotting that Modi is spending more than 36 thousand crores, I think there is something very perverse about the way in which the Election Commission brings bourgeois values into the electoral process instead of really dealing with the fundamental issues of money power and muscle power which they will not be able to deal with so long they exclude party spending in counting what is spent on elections. It is party money that we get, we account for whatever amount, how much is it now? 70 lakhs? So we account for 70 lakhs, and what the party does, worth 70 crores, we don't account for. So I think the Election Commission should be dealing with the fundamentalists, instead of wasting its time tinkering with the system.

Shakul – Sir, as the citizens, we feel that the political class does not have the will to make reforms in the electoral laws….

M. Aiyar – Yes, why should anyone cut off his own nose? The Election Commission doesn't need Parliamentary Laws. The Election Commission draws up its own call and the Election Commission can decide that party spending will be brought within their framework and that really excessive spending by a party will result in the party being disqualified. They can do that. Let them. But have they done it?

Shakul – Sir, any message that you want to give to the readers of 'Abhivyakti' ?

M. Aiyar – Well, I have been very impressed by your college and enthusiasm, and the way in which the audience listened to me. And I hope that you will adore ethics- those that were taught in your college and not those that you will learn from your clients.

Shakul – Thank you Sir.

Presentations

Seminar
"Transfer of Property Act to SARFAESI Act: a Paradigm Shift in the Law of Mortgages"

Cavaet Emptor in a SARFAESI Auction Sale[#]

-Solaiappan Odayappan[*]

The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) was enacted to give quick recovery of secured loans to the banks. By virtue of s. 35 the provisions of the Act apply notwithstanding anything inconsistent in any other law. A consequence of this is that legal principles applicable under The Transfer of Property Act, 1882 (TOPA) need not apply to SARFAESI transactions. By way of jurisprudential development, one divergence from TOPA is seen in s. 13(4) of SARFAESI.

Under s. 13(4), if the borrower fails to perform his liability, the secured creditor can sell the secured asset. Whether an auction sale by secured creditor to a third party will be free from encumbrance is what this article deals with.

The general principle in TOPA is that *caveat emptor* applies. Under s. 55 of TOPA, the seller is bound to disclose material defects of which the seller is aware and the buyer isn't. Once conveyance is done, the risk of property is with the buyer. So a transfer isn't free from encumbrance as no one can transfer a better title than he himself has. This *caveat emptor* doctrine is premised on an expectation of due diligence on the part of the buyer.

Under SARFAESI however, there seems to be a doctrinal shift. In *Jai Logistic* v. *The Authorized Officer*,[1] it was held that the secured creditor is bound to disclose anything that materially affects the value or nature of property. This ratio derives from SARFAESI rules, i.e. Rule 8 (6) (f), which provides that in a public notice of auction of secured property there shall be disclosure of:

> *"(f) any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of the property".*[2]

[#] Presentation made on 7 March 2015 as a part of a Seminar "Transfer of Property Act to SARFAESI Act: a Paradigm Shift in the Law of Mortgages" at I.L.S Law College.
[*] IV B.S.L LL.B.
[1] (2010) 7 Mad LJ 353.
[2] Security Interest (Enforcement) Rules, 2002, r. 8 (6) (f).

This is to protect the interest of the purchaser, as he would otherwise also be purchasing litigation with the property.[3]

But this protection of the purchaser is circumscribed, when the public notice for auction of secured property indicates that it shall be the duty of the intending purchaser to verify, not only the encumbrance by way of alienation of the property, but also the other statutory liabilities.[4] The facts of *Jai Logistics* case didn't fit into this scenario. However this ratio was followed in a case which had this contemplated scenario. In *N. Suresh* v. *The Indian Bank*,[5] the secured creditor had specified in the sale notice that the sale would be on "as is where is" and "as is what is" basis. The petitioner had prayed for quashing of notice of respondent bank representing a claim of forfeiture in the event of non-payment of the rest of the money. The High Court rejected the prayer on the ground that it was indicated on the auction notice as to kind of sale it was, i.e., as is where is basis. It was opined

> *"We aptly point out that the 'Caveat Doctrine' applies when condition of an Auction Sale is printed and published and would-be purchasers were distinctly told to satisfy themselves of the nature of the property before purchase and on purchase, if any encumbrance is found, the Doctrine applies, in our considered opinion"*[6]

In contrast a diferent approach is seen in *R. Shanmugachandran* v. *The Chief Manager*[7], where it was held:

> *"The obligation of the Authorised Officer to include in the public notice issued under Rule 8(6), the details of the encumbrances known to the secured creditor, is actually traceable to Clause (a) under the proviso to Rule 8(6). Since the obligation to disclose encumbrances is inbuilt in Clause (a) of the proviso itself, there is no necessity even to fall back upon Clause (f) under the proviso to Rule 8(6)"*[8]

Instead of rule 8 (6) (f), it is possible to trace the obligation to disclose encumbrance in rule 8 (6) (a) which reads:

> *"(a) the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor;"*[9]

Here, the duty of disclosure on the creditor is reduced to things known to the creditor. Thus the intended protection of interests of purchaser contemplated by

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[3] *Jai Logistic* v. *The Authorized Officer*, (2010) 7 Mad LJ 353 at para. 5.
[4] *Ibid.*
[5] (2013) 3 Mad LJ 885.
[6] *N. Suresh* v. *The Indian Bank*, (2013) 3 Mad LJ 884, para 25.
[7] *R. Shanmugachandran (Deceased)* v. *The Chief Manager*, W.P. No. 21364 of 2011, decided on 12 September, 2012 by Madras High Court.
[8] *Ibid.* at para. 23.
[9] Security Interest (Enforcement) Rules, 2002, r. 8(6)(f).

the *Jai Logistics* and *N Suresh* cases is sacrificed, and the due diligence duty imposed on the creditor to find out all encumbrances and disclose them is done away with. The court in *Shanmugachandran* case holds that the ratio laid down in *Jai Logistics* cannot be understood to mean that the secured creditor has an obligation to obtain an encumbrance certificate upto the period of one day preceding the date of publication of the auction sale notice.[10] An additional reasoning for arriving at this conclusion is that the 30-day sale notice is considered not merely as allowing the borrower to make good his liability, but also allowing for intending purchasers to make sufficient enquiries as a person of normal diligence and ordinary prudence would do while buying any immovable property. The purport of Rule 8(6) cannot be extended to such an extent that it obliterates the liability of the purchaser to undertake due diligence and to scrutinise the title to the property.[11]

Although there are judgments that diverge from the caveat emptor doctrine, in order to protect the purchaser, there also seem to be some that uphold the doctrine. The reasoning in these judgments is conflicting and what is curious is that it has arisen despite account being taken of the other judgments. With due consideration being given to the aims and objectives of the SARFAESI act, there needs to arise a harmonious jurisprudence on this legal question.

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[10] *R. Shanmugachandran (Deceased)* v. *The Chief Manager*, W.P. No. 21364 of 2011, before Madras High Court decided on 12 September, 2012, para. 24.
[11] *Ibid.* at para. 25.

Seminar
"Conclusive Proof of Legitimacy"

Concept of 'Conclusive Proof'#

-*Divya Pagey**

In any matter before the court, the truth of a fact is submitted to judicial investigation. All the legal means to prove or to disprove the fact concerned are called evidence. The object of admitting evidence is, essentially, determination of the truth.

However, in certain cases, determination of the truth is not the ultimate object of the court; justice is deemed to lie in upholding public policy and public morality rather than in upholding the truth of the fact in question. Therefore, in such cases, a provision of law is made prescribing the conclusive presumption of the subject matter of the public policy.

S.4, Indian Evidence Act, 1872, defines 'conclusive proof' as-

> *"When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it."*

It means that the conclusion of the existence of the presumed fact must be drawn and all rebutting evidence is inadmissible.

Conclusive Proof and the Best Evidence Rule

The 'Best Evidence Rule' is a principle of the Law of Evidence which states that no evidence is admissible unless it is "the best that the nature of the case will allow". The principle was for the first time evolved in the case of *Ford v. Hopkins* in 1700. Thereafter, it became increasingly common and was used almost indiscriminately. But, from about the beginning of the 19th century, a clear departure from the Best Evidence Rule is seen, both in decisions of the courts as well as in statutory provisions.

In the present day, it is not true that the best evidence must or even may be given, though its non-production may be a matter of comment or affect the weight of that which is produced. Now, all kinds of evidence are admissible.

Conclusive Presumptions - Rules of Evidence or of Substantive Law?

In the case of *Izhar Ahmad Khan* v. *Union of India*,[1] the question arose whether conclusive presumptions prescribed in the Citizenship Rules, 1956, were rules of

Presentation made on 9 September 2014 as a part of Seminar on "Conclusive Proof of Legitimacy" held at I.L.S Law College.
* IV B.S.L, LL.B.

evidence or of substantive law. The Supreme Court held that it is a misnomer to call conclusive presumptions as 'presumptions'. They are essentially not rules of evidence, as no evidence is admissible to rebut them. They are rules of substantive law misleadingly expressed in presumptive form.

Conclusive Proof in S.112

S.112, Indian Evidence Act, 1872, provides-

> *"The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."*

According to the legislative intention and spirit behind s. 112, once the validity of marriage is proved, then there is a strong presumption about the legitimacy of children born from that wedlock. The presumption can only be rebutted by strong, clear, satisfying and conclusive evidence. The presumption cannot be displaced by mere balance of probabilities or any circumstance creating doubt. It is a well-settled principle of law that *odiosa et inhonesta non sunt in lege praesumenda* (nothing odious or dishonourable will be presumed by the law). The law presumes against vice and immorality. In a civilised society it is imperative to presume the legitimacy of a child whose parents "have access" to each other. s. 112 is based on the presumption of public morality and public policy.[2]

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[1] AIR 1962 SC 1052.
[2] *Sham Lal* v. *Sanjeev Kumar*, (2009) 12 SCC 454.

Nature and Operation of Presumptions#

-Aanchal Lamba*

"Man can lie, but circumstances don't."

What is a presumption?

A presumption is an acceptance of a fact as true or existent based upon a strong probability, which is evident from circumstances. When the court without a direct or conclusive proof assumes the probability of existence of a fact, it is called a presumption. In simple words, a presumption is said to operate where certain facts are taken to be in existence even when there is no complete proof. A presumption is an inference drawn from certain circumstances or facts which are known and proved.

For example, if a man has not been heard of for 7 years by those who would naturally have heard of him if he had been alive, the court may believe that the man is dead.[1] Here, if the fact that he was not heard of by those who would have heard of him is known and proved, the court infers that he is dead.

Presumptions of Fact

Presumptions of fact are those presumptions about things or events that happen in day to day life, which we accept as true, due to inferences which we draw logically and naturally in our minds. These are also called as material or natural presumptions. These presumptions are in general rebuttable presumptions. A rebuttable presumption is a presumption where the amount of evidence is sufficient to establish a *prima facie* case and hence, burden of proof is thrown upon the other party. Further, if no opposing evidence is offered by the other party, the Court is bound to come to a conclusion in favour of the presumption.

In these presumptions, the words "may presume" are used. Whenever it is provided by the Indian Evidence Act, 1872 that the Court "may presume" a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.[2] These presumptions where the words "may presume" are used are discretionary presumptions.

S.114 of the Indian Evidence Act states that the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case. Such a presumption is a presumption of fact. For example, the court may presume that a man who is in possession of stolen goods soon after theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession.

Presumption of Law

A presumption of law is that inference which the law itself provides for. In case of such presumptions, the courts of law have to mandatorily raise a presumption and such a presumption which is raised shall be considered to be proved unless and until it is said to be disproved. In other words, these presumptions are those in which the courts have no discretion to infer a situation in any other way other than that which the law provides for. It is like a command of the legislature to the court to raise a presumption which the court is under an obligation to follow.

The words used in these presumptions are "shall presume". Whenever it is directed by the Evidence Act that the Court "shall presume" a fact, it shall regard such fact as proved, unless and until it is disproved.[3] These presumptions where the words "shall presume" are used are mandatory presumptions. For example: When the question is whether a person has caused the dowry death of a woman and it is shown that soon before her death such a woman has been subjected by such a person to cruelty or harassment for, or in connection with, any demand for dowry; the court shall presume that such person had caused the dowry death.[4]

The similarity between mandatory and discretionary presumptions is that both are rebuttable.

In *Manik Lodh* v. *State of Assam*[5] it was stated that:

> *"There is, indeed, a difference between the expressions "may presume", on the one hand, and "shall presume" or "it shall be presumed", on the other. When the legislature uses the expression "may presume", such presumption is called a natural presumption or presumption of fact, which a Court is entitled to raise if the facts of a given case so require. However, when the statute uses the expression "shall presume" or "it shall be presumed", such a presumption is a presumption of law as distinguished from the presumption of fact."*

Conclusive Proof

When one fact is declared by the Evidence Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.[6] Conclusive proof is also known as conclusive evidence. The law provides certain facts with an artificial probative effect and no evidence which will oppose that effect is

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#IV B.S.L, LL.B.
1 Indian Evidence Act, 1872, s. 108.
2 Indian Evidence Act, 1872, s. 4.

3 *Ibid.*
4 *Ibid.*, s. 113B.
5 2007 (3) GLT 207.
6 Indian Evidence Act, 1872, s. 4.

allowed to be produced. It concludes the existence of a certain fact on the basis of another fact which is proved. This presumption is an irrebuttable presumption. An irrebuttable presumption is a presumption which is provided for by the law so peremptorily that any evidence to the contrary, however strong it might be, is precluded.

Presumption and Burden of Proof

Generally, whoever desires any court to give a judgment dependent on existence of facts which he asserts, must prove that those facts exist.[7] However, when certain facts are presumed to be in existence by the court, the party in whose favour they are presumed to exist need not discharge the burden of proof with respect to it. This is an exception to the general rule of burden of proof. However, this presumption applies only at the beginning. The other party is free to provide proof that disproves the presumption.

Justice Venkataramiah, of SC observed the following, in the case of *Sodhi Transport* v. *State of UP*:[8]

> *"A presumption is not evidence in itself but only makes a prima facie case for the party in whose favor it exists. It indicates the person on whom the burden of proof lies. When the presumption is conclusive, it obviates the production of any evidence, but when it is rebuttable, it only points out the party on whom lies the duty of going forward with evidence on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed the purpose of presumption is over."*

Presumption of Legitimacy:

"Motherhood is a fact, fatherhood a belief."

It is said that maternity is always certain whereas paternity is a matter of inference. This inference is the basis of s. 112 of the Indian Evidence Act. The presumption of legitimacy is enshrined under s. 112. It indicates that every child born during wedlock shall be deemed to be legitimate unless the contrary is proved.[9] The essential conditions for the presumption to arise are:

a. The child should have been born during the continuance of a valid marriage or if the marriage was dissolved, within 280 days after its dissolution, the mother remaining unmarried.

b. The parties to the marriage should have had access to each other at any time when the child could have been begotten.

[7] *Ibid.*, s. 101.
[8] AIR 1986 SC1099, 1986 SCR (1) 939.
[9] Indian Evidence Act, 1872, s. 112.

Further, the section stated that if the above two pre-requisites are met, the same will operate as a **"conclusive proof"** of the fact that the child born out of the wedlock is the legitimate child of the husband. Hence, no proof, inclusive of that of adultery or any other infallible scientific evidence, can cause enquiry into paternity of the child. The only way to refute this presumption is to prove that the man had no access to the mother either due to physical distance or impotency.

This provision is based on the ancient maxim *pete rest quemmuptice demonstrate* which means that "he is the father whom the marriage indicates". The rationale behind this maxim and the law under s. 112 is that the law does not want the paternity of a new born child to be a matter of uncertainty, the object being that the responsibility of the child should be attributed to a particular person and not left undetermined. Another logic which can be drawn is the social attitude during 1872 when the above provision came into force. At that time, polygamy was deep rooted in India and women could easily be abandoned. Hence, this section was a shield to protect a woman's chastity and prevent bastardization of a child.

However, to hold good these obsolete laws in the 21st century, when polygamy is now illegal and the social attitudes of the people have changed, is a blot on the legislative and judicial system of the country. The presumption that a child born within 280 days after dissolution is legitimate unless the woman remarries is going a step ahead of medical science. There is no hypothesis as to why the section specifies '280 days' and not any more. In a modernized world like ours, where surrogacy, sperm banks, in-vitro fertilizations and DNA testing are prevalent, the presumption that sexual intercourse is an absolute essential for the conception of a child is illogical. For example, in case of surrogacy, the surrogate child's mother's husband would be considered to be the father of the child even though he had nothing to do with the pregnancy of his wife. There is a pressing need for amending such outmoded, archaic and obsolete laws which have their roots in social utility rather than in reasoning.

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Conclusive Proof of Legitimacy: Effect of Judicial Recognition of DNA Tests as Reprieve#

-Debopriyo Moulik*

S.112 of the Indian Evidence Act, 1872[1] conclusively proves a man to be the father of a child, provided that the man was legally married to the mother during birth or the child was born within 280 days from dissolution of marriage provided the woman remains unmarried. The only exception to the conclusive nature of the proof is establishing lack of access during conception of the child, by either party. The objective of this enactment has been to prevent the bastardization of the child. This seeks to prevent any harm, societal or otherwise, from being caused to the child, an innocent party.

Recently, the presumption embodied under S.112 was delved into by the Court in *Nandlal Wasudeo Badwaik* v. *Lata Nandlal Badwaik*[2]. The case was a special leave petition directed against the order of High court for not allowing a DNA test to prove the paternity of the child. Lata Badwaik sought maintenance for herself and her child under s. 125 of Code of Criminal Procedure. The magistrate granted maintenance. Subsequently, the appellant preferred a revision petition before the High Court to order for a DNA test to prove the paternity of child and claimed that no maintenance ought to have been awarded to the child. The High Court denied his claim and dismissed his revision petition. The appellant preferred a Special Leave Petition before the Supreme Court against the order of High Court. The Supreme Court dismissed this order and favoured the appellant by ordering for a DNA test, on the condition that the appellant-petitioner deposit all dues, both arrears and current, in respect of the maintenance awarded to the wife and child, for consideration of the DNA test. The results of the DNA test showed that the appellant was not the father of the child. The court held that the appellant was not liable to pay maintenance for the child.

The Supreme Court held that in case of a direct conflict between a presumption of fact and scientific proof, the reliance of the court shall be on scientific proof. The Court recognized that the real intention of creation of this presumption has been for the benefit of the child. Value in this judgment was given to the rights of the man. The bench held that imposition of fatherhood on a man in the presence

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Presentation made on 9 September 2014 as a part of Seminar on "Conclusive Proof of Legitimacy" held at I.L.S Law College.

* IV B.S.L, LL.B.

[1] ***112. Birth during marriage, conclusive proof of legitimacy*** - *The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.*

[2] (2014) 2 SCC 576.

of conclusive scientific proof to the contrary would amount to denial of truth. The court distinguished all previous judgments, referring to the fact that in this particular case, DNA test had already been conducted and was with the knowledge and consent of the parties.

Previous judgments, though distinguished from this case, interpreted and applied s. 112 strictly. The Court, in the *Venkateswarlu* case[3] held that the conclusive presumption of law can only be displaced by proof of non-access of the parties to the marriage, when under ordinary circumstances the husband would have been the father of the child. The Court further held that access and non-access connote the existence or the non-existence of opportunities for marital intercourse. The proof of non-access must be clear and satisfactory.

The court previously restricted to non-access the rebuttal of presumption under s. 112. The court refused to entertain other rebuttals to the same, viz., that the wife was involved in an extra-marital affair,[4] that the husband had a vasectomy operation, due to lack of adequate proof that the same was successful,[5] or that the husband was suffering from a serious illness[6].

The recognition of DNA tests as a valid rebuttal to the presumption of legitimacy was a bold step by the judiciary. It reflected the suggestions made under the 185th Law Commission report, which sought to add impotency, blood tests and DNA testing as additional reprieves to non-access[7].

The 185th Law Commission report also sought to establish certain standards. The proposed change also mandated that in case of impotency, blood tests or DNA testing, two tests must be conducted resulting in identical verdicts[8]. These standards ensure that the social motive as well as principles of justice are protected. However, due to the nature, facts and circumstances of the case, no safeguards or standards were enunciated by the court. The court merely stated that in case of a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former[9].

This provides for rampant use of scientific proof to rebut the presumption under law envisaged under s. 112. This erodes the social motive and detrimentally affects the innocent party in these cases i.e. the child.

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[3] *Venkateswarlu* v. *Venkatanarayana*, AIR 1954 SC 176.

[4] *G.R. Sane* v. *D.S. Sonavane& Co.*, AIR 1946 Bom 110.

[5] *Chandramathi* vs. *PazhettiBalam*, AIR 1982 Ker 68; *Also, Chirutha Kutty* v. *Subramaniam*, AIR 1987 Ker 5.

[6] *Narendra* v. *Ram Gobind*, ILR 29 Cal. 114 (PC).

[7] Law Commission of India, 185th Report on Review of the Indian Evidence Act, 1872 (March, 2003) at pp. 518.

[8] *Ibid* at pp. 519.

[9] *Nandlal Wasudeo Badwaik* v. *Lata Nandlal Badwaik* (2014) 2 SCC 576.

Presumption of Legitimacy of Birth: American Schools#

-*Solaiappan Odayappan**

The presumption of legitimacy holds that a child born during a marriage is the legal issue of both spouses. This presumption was a fundamental principle of English common law that could be rebutted only by proof of the husband's impotence, sterility, or non-access to the wife. Indian law in s. 112 of Indian Evidence Act provides for a rebuttal of this presumption only where non-access at a time when child could have been begotten is proved.

The social benefits served by this presumption were manifold. It protected the legitimacy of children, which in turn entitled them to financial support, inheritance rights, and filiation obligations of their parents. It prevented children from becoming wards of the state so that neither king, nor church, nor taxpayer was forced to provide for them. It prevented a third-party putative father from insinuating himself onto an intact family by claiming to have sired the child, and thus helped to maintain the stability of the family. The presumption also served the judicial system by allowing courts to cut off debates between irate parents about the biological origins of their children at a time when doubts about a child's genetic origins were more a matter of suspicion than science.[1]

Presumptions, are legal constructs that serve values other than determining the truth of a particular matter. However this principle arose in a period when science wasn't equipped enough to arrive at the truth.

Considering the developments in science, such as DNA testing, that make possible the detection of truth, there now exists a tension between legal truth and scientific truth. It is possible that in one case, a judge may both grant the husband a divorce on the ground of the wife's adultery and also, relying on the presumption that all children born during a marriage are the legitimate issue of that marriage, order the same husband to pay support for the child conceived as a result of the adultery. As a consequence, the conflict between scientific truth and legal truth has become very disturbing.[2]

The approach undertaken in other jurisdictions may also be informative of the one that must be undertaken in India. In this regard, USA has three types of approaches taken by its states.

Presentation made on 9 September 2014 as a part of Seminar on "Conclusive Proof of Legitimacy" held at I.L.S Law College.

* IV B.S.L, LL.B.

[1]Diane S. Kaplan, "Why Truth is Not a Defense in Paternity Actions" 10 *Tex. J. Women & L.* 69 (2000) at 71.

[2]*Ibid.*, at 72.

The Pennsylvania Model

According to this model regardless of the husband successfully rebutting the presumption on one of the grounds, the court may still exclude DNA evidence of non-paternity under the doctrine of paternity by estoppel. Paternity by estoppel is derived from the doctrine of equitable estoppel. Equitable estoppel bars a person who made a misrepresentation from denying the truth of that statement if doing so would harm another person who relied on the representation to his detriment. The difference is that under paternity estoppel, as opposed to equitable estoppel, even an innocent person is estopped. This model is well represented in the case of *Miscovich* v. *Miscovich*,[3] decided by the Superior Court of Pennsylvania in 1997. The child who relies on the representation made is protected from being harmed. The representation to the world that he is the father, and the development of an emotional relationship between father and daughter, are the reliances that are sought to be protected.

The Massachusetts Model

Unlike in the Pennsylvania model where fatherhood serves a socio-legal construct, in Massachusetts, it is strictly a matter of biology. The principle of equality between father and mother is also an integral part of the approach undertaken in this model. As held in *K. B.* v. *D. B.*,[4] "*A married man should have no duty to support a child born to his wife during their marriage but fathered by another man, any more than a wife should have a duty to support a child fathered by her husband during their marriage but born of another woman.*"[5] This model rejects parental estoppel on the ground that severance of a parent-child relationship upon which a child had relied as a source of identification, love, and social and financial support could not satisfy the detrimental reliance requirement.[6]

Because husbands had voluntarily assumed the role of the father to illegitimate children born to their spouses, it seeks to protect the interest of the husband. The court favoured this policy because it encouraged husbands to assume fathering responsibilities of their step children, if only temporarily, unlike the former policy, which discouraged husbands from assuming such obligations for fear of becoming permanently financially obligated for child support.

Under this approach, the role of the court is to find the truth, even if the truth hurts because it is inconvenient or disruptive of the status quo.

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[3]688 A. 2d 726 (Pa. Super. Ct. 1997).

[4]639 N. E. 2d 725, 730 (Mass. App. Ct. 1994).

[5]Diane S. Kaplan, "Why Truth is Not a Defense in Paternity Actions" 10 *Tex. J. Women & L.* 69 (2000) at 77.

[6]*Ibid.* at 78.

The New York Model

The New York model reconciles the other two models. It will admit or exclude DNA tests and will apply or not apply the presumption of legitimacy or the estoppels doctrine based on whether such information will assist the court in arriving at a resolution that serves the best interests of the child.[7] So in a case where there is no other biological father possible and there is a substantial development of a father-daughter relationship, the DNA test will not be allowed.

Legal positivists would disapprove of the best-interests model because it substitutes subjective, sentimental analysis for the certainties that inure from the rule of law.[8] The proper role of the courts is to state clearly the legal rules as to conduct and consequences so that people can knowingly conform their behaviour to and comply with such legal requirements. A best-interest-of-the-child analysis leaves everyone in doubt until the judge decides on the issue.

Concluding remarks

The case of *Nandlal Wasudeo Badwaik* v. *Lata Nandlal Badwaik*[9] cannot be completely fitted under any of these schools on account of the factual circumstances of the case. Although it seemingly might be said to follow the Massachusetts Model when it holds that where there is evidence to the contrary, the presumption must yield to the proof, it has also held that, given the pre-existence of DNA results before the case, the negative consequences associated with bastardisation couldn't have been prevented anyway. It is this factual scenario that was integral in the court deciding the way it did in this case. It will be interesting to see what might have been the approach if the results of the DNA test weren't already out.

[7] *Robert L. A.* v. *Sharon A. R.*, 185 A. D. 2d 977.
[8] Diane S. Kaplan, "Why Truth is Not a Defense in Paternity Actions" 10 *Tex. J. Women & L.* 69 (2000) at 77.
[9] (2014) 2 SCC 576.

Comments and Criticism: Supreme Court in Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik[#]

-Namit Oberoy[*]

Misidentification of purpose of the presumption?

Presumptions may be made or required to be made by law for various purposes, viz. convenience and fairness in administration of evidence, balancing 'burden of proof' and 'onus of proof' according to circumstantial positions of the parties, as well as preservation of public policy and morality and furtherance of social objectives.[1] Depending on whether the language of the law providing for presumptions is conservative or liberal in nature, legislative policy may be ascertained. For instance, where under s. 114[2] of the Indian Evidence Act, existence of certain facts ispresumedby the Court, those presumptions are largely drawn to ensure efficacious administration of justice. The language of the Section, too, reinforces that idea. On the other hand, for instance, s. 113B[3] which provides for "Presumption as to dowry death", is strongly worded, providing for a "shall presumption". S. 113B is a clear reflection of the social policy which forms its foundation, i.e. deterrence.

The presumption of legitimacy of birth, contained in s. 112[4], is one of the latter kind. The law accords 'conclusive proof' to legitimacy of a child *unless* a case of non-access of opportunities can be made out. It is noteworthy that the only way prescribed by the section to rebut this presumption of legitimacy is by proving that the husband and wife "had *no* access to each other at *any* time when he *could have been* begotten". Not only is this plea of "non-access" outright difficult to prove, it imposes the burden of proving a negative fact, or absence of a fact, on the petitioner-respondent (husband), which may be argued as quite outrageous.

[#] (2014) 2 SCC 576. The Presentation was made on 9 September 2014 as a part of Seminar on "Conclusive Proof of Legitimacy" held at I.L.S Law College.
[*] IV B.S.L, LL.B.
[1] *Sham Lal* v. *Sanjeev Kumar* (2009) 12 SCC 454.
[2] Indian Evidence Act, 1872, s. 114.
[3] "*113B. Presumption as to dowry death.- When the question is whether a person has committed the dowry death of a women and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry; the court shall presume that such person had caused the dowry death.*"
[4] "*112. Birth during marriage, conclusive proof of legitimacy - The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.*"

Would the difficulty of proving such evidence lead to concealment of truth? Probably. But is preservation of truth even the necessary intended idea behind s. 112? Probably not. It is wrong to assume that presumptions can only be procedural means to justice, and thus may only be limited to attempt the discovery of right and wrong. Conclusive presumptions are rather a misnomer; they are essentially not rules of evidence as no evidence to rebut them is admissible. They are rules of substantive law misleadingly expressed in presumptive form.[5]

The Division Bench reasoned the judgment on the idea that there is no need for a presumption when truth can be ascertained scientifically and accurately, and thus in circumstances where truth somehow has been ascertained, "conclusive presumptions" imposed by law are rendered obsolete ideas. It must be reiterated that determination of the truth may not be the ultimate object of the court and justice may in fact lie in upholding public policy and public morality rather than in upholding the truth of the fact in question. In the author's mind, the legislative intent of s. 112- which is protection of the child from bastardization and social stigma, even at the cost of erosion of truth- has been mis-appreciated and unprioritized.

Departure from precedents on shaky grounds?

In the process of pronouncing the judgment, the Court distinguished the facts of the case from all previous judicial precedents, on the ground that the DNA Test had already been conducted, twice, and the results were now in the public domain. In the court's words:-

> *"...As regards the authority of this Court in the case of Kamti Devi (Supra), this Court on appreciation of evidence came to the conclusion that the husband had no opportunity whatsoever to have liaison with the wife. There was no DNA test held in the case. In the said background i.e. non- access of the husband with the wife, this Court held that the result of DNA test "is not enough to escape from the conclusiveness of Section 112 of the Act". The judgment has to be understood in the factual scenario of the said case. The said judgment has not held that DNA test is to be ignored. In fact, this Court has taken note of the fact that DNA test is scientifically accurate. We hasten to add that in none of the cases referred to above, this Court was confronted with a situation in which DNA test report, in fact, was available and was in conflict with the presumption of conclusive proof of legitimacy of the child under Section 112 of the Evidence Act. In view of what we have observed above, these judgments in no way advance the case of the respondents"*[6] (Emphasis supplied)

[5] *Izhar Ahmad Khan* v. *Union of India*, AIR 1962 SC 1052.
[6] *Nandlal Wasudeo Badwaik* v. *Lata Nandlal Badwaik* (2014) 2 SCC 576.

In the above concluding paragraph of the judgment, the learned judge distinguishes the factual scenario from earlier cases on the basis that since DNA test has been held to be scientifically accurate, and somehow the DNA Test evidence is on record, it must be upheld. In the author's mind, this inference is unwarranted since what the Court had earlier opined must be construed to mean that *even though* the scientific accuracy of DNA tests is unquestionable, it "is not enough to escape from the conclusiveness of s. 112 of the Act". It is absurd that the evidence, which could have been excluded by the Court instead of ordering the parties to conduct DNA tests twice, became the founding basis of granting maintenance.

Test of "eminent need" in summary proceedings

The proceedings, as in this case, were initiated by invoking s. 125 of the Cr.P.C.[7] which are to be summarily decided by the Court. DNA tests cannot be ordered as a matter of course, and must satisfy "eminent need".[8] It may be argued that the Court, which had already failed to preserve the presumption in s. 112, must not also have passed directions for DNA tests in a summary proceeding under s. 125 of the Cr.P.C., since the nature of these proceedings do not *prima facie* necessitate the "eminent need" for subjecting parties to DNA profiling.

Moreover, it is noteworthy that whether the wife objects or consents to DNA tests of the father, must be no factor in influencing the admission or exclusion of such evidence.

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[7] The Code of Criminal Procedure, 1973.
[8] *Bhabani Prasad Jena v. Orissa State Commission for Women*, (2010) 8 SCC 633.

The Law of Character Merchandising in India[#]

-Harish Adwant, Ritvik M. Kulkarni[*]

India has witnessed a high level of technological literacy and scientific advancement. This progression has been highly exploited by the Movie and Entertainment Industry. The Indian Entertainment Industry has been growing at a galactic speed and is expected to reach Rs 2,272 billion by 2018 at a compound annual growth rate of 15%.[1] It is said to be the fastest growing entertainment industry in the world.

The Film and Television Industry casts a lasting influence over its consumers in India as they associate themselves to the stories, actors and characters of television series and motion pictures. This has been possible due to the priceless contributions of cinematic geniuses; who have pushed their creativity to the limit and have produced literary and cinematic gems by means of their intellectual prowess. In the light of its wide reach and character affinity, the entertainment industry has an incredible potential in the Indian market if it employs Character Merchandising as a tool to increase revenue and advertise its characters.

Character Merchandising

Character Merchandising refers to the secondary exploitation of a character (fictional or real) by using the image, name, or appearance of the same on goods in order to create or increase the consumer's desire to purchase. It is the commercial usage of the wide popularity of the character for merchandising of goods and services. The value of the product increases in manifolds due to the affinity of the consumer with the character on the product.

The phenomenon of Character Merchandising is an offshoot of intellectual property and assumes immense significance in a technologically viable market. It has emerged as one of the most lucrative means of popularizing different forms of entertainment in India. Hence, the presentation seeks to analyze scrupulously the growth of the concept and the legal norms governing character merchandising in India.

Analysis

A character is an original creation of a cartoonist or an author of a story. A character can be broadly categorized into real characters and fictional characters. Real characters are those personalities who have obtained importance in various

[#] This presentation was made at the National PowerPoint Presentation Contest, 2015, organized by Manikchand Pahade Law College on 23 January, 2015.
[*] III B.S.L, LL.B.
[1] Pricewaterhouse Coopers, Report: *India Entertainment and Media Outlook* (Confederation of Indian Industry, 2014) *available at:* http://www.pwc.in/india-entertainment-media-outlook/index.jhtml (last visited on March 15, 2015).

dimensions such as entertainment, sports, politics, etc. Fictional characters, on the other hand, can be further classified into human and non-human characters. Credit has to be attributed to Walt Disney for creating fictional characters such as Mickey Mouse, Minnie Mouse, Donald Duck, Goofy, Pluto, etc. who have been accepted and enjoyed since their introduction to the cartoon family.

The persona of every character is a merchantable property and, therefore, the person owning the character ought to have the right to control its commercial exploitation. A character is protected under The Copyright Act, 1957 to the extent of creating and protecting ownership rights on the original expression of an idea in the form of artistic and literary works. This intellectual safeguard creates limited monopoly over the copyrighted work and prevents others from making unauthorized use of such a character.

It is further protected by the Trademarks Act, 1999 by the unique symbol ®, used by the manufacturer, when the character is embossed/imprinted on the product. This symbol distinguishes the products from the others in the market and ensures that the character is so distinguished so as to remind the consumer of the manufacturer.

The American judicial setup has contemplated the question of a well-developed character and come up with two tests to determine the copyright-ability of a character. Judge Learned Hand, in *Nichols* v. *Universal Pictures*[2] stated that the test determines whether the particular character is sufficiently and distinctively delineated so that it warrants protection. He also stated that it follows that the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for making them too indistinct. The 'character delineation test' was considered to be a yardstick to determine copyright-ability of a character in the United States.

This test was extended and interpreted more strictly in *Warner Brothers Pictures v. Columbia Broadcasting System*[3] wherein it was held that no character is protectable unless the character is extremely well-delineated so as to constitute 'the story being told' rather than merely being a 'chess man in the game of telling the story'.

As per the Indian scenario, the Kerala High Court, in *Malayala Manorama* v. *V.T. Thomas*[4] impliedly distinguished between the drawings made using the cartoon character and the actual cartoon character. The Court held that the copyright over the drawings made using the character would vest with the publishing house as an artistic work, while the copyright over the actual character remains with Mr. Thomas. This ruling addressed the issue of copyright

[2] [1930] 45 F.2d 119, 121 (2nd Cir.).
[3] [1954] 216 F.2d 945 (9th Cir.).
[4] AIR 1989 Ker 49.

ownership on character and paved the way for legal developments in India pertaining to copyright-ability of a character.

Legal Developments in India

Character merchandising was acknowledged and interpreted by the Indian courts for the first time in *Star India Pvt. Ltd.* v. *Leo Burnett (India) Pvt. Ltd.*[5] The Bombay High Court outlined the concept of character merchandising as an exploitation of fictional characters or the frames of celebrities by licensing such famous fictional characters to other means when the character has developed commodity value for itself.

In the recent case of *Disney Enterprises Inc.* v. *Santosh Kumar,*[6] the Delhi High Court dealt with the merchandising rights of the owner of the character. The Court held that there is an intense degree of association between the plaintiffs and their characters such as Hannah Montana, Winnie the Pooh, etc. which is why any reference to these characters reminds the public exclusively of the plaintiffs.

The Delhi High Court extensively analyzed the concept of personality merchandising in the case of *D.M. Entertainment Pvt. Ltd.* v. *Baby Gift House.*[7] The Court pointed out that the right of publicity of a celebrity can, in a jurisprudential sense, be located with the individual's right and autonomy to permit or not to permit the commercial exploitation of his likeness or some attributes of his personality. The Court further stated that such commercial exploitation caused significant losses to the plaintiff and held the defendant liable for passing off.

Although there is a strong support extended by the Indian judiciary in analyzing the concept of character merchandising, there is a need for stakeholders in the Indian markets to reap benefits from the untapped resources flowing from character merchandising.

Untapped Resources

The Indian Entertainment Industry has witnessed massive growth with its revenue increasing every year at a compound annual growth rate of 15%. A gradual shift towards the digital medium has led to internet access being the second-largest source of revenue. It has also been revealed that internet advertising and internet access are projected to be the fastest-growing segments, with a Compound Annual Growth Rate of 28% and 21%, respectively.[8]

[5](2003) 2 Bom CR 655.

[6]CS (OS) No. 3032 of 2011.

[7]CS (OS) No. 893 of 2002.

[8]Pricewaterhouse Coopers, Report: *India Entertainment and Media Outlook* (Confederation of Indian Industry, 2014) *available at:* http://www.pwc.in/india-entertainment-media-outlook/index.jhtml (last visited on March 15, 2015).

Wide access to internet service, films and television indicates that the current demographic has been exposed to the movies, TV series, games, online books, etc. Additionally, today's youth also has a greater power of purchasing as they have access to money. All these factors have put a spotlight on character merchandising and its viable options to be introduced in the market.

The licensing and merchandising industry is fundamentally transforming the relationship between TV, movie characters, fictional characters, on the one hand and the viewers on the other. It is proving to be an emerging trend in the newly evolved market and stakeholders like Indian production houses, individual producers, celebrities, cartoonists, magazines, newspaper houses etc. can capitalize on this development with the consumers forming the major chunk of the current demographic. This will attract huge investment from both domestic as well as international investors in a market which has been known as a market with low risk and high returns.

Moreover, from a legal standpoint, there is a dire need to put in place a robust framework for regulating the sale of character merchandise. This presentation makes an endeavor to provide certain recommendations for infusing character merchandising in the Indian market.

Recommendations

The concept of character merchandising is riddled with legal complications owing to the lack of application and vagueness of the relevant legal framework in India. Therefore, it is strongly recommended that the law of character merchandising must be codified in India.

Character merchandising delves more into the Copyright Act, 1957 and hence it should be amended to expressly bring fictional and real characters under the purview of Copyright protection. It should also incorporate specific facets of a character's personality (voice, image, appearance, tag lines, actions, mannerisms, etc.), safeguarding them. Bearing in mind the evolving market conditions, the trademark law and Industrial design law should also be amended accordingly.

Whether or not a particular character is delineated enough to receive copyright protection depends upon the facts and circumstances of each case. If there arises any ambiguity in the legislation, the authorities laid down by several Courts on this issue can be relied upon.

Conclusion

Presently, the Indian market is at a very nascent stage for the sale of character merchandise. Keeping this in mind, there is a great potential for growth if the law on the subject is properly laid down by the respective authorities after extensive deliberation.

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Joint Ventures in India[#]

-Pabitra Dutta[*]

A Joint Venture (JV) may be described as an arrangement whereby two or more parties co-operate in order to run a business for achieving a common commercial objective. It can be of two types: (i) Equity-based, and (ii) Contract-based.

They are further classified into incorporated and unincorporated joint ventures. Incorporated JVs are formed when parties incorporate a new corporate entity or develop an existing corporate entity with investment in the same. Unincorporated JVs are essentially business relationships between parties which are usually based on contracts executed between such parties. An example of such type of JV would be an 'association of persons' or 'body of individuals'. JVs are present usually in the form of Company JV, Partnership JV, Limited Liability Partnership (LLP) JV, or Co-operation agreements. The law which shall govern the JV formed, depends on its final form, generally mentioned in the Joint venture Agreement (JVA).

The main advantage of entering into a JV is flexibility. Parties may make a JV with a single objective in mind, but over a period of time, they may diversify into other fields.

Purpose of Joint Venture

a. Leveraging resources: Bringing together the resources of both parties is probably the main purpose of making a JV. The local party would have knowledge about the existing local market conditions, and the other party from outside would bring its pool of resources.
b. Sharing Liabilities: Another important purpose is the sharing of liabilities among the parties, the share of liability to be incurred by the respective parties being decided by the JVA.
c. Business Diversification: Entering into a JV renders advantages to each party. The parties on their own accord may diversify into other field.

JV Transaction

a. Memorandum of Understanding: This is also known as the term sheet. This document lays down the brief outline of the JV and also the parties' intention to make it. It may be binding or otherwise as may be stated. A prima facie idea of the terms of the JV will also be laid down.
b. The JVA: The JVA governs the inter-se rights amongst the shareholders, and will mention their rights and future obligations in terms of management, funding, branding etc. of the JV. Final terms of the JV, reserved matters such

[#] This presentation was made on 12 January, 2015 at a session of the Corporate Law Cell of ILS Law College.

[*] IV. B.S.L, LL.B.

as appointment of KMP or capital structure, dispute resolution, etc. will also be stated. This is the most important document in an entire JV transaction. A JVA is between partners and does not bind the company unless its terms are included explicitly in the Articles of Association[1]. Hence, it is important to structure the JVA, to precisely state the liability of each of the entities involved. Further, it should also not be against the provisions of the Indian Contract Act.

c. Due Diligence: This investigates the status and true position of the parties.
d. Representation and Warranties: This clause basically ensures that all the representations made by the parties to each are true. They also seek to warrant each other about past encumbrances.
e. Non-Compete / Non-Solicit: Parties undertake that they shall not compete with each other and shall also not procure personnel from each other's entities.
f. Indemnity: The parties may also undertake to indemnify each other with respect to losses as specified in a JVA.
g. Limitation of Liability: The parties seek to limit their liabilities.
h. Shareholders' Agreement: This agreement decides the shareholding pattern of the parties.
i. Resolution of Deadlock: Parties resort to Arbitration, as it is faster and more efficient means to seek dispute resolution.

Tax issues

In India, taxation of income is governed by Income-Tax Act, 1961. It is a general principle of taxation that Indian Residents are taxable in India on the income which has been received world-wide, but Non-residents are taxed on only the income which has been received or deemed to be received or to arise in India. There may be some advantages of entering into JVs with Indian entities as tax exemptions may be claimed by a country if India has a Double Tax Avoidance Agreement (DTAA) with the other country, viz. Mauritius, Cayman Islands, Singapore, etc. Tax treaties override the tax laws of a country, a principle which has been discussed in detail in the *Azadi Bachao Andolan Case*.[2] Corporate tax rate @ 30% & DDT of 15% is levied on foreign companies. In JVs with foreign enterprises, the JV and foreign shareholders shall be considered associated enterprises on an arm's length basis. For partnership and LLP's 30% of both the tax rate and share of profit is exempt from tax in hands of partners. Any interest, salary, bonus etc. is taxable. If the JV has a branch office in India, then it shall be taxed @ 40%. If unincorporated JV are not structured properly, then they will be considered as AOI and rate of taxation can be as high as 40%.

[1] *V. B. Rangaraj. v. V. B. Gopalkrishnan.* (73 Comp Cas 201 SC 1992).

[2] *Union of India v. Azadi Bachao Andolan* (2004) 10 SCC 1.

Intellectual Property

This is one of the fundamental considerations in a JV. The ownership of the JV has to be determined beforehand. Also intellectual property post termination of the JV is also to be considered. Transfer of IP and its post-term use must be decided.

Competition Issues

Any combination which may cause or is likely to cause an appreciable adverse effect on competition within India shall be considered to be void.[3] Hence, before entering into any JV, it is imperative that the permission of Competition Commission of India (CCI) is taken. However, there are also some combinations which are exempted under the Act.

Exit or Termination from a JV

Generally in a JVA, the term of a JV is given and a provision for extension of the same is also stated. There can also be an exit from a JV in the form of an IPO, deadlock or breach of the terms of JV. The parties involved may decide to offer an IPO which shall effectively end the JV. They might also opt for third party sale, in which case the entire JV is sold to a new party altogether. The party may also incorporate rights such as Drag-Along or Tag-Along to stipulate the method of ending a JV.

JV is a popular method of doing business.

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[3]The Competition Act, 2002, s. 6.

Part Performance in Indian Property Law and its Anomalous Proviso[#]

-*Anand Saraf*[*]

The doctrine of part performance lays down a remedy for defense for the transferee, if he, after entering into a contract, performs his part or does any act in furtherance of the contract and the other party (transferor) drags his feet. s. 53A that provides this doctrine was added to the Transfer of Property Act by an amendment of 1929. It is an Indian adaptation of the English equitable principle of part performance as explained in *Maddison* v. *Alderson*,[1] and first applied in India through *Mohomed Musa* v. *Ashok Kumar Ganguli*.[2] The section (53A) is only available as a defense to a transferee, and not as conferring a right on the basis of which the transferee can claim a right against the subsequent lessee.[3]

According to this doctrine, where a person has taken possession of immovable property on the basis of a contract of sale, and he has either performed or is willing to perform his part of the contract, then he would not be ejected from the property on the ground that sale was unregistered and legal title has not been transferred to him.[4] For example, A contracts with B to sell his flat for an amount and accepts an advance from B towards the sale and hands over the possession of the said flat to B. While B was paying the amount in installment to A in furtherance of the contract, as the sale deed was unregistered, A decided to sell the flat to C in for the increased price. B can take the defense of s. 53A against the forthcoming dispossession. The text of the section reads as:

> ***53A. Part performance*** *— Where any person contracts to transfer for consideration any immoveable 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;*
>
> *and 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;*

[#] This presentation was made during a combined lecture for students of property law of II LL.B.

[*] II LL.B.

[1] (1883) 8 App. Cas. 467.

[2] (1914) 42 Cal. 801: 42 I.A.1.

[3] *Delhi Motors Co.* v. *U.A. Basurkar*, AIR 1968 S.C. 794.

[4] Dr. G. P. Tripathi, *The Transfer of Property Act* 226 (Central Law Publication, Allahabad, Fifteenth Edition, 2005).

and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that [5]*[***] where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor 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..."*

Essentials of Part Performance

The necessary conditions[6] for the application of this section are:

a. That there is a contract to transfer for consideration any immovable property.
b. That the contract is in writing and its terms are clear and precise.
c. That the transferee has partly performed his part of the contract and has taken possession of the property, or continues to be in possession, as the case may be.
d. That the transferee has done some act in furtherance of the contract.
e. That the transferee is ready and willing to perform his part of the contract.

The doctrine of part performance has evolved through time and different interpretations have been made with regards to the main part of this section, the meaning of 'willingness', the extent and scope of defense of the non-registered deeds etc. However, it is the proviso that is very less talked about or discussed when it comes to s. 53A.

The Proviso

The purpose of the proviso to s. 53-A merely is to defeat a claim which would otherwise have succeeded under the main part of the section. It reads as, "*Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract of the part performance thereof.*"[7] This has been explained by the Supreme Court in *Hemraj* v. *Rustamji*[8] where The Court states that this proviso saves the right of a transferee for consideration who has no notice of the contract of which there was part performance.

This basically means that any rights which the first transferee of the unregistered deed may have with effect of his part performance, would not be of any use

[5]Omitted by Act 48 of 2001, s. 10.
[6]*S. G. Mahadik* v. *Devi Sahai*, AIR 1982 SC 989. *See also*, Mulla on Transfer of Property Act pp. 284-296.
[7]Transfer of Property Act, 1882, s. 53-A, proviso.
[8]AIR 1953 SC 501.

against a *bona fide* subsequent transferee who had no notice of the transaction. Also, this would mean, as per s. 40[9] the first transferee would have to surrender his possession and the new transferee would acquire the title of the property. All he needs to do is, establish his entitlement as per the main part of the section i.e. take the possession of the property, in part, or in whole, in part-performance of the agreement and do some act in furtherance of the contract. And this would give him the indefeasible title to the property; provided (i) he has paid consideration for it; and (ii) he has no notice of the earlier contract or of its part performance.[10]

It needs to be noted that if the first transferee is already in the possession of the property, this proviso will not have a chance to operate, because of the constructive notice through possession of the first transferee. But, the first transferee may not always be in possession of property even after the deed. Sometimes a tenant may be in possession. In fact people owning multiple properties may not occupy them. And in this case it becomes easier for the transferor to make another sale deed for profit, without informing the subsequent transferee about the previous agreement or its part-performance thereof. Thus, the subsequent transferee fulfills the condition of not knowing about the previous contract or its part performance and gets the benefit of the proviso. It is the first transferee who loses. And no action can be brought against the transferor as this proviso makes the subsequent agreement valid.

In my opinion, there are three solutions to this anomaly of the proviso:

a. By amending s. 3 of The Transfer of Property Act, 1882, that possession by tenants shall also be considered as a constructive notice; and/or

b. There should be a provision which provides for action against the transferor who knowingly makes multiple sale deeds for his personal profit; or

c. The proviso itself should be removed from s. 53A.

The Amendment of 2001

Legislation has taken notice of this anomaly. In 2001, The Registration Act, 1908 was amended to include s. 17(1A) which provides: *"The document containing contracts to transfer for consideration of any immovable property for the purpose of s. 53-A of the Transfer of Property Act, 1882 shall be registered if they have been executed on or after the commencement of the Registration and Other Related Laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then they shall have no effect for the purpose of said Section 53-A."* This restricts the defense of part performance

[9]Transfer of Property Act, 1882.
[10]Dr. G.P. Tripathi, *The Transfer of Property Act* 246 (Central Law Publication, Allahabad, Fifteenth Edition, 2005).

only to agreements that are registered. This restriction applies to agreements made after the amendment. Thus, registration will automatically confer notice upon the subsequent transferee. The amendment however, is not retrospective and therefore the subsequent transferee of the unregistered sale deed done before this amendment still can take the defense of s. 53-A. Also, the amendment does not say anything about the liability of the fraudulent transferor.

Conclusion

The inception of the doctrine of part performance is from the following three maxims of equity – (i) He who seeks equity must do equity; (ii) Equity treats that as done which ought to have been done; (iii) Equity looks to the intent rather than to the form. But when you look closely at the application of the proviso, it seems to be contrary to these maxims, since either transferees can suffer.

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Legal Education Reforms for Enhancing Access to Justice - Particularly for the Poor and Marginalized Sections of the Society[#]

-Suransh Chaudhary[*]

Legal Education as an aspect of professional education has assumed considerable significance, and is the very soul of the society for administering the rule of law in a democratic country like India.

The main challenge facing India's legal and judicial system is ensuring that common people, particularly the poor and the marginalized sections of the society in India, are able to enjoy their constitutional and legislative rights to the fullest extent possible in a free and fair manner. This is certainly possible only when all the individuals in India have equal access to justice without any kind of discrimination. To this end, legal education should aim to prepare legal professionals who will play a decisive leadership role in meeting these challenges.

Primary Stage: Plotting a research agenda for educational reforms

One central problem in discussions about access to justice is a lack of clarity or consensus about exactly the problem. What should Indians, particularly the poor, deprived and marginalized sections have access to? Is it justice in a procedural sense: access to legal assistance and legal processes that can address law-related concerns? Or is it justice in a substantive sense: access to a just resolution of legal disputes and social problems?

Enhancing research on access to justice issues will require expanding the pool of potential researchers and the support available for their work. Law schools and funding organizations could play a more active role by inviting proposals and providing grants.

Secondary Stage: Executing an agenda for educational reforms

Legal education could play a more active role on access to justice issues, not only by supporting research, but also by integrating those issues into curricular and programmatic activities. Unlike medicine, which has well-developed courses, schools and concentrations devoted to public health, law does little to prepare practitioners to address structural problems in the delivery of legal services and the administration of justice. As a consequence, many students graduate without an informed understanding of how the law affects those who cannot afford to

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[#] Presentation at the First Law Student Conference, organized by the Society of Indian Law Firms (SILF) in association with MILAT (Menon Institute of Legal Advocacy Training) and NLSIU, Bangalore on 21st and 22nd February, 2015.

[*] IV B.S.L, LL.B.

invoke it. Some of the most important reforms in legal education which need execution, for enhancing access to justice; particularly for the marginalized and poor sections of the society are as follows:

Reframing of the curriculum content: Relatively few law schools offer specialized courses focusing on issues related to access to justice; and the topic is missing or marginal in the traditional core curriculum. Even legal ethics courses, which are logical forums for these issues, typically focus on the law of lawyering and often omit broader questions about the distribution of legal services particularly to the poor and deprived sections of the society. Very few law school graduates recall coverage of pro-bono obligations in their professional responsibility classes.

Emphasis on problem solving, negotiations and transactional practice to balance out the traditional law school curricular focus on litigation: Another thread of an agenda for legal education reforms should focus on the need for law graduates to be equipped with a broad range of lawyering skills when they enter the profession. The practical and the ethical-social dimensions of lawyering would be addressed holistically. This will enable them to solve the disputes among the deprived sections of the society at the grass root level, without getting engaged in litigation, thereby enabling such persons to not only seek quick justice, but also one which is simple and cost free.

Use of new technologies for learning: New communication technologies through the Internet offer opportunities for law students, faculty and practicing lawyers to support the learning process. The Internet provides a wealth of resources and diverse communications platforms to encourage peer interaction, collaboration and feedback from teachers and others. The specific treatment of strengthening support for law teachers for conducting legal and socio-legal research should be the centre-point of this particular reform.

Globalization of law schools and establishment of Global law schools: Another challenge facing legal education is the globalization of the existing law schools and establishment of global law schools which incorporate into legal education deep concern, knowledge, and skills to provide access to all segments of society; not only for those multi-national companies and individuals operating in a global context, but also access to justice for the marginalized for whom the global marketplace brings few, if any, direct benefits.

Building a bridge to connect theory aspects with practical aspects through means of Clinical Legal Education: Clinical legal education, grounded in the pedagogy of "learning by doing," engages law students in community-based legal work or simulations under faculty or other attorney supervision. Clinical legal education is essential to preparing law students to practice law effectively. Students also develop a sense of social justice and empathy through their work with disenfranchised groups. Indian law schools however, do not generally offer robust clinical legal education programmes.

Path-breaking research at the law-school level: "Path-breaking legal research to create new legal knowledge and ideas" must also be understood to include representation of India's poor people, to improve their access to justice. Access to justice includes access not only to dispute resolution but also access to education, means for meeting basic needs and other human rights for the poor sections of the society.

Conclusion

In order for the next generation of lawyers to address India's diverse priorities from support of its knowledge-based economy to representation of its farmers, women, children minorities, poor and marginalized sections of the society, law schools and the legal profession must guide students to address important domestic and globally shared problems. Greater discussion, planning and resource-sharing as discussed above within the scope and ambit of legal education is urgently needed to respond to these priorities.

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The Dispute of Sovereignty over the Spratly and Paracel Islands: An Overview#

-Namit Oberoy*

The Spratly Islands, known as 'Nansha' in China, 'Kalayaan' in the Philippines and 'Truong Sa' in Vietnam, form collectively a territorially disputed chain of islands located in the South China sea, home to some 100-230 scattered islands, isles, shoals, banks, atolls, cays, and reefs. The Paracels, known as 'Xisha' in Chinese and 'Hoang Sa' in Vietnamese, are a similar group covering approximately 15000 square kilometers of sea area, administered by the 'Hainan' Province of China. Both island groups have known to be uninhabitable, until recently.

Nature of the Dispute

The sovereignty over these two islands groups has been challenged by nation states since past few centuries. While China, Taiwan and Vietnam contest claims for sovereignty over the Paracels, six states including Malaysia, Philippines and Brunei, China, Taiwan and Vietnam have asserted their respective claims over the Spratly group. This race to seize sovereign control has been supplemented by several claims entailing legal and historic grounds, which are largely based on contentions of early occupation and use, discovery of islands, prolongation of continental shelves, etc. Diplomatic dialogues have been inconclusive; third party interests, such as those of United States, have been so as to resist military aggression by China.[1] The island chains are being seen as having substantial strategic and geopolitical significance by the respective claimants, and have witnessed military presence established now by all the actors, except for Brunei.[2]

Stakes

The island chains, spread over more than 410,000 square kilometers of ocean surface, are estimated to hold over ten billion tons of oil and one trillion cubic metres of natural gas reserves. According to an estimate by China, the largest military actor in the region, the hydrocarbon resources are to the tune of 17 billion resources, which would make the reserve bed the fourth largest in the world, ahead of Kuwait.

Presentation made in a special session 'Reassessing Ground Realities' at Pune Model United Nations Conference, 2014.

* IV B.S.L., LL.B.

[1] Gwynne Dyer, "Trouble brewing in South China Sea" *available at:* http://www.odt.co.nz/opinion/opinion/302738/trouble-brewing-south-china-sea (last visited on March 15, 2015).

[2] *Ibid.*

Collectively, the area encompasses one of the world's most productive grounds for commercial fishing, yielding up 7.5 tons of fish per square kilometer.[3] Since two decades, it has been accounted that the South China Sea contains around one-tenth of the total world catch. China predicts that the South China Sea holds combined fishing and oil and gas resources worth approximately one trillion dollars.[4]

Besides, the claimants are interested in the military advantage the islands provide in the region. While China's security interests mostly centre on resisting any expansion of Russia's influence and protection from sea-based attacks, it is well realized that the Spratlys, owing to their strategic location, could be effectively used to stop shipping in the South China Sea in the event of an armed conflict or diplomatic deadlock.[5] The islands are seen as a potential security asset, inviting keen attention from direct and indirect actors.

State Actors and their Claims

China: People's Republic of China claims the islands on historical claims of discovery and occupation. The Chinese case entails references dating back to 12th century during the regime of the Sung dynasty[6]. The problem with the principally historic case made by China is the question of whether proof of historic title validates sovereignty, and hence acquisition of a territory that a state does not exercise control over, in *status quo*. The attribute of effective occupation and permanent settlement is almost an essential in such claims, and China's case does not exhibit any such presence, making it inherently weak under international law.

Vietnam: The legal grounds for Vietnam's claims to the islands groups, together with maps, historical papers and documents, have been set out in two white papers issued in 1979 and 1982. Dates have been suggested during which it claims to hold title, from the 14th century. A map in 1838, identifying the Spratlys under a domestic Vietnamese name of Van Ly Truong Sa, has weakened their claims since the location has been given incorrectly on the released map. Their claims are also based the claims by right cession of the territory from a French claim in the early 19th century.[7]

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[3] Food and Agriculture Organization, "World Review of Fisheries and Aquaculture", Part 1, *available at:* http://www.fao.org/docrep/016/i2727e/i2727e01.pdf (last visited on March 15, 2015)

[4] *Ibid.*

[5] James Hardy, Krispen Atkinson *et. al.*, "China goes all out with major island building project in Spratlys", *available at:* http://www.janes.com/article/39716/china-goes-all-out-with-major-island-building-project-in-spratlys (last visited on March 15, 2015).

[6] Dr. Subhash Kapila, "Paracel and Spratly Islands: Conflict Resolution Impeded by China-Analysis" *Eurasia Review,, also available at:* http:// www.eurasiareview.com/27062014-paracel-spratly-islands-conflict-resolution-impeded-china-analysis (last visited on March 15, 2015)

[7] Daniel J. Dzurek, *The Spratly Islands Dispute: Who's on First?* 102 *IBRU* (1996).

Taiwan: Taiwan has been in occupation of "Itu Aba", the largest island of the Spratly group, since 1956. This control, uncontested for more than 40 years, may qualify as peaceful and continuous sovereignty of Taiwan, making their standing for the claim more sound in law. Other claims of Taiwan are based on historic principles and documentations, links with earlier use of the islands and inconsistent occupation and military presence.[8]

Philippines: Having stationed 595 marines on eight islands, the Philippines' claims to the Spratlys are based on a discovery in 1947, and a further proclamation in 1956, by Thomas Cloma.[9] The first official claim from Philippines came in 1971 in reaction to a violent exercise by Taiwanese forces against a Philippine fishing vessel, the claim being asserted on Cloma's claims.[10]

Malaysia: Malaysia's claims over twelve islands in the Spratly group are founded on international Ocean law principles, based on "seaward prolongation of continental shelf".[11] The essence behind these claims is that possession of a continental shelf by a state gives sovereign rights to any land formations that arise seaward from the continental shelf, which appears to be aloof from any sound interpretation of the 1982 Convention on the Law of the Sea (UNCLOS).

Brunei: Brunei's only claim to the Spratly group is to Louisa Reef, a naturally submerged formation. The claim is asserted on the same ground of seaward extension of a continental shelf, as that of Malaysia. However, what puts this claim at a legally different position is that the reef is a submarine feature and part of the seabed[12], as opposed to the land formations being permanently above sea level in the case of Malaysia.

With the recent upsurge in tension caused by Chinese military aggression and reluctance to negotiate, it has become imperative for peaceful negotiations to take place in presence of third parties. Judicial or extra-judicial methods may be chosen, but they are rendered unlikely prospects considering the stakes involved, as well as China's hestitation to refer the dispute to the International Court of Justice. At a time when a solution has become the most desirable, considering the lack of interference by indirect actors and absence of balance of power in the region, it remains highly improbable that the world will witness a decisive resolution of the issue in the near future.

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[8] Andrew Forbes, David Henley et al, "Vietnam Past and Present: The North" *Chiang Mai Cognoscenti Books* (ASIN: B006DCCM9Q) (2012) at 9.

[9] Christopher C. Joyner, "The Spratly Islands Dispute in the South China Sea: Problems, Policies, and Prospects for Diplomatic Accomodation", *available at:* http://www.stimson.org /images/uploads/research-pdfs/cbmapspratly.pdf (last visited on March 15, 2015).

[10] *See* John C. Baker & David G. Wiencek, *Cooperative Monitoring for South China Disputes: Satellite Imagery, Confidence Building Measures, and the Spratly Islands Dispute*, 324 (Praeger, 2002).

[11] Chia Lin Sien (2003), "Southeast Asia Transformed: A Geography of Change". *Institute of Southeast Asian Studies* (ISBN: 978-981-230-119-2) (2003) at 78.

[12] *Ibid.*

God's Dry Country – Analyzing the Merits of Kerala's New Liquor Policy[#]

-Raghav Venkatesh[*]

The coming fiscal year will mark the beginning of Kerala's long walk towards prohibition. Following in the footsteps of his predecessors both in India and around the world, the path chosen by Kerala Chief Minister Oommen Chandy is paved with good intentions.

In its nascent stages, the policy entailed the foreclosure of all bars operating in the non-five star category, along with enforcing a dry-day norm on the first calendar day of every month as well as on all Sundays. The initiative included gradually phasing out sale of liquor in the retail sector by winding up 10% of the existing Beverages Corporation (Bevco) outlets every fiscal year.

The Kerala High Court, having allowed 312 bars to continue functioning pending disposal of appeals, passed two orders removing 4-star and heritage establishments from the purview of the policy, and directing the state to temporarily renew the licenses of 4-star establishments. The dry day norm on Sunday was rolled back following the alarming 60% increase in retail purchase on Saturdays. In a further relaxation of the original scheme following employment and tourism concerns, non-five star liquor bars that had initially been closed or which remain open on the strength of court orders would be allowed to continue functioning as wine and beer parlours, subject to a strict emphasis on hygiene and monitoring.

Almost inevitably with this kind of principalistic manoeuvre, criticism abounds from various factions. The Church has traditionally stood for absolute prohibition on religious grounds, whereas housewives in Kerala view liquor as a tool for the perpetration of domestic violence and discord. As a result of the subsequent backpedalling on the policy, both parties are dissatisfied and have criticized the watered down stand taken by the government. Especially considering the urgent need on which the move was originally premised, with a report of the Alcohol and Drug Information Centre of Thiruvanthapuram stating that 44% of road accidents, 69% of crimes and 80% of divorce and domestic violence cases are alcohol related, there are concerns that such a diluted approach may not adequately address the identified harms. Even the Supreme Court, commenting on the government's decision to allow bars only in five-star hotels, recommended implementing a complete ban in the vein of the largely successful Gujarat model.

At the other end of the spectrum, hotel-owners, houseboat operators and other stakeholders in Kerala's Rs. 24,000 crore tourism industry gravely stress the economic ramifications of stifling employment and revenue in one of the state's

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[#] The presentation was made as delegate's opening remark in the NSIT Mock Parliament Delegate address on the 28th of March, 2014.

[*] IV B.S.L.,LL.B.

most significant contributing sectors. It is also feared that the ban will deter tourists and adversely affect Kerala's ability to host international conferences and other public events.

More neutral observers are apprehensive about the very idea of legislating against human desires, especially in a state like Kerala where the drinking culture, for better or worse, has become embedded in the fabric of society. The notorious failure of America's experiment with prohibition in the 1920s still looms large, having given rise to rampant organized crime and bootlegging as well as fostering a general disrespect for the law by forcing the ordinary citizen to become a law-breaker.

For Kerala to cultivate a similar trend would be entirely unwise, and it would seem advisable to approach the matter with a certain degree of compromise rather than force. Consider for instance the paradigms of the following counter model for alcohol regulation. In the first instance, retail purchase of liquor would be restricted to employed adults, in consonance with the existing legal drinking age of 21 years. Any working adults who wish to purchase retail liquor would have to register with the state government for a liquor license, at which time they would be required to disclose their personal information, place of employment and monthly salary amount. In order to be eligible for registration, all persons must meet the minimum stipulated monthly salary of Rs. 10,000. At the beginning of each calendar month, such registered persons could purchase a number of non-refundable, transferable units in the form of vouchers for an amount not exceeding 10% of their gross monthly salary. In this hypothesis, retail liquor shops would be entirely state owned and would accept only the aforementioned vouchers as a mode of payment. Meanwhile, sale of alcohol in the tertiary sectors would be limited to 5-star and heritage establishments, along with the toddy shops that continue to exist legally under the status quo.

The above model has many features. It curbs underage consumption of liquor by carefully restricting retail purchase to employed persons. The process of registration serves a dual purpose; preventing persons earning less than Rs.10,000 from purchasing retail alcohol on grounds of social expediency, while also ensuring that eligible persons are not able to purchase liquor in amounts that are excessive or disproportionate to their earnings, thus restraining addiction, inefficiency and domestic abuse. At the same time, it is ensured that access to alcohol for non-working adults is not altogether hampered, but perhaps only somewhat deterred, as they continue to have avenues for recreational drinking in the form of 5-star and heritage establishments. The taxation on alcohol generated from these establishments can be allocated towards public health campaigns to educate the society on the harms associated with excessive consumption.

In broad terms, if we accept that a government's mandate extends to protecting the welfare of its citizens and promoting the public good, then the Kerala government's impetus is perfectly legitimate. Whether the new policy can produce the desired changes, and to what extent, however, still remains to be seen.

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Legislations 2014-2015 : Highlights

The Citizenship (Amendment) Act, 2015

Sravya Darbhamulla, III B.S.L.

Provisions for registering as Overseas Citizens of India, and relaxation of rules concerning the acquisition of citizenship by registration.

The Amending Act benefits the wide Indian diaspora who wish to acquire and maintain a variety of dual citizenship. It unifies the People of Indian Origin (PIO) scheme and Overseas Citizens of India (OCI) scheme into one: that of an Overseas Citizen of India cardholder. This is not dual citizenship, as it confers no political participatory rights.

The OCI scheme entitled holders to a lifelong multipurpose, multiple entry visa. On the other hand,under the PIO scheme, applicable to those able to prove Indian descent in the preceding three generations, the visa was issued only for 15 years and requires the PIO to register with the concerned Foreigners Regional Registration Officer or Foreigners Registration Officer if stay exceeded 180 days. The Amending Act provides certain qualifications for registering a person as an Overseas Citizen of India, and gives bases for registration. Such a citizen can have a multiple-entry, multi-purpose life-long visa to visit India. Citizens of Pakistan, Bangladesh and other notified countries cannot apply for such citizenship.

Sections 7A, 7B, 7C and 7D have been substituted; these sections deal respectively with registration as an Overseas Citizen of India, conferment of and renunciation of such citizenship, and cancellation of registration as Overseas Citizens of India. The Act makes two important changes – (i) the concept of an Overseas Citizen of India cardholder, and (ii) secondly, the inclusion of spouses of foreign origin as eligible for registration as Overseas Citizens of India, provided such marriage has been registered and has subsisted for a continuous period of two years immediately prior to application for citizenship. Such spouse shall however be subject to security clearance from a competent authority. Overseas Citizenship can be cancelled by the Central Government if (i) the marriage is dissolved by a Court, or (ii) the spouse enters into another marriage even when the first marriage is not dissolved.

Rules for citizenship by registration have changed. These changes relax the duration of stay requirement for registration for persons of full age and capacity who were or whose parents were citizens of independent India, as also Overseas Citizens of India who have been thus registered for five years.

The Insurance Laws (Amendment) Act, 2015

Parvaz Cazi, IV B.S.L. LL.B

The Amending Act brings major reforms in the Insurance sector, the most important one being the hike in Foreign Direct Investment to 49%.

The Act enhances the foreign investment cap in Indian Insurance Companies from 26% to 49%. However these companies will be controlled by Indians. Control is defined in line with the FDI Policy to mean the right to appoint majority directors, to control management or policy decisions, etc.

Insurance companies can now raise capital through instruments other than equity shares. These will be prescribed by the IRDA. However, voting rights will belong only to the equity share holders. The four Government owned public sector non-life insurance companies are allowed to raise capital to expand their business, subject to government holding of 51 % at any time. Insurers need not maintain deposits with RBI, but must maintain solvency margin prescribed by the IRDAI.

Consumer friendly provisions include (i) higher penalties from 1 to 25 crores for mis-selling and misrepresentation, (ii) disallowing multilevel marketing of insurance products, (iii) period for repudiating a policy fixed at three years so that no policy can be challenged by the insurer after three years; (iv) easier process for payment to nominees of life insurance policies.

Assignments of policies may be absolute or conditional, but assignments not made *bona fide* in public interest, or made for trading insurance policies, are not allowed to be made. Every insurer is obligated to underwrite certain minimum percentage of its insurance business in third party motor vehicle insurance according to IRDAI Regulations.

The responsibility of appointing agents will be that of insurers, with IRDAI regulating their eligibility, qualifications and other aspects. Agents will now be able to work across companies in different business categories.

Health Insurance is now an exclusive field of insurance, separated from non-life insurance. and will include travel and personal accident cover. Capital requirements for health insurers will be Rs. 100 crores.

Foreign re-insurers (and also Lloyds) can set up branches in India after registering with IRDAI. Properties in India can now be insured with foreign insurers with prior permission of IRDAI.

Appeals against orders of IRDAI shall lie to the Securities Appellate Tribunal.

The Act removes many redundant provisions.

The Motor Vehicles (Amendment) Act, 2015

Samiha Dabholkar, V B.S.L. LL.B.

An amendment to include the 'e-cart' or 'e-rickshaw' within the purview of the Motor Vehicles Act, 1988.

The Government of the National Capital Territory (NCT) of Delhi had made a policy decision to exclude 'e-rickshaws' from the ambit of the Motor Vehicles Act, 1988, the Central Motor Vehicles Rules, 1989 and the Delhi Motor Vehicles Rules, 1993. This meant that e-rickshaws were exempt from registration, insurance and all the precautions necessary for motor vehicles. Pursuant to a writ petition filed in public interest, the Delhi High Court banned the plying of these rickshaws in Delhi as they were 'illegal'.[1]

The Central Government decided to lift this ban on e-rickshaws by promulgation of the Motor Vehicles (Amendment) Ordinance, 2015, passed in January, 2015. The Motor Vehicles (Amendment) Act, 2015 followed.

The sole purpose of the Amendment is to enable plying of e-rickshaws in the NCT of Delhi whilst maintaining the necessary level of road safety and security.

S. 2(A)(2) of the Amendment defines "*e-cart or e-rickshaws*" as "a special purpose battery powered vehicle of power not exceeding 4000 watts, having three wheels for carrying goods or passengers, as the case may be, for hire or reward, manufactured, constructed or adapted, equipped and maintained in accordance with such specifications, as may be prescribed in this behalf."

S. 7 of The Motor Vehicles Act, 1988 prescribes the requirements for attaining a learner's licence to drive public service vehicles. The Amendment adds a proviso to this Section, thereby exempting e-rickshaw drivers from this requirement. An additional sub-section, sub-s. (10), has been added to s. 9 which states that a driving license for an *e-rickshaw* shall be issued in a manner and subject to conditions prescribed by the Central Government. The Central Government can also lay down the specifications of the *e-rickshaws*.

The Amendment Act mitigates the losses of numerous *e-rickshaw* drivers and protects their primary source of income.

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[1] *Shanawaz Khan v. Municipal Corporation of Delhi*, W.P.(C) 5764/2013 decided on 9 September, 2014.

The National Judicial Appointments Commission Act, 2014

Sangh Rakshita, II B.S.L.

An Act to regulate the procedure for appointment of Chief Justice of India and other Judges of the Supreme Court and the High Courts

The two Bills – Constitution (One Hundred and Twenty First) Amendment Bill and the National Judicial Appointments Commission Bill were passed in 2014 by the Parliament to create the National Judicial Appointment Commission.

Article 124 and Article 217 of the Constitution provide that the Executive will appoint judges after consultation with the Judiciary. After the Three Judges' cases,[1] the Supreme Court prescribed a different procedure of appointment, whereby the Judiciary, through its Collegium consisting of the Chief Justice and two or four senior judges, would recommend names to the President, who was then bound by the decision of the Collegium.

The Constitutional Amendment inserted new articles in the Constitution i.e. 124-A, 124-B and 124-C, which provide for the creation of a Judicial Appointments Commission (JAC), and prescribed that the structure, composition and functioning of the JAC will be laid out in a separate law enacted by the Parliament i.e. NJAC Act. The Commission, as per Article 124-A, will consist of 6 members, namely- the Chief Justice of India, two other senior judges of the Supreme Court, the Union Minister of Law and Justice and two eminent persons. Out of the two eminent persons, one person will be from Scheduled Castes or Scheduled Tribes or OBC or minority communities or a woman. The two eminent persons will be nominated by a Committee consisting of the Chief Justice of India, Prime Minister of India and the Leader of Opposition in Lok Sabha for a period of three years, and will not be eligible for re-election. The Commission, as per Article 124-B, will recommend to the President names for appointment of judges of both the Supreme Court and the High Courts, and for transfer of High Court judges. The Commission is also to ensure that the person recommended is of ability and integrity. But much ambiguity remains with regards to the yardsticks of measuring merit and ability as well as the inadequately defined functions and operations of the National Judicial Appointment Commission.

Restoring parity between the Executive and Judiciary, which the Amendment and Act seek to do, is in accordance with rule of law and doctrine of separation of powers.

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[1] *S.P. Gupta and Ors* v. *Union of India*, AIR 1982 SC 149; *Supreme Court Advocates on Record Association* v. *Union of India*, (1993) 4 SCC 441; *Re: Presidential Reference*, (1998) 7 SCC 739.

The Public Premises (Eviction of Unauthorised Occupants) (Amendment) Act, 2015

Sruthi Darbhamulla, III B.S.L.

The Amending Act extends the scope of application to more premises and improves procedures for eviction from public premises.

The Public Premises (Eviction Of Unauthorised Occupants) Act of 1971 has been amended in 2015 to introduce a more efficient and expeditious eviction mechanism and to bring certain premises within the ambit of the Act. An earlier Bill seeking these amendments was referred to the Parliamentary Standing Committee (PSC) on Urban Development, which made some recommendations. Further, in the case of *S.D.Bandi* v. *Divisional Traffic Officer, Karnataka State Road Transport Corporation,*[1] the Supreme Court suggested 20 measures to expedite eviction processes. This Amending Act incorporates the recommendations and measures suggested.

S. 2 of the Act has been amended to expand the definition of public premises. The following are also brought under the ambit of the Act:

- (i) Companies in which 51 % or more of the paid up capital is held partly by the by one or more State Governments, including a subsidiary which carries on the business of public transport, viz. thus including metro railways. This is especially pertinent in light of the Delhi Metro Rail Corporation's request that its premises be included within the scope of this act and that its officers be conferred the powers of Estate Officers so as to effectively deal with the menace of unauthorised occupancy which has been a roadblock so far.
- (ii) Universities established under State Acts
- (iii) Board of Trustees under the Major Ports Trusts Act, 1963, and their Successor companies

The second set of changes pertain to improvement of eviction procedures. This includes setting time- frames for issuing orders, show cause notices, and disposal of cases.

S. 4 has been amended to specify a time frame of seven days after receipt of information about unauthorised occupation of public premises within which the Estate Officer should issue a show cause notice to such person. Delay in doing so would not vitiate proceedings under this Act. According to the amended provision, the occupant must show cause within a maximum of 7 days, as opposed to the previous stipulation which set 7 days as the minimum limit.

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[1] Civil Appeal No. 4064/2004 decided on 5 July, 2013.

S. 5 is amended to set a limit of 15 days for eviction of the premises after issuance of the order. Further it is provided that the Estate Officer should ensure that the order is issued within 15 days after the date specified in the show cause notice. There can be a further extension of 15 days if there exists any compelling reasons preventing vacation within 15 days.

S. 7 which relates to the payment of arrears in rent and damages sees provision for compound interest instead of simple interest.

Amendments in s. 9 stipulate that the appellate officer should endeavour to dispose of cases, finally, within one month of filing the appeal.

The Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act, 2014

Sheethal Menon, I B.A. LL.B

An act to protect the rights of street vendors and to regulate the business of street vending in public areas.

The Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act 2014 provides for protection of livelihoods, rights, social security of street vendors and for regulation of urban street vending in the country.

This Act provides for aTown Vending Committee (TVC) for every local authority, and each TVC is to survey the street vendors (14 years and above) and provide them with a certificate of vending. This certificate of vending is a grant of authorization from the TVC permitting them to engage in street vending. The certificate of vending will carry certain terms and conditions of vending which the street vendors must adhere to.

The Act also requires the identification of vending zones, which are areas officially designated for the purpose of street vending, and the determination of the holding capacity of each vending zone.

In case of a grievance or a dispute, the street vendor may make an application in writing to the committee to be formed by the Government; its Chairperson should have been a civil judge or a judicial magistrate..

To safeguard vendors, s. 27 of the Act provides for protection of street vendors from harassment by police and other authorities, and assures that they carry on their business without the fear of harassment by authorities under any other law.

The provisions of this Act have kept the Railways outside its purview, although vending is an integral part of a Railway.

The Telecom Regulatory Authority of India (Amendment) Act, 2014

Sravya Darbhamulla, III B.S.L, LL.B

The Amending Act changes the restrictions on post-retirement employment of the Chairman and whole-time members of TRAI.

The TRAI (Amendment) Act, 2014 replaces an earlier Ordinance amending the Telecom Regulatory Authority of India Act, 1997, and is deemed to have come into effect on the 28 May, 2014, the date of the Ordinance.

This Amendment Act has only replaced sub-s. 8 of s. 5 of the TRAI Act and deleted the explanation to the section. It seeks to relax certain restrictions with regard to the employment of former Chairpersons and whole-time members after their employment at the TRAI. Former Chairpersons and whole-time members were, under the unamended Act, totally debarred from employment in the State or Central Governments (unless with the previous approval of the Central Government). The Amendment mitigates this absolute bar by reducing the bar to a period of 2 years (or less).

Further, it places a bar on employment in the business of telecommunication services, and increases this bar from the previous one year period to two. It however restricts employment only in this sector, relaxing completely bars on other types of commercial employment.

By deleting explanation to s. 5,[1] the Amending Act effectively removes all bars on immediate employment in other commercial concerns in all the positions or capacities specified therein.

[1] *"For the purposes of this section "commercial employment" means employment in any capacity under, or agency of, a person engaged in trading, commercial, industrial or financial business in any field and includes also a director of a company or partner of a firm and it also includes setting up practice either independently or as partner of a firm or as an adviser or a consultant".*

The Whistle Blowers Protection Act, 2011*

K. Ravalee, III B.S.L.

Our country's first law to safeguard the interest of those who expose corruption and other malpractices by public servants.

Whistle blowers are persons who expose illegal and unethical conduct by public functionaries. In response to a petition filed in 2003[1] after the murder of the renowned whistle blower Satyendra Dubey, the Supreme Court directed that a machinery be set up temporarily, till a law was enacted, for acting on complaints received by whistle blowers. In response to this the government notified a resolution, Public Interest Disclosures and Protection of Informers Resolution, 2004, and designated the Central Vigilance Commission (CVC) as the nodal agency. This Act followed.

The Act provides mechanisms to receive complaints against public servants and to inquire into such disclosure. It also provides safeguards against victimisation of complainants.

According to the Act, 'complainant' is any person who makes a complaint relating to disclosure. 'Disclosure' is a complaint, relating to corruption, any criminal offence or wilful misuse of power that leads to loss to the government or gain to the public servant. The disclosure must be made in writing or by email.

The Act provides for public interest disclosure by any public servant or person or NGO to the Competent Authority. The Act gives a list of Competent Authorities with reference to various departments.The disclosure must be made in good faith. The person making disclosure must state that he reasonably believes the information to be true. He must disclose his identity; anonymous disclosure is not entertained..

The Act states the procedure for inquiry into the disclosure. The Competent Authority must conceal identity of the complainant, unless he is required to do so for the purposes of investigation. If he refuses for revealing his identity, he must provide documentary evidence in support of the complaint. The Competent Authority will seek comments and explanations, and then can initiate proceedings against the public servant, recommend initiation of criminal proceedings or corrective measures, or take steps to redress the loss caused to the government.

If complaint is made seven years after the date of the action complained of, the Competent Authority will not investigate it.

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* No 17 of 2014, notified on 9 May 2014.

[1] WP (C) No. 539 / 2003.

The Act provides that matters tht will prejudicially affect interest of souvereignty of India, foreign relations, public order, decency, morality etc shall be exempt from disclosure.

A complainant can complain to the Competent Authority for redress if he is victimised for making a disclosure, after which it will give instructions to protect such person from being victimised.

The Act provides for penalties for furnishing incomplete or incorrect comments or information, for revealing identity of the complainant, false and frivolous disclosure. Appeals from orders imposing penalty lie to the High Court.

The Act seeks to protect both the complainant and the Public official in the following way:

	Complainant	Public Official
Identity	Identity of the complainant shall not be disclosed by the Competent Authority, unless deemed necessary.	Anonymous complaints shall not be entertained by the Competent Authority.
Penalties	Unnecessary revelation of identity attracts a fine upto Rs. 50,000 and imprisonment upto 3 years.	A frivolous and false complaint calls for a fine upto Rs. 30,000 and imprisonment upto 2 years.

Although the Act is passed, its Rules have not been notified yet.

Judicial Pronouncements 2014-15 - Highlights

Arbitration Law

Associate Builders v. Delhi Development Authority[1]

Namit Oberoy, IV B.S.L. LL.B.

Supreme Court clarifies the scope of judicial interference with an arbitral award, narrows the scope of 'Public Policy' as a ground for setting aside

Associate Builders (appellant) was awarded a tender by Delhi Development Authority (DDA - respondent) for construction of houses for low and middle income groups to be completed in 9 months at a cost of Rs. 87 lakhs. The construction was completed 25 months after the stipulated period. Associate Builders alleged that the delay was caused at the instance of DDA, and brought claims before the arbitrator appointed by Delhi High Court for escalation of costs arising because of the delay and for related damages. The arbitrator accepted Associate Builders' claims of Rs. 23 lakh out of the total claim of Rs. 37 lakh.

DDA applied under s. 34 of the Arbitration and Conciliation Act, 1996 (the Act) to the Delhi High Court for setting aside the award. The Court dismissed the application. In further appeal, the Division Bench of the High Court set aside the award dismissing the Single Judge's decision on five claims.

Associate Builders preferred this Special Leave Petition before the Supreme Court on the ground that the Division Bench acted as a court of first appeal, and considered on merits those facts which were neither pleaded nor proved before the arbitrator. The Division Bench also disregarded the position of law settled by precedents,[2] and failed to appreciate that the scope of judicial interference for setting aside an award under s. 34 was limited. The DDA contended that the arbitrator ignored contractual provisions, which gives rise to a jurisdictional error by the arbitrator.

The Supreme Court allowed the appeal and held that the grounds of setting aside an award are limited by s. 34, and even if the merits of the award are to be considered under the ground "public policy", the judgment did not qualify any of

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[1] (2015) 3 SCC 49.

[2] *Renusagar Power Co. Ltd.* v. *General Electric Co* 1994 Supp (1) SCC 644; *ONGC* v. *Saw Pipes Ltd.* 2003 (5) SCC 705; *Mcdermott International Inc.* v. *Burn Standard Co. Ltd.* 2006 (11) SCC 181.

the interpretations laid down by the Court. It opined that it was not appropriate for the Division Bench to investigate into errors of facts, since the Act makes it evident that the arbitrator is the sole judge of the quality and quantity of the evidence brought before him.

Hyder Consulting (UK) Ltd. v. Governor, State of Orissa[3]

Namit Oberoy, IV B.S.L. LL.B

Post-award interest can be awarded by an arbitral tribunal on pendente lite interest.

The dispute in this appeal from the Orissa High Court raised a question of much debate in Indian arbitration law: whether, within the scope of s. 31(7) of the (Indian) Arbitration & Conciliation Act, 1996, post-award interest can also be awarded on interest *pendente lite* in addition to interest on the principal sum of the arbitral award. A three-judge bench was constituted to reconsider the judgment of the Supreme Court in *State of Haryana* v. *S. L. Arora and Company*,[4] where it was declared that an award of interest on interest, from the date of the award, is not permissible under s. 31(7)[5] of the Act.

In the initial arbitration proceedings, an award of Rs. 2 crores was passed in favour of Hyder Consulting (appellant). In execution proceedings, the Judge ordered payment of Rs. 8 crores, which included interest on the initial principal sum, as well as interest *pendente lite* on the interest on the award. In appeal, the Orissa High Court quashed the order of the Judge, holding that it the order did not follow the judgment of the Supreme Court in *State of Haryana* v. *S. L. Arora and Company*. Hyder Consulting moved the Supreme Court, and the matter was referred to the three-judge bench, because it was necessary to consideration conflicting judgments on this issue.

Justices A. Bobde and A. M. Sapre, gave their majority view that the term "sum" in s. 31(7)(a) of the Act includes the principal sum, as well as interest on the principal sum, the language of the section being abundantly clear to that effect. A comparison with s. 34 of the Arbitration & Conciliation Act revealed that there exists a clear difference in the language of the two sections: while in s. 34 of the CPC, the Court has been empowered to award interest on the "principal sum", the word "principal" is clearly omitted in s. 31(7)(a), showing that interest on interest is covered in the said definition.

On the other hand, Chief Justice H. L. Dattu was of the opinion that the term "sum" is to be accorded its ordinary meaning, and perused a number of sources to conclude that the word "sum" necessarily implied principal sum, and did not include "interest" within its meaning. He provided a different interpretation to the s. 31(7): stating that by the intention of the legislature, the various uses of word "interest" only imply simple interest, and not compound interest.

The Supreme Court overruled the decision in *State of Haryana* v. *S. L. Arora and Company*.

Kolkata Port Trust v. Louis Dreyfus Armatures SAS[6]

Gayatri Dharmadhikari, IV B.S.L. LL.B

An anti-arbitration injunction can be granted.

KPT (Petitioner) has a operation and maintenance contract with HBT. HBT is a subsidiary of ALBA, an Indian Company, in which Louis Dreyfus Armatures SAS (LDA) (Respondent), a French Company has 49% holding, and ABG, an Indian Company, have 51% holding.

Claiming breach of the maintenance contract, HBT commenced domestic arbitration against KPT, in which KPT made a counter-claim. In the meantime, LDA issued notice of claim to the Government of India, State of West Bengal and KPT under a bilateral investment treaty (BIT) between France and India. A notice of arbitration followed. India disputed the right of LDA to invoke the BIT. KPT was not named as party in this arbitration, but received notices from the Arbitral Tribunal. KPT filed proceedings in Calcutta High Court seeking injunction restraining LDA from proceeding with its claim and arbitration under the BIT mainly on two grounds:

(i) The arbitration clause in the BIT was inoperative, and
(ii) KPT not being party to the BIT, could not be dragged into the arbitration under BIT.

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[3] Civil Appeal No. 10531 of 2014, decided on 25 November, 2014 (Supreme Court).

[4] (2010) 3 SCC 690.

[5] *31(7)(a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.*

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment.

[6] G.A. 1997 of 2014 and CS No. 220 of 2014 decided on 29 September, 2015 (Calcutta High Court).

The question before the Court was whether anti arbitration injunction can be granted in the given circumstances. The Calcutta High Court answered this question in the affirmative.

The Court held that the arbitration under BIT was only enforceable against government of India and not against KPT. The fact that under certain circumstances the State may be responsible under International Law for the acts of one of its local authorities, or may have to take steps to redress wrong committed by one of its local authorities is applicable in the instant case. Hence KPT could not challenge the arbitration under BIT.

However, the Court accepted the second ground, and restrained LDA from proceeding in arbitration against KPT.

The Court also stated circumstances under which an anti-arbitration injunction could be granted:-

(i) If an issue is raised about the existence of a valid arbitration agreement between the parties, and the Court is of the view that no such agreement exists.

(ii) If the arbitration agreement is null and void, inoperative or incapable of being performed.

(iii) If the continuation of foreign arbitration proceeding might be oppressive or vexatious or unconscionable.

Oil & Natural Gas Corporation Ltd. v. Western GECO International Ltd.[7]

Sumedha Giridharan, IV B.S.L. LL.B

The widened scope of "public policy", renders arbitral awards more prone to judicial intervention by Courts.

Western GECO International Ltd (GECO) contracted with Oil & Natural Gas Corporation Ltd (ONGC) to upgrade steamers and to fit them with hydrophones of US origin. GECO could not fulfil contractual obligations due problems in obtaining licence from US authorities, and proposed substitution by Canadian hydrophones. After prolonged communications, the ONGC agreed to the substitution subject to ONGC deducting liquidated damages from the invoice amount. GECO contended that deductions made by ONGC were inflated. The Arbitral Tribunal held that in view of the reasons for delay, the deduction made

[7] (2014) 9 SCC 263, 2014 AIR SCW 5727

by ONGC was unjustified. The Bombay High Court refused to set aside the award. ONGC filed this appeal in the Supreme Court.

The Supreme Court referred to s. 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996 that allows setting aside of an award if the Court finds that the "arbitral award is in conflict with the public policy of India", and the *Saw Pipes* decision[8] that has held that an award could be set aside on this ground if it violated the "fundamental policy of Indian law". The Supreme Court observed that an exhaustive enumeration of what would constitute the fundamental policy could not be made. It stated that the phrase "public policy of India" must be given a wider meaning as it connotes matters of public interest. Fundamental policy meant (i) taking a 'judicial approach' which involves the application of judicial mind by the authority and ensuring that it acts bona fide and deals with the subject in a fair manner, (ii) holding on to the principles of natural justice, and (iii) a decision which is irrational that no reasonable person would have arrived at the same will not be sustained in a Court of law. The Court observed that the arbitrator's decision in clubbing the entire period of delay was an error resulting in miscarriage of justice, and hence the award was modified by disallowing deduction for part of the period of delay.

Rakesh Malhotra v. Rajinder Kumar Malhotra[9]

Kalpesh Dhongade, II B.S.L.

Claims of oppression and mismanagement cannot be referred to arbitration.

The Supermax Group, the world's second largest razor manufacturing company, was run by Rajinder Kumar Malhotra (RKM - respondent). Following restructuring in 2008, all the business and assets of the Indian companies were transferred to a new company controlled by Rakesh Malhotra (Rakesh – appellant), the eldest son of (RKM).

During restructuring, all agreements gave Rakesh the sole authority to represent RKM in all transactions. Rakesh also had the authority to operate bank accounts. The subscription and shareholding deed between the parties had an arbitration agreement. By the restructuring, all directors of the Indian companies held by RKM became employees of the company held by Rakesh. Rakesh did not thereafter give any information to RKM about the use of funds and other liabilities he incurred.

RKM filed many petitions before the Company Law Board under ss. 397, 398 read with 402 of the Companies Act, alleging oppression and mis-management,

[8] *Oil and Natural Gas Corpn. Ltd. v. SAW Pipes Ltd* AIR 2003 SC 2629

[9] Company Appeal (L) No. 10 / 2013 decided on 20 August, 2014 (Bombay High Court).

and sought wide orders of removal and appointment of directors etc. Rakesh sought orders to refer the dispute to arbitration under s. 45 of the Arbitration and Conciliation Act, 1996 (the Act). The CLB dismissed applications of Rakesh, holding that reference could not be made to arbitration in case of allegations of oppression and mismanagement.

Rakesh contended that since s. 45 merely refers to disputes, and not to any particular relief or powers. Hence reference must be made regardless of the kind of relief sought from the arbitral tribunal. RKM replied that powers under s. 402 of the Companies Act were inherently incapable of being referred to a private dispute resolution tribunal.

The Bombay HC held that since the operative word in Ss. 8 and 45 of the Act appears to be "matter" under an arbitration agreement, they are not capable of being referred to arbitration, having regard to the nature and scope of the power invoked.

Swiss Timing Ltd. v. Organizing Committee, Commonwealth Games[10]

Namit Oberoy, IV B.S.L. LL.B

Allegations of fraud are arbitrable, and civil and criminal proceedings may run simultaneously.

The application arose out of a contract entered into by the Organising Committee of Commonwealth Games (Committee - respondent) with Swiss Timing Ltd. (STL - petitioner) for provision of services to determine scores, timing, results systems and other incidental services during the Commonwealth Games in Delhi in 2010. STL raised allegations against the Committee for heavy defaults in payment of invoices and other amounts, and nominated their arbitrator according to the terms of their arbitration agreement. After receiving no response, STL sought reference of the court for constitution of an arbitral tribunal.

The Committee, alleged that the contract stood null and *void-ab-initio*, as STL had engaged in corrupt and fraudulent practices in procuring the contract. The Committee also substantiated its allegation with reference to the ongoing criminal proceedings against Mr. Suresh Kalmadi, former chairman of Committee. The Committee placed strong reliance on the decision in *N. Radhakrishnan* case,[11] where the Supreme Court had held that questions about fraud should be tried in a court, and not in arbitration. The Committee also

[10] (2014) 6 SCC 677

[11] *N. Radhakrishnan* v. *Maesto Engineers* (2010) 1 SCC 72

submitted that due to the pendency of criminal proceedings, arbitration could not be proceeded with, since there would be a 'real danger of conflicting conclusions by two fora, leading to unnecessary confusion'.

The Court held the decision in *N. Radhakrishnan case* to be erroneous and *per incuriam*, because it did not take into account the existing position of law at the time as laid down in *Hindustan Petroleum* v. *Pinkcity Midway*[12] and *Anand Gajapathi Raju v. P. V. G Raju.*[13] The Court underlined the importance of following the policy of minimum judicial interference in arbitration proceedings, by reiterating provisions of s. 5 of the Arbitration Act.[14] The Court held that no hard and fast rule could be laid down that civil proceedings in all matters ought to be stayed when criminal proceedings were pending. The Court therefore constituted a three-member arbitral tribunal.

Vikram Bakshi v. McDonald's India Pvt. Ltd.[15]

Harish Adwant, III B.S.L.

The plea of forum non conveniens was upheld, and arbitration clause held to be waived due to filing of ss. 9 and 45 arbitration petitions

The Delhi High Court granted an anti-arbitration injunction, restraining the defendants from pursuing arbitration proceedings before the London Court of International Arbitration (LCIA).

Vikram Bakshi (Plaintiff) was appointed as Managing Director of Connaught Plaza Restaurants Pvt. Ltd. (the Company), formed under the Joint Venture Agreement (JVA) between Bakshi's Company (also plaintiff) and McDonald's India Pvt. Ltd. (McDonald's - Defendant). In 2013, the plaintiffs filed a Company Petition[16] before the Company Law Board (CLB) citing oppression and mismanagement. The CLB directed McDonald's to maintain status quo of the share holding pattern in the Company. Hence, McDonald's terminated the JVA and invoked the arbitration clause. The plaintiffs filed a suit before the Delhi High Court praying for a declaration and mandatory injunction against the arbitration proceedings initiated by McDonald's before the LCIA.

[12] (2003) 6 SCC 503

[13] (2000) 4 SCC 539

[14] S. 5: *Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.*

[15] IA No. 6207 / 2014 in CS (OS) No. 962 / 2014 decided on 22 December, 2014 (Delhi High Court).

[16] Company Petition 110/ND of 2013

Plaintiffs contended that termination of the JVA pending the *status quo* order of the CLB has rendered the arbitration agreement vexatious and oppressive and that the LCIA was a *forum non conveniens*. McDonald's contented that there was abuse of due process of law because of undue judicial intervention.[17] Relying on the *Kompetenz-Kompetenz* principle,[18] McDonald's contended that the parties had expressly agreed to London as the seat of arbitration and that of principle of *forum non conveniens* is inapplicable.

The Court granted ad interim anti–arbitration injunction. Upholding the argument for *forum non conveniens*, it observed that the arbitration agreement was *prima facie* inoperative and incapable of being performed, and that continuation of the arbitration proceedings would lead to conflicting judgments. McDonald's had effectively waived the arbitration clause, and submitted to the jurisdiction of the CLB and the Indian courts by previously filing (albeit subsequently withdrawing) applications made under s. 45 and s. 9 of the Arbitration Act.

[17] Arbitration and Conciliation Act, 1996, s. 5.
[18] *Ibid.*, s. 16.

Competition Law

Bengal Chemist and Druggist Association[1]

Neethika Gandhi, III B.S.L.

A concerted action to fix a uniform trade margin by an agreement between the members of the association violates the Competition Act.

The Competition Commission of India (CCI) received information via e-mail that the Bengal Chemist and Drug Association (BCDA), an association of wholesalers and retail sellers of drugs and affiliated to the All India Organization of Chemists and Druggists, was engaged in determining the sale price of drugs and controlling its supply in the market in a concerted manner, and also issuing anti-competitive circulars directing the retailers not to give any discount to consumers. A Reference Case (No. 01 of 2013) was filed by Dr.Chintamoni Ghosh, Director, Directorate of Drugs, West Bengal alleging that BCDA was indulging in issuing anti-competitive activities. The Competition Commission of India pursued the enquiry suo moto under s. 19(1) of the Competition Act, 2002, ("Act").

The primary issue was whether BCDA was an 'entity' under s. 3(3) read with s. 2(h) of the Act, whether the alleged activities by BCDA would amount to violation of s. 3(3), and whether the office bearers of BCDA could be held liable under s. 48 of the Act.

Dealing with the first issue the CCI stated that BCDA is an enterprise u/s.2 (h) as its Memorandum of Association clearly mentioned that only those persons, firms or companies carrying on business of dealers of medicines and having a drug license could become ordinary members. Thus every member of BCDA was actually a person carrying out economic activity covered by s. 2 (h) and any action taken by an association of enterprises is covered by s. 3 (3). The CCI held that the concerted action by BCDA to fix uniform trade margin by an agreement amongst the members of the trade association is in contravention of s. 3(3)(a) read with s. 3(1) as they cause restraint of trade, stifle competition and harm the consumers.

CCI observed that the provisions of s. 27 were sufficient to make the office bearers of BCDA liable. Additionally, BCDA was a body corporate registered under s. 25 of the Companies Act, 1956 and provisions of s. 48 were undeniably applicable to it.

[1] Ref. case no. 01 of 2013, decided on 11 March 2014 (Competition Commission of India).

Thus, the CCI not only penalised the BCDA but also all 78 of its senior office bearers to be personally liable for ratifying the anti-competitive practices of BCDA. It imposed a fine of Rs. 18.38 crores on the BCDA.

With this order the CCI has been successful in lifting the corporate veil based on the fact that the conduct of a company is the result of the decisions taken by its directors/ office bearers. This power is to bind the office bearers / individuals is given to the CCI u/s. 48 (1) and (2) of the Competition Act, 2002.

Cinemax India Limited v. Film Distributors Association[2]

Sakhi Sahu, III B.S.L.

The uniform revenue sharing pattern, and imposition of fines on members who did not comply with the terms and conditions of the Film Distributors Association, has an adverse effect on competition and violates s. 3 of the Competition Act.

Film Distributors Association (Kerala) (FDA) , the single largest association of distributors of Kerala instructed all movie distributors to stop the supply of Malayalam, Hindi and English films to Cinemax India Ltd. (the Informant), as it did not approve the new revenue-sharing terms laid out for Malayalam movies by the distributors. Cinemax filed a complaint before the Competition Commission of India (CCI) against FDA under s. 19(1)(a) of the Competition Act, 2002 (Act), being barred from screening Malayalam films.

The issue involved was whether FDA had contravened s. 3 of the Act. Investigation by the Director General (DG) concluded that the allegations relating to infringement against the FDA were true, and the revenue sharing mechanism was in fact imposed unilaterally on Cinemax. Also their activities were found to directly fix the revenue sharing arrangement among the distributors and exhibitors, which had the effect of limiting the market. This contravened s. 3(3)(a) and (b). Also, the very act of fixing the pre-determined price together with the use of its position to coerce Cinemax and other Film Exhibitors for such arrangements violated ss. 3(3) and 2(c) of the Act which deal with the formation of cartels. FDA filed its objections.

The CCI stated that FDA falls under the definition of an association of distributors / enterprises under s. 3 of the Act. Dealing with the preliminary objection of FDA of violation of its fundamental right to form association under Art. 19(1)(c) of the Constitution of India, the CCI explained that if the impugned conduct would have a harmful effect on competition, the same needed to be examined under the relevant provisions. It had also verified that FDA was directly involved in implementing the fixed uniform revenue sharing pattern and had stopped the screening of all movies in the theatres which did not accept its terms and conditions. It had also imposed fines on its members which did not implement their terms.

The CCI held that once it is established under s. 3(3) of the Act that an Association exists, the onus lay on FDA to rebut the presumption that agreement had no adverse impact on competition, which the FDA failed to do. FDA had failed to show how the impugned conduct resulted into accrual of benefits to consumers, or made improvements to the goods, and how the said conduct did not foreclose competition. The CCI directed FDA to cease from indulging in the acts or conduct contravening the provisions of ss. 3(3)(a) and (b) read with s. 3(1) of the Act, and imposed a penalty of Rs.75,315.

[2] Case No. 62 of 2012 decided on 23 December, 2012 (Competition Commission of India).

In Re: Faridabad Industries Association and Adani Gas Limited[3]

Nikhila Settipalli, III B.S.L.

Adani Gas Ltd. fined Rs. 256 million for engaging in anti-competitive practices.

Information was filed under s. 19(1)(a) of the Competition Act by Faridabad Industries Association (FIA) against Adani Gas Limited (AGL); alleging that the terms of the Gas Sales Agreement (GSA) were biased and in contravention of s.4 of the Act. The Competition Commission of India (CCI) directed its Director General (DG) to investigate into the matter and submit a report.

After investigation, the DG concluded that AGL was in a dominant position in the relevant market as per s. 4 (a) of the Act and observed that a few of the clauses imposed unfair conditions. The Informant submitted that Clause 9.4 of the GSA prevented the consumer from demanding the quality certificate from the AGL's supplier or from demanding corroboration of the same. It further submitted that Clause 11, under which AGL cannot be held liable even if it fails to supply gas, was unreasonable.

AGL raised a preliminary objection on the maintainability of the complaint alleging that the Informant's issues were under the purview of contract law and not under competition law. It also challenged the DG's interpretation of the term

[3] Case No. 71 of 2012, decided on 3 July, 2014 (Competition Commission of India).

"relevant market" and clarified that since natural gas is substitutable, the relevant market ought to include substitutable products as well.

However, the CCI rejected this claim and held that the relevant market was that of the supply and distribution of natural gas to industrial consumers in Faridabad. Since AGL was the only entity allowed to supply natural gas by the State Government; the CCI held that AGL did enjoy a dominant position.

The CCI however rejected FIA's first allegation and held that the AGL was just a supplier and that they get a quality certificate from GAIL which is readily available to the consumers. While the CCI stated that clause 11 of the GSA was not unfair or unreasonable, it observed that the fact that AGL had no obligation to pay interest on any amount that is to be reimbursed to its customers was an unfair condition. As a result, AGL was ordered to cease and desist from indulging in the violating conduct and to modify its GSA accordingly. The Commission decided to impose penalty of Rs 256 millions on AGL.

Indian Sugar Mills Association v. Indian Jute Mills Association[4]

Ritika Chatterjee, V B.S.L., LL.B.

The Indian Jute Mills Association's practices held to be anti-competitive.

Along with others, the Indian Sugar Mills Association (ISMA) filed information against the Indian Jute Mills Association (IJMA) and Gunny Trade Association (GTA) before the CCI under s. 19 (1) (a) of the Competition Act, 2002 alleging the contravention of s. 3 of the Act.

The Jute Packaging and Materials (Compulsory Use in Packaging Commodities) Act, 1987 made it mandatory to use jute bags for packaging commodities like sugar. By this statutory provision, IJMA and GTA were enjoying a monopoly, since there was no competition from manufacturers of substitutes like HDPE / PP bags. ISMA alleged that members of IJMA were colluding among themselves and were arbitrarily fixing prices of various jute bags after formal discussions, meetings. They fixed sale price for IJM and GTA members through a Daily Price Bulletin (DPB) of the GTA; thereby limiting the technical development, limiting and controlling production and supply of jute bags.

Refusing the existence of any such agreement / arrangement, both IJMA and GTA contested the procedure by comparing the prices of BTWILL and ATWILL bags to show the stark difference between the two. They further contended that

[4] Case No. 38 / 2011 decided on 31 October, 2014 (Competition Commission of India).

DPB's price quotations were recommendatory in nature and they were based on market trends and economic factors.

However, on conducting investigation, the Director General found that the IJMA and GTA had violated s.3 of the Act. Concurrently, the CCI held that publication of a Daily Price Bulletin clearly violates s.3 of the Act, since it acts as a price indicator and point of reference for undertaking actual transactions which are relied upon by jute mills to determine the sale price of the jute products. Neither was the price based on market trends or last transacted prices, nor did the prices have any correlation with the demand and supply of the product or the raw material. But the CCI did not find that the IJMA and GTA violated s. 4, because no one entity occupied a dominant position.

It held that there was no correlation between the prices of the ATWILL and B TWILL bags even though the basic material for them was the same. Furthermore, the production of ATWILL bags was deliberately restricted and controlled by manufacturers in a concerted manner by non-utilization of the maximum production capacity.

The Commission imposed a penalty on IJMA and GTA as an association as well as the members of the Executive Committee of IJMA and DPB and GTA @ 5 % of the average turnover of the last three years.

Shamsher Kataria v. Honda Siel Cars India[5]

Sharada Krishnamurthy, IV B.S.L., LL.B.

Restrictions requiring purchasers of automobiles to purchase spare parts from dealers authorised by manufacturers is anti-competitive.

Genuine spare parts of automobiles are not sold in the open market. Manufacturers of automobiles sell these only through authorised service stations and workshops, which are under their control. Any repair, maintenance and servicing of such automobiles can be carried out only through these manufacturers. Charges of authorised service providers are 30-35 % higher as compared to independent service providers. Shamsher Kataria (SK) filed information under s. 19(1) (a) of the Competition Act, 2002 to the Competition Commission of India (CCI), against renowned manufacturers of automobiles alleging the above anti-competitive practices

Therefore, the questions before the CCI were-

[5] Case No 03/2011, decided on 25 August, 2014 (Competition Commission of India).

(i) Whether the manufacturers were guilty of indulging in anti-competitive practices by entering into exclusive supply agreements, exclusive distribution agreements and refusing to deal.
(ii) Whether denial of access to spare parts amounts to denial of 'essential facility' and hence abuse of dominant position.

The report of the Director General (DG) revealed that the manufactures violated s. 3(4) for anti-competitive behaviour and s. 4 for abusing their dominant position.

The automobile manufacturers replied that while deciding violation of s. 3, the DG had erred in his determination of appreciable adverse effect on competition. They also contended that they were not in, and did not occupy a dominant position in a unified systems market for cars and spare parts / repair services. They also argued that the conditions necessary for invoking the 'essential facilities' doctrine were not fulfilled in this case. The manufacturers relied on the exception under s. 3(5) of the Act which expressly permits a person or enterprise to impose reasonable restrictions as may be necessary for protecting any of his IPRs.

The CCI held the manufacturers were guilty because the restrictions they placed in terms of exclusive supply or refusal to deal fell within the ambit of anti-competitive behaviour having appreciable adverse effect on competition It also held that in order to be able to seek protection under s. 3(5), the IPRs claimed by these manufacturers should have been granted protection, which the manufacturers failed to prove. The CCI also held that the manufacturers were guilty under s. 4 for abuse of dominant position, and ordered them to cease and desist from indulging in such conduct. The CCI also ordered the manufacturers to sell their spare parts in the open market and place no restrictions on the operation of independent service providers.

Constitutional Law

Animal Welfare Board of India (AWBI) v A. Nagaraja[1]

Suganshi Ropia, I B.A. LL.B.

Jallikattu, bull racing and bull fighting are illegal in India.

Approaching the Supreme Court, the AWBI appealed against the practice of Jallikattu, bull fighting and bull racing which violate ss. 3, 11(1) (a), 21 and 22 of Prevention of Cruelty to Animals Act, 1960 . These practices/ races were taking place in states of Tamil Nadu and Maharashtra.

AWBI claimed that the event organisers intentionally trouble and injure the bulls for increasing their fear and anxiety after keeping them in extremely painful and uncomfortable positions for hours without food and water. This triggers the fight or flight mode in them, instigating them either to run away or to show violent aggression.

The question before the Apex Court was whether this amounted to cruelty against the bulls under ss. 3, 11(1)(a), 21 and 22 of PCA Act. Holding in ABWI's favour, the Court stated that Jallikattu and bullock-cart races violate ss. 3, 11(1)(a) and 11(m) as the bulls are subject to extreme physical and mental torture for human pleasure and enjoyment. Even ancient Indian culture and tradition do not support the conduct of Jallikattu in the manner they are being conducted presently.

Also, bulls are not "performing animals" within the meaning of ss. 21 and 22 of PCA Act; but instead are "draught and pack animals", i.e. live-stock used for farming and agriculture purpose. Every species has the right to life and security and has an inherent right to live and shall be protected by law, subject to the exception provided out of necessity. Here, the activity is performed merely for human satisfaction and entertainment.

Hence, bulls cannot be used as performing animals, either for Jallikattu events or for Bullock-cart races in Tamil Nadu, Maharashtra or any other state.

[1] 2014 AIR SCW 3327; Civil Appeal No. 5387 Of 2014 decided on 7 May 2014

B. Mahesh Sharma v. Union of India[2]

Gokul Ashok Thampi, III B.S.L.

Prior approval of the All India Council for Technical Education is mandatory for conduct of Technical course (MBA, BBA etc.).

The Indian Institute of Planning and Management (IIPM) fraudulently used "MBA / BBA". Its degrees were not recognised by the University Grants Commission (UGC). The IIPM did not have sponsorship of the foreign institutions that it claimed it did. This Public Interest Litigation was filed seeking action against IIPM by Union of India (UOI), the University Grants Commission (UGC) and the All India Council for Technical Education (AICTE).

The petition sought for directions that these authorities shall frame appropriate norms and guidelines about use of terms MBA or BBA in association of courses, and about use of names of foreign universities. The petition also sought an enquiry into the affairs of IIPM.

The High Court found the IMI Belgium, which IIPM claimed to have recognised its degrees, was a global initiative of IIPM itself. This was misleading. Hence the High Court directed the IIPM and its officials to remove advertisements.

Prior approval of AICTE is compulsory and mandatory for conduct of a Technical Course including the MBA / Management course. Hence the High Court also held that the MBA and BBA courses of the IIPM did not have the approval of the AICTE, and that the IIPM was not entitled to run an MBA and BBA course or advertise itself as conducting any such course. It also held that the prospectus issued by IIPM for admission to its courses showed itself as conferring degrees, and hence was false and misleading.

The High Court

(i) restrained IIPM and its management from using the word "MBA, BBA, Management Course, Management School, Business School or B-School" in relation to the Courses / programmes being conducted by them; and

(ii) directed IIPM to prominently display on its website of IIPM that

a. they are not recognized by any statutory body / authority and

b. the status of the Foreign University / Institution and/or its Degree or Certificate in the country of its origin and whose Degree or certificate the students enrolling in the Course / Programme offered by IIPM would be entitled to.

c. IIPM shall display this judgment on its website.

[2] Writ Petition (Civil) No 5937/2010 decided on 26 September, 2014 (Delhi High Court).

The judgement recognized the fact that education being turned into a business, many students were duped by the 'dare to think beyond the IIM's' Management Institute – IIPM due to false claims that MBA degree recognized by the UGC and AICTE. The judgement explicitly stated that IIPM or its Dean will not be relieved from any action by any other person who may have been lured by the advertisements.

Cellular Operators Association of India v. TRAI[3]

Sharanya Singh, I B.A. LL.B.

Differential tarriff for calls from private networks terminating in BSNL or MTNL networks and in private operator network, struck down.

Cellular Operators Association of India (COA - appellant) is the association of private GSM cellular operators.

In 1995, separate licenses were granted to cellular operators for metro service areas and the States. A notification of 2005 issued by Telecom Regulatory Authority of India (TRAI – respondent) imposed certain conditions and merged the inter-service area connectivity of the metro with the respective State. As a result of the merger members of COA began levying differential tariff for calls from a private operator network terminating in BSNL or MTNL network and to those terminating in other private operator network. In 2006, the TRAI found this differential tariff discriminatory and inconsistent with conditions of the 2005 notification. COA approached the Telecom Disputes Settlement and Appellate Tribunal (TDSAT), which also held that the differential levy was in defiance of the non-discriminatory clause. COA appealed to the Supreme Court against this order.

COA contended that owing to direct connectivity between private operators, the call cost as much as a local call, while calls terminating in BSNL or MTNL were not routed directly and cost as much as an STD call, thus giving rise to the differential tariff. Hence it was not discriminatory and did not violate Art. 14 of the Constitution. COA also alleged that the TRAI was aware of the reason of this difference. The TRAI alleged that it was responsibility of the COA to set up points of intersection with BSNL or MTNL network, just as they had set up among themselves.

[3] Civil Appeal No.1563 of 2007 decided on 30 January, 2015 (Supreme Court)

The Supreme Court dismissed the appeal and held that the differential tariff was discriminatory and there was no reasonable classification between the network subscribers as derived by members of the COA who used the provisions to their benefit.

Charu Khurana v Union of India[4]

Arati Ranade, II B.S.L.

Women who are eligible to be make-up artists cannot be restricted to being only hairdressers.

In a writ petition under Art. 32, The Supreme Court held that that women who are eligible to be make-up artists cannot be restricted to only being hairdressers in the cinema industry.

Charu Khurana, a Hollywood trained make-up artist, was denied a membership card of the Cine Costume Make-up Artists and Hair Dressers Association primarily because she was a woman, and had not been residing in Maharashtra for the past five years. On the first issue i.e. gender inequality, the Supreme Court stated that it was the duty of the State to give opportunities to people and not curtail them. It invoked Arts. 14, 19(1)(g), and 21. It stated that equality cannot be achieved unless there is equality of opportunities; and if a woman is debarred at the threshold of her profession, equality cannot be realized.

S. 21 of the Trade Unions Act, 1926 provides for grounds for cancellation of license. It prescribes only age and certain other qualifications, making no distinction between a man and a woman. The arbitrary distinction between an eligible woman allowed to be a hairdresser, but not make-up artist, is unjustified because it tramples her right to livelihood, and her fundamental right to life.

On the second issue, i.e. of domicile, the Court stated there was no rationale, and the restriction violated Arts. 14, 15 and 21 of the Constitution. Thus clauses 4 and 6 of the Association violated constitutional provisions and should be effectively deleted.

This judgment will extend to the State of Maharashtra, and shall apply to other States after January 1st, 2015.

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[4] (2014) SCC Online SC 900; WP (Civil) No 78 / 2013 decided on 10 Nov 2014 (Supreme Court)

Imran Ali V. Union of India[5]

Anhita Tiwari, I B.A. LL.B.

Appointment of a Leader of Opposition in Parliament is not a mandatory requirement.

In the 2014 Lok Sabha Elections, Congress emerged as the second largest party securing 44 seats. The Speaker of the 16th Lok Sabha refused to appoint/recognize any person as Leader of Opposition, because no opposition party was able to secure 55 seats in the election. A Public Interest Litigation was filed by Advocate Imran Ali in the Delhi High Court seeking mandamus for the appointment of a leader of opposition, and certiorari quashing the directives issued by the Speaker.

Imran Ali contended that (a) for recognizing the Leader of Opposition, the Speaker applied the test of 10% of the seats in the Parliament, instead of the test of the greatest numeral strength provided for in the Salary and Allowances of Leaders of Opposition in Parliament Act, 1977, thereby putting a rider in nature of a caveat in s. 2 of the Act; (b) the post of Leader of Opposition was essential to rule out any act of arbitrariness by the ruling party; (c) various legislations like the Protection of Human Rights Act, 1993, the Central Vigilance Commission (CVC) Act, 2003, the Right to Information Act (RTI), 2005 and the Lokpal and Lokayuktas Act, 2013 mandate the participation of Leader of Opposition, while making decisions on appointments etc.; and (d) The Speaker has wrongly invoked the Residuary Powers.

The Additional Solicitor General contended that (a) there have been prior instances when the Lok Sabha did not have a Leader of Opposition; (b) the statues referred provide that all appointments made would be valid even if any of the offices required to participate in the same was vacant; and (c) the reckless allegations made against the high office of Attorney General, points that the petition was not filed bona fide but with a political motive.

The Judges concluded that all the above legislations proceed on an assumption that there is a Leader of Opposition and do not provide for appointment of Leader of Opposition. Imran Ali was neither able to bring to attention of the court any law or provision in the Constitution of India that mandates the appointment of the Leader of Opposition nor could substantiate to the content, the reason of necessity for such appointment . Hence, the petition was dismissed.

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[5] W.P. (C) 5745/2014, decided on 14 January 2015 (Del HC)

Madras Bar Association v. Union of India[6]

Gokul Ashok Thampi, III B.S.L.

The National Tax Tribunal Act, 2005 struck down as unconstitutional.

In this case, few key provisions of the National Tax Tribunal Act, 2005 (NTT Act) were challenged. The National Tax Tribunal is authorized to adjudicate upon appeals arising from the Appellate Tribunals constituted under the Income Tax Act, the Customs Act, 1962, and the Central Excise Act, 1944, where such appeals involved substantial question of law.

The petitioner challenged the NTT Act on four grounds.

1. The reasons for setting up the NTT were fallacious and non- existent, since there were no inconsistencies in the provisions under which High Courts have been constituted.
2. Deciding upon a 'substantial question of law' was a core judicial appellate function, which cannot be transferred to a quasi-judicial authority that lacked the basic features of the superior court.
3. Art. 323-B inserted by the Constitution (Forty-second Amendment) Act, 1976, violated basic features of the Constitution (like separation of powers, the rule of law, judicial review etc.)
4. A number of provisions including ss. 5, 6, 7, 8 and 13 of the NTT Act, undermine the independence of the adjudicatory process vested in the NTT.

The court accepted the second and fourth contentions, whilst upholding the validity of Art. 323B. Ss. 5, 6, 7, 8 and 13 of the NTT Act, 2005 were held unconstitutional. It was held that since these provisions constitute the edifice of the NTT Act, the other provisions will automatically be rendered ineffective and inconsequential. Hence the entire legislation was declared unconstitutional.

The Court held that the NTT Act did not violate the basic structure doctrine, because the NTT Act transferred only jurisdiction, and not the High Courts' powers of superintendence under Art. 226 and 227 of the Constitution. The Court found that the establishment of a National Tribunal (with no regional branches), the power of central government to determine the constitution of the benches and transfer of the members, the appointment of 'technical' and 'accountant' members to the tribunal to adjudicate substantial questions of law, the provisions of a direct appeal to the Supreme Court bypassing the jurisdictional High Courts – all pointed to the fact that while the composition of the NTT was supposed to be on the same parameters as that of the judges of High Courts in practice, such was not the case.

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[6] (2014) 10 SCC 1.

Justice R.F Nariman, in his concurrent verdict, said that jurisdiction to decide substantial questions of law is vested only in the High Courts and the Supreme Court, and cannot be vested in any other body; providing otherwise would impair a core constitutional value, presumably that of judicial superintendence.

National Legal Services Authority v. Union of India[7]

Naveena Pradeep, II B.S.L.

Trans-genders shall be officially recognized as the third gender.

Members of the transgender community filed a writ petition for their right to gender identity other than the one assigned to them at their time of birth. They alleged that the non-recognition of such identity violated Art. of 14 and 21 of the Constitution.

The main issues raised were

(i) whether a person born with predominantly female orientation has the right to be recognized as female by his choice (or converse), and
(ii) whether transgenders have the right to be recognized as the third gender.

The Court identified a transgender as a "person" under law entitled to equal opportunities and protection of law. It held that the terms 'person' and 'citizen' used under Art. 14, 15, 16, 19 and 21 of the Constitution are gender-neutral. The term "sex" cannot be confined to the categories of male and female, and must include hijras / transgenders. The Court stated: *"Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom*". The Court recognised that no one should be forced to undergo medical procedures, including sex reassignment surgery, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity. Psychological gender must be given much more importance over biological sex. Rights must be protected regardless of chromosomal sex, genitals, assigned birth sex, or implied gender role. The Court stated that that every human has their right to gender identity. No one shall be ostracized for being a transgender. They must be given equal protection under law, and must not to be discriminated.

The Court held that the right to gender identity falls under the right to lead life with dignity, and is protected under 21 of the Constitution. The Constitution requires equal treatment of all people irrespective of gender identity or expression.

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[7] (2014) 5 SCC 438.

Hence, The Court declared that the Centre and State Governments must grant full legal recognition of gender identity as male, female or third gender at all levels (social, economic and educational).

Pramati Educational & Cultural Trust v. Union of India[8]

Gayatri Dharmadhikari, V B.S.L. LL.B.

Right to (Free) Education Not Applicable to Any Minority Institution

This case arises from a reference made to a larger Bench by a three-judge Bench of the Supreme Court in *Society for Unaided Private Schools of Rajasthan v. Union of India.*[9]

The issue before the Supreme Court was whether Art. 15(5)[10] and Art. 21A[11] of the Constitution, inserted by the Constitution (93rd Amendment) Act 2005, altered the basic structure of the Constitution, and therefore the constitutionality of the Right of Children to Free and Compulsory Education Act, 2009 (RTE Act).

The Petitioners contended that:

(i) Imposing reservation on unaided institutions violates Art. 19(1)(g) and Art. 14 insofar as it fails to make a distinction between aided and unaided educational institutions, thus treating the both equally.
(ii) It compels private educational institutions to give up a share of the available seats to the candidates chosen by the State.
(iii) And insofar as it excludes minority institutions referred to in Art. 30(1), it violates secularism.

In reply, the Respondents contended that, it is only an enabling provision consistent with Art. 19. Exclusion of minority from Art. 15(5) does not violate Art. 14 as minority in itself is a different group.

The Court held that Art. 15(5) is valid for the following reasons:

(i) It is an enabling provision to carry out the constitutional mandate of equality of opportunity.

[8] WP (Civil) 416 / 2012 decided on 6 May 2014 (Supreme Court).
[9] (2012) 6 SCC 102.
[10] Enables the State to make a special provision, by law, for the advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes relating to admissions to private educational institutions, whether aided or unaided by the State, other than the minority educational institutions.
[11] Mandates the State to provide free and compulsory education to all children in a manner that the State can determine by law.

(ii) Art. 15(5) is a guided power to be exercised for the limited purposes stated in the clause otherwise it will violate Art. 19.
(iii) Art. 15(5) does not say that such a law will not comply with the other requirements of equality as provided in Art. 14 and hence does not violate Art. 14. The minority is a different class in itself. By excluding the minority institutions referred to in clause (1) of Art. 30, the secular character of India is maintained and not destroyed.
(iv) There is no merit in the submission that Art. 15(5) violates the right under Art. 21.
(v) Art. 21A is applicable to the State and not to private unaided educational institutions. But the manner in which the obligation is to be fulfilled is left on the state. Thus there is nothing which violates Art. 19 in Art. 21A, but a law made under Art. 21A may violate Art. 19.

The Supreme Court therefore upheld the RTE Act to the extent that it excluded minority administered institutions, both aided and unaided, from its operation.

Rajat Prasad v. Central Bureau of Investigation[12]

Sharanya Singh, I B.A. LL.B.

A sting operation showing Mr Dalip Singh Judeo, Union Minister for the Environment and Forests (deceased), accepting a bribe of Rs 9 lakhs was released to the media. After due investigation it was found that the sting was conducted and released to press by Mr. Amit Jogi (accused No 5), son of Mr. Ajit Jogi, former chief minister of Chattisgarh.

Rajat Prasad (RP – appellant), who had booked the room for the sting operation and made preparations for it was held guilty by the trial court under s.120-B of the IPC and s.12 of the Prevention of Corruption Act, 1988, and the order was upheld by the Delhi High Court. Hence this appeal to the Supreme Court.

RP argued that the sting operation was a journalistic exercise to "reveal the murky deeds in seats of governmental power" prior to the State of Chhattisgarh elections, and to gain political leverage by Amit Jogi, and hence no case was made out against RP. RP also argued supporting sting operations as tools for exposing misuse of power by those in power.

The CBI contended that one cannot commit crime and get away, under the garb of exposing corruption. It also sought adequate time be given to record evidence.

The Supreme Court opined that in India, sting operations were not recognised as a legal method for law enforcement, since it hard to tell from cases where a

[12] Criminal Appeal No.747 of 2010 decided on 24 April, 2014 (Supreme Court)

person has willingly done a thing, and when a person is enticed to do a thing. It also held that a sting operation conducted without public interest would be an offence. Since this sting operation was conducted with political motives, and not in public interest, the Court affirmed the order of the High Court and upheld the criminal charges.

Ram Singh v. Union of India[13]

Namit Oberoy, IV B.S.L. LL.B.

Caste cannot be sole factor to determine socio-economic backwardness. Notification including Jat community in the list of Other Backward Class struck down.

In this group of Writ Petitions, the petitioners challenged the legality of a notification issued by the UPA Government dated 4 March, 2014, under which the "Jat" community was included in the Central List of Other Backward Classes (OBCs). The notification, made with the objective of extending reservation benefits to the Jat community, was applicable to the Jats of certain specified States.

The socio-economic status of Jats was examined by the National Commission for Backward Classes (NCBC) in 1997, where the body had recommended that only the Jats of Rajasthan be included in the List. It rejected claims relating to Jats of other States. After the NCBC (Power to Review) Rules, 2011 came into force, the Commission took up for review its earlier recommendations in response to the "large number of representations received from the Jat community". Subsequently, on the basis of the report of an Expert Committee of the Indian Council of Social Science Research (ICSSR), as well as public hearings held in different States, the NCBC opined that the Jat community did not fulfill the criteria for inclusion in the Central List of OBCs. It observed that the Jats were not socially, economically or educationally backward, and did "enjoy adequate representation in armed forces, government services and educational institutions".

However, in a meeting held on 2 March, 2014, the Union Cabinet rejected these, citing as the reason the report's inability to account for "ground realities". On 4 March, 2014, a notification was issued, giving the status of OBCs to Jats of Bihar, Gujarat, Himachal Pradesh, Haryana, Madhya Pradesh, Delhi, Uttar Pradesh, Uttarakhand, and a limited portion of Rajasthan.

The Supreme Court examined the merits of the reports of the NCBC, and scrutinized whether the notification arose from an adequate "application of mind". The Court observed that the Jats, which form a politically organized class

[13] W. P. (Civil) No. 274 of 2014 before the Supreme Court of India.

and enjoy adequate socio-economic status and representation, cannot be held to be a backward class. The Court condemned the Cabinet's decision to disregard the advice of the NCBC. It held that the NCBC's view was "adequately supported by good and acceptable reasons".

As a result, the Supreme Court quashed the notification. It observed that that "caste" cannot be the sole factor of determining backward status; and though the Centre is empowered to accord reservations to backward classes on the basis of "reasonable restrictions", further inclusions must be limited only to the most distressed, and cannot be based on outdated notions of "backwardness".

Sabu Mathew George V. Union of India[14]

Gayatri Dharmadhikari, V B.S.L. LL.B.

Advertisement of pre-natal diagnostic techniques in violation of law, condemned by the Supreme Court

The issue before the Court was whether, despite the legal prohibition, the respondents, viz. Google India, Yahoo India and Microsoft Corporation (I) Pvt. Ltd., were still allowing advertisements that violated the provisions of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994.

The Petitioner contended that the Department of Information Technology, Ministry of Communication and Information and the competent authority of Department of Health and Family Welfare are required to work harmoniously to see to it that the provisions of the 1994 Act are not violated.

The Respondents replied that:

(i) The service provider or search engines only provide the carriage technology for indexing information. The content information is provided by others.

(ii) The pre-natal sex determination is an offence in India under PC&PNDT Act, but it may not be an offence in other countries.

(iii) The information published on the websites is generally aimed at wider, world-wide dissemination and caters to the needs to many countries, and not merely be persons from India.

(iv) Most of these websites are hosted outside the country, because of which blocking of such sites may not be feasible.

(v) Some websites provide good content for medical education, and hence the blocking of such websites may not be desirable.

[14] WP (Civil) No 341 / 2008 decided on 28 January, 2015 (Supreme Court)

The Petitioners Counsel clarified that other countries have controlled such advertisements where they violated laws of those countries. This was achieved by entering into agreements, developing technical tools and issuing appropriate directions.

The Court observed that an effort must be made to see that nothing should be advertised or shown on websites that is contrary to laws of this country. Assistance from the competent authority from the Department of Information and Technology can be sought where technical issues are involved.

Shreya Singhal v. Union of India[15]

Sharanya Singh, I B.A. LL.B.

S. 66A of Information Technology Act 2000, struck down as unconstitutional.

Petitions challenging the constitutionality of various provisions and rules under the Information Technology Act, 2000 (the Act), mainly of ss.66A and 69A, filed by 10 petitioners (*inter-alia*, People's Union of Civil Liberty, Common Cause, online platform MouthShut.com) were clubbed, and heard by the Supreme Court. The provisions were challenged on the grounds of violating Arts. 14, 19(1)(a) and 19(2),

S. 66A of the Act makes punishable with imprisonment the acts of sending information that is 'grossly offensive', is of 'menacing character', 'causes annoyance', 'inconvenience', 'danger', 'obstruction', 'insult', 'injury', 'criminal intimidation', 'enmity', 'hatred' or 'ill-will'. These terms are not defined. S. 69A permits the government to block access on some grounds. S. 73(3)(b) oblige intermediaries to remove matter or block access to unlawful content.

The Petitioners questioned the basis of s. 66A, and argued that it suffered from the vice of vagueness, did not communicate to persons what actions are unlawful, and gave leeway to authorities to be arbitrary and whimsical while exercising their powers, and had a chilling effect, impairing Art. 19(1)(a).

The Government defended s. 66A relying on Legislature's understanding of the needs of people. It denied vagueness as ground of unconstitutionality because the statute was otherwise legislatively competent and non-arbitrary.

Deeming liberty of thought and expression a cardinal value of democracy, the Supreme Court defined its three component aspects – those of discussion, advocacy and incitement, and quoted Shakespeare to differentiate between the latter two. The Court highlighted that these had no proximate relationship to

[15] WP (Cr) No.167 / 2012 decided on 24 March, 2015 (Supreme Court)

public order. It stated that "Governments may come and Governments may go but s. 66A goes on forever", implying 66A suffered from lack of defined criteria of exercise, and gave rise to a chilling effect and over-breadth without reasonable restriction.

Further, owing to undefined subjective terms, it conclusively held s.66A to be unconstitutional. The entire 66A was struck down without applying the doctrine of severability. The Court however upheld ss.79(3)(b) and 69A, because it was a narrower provision with a three-tier confidential mechanism of blocking.

This is certainly a welcome judgement for Indian society, and a triumph for proponents of free online speech.

State of Karnataka v. Associated Managements of Primary & Secondary Schools[16]

B.A Dharaani, III B.S.L.

Government order mandating Kannada (or mother tongue) as compulsory medium of instruction struck down.

The Government of Karnataka had issued an Order in 1994 regarding its language policy, mandating Kannada or mother-tongue as compulsory medium of instruction in all government-recognised primary schools across Karnataka. The Karnataka High Court struck down the order in 2008. The State filed this appeal. The Division Bench referred the five questions to the Constitutional Bench. The Supreme Court dismissed the appeal for these reasons:

The Court held that freedom of Choice in the matter of speech and expression is absolutely necessary for an individual to develop his personality in his own way. The Right to Freedom of Speech and Expression under Art. 19(1) (a) of the Constitution includes the freedom of the child to be educated at the primary stage of school in a language of the choice of the child. The state can't impose control on such choice because it thinks it will be more beneficial for the child if he is taught in the primary stage of school in his mother tongue. The Right to Freedom of any Occupation under Art. 19(1) (g) includes the right of a citizen to establish a school for imparting education in a medium of instruction of his choice. The State Government policy did not have any direct bearing and impact on the determination of standards of education. The power of the State to prescribe the medium of instruction in primary schools can't be exercised in contravention of the rights guaranteed under Art. 19(1) (a) and 19(1) (g).

[16] (2014) 9 SCC 485: AIR 2014 SC 2094

The 'Mother Tongue' in the context of Art. 350A of the Constitution means the language of the linguistic minority group in a particular state. The Constitution nowhere provides that mother tongue is the language which the child is comfortable with. The State has no power under Art. 350A to compel the linguistic minorities to choose only their mother tongue as a medium of instruction in primary schools. Under Art. 30(1), the linguistic minority has the right to choose the medium of instruction in the primary schools which it has established.

Though the experts in the field of education have opined that children studying in classes I to V in primary school can learn better if they are taught in their mother tongue, the Court held that the State cannot stipulate it as a condition for recognition of schools as it violates the right of Unaided schools to do business under Art. 19(1) (g) and the Minority schools protection under Art. 29(1) and 30(1).

Union of India v. Atul Shukla[17]

Aufa Karnalkar, IV B.S.L. LL.B.

Differential treatment towards members of the same cadre on the basis of age of retirement struck down.

Group Captains of the Indian Air Force were divided into two categories for the purposes of date of retirement:

(i) those who rise to the rank on the completion of 26 years of service – who were Group Captains –Time Scale , and
(ii) those who received the rank by promotion on the basis of merit – who were Group Captains - Select.

The former would retire two years before the latter.

Atul Shukla (respondent) aggrieved by this discrimination, alleged that all Group Captains constituted a single class irrespective of whether they were promoted to that rank by Scale or by merit ***inter se*** . They have the same emoluments, allowances and conditions of service, and discharged the same kind of duty, and the only difference was their m ode of appointment. Hence classifying officers on the basis of mode of promotion violated Arts. 14 and 16 of the Constitution.

The Union argued that the nature of duties performed by the first and the second category were substantially different; and that the manner of promotion of the officers was in itself a ground for their classification.

[17] (2014) 10 SCC 432.

The Court had to decide the question whether classification on the basis of mode of promotion was based on intelligible differentia. The Court held that there can be no intelligible differentia between an employee directly recruited and another who is promoted. Group Captain (Time Scale) and Group Captain (Select) are only indicative of the route by which they have risen to that rank. The Court also held that so long as the two employees are of the same cadre, they cannot be treated differently for purposes of pay and allowances or other conditions of service including the age of superannuation. Accordingly the civil appeal was dismissed.

The judgement is significant as it represents the first time that the court has struck down age based classifications under Art. 14.

Corporate and Investment Law

Balwant Rai Saluja v. Air India Ltd.[1]

Srushti Chauhan, III B.S.L.

Employees of a fully owned subsidiary are not, by that virtue, employees of the holding company.

Employed by Air India (Respondent No. 1) in the Ground Services Department Canteen, under a unit of Hotel Corporation of India (HCI), namely Chef Air (Respondent 3), its Workmen (Appellants) raised an industrial dispute to the effect that they be treated as deemed employees of the management of Air India and their employment be regularized with back wages.

The Appellants contended that the HCI has entered into a contract with Air India to run and maintain the canteen and for that purpose they were initially appointed for a period of 40 days, with extensions, and without any regularization; and that this amounted to unfair labour practice, and violated various provisions of the Contract Labour (Regulation and Abolition) Act, 1970.

After the Government referred this dispute to the Central Government Industrial Tribunal, it came to the conclusion that *"HCI is 100% subsidiary of Air India and the Canteen in question is a statutory Canteen established for the welfare of more than 2,000 workers. Further s. 46 of the Factories Act, inter alia, confers power on the State Government to make rules requiring a specified factory where more than 250 workers are ordinarily employed, to provide and maintain a canteen for the use of the workers and in pursuit of notification issued by the Lieutenant-Governor, Union Territory of Delhi, dated 21st of January, 1991, M/s. Air India Ground Services Department, Indira Gandhi International Airport, Delhi (Engineering Unit) were to be included. The Tribunal upheld the workers' demands and held (i) that the workmen have been terminated from their services during the pendency of the dispute and (ii) that the termination is illegal. Accordingly, it set aside the termination of their employment and directed reinstatement with 50% back wages."*

Air India challenged this award in a writ petition before the Delhi High Court. The Single Judge set aside CGIT's decision, which was upheld by the Division Bench.

The Supreme Court held that while Air India might be the sole holder of shares in HCI, it is a separate legal entity, independent of its shareholders. The authority to issue directions does not merge the identity of HCI with the shareholder. Furthermore, since HCI was not incorporated merely to run the canteen of Air

[1] (2014) 6 SCC 756.

India, it is a business entity in its own right. The fact that its 100% share capital is held by Air India or Air India has the power to appoint the Board of Directors, issue directions etc., will not denude the legal status of the HCI as a Government company and Chef Air as a unit of HCI, not of Air India. Hence, the Supreme Court held that employees of Chef Air cannot be deemed employees of Air India.

In re Godrej Industries Limited[2]

Solaiappan.Odayappan, IV B.S.L. LL.B.

S. 103 and s. 110 of the new Companies Act allow for postal ballot as additional means, and not as one that excludes voting in person.

In connection with a scheme of amalgamation of Wadala Commodities Limited with Godrej Industries Limited, a question arose whether a resolution for approval of the scheme could be passed by a majority of the equity shareholders casting their votes by postal ballot (voting by post and electronically) without actually convening a meeting. The case arose before the Bombay High Court out of a Company Summons for Direction under s. 110 of the Companies Act, 2013 and SEBI Circular of 21st May 2013.

The judge made a preliminary observation that the apparent legislative intent in providing for postal ballots and electronic voting is unexceptionable and entirely salutary.

Godrej submitted that the 2013 Act had a clear mandate to do away with all meetings, other than those required in certain limited circumstances. The judge observed that s. 110 of the 2013 Act has a framework that postal ballot is mandatory for such items of business as the Central Government notifies, drawing interpretative aid for this view from Rule 22 of the Companies (Management and Administration) Rules, 2014.

Godrej also argued that SEBI circular relating to Clauses 35B and 49 of the Equity Listing Agreement calls for mandatory postal ballot and the *non-obstante* nature of s. 110 eliminated the need for any quorum as required under s. 103. The Court held that the SEBI circular applies to rights of shareholders to participate in, and to be sufficiently informed about, decisions. Since transparency and indoor democracy enables informed decision making, the circular cannot be interpreted to mandate postal ballot.

Referring to s. 103 of the new Act, the Court held that as ss. 230 and 232 of the new Act were yet to come into force, ss. 391 and 394 of the 1956 Act continued

[2] Company Summons for Direction No. 256 / 2014 decided on 8 May, 2014, (Bombay High Court).

to apply. Hence the non-obstante provision of s. 110 did not apply to the current amalgamation. It also held that s. 110 speaks of meetings called by the company, and since meetings for approval of schemes were not called by the Company, the section did not apply.

Accepting the submissions of the amicus curiae, the Court held that postal ballot was an additional mode of casting votes, and did not exclude in-person voting.

Keshavlal Khemchand and Sons Pvt Ltd v. Union of India[3]

Different norms for classifying NPAs with reference to different categories of creditors are valid.

When a debtor commits default in repayment of loan to the Creditor bank or financial institution (FI), the creditor can initiate proceedings after classifying the account of the borrower (an asset of the Creditor's) as a non-performing asset (NPA).[4] The Creditor can enforce securities without intervention of the Court by following the procedure of s. 13 of the SARFAESI Act.[5]

The definition of NPA under the SARFAESI Act 2002 was amended in 2004,[6] which provided that banks or FIs regulated by an authority or body established by law could classify NPAs according to the directions issued by such authority or body; rather than the directions issued by the RBI. Other banks or FIs shall classify according to directions issued by RBI. This created two classes of borrowers.

This is a batch of petitions challenging constitutional validity of the Act, particularly this amendment, *inter alia,* on the grounds of excessive delegation. High Courts differed in their views.

The question before the Supreme Court are: (i) whether delegating authority of classification of assets upon an authority or body other than RBI amounted to excessive delegation, and (ii) whether the different standards constituted reasonable classification for the purposes of Art. 14.

Petitioners contended that the Amendment violates Art 14 of the Constitution by enabling different creditors to adopt different guidelines for classifying NPAs.

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[3] WP (Civil) No 901 / 2014 decided on 28 January, 2015 (Supreme Court).
[4] Under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.
[5] *Ibid.*
[6] The Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2004

They also contend that the Act did not allow them to demonstrate that the classification as NPA was untenable.

The Union of India contended that the assessment of NPA depended on many changing factors, which required the assessment to follow guidelines. Hence there was no delegation of essential function. The classification was because credit facilities differed according to categories of borrowers, and were made on different terms and conditions.

The Supreme Court upheld the amended definition. It observed that because of the variety of loans and advances lent or made, it was not possible to define NPAs for universal application, and hence guidelines were necessary. Prescribing norms for classifying borrowers' accounts as NPA was not an essential legislative function. All creditors do not form a homogenous class. Hence prescribing different norms with reference to different creditors was not unreasonable classification. The differences arose from the legal structure of the creditors, variety of loans they gave, and the different terms and conditions applicable to the various loans and advances.

SEBI v Akshya Infrastructure Pvt. Ltd.[7]

Deepansh Guwalani, II B.S.L.

Public offer of shares made through public announcement cannot be withdrawn (even) if it becomes uneconomical.

Akshay Infrastructure (Akshay - Respondent) made a voluntary open offer through a public announcement for purchase of shares of a target company (MARG Ltd) in October 2011. It sought to withdraw the offer in March 2012 under regulation 27 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, because the offer became uneconomical. SEBI refused. In appeal, SAT allowed Akshay to withdraw the offer and the amount deposited in escrow. SEBI filed this appeal.

Regulation 27(1) provides: "no public offer, once made, shall be withdrawn except under the following circumstances."

Akshay alleged it was required to withdraw the offer because of a delay of 13 months by SEBI in issuing the directions. It was held that SEBI's delay *inter alia* in making its comments on the letter of offer would not fall under Regulation 27(1)(b) cannot be equated to refusal of the statutory approval required from other independent bodies, such as under the RBI, Taxation Laws and other regulatory statutes.

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[7] (2014) 11 SCC 112.

The Supreme Court reiterated its opinion in *Nirma Industries Ltd. v. SEBI*[8] that under Clause 27(1)(b)(c) and (d), a Public Offer, once made, can only be permitted to be withdrawn in circumstances which make it virtually impossible to perform the Public Offer. In fact, the very purpose for deleting Regulation 27(1)(a) was to remove any misapprehension that an offer once made can be withdrawn if it becomes economically unviable. Accepting such a submission, would give a field day to unscrupulous elements in the securities market to make Public Announcement for acquiring shares in the Target Company, knowing perfectly well that they can pull out when the prices of the shares have been inflated, due to the public offer. The Supreme Court also held that no distinction could be made between a voluntary public offer and a triggered public offer, because such distinction would defeat the very purpose for which the Takeover Code is enacted.

In view of the above, the appeal was allowed. The impugned order passed by the Securities Appellate Tribunal was set aside and the directions issued by the SEBI in the letter dated 30th November, 2012 were restored.

Subrata Roy Sahara v. Union of India[9]

Subodh Bhaisare, I B.A. LL.B.

Any company seeking money from more than 50 persons has to take the prior approval of SEBI and subsequently make disclosures to SEBI.

Sahara India Real Estate Corporation Limited (SIRECL) and Sahara Housing Investment Corporation Limited (SHICL) issued Optionally Fully Convertible Debentures (OFCDs) through subscriptions from 30 million investors for various purposes and raised around Rs. 20,000 crores under the guise of a private placement for 10 years. Later, Sahara Prime City Limited intended to raise funds through listing of its shares filed through a Red Herring Prospectus to SEBI. While processing the prospectus, SEBI received a complaint from one K. M. Abraham and 'Professional Group of Investors Protections'. SEBI heard the matter and ordered SIRECL and SHICL and their promoter Subrata Roy (Appellant) to refund the amounts to the subscribers with interest at 15 % p.a. Sahara companies preferred an appeal before Securities Appellate Tribunal (SAT). The SAT confirmed the order. Subsequently, Sahara filed a petition before the Supreme Court against the SAT order.

Sahara's contended that: (a) Issue of OFCDs is not a public issue, (b) There is no statutory requirement to list FCDs. (c) The bonds issued by Sahara are hybrid

[8] (2013) 8 SCC 20.

[9] (2014) 8 SCC 470.

instruments as per s. 2(19A) of the Companies Act and the convertible bonds as per s. (1)(b) of the Securities Contracts (Regulation) Act 1956 (SCR Act); and hence are not list-able securities as per s. 2(h) of the SCR Act.

On the other hand, SEBI contended that the (a) OFCD was public issue, (b) There was a violation of s. 73 of Companies Act 1956 and Securities Contracts (Regulation) Act, 1956 and (c) the Red Herring Prospectus was untrue.

The Court stated that OFCDs were offered to more than 50 people, hence were marketable as per s. 67(3) of Companies Act, 1956. It is mandatory to list any issue to more than 49 persons under s. 67(3) of the Companies Act, 1956. The term OFCD itself contains the term "Debenture"; it is deemed to be a security as per the provisions of Companies Act, SEBI Act, SCR Act. Therefore s. 73(1) of the Companies Act casts an obligation on every company indenting to make offer securities to public to list its securities. Pursuant to these findings, the Court ordered Sahara to repay the investors.

In re Adam Comsof and Kolar Biotech Limited, SEBI[10]

K. Ravalee, III B.S.L.

For the first time, the market regulator of India, the SEBI, sentences an individual defaulter to civil imprisonment.

The Securities and Exchange Board Of India (SEBI) has exercised its newly found powers under s. 28A of the SEBI Act, 1992, and sentenced defaulter Vinod Hingorani (defaulter) to civil imprisonment for a period of six months, or until the dues are paid, or an order of release is given.

The case involves Kolar Biotech Limited (KBL) and Adam Comsof, its related entity. Vinod Hingorani is the non-executive chairman of Adam Comsof and Kolar Biotech Limited.

In August 2004, a complaint alleging fraud by KBL was received by SEBI. SEBI proceeded with investigation into the scrip of KBL. It is further stated that KBL widely circulated bogus advertisements regarding a bonus for shareholders of KBL and issue of Global Depository Receipt (GDR). After these advertisements, there was a notice stating the sale of property of one Raj Kumar C. Basantani. Following the investigation, SEBI issued notices imposing multiple monetary penalties of Rs. 25 lakh, Rs. 30 lakh and Rs. 55 lakh amounting to approximately Rs 11 million for deliberately and consciously indulging in fraudulent practices to induce gullible investors to invest in the shares of KBL only to defraud them.

[10] Order No. RO/012/2014 passed on 18 December, 2014 (SEBI). The order against Vinod Hingorani was set aside by the Bombay High Court. Note the case that follows.

Additionally, SEBI issued several notices of demand calling for payment of the penalty amount with interest and expenses. In spite of ample time and opportunity being granted, the defaulter did not respond. Hence he was directed to appear before the Recovery Officer.

During the course of hearing, the defaulter was advised to make good the dues or submit substantial proposal for payment of the said dues. An opportunity was granted to show cause as to why he shouldn't be sentenced to prison. The defaulter stated that he was only a non-executive chairman of KBL and Adam Comsof, and had no role in the alleged matter. Subsequently, the defaulter was detained. Since the defaulter failed to furnish any substantial proposal pertaining to the payment of penalties, he was sentenced to civil imprisonment for six months, under Rule 77 of Part V of Schedule II of the Income Tax Act, 1961 read with s. 28A of the SEBI Act, 1992. He was to be kept in civil prison for the said period, or until the dues with further interest were paid, or an order of release was received from the Recovery Officer.

Civil imprisonment was ordered in this case in spite of availability of other alternative modes of recovery under s. 28A of SEBI Act, 1992, which include attachment and sale of defaulter's movable or immovable property, or attachment of his bank accounts etc.

Vinod Hingorani v. Securities and Exchange Board of India[11]

K. Ravalee, III B.S.L.

SEBI's order of first imprisonment quashed by the Bombay High Court on grounds of patent illegality.

Securities and Exchange Board of India (SEBI) had imposed multiple penalties amounting to approximately Rs 11 million on Mr. Vinod Hingorani,[12] a non-executive chairman of Kolar Biotech Limited (KBL), on account of defrauding investors by misleading advertisements pertaining to bogus bonus shares and Global Depository Receipt (GDR). Various Notices of Demand were issued by SEBI. On receiving no response from Hingorani, he was presented before the Recovery Officer as a defaulter, and was sentenced to imprisonment for a period of six months, when he failed to furnish substantial proposal for payment of dues, in spite of his detention. Hingorani challenged this order in this writ petition.

[11] W.P. No 639 / 2015 decided on 10 March, 2015 (Bombay High Court)
[12] Order No. RO/012/2014 passed on 18 December, 2014 (SEBI).

Hingorani contended that he was not given a fair hearing and was detained in a summary and arbitrary manner. Neither did he transfer, conceal or remove any part of the property with the intention of obstructing the execution of the certificate, nor did he refuse to pay the dues despite having the means to pay. The order thus violated principles of natural justice, because it did not comply with the pre-requisites required by Rule 73 of Part V of Schedule II of the Income Tax Act.

SEBI challenged the maintainability of the writ, because an efficacious and alternative remedy was available in the form of appeal to the Securities Appellate Tribunal. The order imposing penalty became final because Hingorani never challenged the order imposing penalty. Hingorani failed to pay the dues despite ample time and opportunity. Therefore the Recovery Officer imprisoned him pursuant to his powers under the SEBI Act.

The court held that the petition was maintainable, and existence of an alternative remedy was no bar for exercising writ jurisdiction. The remedy of writ being discretionary, the court can exercise discretion if it is of the opinion that there has been a breach of principles of natural justice, or if the procedure required for decision has not been followed.

Rule 73 of Part V of Schedule II to the Income Tax Act confers the power of arrest and detention only in two situations (i) when the defaulter transfers property with the intention of obstructing the execution of a certificate of demand issued, and (ii) neglects or refuses to pay despite having the means to pay. In this case the Recovery Officer has not recorded to satisfaction the existence of these two circumstances. Ordering arrest and detention of a person for mere inability to furnish a proposal for payment amounted to sheer abuse of power. Relying on an earlier decision,[13] the court asserted that non-payment of dues did not amount to refusal to pay; simple default to discharge is not enough. The order of arrest was illegal and arbitrary because it did not comply with the prescribed procedure. The Court released Hingorani and remitted the case to the Tax Recovery Officer with directions to decide the same afresh.

The judgment protects individual liberty, and sets barricades to the exercise of the newly found power of Arrest and Detention of defaulters by SEBI.

[13] ***Jolly George Vargese v. Bank of Cochin***, AIR 1980 SC 470

Criminal Law

Adambhai Sulemanbhai Ajmeri v. State Of Gujarat[1]

Saloni M. Ghule, III LL.B.

Akshardham temple convicts held under the Prevention of Terrorism Act acquitted by the Supreme Court for lack of evidence.

On 24 September, 2002, the Swaminarayan Akshardham Temple, situated at Gandhinagar, Gujarat was attacked by terrorists, and 33 persons were killed, and 86 grievously injured. 6 accused were arrested and brought before the Special Courts. Various sentences of rigorous imprisonment, life imprisonment and death sentence were passed under Prevention of Terrorism Act 2002, against the accused. This sentence was challenged before the Supreme Court.

The accused (Petitioners) contended that: (a) confessions of the accused were recorded under coercion and duress; also, these confessions were retracted at the earliest available opportunity, and that there was no independent evidence corroborating the confessional statements, (b) statements of accomplices were recorded after delay of more than one year and (c) some accused were detained in custody much before the actual date of arrest. On the other hand, the prosecution contended that confessions of the accused were properly recorded, and complied with the provisions of POTA, and that there was no ill-treatment, nor were the accused oppressed or lured to confess.

The Supreme Court acquitted all accused. It held that the evidence of the accomplices could not be used to corroborate confessions of the accused in the absence of independent evidence. Moreover, delay of more than one year in recording statements of the accomplice, discredits the evidence.

Though the accused were acquitted the judgment suffers from a few shortcomings. Neither was there an order granting compensation or restitution to the acquitted, nor were those who meddled with the delivery of justice prosecuted. Nevertheless, on the foundation of this judgment there is need to revisit the tenability of all existing prosecutions under POTA.

[1] (2014) 7 SCC 716.

Arnesh Kumar v. State Of Bihar[2]

Gayatri Dharmadhikari, V B.S.L .LL.B.

No automatic arrest on an accusation under 498-A of the IPC.

In this case, the issue before the Supreme Court was whether anticipatory bail should be granted to the petitioner.

The Petitioner feared arrest and applied for anticipatory bail, but was unsuccessful. Thereafter he appealed to the Supreme Court. His wife made allegations that he had demanded dowry, and driven her out of the matrimonial home. The Supreme Court allowed the appeal, and granted anticipatory bail.

The important part of the judgment is the order to all State Governments to instruct their police officers not to arrest automatically when a case under s. 498A of the IPC is registered. But instead they must satisfy themselves about the necessity for arrest under the parameters laid down, that flow from s. 41 of Cr.P.C. that provides the conditions under which the police may arrest without warrant. This order also stipulated that all police officers be provided with a check-list for the purpose of matters specified under s. 41(1)(b)(ii), which section provides for the circumstances of which the police officer shall be satisfied when the arrest is necessary.

The police officer shall forward the check-list and shall furnish the reasons and materials which necessitated the arrest, while forwarding or producing the accused before the Magistrate for further detention. While authorising detention of the accused, the Magistrate shall peruse the report furnished by the police officer in the terms mentioned above, and shall authorise detention only after recording his satisfaction as regards compliance.

In arriving at its decision, the Court stated the following reasons:

(i) Law Commissions, Police Commissions and this Court in a large number of judgments have previously emphasized the need to maintain a balance between individual liberty and societal order while exercising the power of arrest.

(ii) The existence of the power to arrest is one thing, the justification for the exercise of it is quite another.

(iii) It must be ensured that police officers do not arrest accused unnecessarily, and Magistrates do not authorise detention casually and mechanically; because any arrest affects the liberty of a person and may leave permanent scars on him.

[2] (2014) 8 SCC 273

Mohd Arif Ashfaq v. Registrar, Supreme Court of India[3]

Gayatri Dharmadhikari, V B.S.L. LL.B.

Review of death sentence must be done through a hearing in open court.

This is a group of petitions in which execution of death sentence had been stayed. The petitioners raised the issue of whether, after a person has been given death penalty, there should be review of death sentence by giving an oral hearing or whether circulation was enough.

The Supreme Court ruled that there must be review in open court and not mere circulation, for the following reasons:

(i) By its very nature, death sentence is irreversible.
(ii) Death sentence is a 'judge-centric' punishment. Different judicially trained minds may come to different conclusions on the basis of same facts. Hence it is necessary to hear the arguments of a skilled lawyer and take into consideration relevant and mitigating circumstances.
(iii) Such procedure complies with the due process of law.

However, the dissenting opinion states that oral hearing is not mandatory in all cases, but should be done only in those cases that justice demands, for the reasons that:

(i) The principle of natural justice of *audi alteram partem* puts an obligation of giving a right of hearing but does not exceed so far as to give a compulsory oral hearing in all cases, only in those which justice demands.
(ii) It has never been held in India or anywhere else in the world that *audi alteram partem* takes within its sweep the right to make oral submissions in every case.[4]

People's Union for Civil Liberties v. St. of Maharashtra[5]

Sharanya Singh, I B.A. LL.B.

Supreme Court lays down 16 guidelines for investigation of police encounters.

In three writ petitions in the Bombay High Court, the People's Union of Civil Liberty (PUCL) raised the issue of genuineness of 99 encounters between the

[3] (2014) 9 SCC 737.
[4] *P.N. Eswara Iyer & Others* v. *Registrar, Supreme Court of India*, (1980) 4 SCC 680.
[5] 2014 AIR SCW 5940.

Mumbai police and alleged criminals resulting in death of about 135 persons between 1995 and 1997. They prayed for information and particulars, registration of offence against police officers, directions against the Coroner to submit report about his actions, and for guidelines to regulate investigation of police encounters. The High Court issued some guidelines. Not satisfied with these guidelines, the PUCL filed SLPs before the Supreme Court.

PUCL put forth suggestions on the basis of guidelines given by the High Court and National Human Rights Commission (NHRC), mainly for forming separate investigative team to investigate encounters, and providing compensation to victim's family after ascertaining the victim's identity.

The different governments varied in their response. Union of India and some States and Union Territories had implementation concerns. While some stressed on investigation by a higher officer, some opined that exhaustive knowledge of the local area would make the local police an ideal investigative team.

The Supreme Court acknowledged the role of police in the society and stressed that rule of law must be followed. It laid down 16 procedural guidelines for investigating death and grievous injury during police encounters, in light of the Universal Declaration of Human Rights (UDHR), the United Nations Code of Conduct for Law Enforcement Officers and the Minnesota Protocol. The important guidelines are:

(i) any information of criminal movements or activities to be reduced into writing without revealing details of the suspect;
(ii) death arising out of an encounter to be registered as FIR and forwarded to the Court;
(iii) independent investigation of the encounter by CID or another police team;
(iv) family members of the victim can approach the Sessions Judge;
(v) compensation to victim's dependants under the scheme provided in s. 357A of the Criminal Procedure Code.

Sanskar Marathe v. State of Maharashtra[6]

Ritvik M. Kulkarni, III B.S.L.

Mere criticism of politicians or other persons in charge of government administration does not amount to sedition.

Aseem Trivedi (Trivedi), a political satirist and cartoonist, made and posted on the internet, cartoons and caricatures of the Parliament and the Ashok Chakra as

[6] Criminal PIL No. 3 / 2015 decided on 17 March, 2015 (Bombay High Court).

a protest against corruption. He was arrested for violation of s. 124-A of the IPC, s. 66-A of the Information Technology Act and s. 2 of the Prevention of Insults to National Honour Act, 1971. Hence this public interest litigation was filed. The Bombay High Court granted him bail in September 2012.

The Court was to decide whether Trivedi's humorous and potentially damaging criticism amounted to sedition. On behalf of Trivedi, it was contended that making the cartoons fell within his right to free speech and expression guaranteed under Art. 19(1)(g) of the Constitution, and that his arrest and detention for these acts were a blatant violation of his fundamental rights.

Deciding in Trivedi's favour, the Court held that mere criticism cannot be a ground for criminal liability as an act of sedition. The Court confirmed the principle that the words 'government' in s 124A of the IPC should be interpreted to mean the visible symbol of the State, and not merely the specific persons who are at a particular time entrusted with the responsibilities of carrying on its administration. The Court observed: "*... comments, however strongly worded, expressing disapprobation of actions of the Government, without exciting those feelings which generate the inclination to cause public disorder by acts of violence, would not be penal*".

The Court stated that while Trivedi's actions are driven by strong dislike of the Government, they are not of such nature as to incite member of the public to commit any offence. It also held that criticism of politicians or advocating for the change of government by lawful means will not amount to sedition, even though the expression employed may be obscene or vulgar; unless it is capable of inciting violence among the public (or does so, in fact).

Shatrughan Chauhan v. Union of India[7]

Prabitha Balasubramanian, III B.S.L.

Death sentence commuted to life imprisonment on grounds of delay in execution of the sentence.

Arts. 72 and 161 of our Constitution give the power and duty to pardon etc., and to suspend, remit or commute sentences in certain cases, especially death sentences. After exhausting all remedies, the convict has the Constitutional right to file a mercy petition either to the Governor of his State, or to the President of India.

Shatrughan Chauhan is a family member of death convicts Suresh and Ramji. These two men, and their families, filed mercy petitions, and wrote several times

[7] (2014) 3 SCC 1.

to jail authorities regarding the status of their mercy petitions. The mercy petition was disposed of after 11 years, and it took another 4 months to inform them of the rejection. Although granting mercy petitions is the discretionary power of the President or Governor, and thereby is not subject to judicial review, Chauhan alleges that the inordinate delay in deciding mercy petitions violates the right to life under Art. 21, which is why they have approached the Supreme Court under Art. 32.

The Supreme Court accepted that undue and unexplained delay in dealing with mercy petition is one of the circumstances, and held that due to the absence of acceptable reasons for delay by the executive, the commutation of death sentence to life imprisonment may be allowed.

Though there is no legal obligation imposed on the Governor and President to give reason for their decision, if supervening circumstances after the sentencing of a prisoner have occurred, the Supreme Court will have the power to uphold the *de facto* constitutional protection of Art. 21 to every convict; thereby subjecting such cases to judicial review. The following supervening circumstances are relevant for commuting death sentence to life imprisonment:(i) unexplained delay (ii) insanity (iii) solitary confinement (iv) judgments declared *per incuriam* (v) procedural lapses.

This judgments balances the rights of both the accused and the victim, and the power vested in the highest dignitaries who must exercise their reason.

Sunil Bharti Mittal v. Central Bureau of Investigation[8]

Anshul Chopra, IV B.S.L. LL.B.

Mens rea required to invoke liability of human agent for acts of company.

The CBI identified irregularities in the controversial allocation of the Unified Access Services Licenses in 2008. The allocation of these licenses was held to be illegal by the Supreme Court. A Special Court was set up for trial of offences relating to the 2G Case. After investigation by the CBI, a charge sheet was filed naming the then Telecom Secretary along with three companies, accusing them of causing losses to the Government Revenue. This Special Court issued summons to Sunil Mittal although he was not named in the charge sheet. While applying the principle of "*alter ego*", the Judge held that Sunil Mittal was liable for acts of the company, being in charge of the affairs of the company. Sunil

[8] 2015 Cri.L.J. 1130 (SC): 2015 (1) SCALE 140

Mittal challenged this order in the Supreme Court under Art. 136 of the Constitution of India.

The Court had to decide whether the principle of '*alter ego*' could be applied in such a way as to make the directors of a Company liable for an offence committed by the Company.

Sunil Mittal contended that the principle of *alter ego* had been applied erroneously. The principle is always applied in reverse, whereby, whenever a person who is controlling the affairs of the company is made an accused, the company can also be implicated as accused person. Sunil Mittal also contended that such a person will be vicariously liable only when a statute provides so, or when there is material to attribute acts of criminality to that person. The CBI contended that it is the "human agency" in the accused companies that was responsible for such an offence involving mens rea, and such an agency or person was to be the top-most person as indicated by circumstantial evidence.

The Court upheld the contention of Sunil Mittal and declared that the principle has been applied incorrectly by the Special Judge, as it ran contrary to the principle of vicarious liability. The Court observed that a person who is in charge of the affairs of the company can only be held liable in the following circumstances:

i. When there is sufficient evidence regarding his active role coupled with criminal intent.

ii. Where a statutory regime attracts doctrine of vicarious liability

Intellectual Property Rights Law

Aloys Wobben v. Yogesh Mehra[1]

Sejal Agarwal, III B.S.L.

Aloys Wobben (Wobben - Appellant) is a scientist engineer and founder of a German Company Enercon GmbH, and holds Indian patents for inventions in the field of wind turbine generators and wind energy converters. The operations in India are done by à joint venture Enercon India Limited formed by Enercon GmbH and Yogesh and Ajay Mehra (Mehra– respondent). Wobben's patents were licenced to Enercon India Ltd (Enercon India) and were renewed. This agreement was terminated in 2008 because of non-fulfilment of obligations. Enercon India filed 19 revocation petitions before the Intellectual Property Appellate Board (IPAB) under s. 64(1)[2] of the Patents Act 1970 (the Act). Wobben filed 10 infringement suits in the High Court. Enercon India filed 4 more revocation petitions before the IPAB, and also counter-claimed for revocation in Wobben's suits under s. 64(1) of the Act. IPAB. Parties filed consent terms in the High Court to expedite trial in the suit and counterclaim. After this order, the IPAB revoked 6 patents granted to Wobben. Wobben alleged that pursuing revocation proceedings after the consent order was an abuse of process of court. The matter came to the Supreme Court.

The question before the Supreme Court was whether the same party could seek counter-claim of revocation in an infringement suit after having already availed earlier of the remedy of post-grant opposition before the Patent Office.

The Supreme Court held that the same parties cannot avail of both these remedies under s. 64(1) of the Patent Act, 1970, as the section expressly uses the term "or" to separate the two remedies, thereby making them disjunctive. Moreover, availing of both remedies amounts to misuse of judicial process, because the prayer in both proceedings is the same. The Supreme Court also held that once a post-grant opposition has been filed, the same party cannot seek revocation, or challenge the patent by way of counter-claim of revocation in infringement proceedings.

[1] AIR 2014 SC 2210.
[2] *64. Revocation of patents: (1) Subject to the provisions contained in this Act, a patent, whether granted before or after the commencement of this Act, may, be revoked on a petition of any person interested or of the Central Government by the Appellate Board or on a counter-claim in a suit for infringement of the patent by the High Court on any of the following grounds, that is to say...*

The Court reached this conclusion based on the fact that the locus to raise a challenge in both proceedings is the same: "person interested." Also, since s. 64(1) starts with the words "Subject to the other provisions of this Act" a revocation proceeding is made subservient to a post-grant proceeding. Hence it cannot be filed once post-grant remedy under s. 25(2) has been sought.

However, it was held that in view of the consent order in the High Court, Enercon India could not pursue the revocation petitions before the IPAB.

The judgment however does not clarify the situation in a case where revocation has been filed, and thereafter an infringement suit i.e. whether the infringement suit should be stayed till the revocation is heard and the validity of patent decided.

Bayer Corporation v. Natco Pharma Limited[3]

Rachit Betharia, III B.S.L.

Grant of compulsory license to Natco for Bayer's "Nexavar" upheld.

Bayer, the Petitioner, an internationally renowned manufacturer of innovative drugs, held patent rights for a cancer drug, **"Sorafenib Tosylate"**, marketed as "Nexavar". On refusal of a license, Natco, the Respondent successfully brought an application before the Controller of Patents for a compulsory license. Aggrieved by this order, Bayer preferred an appeal to the IPAB which upheld the Controller's order. Bayer challenged the order in a writ before the Bombay High Court. Bayer's argument that no reasonable efforts to obtain a voluntary license were taken by Natco was not accepted by the Court taking in view the explicit refusal by Bayer to grant a voluntary license to Natco by its letter of 27 December, 2010. On the question of whether the supplies by infringers of the patented drug could be taken into account to decide the 'reasonable test' requirement, the Court held that infringer's quantity of goods could not be taken into account only because it could stop on any day. On the meaning of "adequate extent" with respect to reasonable requirement, the Court opined that, so far as luxury articles are concerned, the threshold of the 'adequate extent' test would be completely different from the threshold of the 'adequate extent' test so far as medicines are concerned. In respect of medicines the adequate extent test has to be met fully.

On the drug's pricing, Bayer stated the price was to be arrived at taking into account the R&D costs incurred not only on the patented drug, but also that on failed drugs. It refused to submit its balance sheet and details of reimbursement received from the government of U.S.A. as the drug was an orphan drug. This hindered the determination of the reasonable price due to lack of evidence. Bayer

[3] WP No. 1323/2013 decided on 15 July, 2014 (Bom High Court)

also contended that it had introduced a Patient Assistance Program (PAP) in respect of the patented drug. The Court observed that the PAP price is a conditional price, depending upon the patient satisfying certain pre-existing criteria, and that it was completely at the discretion of Bayer and the doctor attending the patient. Hence such price is not the price at which the patented drug is made available to the public. In view of such circumstances the court held that the patented drug was not available to the public at an affordable price.

The Court further observed that manufacture in India may not be in all cases necessary to establish working in India. However, the patent holder would nevertheless have to satisfy the authorities under the Act as to why the patented invention was not being manufactured in India keeping in view s. 83 of the Act. In the light of the above discussion the court refused to interfere with the orders of the Controller and the Tribunal.

Bayer's Special Leave Petition to the Supreme Court was dismissed.[4]

Institute for Inner Studies v. Charlotte Anderson[5]

Ritvik M. Kulkarni, III B.S.L.

No copyright over positions and performance of pranayama and Asanas.

Institute for Inner Studies (Institute – plaintiff) is a Filipino company established to spread *pranic* healing, *arhatic yoga*, inner teachings and practices developed by their Master Choa Kok Sui, and has affiliated institutions and branches in India, which are the other plaintiffs. Charlotte Anderson (CA) was associated with Institute, and under its licence, conducted courses and sold its publications in India. This licence was terminated, yet CA conducted courses, issued certificates and sold books and CDs without authorisation from the Institute. Other defendants unrelated to each other, are practitioners of *pranic* healing techniques. The Institute claimed in the suit copyright over the techniques of *pranic* healing, and trademark over 'Pranic Healing', and brought a suit of copyright and trade mark infringement against CA and other defendants and sought injunction restraining them from carrying out activities of spreading Pranic Healing teachings, techniques, practices and courses, or from organising workshops, training programmes or seminars.

On the question of trademark protection, the Court held that the word 'Pranic Healing' has been in the public domain with literary mentions dating back to 1906, and said term fails to pass the test of non-distinctiveness as required by s. 9 of the Trademark Act 1999, as the words are descriptive in nature.

[4] SLP (C) No. 30145/2014 decided on 12 December, 2014 (Supreme Court)

[5] CS (OS) 2252 / 2011 decided on 10 January, 2014 (Delhi High Court).

On the question of copyright protection, the Court held that there cannot be a copyright in the mere idea of performing an art or exercise in a particular manner, and the mere assembling of physical positions did not amount to a work of choreography, because they lacked 'pre-determination or fixation'. It therefore concluded a copyright or a trademark cannot exist in the specific forms of Pranayama '*Asanas*' or Bikram Yoga.

Jones Investment Co Inc v. Nagarajan Srinivasan[6]

Yojit Pareek, III B.S.L.

Doctrine of first user applies if trans-border reputation is not established after non-usage of trademark

NS applied for registration of the trademark 'Jones alleging its use since 1993. Jones Investment (JI - appellant) opposed registration, claiming that it had been using the trade mark "Jones New York" since 1966 and was registered in 1977. JI alleged that it was the prior user of the trademark and it had acquired international reputation and trans-border reputation.

NS replied that the trademark "Jones" is different from the NS's trademark "Jones New York", and the goods in respect of which the JI has registered the trademark were sold only in foreign countries and not in India. JI does not use the trademark in India. NS has adopted the trademark honestly and has been continuously using their trademark from 1993. There is no question of confusion or deception.

JI raised grounds of opposition under ss. 9(1), 9(2)(a), 11(1), 11(2), 11(3), 11(10) and 18(1) of the Trade Marks Act, 1999. The Deputy Registrar considered each objection, and dismissed the opposition, and allowed the registration of NS's mark "Jones". JI filed the appeal in IPAB.

JI stressed on the use of the mark since 1966 and the fact that it had international reputation and trans-border reputation, since the mark was used in more than 35 countries including USA. Appellant has registered their trademark in India in the year 1977 in respect of class 25 relating to same goods as of the respondent.

The IPAB dismissed the appeal, and observed that JI was not been able to establish trans-border reputation for its mark as it had not used the trademark in India. The IPAB relied on the judgment of the Supreme Court in *Milmet Oftho Industries v. Allergan Inc:*[7]

[6] Oa/48/2010/TM/CH & MP No. 260/2010 in OA/48/2010/TM/CH decided on 24 February, 2014 (Intellectual Property Appellate Board).

[7] (2004) 12 SCC 624: AIR 2004 SC 3355

"multinational corporations, who have no intention of coming to India or introducing their product in India should not be allowed to throttle an Indian Company by not permitting it to sell a product in India, if the Indian Company has genuinely adopted the mark and developed the product and is first in the market. Thus the ultimate test should be who is first in the market... However, if an evidence it is shown that the Respondents had not adopted the mark prior to its use in India by the Appellants then, undoubtedly, the trial Court would vacate the injunction."

Shamnad Basheer V. Union Of India[8]

Aishwarya Bedekar, III B.S.L.

Key provisions of Trademark Act and Patents Act about composition of the IPAB struck down as unconstitutional.

Mr. Shamnad Basheer filed a writ petition in the Madras High Court in 2011 seeking to declare the establishment and constitution of the Intellectual Property Appellate Board (IPAB) (as provided under the Trademarks Act, 1999 and the Patent Act, 1970) as unconstitutional, since it violated the basic structure of the Constitution. He also pursued a miscellaneous petition seeking stay to the appointment of Vice Chairperson to the IPAB, on the grounds that the Selection Committee formed for the appointment of Vice Chairperson did not abide by the rules prescribed by the Supreme Court in *Union of India v. R. Gandhi.*[9]

Mr. Basheer raised several issues; one of them being that the salaries, appointments and functions of the officers of the IPAB were controlled by the Department of Industrial Policy and Promotion (DIPP) of the Ministry of Industry and Commerce. Thus, the constitution of the IPAB clearly violated the doctrine of separation of powers, which requires the Judiciary to be strictly separate from the Executive. It also violated Art. 14 and 21 of the Constitution, which give to each citizen the right to have their judicial matters decided by a judicial body that is independent. The qualifications for the appointment of Chairperson, Vice-Chairperson, and Judicial Member under Ss. 84 and 85 of the Trade Marks Act, 1999 and of the Technical Member under s. 116 of the Patents Act, made no mention of the requirement for them to be advocates with experience of 10 years. The provision relating to elevation of Technical Member to the post of Chairperson or Vice-Chairperson was also questioned. He also

[8] WP 1256 / 2011 decided on 10 March 2015 (Madras High Court).

[9] AIR 2007 SC (Supp) 1024.

argued against the composition of the Selection Committee, which had minimal representation from the judiciary.

The Madras High Court held these critical provisions of Trademarks Act, 1999 as unconstitutional. The Court held that the selection of judicial members from persons having no judicial experience was invalid, and Technical Members lacking judicial qualification could not be appointed as Chairperson or Vice-Chairperson. It also held that the Selection Committee must necessarily have more judicial members.

Sunny Sales v. Binod Khanna[10]

Kamlesh Y. Mali, IV B.S.L. LL.B.

Plaintiff held to be liable of reverse passing-off defendant's trademark

Based in Kolkata, both Sunny Sales (SS) and Binod Khanna (BK) import sewing machines and cutting machines. and sell them in the Indian market. Both use the word mark 'LIPU' and a label mark consisting of a 'triangle'; the word 'LIPU' is derived from a geographical region of China.

While SS was using the mark since 1994, BK claim use since June 2007. Both have applied for registration of the label mark, which is pending. SS has also applied for registration of the word mark 'LIPU' in December 2014. Hence SS seeks interim injunction to restrain BK from using the trade mark 'LIPU'.

BK states that an importer cannot normally claim proprietorship over the mark of an exporter or manufacturer.[11] In *Double Coin Holdings Ltd. v. Trans Tyres (India) Pvt. Ltd.*,[12] a test was laid down to determine whether an importer or distributor can claim proprietorship over the trademark of a manufacturer or exporter; wherein it was held that when the customer identified the trademark with the importer or distributor, it could make such a claim, else not. SS stated that the machines were manufactured in China on their instructions and that the mark 'LIPU' was imprinted on the machines on their instructions.

The doctrine of reverse passing off laid down in *Bristol Conservatories* case,[13] was invoked; the question was whether SS is the proprietor of the mark 'LIPU' in India, and whether any goods sold under that mark in India are associated with SS. Two of the exporters and manufacturers whose products were imported by SS were 'Linhai New Lipu Machine Company Limited' and China Light Suit Cases bags and safety products IMP/EXP Corporation, situated in China.

[10] G.A. No. 910 of 2014 decided on 10 November 2010 (Calcutta High Court).
[11] See *In re Apollinaris Company, Limited* [1891] 8 RPC 137
[12] 2011 (46) PTC 194 (Delhi).
[13] *Bristol Conservatories Ltd. v. Conservatories Custom Built Ltd* (1989 RPC 455).

Rejecting the injunction prayer, the Court held that SS failed to establish that the mark has become so identified in this country, that its people identify it as belonging to SS and not to the Chinese manufacturer. BK was successful in proving reverse passing off. Hence the prayer for an injunction was refused and the application disposed of in favour of defendant.

Tekla Corporation v. Survo Ghosh[14]

Aishwarya Bedekar, III B.S.L.

Doctrine of misuse of copyright not a defence to infringement.

Tekla Corporation (plaintiff) claimed copyright in a software programme named Tekla Structures. Tekla sued Survo Ghosh (defendant) for installing the programme without obtaining a license from Tekla.

Ghosh's contentions were based on the "Doctrine of copyright misuse", that Tekla was involved in practices of copyright misuse, wherein as copyright owner Tekla took advantage of the monopoly rights and engaged in practices that were either anti-competitive, restrictive, or against public policy. Ghosh also argued that the terms of use of Tekla Software, and the unreasonable conditions that the licensees had to agree while obtaining license, were a clear case of copyright misuse. He relied on the US court's decision in *Lasercomb v. Reynolds*,[15] which recognized this doctrine of copyright misuse.

Tekla contended that copyright is a statutory right in Indian law, and contained an exhaustive list of defences that could be sought in a case of infringement. The doctrine of copyright misuse is not one of them and has never been applied in India before.

The Delhi High Court decided in favour of Tekla. The Court held that s. 52 of the Copyright Act, 1957 provided for a list of defences, and the doctrine of copyright misuse was not one of them. Even if doctrine of copyright misuse were an equitable right, Ghosh had no defence because he did not come to court with clean hands, having committed copyright infringement. The Court also explained that if the doctrine of copyright misuse were to be applied, any person may unilaterally decide that the owner of the copyright has lost her monopoly right, and would thereby usurp the exclusive rights of a copyright owner.

[14] CS (OS) 2414 / 2011 decided on 16 May, 2014 (Delhi High Court).
[15] 911 F.2d 970 (4th Cir. 1990)

Whirlpool of India Ltd. v. Videocon Industries Ltd.[16]

Ritvik M. Kulkarni, III B.S.L.

Registered design proprietor held liable for piracy of design.

Whirlpool (plaintiff) and Videocon (defendant) manufacture home appliances in India. Whirlpool contended that Videocon's *Videocon Pebble* was an exact replica of its washing machine model, for which it had design registration. Videocon had registration for its design for the product. Therefore the Court was required to decide whether a registered proprietor could be sued for piracy of a registered design.

Whirlpool relied on a plain reading of the words *"any person"* s. 22 of the Designs Act, 2000 (the Act),[17] which can include even a registered proprietor. It contented that if the legislative intent was to exclude registered proprietors, then the Act would have expressly mentioned such exclusion, as can be found under s. 29 of the Trademarks Act, 2000, that describes infringement of a registered trade mark.

Videocon argued that since s. 11 grants a monopoly right to use its registered design, it cannot be sued for piracy. At best, Whirlpool could challenge the validity of the design before the Controller under s. 22(3) of the Act.

The Court held, in favour of Whirlpool, that a registered proprietor could indeed be held liable for piracy of another's registered design. Since Videocon obtained registration *after* Whirlpool did, it could not invoke its registration as a defence. The Court observed that the monopoly right granted under s. 11 was not being absolute, but subject to all other provisions under the Act, including s. 22.

After comparing the visual features of the two products, the Hon'ble Court concluded that Videocon certainly infringed Whirlpool's registered design. Since the Defendant's product was an *obvious imitation* of that of the Plaintiff's, the Hon'ble Court upheld the latter's action for passing off as well and granted an injunction against Videocon restraining it from making or selling the impugned product.

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[16] NM No. 2269 / 2012 in Suit No 2012 / 2012 decided on 27 May, 2014 (Bombay High Court).

[17] *22. Piracy of registered design. (1) During the existence of copyright in any design it shall not be lawful for any person-*
(a) for the purpose of sale to apply or cause to be applied ... the design or any fraudulent or obvious imitation thereof, ...;
(2) If any person acts in contravention of this section, he shall be liable for every contravention-
(a) to pay to the registered proprietor ... a sum ... recoverable as a contract debt, or
(b) ... to pay such damages as may be awarded and to be restrained by injunction accordingly: ...

Personal Laws

Juveria Abdul Majid Patni v. Atif Iqbal Mansoori[1]

Varad Shende, III LL.B.

Decree of divorce does not free husband from liability under the Domestic Violence Act, 2005.

Juveria Patni (appellant) married Atif Mansoori (respondent) according to Muslim rites in May 2005. Atif treated her with cruelty, harassed her and physically assaulted her in January 2006. He refused to allow her into the house in February 2006, and told her to stay with her parents. He never visited to see his own baby delivered in Mumbai in August 2006; instead filing a petition seeking custody of the minor child. Juveria lodged an FIR in September 2007 under s. 498A, and 406 IPC. Later she also contended to have obtained an ex parte *khula* (a type of divorce) from a Mufti under the Muslim Personal Law in May 2008. Atif challenged the *khula*, and filed a petition for restitution of conjugal rights.

In September 2009, Juveria filed a petition under s. 12 of the Domestic Violence Act, 2005 (DV Act) in Mumbai. In February 2012, the Magistrate allowed the application and directed Atif to pay interim maintenance of Rs. 25000. The Sessions Judge set aside this order on the ground that it was not maintainable on account of an effectual divorce and lapse of *iddat* period. The High Court upheld the order of the Sessions. Juveria approached the Supreme Court in appeal by special leave.

Atif argued that he was no longer liable to pay maintenance under Muslim Personal Law since a divorce was obtained by *khula* in May 2008.

The Supreme Court held that once act of domestic violence was committed during the sustenance of a domestic relationship (as defined in s. 2(f) of the DV Act), subsequent decree of divorce will not absolve the committer from liability from the offence committed, nor will it deny benefit to which the aggrieved person is entitled including monetary relief, child custody, compensation and interim orders under the various provisions of the DV Act. It directed Atif to pay Rs. 25,000 interim maintenance as ordered by the Magistrate with direction to the Magistrate to dispose of the petition under s. 12 of the DV Act.

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[1] (2014) 10 SCC 736.

Khursheed Ahmad Khan v. State of U.P.[2]

Chithra George, V B.S.L. LL.B

Polygamy is not an essential practice among Muslims as it finds no clear propagation in Quranic texts.

Khursheed Khan (Appellant), an Irrigation Supervisor with the UP Government, was removed from service for misconduct, for contracting another marriage during the existence of the first marriage without permission of the Government. This violated Rule 29(1) of the U.P. Government Servant Conduct Rules, 1956 (the Rules).

Khan contended that he had divorced his first wife before performing the second marriage. He also challenged the validity of the Rules as being violative of Art. 25 of the Constitution, on the ground that Islam, the religion to which he belongs, permits him to have four spouses.

The State submitted that there was no proof of divorce; and that the validity of the Rule 29(1) of the Rules was not open to question on the ground that it violated Art. 25 of the Constitution of India.[3]

In *Badruddin v. Aisha Begum,*[4] Allahabad High Court had held: '*though the personal law of Muslims permitted having as many as four wives but it could not be said that having more than one wife is a part of religion. Neither is it made obligatory by religion nor is it a matter of freedom of conscience. Any law in favour of monogamy does not interfere with the right to profess, practise and propagate religion and does not involve any violation of Art. 25 of the Constitution.*' In *R.A. Pathan v. Director of Technical Education,*[5] the Gujarat High Court analysed in depth the tenets of Muslim personal law and held that Art. 25 of the Constitution permits only what is permissive under the scripture and could not be equated with a mandate which may amount to a religious practice. In *Ram Prasad Seth v State of UP,*[6] The Allahabad High Court had held that the act of performing second marriage during the lifetime of one's wife was not an integral part of religion, nor could it be treated as practising or professing or propagating Hindu religion.

The Supreme Court approved the views in these three cases.

The Supreme Court held that there was no reliable evidence of divorce. It also held that Rule 29(1) of the Rules did not violate Art. 25 of the Constitution as

[2] CA No 1662 / 2015 decided on 9 February, 2015 (Supreme Court).
[3] *See Sarla Mudgal v. Union of India* (1995) 3 SCC 635 ; *State of Bombay v. Narasu Appa Mali* AIR 1952 Bom 84
[4] (1957) All LJ 300.
[5] (1981) 22 Guj LR 289.
[6] AIR 1957 All 41.

there was nothing in the Quranic text indicating that contracting many marriages was a matter of religious faith and belief. It also declared that religious practices that run counter to public order, morality or health or any policy of social welfare that the State embarks upon, are not protected by Art. 25 of the Constitution. Religious practices must therefore give way to the good of the people of the State as a whole.

Shabnam Hashmi v. Union of India[7]

Thulasi K.Raj, V B.S.L. LL.B.

Right to adopt a child is not a fundamental right under Art. 21.

Relying on *Manuel Theodore D'Souza*[8] and *Philips Alfred Malvin v. Y. J. Gonsalvis,*[9] Shabnam Hashmi (petitioner) filed a writ petition under Art. 32 seeking recognition of right to adopt and to be adopted as a fundamental right under Art. 21 of the Constitution. Alternatively, Hashmi requested the Court to lay down optional guidelines enabling adoption of children by persons irrespective of religion, caste, creed etc., and to direct the Centre to enact a law focusing on the child. Hashmi stated that the Juvenile Justice Act, 2000 (the Act) was a secular law enabling any person to adopt a child, irrespective of the religion.

The All India Muslim Personal Law Board (AIMLB), the intervener, stated that adoption was merely one of the methods provided for under the Act, and that Islamic law did not consider the adopted child equal to a biological child. It asked the Court to direct Child Welfare Board to observe the principles of Islamic Law before declaring a Muslim child available for adoption under s. 41(5) of the Act. The Union informed the Court that prospective parents, irrespective of their religious background, were free to access the provisions of the Act for adoption of children after following the procedure prescribed.

Since the petition was filed in 2005, and the Act was amended in 2006 facilitating adoption, Hashmi's prayer was fulfilled. But the Court did not uphold a right to adopt or to be adopted as a fundamental right. It observed: "the present is not an appropriate time and stage where the right to adopt and the right to be adopted can be raised to the status of a fundamental right and/or to understand such a right to be encompassed by Art. 21 of the Constitution" in view of the conflicting views amongst different communities.

[7] (2014) 4 SCC 1.
[8] (2000) 3 Bom CR 244.
[9] AIR 1999 Ker 187.

Procedural Laws

Dashrath Rupsingh Rathod v. State Of Maharashtra[1]

Bhagyashree Patwardhan, III LL.B.

Complaint of dishonour of cheque can be filed only in the Court within whose local jurisdiction the offence was committed.

Dashrath Rathod (accused) issued a cheque to the complainant company issued by UCO Bank, Tangi, Orissa. The complainant presented it to State Bank of India, Ahmednagar Branch, Maharashtra. The cheque was dishonoured by UCO Bank. He filed a complaint under s. 138 of the Negotiable Instruments Act 1888 (the Act) at Ahmednagar. The accused questioned the jurisdiction of the JMFC Ahmednagar. The JMFC held that since the demand notice was issued from, and the payment was claimed at Ahmednagar, he had jurisdiction to try the Complaint. In appeal, the High Court disagreed with the conclusion of the JMFC that the receipt of notice and non-payment of the demanded amount had prominence over the place from which the notice of demand was issued, and held that JMFC, Ahmednagar did not have territorial jurisdiction. The accused filed criminal appeal in the Supreme Court, which was heard with many other appeals that involved the same question.

The Supreme Court observed that cause of action to file a complaint arises after (a) the cheque is presented to the drawee bank within a period of six months from the date of its issue, (b) the complainant demands payment of the cheque amount within thirty days from the day he receives information from his bank that the cheque has been dishonoured, and (c) the drawer has failed to pay the cheque amount within fifteen days of receiving such notice. However these conditions were not ingredients of offence.

The Supreme Court observed that under s. 138 of the Act, an offence occurs when the drawee bank returns the cheque unpaid. The Court held that once the cause of action accrues to the complainant, the jurisdiction of the Court under s. 177 of Criminal Procedure Code will be decided with reference to the place where the cheque is dishonoured. It was held that the court where the place of commission of the offence was the place where the drawee bank is located; hence the complaint cannot lie in Ahmednagar court, and must be returned for further action.

[1] (2014) 9 SCC 129.

The Court also gave directions about pending matters, and ordered that the complaints in those proceedings in which evidence had not commenced will be returned to complainants, which they must file within 30 days in the Courts having jurisdiction without prejudicing the limitation period.

There is one more practical and social aspect as well. The Court interpreted the provision in a manner that would avoid harassment and oppression of the accused by being required to contest proceedings at the place where the complainant chose to present the cheque for payment or to issue notice of demand. This decision takes away the complainant's power to choose jurisdiction.

Dipanwita Roy v Ronobroto Roy[2]

Solaiappan.Odayappan, IV B.S.L. LL.B.

The presumption of legitimacy does not bar the DNA test, as it is presumption and not legal fiction.

Dipanwita Roy (petitioner-wife) and Ronobroto Roy (respondent-husband), were married at Calcutta. Ronobroto filed a petition for divorce under s. 13 of the Hindu Marriage Act, 1955 on the ground of alleged adulterous life style of Dipanwita.

Ronobroto alleged that since 2007 Dipanwita had stopped living with him, and she did not perform any conjugal functions. She had an extra marital relationship with a certain Mr. Shah, and a son born out of this relationship. Dipanwita denied these allegations. Ronobroto moved an application seeking DNA tests for himself and Dipanwita's son.

The Family Court dismissed the petition. In appeal, the High Court allowed the petition. Dipanwita filed this special leave petition.

Dipanwita relied on s. 112 of the Indian Evidence Act 1872 (the Act), which provides that birth of a child during subsisting marriage was conclusive proof of legitimacy of the child, unless it can be shown that the parties to the marriage had no access to each other at any time when the child could have been begotten. This provision applied because while deciding the petition, the issue of legitimacy will also be incidentally involved. The Petitioner alleged that the Supreme Court has earlier held[3] that Courts cannot order blood test as a matter of

[2] CA No. 9744 / 2014 decided on 15 October, 2014 (Supreme Court)

[3] *Goutam Kundu v. State of West Bengal* (1993) 3 SCC 418

course or as a roving inquiry and a strong prima facie case of non-access needs to be established.

The Court observed that s112 of the Act was enacted at a time when the modern scientific advancements with DNA as well as RNA tests were not even contemplated by the legislature. Results of a DNA test are considered scientifically accurate. Although s. 112 raises a presumption of conclusive proof it is rebuttable as s.112 created a presumption and not a legal fiction, and when the truth or fact is known there is no need or room for any presumption. The Court held that the question in the case was not one of legitimacy, but of adulterous conduct of the wife.

The Court agreed with Ronobroto that but for the DNA test, it would be impossible for him to establish his assertions. While upholding the order passed by the High Court, the Court provided for a caveat, giving the wife liberty to comply with or disregard the order passed by the High Court, and stated that in case she declined to comply, adverse inference can be drawn against her as illustrated in illustration (h) of s. 114 of the Act.

General Motors v Ashok Ramnik[4]

Solaiappan.Odayappan, IV B.S.L. LL.B.

Punitive damages cannot be awarded when not claimed for.

Ashok Ramnik (respondent) had a passion for driving and was desirous of visiting Leh-Ladakh, Jammu & Kashmir and Nepal in his car. He saw an advertisement and visited the showroom of General Motors (GM-appellant). He was assured that the Chevrolet Forester would be the appropriate vehicle for him to realise his dream. The brochure also assured that the vehicle in question was an SUV.

He realised that the vehicle was not fit for off-road, no-road and dirt-road driving, contrary to what was represented, and the car had defects. He approached GM and its dealers, who referred to the owner's manual, that stated that the car was a passenger car, and was neither a conventional off-road vehicle nor an all terrain vehicle. The owner's manual contradicted the assurance in the brochure and internet.

Ashok Ramnik filed a complaint before the Consumer District Forum alleging unfair trade practice and deficiency in service. He sought refund of price of the vehicle and compensation for physical and mental pain and shock. The District Forum ordered subject to the return of the vehicle a refund of Rs.14 Lakhs,

[4] CA Nos. 8072-8073 / 2009 decided on 9 October 2014 (Supreme Court)

additional amount for cost of accessories, interest @ 9% per annum, and also compensation for mental agony and costs of litigation.

In the appeal filed by GM, the State Commission agreed with the District Forum that it was an unfair trade practice, but set aside the order of payments and awarded Ashok Ramnik Rs.50000 as compensation. It also directed General Motors to not advertise the vehicle as an SUV. Both Ashok and GM sought revision from the National Commission, which affirmed the unfair trade practice, but restored the order of the District Forum. However the National Commission also ordered GM to pay punitive damages of 25 lakhs, of which 5 lakhs were awarded to Ashok Ramnik. GM approached the Supreme Court.

The question before the Supreme Court was whether in the absence of claim for punitive damages the same could be given. The Supreme Court set aside the order of the National Commission to the extent it had awarded punitive damages. It held that punitive damages could not be awarded because there was no claim for punitive damages, nor any averments in the complaint. GM had not notice of such claim, and did not have a chance of meeting it. Punitive damages must be pleaded.

KSL & Industries v. Arihant Threads Ltd[5]

Keshav Raheja, I B.A. LL.B.

Precedence of revival of sick units over recovery of loans.

Arihant Threads Ltd. (company – respondent) failed to repay instalments of the loan it owed to IDBI Bank. The Bank filed an application before the Debt Recovery Tribunal at Chandigarh (DRTC). The DRTC issued an ex-parte final order determining the amount to be recovered, and also fixed the reserve price for the auction of company's properties. KSL & Industries (purchaser - appellant) sought to purchase the properties in the auction.

Aggrieved by the DRAT's decision in holding the sale transaction in favour of the purchaser, the Company filed successfully two writ petitions in the Delhi High Court. The purchaser moved the Supreme Court.

The Full Bench of the Supreme Court deliberated over:

(i) whether recovery proceedings could be initiated against the Company in the present case, and
(ii) whether the provisions of Sick Industries (Special Provisions) Act, 1985 (SICA) override the provisions of Recovery of Debts due to Banks and Financial Institutions Act, 1993 (RDDB Act).

[5] (2015) 1 SCC 166.

The Supreme Court observed that the term "not in derogation" in s. 34(2) of the RDDB Act[6] means that the provisions of SICA are not to be detracted from or abrogated in any way. Hence the proceedings under SICA for reconstruction of a sick company should continue, and for that purpose all other proceedings against the company and its properties, including those arising from RDDB Act, should be stayed, during the pendency of the process of reconstruction.

It held that provisions of SICA, in particular s. 22, which provides for suspension of legal proceedings when proceedings under the SICA have commenced, shall prevail over the provision for the recovery of debts in the RDDB Act, because the purpose of recovery application could be achieved only by way of execution and distraint over a sick unit's property; but s. 22 of SICA encompasses every application for recovery of debt through such means. Hence, as per the settled rule of interpretation that if one construction leads to a conflict, whereas on another construction two Acts can be harmoniously construed, then the latter must be adopted, the Court held that the provisions of SICA have an overriding effect.

S. Muthulakhmi v. The Record Officer, The Madras Regiment[7]

Netra Anandan Nair, I B.A. LL.B.

Wife of a marriage presumed from long cohabitation held entitled to family pension after death of the husband.

S Muthulakhmi, the plaintiff, claimed the pension of her husband, Mr. Swamidoss. She filed a suit for declaration that she was his legally wedded wife. The defendant denied the said claim on grounds:

(1) Swamidoss's earlier marriage was alleged to be dissolved by a deed of dissolution of marriage that was not counter attested by a witness, and nor was it before court of law. Hence the marriage with plaintiff was a nullity.
(2) Muthulakhmi's name did not appear in the service record relating to family pension

The trial court decreed the suit, which was reversed in appeal. In this second appeal, the Court found that Swamidoss had been living with Muthulakhmi before and after the death of the first wife. Muthulakhmi and Swamidoss had a child. Muthulakhmi was acknowledged as the wife in the ration card, and other identity cards. The first wife never objected to the marriage with Muthulakhmi.

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[6] *34. Act to have over-riding effect:*
(2) The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, ... the Sick Industrial Companies (Special Provisions) Act, 1985...

[7] Second Appeal (MD) No.1068 of 2009, decided on 24 June 2014 (Madras High Court).

The Court applied the presumption that long cohabitation showed the existence of relationship of husband and wife. Allowing the second appeal, the court restored the decree of the trial court, enabling Muthulakhmi to get pension benefits.

Shree Balaji Aromatics Pvt. Ltd. V. Union of India[8]

Jyothi Anumolu, III B.S.L.

Waiver of interest by the assessee does not have any bearing on the Revenue's obligation to give interest on belated fund.

In this case, the assessee (petitioner) wrote a letter waiving interest accruing to him in some pending refund claims, in response to a verbal undertaking given by the Department (respondent) for the expeditious disposal of refund claims. Therefore, the said refund claims were allowed without any interests vide order dated July 8, 2007. However, the assessee filed a writ petition before the High Court against this order, seeking interest on belated refunds under s. 11BB of the Excise Act.

The substantial question of law before the Court was whether waiver of interest on delayed refund by the assessee released the Revenue of its statutory liability to pay interest on such delayed refund under s. 11BB of the Central Excise Act, 1944 ("the Act").

It was the contention of the assessee that interest under s. 11BB of the Act was statutory and mandatory, which became payable automatically as and when refund was not made within thirty days from the date of receipt of the application. This was regardless of whether a claim was made or had been waived. However, the Department, placing reliance on a circular, contended that the assessee's letter to the Department had amounted to waiver of interest, and therefore debarred him from claiming interest later on.

The Allahabad High Court held that since the wordings used in s. 11BB was: *"there shall be paid to the applicant"*, the payment of interest was statutory, automatic and not discretionary. The Court came to this conclusion after referring to the same circular which had stated that the provisions of s. 11BB of the Act would be automatically attracted if the refund had not been made beyond a period of three months. It relied on *Ranbaxy Laboratories Ltd. v. Union of India,*[9] where the Supreme Court had held that the only interpretation of the said section was that interest under the said section became payable on the expiry of a period of three months from the date of receipt of the application under sub-s. (1) of s. 11BB of the Act, and that the said Explanation regarding refund by way of

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[8] Civil Misc WP 1062 / 2007 decided on 24 April, 2014 (Allahabad High Court)

[9] [2011] 33 STT 326.

court order did not have any bearing or connection with the date from which interest became payable.

Thus, the assessee was entitled for interest under s. 11BB of the Act on the refunded amount, if the amount was refunded after three months from the date of receipt of the application.

Vishwa Lochan Madan v. Union of India[10]

Awani Kelkar, II B.S.L.

Fatwas issued by Muslim (quasi-)adjudicatory bodies have no legal authority.

Vishwa Lochan Madan (Appellant) filed this writ petition under Art. 32 of the Constitution to restrain Union of India (Respondents) from establishing Dar-ul-Qazas (Muslim Courts) and from passing any fatwa. Madan alleged that the Muslim Courts all over the country are functioning as a parallel judicial system. Madan was prompted to file this petition in the aftermath of numerous objectionable *fatwas* issued by these courts.

Madan asserted that adjudication of disputes is essentially the function of the sovereign State. Hence he sought a declaration that administration of justice by such Courts was illegal, and that any *fatwa* issued by them had no legal backing. Madan also prayed that these Courts be closed.

The Union of India contended that *fatwas* are advisory in nature, and no Muslim is bound to follow them. The *dar-ul-qaza* does not administer criminal justice, but it only functions as a negotiator in matters of civil disputes between Muslims; they are alternative dispute resolution mechanisms that amicably and expeditiously resolve disputes. They are not parallel Judiciary.

The Court held that the *dar-ul-qazas* do not satisfy any essential features of a valid judicial system, and have no sanction in law. They are not part of the *corpus juris* of the State. Hence the contention that they are a parallel judicial system is misconceived. It also held that a *fatwa* has no legal status in the Constitution, and issuing it is not illegal.

The Court referred to the psychological impact of a *fatwa*, and recognised that some *fatwas* might infringe on individual rights, and held that that no Muslim Court shall give verdict or issue *fatwa* affecting the rights, status and obligation of an individual, unless such an individual has asked for it. The writ petition was dismissed with the above observations.

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[10] (2014)7 SCC 707.

Vodafone India Services Pvt Ltd v. Union of India[11]

Srishti, II B.S.L.

Capital receipts and difference in fair market price for issue of shares to holding company shall not be income for transfer pricing under Income Tax Act

Vodafone India Services Pvt. Ltd. (petitioner) issued 2,89,224 equity shares of the face value of Rs.10/- each on premium of Rs.8,509/- per share to its holding company, a non-resident entity, the fair market value of which was determined in accordance with the Capital Issues (Control) Act, 1947.

However, according to the Income Tax (IT) Department, Vodafone ought to have valued each equity share at Rs. 53775, and not Rs. 8519. On that basis shortfall in premium to the extent of Rs. 45256 per share resulted into total shortfall of Rs. 1308.91 crores. Under Transfer Pricing provisions in Chapter X of the Income Tax Act 1961, this amount of Rs.1308.91 crores was income. Hence the shortfall should be considered as loan, and deemed interest shall be charged on the deemed loan.

Vodafone contended that the IT Act does not levy tax on the inflow of capital into the country so as to obstruct its coming into India. Nor does the Act create any legal fiction to treat as income such alleged shortfall in capital receipt on issue of equity shares by an Indian company to its non-resident holding company. Therefore, there is no question of treating the shortfall as a deemed loan and taxing the deemed interest.

The Department contended that the difference between the Arm Length Price (ALP) and the price charged for issue of shares is the benefit conferred upon the holding company. This passing of benefit to holding company is the cost to Vodafone, which should be subjected to tax.

The issue was whether the issue of shares by a subsidiary to its holding company results in an income under the Indian tax laws.

The Court held that the capital receipts received by Vodafone on issue of equity shares to the holding company, which is a non-resident entity, and the alleged short-fall between the fair market price of its equity shares and the issue price of the equity shares, cannot be considered as income within the meaning of the expression as defined under the Act, and Chapter X of the IT Act does not apply.

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[11] WP No.871 / 2014 decided on 10 October, 2014 (Bombay High Court)

World Wrestling Entertainment v. Reshma Collection[12]

Solaiappan.Odayappan, IV B.S.L. LL.B.

Virtual presence through internet is enough to constitute essential part of business for the purpose of territorial jurisdiction of the court.

World Wrestling Entertainment (WWE - appellant) filed a suit and sought injunction against Reshma Collection (RC - respondent) which carried out the business of manufacture and sale of garments and apparel, for violation of copyright and trademarks, and for passing off, by selling goods that bore reproduction of WWE's creations. The Delhi Court returned the plaint to WWE. Hence this appeal to the Division Bench of the High Court.

The question before the Court was whether Delhi High Court had territorial jurisdiction under s. 134(2) of the Trademarks Act, 1999 and s. 62(2) of the Copyright Act, 1957. The Single Judge refused jurisdiction relying on *Dhodha House v. S.K. Maingi,*[13] which had held that the term 'carries on business' for the purpose of jurisdiction meant a place where the defendant has and interest in a business, a voice in what is done, a share in the gain or loss and some control at that place, through an agent who is: i) special agent, ii) agent in strict sense, and iii) essential part of business is carried on in that place.

WWE argued that it carried on business in Delhi because its programmes were broadcast in Delhi and its merchandise, books, goods and services were available for sale in Delhi through the internet. RC argued that the test as laid down in Dhodha was not satisfied.

The court held that internet transactions being similar to instantaneous telephone transactions, cause of action arose at Delhi, as acceptance intimated by WWE through the internet was at Delhi. The cause of action was sufficient to hold that essential part of business was in Delhi. Advancements in technology and new models of conducting business over the internet make it is possible for an entity to have a virtual presence at any place. This virtual presence was equivalent to a seller having shops at that place in the physical world. The *Dhodha case* did not contemplate web-based models; hence the requirements of agency need not be satisfied.

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[12] FAO(OS) 506 / 2013 decided on 15 October 2014 (Delhi High Court)
[13] 2006 (9) SCC 41.

Other Laws

B.N. Reddy v. Bar Council of India[1]

Radhika Gupta, V B.S.L. LL.B.

BCI directed to post on its website the question papers and keys of the All India Bar Examination.

B N Reddy applied for copies of past question papers of All India Bar Examination, relying on an earlier ruling of the Central Information Commission (CIC),[2] that had directed the Bar Council of India (BCI) to make available on its website all the past question papers of the All India Bar Examination. The Public Information Officer expressed disability to furnish the information sought, stating that the (BCI) was considering a policy decision about such disclosure.

In this appeal, the BCI submitted that though they had decided to provide copies of the question papers, they were not in a position to provide copies of first three examinations as they were retained by Rainmaker, the private firm which conducted these examinations. The CIC rejected this submission and observed that it was the duty of the Bar Council to make all the previous question papers available to prospective lawyers. It also observed that if Rainmaker had not shared the question papers after conducting the examinations, the BCI should have initiated legal action to recover the same.

The Commission directed the BCI to collect the question papers with the key from Rainmaker, and keep it on its web-site, and to do so after completion of every examination. This, the BCI opined, would avoid exploitation of young lawyers by the publishers that sell these at exorbitant prices.

Devasheesh Pathak v Bar Council of India[3]

Sharanya Singh, I B.A. LL.B.

No upper age limit for CLAT examination.

The Common Law Admission Test (CLAT) is a national level entrance exam conducted for admission in the undergraduate law programme of the 16 National Law Universities (NLUs) of India. The rules of the CLAT prescribed a maximum

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[1] CIC/SA/C/2014/000434 decided on 17 March 2015 (Central Information Commission).
[2] *G. Dones George v. Ministry of Law and Justice* CIC/SS/A/2013/ 000471 decided on 5 November, 2013
[3] WP (Civil) No. 5219 / 2015 decided on 26 February, 2015 (Allahabad High Court); see also order of Rajasthan High Court dated 4 March, 2015 in Kshitij Sharma v Bar Council of India DB W (PIL) No 2497 / 2015

age limit of 20 years for appearing at the test. Earlier, the Bar Council of India had withdrawn Clause 28 Schedule III Rule 11 of the Legal Education Rule, 2008, which specified the upper age limit for enrolment as Advocate.

Devasheesh Pathak (petitioner) fulfilled all criteria for appearing for CLAT except age. He enrolled for CLAT coaching in Allahabad, but his application wasn't accepted.

The Allahabad High Court held it in favour of Pathak especially in view of withdrawal by the Bar Council of India of upper age limit for enrolment to the Bar, and the earlier successful challenge to the upper age limit in many proceedings (such as before the Punjab and Haryana High Court).

Dr. Ram Manohar Lohiya National Law University filed an appeal against the same. On 27 March 2015, the Supreme Court allowed withdrawal of appeal filed by the Vice Chancellor of Dr. Ram Manohar Lohiya National Law University (which was in charge of organisation CLAT for 2015). RMLNLU had no authority in law to prescribe the upper age limit for appearing in CLAT-2015 as it was merely an examination conducting university.

Management of Sundaram Industries Ltd v. Employees Union[4]

Bhagyashree Patwardhan, III LL.B.

Workmen's refusal to do additional work without additional remuneration not unjustified.

In Sundaram Industries (management), the work of the moulders was restricted to the work of production of rubber components. The management handed over additional work to the moulders with a promise of additional payment. The management did not compensate the moulders. Some moulders refused to follow the orders, and were suspended.

The Union (respondent) raised the dispute before the Labour Officer. It was advised to tender an apology to the management and an undertaking that they would not repeat their acts in future. Despite the apology and undertaking tendered, the defaulting workmen continued disobeying the instructions. Disciplinary proceedings were initiated and the delinquent workmen were dismissed on the charges of misconduct proved against them.

The Industrial Tribunal set aside the dismissal on the ground that the punishment of dismissal imposed upon the workmen was disproportionate to the gravity of

[4] (2014) 2 SCC 600.

the offence. Aggrieved by the award, the management filed a Writ Petition and further an appeal in the High Court, which were dismissed. Hence this appeal to the Supreme Court.

The Supreme Court held that the conduct of the delinquent workmen was wholly unjustified having regard to the fact that they had, in the course of the proceedings before the Labour Officer, not only apologised for their misconduct but filed an undertaking to obey their superior officers in future. It was only on that basis that the management had revoked the orders of suspension issued by it and permitted the workmen to resume their duties. Thus the workmen were not justified to go back on their promise and undertaking and refuse to follow the instructions of the management.

But it held that the orders of dismissal were unsustainable on facts and in equity, the same having been passed in a spirit of vengeance and with a view to deter other workmen from objecting to the unjustified demand requiring them to do additional work beyond the shift hours without paying any additional wages.

The refusal by workers to do additional work was not contumacious. The instructions requiring them to do additional work amounted to changing service conditions. Hence the Supreme Court set aside the dismissal, and ordered reinstatement with 50% back wages.

Parasnath Singh v Tihar Jail[5]

Prachi Acharya, I B.A. LL.B.

Death warrant and other information of Afzal Guru's execution made public

Parasnath Singh filed an application under the Right to Information Act (RTI Act) for information about the death warrant and execution of Afzal Guru, who was awarded a death sentence. The application was motivated by the fact that sufficient time and information had not been given to Afzal's family members before his execution. He made a request for a copy of Afzal Guru's death warrant, the video recording of the execution of Afzal Guru (if recorded), name of the authority who fixed the execution date, a copy of the correspondence file noting the date of execution or other documents dealing with the fixing of date of his execution, correspondence with Afzal Guru's family, and extracts of the rules and regulation under which the execution was carried out. The Public Authority and First Appellate Authority claimed exemption under 8(1)(a) of RTI Act, under which information need not be made public if it endangers the integrity and

[5] Case No CIC / SS / A / 2013 / 002083-A decided on 1 October, 2014 (Central Information Commission).

sovereignty of the country. Hence this appeal to the Central Information Commission.

The Commission ordered Tihar Jail authorities to give copy of Afzal Guru's death warrant, as it would not be against national interest; and also the communication sent to the family members about date of execution, and extract of rules and regulations. It held that the video recording and the name of the official who fixed the execution date shall not be disclosed under s. 8(1)(g) of the RTI Act. Thus it was held the authorities could not take exemption under s. 8(1) of RTI Act without proper justification.

Velaxan Kumar v. Union of India[6]

Sharanya Singh, I B.A. LL.B.

S. 24(2) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013 has retrospective effect.

Velaxan Kumar had a land in a village of Delhi. It was acquired under the Land Acquisition Act, 1894. An award was passed in 2002. The writ petition challenging the award was dismissed by the High Court. His appeal by special leave was admitted in 2007. Pending this appeal, the Act of 1894 was repealed, and the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013 (Act of 2013) came into force.

Kumar contended that under the provisions of s. 24(2)[7] of Act of 2013, the land acquisition proceeding lapsed; the award was passed more than 5 years prior to commencement of the Act of 2013, compensation was not paid to him, and physical possession was not taken.[8] He also contended that proper procedure was not followed, as the Panchnama was not prepared in the presence of witnesses and land-holders.

The Government contended that the Act of 2013 was prospective in nature, when s.24 of the Act of 2013 was read with its s.114 and s.6 of the General Clauses

[6] Civil Appeal No. 10954 of 2014 (Arising out of S.L.P. (C) No. 16578 of 2007)

[7] ***24. Land acquisition process under Act No. 1 of 1894 shall be deemed to have lapsed in certain cases.***

(2) ... in case of land acquisition proceedings initiated under the Land Acquisition Act, 1894, where an award under the said s. 11 has been made five years or more prior to the commencement of this Act but the physical possession of the land has not been taken or the compensation has not been paid the said proceedings shall be deemed to have lapsed and the appropriate Government, if it so chooses, shall initiate the proceedings of such land acquisition afresh in accordance with the provisions of this Act

[8] citing *Pune Municipal Corporation v. Harakchand Misrimal Solanki* (2014) 3 SCC 183.

Act, 1897. Thus the proceeding cannot be considered as lapsed, and the land would be under the possession of the State Government without any power to restore it to the land owner. It requested for a larger bench to be constituted in order to interpret the s. 24(2) of the 2013 Act.

The Supreme Court held that s. 24(2) was retrospective. It also held that the land acquisition proceeding had lapsed under s. 24(2) of the Act of 2013. It also refused to refer the question to a larger bench.

Notes

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