ILS
ABHIVYAKTI LAW JOURNAL
2016

Articles
Alternate Judgment Writing
Moot Research Articles
Presentations
Legislations : Highlights
Judicial Pronouncements: Highlights

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Editorial

We welcome you to an interesting reading of yet another volume of ILS Abhivyakti Law Journal, 2016.

ILS Law College advocates student journalism as an amazing opportunity for the students to showcase their knowledge and opinions and to constructively express them in the form of writing. Indeed, writing is a form of communication skill which brings out the hidden potential in an individual. To quote, F. Scott Fitzgerald, "You don't write because you want to say something, you write because you have something to say."

This journal reflects the students' desire to express their views on issues and current topics emerging in the field of law, covering myriad of laws like Contract law, Intellectual Property Rights laws, Arbitration, Family law, Constitutional law, Criminal laws, Corporate and Investment laws, Procedural laws, Personal laws to name a few.

This year we have also included competitive student initiatives like moot research articles and alternate judgment writing to promote the students' critical thinking, problem analysis and solution preparations.

We hope that the ILS Abhivyakti Law Journal, 2016 would continue the precedence set by the previous issues in enlightening on current law and legal issues and initiate a constructive thinking amongst our readers.

Swati Kulkarni
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ILS Abhivyakti Law Journal, 2016
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Compulsory Voting

Karan Babuta[*]

Introduction

In the 21st century, many nations are democratic. The latest one to convert to the democratic creed is Bhutan, which recently conducted elections. In any democracy, voting for and election of representatives is considered to be the backbone of popular representation. In some countries even amendments in the constitution are made *via* referendum or plebiscite, or other modes of public voting.[1] This indicates that the consent of citizens is absolutely important in a welfare state.

The founding fathers visualized India as a democratic nation, wherein the Government is appointed by the citizens of the country.To attain this purpose the constitution makers made provision for Election Commission under the Constitution. The significance of Election Commission can be understood from the fact that the Election Commission is a Constitutional Body and not a statutory body; further, no one can interfere with the working of the Commission at the time of election.Art. 324 of the Constitution provides for Election Commission; its powers, function and duties.

The author does not wish to discuss the anatomy of the Election Commission nor does desire to comment on the functioning or efficiency of the commission. The concern here is that despite the existence of a well-structured and efficient Election Commission the voter turnout in India is poor,as compared to other countries. We have had an uninterrupted 67 years of democracy, but voter turnout during Lok Sabha elections is dismal, as displayed by the figure below[2]

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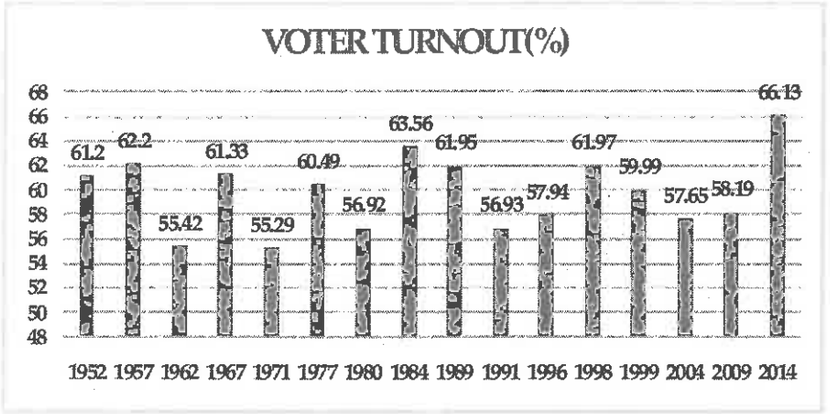
[*] II LL.M.

[1] E.g.: Constitution of Australia, Chapter VIII, S. 128

[2] Election Commission of India,Turnout LokSabha Elections - 1952-2004, available at <http:// eci.nic.in/eci_main1/votingprecentage_loksabha.aspx> last accessed 10th February, 2016



If we take an average of voter turnout in all the 16 Lok Sabha Elections held so far, the voter turnout is only 59.82% (total of voter turnout of 16 Lok Sabha election is 957.16 which was divided by 16). This indicates that the average voter turn is approx. 60 % which is much below that of countries like Australia, where voter turnout is more than 90%.

Compulsory Voting And India

The debate regarding compulsory voting is not new, and it can be traced back to the time when the Constitution was being framed. It was in the Constituent Assembly that the point of compulsory voting was raised when the voting rights of the citizen were discussed. M.Ananthasayanam Ayyangar, a prominent member of the Constituent Assembly, stated that

> *"it may be necessary in the future years when the election becomes so costly and people may not come to the polling station that you may have to have a provision, as exists in some other constitutions, that there must be a compulsion on voters to come and vote".*

This illustrates that Mr. M. A. Ayyangar had anticipated what will happen in future and thus, proposed compulsory voting as a solution.

Further when the electoral reforms were discussed by all political parties, the agenda of compulsory voting was again raised, but was rejected on the ground that the measures to implement compulsory

voting would be very difficult. Such contentions were canvassed when the Compulsory Voting Bill, 2004 was introduced in the parliament.[3].

The proposal of compulsory voting was considered again, and two bills were introduced in Lok Sabha in the year 1998 and 1999 but lapsed.Further a Compulsory Voting Bill, 2004 was introduced in Lower House of the parliament by Bacha Singh Rawat which was again unsuccessful.

In the debate, Mr. K.S Rao said[4] that the people those who vote in the polls are poor people because they consider it as a privilege and want to exercise their right. It is the educated people who do not vote but claim that they are knowledgeable, sensible and conscious regarding their rights and duties. Mr K.S. Rao was more concerned with creating an atmosphere where a person can go fearlessly to the polling station to vote. He stated that if a fearless atmosphere is created people would definitely exercise their right. The members were also of the opinion that this Bill would prevent bogus voting. The Bill provided that defaulter voters will be subject to jail. Thus, if a person has migrated to some other place then he would have to ensure that his name does not appear in the voting list of the place from where he has migrated orthe place where he is not living now. The concept of compulsory voting will cast a duty on the person to ensure that he is enrolled in one place alone and not any other.

In 2009, a private member bill was introduced in Parliament again by Mr. J.P. Agarwal with some improvements which cast duty on the state to ensure that there are a large number of polling booths and that special arrangements are made for senior citizens and pregnant women. Again in 2014 a private member bill on compulsory voting languished in Parliament.

Compulsory Voting And State of Gujarat

The Gujarat Local Authorities Law (Amendment) Bill which makes voting compulsory at three levels i.e.municipal corporation,

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[3]Shri Giridhar Gamang, Parliamentary Debates,(29th April, 2005)available at<http://indiankanoon.org/docfragment/328349/?formInput=compulsory%20voting>last accessed 11th February 2016

[4]Speech of Mr. K.S. Rao, available at: http://164.100.47.192/Loksabha/Debates/Result_Archive.aspx?dbsl=1401328> last accessed 11th February 2016

municipality, and Panchayat polls was first passed by the Gujarat assembly in December 2009 but it was rejected by the then Governor Kamala Beniwal. In March 2011 the State Assembly again passed the bill but the Governor again rejected it on the ground that it infringes freedom of expression and rights given under Article 21 of the Constitution. It was only after the NDA Government came into power and the governor was changed from Kamala Beniwal to O.P Kohli that the bill got the assent of the Governor. It got the assent on 23rd July, 2015. The provisions of the act which makes voting compulsory for Municipal Corporation are given under S. 16A-16E. These provisions are titled under the heading i.e. "Obligation to vote". S. 16A states that every qualified voter of the Municipal Corporation has the duty to cast his/her vote. It provides that the voters are free to cast a NOTA ('none of the above') vote.

Further, the Act gives power to the State Election Commission to appoint an Election Officer who would be competent to declare a voter as defaulter[5]. It gives opportunity to the aggrieved voter to file an appeal against the order of Election officer to Appellant Officer who is to be appointed by State Election Commission[6]. The decision of the Appellant Officer will be final, which means that the trial will be conducted quickly. It is presumed that any civil court procedure would not be followed indicating that the concerned Officers i.e. the Election Officer and Appellant Officer have to follow the principles of natural justices. The Act is silent on the issue of whether if the principles of natural justice are not followed, the orders given can be challenged in the court of law.

The grounds on which the voters are exempted from voting are[7]:-

1. Physical incapability due to illness and other bodily infirmity,
2. Absence from country or state
3. Such other reasons as prescribed in the rules formulated by the State Government in consultation with the State Election Commission.

[5]GujaratLocal Authorities Law (Amendment) Act,2009, S. 16 B
[6]Gujarat Local Authorities Law (Amendment) Act, 2009, S. 16 E
[7]Gujarat Local Authorities Law (Amendment) Act,2009, S.16 C

Similar provisions are made for Municipality and Panchayat Elections in the Act. The important thing to note is that the Act does not provide for any punishment but states that the State Government shall lay down rules under the State legislation regarding the consequences to be suffered by a defaulter voter.

The Bill was supported by many people and Mr. NarendraModi while supporting compulsory voting stated that"the health of democracy is based on the vote of all the people. The bond of rights and duties between the people and government would strengthen if all the people vote in elections, the axis of democracy. The democracy would become more soulful, more complete"[8]. He further stated that "Pale voting indicates pale democracy and such a situation would create an imbalance to the democratic climate". Similarly, Mr. L.K Advani while supporting compulsory voting has said that "the NOTA option would be really meaningful only if it is accompanied by the introduction of mandatory voting".[8]

On the line of the Gujarat Act which made voting compulsory, the State of Karnataka has also moved a Bill named Karnataka Panchayat Raj (Amendment) Bill 2015 which is a replica of the Gujarat Local Authorities Laws Bill, 2009. This proposed bill makes voting compulsory in the Panchayat elections of the State. The purpose of moving such a Bill is to make reforms in the Panchayat system of the State as proposed by K.R. Ramesh Kumar Committee[9].

Is Voting A Right Or A Duty?

In India the concept of voting is regulated by two laws i.e. Constitution of India and the Representation of People's Act, 1951. Art. 326 of the constitution confers a right to vote to every citizen who is of 18 years of age, whereas S. 62 of the Representation of People's Act, 1951 provides that if a person's name is entered in the electoral roll of any constituency then he shall be entitled to vote for that constituency.

[1]FP Politics, "ImplementNarendraModi's compulsory reform says Advani" (First Post, October 7, 2013)available at: <http://www.firstpost.com/politics/implement-narendra-modis-compulsory-vote-reform-says-advani-1156487.html> last accessed11th February 2016

[2]SowmyaAji, "Karnataka government plans compulsory voting in panchayat polls", (The Economic Times, Apr 1, 2015) available at http://economictimes.indiatimes.com/news/politics-and-nation/karnataka-government-plans-compulsory-voting-in-panchayat-polls/articleshow/46764827.cms(accessed on 13/2/16)

Thus, by reading these two provisions we can say that every individual who is above 18 years of age may cast his vote if his name appears in the electoral roll and if he is not disqualified under the Representation of People's Act, 1951.

But the author feels that besides the right to cast a vote, it is also a duty of every qualified voter to cast his or her vote so that he can take part in the democratic process of the country. It was suggested by the Justice Verma Committee on *Operationalization of Fundamental Duties*[10] that duty to vote at elections should be added in Article 51A of the Constitution of India. Similarly, a National Commission on *Effectuation of Fundamental Duties of Citizens*[11] suggested that duty to vote should be added under Article 51A of Constitution.

Even the Apex Court in a PIL filed by MP Ranganath Misra had stated that *"the government should not hesitate to enact appropriate legislation in order to enforce the constitutional mandate that every citizen must adhere to fundamental duties"*[12].

Thus, the author is of the opinion that voting as a right is conferred on the citizens by the founding fathers but certainly it is also an implied duty of every citizen to cast their vote as this will lead to strengthening of the democracy.

Need For Compulsory Voting

The two questions up for discussion are what is the need for?; and what is the importance of compulsory voting? We have to answer these two questions before the implementation of compulsory voting.

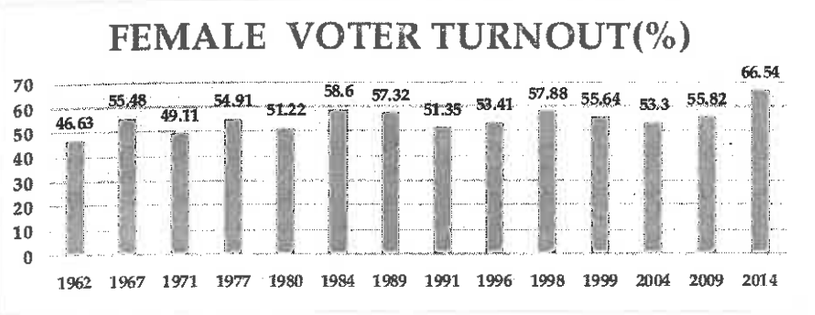
There is an urgent need for compulsory voting because the average voter turnout in Lok Sabha Election is only 59.82% and, upon further

[10]M.N. Venkatachaliah ,Chapter 3: Fundamental Rights, Directive Principles And Fundamental Duties, Report Of The National Commission To Review The Working Of The Constitution (ed., 2002) <http://lawmin.nic.in/ncrwc/finalreport/v1ch3.htm> last accessed on 10th February 2016

[11]National Commission to Review the Working of the Constitution on Effectuation of Fundamental duties of Citizen, (July 2001) available at http://lawmin.nic.in/ncrwc/finalreport/v2b1-7.htm> last accessed 12th February 2016

[12]RakeshBhatnagar, "SC for law to enforce fundamental duties"(The Times of India, Aug 13, 2013)http://timesofindia.indiatimes.com/india/SC-for-law-to-enforce-fundamental-duties/articleshow/128920.cms last accessed 10th February 2016

analysis by gender, one may deduce that the percentage of female voters is less.This is indicated in the diagram given below[13]:-



From the above chart it is clear that the percentage of female voter has consistently been lesser than the male voters. Thus, to bring female voters out of the confines of their home it is absolutely essential to implement the concept of compulsory voting.

The analysis of the expenditure made by Election Commission for the awareness program before any Lok Sabha election, indicates that the tax payer's money is wasted. In 1951 approx. Rs. 10.45 Cr were spent whereas this number increased in 1984 to Rs. 81.51 Cr approx. and in 1989 the money spent was Rs. 154.22 Cr. This number increased with every election and in 2004 the amount spent was Rs. 1300 Cr[14]. The comparison between the amount spent and the voter turnout indicates that there is a need for more initiatives which can bring voters to the polling booths and in the opinion of the author, compulsory voting is one such measure.

The importance of the concept can be seen from the fact that in which ever country the concept is implemented the voter turnout is huge: in Australia the voter turnout has not been below 92%, counting from the 1924 Election when compulsory voting was first implemented[15]. Similarly, in Belgium, the voter turnout has been more than 89% from 1946, when voting was first made compulsory, till 2014. This clearly

[13]Election Commission of India,Turnout LokSabha Elections - 1952-2004, available at <http://eci.nic.in/eci_main1/votingprecentage_loksabha.aspx> last accessed 10th February, 2016.

[14]Election Commission of India,LokSabha Election Expenditure, available athttp://eci.nic.in/eci_main1/expenditurel_loksabha.aspx>last accessed 13th Febrary,2016

[15] Except in the year 2014 Senate Election, when the voter turnout was 88.50%

shows that compulsory voting increases the participation of the citizens, and helps in electing a government which is at the will of the people, and is for the people of this country.

CONCLUSION OR PROPOSALS

The author proposes that the Act should not provide for the imprisonment of defaulter voter because such a provision will be practically impossible to implement. Alternatively, it could provide for fine which should be high so that people are deterred from not voting. For example, in Belgium, the fine for not voting may go up to 50 Euros for first-time offenders, while for second- time offenders may go up to 125 Euros. Defaulters may be restricted from taking professional exams or obtaining loan or passport.

Besides these punishments, the author proposes that the government should create an atmosphere where every person can come and cast their vote fearlessly. In some places the polling booths are captured or looted which discourages people from exercising their right to free franchise. The author further proposes is the introduction of mobile pooling booths, which makes voting easy and hassle-free. The other measures which the government can introduce for making the concept of compulsory voting a success is the system by which a person can cast his or her voting through internet. In this system the Election Commission can create a personal id for a qualified voter through which he can cast his vote with a click of a button. These measures if implemented can create a revolution in the voting system of the country.

Regarding the exemption of qualified voters from voting, the government should exempt senior citizens from the duty because this will create more difficulties for them; or if not exempted, then provisions should be made through which they can cast their vote from the comfort of their own homes. The Authorized Officer as appointed by the Election Commission could come to their place for taking their vote. Similar provisions should be made for differently abled persons and pregnant women.

If these measures are implemented with compulsory voting, the voter turnout would definitely increase and the Government that is elected reflects the proper will of the people.

The Dilemma of Delivery- Rights of the Unborn v. Rights of the Pregnant Woman

- *Disha Surpuriya**

Just 10 days after her petition (seeking permission to terminate a pregnancy in the 24th week) was turned down by the Bombay High Court[1], Niketa Mehta looked sad but relieved to have suffered a miscarriage. Her foetus was diagnosed with a complete congenital heart blockage implying that it was very likely that the child born might be seriously handicapped and would need a pace maker throughout his lifetime,not to forget the mental and financial sufferings that her family would have to witness. However, bound by the provisions of the Medical Termination of Pregnancy Act, 1971 which does not permit termination after 20 weeks, the court denied Mrs. Mehta access to an abortion. This case triggered a national debate on abortion law and raised a very vital question regarding women's individual rights. Previously, the secular public discussion on abortion in India had generally been focused on the issue of sex selective abortion. It needed a person like Niketa Mehta to initiate the ethical discussion surrounding the question of abortion per se in India[2]. This article focuses on the ardent need to amend the obsolete provisions of the MTP Act and also on the conflict between the rights of the mother and of the foetus.

Abortion: Background

"An abortion refers to the termination of a pregnancy. It can be induced through a pharmacological or a surgical procedure, or it may be spontaneous (also called miscarriage). Popular use of the word abortion implies a deliberate pregnancy termination, whereas a miscarriage is used to refer to spontaneous foetal loss when the foetus is not viable (i.e. unable to survive independently outside the

*II B.A.LL.B

[1]Dr. Nikhil Datar and others v. Union of India, MANU/MH/0937/2008

[2]NehaMadhiwalla, 'The Niketa Mehta case: Does the right to abortion threaten disability rights', Indian Journal of Medical Ethics,Vol 5(4), (2008), pg. 152-153 available at <http://www.issuesinmedicalethics.org/index.php/ijme/article/view/456/1110>last accessed 20March 2016

womb)."[3]Definitions of abortion vary across and within countries as well as among different institutions. Language used to refer to abortion often reflects societal and political opinions and not only scientific knowledge.[4]

Induced abortion has a long history, and can be traced back to various civilizations in China, Egypt, Rome, etc. Abdominal abortion was also depicted in the Hindu and Buddhist cultures. Soviet Russia (1919), Iceland (1935) and Sweden (1938) were among the first countries to legalize certain or all forms of abortion[5]. This then gained pace only in the second half of the 20th century.

Abortion Laws in India

Abortion was always practiced in India, even in the ancient past, using herbal medicines, sharp tools, force or other traditional methods[6]. But, because it was not permitted, it was practiced in a clandestine manner. The Indian Penal Code, 1860, keeping in mind the religious, moral, social and ethical background of the Indian community, declared induced abortion illegal. It has been defined as 'purposely causing miscarriage', which under S.312 to S.316 is a punishable offence.[7] However, hundreds of women died while attempting illegal abortions and this made India reconsider its initial stance. Finally, in 1971 with an intention to reduce illegal abortions and the consequent maternal mortality and morbidity, the Indian Parliament enacted the Medical Termination of Pregnancy (MTP) Act.

According to S. 3(2) of this Act, pregnancies not exceeding 12 weeks may be terminated by the opinion of a single medical practitioner and pregnancies exceeding 12 weeks but not exceeding 20 weeks shall require the opinion of two registered medical practitioners. However, in both these cases the opinion must be formed in 'good faith' i.e. pregnancy may be terminated only if –

[3]Kulczycki, Andrzej, 'Abortion' (Oxford Bibliographies, 9 April 2014)
[4]Grimes, DA & Stuart, 'Abortion jabberwocky: the need for better terminology', Contraception, Vol 81, (2009), pg. 93-96
[5]Childbirth by Choice Trust, 'Abortion, history and religion'(2008)
[6]Joffe, Carole, *'Abortion and Medicine: A sociopolitical history'* (2009)
[7]Indian Penal Code, 1860; S.312 – causing miscarriage, S.313 – causing miscarriage without women's consent, S.314 – death caused by act done with intent to cause miscarriage, S.315 – acts done with intent to prevent child being born alive or to cause it to die after birth, S.316 – causing death of quick unborn child by act amounting to culpable homicide

a) The continuance of pregnancy involves a risk of grave physical or mental injury to the life of the pregnant woman.
b) The child born would suffer such physical or mental abnormalities so as to be seriously handicapped i.e. on eugenic grounds.
c) The pregnancy has been caused by rape i.e. humanitarian grounds.
d) The pregnancy has occurred as a result of failure of any contraceptive method or device.[8]

Another very important section of this Act is S.5. This section states that –

> *"The provisions of S.4 and so much of the provisions of sub-section (2) of S.3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practitioner, shall not apply to the termination of a pregnancy by the registered medical practitioner in case where he is of the opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman."*[9]

Rights of the Unborn

The dearth of original research on the topic of legal personality of the unborn has given rise to much ambiguity. Natural persons i.e. human beings are the prime claimants of legal personality. Legal personality begins at birth and extinguishes with death with the result that pre-birth, post-death stages are devoid of any legal persona.[10]

In India, in various statutes[11], a child in the mother's womb is regarded as a legal person by means of a legal fiction. However,in *R v.Tait*, the Court of Appeal in England held that the foetus *in utero* is not in the ordinary sense 'another person' distinct from its mother.[12] Art. 2 of

[8]S. 3(2), Explanation 1 and 2, The Medical Termination of Pregnancy Act, 1971
[9] *ibid* S. 5(1)
[10]SunandaBharti, 'Legal Personality of Unborn – A Jurisprudential Analysis' (University of Delhi, 2013)
[11]S.13 of Transfer of Property Act, 1882 – Transfer for the benefit of unborn person, S.6 of the Limitation Act, 1963 – legal disability, S.20 of the Hindu Succession Act, 1956 – Right of child in womb
[12](1988) 43 CCC 3d 65

the European Convention on Human Rights says that "*everyone's right to life shall be protected...*" It was assumed conclusively that 'everyone' connotes a person who is already born and this right to life does not extend to foetuses.

The foetus enjoys the right to life because it is a 'potential human being' and if the pregnancy runs in its full course, it will be born as an actual human being. As a general rule we do not think that potential rights are the same as actual rights i.e. we do differentiate between the two. For instance, a 10-year-old child is a potential voter, and has the potential right to vote, but s/he does not get the actual right to vote until s/he becomes eligible to practice that right.[13]Pro-abortionists are of the view that when talking about the unborn we are dealing with a group whose membership is based on several possibilities.

Rights of the Pregnant Woman

Human Rights are those rights, which should be available to every individual without discrimination of any kind. The most popular right of a Human is the 'Right to Life'. Art. 21 of the Constitution of India, 1950 provides that, "*No person shall be deprived of his life or personal liberty except according to procedure established by law*". This right is held to be the heart of the Constitution, which lays the foundation of all the other laws. Over the years, this broad umbrella of 'right to life and personal liberty' has been subjected to different interpretations. It has a much wider meaning and therefore includes several implied rights like the right to be informed, right to livelihood, right to health, right to reputation, etc. However one of the most important underlying rights is the right to privacy, which also includes the right to make reproductive choices.

Right to Privacy - As per Black's Law Dictionary, privacy means, 'the right of a person to go his own way and live his own life that is free from interferences and annoyances'[14]. Although no single statute confers a crosscutting 'horizontal' right to privacy, various statutes

[13] BBC- Ethics Guide, 'Potential Human, Potential Rights'(available at <www.bbc.co.uk/ethics/abortion/child/potential.html> last accessed 20 March 2016

[14]Avaiable at: http://thelawdictionary.org/right-of-privacy/

[15]*Roe v. Wade*, 410 US 113 (1973)

contain provisions that either implicitly or explicitly preserve this right. Right to abortion has been recognized under right to privacy which is a part of right to personal liberty and which emanates from right to life.[15] Reproductive rights are recognized internationally and in the recent times, governments from all over the world have committed to promote them. A woman must have the right to make the final decisions about every part of her body i.e. she must enjoy her bodily sovereignty- no person can force her to carry or terminate a pregnancy against her will.

The Conflict with Disability Rights

In the *Niketa Mehta* case[16], the couple wanted an abortion because the foetus was diagnosed to have a congenital complete heart block. Niketa did not want to give birth to a severely disabled infant and witness its sufferings; the mental and financial trauma caused to her family and her were additional reasons. This sparked the debate on disability related abortion.

Niketa was remarkably unequivocal in her views. Regardless of the offers to support and care for her child when born, she was categorical in the assertion that her decision was a private matter. This is not surprising as disability has remained largely a private concern in India. It is looked upon with a sense of fear and a lack of understanding. The family of the disabled child bears almost all the burden of care, support and even financial costs.[17] However, removing the social barriers to care, stigma and discrimination will not automatically make disability a 'non-issue'.

The decision to give birth to a child who is disabled can never be easy even in the best of circumstances. Disability poses inherent disadvantages, which although can be ameliorated by social measures, cannot be removed altogether. In such a situation, one must give the woman the right to decide in her best interest.The decision to abort a foetus for no other reason but congenital defects is largely based on the parents' prediction, of the quality of life that they would want their child to have. There is little acceptance of the rights of the disabled

[16] *supra note 1*

[17] *supra note 2*

in society, and scant attention paid to their needs, making disability appear to be a greater tragedy than it needs to be.It is extremely cruel to make such a child suffer his entire life simply because we as educated, modern parents want to show the society that we uphold the principle of non-discrimination. In the quest to flaunt our unbiased views we bring a special child into this world and infringe his right to live life with dignity. Therefore, instead of considering such absurd humanitarian grounds it is prudent to review the anguish and pain which the child and its family is likely to suffer.

The question that remains now is whether one's exercise of right to abortion threatens the rights of the disabled? This author believes that the rights of a mother need to be balanced with the rights of the unborn. The value of rights of living persons cannot be equated with the rights of a foetus which is not an actual person. Pre-ambulatory para 9 of the Convention on the Rights of the Child (CRC) states that *"the child... needs... appropriate legal protection before as well as after birth"*, but due to ambiguity the legal protection of the foetus conflicts with the rights of a pregnant woman under the same Convention. Under CRC, the rights of a pregnant woman are interpreted as superseding those of her foetus.[18] Several organizations, such as the World Health Organization (WHO) and the Human Rights Watch prioritize women's reproductive rights over foetal rights. Therefore, a woman's right to abortion does not in any way interfere with the rights of the disabled.

The Debate

The 1971 MTP Act seems liberal only from a public health perspective; it can be interpreted as a conservative law from a feminist perspective. This is because the woman's agency is transferred to her healthcare provider and she is made dependent on the clinic where the abortion is performed. The focus is on the medical profession rather than the women and this is partly because the Indian abortion law stemmed from a national concern about the growing population and about the high maternal mortality rates due to unsafe abortions. This is in

[18]Abby F. Janoff, 'Rights of the pregnant child vs. Rights of the unborn under the Convention on the Rights of the Child', (Boston University International Law Journal 2004)last retrieved October 2015

stark contrast to the abortion laws of the West. In USA, women's equality as individuals and women's right to self-determination were recognized at the very outset.[19] The State's interest of protecting the unborn is recognized only after the stage of viability.

Foetal viability is the ability of the foetus to survive outside the uterus.[20] According to studies, the foetal viability i.e. the chances of survival of a foetus are as follows[21]:

- 21 weeks and less – 0%
- 22 weeks – 0-10%
- 24 weeks– 40-70%
- 27 weeks – more than 90%

The United States' Supreme Court, in *Roe* v. *Wade* stated that viability *"is usually placed at about 7 months but may occur earlier, even at 24 weeks"*[22] Therefore, when the chances of the foetus's survival are so meagre before 27 weeks, setting the abortion limit at 20 weeks violates a woman's fundamental right to life, health, dignity and equality.

The only exception in which abortion is permitted after 20 weeks is when the pregnancy poses a grave danger to the woman's life. The problem arises when the reason for abortion is not the risk posed by the pregnancy but by the perceived consequences of giving birth to that child i.e. in cases of pre-natal diagnosis of congenital defects. These risks are not physical but social and one must explore the woman's reasons before depriving her of her right to abortion. Very often, the defects show up much after 20 weeks and this law is not enough to cover these scenarios.[23] The National Commission for Women recommends that abortion be allowed up to 24 weeks, keeping in mind that modern medical technology can detect some foetal anomalies only after the 20th week.[24]Moreover, it is quite incongruous

[19]Luker K., *'Abortion and the politics of motherhood' (Berkeley: University of California Press 1984*

[20]Moore, Keith and Persaud, *'The Developing Human: Clinically Oriented Embryology' 103 (Saunders 2003)*

[21]available at<http://www.spenserhope.org/chances_for_survival.htm> last accessed 20 March 2016

[22]*410 US 113 (1973)*

[23]Lekhni, *'Abortion and the Niketa Mehta case' (2008)*

[24]*supra note 2*

to note that an abortion carried out in the 20th week is termed as humane but an abortion done just 7 days later is inhuman.

Conclusion - Key amendments required

A person's position on abortion may be described as a combination of his personal belief on the morality of induced abortion and the ethical limit of the government's legitimate authority. His personal stance on the complex ethical, moral and legal issue has a strong relationship with his value system. Religious, moral and cultural sensibilities continue to influence abortion laws throughout the world. Arguments on morality and legality tend to combine and further complicate this issue. Indian as well as International courts and tribunals have not addressed the difficult philosophical issue of when life begins. They have generally held that the references to every human being or every person do not include an unborn foetus.[25]

On 29th of October 2014, the Ministry of Health and Family Welfare put forward a draft to bring certain amendments in the provisions of the MTP Act. The draft proposed to extend abortion up to 24 weeks and to exclude all time limits in case of substantial foetal abnormalities. For years, activists, the National Commission for Women, Federation of Obstetric and the Gynecological Societies of India (FOGSI), and prominent doctors have advocated for amendments to the MTP Act that would ensure protections of women's mental and physical health throughout their pregnancies.[26] The Amendment Bill has the potential to improve access to abortion but this is possible only if women are made aware of the proposed changes. This is a huge task before the government; however the enormity of the work should not be an impediment in its implementation. This Bill marks a step towards a more women-centric, rights-based abortion law in India. [27]

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[25]ManishaGarg, 'Right to Abortion', available at:www.legalserviceindia.com/articles/adp_tion.htm

[26]Available at<http://www.hrln.org/hrln/reproductive-rights/pils-a-cases/1646-government-of-india-announces-proposed-amendments-to-the-mtp-act.html> last accessed 20 March 2016

[27]Shweta Krishnan, 'MTP Amendment Bill, 2014: towards re-imagining abortion care', Indian Journal of Medical Ethics, Vol 12 (1) (2015), pg. 43
available at <http://www.issuesinmedicalethics.org/index.php/ijme/article/view/2179/4663> last accessed 20 March 2016

Barricading Arbitration From Judicial Interference

-*Urvashi Mehta, K.Ravalee*[*]

Introduction

Professor Jan Paulsson has rightly noted, "*the great paradox of arbitration is that it seeks the co-operation of the very public authorities from which it wants to free itself*". A harmonious relationship between the courts and the arbitral process is therefore vital[1]. Just as the proof of the pudding lies in the eating, the efficacy of any legislation must be judged by its implementation.The Indian judiciary in its various controversial judgements has rewritten the text of the act to such an extent that we seem to have lost the very object of the act. With a large extent of judicial intervention in arbitration cases, the question that needs to be answered is that if disputes are going to end up in courts anyway, what is the incentive for parties to arbitrate in the first instance?

What should be the realm of judicial interference in arbitral matters and where should it meet the barricades is the question addressed by this article. The authors have identified certain primary areas of conflict between the Arbitration and Conciliation Act, 1996 (the Act) and its judicial implementation and have also compared it to the amendments put forth in the Arbitration and Conciliation (Amendment) Act, 2015.

Areas of Conflict

The development of arbitration in India has been criticized primarily for the unwanted judicial intervention in domestic arbitration as well as extra territorial application of domestic laws to awards obtained outside India.[2]Mentioned below are a few areas that pose a predicament to the successful implementation of the Act. This is analyzed in contrast to the recent Amendment Act passed by the Parliament that seems to appear promising.

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[*] IV B.S.L LL.B

[1]J Paulsson, 'Arbitration in Three Dimensions', 12 LSE Legal Studies Working Paper, 2 (2010).

[2]Ajay Kr. Sharma, 'Judicial Intervention in International Commercial Arbitration: Critiquing the Indian Supreme Court's Interpretation of the Arbitration and Conciliation Act, 1996', Vol. III Issue 1(2014), Indian Journal of Arbitration Law

Seat of Arbitration :

Given the scheme of the Act, it is clear that the Act in its Part I regulates disputes both domestic and international, provided the seat of arbitration is in India.[3] The Indian courts are empowered under Part I of this Act to order interim measures, appoint and replace arbitrators and hear challenges to arbitral award. The delicate balance with regard to intervention of courts in arbitral matters was disturbed by the ruling of the Supreme Court in *Bhatia International* v. *Bulk trading S. A. and Anr.*[4]('*Bhatia International*') which entitled the Indian courts to exercise their powers under Part I of the Act even in respect of arbitrations having a foreign seat. This judgment has been heavily criticised for extending the scope of interference by the Indian courts in arbitrations with a seat outside India. Post the judgment of the apex court in *Bhatia International*, the Indian courts have in numerous judgments set aside arbitral awards rendered in offshore arbitrations and advocated that they have the power to appoint arbitrators even in arbitrations having a foreign seat. One judgment falling into this bracket is *Venture Global Engineering Ltd. v. Satyam Computer Services Ltd*[5] ('*Venture Global*') which relying heavily upon the terms of the decision in Bhatia International held that Part I of the Act is applicable to the award in question even though it is a foreign award without any regard to the merits of the claim of both the parties. The much awaited relief came with the Supreme Court overruling the *Bhatia International* judgement in *Bharat Aluminium Co. v Kaiser Aluminium Technical Service, Inc.*[6] ('*BALCO*'). The constitutional bench of the Supreme Court ruled that its decision in *Bhatia International* and *Venture Global* was incorrect, after a laudable consideration of law laid down by various Indian and foreign judgments and writings of renowned authors. The court upholding the territoriality principle of the act and with regard to the legislative intention concluded that Part I of the Act cannot be applied to arbitrations with a foreign seat, without any regard to the fact that the parties chose to apply the act or not. The Court asserted that the absence of the word 'only' from S.2(2)[7]cannot permit applicability of

[3]Part 1, Arbitration and Conciliation Act.
[4]2002 (4) SCC 104
[5]2010 (8) SCC 660
[6]2012 (9) SCC 552
[7]Arbitration and Conciliation Act, 1996

Part I to offshore arbitrations.The Court cannot produce a new jacket, while ironing out the creases of the old one. Judiciary can only interpret the law and not reconstruct it. This judgment has in any case brought the Indian law in line and at par with international standards.

Now the scenario has changed as the new amendment provides that Part I shall apply where the place of arbitration is in India and that provisions of Ss. 9, 27, 37(1) (a) and 37 (3) shall also apply to international commercial arbitration even if the seat of arbitration is outside India unless parties to the arbitration agreement have agreed to the contrary.

Appointment of Arbitrators :

S. 11 of the Act provides for the procedure concerning the appointment of arbitrators in disputes arising out of arbitral agreements. This provision grants an apparatus to the Courts for unhindered and legitimate interference in the arbitral proceedings. Thus, if the *persona designata* did not appoint an arbitrator despite service of notice, the court has the authority to appoint the arbitrator.[8]

The bone of contention between these two parallel justice delivery systems with respect to this provision of law is the nature of the power conferred upon the courts. There has been much debate so as to determine whether the appointment of arbitrators by the courts is a judicial or an administrative power. *Prima facie*, this appears to be a trivial issue but it is pertinent to ascertain the same since if it is a judicial one then it would empower the parties to challenge the very appointment by the Court. On the contrary the administrative nature of the power merely provides a procedural solution to the dispute, not delving into the merits of the case.

A three Judge bench in *Konkan Railway Corporation Ltd. and Anr.v.M/s. Rani Construction Pvt.ltd*[9]('*Konkan Railway*') laid down that "*the statement of objects and reasons of the Act clearly enunciates that the main objective of the legislation was to minimize the supervisory role of courts in the arbitral process.*" The bench heavily relying upon the position of Law declared in *Sundaram Finance Ltd. v. NEPC India Ltd.*[10], held that

[8]P. C.Markanda, Naresh Markandaand Rajesh Markanda, '*Law Relating to Arbitration and Conciliation' (8th ed. 2014). pg. 216*
[9]2000 (7) SCC 201
[10]1999 (1) SCR 89

it is imperative for the Chief Justice to endorse the legislative intent of the Act and refer the matter to arbitration, the power of appointment being administrative in nature. It was found appropriate to reconsider and re-examine the decision of the three Judge Bench by a larger dais. The five Judge Constitution Bench upheld and confirmed the *ratio* laid down in the previous case.

However, the apex Court, in a superfluous attempt to review the abovementioned judgment, constituted a seven Judge Constitutional bench in the landmark judgment of *S.B.P. and Co. v. Patel Engineering ltd and Anr.*[11]('*Patel Engineering*') to discuss the same issue. The Court, relying on a catena of judgments, in a 6:1 majority ratio overruled *Konkan Railways* stating that the disputes which are referred to the court are contentious issues and require adjudication pronouncing the power of the Court in the appointment of arbitrators to be judicial in nature. This order evaporated the *Kompetenze-Kompetenze* principle while giving the Chief Justice or his designate power to decide preliminary objections raised by the parties.

The scope of the court's power under S.11 of the amended Act has been restricted to examining the validity of the arbitration clause alone and no further. This provision supersedes the ratio laid down in the *Patel Engineering* case providing clarity as to the administrative power of the court.

Public Policy- 'Untamed Horse'

Public policy has been described as an "*unruly horse, and when you get astride it you never know where it will carry you.*"[12]In domestic arbitration, an arbitral award can be set aside only on the grounds mentioned in S. 34 of the Act. However in the Indian context the word 'only' prefixing the grounds is a bit of a misnomer as the residuary ground under S.34 of the Act i.e. violative of the 'public policy' of India, leaves immense scope for "judicial interpretation". The question of interpretation of the term 'public policy' arose before the Supreme Court in *Renusagar Power Plant Co. v. General Electric Co.*[13] and was delved into by a three Judge Bench. The court was faced with the

[11](2005) (8) SCC 618
[12]*Janson v. Dreifontein Consolidated Gold Mines Ltd,* (1902) All ER Rep 482,500
[13]1984 (4) SCC 679

issue of whether to interpret 'public policy' in a narrow or a broad sense. The Court after referring to a plethora of judgments and going through the works of several eminent authors in the field of arbitration held that"*it is obvious that since the Act is calculated and designed to sub serve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration, any expression or phrase occurring therein should receive, consisting with its literal and grammatical sense, a liberal construction.*"[14]

Thus the apex Court while laying the threshold for refusal of enforcement of an award held that an award would be deemed to be contrary to 'public policy' only when its enforcement will result in contravention of :

i. fundamental policy of India; or

ii. the interest of India; or

iii. justice or morality.

The decision of the court is definitely praiseworthy as it rightly acknowledges the competence of the arbitral tribunal and gives a right direction for enforcement of arbitral awards in India.

But this was short lived as the next decision of the Hon'ble Court in *Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd*[15] has been subjected to sharp criticism from all quarters. In the *ONGC* case, the Court disturbed the delicate balance between party autonomy and judicial supervision and tilted the scales strongly in favour of the latter. The issue in the case was whether an award by the arbitral tribunal could be set aside on account of incorrect application of the law of liquidated damages. And the apex Court held that the impugned award was legally flawed on account of erroneous liquidated damages awarded. The Court further expanded the ambit of the term 'public policy' by stating that an award would be in contravention of public policy if it is found to be 'patently illegal'. It opened the floodgates to many previously barred challenges and rendered the Court a court of appeal. Invariably, almost every dispute being arbitrated is further being litigated under the garb of a challenge. Another side effect is

[14] *ibid*
[15]2003 (5) SCC 705

that this decision has become a significant ground for parties to opt for a foreign seat of arbitration lest the award rendered becomes more prone to judicial perusal or judicial review delays its enforcement. The *ONGC* case has threatened certain key principles of arbitration namely those of speed and efficiency and has raised doubts as to the finality of award. The last words on the subject were well summarised by the eminent advocate and jurist F.S.Nariman " *the division bench of the two judge has altered the entire road map of arbitration law and put the clock back to where we started under the old 1940 Act''*[16]

ONGC still stands as the *locus classicus* on the interpretation of public policy. However a few judgments have tried to water down the impact of ONGC on domestic arbitration.

First we have the decision of the Supreme Court in *McDermott Industries v. Burn Standard Co. Ltd.* [17]where the court rightly held that in cases of arbitration the courts play only a supervisory role and can intervene only in few circumstances like in case of gross injustice etc. By opting for arbitrations the parties make a conscious decision to exclude the court's jurisdiction, hence judicial intervention should be strictly restricted.[18]

Second, in *Sumitomo Heavy Industries Ltd. v. ONGC Ltd.*[19] the Hon'ble Supreme Court, relying on another recent decision in *SAIL v. Gupta Brothers Steel Tubes Ltd.*[20] held that *"the umpire is legitimately entitled to take the view which he holds to be correct. Hence if the conclusion of the arbitrator is based on a possible view of the matter, the court is not expected to intervene".*

Further in the *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran*[21], the Supreme Court upheld its view in *Sumitomo Heavy Industries ltd. v. ONGC and Ors.*[22]stated that the court is not justified in intervening to correct the errors of the tribunal.

[16]Transcript of the speech delivered at the inaugural session of 'Legal Reform in Infrastructure', New Delhi, May 2, 2003.
[17]2006 (11) SCC 181.
[18]*ibid* at para 52.
[19]2010 (11) SCC 296 at para 41-43
[20]2009 (10) SCC 63.
[21]2012 (5) SCC 306 at para 43-45
[22]1998 (1) SCC 305

These judgments have successfully diluted the impact of *ONGC* case but couldn't overrule it.

The new amendment has clearly provided that an award passed in an international arbitration, can only be set aside on the ground of being against the public policy of India if, and only if, – (i) the award is vitiated by fraud or corruption; (ii) it is in contravention with the fundamental policy of Indian law; (iii) it is in conflict with basic notions of morality and justice. Further the amendment has also provided that the ground of 'patent illegality' can be taken only for domestic arbitrations and the award shall not be set aside merely on the ground of an erroneous application of law or by re-appreciation of evidence.[23]

Comparative Analysis

The tabular representation herein under displays a comparative analysis of the relevant provisions of the arbitral legislations of India, Singapore and Hong-Kong in order to trace the development of India as compared with its ace competitors in Asia.

Provision	India	Singapore	Hong-Kong
Arbitral Institution	Indian Council for Arbitration (ICA).	Singapore International Arbitration Centre (SIAC).	HongKong International Arbitration Centre (HKIAC).
Statutory Legislation	The Arbitration and Conciliation (Amendment) Act, 2015	International Arbitration Act, 1994 (International Arbitration). The Arbitration Act 2001 (Domestic Arbitration)	Arbitration Ordinance, 2011.
Judicial Intervention	Certain provisions of the Arbitral	Singapore Courts have reaffirmed that that Court	Hong-Kong has rightly been conferred with the status of the World's

[23]S. 18, The Arbitration and Conciliation (Amendment Act), 2015, No. 3 of 2016

	legislation in India have been exploited to a very large extent by unwarranted Court interference. The Judiciary in deciding upon certain peculiar issues like the seat of arbitration, appointment of the arbitral tribunal and enforcement of domestic as well as foreign awards attempts to display its dominance by Intervening in the Arbitration proceedingsas explained in detail earlier. However, the recent amendments provide for a sigh of relief as a positive change to end the subsisting interference by the Court.	intervention would only be appropriate to the extent such intervention is expressly sanctioned by the Model Law itself (Article 5). A good example of the beneficial application of this article was in *Mitsui Engineering & Shipbuilding Co Ltd v. Easton Graham Rush*[24] and in *BLC &Ors. v BLB &Anr.*[25]to name a few. The court held that it should not endeavour "*to pick holes, inconsistencies and faults in awards*". Intervention is admissible only on grounds of gross injustice.	Freest economy. The recent developments in the legal arena like maximum party autonomy, an open legal system and expert legal practitioners mean that Hong Kong continues to exert immense arbitration appeal within Asia and limited Court Interference.[26]The courts in Hong Kong therefore recognize and will readily enforce arbitral awards made in countries, which are signatories to the New York Convention.Currently, S.2D of the Hong Kong Arbitration Ordinance allows a party to apply for court proceedings concerningarbitration.

[24]2004 (2) SLR 14
[25]2014 SGCA 40
[26] Kathryn Sanger and Clifford Chance, 'The Asia-Pacific Arbitration Review 2015', Section 3: Country Chapters, Hong Kong

Appeals	S.37: An appeal can lie to the court from an order passed by an Arbitral Tribunal.	Rule 28.9:The award shall be final and binding on the parties from the date it is made.	Art.30.2: Awards shall be final and binding.

Conclusion

"An ounce of mediation is worth a pound of arbitration and a ton of litigation" – Joseph Grymbaum.

It has time and again been articulated by a number of jurists in this country that the courts should curtail their wide jurisdiction and confine themselves to a set of core issues.[27] The authors have recognized the significance of a separate and speedy dispute resolution mechanism as the only recourse in this context. The Act encompasses such alternate dispute resolution mechanisms such as arbitration and conciliation.

However, there exists continual intervention by the courts defeating the very purpose of the Act. To countermand this plague of shortcomings, the government had introduced the amended version of the Act.

The amended act has provided a progressive step towards the effective implementation of arbitral legislation in India. Besides setting a cap for disposal of cases by a court in one year, it also makes provision for fast track procedure for arbitration, i.e. 6 months. Further it provides additional grounds of contravention of the fundamental policy of Indian Law and notions of morality or justice, the appointment of arbitrators has also been declared a mere administrative power of the courts. The domestic arena would witness a sea change in the corporate scenario if the enacted amendments are effectively implemented. It would also encourage international trade and improve international economic relations by providing for an efficacious mechanism reducing the risk of transnational commerce. The execution of the said amendments will hopefully give rise to a flourishing arbitration era in India.

[27]Vishal P Bhat, 'A Never ending Saga of Judicial Interpretation,' (2012).

Biometrics In Control Of Machines: The Dilemma Of Privacy And Security

Kaanchi Singhal[*]

Introduction

The information explosion in the past century had manifold manifestations in the fields of information usage, storage and communication, thereby leading to digitization of economies. Digitization and its attendant electronic databases have proven to be very useful for addressing national security concerns and governance. The whole idea of easy governance is associated with giving power to each individual. Security concerns of nations, on other hand, fixate upon selective access to borders and stricter check on identities. The need, to address both the concerns of security and governance,was of a unique identification tool interconnecting all national benefits. Biometrics was the sole answer.

This biometric technique, that reassures governments, has hit individual life and liberties hard, with technology always winning in the end.[1]Some may argue that *"Law... muzzles technology"*[2], but this extreme regulation seems necessary when crippled civil liberties waiton the other side. Biometrics has been used as an identification tool by both the private sector and governments. Although the private sector might still ask for the consent of the parties, to some extent, compulsion under government policies for disclosure of any biometric information leads to state control on the most private aspects of an individual's life. This aspect of biometrics has been brought under the concept of *'biopower'* promulgated by Michel Foucault[3], where a biological existence is under the power and control of the State[4].

[*] IV B.S.L. LL.B.

[1] Shyam Divan, 'The Prime Minister's Fingerprints: Aadhaar and the Garrotting of Civil Liberties' (2014) 26 NLSI Rev 159, 160

[2] ibid. at pg.161

[3] Mark Kelly 'Michel Foucault: Political Thought', (Internet Encyclopedia of Philosophy) <http://www.iep.utm.edu/fouc-pol/#H7> last accessed 18th February 2016

[4] 'The Biopolitics of Biometrics: An Interview with Btihaj Ajana' (Theory, Culture & Society, 12th May 2014)<http://www.theoryculturesociety.org/the-biopolitics-of-biometrics-an-interview-with-btihaj-ajana> last accessed 18th February 2016

The biometrics system seems more like mortgaging private biometric information in exchange of national and allied benefits, making the governing body feel secure about one's existence. But isn't this mortgage too costly a transaction? A single finger impression registered by an individual traces back to the most private, unique and important information from ethnic origin[5] to emotional stabilities and habits[6]. The article deals further with how this biometric information is so sensitive. The greater apathy seems to be towards non-consensual facial recognition systems in almost every aspect of data collection.Safety and security have become such a priority in life that in some years privacy protection may be a decade old phenomenon, ushering in a period of *dataveillance*[7] i.e., zero informational privacy.

The article analyses the sensitivity of biometric information and its use, raising thereby relevant policy issues. It urges for the need of strict laws in India for database protection of biometric information explaining the recent Aadhar Card issue. Part I of the article analyses how and why biometric information is so critical. Part II then analyses privacy law in India and its regulation of biometric information.Part III concludes with the main proposition of the article.

Why Is the Use Of Biometrics Critical?

Biometrics can be defined as the utilisation of *"distinctive measurable characteristics of a person"*[8] used for labelling and marking individuals. "Body as passwords"[9] has emerged as a more attractive identification tool than the hard tokens of ID and Permanent Identification Number. Biometrics of face and fingers are particularly best for identification purposes since they are distinctive and visible publicly[10]. Subjects for

[5] Caren Chesler, 'Your fingerprints are about to reveal a lot more about you', (PM) <http://www.popularmechanics.com/technology/security/a17172/your-fingerprints-are-about-to-reveal-a-lot-more-about-you/> last accessed18th February 2016

[6] Marissa Fessenden, 'What Fingerprints can reveal about your ancestry', (Smithsonian.com, Oct 2, 2015) <http://www.smithsonianmag.com/smart-news/fingerprint-ridges-can-reveal-peoples-ancestry-180956800/?no-ist> last accessed 18th February 2016

[7] Roger Clarke, 'Information Technology and Dataveillance' in C. Dunlop And R. Kling (eds.), Controversies In Computing (Academic Press, 1991)

[8] Divan, supra note 1

[9] A. Michael Froomkin, 'The Death of Privacy', (2000) 52, 5 Stanford Law Rev. 1461,

[10] Yana Welinder, 'A Face Tells More than a Thousand Posts: Developing Face Recognition Privacy in Social Networks', (2012)26,1 Harv. J. of Law And Tech., 167, 165

data theft could range from individuals to job servers like intelligence agencies, tax authorities or various security and e-commerce sites. The data collectors could range from government to private entities; however data poachers would include private parties who could use such information for commercial purposes.Databases serve as an attractive target since it is possible to access a large volume of important information in less time.[11]

Although biometric technology resolves surveillance and security problems, its misuse imbalances the gain derived. Two main potential threats identified by scholars are: firstly, biometrics acts as a unique identifier for all information related to the person. The better the identifier, the more information it is able to reveal. Secondly, biometrics linked to DNA is vulnerable, as it can lead to detection of state of mind and other emotions in a person.[12] Biometric information is considered extremely sensitive since it is fixed and, unlike a password or a PIN, cannot be reset once it has been inappropriately released.[13]

Considering the commercial aspect, social media has exploited face recognition technology for a whole new purpose. Companies like Facebook, Apple and Google utilise automatic face recognition technologies without as such giving an opportunity to the user to consent to the recognition. An example can be Google's Picasa,which prompts a user to tag names to clusters of matching faces in photos loaded into Picasa 7, although users may opt out of sharing tags when they upload photos from Picasa to Picasa Web Albums. Other companies that developed face recognition software were Polar Rose, Riya, Photo Tagger, and Face, which are used by Google and Facebook. The problem is the presumed consent of the user for face recognition.[14] Another issue related to digital signage, also known as digital out-of-home (DOOH) or "smart signs," calculate a passerby's age and gender, how long an individual watches the display and they can

[11] Mark J. Davison, *Legal Protection Of Databases, (Cambridge University Press, 2003) 1*

[12] Froomkin, *supra note 4*

[13] Robert Woo, *'Challenges Posed by Biometric Technology on Data Privacy Protection and the Way Forward',in* Ajay Kumar, David Zhang (eds.),*Ethics And Policy Of Biometrics,(Springer 2010)1*

[14]'Facial Recognition & Privacy: An EU-US Perspective', (Centre For Democracy And Technology, 8 October 2012) <https://www.cdt.org/files/pdfs/CDT_facial_recog.pdf > last accessed 10th September 2015

react to consumers' emotional status.[15]Apple's iOS 5, Windows Mango, and Google's Android 4.0 mobile operating systems include face detection and recognition APIs.[16]Google Glass pairs facial recognition technology with data from social media and dating websites to identify strangers on road.[17]The issues raised are that such technology will be used without any consent of the individual, in fact, without him even knowing if he is under camera.[18]

The ethical concerns for biometrics arise when it is used for surveillance purpose in public places ignoring consent of individuals. While one may agree to give up of privacy for security reasons, the problem arises because such collected data may be sold for commercial purposes or for creating a database wholly different from the purpose intended.[19] Therefore the need is not to ban the use of technology as such, but the careless data handling thereafter.[20]

Sutrop in his work has analysed three kinds of groups, one which views biometrics as the Liberator, viewing convenience, efficiency and mobility brought by technology, welcoming even powerful surveillance methods. The other group sees biometrics as a threat believing that surveillance technology is inhumane, untrustworthy, and destructive of liberty. A third group sees biometrics as *"a sword with multiple edges"*, the use of which depends on the carrier, and aims

[15]Facial Recognition & Privacy: An EU-US Perspective', (Centre For Democracy And Technology, 8 October 2012) <https://www.cdt.org/files/pdfs/CDT_facial_recog.pdf > last accessed 10th September 2015

[16]*ibid.*

[17]*Camille Calman, 'As Facial Recognition Technology is Poised to Enter Everyday Life, Regulators express Concern', (Privacy And Security Law Blog, Feb. 10, 2014) <www.privsecblog.com/2014/02/articles/marketing-and-consumer-privacy/as-facial-regulation-technology-is-poised-to-enter-everyday-life-regulators-express-concern> last accessed 10th September 2015*

[18] *'Daniel Thomas, UK Watchdog Raises Privacy Concerns over Google Glass',(Politics And Policy, June 26, 2014) <http://www.ft.com/cms/s/0/3488b1d2-fd59-11e3-96a9-00144feab7de.html#axzz3lJD7EJHP> last accessed10th September, 2015*

[19]Brey, P., 'Ethical Aspects of Face Recognition Systems in Public Places', (2004) 2,2 Journal Of Information, Communication & Ethics In Society, 97, 99

[20]Laura K. Donohue, 'Technological Leap, Statutory Gap, and Constitutional Abyss: Remote Biometric Identification Comes of Age', (2012)97Minnesota Law Review, 406, 409

followed.[21]The views definitely depend on the psychology and needs of every society. Therefore, there is no one way to solve the issues raised by biometrics. Complete restriction will stifle development of these technologies[22], which are necessary in their own right. The only need is control and management of data handling.

Biometrics and Privacy In India

The origin of a legal right to privacy can be traced back to the 18th and the late 19th Century, in natural law, which was later widened by Blackstone to religious practices, artistic expression, eating habits, in architecture, in clothing, and growing sexual modesty.[23] The Right to Privacy developed as a basic human right after it was stated in Article 12 of the Universal Declaration of Human Rights :

> *"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks."*[24]

The issue of biometrics and privacy at crossroads is complicated in India due to the half-developed jurisprudence of privacy law and database protection. The recent Aadhaar Card scheme, a unique ID card initiative by the Government of India, which collected sensitive personal data of citizens, was in question for the handling of data, and the new issue of database protection was in debate. The recent ruling by the Supreme Court upon the handling of data collected for Aadhaar Cards is a major development in privacy law jurisprudence.

1. Right To Privacy In India

Right of Privacy does not find explicit mention in the Constitution of India; however Indian jurisprudence on Right to Privacy has developed through wide interpretation of Art. 21 post *Maneka Gandhi* case[25], thereby partially recognizing it as a fundamental right.

[21]Margit Sutrop, *'Ethical Issues in Governing Biometric Technologies'inAjay Kumar, David Zhang (eds.), Ethics And Policy Of Biometrics,(Springer 2010)102, 104*
[22]Welinder, *supra note 10*
[23]Peter A. Winn,'Older than the Bill of Rights: The Ancient Origins of the Right to Privacy'(2010) SSRN <http://ssrn.com/abstract=1534309> last accessed September 10, 2015
[24]Universal Declaration of Human Rights Art. 12
[25]*Maneka Gandhi v Union of India,*AIR 1978 SC 597

In *R. Rajagopal v. State of Tamil Nadu*[26], the Supreme Court held that the right to privacy was a fundamental right, enforceable against private persons as well. In this, restrictions on the use of a person's biography were envisaged. The right to privacy protects all individuals, whether Indian or foreign, against omissions and/or acts of the state. This right applies in case of invasion of the private sphere, rather than use of an individual's likeness.

In *Kharak Singh v. State of U.P.*[27] the court held that police surveillance of a person by domiciliary visits would be violative of Art.21 of the Constitution. The majority judgment in the impugned case was of the opinion that our constitution does not in any terms confer any constitutional guarantee like right to privacy. But, Subba Rao, J. in his minority judgment opined that though the constitution does not expressly declare a right to privacy as a fundamental right, but the said right was an essential ingredient of 'personal liberty' in Art. 21. The right to personal liberty takes in not only the right to be free from restrictions placed on his movements, but also free from encroachments on his private life.

In *Mr. X v. Hospital Z*[28], the Court held that in case of conflict between rights, the right which advances 'public interest' or 'public morality' would be enforced by the court. In *Gobind v. State of Madhya Pradesh*[29], it was discussed that an individual and "those things stamped with his personality" would be protected against official interference unless a "reasonable basis for intrusion exists". The same was upheld in the case of *People's Union for Civil Liberties (PUCL) v. Union of India*[30] case, famously known as the wire tapping case. While reasserting that privacy right were part of the right to life and personal liberty, the Court held that such a right was not absolute and would remain subservient to the interest of the State. While the Court has on occasion declared that every man's house was his castle, the right of the State is not merely to act in 'public interest', but also to define the ambit of what constitutes 'public interest', giving the State intrusive authority

[26]AIR 1995 SC 264
[27]AIR 1963 SC 1295
[28] (2003) 1 SCC 500
[29](1975) 2 SCC 148
[30] AIR 1997 SC 568

to enter anyone's 'castle'.[31] Further, while earlier a 'territorial' or 'spatial'understanding of a person's privacy was considered, recently, the courts seem to have adopted a view of the right to privacy, wherein it exists 'in persons, not places'.[32]

In *Selvi v. State of Karnataka*[33], Supreme Court adopted a wider meaning of privacy, extending to "personal knowledge of a fact". It emphasized personal autonomy, holding that revealing a personal fact, was entirely in the domain of individual decision- making, which must be free from interference.

2. The Aadhaar Case in India

The Aadhaar project in India was started with the noble intention of creating a central database of all Indian citizens identifying them by a random and unique 12 digit number. The project required each Indian citizen to go through a process of biometric information collection, including facial photographs of the individual, all 10 fingerprints and a scan of both irises. The policy of the Government mandated holding of the Aadhar card as a national ID card, that in turn meant mandatory biometric data collection of each citizen. Compulsory biometric collection by the Government acts as a bait as well as net to citizens, who either get lured to the bait or are forced to get caught in the net anyhow for availing national benefits.

However, the noble project was clouded when the reins of the 'noble' project was given to the Unique Identification Authority of India (UIDAI), an administrative body, created by a notification issued by the Planning Commission in 2009. The process of the biometric collection for Aadhaar was spine-chilling as the private sector was the main linkage between the agencies and the government. There was no qualification as such prescribed for the enrolment agencies, and the private sector took up the role of the enrolment agencies. Collection of highly private biometric information had to be done by filling a form. This information so collected was stored in private

[31] AmbaUttaraKak and Swati Malik, 'Privacy and National Identification Authority of India Bill: Leaving much to Imagine', (2010) 3 NUJS L. Rev., 485, 499

[32] NooraMeena, 'Right to Privacy under Article 21: A Case Study,'(Legal Services India, August 09, 2012) <http://www.legalservicesindia.com/article/print.php?art_id=1235> last accessed 10th September 2015

[33] (2010) 7 SCC 263

hands initially and transferred thereafter to UIDAI Central ID Repository through cheap means like a memory stick, courier or even direct uploading. Above everything, there was no privity between the enrolment agencies and UIDAI. This process was managed by alien corporate giants like Accenture, Mahindra Satyam, Morpho Joint Venture and L1- Identity Solutions. Aadhaar biometric information was intended to be used as a gateway to all security, whether unlocking a mobile device, car door, bank account, entering an aircraft or entering a university campus or an office.[34]

The Supreme Court in *K. S. Puttaswamy (Retd.) and Ors. v. Union of India (UOI) and Ors.*[35] held that the Aadhaar card was not necessary for schemes of government, which judgment, at the least, does away with the civil disabilities which this project could have created for those striving for an Indian identification.Accepting the benefits of Aadhar Card, the Court gave a 4-point guideline for regulation of Aadhar cards and their information.The Court ruled that the information collected by UIDAI could not be used in any manner, other than for criminal investigation and that too, by order of the court. A three-judge Bench referred to a larger Constitution Bench a batch of petitions challenging the Aadhaar scheme and the issue whether right to privacy is a fundamental right.[36]

Specifically in relation to data privacy, the UNHRC has opined in its General Comment on Art. 17 of ICCPR[37], which deals with the right to privacy, that:

> *"The gathering and holding of personal information on computers, databanks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law. Effective measures have to be taken by States to ensure that information concerning a person's private life does not*

[34] Divan, *supra note 1; R. Ramakumar, 'The Unique ID Project in India: A Skeptical Note'inAjay Kumar, David Zhang (eds.),Ethics And Policy Of Biometrics,(Springer 2010)154*

[35] AIR 2015 SC 3081

[36] 'Aadhar Card not Mandatory, rules Supreme Court',(India Today, August 11, 2015) <http://indiatoday.intoday.in/story/AADHAAR-not-mandatory-for-citzens-supreme-court/1/457788.html> last accessed 10th September 2015

[37] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the Covenant."[38]

3. Database Protection: Information Technology Act

Although India seems to lack a full-fledged database protection law, S. 43 A of the Information Technology Act 2000, added by an amendment in 2008, provides some respite. It hopes to provide this privacy by penalizing the unauthorized disclosure of "sensitive personal data or information". This section particularly applies to "body corporate" which term is explained to include any form of an association of persons such as company, firm or even sole proprietorship. If such a body corporate is negligent in maintaining reasonable security practices and procedures,thereby causing wrongful loss or wrongful gain of such sensitive and personal data, then it shall be liable to pay damages by way of compensation to the person who is affected.In this regard the Government released the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data Or Information) Rules, 2011.[39] Rule 2 (i) states that, "Personal information" means any information that relates to a natural person, which, either directly or indirectly, in combination with other information available or likely to be available with a body corporate, is capable of identifying such person. Biometric information qualifies as "Sensitive personal data or information of"as defined under Rule 3.Rule 4 (1) frames mandatory privacy policy including clear and easily accessible statements of its practices and policies, type of personal or sensitive personal data or information collected, purpose of collection and usage of such information, disclosure of information including sensitive personal data or information as provided in rule 6, reasonable security practices and procedures as provided under rule 8.[40]

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[38] Tim Parker, *'Are We Protected? The Adequacy of Existing Legal Frameworks for Protecting Privacy in the Biometric Age',in Ajay Kumar, David Zhang (eds.),Ethics And Policy Of Biometrics,(Springer 2010)40-46*

[39]Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data Or Information) Rules, 2011 , available at<http://www.wipo.int/edocs/lexdocs/laws/en/in/in098en.pdf> last accessed 20th March 2016

[40]Apar Gupta, *Commentary On Information Technology Act, 2000, (2nd edn. Lexis Nexis ButterworthsWadhwa 2011) 185*

Conclusion

An outright ban on biometric technology will cripple development. One cannot ignore the convenience it provides by linking various benefits, making implementation of government schemes easier. This does not imply that biometric use should go unfettered; rather it imposes the condition that biometric use can be allowed only when coupled with adequate laws. The Aadhaar controversy in India exposed the infancy of data handling laws in India and the need for stringent database protection systems. The solution lies in handling of biometric information only for the purpose intended, without allowing private parties access.For this purpose, the UIDAI alone should handle data. Information Technology Act may be a stopgap for law makers as regards database protection; however its implementation, and widespread consciousness on this issue still remains a distant dream.

Recent Trends Of Disqualifications In Rural Governance

*Lavanyaa Chopra, Saee Athalye**

"Laws and Institutions are constantly tending to gravitate. Like clocks, they must be occasionally cleansed, and wound up, and set to true time."- Henry Ward Beecher

Background

From 1951 to 2001, India's population grew from 360 million to 1020 million. This growth has been characterised as a 'population explosion'.[1]In light of the growing population in India, a policy that debars anybody having more than two children from contesting Panchayat elections and holding posts in Panchayats, Zila Parishads or Panchayat Samitis was introduced in 9 states of India,out of which it continues to operate in Haryana, Andhra Pradesh, Gujarat, Maharashtra, Odisha and Rajasthan. The Haryana Panchayat Raj (Amendment) Act, 2015 brought with it a new set of disqualifications, the most controversial of them being the minimum educational qualifications to contest elections. This policy was also proposed to be enacted in Rajasthan; it is feared that other states will follow suit.The two-child norm and the new disqualifications were severely criticized by various individuals and NGOs and various PILs were filed in courts challenging the constitutionality of these arbitrary provisions on grounds of them violating Art. 14 and Art. 21 of the Constitution of India. The Supreme Court upheld the constitutionality of these provisions in *Javed v State of Haryana*[2] and *Rajbala v State of Haryana*.[3]

The sections of the Haryana Panchayati Raj Act which were challenged are as follows:

> *S.175. (1) No person shall be a Sarpanch or a Panch of a Gram Panchayat or a member of a Panchayat Samiti or Zilla Parishad or continue as such who*

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

[1]National Commission On Population,Facts, <http://populationcommission.nic.in/content/932_1_TablesMapsAndBarCharts.aspx>last accessed on 18th February 2016

[2]2003AIR SC 3057

[3]Writ Petition(Civil) No. 671/2015

> *(q) has more than two living children :*
>
> *Provided that a person having more than two children on or upto the expiry of one year of the commencement of this Act, shall not be deemed to be disqualified;*
>
> *(v)has not passed the matriculate examination or an equivalent examination from any recognized board / institution:*
>
> *Provided that in case of a woman candidate or a candidate belonging to the Schedule Caste, the minimum qualification shall be middle pass;*
>
> *Provided further that in case of a woman candidate belonging to a Schedule Caste contending election for the post of Panch, the minimum qualification shall be 5th pass; or*
>
> *(w) fails to submit self declaration with effect that he has a functional toilet at his place of residence*
>
> *"S.177(1) If any member of a Gram Panchayat, Panchayat Samiti or Zila Parishad -*
>
> *(a) who is elected, as such, was subject to any of the disqualifications mentioned in S.175 at time of his election;*
>
> *(b) during the term for which he has been elected, incurs any of the disqualifications mentioned in S.175, shall be disqualified from continuing to be a member and his office shall become vacant.*[4]

Through this paper, we wish to analyse the aforementioned sections and the Judgments of the Hon'ble Supreme Court with regards to Art. 14 and Art. 21 of the Constitution of India.

Interplay between the disqualifications and Art. 14

The authors of this paper are of the opinion that these provisions violate Art. 14 of the Constitution of India. For a statute to be in consonance with Art. 14,

[4]Haryana Panchayati Raj Act, 1994 (Act No.11 of 1994)

I. *"It should not be arbitrary, artificial and evasive. It should be based on an intelligible differentia, some real and substantial distinction, which distinguishes persons or things grouped together in a class from others left out of it.*

II. *The differentia adopted as the basis of the classification must have a rational or reasonable nexus with the object sought to be achieved by the statute in question.[5]"*

In the very controversial judgment of *Javed v. State of Haryana*[6] it was held that the aforementioned provisions were not violative of Art. 14 as it fulfilled the intelligible differentia test. The intelligible differentia in this scenario is people having less than two children and people having more than two children. This differentiation was made primarily to check population growth and encourage family planning and family welfare. The intention of the legislature, behind enacting such provisions was that members of Gram Panchayats, Panchayat Samitis and Zila Parishad, were role models to the general public, and their having less than two children would encourage the public to do the same. This will in turn, promote family planning and help reduce the growing population in the rural areas.[7]The Supreme Court, in justifying the constitutionality of the educational requirements said that

"It is only education which gives a human being the power to discriminate between right and wrong, good and bad."[8]

In the opinion of the authors, the view adopted by the Honourable Supreme Court is inherently flawed as the above mentioned intelligible differentia and the object of the Statute have no rational or reasonable nexus. The objective of reducing population explosion, promoting family planning and family welfare is not going to be achieved if it is only enforced on a particular class of people. This problem is collective and the remedy should also be collective in nature. Since unreasonableness of a law, is a question of fact, it is imperative

[5]*Laxmi Khandsari v State of Uttar Pradesh* [1981] AIR 873, 891
[6]2003AIR SC 3057
[7]*ibid*
[8]Writ Petition (Civil) No. 671/2015

to examine the realities of rural India and the implications of these provisions.

A plain reading of the provisions and of the judgment of the Supreme Court in *Javed v. State of Haryana* would present such a situation which would make people believe that the two-child policy will indeed be effective. In a utopian world, it might just work; however, at a practical level, this policy is skewed and faulty.The implementation of the policy is clearly against public interest and does not serve the objective.The rural areas of our country are riddled with problems such as a preference for male children andrestricted access to contraception. Therefore, in such a situation, the two child policy fails completely and thus becomes arbitrary and unreasonable. The minimum educational requirements set out by the amendment are made to ensure good governance and promote education in rural areas. These policies are based on various faulty assumptions as delineated hereafter.

That leaders' choices influence the reproductive choices of the public in a tradition-bound patriarchy like India.

The two child norm is based on the faulty assumption that these leaders will have a positive influence on the public to such an extent so as to impact their choice of the number of children they want to have. In a country like India, where the inherent need for a male child is so deeply ingrained in our mentality, the likelihood of the general public getting influenced by the choices made by his leader is very less. The fact that there is an excessive need for a male child in our society was completely overlooked by the Legislature as well as the Judiciary. When such a need exists, the number of children the leader has is immaterial. A person wanting a son will keep trying to have one irrespective of the number of daughters he bears in doing the same.

That the two child policy cannot be circumvented

A study conducted by the National Population Stabilisation Fund and published in the Economic and Political Weekly has shown that the two child norm can easily be circumvented by sitting and prospective members of the Panchayat Samiti or Gram Panchayat. Leaders have been found resorting to malpractices like forced abortions and abortions in the second trimester. The study further

found that 80% of the affected representatives were already aware of the importance of small families, and over a half (53 per cent) had adopted permanent methods but only after their desired family size and its sex composition was completed which exceeded the legal norm of two. There were at least 11 cases in which abortion had been induced and in four cases pre-natal sex determination had been undertaken, resulting in abortions in cases of female foetus and continuation of pregnancy if it was reported to be male.[9]

Also, the Judiciary failed to consider the possibilities of unplanned pregnancies. Another big lacuna in the Statute, which has not been taken into cognisance by the Honourable Supreme Court, is that there is no provision for twins and triplets.These kinds of pregnancies are not in the hands of the parents and thus, it is arbitrary to disqualify people on this basis.

That these policies will not have any effect on the participation of women in elections

The Government of India is constantly trying to increase the female participation in politics and governance, especially at grass root levels. The government, in the 73rd amendment to the Constitution of India, mandated reservation of at least one third seats of Panchayat Councils and one third of the head of the Panchayat positions for women in furtherance of the same. The Legislature and the Judiciary have failed to realise that these provisions will affect women the most and adversely impact their participation in governance.

In matters such as family planning, most women in the rural areas still do not have a say.They are subject to great pressure by their husbands and their in-laws when it comes to children."And, with preference for a male son continuing to be the norm especially at the village level, families have no objection to women stepping down from their posts in order to give birth to at least two or three sons."[10] The assumption that, being a part of the Panchayat Councils empowers women enough to successfully resist this pressure fails on all counts.

[9]Writ Petition(Civil) No. 671/2015

[10]Rashme Sehgal, 'Two-child norm puts panchayats under pressure' <http://infochangeindia.org/population/analysis/two-child-norm-puts-panchayats-under-pressure.html>last accessed 18th February 2016

Many competent and able women are forced to step down from their posts because of this policy.[11]

Also, although the provisions have a lower educational bar for women and scheduled castes, due to the general neglect of women's education, many women do not fulfil the lowered minimum criteria too. Approximately 50% of the eligible women have now been disqualified from contesting elections.[12]

That the illiteracy of the people in rural areas is due to 'lack of will'

The educational qualifications were enacted with the intention of improving governance and promoting education in rural areas. However, the Legislature and Judiciary fail to take cognizance of two main factors which impact the literacy rates in rural India- Poverty and Lack of infrastructure. Many sections of rural areas, especially the scheduled castes, live hand to mouth and cannot afford to send their children to schools. Another important factor is the lack of adequate infrastructure. If the situation was such that the people had access to schools that were in proximity to their homes, and in spite of this, if the literacy rates continued to be low, then the assumption on the part of the Legislature that there is lack of will would be valid. However, in a country where the school per village ratio is grossly inadequate this disqualification is without wisdom on the part of the Legislature.[13]

Effect of the two child norm on the life and liberty of people

Art. 21 of the Constitution of India protects the life and personal liberty of individuals. Art. 21 lays down that no person shall be deprived of his life or personal liberty except according to procedure established by law[14]. The term personal liberty is not used in a narrow sense but has been used in Art. 21 as a compendious term, to include

[11] Nirmala Buch, 'Law of Two Child Norms In Panchayats –Implications, Consequences and Experiences' (Economic and Political Weekly,.11 June2005)<http://jsk.gov.in/articles/law_of_two_child_norm_nirmala_buch.pdf>last accessed 18th February 2016

[12] National Population Register 2011.

[13]Sarva Shiksha Abhiyaan Analytical Report, Elementary Education in Rural India: Where do we Stand?' <http://www.dise.in/Downloads/Publications/Publications%202011-12/Elementary%20Education%20in%20Rural%20India.pdf>

[14]M. P. Jain, *'Indian Constitutional Law' (7th edn, LexisNexis 2014)1114*

within itself all that variety of rights which make the personal liberty of a man. A man has the right to control his or her bodily functions; and procreation, being a bodily function, to restrict the number of children a man and a wife can have is deprivation of their personal liberty. A woman's right to make reproductive choices has been held to be a dimension of personal liberty within the meaning of Art. 21[15] by the Supreme Court of India in the year 2009 wherein it was held that it is important to recognize that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and integrity should be respected.

One must understand that procreation involves the rights and choices of both the husband and the wife. When one of them holds the aforementioned positions, the rights of the other get curtailed ipso facto. A husband who holds a position of authority indirectly restricts his wife from bearing any children, curtailing her right to personal liberty and control over her body. Although the right to personal liberty can be curtailed by a procedure established by law, the procedure prescribed by law has to be fair, just and reasonable and not fanciful, oppressive or arbitrary.[16]

Conclusion

In the opinion of the authors, the Supreme Court has examined these disqualifications in isolation, without examining their implications on society, thus failing to examine whether they achieve their objectives. In order to encourage family planning, a different approach needs to be adopted. The two-child norm might be effective a few years down the line, but looking at the current scenario in India, it is important to bring about some social changes, which cannot be effectively achieved through this policy. The fact that states like Madhya Pradesh, Chhattisgarh, Himachal Pradesh and even Haryana revoked this policy further validates the fact that it doesn't fulfil its purpose and in fact, goes against public interest. The educational qualifications for candidates are not in consonance with the social structure of our society. Candidates who are now eligible by age to

[15] *Suchita Srivastava v. Chandigarh Administration* [2009] 9 SCC 1
[16] *Maneka Gandhi v Union Of India* AIR [1978] SC 597, [1978] SCR (2) 621

contest elections are disqualified for no fault of theirs because ten years prior there were no facilities for schools, or even if there were, awareness among the villagers was fairly low. These disqualifications prohibit proficient and experienced candidates, who can be instrumental in developing society, from contesting elections. A good leader is a good leader, irrespective of the number of children he has or how educated he is.The Executive must first focus on providing enough access to education, only then will these policies be instrumental in achieving their true purpose. In the current situation these policies are a dead letter.

Digital Evidence : Disclosure, Discovery and Admissibility

Ayush Chaddha[*]

Introduction

Sir Bentham, eminent English Jurist, defines evidence as a matter of fact, the effect or tendency of which is, to produce in the mind a persuasion, affirmative or dis-affirmative of the existence of some other matter of fact. It is derived from the Latin word "evidens" or "evidere", which means to show clearly; to make clear to the sight; to discover clearly; to make plainly certain; to ascertain; to prove. The term 'Evidence' in the popular sense means that by which certain facts are established to the satisfaction of persons enquiring into them.[1]

In the term 'electronic evidence', 'electronic' refers to having or operating with components such as micro-chips and transistors that control and direct electric currents, especially over a network. In legal parlance, digital evidence or electronic evidence is any probative information stored or transmitted in digital form that a party to a court case may use in trial.

Electronic Evidence

Enormous growth has been witnessed in the field of electronic correspondence in the 21st century. The evolution of a paperless environment has been characterized by three principal trends, namely dematerialization of the work place; omnipresence and malleability of electronic devices. The proliferation of computers, social influence of information technology and the ability to store information in digital form has required the Indian Law to appreciate digital evidence.[2]

The necessity to admit e-evidence was heeded by the Parliament through the introduction of the Information Technology Act, 2000 (IT Act). The introduction of the IT Act led to amendment in the Indian Evidence Act, 1872 (Act) which made provisions for admission of electronic evidence.

[*] *II B.A. LLB*

[1] Ernest Cockle, *Cockle's Cases and Statutes on Evidence (Sweet and Maxwell 1938) 1.*

[2] *Societe des Products Nestle S.A. v. Essar Industries* [2006] 33 PTC 469 (Del).

Electronic evidence as defined by the Act includes any data or information created or stored in electric format or on electronic media. It includes emails, text documents, spreadsheets, images and graphics, database files, deleted files, and data back-ups. It may be located on floppy disks, zip disks, hard drives, tape drives, CD-ROMs or DVDs, as well as portable electronic devices such as PDAs and cellular phones. Thus, covering all the requirements of the modern age.

Analysing Sections 65-A and 65-B of Indian Evidence Act

The Information Technology Act, 2000 introduced S.65-A and S.65-B in the Indian Evidence Act. S.65-A requires the content of the electronic records to be proved in accordance with the provisions of S.65-B. S. 65-B deems any information contained in an electronic record, to be a document and admissible as evidence without further proof or production of the original provided the conditions are satisfied. It states that any information contained in an electronic record, which is printed, stored, recorded or copied in optical or magnetic media produced by a computer, 'shall be deemed to be a document' subject to the conditions set out in S.65-B(2). Further, it lays down certain conditions to be fulfilled to admit an e-evidence before the Court:

a) Ensure that the computer was in regular use to store or process information for the purpose used.

b) Information derived from the computer-output was 'regularly fed into the computer in the ordinary course'.

c) During the material part of the concerned period, the computer must be operating properly and did not affect the electronic record or accuracy of its contents.

d) The information contained in the electronic record is derived from the information fed into the computer in the ordinary course.

S.65-B(4) establishes the importance of a certificate being submitted along with the e-evidence. The certificate must identify the electronic record which contains the statement and describing the manner in which it was produced. The details of the device involved in production of that electronic record must be produced in the certificate which must be signed by a person in a responsible official position in relation to the operation of the relevant device.

Admissibility of Electronic Evidence

However the discovery of information does not give rise to any presumption that it will be admissible at trial. To be discoverable under the rules of civil procedure, information needs to be admissible or *"reasonably calculated to lead to the discovery of admissible evidence"*.[3] The admission or exclusion depends on factors such as the relevance of the intrinsic nature of its electronic form, its probative value.

In the United Kingdom, computer records were made admissible in 1995 through an amendment to the Civil Evidence Act, 1968. The Court of Appeal in *R.* v. *Wood*[4] concluded that a computer-printout of the chemical analysis was real evidence admissible by the Court.

Further in *Castle* v. *Cross*[5] a print-out of an automatic breath-testing device was held to be real admissible evidence. The position of law was clarified in leading case of *R.* v. *Shepherd*.[6] The Court established the Doctrine of Presumption i.e. in the absence of evidence to the contrary, the courts shall presume that the mechanical instruments were in order at the material time and the computer record can be admitted as evidence.

The United States District Court for Maryland in *Lorraine* v. *Markel American Insurance Company*[7] clarified the rules regarding the discovery of electronically stored information. *Lorraine* held when electronically stored information is offered as evidence, the following tests need to be affirmed for it to be admissible:

a) Relevance of the Evidence;

b) Authenticity;

c) Hearsay or original;

d) Primary or Secondary;

e) Probative value-test of unfair prejudice.

In *Anvar* v. *Basheer*[8], the Supreme Court applied the legal principle *lexspecialis derogate legigenerali* and observed that the provisions of

[3] *Ramsey County v. S.M.F.* [1980] 298 N.W.2d 40 (Minn.).
[4] [1982] 76 Cr App R 23.
[5] [1985] R.T.R. 62.
[6] [1992] 97 Nfld& P.E.I.R.144 (Nfld. S.C.).
[7] [2007] 241 FRD 534 (D. Md.).
[8] [2015] AIR 180 (SC).

S.65-A and S.65-B of the Evidence Act created special law that overrides the general law of documentary evidence. *Anvar* clarified the law pertaining to e-evidence in India which was earlier lying in a dormant state.

Commonly Admissible E-Evidence

Video Conferencing

Video conferencing is capable of replacing the physical presence of the witness in the Court. Presence of a witness in Court can be affected due to security, monetary, time and other reasons.

In *Praful B. Desai,*[9] Supreme Court dealt with the question that whether the examination of a witness can be conducted through video conferencing. It was observed that though S.273 of the Criminal Procedure Code, 1973 (CrPC) requires the "presence of the accused", the expression "presence" does not contemplate actual physical presence but only constructive presence. Thus, S.273 of CrPC and S. 65-B of the Indian Evidence Act do not contradict but complement each other. The courts have heeded to the demand for video conferencing in case of a threat to the security of the witness.[10]

Thus, video conferencing is considered to be admissible once it confirms with the safeguards mentioned under section 65-B of the Act.

Video Cassette and Tape Recording

The Judicial Authorities have been positive in admitting video cassettes and tape recordings subject to the conditions enlisted under S.65-B.

In *Jagjit Singh* v. *State of Haryana,*[11] the speaker of the Legislative Assembly of the State of Haryana disqualified a member for defection. While hearing the matter, the Supreme Court considered the appreciation of digital evidence in the form of interview transcripts produced by the News Agency. The court determined that the

[9] *State Of Maharashtra v. Praful B Desai* [2003] AIR 2053 (SC).
[10] *State of Maharashtra v. Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid.* [2011] 2 AIR Bom R 648 (BomHC).
[11] [2006] 11 SCC 1 (SC).

electronic evidence placed on record was admissible and upheld the reliance placed by the speaker on the recorded interview.

In *Twentieth Century Fox Film Corporation* v. *NRI Film Production Associates (P) Ltd.*,[12] certain conditions for video-recording of evidence have been laid down:

a) Filing of an affidavit by the witness with regard to identification,

b) Filing of an affidavit by the examiner with regard to identification,

c) Administering oath to the witness,

d) Service of plaint and written statement to the witness,

e) Filing of the acknowledgment of the service,

f) Signature of the witness on the testimony recorded by the Court,

g) Expenses and arrangements are to be borne by the applicant.

In *R.M. Malkani* v. *State of Maharashtra*,[13] it was observed that an electronically recorded conversation is admissible provided the conversation is relevant to the matter in issue. It further observed that a contemporaneous electronic recording of a relevant conversation is a relevant fact comparable to a photograph of a relevant incident and is admissible as evidence under S. 8 of the Act.

Photograph

Photographs are held to be admissible under the Act as documents. Justice Willes in *R.* v. *Tolson*[14] observed that "a photograph a visible representation of the image or impression made upon the minds of the witnesses by the sight of the person or the object it represents and hence is admissible." Photographs have been regarded as documents and hence are admissible under S. 65-A and S. 65-B of the Act.

[12][2003] AIR 148 (Kant HC).
[13][1973] AIR 157 (SC).
[14]*R.* v. *Tolson* [1864] 4 F. & F. 103.

Electronic Mail

Electronic mails (E-mails) are seldom admitted as authentic evidence due to the ease of it being tampered. In *Rahul Associates* v. *CC, Mumbai*,[15] it was observed that an e-mail message sent without disclosing its source or without hard copies of message supplied to an assessee is unsubstantiated and clumsy evidence, worthy of no reliance.

Though the Courts in the United States have admitted e-mails, it has been strictly on the grounds of authentication with regard to their origin. The Internet Protocol (IP) address is to be matched against the IP address of the senders' computer, which verifies the authenticity of the email.[16]

In the case of *R.* v. *Mawji (Rizwan)*,[17] it was observed that it was not necessary to authenticate the email by providing evidence of the IP address but a mere corroboration of facts from the testimony of the witnesses is enough to verify the authenticity of the email in question.

It is evident that e-mail as an e-evidence has not been utilised to its full potential. The difficulties and complications involved in the admission of an email as evidence in court makes it less favoured as reliable evidence.

Call Records

Intercepted Call Records complying with the conditions under S.65-B of the Act are admitted by the Court. In *State* v. *Navjot Sandhu*,[18] the proof and admissibility of mobile telephone call records was dealt in detail. The accused submitted that no reliance could be placed on the mobile telephone call records, because the prosecution had failed to produce the relevant certificate under S. 65B (4) of the Act.

However, the Apex Court concluded that a cross-examination of the competent witness acquainted with the functioning of the computer during the relevant time and the manner in which the printouts of the call records were taken as sufficient to prove the call records.

[15][2002] (142) E.L.T. 126 (Tri.Mumbai).
[16]*U.S. v. Siddiqui* [2003] 235 F. 3d 595 (11th Circuit).
[17][2003] EWCA Crim 3067.
[18][2005] 11 SCC 600 (SC).

This position was over-ruled by the Supreme Court in *Anvar* v. *Basheer*.[19] The court concluded that an electronic record shall not be admitted unless the requirements under S.65-B are satisfied. In the case of CD, Mobile call records etc. the same should be accompanied by a certificate in terms of S.65-B. The Supreme Court ruled that in the absence of a certificate or non-fulfillment of the conditions mentioned under S.65-B, the electronic evidence shall not be admissible by the Court.

Automated Teller Machine

With the rise in e-commerce business, there has also been an exponential increase in the incidents of banking frauds. The admissibility of the extract of Automated Teller Machine (ATM) is one of the prime issues in dealing with such cases.

In *P. Padmanabh* v. *Syndicate Bank*,[20] the link between the ATM machine and computer snapped. The snapping of the link allowed the withdrawal of an amount beyond the balance in the account. The court concluded that the link between the ATM machine and the computer snapped, the computer had malfunctioned. Hence, the extract of the ATM machine was not admissible.

Hence, the operation of the computer in usual mode is a *sine qua non* in order to admit an e-evidence by the Court.

Challenges involved with the Electronic Evidence

Authenticity Issue

Authenticity is often the central background for determining the admissibility, as electronic records may be readily altered. The expression 'authentic' is used to describe whether a document or data is genuine, or that the document 'matches the claims made about it'. The technical focus of proving the authenticity of a digital object is to have checks and balances in place to demonstrate the history of how the data has been managed, which leads to the assertion that the data has not been modified, replaced or corrupted and must, therefore, be original.

[19] *Supra 8.*
[20] [2008] AIHC 1609 (Kant.HC).

However, an unbroken chain of custodianship does not in itself prove that records have not been corrupted; there would be no logical need to establish that custodianship had been maintained.[21] Hence, it can be concluded that verifying the 'authenticity' of electronic evidence is much more challenging than maintaining the 'authenticity' of the same. The court does not admit an evidence until the authenticity of the same has been established.

In *Anvar* v. *Basheer*,[22] the call records were held to be inadmissible as they were produced in the absence of a certificate as required under the law.

The Supreme Court has listed a number of conditions to be fulfilled while dealing with the authenticity of tape recordings:[23]

a) The voice of the speaker must be duly identified.
b) The accuracy of the tape recorded statement has to be proved by the maker of the record.
c) Every possibility of tampering or erasure must be ruled out
d) The statement must be relevant according to the Law of Evidence.
e) The recorded cassette must be kept carefully sealed and kept in safe custody.

The time gap between retention and actual production of re-writable media can also create serious doubts of its authenticity, in such cases intermediate officer handling the exhibit must testify in order to vouch for its authenticity.[24]

Preservation

Preservation of the electronic evidence produced or to be produced before the court is vital to maintain the authenticity of the e-evidence. In *American Express Travel Related Services Company* v. *Vee Vinhee*,[25]

[21] Jeff Rothenberg, *'Preserving Authentic Digital Information', in Authenticity in a Digital Environment.*
[22] *Supra 8.*
[23] *Ram Singh v. Col. Ram Singh* [1986] AIR 3 (SC).
[24] *Abdullah Bin Yaacob v. Public Prosecutor*[1991] (2) MLJ 237.
[25] [2005] 336 B.R. 437 (9th Cir. BAP).

the court observed that the focus is on the circumstances of the preservation of the record, so as to assure that the document being proffered is the same as the document that originally was created. In certain anti-corruption cases, the original recording recorded in Digital Voice Recorder was not preserved and thus, once the original recording is destroyed, the question of issuing the certificate under S.65-B (4) did not arise.[26]

In the United States, preserving information relevant to a pending law suit is a duty bestowed on the parties. If a party fails to preserve evidence, this can result in serious punitive consequences.[27] Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents.

The success of a computer forensic investigation is determined by both the availability and preservation of digital evidence sources. Without any specific malicious intent, organisations suffering data compromise commonly tamper with evidence sources before engaging a formal forensic investigation, handing investigators an unnecessary handicap.

Hearsay Controversy

Hearsay evidence is one which does not derive its value solely from the credit given to the witness himself but which rests also, in part, on the veracity and competence of some other person.[28] It is a fundamental rule of evidence under the Indian Law that hearsay evidence is inadmissible. However, in case of digital evidence the rule is applied in a dissimilar manner.[29]

In *R.* v. *Wood,*[30] a consignment of valuable metal had been stolen and certain metals, alleged to have come from the stolen consignment, were found on appellant's premises. Tests were performed on these metals to determine their precise chemical composition, and data obtained from these test was then analysed with the aid of a computer,

[26] *Supra 8.*
[27] *Silvestri v. General Motors Corp.* [2001] 27 F.3d 583, 590 (4th Cir.).
[28] R.P. Croom-Johnson, *Taylor on Evidence (12edn, Sweet & Maxwell 1931) 368.*
[29] *Kalyan Kumar Gogoivs Ashutosh Agnihotri & Anr. AIR 2011 SC 760.*
[30] *Supra 4.*

which was used to perform a number of complex mathematical calculations. The Court of Appeal held that the computer evidence of this kind posed no problem, as long as the accuracy of the data on which the calculations were performed could itself be proved admissible evidence. Hearsay problem will arise only where there is no separate admissible evidence as to the accuracy of the data recorded or processed.[31]

When considering the application of the hearsay rule to a print-out from a computer it is necessary to distinguish between computer print-outs containing information implanted by a human and print-outs containing records produced without human intervention. To rely on the contents of the former is to rely on inadmissible hearsay whilst to rely on the contents of the latter is to rely on real evidence.[32]

Prior to the Information Technology Act, 2000 computer records were widely considered to be hearsay statements since any information retrieved from a computer would consist of an input provided by a human being. Thus, a word document containing statements typed by one party would be inadmissible hearsay. The change in attitude came with the amendment to the Indian Evidence Act in 2000. S.65-B provides that all computer output shall be considered as being produced by the computer itself, whether it was produced directly or indirectly, whether with human intervention or without. This provision does away with the concept of computer evidence being hearsay. Therefore, electronic evidence which involves a human intervention would be admissible.

Though the concept of Hearsay Evidence with regard to digital evidence has been waived off in India by the Information Technology Act, 2000, it is still very much in existence in the United Kingdom where the computer print-outs produced by a human intervention are inadmissible hearsay.

[31] Indira Carr and Katherine Williams, *Computers and Law* (Intellect Books 1994) 166.
[32] *R. v. Coventry Justices* [1992] 95 Cr. App. R. 175.

Conclusion

Electronic Evidence as a novel category of evidence offers a huge potential in the field of criminal as well as civil judicial administration. However, the only impediment is the difficulty in the verification of the authenticity of e-evidence. The dearth of technological expansion in the Indian judiciary acts as a hurdle in realising its true potential. The challenges discussed herein above needs to be catered to in order to allow the e-evidence to act as a helping hand in the trial procedure. Therefore, though e-evidence has a huge potential to grow as a means to further dispense justice, there are certain pre-requisites which needs to be fulfilled before imposing confidence on digital evidence.

Representation And Warranty Insurance : The Middleman In Modern Day Transactions

*Namrata Nambiar, Tanisha Bhatia**

Introduction

Company A and Company B are two business competitors who participate in an auction to acquire Company C. Company A, despite having offered the best price, loses the auction to Company B who in turn offered the seller greater proceeds from the sale upfront and lower post-closing indemnity obligations.

This is a common illustration of a business deal in today's competitive environment. One of the primary reasons for Company C to have chosen Company B is the greater flexibility it offered in indemnification terms. It is interesting to note, that Company B is able to offer such flexibility due to Representation and Warranty Insurance (hereinafter referred to as RWI), a lesser known, and more transaction-friendly tool.

RWI, in simple terms, is an insurance cover for the representations and warranties of a sale agreement. It operates like any other insurance cover, where, in order to recover the claim amount, the insured needs to establish the breach giving rise to the obligation to indemnify the loss suffered as a consequence of such breach.

The above-stated example brings to the fore a very important aspect of today's business environment, i.e., "the sticking point, more often than not, is the scope of seller indemnification"[1], where the seller would want to limit his exposure under the sale agreement after its closing and the buyer would want to secure himself of the loss that could be occasioned by the seller's breach of the representations and warranties. Under such circumstances, even if the timing, price and viability of the deal is right, the parties are apprehensive about closing the deal, unless they arrive at a means of reallocating all or some of the potential risks arising out of the transaction.

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*IV B.S.L. LL.B

[1] Mary McDougall Duffy, 'Representations & Warranties Insurance: Five Issues To Consider' (The Metropolitan Corporate Counsel, June 2009) 27

The traditional risk management mechanisms used by parties to reallocate risks in such agreements are indemnity and escrow provisions. Indemnity provisions in a sale agreement fix the liability of the seller to make good the loss suffered by the buyer in cases of breach. Escrow provisions entail a portion of the sales proceeds to be kept aside to fulfill these indemnity obligations. These, however, have certain limitations such as dependence on seller's credit in case of indemnity provisions and non-availability of sales proceeds for an extended period of time in case of escrow provisions. These limitations are much to the displeasure of parties and often a bone of contention.

An RWI, on the other hand, is a tactical technique which allows the parties to shift the risk to an independent third party insurer. This helps in bridging the gap in the negotiating position of two parties and facilitates the closure of deals. It is widely used and accepted in the US, UK and other commercially developed countries as an alternative or an addition to the traditional risk- management mechanisms. RWI, however, remains relatively untapped in the Indian market. Optima Insurance Brokers and Marsh are examples of few insurance brokers in India which provide RWI cover.

Representation And WarrantyInsurance

RWI is an insurance cover available to the buyer against the seller's breach of representations and warranties (buy-side policy) and to the seller for the loss arising out of such breach (sell-side policy). "In addition, despite what its name may suggest, RWI may also be available to cover certain general indemnities beyond the actual representations and warranties."[2]

Since the protection under the RWI policy is guaranteed by an independent third party (the Insurance Company), the parties are in a better position to negotiate the various provisions of the agreement. These include the scope of representations and warranties, the escrow provisions and the deductibles. It is, therefore, an invaluable tool with the potential to offer a variety of benefits to both buyers and sellers while substantially phasing out problems in deal negotiations.

[2] *ibid*

"RWI is best suited to deals of a certain size range and type. Given the amount of limits that can be purchased in the marketplace for any particular deal, insurance pricing and the size of a typical escrow or indemnity requirement, the "sweet spot" for reps and warranties insurance are deals between $20 million and $1.5 billion."[3]

Insurance As Security And Indemnity

A closer look at the RWI policy reveals that the insurance functions as both 'security' and 'indemnity', based on how the policy has been structured. In an ordinary agreement, the seller is obligated to the buyer for the fulfillment of indemnity obligations. RWI policy tends to reduce the dependence of the buyer on the seller's creditworthiness to be able to fulfill these obligations. Therefore, the insurance policy acts as a security by minimizing the need to resort to escrow and other traditional risk management mechanisms and addresses any concerns the buyer may have in relation to seller's credit.

Alternatively, the insurance policy may also act as an indemnity wherein insurer assumes the role of the seller and undertakes to cover any or all of the breaches of representations and warranties.

Types of RWI : Buy –Side Policy and Sell-Side Policy

RWI policies can be categorized into buy- side policy and sell-side policy. Both, the buy-side policy and sell-side policy, enhance the value of the transaction by shifting the risk under the sale agreement to an independent third party insurer. It is important that the parties, at the time of obtaining RWI, elect a buy-side or sell-side policy, depending upon the suitability to a particular deal.

Buy – side Policy

A Buy-side policy is in the nature of first-party coverage which allows the buyer to claim directly from the insurer. These policies have the potential to minimize and in certain cases, even eliminate the buyer's dependence on the seller's ability to fulfill his indemnification obligations.

[3] Noam Noked, 'M&A Representations and Warranties Insurance: Tips for Buyers and Sellers' (Harvard Law School Forum on Corporate governance and Financial Regulation, 1 May 2013) <https://corpgov.law.harvard.edu/2013/05/01/ma-representations-and-warranties-insurance-tips-for-buyers-and-sellers/> accessed 17 February 2016

A buy-side RWI is of strategic advantage to the buyer for several reasons. As is explicitly evident from the above stated illustration, it has the potential of giving the buyer (Company B) a competitive edge in a highly aggressive deal market. It offers a more practical solution to mitigate risks associated with the transaction by reducing the buyer's reliance on seller's credit. Further, in a transaction with many sellers, it also reduces the 'collection risks'.

An RWI is of economic significance to a buyer having a continuing business relationship with the seller as it prevents souring of relation with friendly business associates. It also averts the situation of breakdown of business operations which may ensue on account of the seller being incapable of honouring his indemnity obligations.

From the seller's perspective, it makes for an attractive alternative as it eliminates or reduces the buyer's dependence on purchase price escrow, thereby, availing of him of the entire or a substantially large portion of the sales proceeds. In the above-stated illustration, *if the seller (Company C) were a private equity fund, the availability of a larger portion of the sales proceeds would enable it to immediately distribute the proceeds amongst its investors and reduce the risk of 'clawback'.*

Therefore, the mutually beneficial buy-side policy is instrumental in bridging the gap in the negotiation position of the seller and the buyer.

Sell-Side Policy

A Sell-side policy is in the nature of third party coverage where the seller makes a claim to the insurer to insure the buyer for the losses sustained on account of the seller's breach of representations and warranties. It, therefore, to the extent possible, has the effect of reducing or eliminating the seller's exposure under a sale agreement.

It is common practice for a buyer to set aside a certain portion of the purchase price in an escrow to ensure payment in case of breach. The sell-side policy grants to the seller a 'clean exit' by limiting the need for escrows without compromising on his ability to fulfill his indemnity obligations. This in turn confers greater freedom upon the seller to immediately utilize the deal proceeds towards further business objectives.

The availability of sell-side policy aligns a seller's exposure under the agreement to a level comfortable to him. The seller with the knowledge that the risk shall be borne by the insurer places himself at a better

bargaining position at the time of negotiations. Let us redefine the above-stated illustration to understand sell-side policy from the perspective of Company C, the seller.

Let us suppose, Company B requires 25% (twenty five percent) of the purchase price to be set aside in an escrow. Company C, the seller, on account of certain immediate financial obligations, is only ready and willing to set aside 10% (ten percent). In such a situation, an RWI policy issued to cover the 15% (fifteen percent) of the purchase price which Company C was unwilling to set aside allows the coverage of risk to the satisfaction of both Company B and Company C.

Therefore, a sell-side policy, in such situations has the effect of promoting a business friendly atmosphere by facilitating flexibility in the negotiations between the parties.

Key Areas of Difference in The Policies

Although, Buy-side and Sell-side policies share many common characteristics, they differ in certain key aspects. The differences are primarily on account of the different motivations of the seller and the buyer for procuring the policy. The key areas of difference include the period of policy, the policy limit, the breadth of coverage and the policy premium, amongst others.

a) Policy Period :

The policy period for a sell-side policy is generally shorter than that of a buy-side policy. In a sell-side policy, to ensure that the sellers risk with respect to a breach of representations and warranties is not unlimited, the policy period is generally for the same duration as the survival period in the sale agreement. On the other hand, in a buy-side policy, the policy period may survive beyond the period provided for in the sale agreement, if the buyer does not want to limit the coverage to the terms of indemnity.

b) Policy Limit :

A seller generally limits his coverage to the indemnity cap under the sale agreement while a buyer might want coverage in excess of the indemnity cap. However, the seller under sell-side policy may seek additional coverage to insure his defense costs.

c) Policy Coverage :

The differences in coverage relate to treatment of fraud. Buy-side

policies would insure the buyer against fraudulent misstatement by the seller but a sell-side policy would not cover the seller's fraud as it would amount to the seller insuring against his own fraud. Likewise, a buy-side policy would not cover the seller's misstatements known to the buyer, but a seller under his policy would be bound by such a situation.

d) Policy Pricing :

The breadth of coverage of a buy-side policy vis-à-vis a sell-side policy is generally higher. This in turn leads to higher pricing of the buy-side policy.

The differences in these two policies warrant the procurement of a policy that well suits the needs of the parties. Insurance Companies offer both general and customized RWI policy. It is advisable for the parties to obtain a RWI policy that caters to their specific objectives taking into account the several issues of policy duration, policy coverage, policy limits and other economic terms. This would ensure a policy that is structured to meet the best interest of the parties.

Insurer's Perspective of RWI

RWI policy is a lucrative venture for the insurer. The huge premiums associated with these policies are greatly profitable to the business of the insurers. It is largely in their interest to judiciously settle the claims arising out of these policies so as to ensure trust in, and acceptability of this policy. RWI, therefore, works well for all three stakeholders, i.e., the seller, the buyer and the insurer.

Although, from the business perspective, RWI policy is an attractive opportunity, the substantial losses that can entail from a carelessly drafted policy are huge. The insurers, therefore, are very careful in structuring an RWI policy. They conduct thorough reviews of all the transaction related documents before arriving at the decision of underwriting and pricing of the policy. The insurer may engage chartered accountants, legal advisors and even actuaries to review these documents, which may include the sale agreement, the financial reports of both the buyer and seller, the due diligence reports and other such important transaction related documents.

The insurer will caution the party seeking to be insured, at the preliminary stage itself, of the problematic representations and warranties and ask for the same to be resolved. This and various other factors, such as the retention amount, play an important role in shaping

the policy. The insurer will be in a more comfortable position to provide insurance to the insured, if the sellers and/ or the buyers undertake to retain a certain portion of the risk before the insurance policy responds. This may also reflect in attractive premium pricing.

Factors Driving Growth of RWI Globally

RWI as an insurance product finds a reasonable market presence on account of multiple factors which channel its growth in today's competitive markets. First, the international presence of the RWI policy facilitates the use of such policy for cross border deals. Secondly, the efficiency of the policy as facilitated by speedy and streamlined underwriting by insurers; use of insured friendly language and positive experience in claims administration has increased the comfort towards this insurance product. And finally, the general public awareness and responsiveness to financial fluctuations and distress has fostered the understanding to develop the mechanism to deal with it. All of these factors together have led to the emergence of RWI as a consumer friendly insurance product.

Conclusion

RWI policy has been instrumental in commercial transactions in the US and UK for over two decades. It has revolutionized the approach to negotiate deals by proving to be a transaction and consumer friendly tool. RWI has enabled parties to shift their focus from the indemnification provisions to more important provisions of pricing and deal certainty. It has, however, largely failed to gain popularity in the Indian market. This comes as a surprise considering the wide expansion and penetration of the Indian M&A sector.

Much of the apprehension can be attributed to the lack of trust in the insurance sector in India. This results in the inability of the insurance companies to develop consumer friendly insurance products such as RWI which, despite its utility, is unable to find a significant demand in the corporate world.

The success and growth of RWI as one of the strongest transactional tools globally, makes it attractive for India's fast growing economy. It is one of the few techniques in the M&A world that is beneficial to all three stakeholders, i.e., the buyer, the seller and the insurer. What is, therefore, awaited, is the maturing of the Indian markets to allow the emergence of RWI as a fundamental financial component.

Juvenile Justice Act 2015 - A Promise Of Justice Or Regressive Legislation?

Mukta Sathe[*]

Introduction

The Juvenile Justice (Care and Protection of Children) Act, 2015 has received the long-pending assent of the Rajya Sabha and has come into effect only recently. The Act states that children between the ages of 16 to 18 who commit heinous offences shall be tried as adults if deemed fit to be so tried. The entire rhetoric created around the debate makes one question whether lawmakers have considered the long-term impact of the law, or whether this Act will in future become a most apt example of populism and emotion overriding cautious as well considered law making. A prima facie look at the Act, the environment in which it was passed and the kind of discussion, or rather, the lack of meaningful discussion that accompanied its passage, leads one to the conclusion that the Bill was a knee-jerk reaction to an incidence of grotesque brutality. But law cannot be drafted to address the anguish created by one single act. It must consider the impact it would have on the society as a whole and also on those it purportedly seeks to protect. This article seeks to assess this possible impact. Further it seeks to analyse whether the amendment would really serve the ends of justice.

The Act is progressive in various aspects related to adoption and care of children. However, it seems to have done away with the tradition of implementation of increasingly progressive legislation to deal with 'juveniles in conflict with law'. The Juvenile Justice (Care and Protection of Children) Act 2000 recognised the principles elaborated in the United Nations Convention on Rights of the Child which fixed the age of children at eighteen. It also adopted a reformative approach towards children involved in offences, instead of a retributive one. However, the present Act seems to overturn the view adopted formerly as to the rehabilitation of children.

[#] Also refer to the Legislation Highlight Section for further information about the Act

[*] IV B.S.L. LL.B.

In order to evaluate the need and impact of the new Act holistically it would also be important to consider the deficiencies of the previous Act which the members of the legislature cited as the foundation of the amendment. It is necessary to discuss if the deficiencies proposed truly exist. Further, if they do, it is necessary to study if the deficiencies justify the enactment of the new Act. And if not, what alternatives could have been resorted to in order to address the deficiencies are matters which this article seeks to discuss.It would therefore be pertinent to first discuss the provisions of the new Act and to critically analyse the same.

Heinous offences

The Juvenile Justice (Amendment) Act, 2015 creates a category of offences known as heinous offences, laying down the circumstances in which children between the ages of 16 to 18 may be tried as adults, provided that they are deemed fit to be so tried. S. 2 (33) states that "heinous offences" includes the offences for which the minimum punishment under the Indian Penal Code or any other law for the time being in force is imprisonment for seven years or more.[1] There are therefore at least 46 offences under the Indian Penal Code and other penal laws for which such children may be so tried.[2]

The Juvenile Justice Board has been given the authority to conduct a preliminary assessment into the mental capacity of the child committing the heinous offence and to pass an order stating that the child is capable of being tried as an adult.[3] When such an order is passed the case shall stand transferred to a Children's Court having jurisdiction.[4] The Board is entitled to take the assistance of psychologists and psycho-social workers or other experts while making such an assessment.[5] This provision raises questions at two levels.

[1] Juvenile Justice (Care and Protection of Children) Act, 2015.
[2] Vihar Ahmed Sayeed, 'Interview with Swagata Raha, 'Replication of a failed Western model', (Frontline, January 22 2016) <http://www.frontline.in/cover-story/replicating-a-failed-western-model/article8068377.ece> last accessed 20th March 2016
[3] Juvenile Justice (Care and Protection of Children) Act, 2015 S. 15(1)
[4] Juvenile Justice (Care and Protection of Children) Act, 2015 S. 18(3)
[5] Juvenile Justice (Care and Protection of Children) Act, 2015 S. 15(1)

Firstly, the discretion granted to the Juvenile Justice Board in assessing something which is as subjective as mental capacity invites scrutiny. Taking the advice of experts is not mandatory and is a provision that can be dispensed with. Further the ability of such an 'expert' to accurately evaluate the mental capacity of the child can be questioned. The assessment of the exact level of mental maturity is a subjective task and can therefore lead to arbitrariness. The Act presumes that level of maturity will vary from child to child within the age range of 16 to 18. However, it provides no instruction on how the mental capacity is to be assessed. In absence of such instruction it is likely that the test of mental capacity to be applied may be borrowed from the standards set for adults. The Indian Penal Code deems a person to be mentally incapable if he at the time of the commission of the act is incapable of knowing its nature or that it is wrong or contrary to the law.[6] Children are deemed to be incapable because of a different reason. Cognitive capacity amongst children of the age group of 16 to 18 is as developed as that of adults. But they are not mature enough to make proper judgements and are unable to control impulses. The Act, as it stands now, can be read to mean that a child above the age of 16 committing a heinous crime will be deemed to be mentally capable unless the standards of mental incapacity mentioned in the IPC with respect to adults are fulfilled. The application for same standards to children and adults is a threat which must be avoided.

Secondly, the constitutional validity of the provision of a pre-trial assessment of mental capacity can be questioned. The explanation to the section states that the preliminary assessment is not a trial. However, it seems to do away with the concept of presumption of innocence. Further, it leads to the creation of a separate category of children aged 16 to 18, without the support of any research or data. Such unreasonable classification and dispensing off with the concept of presumption of innocence can be seen to be conflicting with the fundamental rights enumerated under Art. 14 (Equality before the law), Art. 19 (Protection of certain rights regarding freedom of speech etc.) and Art. 21 (Protection of life and personal liberty) of the Constitution.

[6] The Indian Penal Code 1860 S. 84

Children's Courts

The Act authorises the Children's Courts to decide whether the children in conflict with law who are found capable by the Board in its preliminary assessment will be tried as adults or not.[7] Thus the mental capacity of the child will be first assessed by the Board and then by the Children's Court. This may lead to multiplicity and repetition of proceedings which are carried on in respect to mental capacity and will inevitably lead to delays. Further, the Children's Courts are given the discretion to decide if a child in conflict with law who has completed 21 years of age but is yet to complete his term of stay should be released or sent to serve the rest of his term in jail on the basis of an assessment of the child's capacity to be a contributing member of the society. No rules are made on the basis of which the capacity of the child to be a contributing member would be assessed. The Act gives the Children's courts absolute, unguided and unrestricted discretion to decide who should be considered as capable of being a contributing member of society. 'Observers have expressed the apprehension that this provision allows the Children's Courts to make a decision that is potentially subjective, is prone to arbitrariness, and may result in class, caste and religion-based targeting of children under the garb of assessing their potential contribution to society and the extent of reformation.'[8]

It can be seen that the application of the Act is fraught with discrepancies and can lead to arbitrariness. It would now be necessary to analyse the grounds based on which this Act was passed.

Grounds supporting the reduction of age to 16 for certain categories of crimes

The demand to reducing the age limit of children in conflict with law from eighteen to sixteen first arose after the Delhi gang rape.[9] It is pertinent to note that the Justice Verma Committee which was formulated to look at amendments to the existing criminal laws

[7] Juvenile Justice (Care and Protection of Children) Act, 2015 S. 19(1)

[8] V. Venkatesan and T.K.Rajalakshmi,, *'Of Juveniles And Justice', (Frontline 4, January 22, 2016) <http://www.frontline.in/cover-story/of-juveniles-and-justice/article8068293.ece> last accessed 20th March 2016*

[9] Leila Seth, *Talking of Justice People's Rights in Modern India (Aleph 2014)*

regarding rape and sexual violence had, after a lot deliberation, come to the conclusion that the age limit for children in conflict with the law should not be reduced. [10] The grounds supporting reduction of age limit to 16 can be classified under the; following heads- the Getting Away Factor, the Increasing Number, Mental Capacity Arguments and Recidivism Arguments. These factors shall now be briefly analysed.

1. The Getting Away Factor :

What has enraged many people is the fact that the person responsible in the above mentioned rape case for indulging in the highest degree of violence went without being punished just because he was a few months shy of eighteen. This encouraged people to argue that there are cases where accused persons get away by using the excuse that they are juveniles.

It is indeed true that an individual or 'child' who is seventeen years eleven months old is no less mature than himself at eighteen years old, but there is certainly a difference in maturity between an individual who is eighteen and one who is sixteen. As long as an age limit is set - any age limit- once a date after which an individual is to be considered an adult is decided, the problem of people getting away will always arise. The reduction of age limit from eighteen to sixteen fails to eradicate the problem, as claims can still be made that some people get away due to being just a few months shy of 16. The Act tries to overcome this problem by bestowing upon the Juvenile Justice Board the power to determine whether the child concerned should be treated as an adult. The arbitrariness caused due to the grant of such powers has been already discussed. It must be noted that the precedent set by reducing the age limit, due to the fear that some people may get off with a lighter sentence than they deserve, is a dangerous one as it will encourage a further reduction of age on the same grounds in the future as well.

2. The Increasing Number :

While the Bill was being passed, a reference was made to the fact that an increase has been seen in the number of children who are

[10] Leila Seth, *Talking of Justice People's Rights in Modern India (Aleph 2014)*

between the ages of sixteen and eighteen and who are engaged in criminal activity.[11] This reference to the rise in crimes by children demands closer scrutiny at two levels. Firstly, the veracity of this statement requires inquiry. A closer look at the National Crime Research Bureau[12] data regarding crimes committed by children paints a different picture. In terms of absolute numbers the number of cases can be seen to have increased from 2003 to 2013. However, the data clearly shows that crimes committed by children as the percentage of the overall crimes committed in the country has fluctuated in the above mentioned decade between 1 and 1.2 percent which cannot be said to be a huge rise. Therefore, the question that arises is whether it is justifiable to decrease the age of children in order to address this minute increase in crimes committed by juveniles. Secondly, it must be questioned if the number of crimes committed by children is relevant in this context. The Juvenile Justice Act 2015 provides for a different criminal system for children not because the number of children committing crimes is lesser than adults, but on the basis of the belief that those below the age of eighteen are yet incapable of understanding the meaning of the crime they have committed, and are motivated by factors other than those which influence adults.

3. Mental Capacity :

A closely related point is that of mental capacity. The argument is put forth that children today are, by virtue of being exposed to a variety of media, more mature than ever before. However, many psychologists have disputed this claim. A distinction must be drawn between cognitive capacity and power to make correct judgments. Arlene Manoharan, Fellow, Programme Head- Juvenile Justice, Centre for Children and the Law, National Law School of India University (NLSIU), Bengaluru, also made submissions before the Parliament's Standing Committee on the Bill. He said that while the cognitive levels of a 16 or 17-year-old might match that of an adult, findings show

[11] Sagnik Dutta, Interview with Ved Kumari, 'Government giving in to reactionary ideas', (Frontline 21, January 22 2016) <http://www.frontline.in/cover-story/government-giving-in-to-reactionary-ideas/article8068406.ece> last accessed 20th March 2016

[12] National Crime Records Bureau 'Crime in India- 2014' available at <ncrb.nic.in/StatPublications/CII/CII2014/Compendium%202014.pdf> last accessed on 1st March 2016

that they lacked the psychological maturity of adults.[13] Adolescents are therefore more prone to making rash decisions, unable to control impulses as well as adults, and are more prone to peer pressure. Greater exposure to media does not help in increasing the capacity of the child in making more rational decisions.

4. Recidivism :

One important reason why many argue that the age limit should be reduced to sixteen is the fear that adolescent juveniles may commit the same crime when they get out of the reformatory homes. If adolescents understand that they are not going to face trial till the age of 18 they may, after coming out of observation home, turn back to committing more crimes in the belief that they will be easily let off. An important function of law is to protect the society from criminals.

However, the available data actually shows a reduction in the rate of recidivism amongst children in conflict with the law in the recent years. The rate of recidivism had fallen from 12.1 percent to 5.4 percent in the period from 2010 to 2014. The overall average rate of recidivism in adults is 7.8 percent and therefore, more than that of children in conflict with law. Further studies have shown that the rate of recidivism is higher amongst children treated as adults in countries where there are provisions to so treat them. A major concern while treating children as adults is the fact that if they are introduced to the mainstream criminal justice system, they will, after the age of 21, come in contact with adults who are cold blooded criminals and can fall under the influence of the same. Further their introduction to the criminal justice system will inevitably nullify any opportunity of rehabilitation which may tend to encourage recidivism. This can be corroborated by experience in countries other than India where such provisions are applicable. For example, in the United States, *'Juveniles who were transferred to the adult system were found to invite arrests for subsequent crimes to a greater extent than those who were retained in the juvenile justice system.'*[14]

[13] V. Venkatesan and T.K.Rajalakshmi,, 'Of Juveniles And Justice', (Frontline 4, January 22, 2016) <http://www.frontline.in/cover-story/of-juveniles-and-justice/article8068293.ece> last accessed 20th March 2016

[14] V. Venkatesan and T.K.Rajalakshmi,, 'Of Juveniles And Justice', (Frontline 4, January 22, 2016) <http://www.frontline.in/cover-story/of-juveniles-and-justice/article8068293.ece> last accessed 20th March 2016

Therefore, it becomes apparent the Act threatens to hurt the interests of the very people that it seeks to protect by putting the society at greater risk due to introduction of children in the adult system.

The Union Minister for Women and Child Development has claimed that the reformation homes set up for rehabilitating children in conflict with the law have failed in their objective of reformation and therefore the age limit should be reduced. Can the inability of the State to carry out its duty be used as an excuse to curb the rights of an individual? If the institutions of the State have failed in their task then the onus must rest with State to rectify their functioning. The Standing Committee of the Parliament which was appointed with respect with this Bill has noted that the reformation homes are understaffed and under-funded and are therefore unable to carry out their functions properly. The proper response to this finding would be to ensure adequate funds and personnel and not an attempt to place the burden on children.

It can therefore be said that the grounds which are quoted in favour of the Act are easily refutable and do not justify the change in the law. However, it is also true that the juvenile justice system requires reformation. This aspect will be now dealt with briefly.

Alternative Amendments to the Juvenile Justice Law

Reformation of the juvenile justice system is urgently required both for the sake of the society and for the sake of the children concerned. A more appropriate approach would be to strengthen the existing institutions instead of creating new ones and to take measures for reformation of all children upto the age of 18 within the framework of the same. These institutions must be adequately staffed and funded. Research is required in the field of child psychology which would form the grounds of reasonable classification of children according to age group. One alternative is that the period of detention of children may vary on the basis of such reasonable classification and need not be restricted to the short period of three years. Further their progress must be continuously monitored. Release of children after completion of term should be the norm. But there should be a provision for extra detention by the Board on application in cases where it is feared that the child will commit a crime and such grounds should be stated by the Board in writing in its order. The Act must provide that where

such an order of continued detention is made the child concerned has a right to appeal against the order in the High Court. The Juvenile Justice system in India requires reform. However, the introduction of children into the adult criminal justice system is a step which requires reversal as it will neither be beneficial to the society nor to the child.

Conclusion

The Juvenile Justice (Care and Protection of Children) Act, 2015 may *prima facie* appear to address some of the problems caused by the improper application of the previous Act. However, a closer scrutiny of the Act leads one to the conclusion that it has the potential to cause arbitrary use of power. Further the arguments which favoured the passing of the new Act fail to be convincing once subjected to scrutiny. The Act will not protect the ones it seeks to protect but rather put them in greater danger. Public opinion has prevented the legislature from perceiving this obvious threat. The passage of this Act is a regressive step which will cause more hurt than help and thus requires to be reversed by the legislature.

Limited Liability Partnership: A Critical Analysis

-Shivani Maurya[*]

The LLP is a composite representation of business organization in India that synthesizes the positive aspects of both the traditional partnership and the company. As the name indicates, it lets the benefits of Limited Liability permeate and allows its members the pliability of crafting their internal structure on a mutual agreement based on a partnership. In this world of globalization and privatization everyone wants to diminish their liabilities and reside in a flexible yet valuable domain. In sync with these interests, the new concept of Limited Liability Partnership (LLP) has arisen. In an LLP, the liability of its members would be limited while the LLP itself would be accountable to the full degree of its assets.

In India, the need for the Limited Liability Partnership Act 2008 (the LLP Act) was described by the Ministry of Corporate Affairs:

> *"With the growth of the Indian economy, the role played by its entrepreneurs as well as its technical and professional manpower has been acknowledged internationally. It is felt opportune that entrepreneurship, knowledge and risk capital combine to provide a further impetus to India's economic growth. In this background, the need has been felt for a new corporate form that would provide an alternative to the traditional partnership, with unlimited personal liability on one hand, and the statute based governance structure of the limited liability company on the other, in order to enable professional expertise and entrepreneurial initiative to combine, organize and operate in flexible, innovative and efficient manner."*[1]

Genesis

The idea of the LLP has been attributed to a twenty-odd person law firm from Lubbock, Texas. Their idea, which led to the enactment of the first LLP statute in Texas in 1991, was a reaction to the adverse legal result of an economic catastrophe. This form of partnership

[*]II Year, LL.M

[1]The statement of Objects and Reasons appended to the Limited Liability Partnership Bill 2006, introduced in the Rajya Sabha on 15th December by Mr Prem Chandra Gupta, the Minister of Company Affairs, explains the object of this new structure of organization.

distributes proposals to all partners giving them the right to participate in the management and the functioning of a partnership without forcing them to undergo unlimited personal liability asis the case with atraditional partnership.

Indian Debut :

The Indian Legislature, following the international business drift where various professionals and businesses in the form of Limited Liability Partnerships offered a horizon of services, sanctioned the much awaited Limited Liability Partnership Act, 2008. Keeping in mind the requirements of international norms, on November 2, 2005 the Ministry of Corporate Affairs had introduced a 'concept paper' on Limited Liability Partnership with a view to stimulating public debate over ideas which were to be incorporated in the proposed Limited Liability Partnership Bill.[2]

Traditional partnerships are a somewhat narrow and perhaps dispensble channel for delivering modern practices. The LLP agreement between members is very flexible. Following trends, predominantly those in the United States of America, United Kingdom, and Singapore, the LLP structure in India has evolved recently. This structure recognizes the 'world's best practice' model design not only to attract venture capital from offshore institutional investors but also to retain domestic investment. A few advantages of this form of business structure include low cost of incorporation, unlimited capacity, limited individual liability, a flexible management structure, tax benefits and less audit and filing requirements.

However, this form of business structure may be misused too. After the Enron collapse, it can be seen that Limited Liability is associated with professional error and malpractice to a large extent. The Enron scandal, revealed in October 2001, eventually led to the bankruptcy of the Enron Corporation, an American energy company based in Houston, Texas, and the dissolution of Arthur Andersen, which was one of the five largest audit and accountancy partnerships in the world. Many executives at Enron were indicted for a variety of charges and were later sentenced to prison. Enron's auditor, Arthur Andersen,

[2] Ravi Sharma, 'Limited liability Partnership-Valuation of the New Business Vehicle', Corporate Law Adviser, (Vol.90/3, 01 June 2009) at pg. 15

was found guilty in a United States District Court, but by the time the ruling was overturned in the U.S. Supreme Court, the firm had lost a majority of its customers and shut down[3]. Arthur Andersen not only turned a blind eye to improper accounting practices, but was actively involved in devising complex financial structures and transactions that facilitated deception.

Even in India, the Organization of Economic Co-ordination and Development (OECD) recognizes Limited Liability Partnership as being a corporate vehicle, which is subject to misuse, predominantly for the reason that it is less supervised than corporations.

Critical Appraisal :

The Act has several loopholes if compared to the Companies Act of 2013 and the Partnership Act, and falls short of international standards. Inadequacies of this Act are as follows:

S.7 lays down that every LLP shall have at least two designated partners who are individuals and one of them should be resident in India. S.8 says that the designated partner would be responsible for compliance with the provisions of the Act. Clause (b) makes him liable to all the penalties imposed in the event of non-compliance. He is also responsible for filing of account of solvency and under various other provisions. However, the conditions laid downby S.7 of the Act are not enough- there are no qualifications or disqualifications for the designated partners similar to those for directors under S. 274 of the Company Act, 1956. The managing director under company law is entrusted with substantial powers of management by virtue of agreement with the company or of a resolution passed by the company in general meeting or by board of directors or by virtue of memorandum or articles of association but a designated partner has no managerial powers for an LLP. All partners are equal and can manage affairs of an LLP but a designated partner may be vested with managerial powers under the LLP Agreement. It is expected that the manager should be a qualified one and not merely a dummy. While the Act does not lay down any qualifications for a designated partner, Rule 9 of the LLP Rules, 2009 lay down disqualifications for designated

[3] *Arthur Andersen LLP v. United States* 544 U.S. 696 (2005)

partners. Therefore it is indeed possible that the partners may appoint somebody who is not qualified enough and that person in the due course of time becomes a scapegoat for the activities of the partners.

Consider a scenario where the person appointed as the manager is insolvent. In such a situation nothing can be realised from the manager, so ultimately the purpose of making the appointee-manager personally liable is not served, thus making the provision redundant.

S. 67 authorizes the Central Government to apply the provisions of the Companies Act of 1956. Thus Central government further amended the LLP Rules of 2009 by virtue of the LLP (Amendment) Rules 2010. As per the Statement of Object and Reasons appended to the Bill, limited partnership has been assumed to be the new business vehicle auxiliary to the present business model. The main attractions of LLP are absence of arduous statutory provisions relating to governance and procedure. If the provisions of the Companies Act are applied to an LLP, it might take away the said advantage and render void the very object of the Act. Under this section, no framework has been defined under which the government is supposed to act. This unbridled authority given to the legislature especially when coupled with the power to apply provisions with modifications and exceptions amounts to excessive delegation and is thus ultra vires.

Chapter VII of the LLP Act deals with financial declaration and requires the LLP to prepare a statement of accounts and solvency for a given financial year and file it with the Registrar. Need for financial declaration has been accepted as non-discriminatory for the limited liability defence provided by the LLP. But S. 36 provides that the incorporation document filed with the registrar, including the account of solvency, will be open to inspection by any person. This means that the financial health of an LLP is open to public dissection which may not be in the interests of business, particularly when such LLP is facing financial issues. Therefore, it would be preferable if the word *'any person'* is removed from S. 36 and only certain select authoritiesare allowed to have access to this data.

Appointment of auditors is an important requirement. There is a separate provision mentioned under Rule 24 of LLP Rules, 2009 but the provision mentioned there merely lays down the procedure for appointment and re-appointment of the auditor. The right to appoint

them is given to a designated partner, which can in many situations be misused by the designated partner for personal gain. There is no strict screening of a partner during the appointment process, contrasted to the process mentioned in S. 139 of the Indian Companies Act 2013, which is more comprehensive and follows a stringent pattern for appointment of auditor. The auditor is required as there should be someone who could be made responsible in law for the accounts of an LLP. Provisions similar to those under the Companies Act can be adopted as it is necessary to ensure that the accounts of the said LLP are audited fairly and no harm is caused to the interests of the creditors and all other persons dealing with it.

S. 23(2) provides that the LLP agreement should also be filed with the Registrar. Such a provision is not essential as the agreement is for management of internal affairs and the same should not be made public. Even in the UK the LLP agreement is not required to be filed with the authorities or any registrar and hence is not public. Therefore, LLP agreement should not be included among the documents required to be filed by an LLP because such filing is unnecessary; also it makes the working and internal affairs of an LLP public which may not be to its advantage.

S. 33 of the LLP Act provides that the responsibility of partners to contribute money for other property shall be in conformity with the LLP agreement. But there is no corresponding provision in the First Schedule or anywhere for dealing with similar situations in the absence of an agreement. Therefore, it is suggested that a default provision should be included which shall operate in the event of the absence of an LLP agreement to this effect.

When any existing company or Partnership firm is converted into an LLP, the assets of such firm are transferred to the LLP. To make this transfer of assets convenient, the dual barriers of stamp duty and capital gain tax under the Income Tax Act must be removed. A more liberalized policy must be brought about. The UK statute incorporates provisions exempting such transfer from the charge of stamp duty. India must incorporate the similar provisions. While the Act contains a conversion procedure for existing business entities like firms and companies, it does not provide for what happens when existing firms convert themselves into an LLP, or address the question of whether such firms or corporations have the option of going back. It is suggested

that provision be made to tackle this issue.

Taxation of an LLP is one area which has been ignored completely by the Act. The success of the LLP largely depends upon the kind of tax jurisdiction it is subjected to. It has been advocated that we adopt the UK model of taxation for LLPs, where for purposes of tax, the business carried on by the partners shall be treated as being carried on by the partners, thus amounting to giving a free pass to LLPs in taxation matters while taxing in the hands of the partners. This sort of taxation might have some major drawbacks in the case of a small LLP, though. For example, if the overall profit of a firm consisting of five partners amounts to Rs.10 lakh and this amount is equally divided amongst all partners, each partner will get a sum of Rs. 2 lakh which is mostly exempted from taxation. This will lead to a loss of revenue which shall not happen if the same income is charged at the firm level itself.

Another option is to tax an LLPs as a company. A third way of taxing the LLP is the model followed in the US where it is left to the firm to decide how it wants to be taxed- as a company or by the pass through method.

This methodology will also ensure that the same is on par with other countries leading to such LLPs being eligible to tax benefits by virtue of the tax treaties entered into by India with other countries. In short, taxation of an LLP is an issue of paramount importance which does not even find mention in the act.

Indian LLPs will have a level playing field with similar bodies in other countries instead of being at a disadvantage only if the major concerns mentioned above are taken care of by amending the LLP Act of 2008. In its present form, the LLP Act views LLPs as small companies. Unless suitable changes are made, it may defeat the very objectives for which LLPs were thought of and may not receive the contemplated response expect, perhaps, from professionals. Because of the vast regulatory strictures provided in the Act, small and medium level businesses would think twice before making use of this system of managing business.

The LLP system can be seen as a 'marriage between brains and bank balances' that take place within the small enterprise/business sector, just as is meant to happen every time in a company in which the organized corporate sector issues capital to the public in the form of

equity shares or debentures. The LLP will source funds not from the public but from a section of slothful co-partners of an enterprise whose liability to repay debts of the business is limited to their investment and who will be entitled to a share in the profits of the business.

The Ministry of Company Affairs has tried to do away with the loopholes in the legal system concerning LLPs in India, but it is as yet still in a rudimentary stage. Yet a great deal of thought needs to be put into certain aspects of the law, wherein some features can be embraced from laws of other countries. Nevertheless, even a law that is tried and tested in any other country has to be configured to suit Indian conditions and incidents.

LLP is a new concept and will require a lot of contemplation. The Centre must try to involve more and more people in the law-making process. The content of the law and its manner of implementation must ensure maximum benefit to everyone involved, and efforts must be made to make the LLP form of corporate governance widely accepted and popular, as it is in U.S.A and the U.K. As for now, it can be summed up by the universal saying, 'a project well begun is half done.'The Ministry has started out well.

Stridhana-The Absolute Property of Women

-Runu Sharma, Satyam Singhal[*]

"Frailty thy name is woman!" wrote William Shakespeare in his play 'Hamlet'. But this infirmity shall not make woman a victim of exploitation and deprivation ofher financial security by her husband. The lawof property of a Hindu female has been marked by vicissitudes, starting from the Vedic society, where the female enjoyed equal status economically and wife enjoyed equal rights in a husband's house[1], to a very inferior position when Manu declared that wife, son and slave have no property and if they happened to acquire some, it would belong to the male under whose protection they are[2]. The property inherited by a woman from a female has not been considered as her stridhana[3], and still this discriminatory exclusion exists in society. The status quo is that daughter's right to inherit the patrimony is unrecognised, woman's right to property is subject to husband's dominion and her financial security is in limbo. In light of these facts, this article tries to distinguish between Dowry and Stridhana, discusses the extent of the husband's dominion over it and encapsulates the concept of entrustment.

Introduction

The subject of Stridhana is by far the most difficult branch of Hindu Property Law and has always been confused with dowry. These are two different aspects of women's property though; Stridhana is a wider term and derived from 'stri' i.e. woman, and 'dhana' i.e. property[4]. It literally means 'woman's property'. The *Mitakshara* school takes the term stridhana in its etymological sense as including all kinds

[*] *IV B.S.L. LL.B*

[1] Sir Gooroodas Banerjee in 'Marriage and Stridhana', remarks, "nowhere were proprietary rights of women recognized so early as in India; and in very few ancient systems of law have these rights been so largely conceded as in our own". P.V. Kane has quoted some passages from the Vedas which support the view that women owned property in those times. (Kane HDS, Vol. III (1968). Ch. XXX)

[2] Manu, VIII, 416.

[3] *Sheo Shankar v. Debi Sabai* (1903) 25 All 468.

[4] SA Desai, Mulla, *'Principles of Hindu Law'*, (19th edn. Vol. II 2005) 230.

of property of which a woman has become the owner, whatever the extent of her right over it.[5] Vijnaneshwara of the Mitakshara school defined Stridhana as:

> *That which was given by the father, by the mother, by the husband, or by a brother and that which was presented by maternal uncles and the rest at the time of wedding before the nuptial fire and a gift on a second marriage or gratuity on account of supersession and, as indicated by the word 'adya' (and rest), property obtained by: inheritance, purchase, partition, seizure, adverse possession; and finding; and this is stridhana according to Manu and the rest.*

In Modern Hindu law, the term 'stridhana' denotes not only the specific kinds of property enumerated in the Smritis, but also other species of property acquired or owned by a woman over which she has absolute control.

Modern Concept of Stridhana

The concept of women's estate has been abolished and converted into full estate by amendment of S. 14 of the Hindu Succession Act, 1956. The Rau committee on Hindu law reforms recommended that all properties held by a woman should be her absolute property.[6] The Hindu Code Bill substantially incorporated these recommendations. The substantive provisions as recommended laid down that whatever property was acquired by a woman becomes her absolute property and devolves on her own heirs. When the Bill was passed by the Parliament,fundamental changes were introduced into traditional Hindu law.

Object of S. 14

The bare text of S. 14 reads as follows:

Property of a female Hindu to be her absolute property-

(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

[5] Mitakshara, II, xi, 2-3.

[6] Sabzwari, *'Hindu Law (Ancient & Codified)' (2nd edn. 2007) 1078.*

(2) Nothing contained in sub section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property.

The objectwhich can be gathered of this section is:

I. To remove all disability of a Hindu woman in the context of property.

II. To acquire and deal with property, i.e., all the property that she acquires will be her absolute property.

III. To convert existing woman's estate into full estate.

Analysis of S. 14

It incorporates the following propositions :

(A) (a) Any property acquired by a Hindu female after commencement of the Act will be held by her as her absolute property.

(b) Any property held by a Hindu female as woman's estate and is in her possession, will become her property.

(c) But if any property is covered by the provision of sub-section (2) of the section, neither clause (a) nor (b) will apply.

(B) The requirement of being possessed in sub-section (1) applies only to the woman's estate existing at the time of the commencement of the Act; this obviously cannot apply to the properties acquired by her after the commencement of the Act.

(C) When a widow dies after coming into force of the Hindu Succession Act, the next heir of her husband is to be determined in accordance with the law prevailing on the date of the death of the widow and not in accordance with the law prevailing at the time of the death of her husband.[7]

(D) The definition of the term 'Property'contained in the explanation applies to both types of properties covered under clause (a) and (b).

[7]*Daya Singh (D) Through LRs v Dhan Kaur*, AIR 1974 SC 665.

(E) The section has qualified retrospective application. It enlarges the Hindu women's estate even in respect of property inherited or held by her as a limited owner before the Act came into force.

Where a woman acquired property before the Act, but did not possess it on the date of its commencement, the question arises whether this provision operates and to give her full ownership in that property which is held by her as a limited owner.This was answered and court held that even if she alienates the property and is not in possession at the commencement of the Act, she is the full owner, as she, at one time, possessed the property.[8]

Meaning of Property

The term 'property' was defined comprehensively when the Hindu Succession Bill was before the Joint Select Committee. The word 'property' includes both movable and immovable property acquired by a female Hindu by inheritance, or at a partition or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of the Act.[9]

The expression 'female Hindu' and 'any property possessed by female Hindu' would include property held by daughter also.[10] The Andhra Pradesh High Court has held that jewellery is also included in the term 'property'.Further, it is necessary that the female must have acquired the property either by inheritance, or device or in lieu of maintenance or in lieu of her arrears of maintenance or by way of gift,for the conversion of woman's estate into Stridhan.[11]

The Apex Court has summed up the law on property as:

It is obvious that S. 14 is aimed at removing restrictions or limitations on the rights to a female Hindu to enjoy, as a full owner, property, possessed by her so long as her possession is traceable to a lawful origin, that is to say, if she has a vestige of a title. It makes no difference whether the property

[8]*Ramswaroop Singh v Heeralal Singh*, AIR 1958 Pat 319.
[9]S. 14 (Explanation (1), Hindu Succession Act, 1956
[10]*Jose v Ramkrishnan Nair*, AIR 2004 Ker 16.
[11]*Padala Latchamma v. Mutchi Appalaswamy*, AIR 1961 AP 55.

is acquired by inheritance or devise or at a partition or in lieu of maintenance or arrears of maintenance or by gift or by her own skill or exertion; by purchase or by prescription or in any other manner whatsoever. The Explanation expressly refers to property acquired in lieu of maintenance and we do not see what further title a widow is required to establish before she can claim full ownership under S. 14(1) in respect of property given to her and possessed by her in lieu of maintenance. The very right to receive maintenance is sufficient title to enable the ripening of possession into full ownership if she is in possession of the property in lieu of maintenance. Sub-section (2) of S. 14 is in the nature of an exception to S. 14(1) and provides for a situation where property is acquired by a female Hindu under a written instrument or a decree of court and not where such acquisition is traceable to any antecedent right.[12]

Meaning of Word 'Possessed'

The word 'possessed' is used in a very broad sense. A property is said to be possessed by a person if she is its owner even though she may, for the time being out of the actual possession or even though she is in constructive possession. It is enough if the property is held by the female in her power so as to invoke provision of the sections.The expression *'any property possessed by a Hindu female whether acquired before or after the commencement of the Act'* means

a) Any property possessed by a Hindu female acquired before the commencement of the Act will be held by her as a full owner thereof and not as a limited owner.

b) Any property acquired by her after the commencement of the Act will be held as a full owner thereof and not as a limited owner.

It was observed by the Supreme Court that the expression used is 'possessed by a female Hindu' and not 'in the possession of a female Hindu.' This indicates that the female should have some right or interest akin to ownership with a right to possession. It need not be actual possession. It is sufficient if it can be said that she had constructive possession which courts accept as having possession in law.[13]

[12]*Gulwant Kaur v Mohinder Singh*, AIR 1987 SC 2251.
[13]*Dindayal v. Rajaram*, AIR 1970 SC 1019.

Relationship between Sub-Section (1) and (2)

Sub- section (2) is an exception to the first as it states that nothing contained sub-section (1) will apply to any property acquired by way of gift or under a will or any other instrument or under a decree, or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or reward prescribes a restricted estate in her.

On reading sub-section (1) with the explanation, it is clear that whatever the property was possessed by a female Hindu as her limited estate, on and from the date of commencement of the Act, she would become absolute owner thereof. However, if she acquires property after the Act with a restricted estate, sub-section (2) applies.

The contentions before the court were that an interest was created in favour of a widow by an award of maintenance, that she should be entitled to rent out her property for her life time, that this amounts to a restricted estate by virtue of an instrument within the meaning of sub-section (2) and sub-section (1) will not apply and the widow will not get absolute rights in the Property.[14] The court answered in the affirmative.

The same proposition was again in contention before the Apex Court and this time the court said that various aspects were not brought to notice of the Court or considered in *Naraini*'s case viz., the nature and the extent of the Hindu Women's Right to Property Act, 1937, the limited scope of sub-section (2) which is only a proviso to sub-section (1) and the effect of the explanation.[15] The court overruled *Naraini* and held that S. 14(1) would be applicable to the property acquired under the compromise in lieu or satisfaction of her right of maintenance and hence the woman will be deemed to become full owner of the property.

Dowry versus Stridhana

In our country, a social legislation like the Dowry Prohibition Act,1961 has been in force since a decade, but still the menace of dowry is practiced rampantly and often confused with Stridhan. There is a

[14]*Naraini Devi v. Ramo Devi*, AIR 1976 SC 2198.
[15]*Tulsamma v. Seshareddy*, AIR 1977 SC 1944.

common misbelief prevailing in the society regarding the age-old ritual where parents offer their daughter her share during her marriage. The domestic law perceives dowry as any property or valuable security given or agreed to be given by the bride's side to the family of the bridegroom before, during or after marriage, by exploiting or threatening the girl or her family while Stridhana is voluntary gift given by members of bridal side to the bride as a stepping stone to establish her own property. Stridhana is the wealth and other belongings of the woman which she has brought from her parents' house before, during or after marriage. The Judiciary has made reference to two distinguished case laws, in order to differentiate between Stridhana and Dowry.

1. *Bhai Sher Jang Singh v. Smt. Virinder Kaur*[16]

The High Court ruled that the groom's side was bound to return all the items owned by Virinder Kaur thatwere her stridhana including property, ornaments, money and other belongings offered by the bride's side at the time of marriage, if claimed. In the case of denial, the groom's family would get strict punishment under S.406 of IPC by committing criminal breach of trust.

2. *Pratibha Rani v. Suraj Kumar*[17]

The Supreme Court observed that the complainant (Pratibha Rani) had suffered because of her in-laws, when she was harassed and denied her Stridhan by her husband's family. Pratibha Rani's family had given Rs 60,000, gold ornaments, and other valuable items to Kumar's family on their demand at the time of marriage. The court observed in the case of Stridhan property, the title of which always remains with the wife though possession of the same may sometimes be with the husband or other members of his family, if the husband or any other member of his family commits such an offence, they will be liable for punishment for the offence of criminal breach of trust under S. 405 and 406 of the IPC.

[16] 1979 CriLJ 493.
[17] AIR 1985 SC 628.

Legal Status of Stridhana

Applicability of S. 405 IPC

The offence under S.405 is said to be committed only when all of its essential ingredients are found to be have satisfied i.e.

(a) The accused must be entrusted with property or dominion over it, and

(b) He must have dishonestly misappropriated the property or converted it to his own use or disposed of it in violation of such trust.

In the cases of criminal misappropriation, even a temporary misappropriation could be sufficient to make a person liable under this section. And even if the accused intends to restore the property in the future at the time of misappropriation, it is a criminal breach of trust.

The Supreme Court held that if the wife entrusts her stridhana property and dominion over that property to her husband or any other member of the family, and the husband or such other member of the family dishonestly misappropriates or converts to his own use that property, or wilfully suffers any other person to do so, he commits criminal breach of trust.[18]

Provisions to Claim Stridhana

The interpretation of S. 27, Hindu Marriage Act, 1956 clarifies that the Matrimonial Court has jurisdiction to dispose of exclusive property of the spouses, provided it was presented at or about the time of marriage. The section uses the phrase *'property presented at the time of marriage, which may belong jointly to both husband and wife'*- it also includes even exclusive properties of the spouses. Thus the prerequisite of the section is that the property must be connected with the marriage. The wife may even claim her stridhana under this section rather than resorting to other dilatory court proceedings.[19]The Matrimonial Court has no jurisdiction to make any order with respect to property presented subsequent to the marriage.[20]An order of the

[18] *Rashmi Kumar v. Mahesh Kumar Bhada*, (1997) 2 SCC 397.
[19] *Hemant Kumar Agrahari v Lakshmi Devi*, AIR 2004 All 126.
[20] *M. D. Krishnan v. M.C.Padma*, AIR 1968 Mys 226.

Family Court granting relief under S.27, in respect of articles acquired by the couple by their own efforts after marriage, was held to be without jurisdiction.[21] A S.27 claim also includes property given before or after the marriage as the joint property of a couple.[22] S. 7(1)(c), Family Courts Act, 1984 states that the Family Court has very wide jurisdiction. It has jurisdiction to decide a suit or proceeding between the parties to a marriage with respect to the property of the parties or either of them.

Conclusion

The Hindu Succession Act 1956 was aimed at removing inequalities between men and women and entitling the latter to succeed on intestacy, based on love and affection, and to a great extent, the Act succeeded in achieving this. But, the unsolved mysterious deaths of women in matrimonial homes for property have been compelling the Court to distinguish between entrustment of property and Stridhan[23]. Though S. 14 removed disability of a female to acquire and hold property as an absolute owner, providing for the concept of stridhana, however there are diverse interpretations given by various High Courts that are totally contrary to bare text and the same scenario has been followed by the Supreme Court leaving the judiciary in absolute perplexity. Further, the major difficulty lies in establishing any property as part of stridhana. Hence, there is a need to give a strict interpretation to this term and formulate a process to claim it.

[21] *Kamlakar v. T.K. Sambhus*, AIR 2004 Bom 479.
[22] *Balkrishna Kadam v. Sangeeta Kadam*, AIR 1997 SC 3562.
[23] *Bobbili Ramakrishna Raju Yadav & Ors. v.State of Andhra Pradesh*, (2016) 43 SCD 250.

Menacing with NPA

- *Saranya Mishra*[*]

The article deals with the modern menacing concept of 'Non-Performing Asset', colloquially referred to as 'Bad Debt', and its interface with public law, in the light of a recent judgement[1] which decided the Constitutional validity of the definition of NPA as under the SARFAESI Act, 2002[2].

The great Greek crisis is a classic example of the doom that unrestrained heaps of Non-Performing Asset (hereinafter referred to as 'NPA') result in. The condition is analogically relatable to the Nursery Rhyme of 'Humpty Dumpty', Greece being the protagonist and the whole of Europe being the King's men, who are not able to put the former together again. Though it would be an overstatement to correlate India's condition consequentially to present day Greece, it provides the requisite intensity of the effects of NPA, for understanding the menace NPA has the potential of creating. This is not to say that one cannot menace with the menace that NPA already is, for that can very well be done through engagement in litigation spirals, which would by the way attract Greece-like conditions in India.

To give a preliminary insight, NPA has been an unsung evil for long, until recently when it began escalating at such a rate that India was clambering to deal with it. Since then it has become a bone of contention for both the policy makers as well as the academicians alike. It has also managed to gain attention of activists and penniless defaulters (endeavouring to menace), who engage in litigations which end up being viciously protracted, and with most ending up with an out of court settlement or the NPA being disposed off to Asset Reconstruction Companies (hereinafter referred to as 'ARC').

[*] II B.A LL.B
[1] *Keshavlal Khemchand v. Union of India*, 2015(4) SCC 770.
[2] Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

The instant article deals with one such litigation, which indulged in a prolonged legal process, with petitions lying in three different High Courts and lastly to Supreme Court and contended to scrap off the statutory definition of NPA, for being *ultra vires* the Constitution of India. The author has divided the article into three legs, first being the basics of the now often and most un-'understood' term NPA, thereon its mention and evolution in the statutes and lastly in the light of the above discussed litigation.

Dawning of NPA in India

Despite extensive insolvency reforms and restructuring techniques, India has mounting NPA in public as well as private sector. The said escalation owes its existence to the lack of implementation and structural weaknesses[3]; the most embarrassing reason remains the fact that India till date is coping up with the blunders committed in the past when it was young nation, thus while it has the capacity to recapitalise in the modern day, its funds are directed towards recompensing the debts of yesteryears.

These are the debts which date back to the pre-1991 era, wherein despite suffering from problems of unprofitability, inefficiency and financial unsoundness, the significance of the concept of NPA was not recognised, and consequently no remedial measures were applied. This does not mean that NPA did not exist, it existed but under a different general nomenclature. That is why, despite the impressive progress made by the banks in the two decades following nationalization in 1969, the excessive controls enforced by the government not only hindered the development but also eroded the profitability. The need then to overcome the said issues were deafening and thus came along the 1991 reforms, providing for privatisation, liberalisation and globalisation and the constitution of the high level Narsimhan Committee. The Narsimhan Committee Report was the knight in shining armour for the Indian Banking damsel in distress. It recommended *inter alia* that India borrowed the Western well-recognised concept of NPA.

[3] Organisation Economic Cooperation and Development (OECD), Maximising Value of Non-Performing Assets- Proceedings from the Third Forum for Asian Insolvency Reform (November 2003)

The initiative taken by the Narsimhan Committee was corroborated with the efforts the Reserve Bank of India (hereinafter referred to as 'RBI') took.Various rectification measures, like formation of Joint Lenders' Forum (hereinafter referred to as 'JLF'), Strategic Debt Restructuring, establishment of an institution for 'Non-Cooperative Borrowers', Holistic Credit Reports, etc., have been institutionalised by the RBI, to empower the banks against the vice of burgeoning NPA, currently for the banks and financial institutions that are governed by the RBI. These steps taken by RBI have been instrumental in containing the contingencies of an economic catastrophe, which is successor to the status quo of NPA, which is alarming given the increasing trend of NPA and decreasing recovery trend, in an extensive recovery-induced climate.

NPA – Statutorily

The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (hereinafter referred to as 'SARFAESI Act') was enacted in 2002, keeping in mind the financial health of the country, with a view to expedite the process of recovery of monies and defaulting loans, which suffered from the vice of insufficient legislation like that of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 ('RDDBI Act'), ineffective judiciary and lax attitude of the financial institutions and banks towards recovery in the face of mounting Non-Performing Asset. Its validity was challenged in *Mardia Chemicals Ltd. v. Union of India*_,[4]*Transcore v. Union of India*[5]and *ICICI Bank Ltd. v. APS Start Industries Ltd.*[6] The former case of *Mardia* being a landmark one, in which the constitutional validity of SARFAESI Act was upheld, save S.17(2) which was declared as *ultra vires* Art. 14 of the Constitution of India. In light of this judgement, the Enforcement of Security Interest and Recovery of Debt Laws (Amendment) Act, 2004 (hereinafter referred to as 'Amendment Act of 2004') was enacted to discourage borrowers to postpone the repayment of their dues and also to enable the secured creditor to speedily recover its debts, thus making some necessary amends in the provisions of the SARFAESI Act. One of the amends

[4] 2004 (4) SCC 311.
[5] 2008 (1) SCC 125. (NPA considered in paras 13, 14 and 61)
[6] 2010 (10) SCC 1 (NPA considered in para 41)

was with respect to the definition of NPA, which forms the bone of contention in the *Keshavlal* case.

NPA, prior to the Amendment Act of 2004 was defined as follows:

> *"S. 2. Definitions*
>
> *(1) In this Act, unless the context otherwise requires:*
>
> *(o) "Non-Performing Asset" means an asset or account of a borrower, which has been classified by a bank or financial institution as sub-standard, doubtful or loss assets, in accordance with the directions or under guidelines relating to assets clarification issued by the Reserve Bank."*

Post Amendment Act of 2004, NPA came to be defined as follows:

> *"S. 2. Definitions*
>
> *(1) In this Act, unless the context otherwise requires:*
>
> *(o) "Non-Performing Asset" means an asset or account of a borrower, which has been classified by a bank or financial institution as sub-standard, doubtful or loss asset,-*
>
> *(a) In case such bank or financial institution is administered or regulated by any authority or body established, constituted or appointed by any law for the time being in force, in accordance with the directions or guidelines relating to assets classification issued by such authority or body;*
>
> *(b) In any other case, in accordance with the directions or guidelines relating to assets clarifications issued by the Reserve bank."*

By means of this amendment, different regulatory bodies came into picture, resulting in different guidelines and directions differing in nature, to be followed by the creditors i.e. the banks and financial institutions depending upon what their administering /regulatory body is.

Ripple effect of the Amendment

The amended definition became *cause celebre*, owing to its widened scope of NPA and its classification, with proceedings being initiated in various High Courts throughout the country challenging the constitutionality of the amended definition. However, High Courts

were not unanimous in their decisions regarding the validity and had contradictory stances. Gujarat High Court held that the impugned provision was unconstitutional for *inter alia* being inconsistent with the Statement of Object and Reason of the SARFAESI Act and Art. 14 and for the fact that in the instant case creditors had become bound by their respective regulatory bodies and authorities, thus losing its essence of creditors being bound by one authority alone i.e. Reserve Bank of India for which the original definition of NPA was not repelled in the *Mardia* case. The Madras High Court, on the other hand had upheld its validity.

***Keshavlal* Case Study**

The case after dissents from the High Courts, came before the division bench of the Hon'ble Supreme Court, comprising of HMJ J. Chelameswar and HMJ S.A. Bobde. It is a typical case of a class of borrowers challenging the constitutionality of a provision they feel is violating the Doctrine of Equality, basically to suit convenience, because the restructuring is not a very favourable one.

The questions of law considered were:

1. Whether there had been excessive delegation by legislature, of an essential legislative function?

The Petitioner argued that there was excessive delegation of an essential legislative function on the part of legislature in terms of NPA definition.

The Respondents argued that the classification of asset was dependent on factors changing with time, so the expression also had to be dynamic in nature to meet the needs and requirements of the day and save the interest of the creditors, conclusively contending that it is not beyond the scope of law for the creditors to be governed by the guidelines of the regulatory bodies, and that there is no excessive delegation whatsoever in this

2. Whether the amended definition was in violation of Art 14?

The Petitioner contended that the amended definition was violative of Art 14 for equals were being treated unequally, as there was no uniform standard of asset classification to be adopted by the creditors who instead can adopt different guidelines each having different standards of asset classification.

The Respondents on this issue reasoned that there was no violation of Art. 14 since the borrowers were not a homogenous group nor were the credit facilities sought same in nature. As for instance, the loan procured by Shipping and Construction companies cannot be put on the same pedestal with the loan procured by an Advertising company, since the former unlike the latter has the slow rate of return on investment.

3. Whether it is possible to have a universal definition of NPA?

As regards the universality, the Petitioner argued for it, but did not hold it a meritorious ground. It was also contended that the Act suffers from uncertainty in terms of application of guidelines and that it had failed to provide reasonable opportunity to demonstrate the borrower's asset classification, which is untenable and arbitrary.

The Respondent had sufficiently made it clear that the fish and the elephant cannot be tested on the same parameter test of crawling, thereby providing a reasoned ground for non-universality. The Respondent also rebutted the argument of petitioner that there is uncertainty in application of guidelines is untenable, by stating that it had no standing both at a hypothetical level and practically. In fact there was no case made out against creditor for transferring asset in favour of any other body.

Briefly on the basis of the arguments advanced by the petitioners and the respondents, the Hon'ble Court was of the conclusive view that the amended definition is not bad in law as alleged and upheld its constitutional validity, rejecting arguments of the petitioner that the amended definition is *ultra vires* Art. 14 and that there is excessive delegation. For the former the Hon'ble Court reasoned that there can be no one definition of NPA, since the innumerable differences betweenthe class of borrowers is not uniform or homogenous nor are the credit facilities extended by creditors *in toto* same in nature, obliging creditors to follow the guidelines of classification of asset as determined by the respective regulatory body. Reliance was also placed upon the well-settled principle of law that 'unequals' cannot be treated as equals.

For the latter, i.e. in context of excessive delegation, the Hon'ble Court held that such an argument was untenable and opined that :

> *"We are of the firm opinion that it is not necessary that legislature should define every expression it employs in a statute. If such a process is insisted upon, legislative activity and consequentially governance comes to a standstill."*[7]

It further was of the opinion that since NPA depended on dynamic factors, it cannot have only one legislative definition, since the same would have to be amended from time to time within short time gaps owing to fast changing financial scenario in the country.

Refuting arbitrariness of the clause, the Hon'ble Court held that the expression NPA can be construed only in the manner as prescribed by the guidelines of the respective regulatory bodies and classification of the assets of the borrowers also has to be strictly as per the guidelines, which leaves no scope for arbitrariness.

Conclusion

The judgement having been passed in favour of the creditors, allows them to recover the default loan monies from the borrowers within the procedure established by law. And also sends out a clear signal to the class of wilful defaulters to 'Stop Menacing with the NPA, because it can wreck your world- sooner or later, directly or indirectly'

Conclusively, the problem of Non-Performing Assets (NPAs) is a serious issue and danger to the Indian Scheduled Commercial Banks, because it destroys the sound financial positions they hold. The customers and the public would not trust the banks any more if the banks have higher rate of NPAs. So, the problem of NPAs must be handled in such a manner that would not ruin the financial positions and affect the image of the banks.[8]In the present scenario, NPA classification is subject to guidelines framed by the respective authorised/regulatory body thus extending different credit facilities to different class of borrowers. Thus in such a situation it is legally advisable to the borrower to be well-aware of the guidelines regarding classification of asset and NPA, framed by the regulatory body and followed by the creditor. However what is important is the scrupulous implementation of the legislation, for recovery which upholds the spirit of law and has instilled in it a good measure of logical and rational consideration and reconsideration.

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[7]*Keshavlal Khemchand v. Union of India*, 2015 (4) SCC 770, at para 65.

Judicial Trends in Female Criminality

*-Vinaya Sharma Latey**

"As a judge, I am bound to the law as I find it to be and not as I fervently wish it to be."

-Justice Stanley Mosk, California

Introduction

Women across civilizations and in almost all societies from pre-historic times to the present day have experienced low status, exploitation, oppression and loss of self–determination. Men were allowed an independent existence, but a woman's survival was not socially conceivable without a family and her role was intricately linked and limited to the family. There were clear delineations of spaces, public for men and private for women. This essentially was the foundation of a patriarchal structure. Patriarchy is the rule of man for men and more particularly for women. Under patriarchy a woman is defined and differentiated with reference to man and not with reference to her own characteristics.The historical and traditional position of women in domestic relations has its own ramifications when viewed from a broad sociological and philosophical perspective. It renders her vulnerable to abuse, manipulation, violence and denial of power.

In India the characterization of a woman has always been as a symbol of strength and power in various depictions of goddesses in Hindu mythology. The apparent paradox within the Hindu culture is that it reveres the feminine in the form of the goddess Shakti, while subordinating and ill- treating the female in actual social life. Such inequalities are apparent under every branch of law; particularly criminal law. The bias in criminal investigation and trial is palpable whether the woman is a victim of an offence or accused ofan offence.

This article succinctly discusses the judicial response to female criminality in India.

* II Year, LL.M.

The criminal justice system has largely identified women as victims rather than as perpetrators. While females constitute about half of violent crime victims, they represent only a fraction of the offenders.The subject of female criminality so far is not adequately and systematically addressed in India.But with the rise in female criminality it would be interesting to understand a few aspects of the same. Particularly, how judges perceive female criminality. Otherwise, differences in the experiences of women and girls in the criminal justice system may be masked by trends that reflect the larger male offender population.[1]

Principally the law deals with criminals equally; and will not support any discrimination between criminals accused of the same crime. However, a plethora of cases have shown a variety of approaches for dealing with female criminals. This is the arena of the judges, where they decide how to approach a case before them which involves female offenders. Benjamin Cardozo[2], one of the most celebrated legal scholars and jurists, recognized the immense influence a judge has in law making. This article looks into the process adopted by the judges while dealing with female criminals. It is believed that a judge is influenced by many factors while deciding a case. Is the gender of the criminal one of those factors that can influence a judge to change, modify or moderate his approach to similar cases? Do the judges really need to approach the case of a women offender differently? How far can a judge let this difference rule his mind while he reads the letter of the law that does not see the identity, leave alone gender of the criminal? This is what this article will delve into, as it seeks to identify the process of judicial inquiry into female criminality.

Judicial Process

Benjamin Cardozo in his book 'Nature of Judicial Process' recognized the immense authority a judge has in law making. The Constitution overrides a statute, but a statute, if consistent with the constitution, overrides the law of judges. In this sense, judge-made law is secondary

[1]Mohany Tina, 'Women and the Criminal Justice System', available at<http://www.statcan.gc.ca/pub/89-503-x/2>last accessed 03 February 2016

[2] Benjamin Cardozo, an American jurist of 20th Century, has been revered for his contribution to the development of American law. In 1921, Cardozo gave the Storrs Lectures at Yale University, which were later published as 'The Nature of the Judicial Process', a book that remains valuable to judges today.

and subordinate to the law that is made by legislators. But it is also true that codes and statutes do not render the judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. There are doubts and ambiguities to be cleared. There are hardships and wrongs to be mitigated, if not avoided. Interpretation is often spoken of as if it were nothing but the search and the discovery of a meaning which, however obscure and latent, had none the less a real and ascertainable pre-existence in the legislator's mind. [3]

Cardozo states that a judge-made law is an existing reality. When a judge interprets the law, he fills in the gaps which the legislature did not conceive. But his function is secondary and subordinate to that of legislature. A judge has to be objective, rational, principled, apolitical. He has to evaluate what the sources of law are, the grounds on which he should stop his search (customs), if precedent is in appropriate when he should refuse to follow, consider society's and his own standards of justice and morality, and reach a rule/ principle that should be made the law. All these ingredients enter in varying proportions in the process of judicial law making. One of the important factors that go into the judicial process is gender. Be it the gender of the offender or that of the victim, gender on both sides of the crime influences the manner in which the judges perceive the offence. This dimension of female criminality and its influence in judicial law making may be elucidated further.

Female Criminality in India

The gravity of the challenge of female criminality increases manifold when we go through the available data on crime from the National Crime Records Bureau (NCRB). Women criminals are still a minority-they comprise only 6.3% of the criminals convicted for crimes under IPC (NCRB Crime report 2009)-the Crime in India Reports reveal that the number of females arrested for criminals activities in 2003 was 1,51,675, and this shot up to 1,54,635 in 2007. The total percentage of female criminals among the total criminals arrested for committing various crimes in 2001 has risen from 5.4% to 6.2% in 2011. [4]

[3] Benjamin Cardozo, *The Nature of Judicial Process (3rd edn.,Universal Law Publishing Co., Delhi, 2000).*

[4]*Mili, Perumal, Neethu Cherian, 'Female Criminality in India: Prevalence, Causes and Preventive Measures', International Journal of Criminal Justice Sciences, Vol. 10, Issue January – June 2015.*

There has been a steady rise in the crimes committed by women. Through the examination of the cases cited here under the author will be looking at the tropes which are commonly used by the Indian Courts to decide cases involving female criminality.

Judicial Response

R. v. Ahluwalia[5] is a key case in its analysisof the judicial process in its encounter with female criminality. It is significant in the sense that it brought about a drastic change in the English law and 'diminished responsibility due to battered women syndrome' was seen as a valid ground for reduction of punishment. Study of this case helps to appreciate the judicial response to the intricacies in the application of law that can vary with gender and situations specific to it.

Kiranjit was a housewife who had withstood violence from her husband for a long time. She was terribly afraid of him and could not have put up any physical resistance to his advances as he had a muscular frame. He inflicted on her burns of a cigarette end. Only the earlier night she had been subjected to torture of an unbearable type. In the morning, while her husband was asleep, she threw petrol on him and set it to fire merely to show him how painful such burns could be. Although she did not intend to kill him, he died and she was prosecuted for murder. According to the established law, she could not plead that she did it in self-defence or out of sudden and grave provocation. The torture was inflicted at night whereas her retaliation had come some hours later. It could therefore be called a pre-meditated murder. She was sentenced to 10 years of imprisonment for the offence of murder. Women's organisations crusaded on her behalf and her appeal was admitted on the ground that the judge had misinformed the jury regarding the law of provocation. The Court of Appeal set aside her conviction for murder and ordered retrial. The most significant gain was that the definition of provocation was relaxed so that any temporary cooling off period could be considered as a boiling over period. In the re-trial, the judge admitted that she had suffered violence and abuse and reduced her punishment to three years' imprisonment.

In this case the judges looked into a new aspect and factors to determine criminality that can only be found in women. Here, the

[5](1992) 4 AER 889

judicial inquiry into the peculiar circumstances a woman undergoes and the experiences and emotions experienced by women played an important role in deciding the case. Judges looked beyond the letter of law and recognized the sociological disadvantages which women experience and how that could lead her to commit crimes.

Similarly, in *Ashok Kumar v. the State of Delhi Administration*[6], the accused was having illicit relations with her co-accused and killed her husband by striking him with a stone. The High Court spelt out the case to be a 'rarest of rare' one. On appeal, the Supreme Court held that the appellant was rightly convicted. Circumstances fully established the guilt of the accused. However, on the point of sentence, the Court observed that the act of striking the deceased with a handy stone and causing the death cannot be said to be so cruel, unusual or heinous which would warrant death penalty.The Court commuted the death sentence of the appellant to that of imprisonment of life. Here again the apex court used a mild approach to a female offender.

Ediga Anama v. State of Andhra Pradesh[7] is perhaps known for another breakthrough in law with respect to 'reversal of punishment', and makes for a good discovery of the pro-women undertones that influence judges in deciding a case. The accused, a married woman, was having illicit intimacy with a shepherd. She discovered that her paramour was on flirting terms with the deceased. She lured the deceased into a jungle on a false pretext along with her child and then killed them both. To perplex the investigating authorities, she then clothed the deceased with her own clothes and burnt her face and buried the child in the river sand. While the High Court awarded death penalty, the Apex Court reduced the punishment to life imprisonment.

Justice Krishna Iyer, though admitting that this judgment may be vulnerable to criticism, reiterated that the humanism of our Constitution requires a judge to delve into the sociological aspects of crime and the accused as well. He said, *"modern penology regards crime and criminal as equally material when the right sentence has to be picked out, although in our processual system there is neither comprehensive provision nor adequate machinery for collection and presentation of the*

[1]1982 SCR (3) 707
[2]AIR 1974 SC 799

social and personal data of the culprit to the extent required in the verdict on sentence."

Therefore, while emphasizing on the social and personal data of the culprit, Justice Iyer came down heavily on the shepherd boy who had lured both the women into his love. Reducing the punishment to life imprisonment, the Court found it worth mentioning that, apart from her youth and womanhood, she had a young boy to look after. This might be an extrinsic factor but was perceived by the court as of humane significance. With a dearth of any guidelines for reversal of punishment, the Court was influenced by the seminal trends present in the current sociological thinking. The judge pointed out that the criminal's social and personal factors merit less harshness, her femininity and youth, her illicit sexual intercourse and expulsion from the conjugal home, being the mother of a young boy-these individually inconclusive and cumulatively marginal facts and circumstances tend towards an award of life imprisonment.

This judgment is a shining example pointing out that the sociological considerations that come with a culprit are of great importance.

Following the same lines in *Shamim Rahmani v. State of Uttar Pradesh*[8], the Apex Court once again considered femininity and the age of the offender to be just as important as any other evidence in pronouncing the sentence. In this case a young girl fell in love with a medical doctor, married and a father of three children. After some time, the girl discovered that he was having affairs with other girls also. She called him to her home on the night of the incident and they had an altercation, and when he was leaving she shot him dead. It was held that although it was a deliberate murder, the ends of justice would be met if she was sentenced to imprisonment for life only. The tenor of the judgment throughout hints of the sympathy the judge showed towards the accused for having fallen in love with the deceased and for hoping for his exclusive love for her.

In yet another case, the Supreme Court had the opportunity to decide the punishment of the culprit after looking at various sociological conditions including the gender of the criminal. This case gives an opportunity to study how each judge looks at such factors differently

[8]AIR 1975 SC 1883

and how his own opinion about these factors can indeed go a long way in determining the fate of the case. *State of Tamil Nadu v. Nalini* was the Rajiv Gandhi murder case. This case involved 26 persons accused of being involved in the conspiracy to assassinate former Prime Minister of India, Rajiv Gandhi.

The trial was conducted under the Terrorist and Disruptive Activities Act (TADA). The designated TADA court in Chennai gave death sentences to all the 26 accused. Under TADA an accused can appeal only to the Supreme Court.[9]On appeal to the Supreme Court, only four of the accused were sentenced to death and the others to various jail terms. Amongst them was one woman, S.Nalini Sriharan, who later gave birth to a girl, Harithra Murugan in prison. While dealing with her case, Thomas, J. expressed a dissenting opinion on the ground that she was a woman and had given a birth to a daughter during trial and was simply an instrument in the offence. The majority however did not agree and held,

> *"it was difficult to overlook that she was the mother of a little female child who would not have even experienced maternal cuddling as that little one was born in captivity. Of course, the maxim Justicia non novitpatrem nee matrem (justice knows no father nor mother) is a pristine doctrine. But it cannot be allowed to reign with its rigour in the sphere of sentence determination. As we have confirmed the death sentence passed on the father of that small child, an effort to save its mother from gallows may not militate against jus gladii so that an innocent child can be saved from orphanhood. It is not that Nalini did not understand the nature of the crime and her participation. She was a willing party to the crime. We have to see both the crime and the criminal. Nalini in her association with Murugan and others developed great hatred towards Rajiv Gandhi and wanted to have revenge. Merely because Nalini is a woman and a mother of a child who was born while she was in custody, this cannot be a ground not to award the extreme penalty to her. She is an educated woman and was working as a stenographer in a private firm."*

Later upon the intervention of Rajiv Gandhi's widow and Congress president Sonia Gandhi, who petitioned for clemency for the sake of

[9]S. 19, Terrorist and Disruptive Activities (Prevention) Act, 1987 (Act 28 of 1987)

Nalini's daughter in 2000, the death sentence was commuted to life imprisonment. It needs to be mentioned that the mercy petition of Nalini was allowed later on, on the same humanitarian grounds which were expressed by Thomas, J.

This judgment and the subsequent developments clearly explain that the personal opinion of the judge clearly rules the verdict when it comes to determination of such sociological concerns when there is paucity of definite guidelines.

Conclusion

As a natural corollary of consideration of various sociological factors, the Indian judiciary has been sensitive towards female criminals. However, in doing so, no objective standard has been laid down. In this, judges have been vulnerable to their own perceptions, mindsets and standards of humanity. Consequently, judges have faced either enormous support or complete dismissal for their approaches. The law and the judiciary have been compassionate and merciful towards female delinquents throughout. But in all this several important concerns are born. When we are looking at a society that should provide for equal rights to women then why not equal penalties of law? Role of women in the shaping of society is undeniable but is it not an injustice to those who are denied such exemptions? Such are the vagaries of law. And it will remain so. To expect the law to provide a strait-jacket formula for every such issue would be a dream close to Utopia. The Lady Justice does not look at the identity of the one before it, but a judge can and he must to serve the larger good. In the words of Cardozo, *"The judge as the interpreter for the community of its sense of law and order must supply omissions, correct uncertainties, and harmonize results with justice through a method of free decision- 'librerecherche scientifique'."*[10]

[10]*supra note 2*

Cyber Anonymity and Free Speech- A Psycho-Legal Analysis

*-Tanushree Nigam, AishwaryaSalvi**

Anonymity is the shield from the Tyranny of the majority
-Justice John Paul Stevens, McIntyre v. Ohio Election Comm'n

Introduction

On July 5, 1993, *The New Yorker* published a now-infamous cartoon by Peter Steiner: a dog sitting at a computer, along with the headline, "On the Internet, nobody knows you're a dog."[1] This statement appears to have marked a turning point in the history of the Internet as this was one of the first times that the issue of digital anonymity was raised in the public sphere. Cases in the early years of American internet speech jurisprudence took the *Goliath v. David* shape. The typical Goliath was the massive corporate suing for defamation after one or many 'John Does' criticized it online. The typical John Doe was usually a troubled employee expressing his wrath on a financial message board. After filing a suit, the corporate Goliath subpoenaed the Internet Service Provider (ISP) seeking to obtain the identity of the Doe defendants. From there the unmasking gathered speed. The ISPs mostly revealed the identity of the John Does, sometimes without even notifying them about the same.[2] Even if they received the notice, most of these John Does lacked the resources to find a counsel or file motions. Those who did, mostly met with an unresponsive system and hostile judges.[3] Few in the system were familiar with the Internet Message Board culture or the relevant First Amendment interests. Such early cases reflected the poor state of the US Supreme Court's anonymous speech jurisprudence and had a chilling effect on free speech. They hampered the free expression that the internet appeared

*IV B.S.L LLB

[1] Sue Cockburn, 'Is Social Media Just a Passing Fad?' <http://ezinearticles.com/?Is-Social-Media-Just-A-Passing-Fad?&id=6547282>last visited 20thMarch 2016

[2] *Doe v. The Mart.com Inc.(2001) 140 F. Supp. 2d 1088, 1095 n.5 (W.D. Wash. 2001)*

[3] *Hvide v. John Doe 1 through 8 (2000) No. 99-22831 CA 01, (Fla. Cir. Ct. May 25, 2000) 52- 55*

to promise. The jurisprudence has much evolved over time and stands at a very different place today.[4]

Internet: A Marketplaces of Ideas

The advent of the internet opened a "marketplace of ideas" to the populace.[5] It marked a complete shift in global functioning and perspectives. While hate speech online is not inherently different from similar expressions found offline, there are peculiar challenges unique to online content and its regulation. Those challenges related to its permanence, itinerancy, anonymity and cross-jurisdictional character are among the most difficult to address.[6] The 'old' or 'traditional' mass media such as newspapers, magazines books and broadcasters placed a gatekeeper between the speaker and the audience.[7] The internet removed this gatekeeper as people could express opinions without the intermediary; this democratization on one hand made the internet a space for free dissemination of ideas while on the other hand opened the Pandora's box for cyber-crimes like hate speech crimes, child pornography, illicit anonymous transactions etc.[8]

Free speech and Anonymity

The right of digital anonymity has received litle recognition in international law. The 2013 report of the UN Special Rapporteur highlighted the important relationship between the rights to privacy and freedom of expression in cyberspace.[9]It can be seen through the study of free speech cases that domestic and international courts have always linked anonymity as an element of the right to privacy. In *R. v. Spencer*, the Court noted, "informational privacy is often equated with secrecy or confidentiality, and also includes the related but wider

[4] Lyrissa Barnett Lidsky, 'Silencing John Doe: Defamation & Discourse in Cyberspace' (2000) 49 Duke L.J. 855, 888-98 n.6

[5] ibid at pg. 894-895

[6] UNESCO, 'Countering Online Hate Speech', UNESCO Series on Internet Freedom, available at <http://unesdoc.unesco.org/images/0023/002332/233231e.pdf>last accessed 21September 2015

[7] Jack M. Balkin, 'Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society' (2004)79 N.Y.U. L. Rev. 1, 10

[8] Yuval Karniel, 'Defamation on the Internet—A New Approach to Libel in Cyberspace' (2009) 2 J. Int'l Media & Ent. L. 215, 220

[9] UN Human Rights Council, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' (A/HRC/29/32, 22 May 2015)available at <http://www.refworld.org/docid/5576dcfc4.html> last accessed 21 September 2015

notion of control over, access to and use of information. However, particularly important in the context of internet usage is the understanding of privacy as anonymity."[10]A robust global practice has emerged that protects anonymous expression as an essential aspect of the rights to privacy and freedom of expression, online and offline.

For Americans, the right to free speech is axiomatic. It is protected by the First and Fourteenth Amendment to the Constitution. The relevant part states- *'Congress shall make no law...abridging the freedom of speech'*.[11] The concept is ingrained in the American society. The internet is viewed as a medium to expand it.[12] Over centuries the advantages of being able to express opinions anonymously using pseudonyms have been recognized. The best example of the same being *Federalist Papers*, a series of 85 essays written and published between October 1787 and May 1788, anonymously written under the name *'Publius'*.These were ofimmense importance in America's Founding Period. Additionally, the world seems a better place because of the writings that have been produced behind the pseudonym, whether they be the novels of George Eliot or George Sand, or the humour of Mark Twain.[13]

Human rights and civil liberty activists consider digital anonymity to be an important tool in guaranteeing freedom of speech expression. Anonymity permits individuals to profess their interests, beliefs and political ideologies fearlessly. It also makes it possible for others to receive such views.[14] History bears testimony to the fact that anonymous speech also has made it possible to express unpopular but true notions in science, philosophy as well as politics. Article 10 of the European Convention of Human Rights also protects free speech.

However it is recognized that anonymity is a mixed bag. On one hand it empowers people to say things worth saying, yet its darker side

[10]*R v. Spencer(2014) SCC 43 available at<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14233/index.do> last accssed 21 September 2015*
[11]U.S. Constitution. First Amendment
[12] Laura Rogal, *'Anonymity in Social Media' (2013) 7 Ariz. Summit L. Rev. 61, 63*
[13]Frederick Schauer, *'Anonymity and Authority'(2001-2012) 27 J.L. & Pol. 597, 597*
[14]Katherine S. Williams, *'On-Line Anonymity, Deindividuation and Freedom of Expression and Privacy'(2005-2006) 110 Penn St. L. Rev. 687, 688*

facilitates the commission of crimes, torts and other harmful, anti-social or deviant activities. Individuals can libel others, damage economies, damage companies, destabilise regimes, disseminate hate speech, prey on children or other vulnerable individuals, and disseminate criminal or offensive information or images. Governments fear the possibility of individuals being strongly persuaded politically by information in the virtual community. They can be persuaded to take part in terrorist activities, be influenced by undesirable political propaganda and get instructions on production and circulation of arms thus providing both the ideology and practical information necessary to destabilise regimes.[15] In Plato's *Republic*, while discussing justice, Socrates relates the tale of a ring that enabled Gyges, its wearer to become invisibleon demand who then goes, to seduce the queen, kill the king, and usurp his power.[16] This story reflects the potential for abuse that anonymity carries. A truly anonymous speaker can libel, slander, and defame at will. Such a person lacks accountability and therefore reliability. Without knowing who a speaker is, or where his expertise lies, the audience cannot evaluate the veracity of his contribution. It creates a greater potential for deception and frivolity in public debate.[17]

The Psychological Factors

It has been suggested that de-individualisation theories can explain the link between anonymity and unacceptable behaviour online. *Social Identity Theory of De-individuation* (SIDE) is a social psychological theory that is concerned with the behaviour of individuals lost amidst crowds. The essence of the theory is that inner restraints are lost when people are no longer seen or considered as individuals.[18] Philip Zimbardo's[19] research showed that people were more likely to administer a stronger electric shock when they were hooded and therefore unknown. Similarly even on online media, individuals when

[15]*ibid at pg. 689.*
[16] Plato, *Republic (Paul Shorey trans.) in 2 Collected Dialogues (Edith Hamilton & Huntington Cairns eds., Princeton Univ. Press 1982) 607*
[17]Edward Stein, *'Queers Anonymous: Lesbians, Gay Men, Free Speech, and Cyberspace' (2003) Harv. C.R.-C.L. L. Rev. 159, 193*
[18] L. Festinger et al., *'Some Consequences of Deindividuation in a Group' (1952)47 J. ABNORMAL & Soc. PSYCHOL.382, 390*
[19] Phillip G. Zimbardo, *'The Human Choice: Individuation, Reason, and Order Versus Deindividuation, Impulse, and Chaos' (1969)17 NEB. SYMP. ON MOTIVATION 237*

masked by anonymity don't feel restrained by internal or social regulators.[20] It is this 'thrill' of disregarding restraints that lends to digital anonymity its addictive nature.Anonymity has many liberating aspects to fulfil personal or societal objectives which are driven either by positive or negative motives. Literary historian John Mullan identified eight motives for authors masking their identities: mischief, modesty, women being men, men being women, danger, reviewing, mockery and devilry, and confession.[21] Beneficial motives could include the notion of safety and concealment of one's status, caste, gender for free expression but mostly people use it for fulfilling negative motives like intimidation, insult or fraud. It has been studied that anonymous communication has a disinhibitive effect on the author but it can also create a de-individuation effect wherein the author loses self-control and indulges in anti-social activities. The most impacting influence on anonymous persons online in such a scenario was observed to be the attitude of the anonymous group in which the individual was interacting anonymously.[22] This reflects that anonymous behaviour is influenced by anonymous peer groups of individuals. This makes it all the more important to ensure that online behaviour is not unruly or offensive because that will in turn give birth to more such behaviour.

The understanding of the judges also plays an essential role. In order to make socially relevant decisions it is important that the decision-makers understand not just the emerging technology, but the social and cultural uses of the technology as well.[23] The best example of the same with respect to anonymous online posts was the *Krinsky* case[24] decided by the California Court of Appeal. The Court held that Doe 6's statements calling the plaintiff and other corporate officers 'boobs, losers and crooks'[25] could not be classified as defamatory. It held that

[20] Jonathan Siegel et al., *'Group Processes in Computer-Mediated Communication' (1986) 37 Organisational Behav. And Hum. Decision Processes157*
[21] John Mullan, *Anonymity: A Secret History Of English Literature (Princeton University Press, 2007)*
[22] Tom Postmes et al., *'Intergroup Differentiation in Computer-Mediated Communication: Effects of Depersonalization' (2002) 6 Group Dynamics 3*
[23] Lyrissa Barnett Lidsky, *'Anonymity In Cyberspace : What Can We Learn From John Doe?' 50 Boston College Review (2009) 1373,1383*
[24] *Krinsky v. Doe* (2008) 72 Cal. Rptr. 3d 231 (Cal. Ct. App. 2008), 244-246
[25] *ibid,at pg. 235*

the Internet contributes to a 'relaxed communication style' where 'exaggeration', 'gossip' and 'venting' are common. This makes it less likely that reasonable readers will take it seriously in the first place[26]. This perspective takes free dissemination of speech to another level and widens the ambit of the First Amendment.

The Current Legal Landscape for Anonymous Free Speech

Faced with the rapidly evolving pace of modern complex technology, courts have taken up the task of not only evolving new legal doctrines to address the issue raised by the Doe cases but they have also made existing doctrines responsive to the culture of Internet discourse. Courts are working on evolving a set of standards to balance the right to speak anonymously with the rights of those injured by defamatory anonymous speech. In *Dendrite*[27], *Cahill*[28] and finally *Mobilisia*[29] the requirements were effectively codified.

There are two essential components that have been recognised as indispensable before revealing the Doe's identity. Firstly,he ought to be given a notice of the lawsuit and an opportunity to file a motion to protect his anonymity.[30] This notice requirement is not too stringent since the identity of the defendant is unknown, it is accepted as fulfilled by posting the notice on the same forum where Doe allegedly posted his defamatory statement.[31] This gives hima short window of opportunity to assert his First Amendment rights.The second component requires the plaintiff to provide some indicia to show the viability of their libel action, after which the court may order disclosure of identity.[32]But before this the following elements will have to be properly proved,viz.,

1. A good faith basis for the plaintiff's claim.[33]
2. Sufficient pleading to survive a motion to dismiss.[34]

[26] *ibid,at pg. 244-249*
[27] *Dendrite Intern., Inc. v. Doe No. 3* [2001] 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001)
[28] *Doe No. 1 v. Cahill* [2005] 884 A.2d 451, (Del. 2005)
[29] *Mobilisa, Inc. v. Doe* [2007] 1, 170 P.3d 712, (Ariz. Ct. App. 2007)
[30] *Doe No. 1 v. Cahill* [2005] 884 A.2d 451, (Del. 2005) [460] –[461]; Inc. v. Brodie [2009] 966 A.2d 432 (Md. 2009),457
[31] *ibid*
[32] *Inc. v. Brodie* [2009] 966 A.2d 432 (Md. 2009),449–456
[33] *Doe v. 2TheMart.com Inc.* (2001) 140 F. Supp. 2d 1088, 1095 n.5 (W.D. Wash. 2001), 1095
[34] *Columbia Ins. Co. v. seescandy.com* [1999] 185 F.R.D. 573 (N.D. Cal. 1999); Lassa v. Rongstad [2006] 718 N.W.2d 673, 687 (Wis. 2006)

3. Production of evidence sufficient to establish a prima facie defamation case coupled with balancing of the right to speak anonymously and the right to pursue a libel claim.[35] This is the most essential requirement.

4. A showing of evidence sufficient to avoid summary judgment, without the additional balancing test.[36]

In *Independent Newspapers, Inc. v. Brodie,* the court specifically held that in a defamation action involving anonymous speakers, a trial court should not order disclosure until five criteria are satisfied. The first two criteria ensure that defendants have notice and an opportunity to defend. The third requires the plaintiff to identify with specificity the allegedly defamatory statements made by defendants. The fourth requires the trial court to "determine whether the complaint has set forth a prima facie defamation per se or per quod action against the anonymous posters." Finally, "if all else is satisfied, [the trial court must] balance the anonymous poster's First Amendment right of free speech against the strengthof the prima facie case of defamation presented by the plaintiff and the necessity for disclosure of the anonymous defendant's identity, before ordering disclosure."[37] It's only when all these criteria are satisfied that disclosure of Doe's identity is valid.

Shifting Paradigms

Thus, as can be seen the court provides sufficient protection to John Does disseminating speech. However, it needs to be seen that the anonymous speech paradigm is fast shifting. Cases relating to such issues are no longer merely about relatively powerful Goliaths trying to silence puny Davids on Internet message boards. There is an increasingly rising number of cases of harmful anonymous speech. The recent criminal case against Missouri mom Lori Drew[38] well reflects the harm that anonymous speakers can cause. The 49-year-old Drew opened a My Space account as 'Josh Evans', a teenage boy,

[35]*Dendrite Intern., Inc. v. Doe No. 3* [2001] 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001) [60]-[61]; *Inc. v. Brodie* [2009] 966 A.2d 432 (Md. 2009),457
[36]*Doe No. 1 v. Cahill* [2005] 884 A.2d 451, (Del. 2005),460–461; *McMann v. Doe* [2006] 460 F. Supp. 2d 259 (D. Mass. 2006), 266-268
[37]*Inc. v. Brodie* [2009] 966 A.2d 432 (Md. 2009),457
[38]Jennifer Steinhauer, 'Verdict in My Space Suicide Case'N.Y. Times (New York, 26 November, 2008) A25

in order to start a correspondence with her 13-year-old daughter's former friend, Megan Meier. After winning Meier's trust, 'Josh' cruelly 'dumped' her by email. The girl went on to commit suicide. Another such case was the *Auto Admit* case[39]. Auto Admit is a message board for current and prospective law students to share information about their course. Unfortunately, Auto Admit sometimes also attracts a number of posters who use the site to put up reprehensible posts. Some posters targeted a few Yale law students. They posted that one of the students had bribed her way into Yale and had had a sexual affair with a Yale administrator. For another they posted that she had gonorrhea and was addicted to heroin. Even more alarming were posts in which one poster threatened to force himself on one of the users and 'sodomize her'.[40]

Such cases mark the glaring limitations of American libel law and how anonymous posts can be a massive social nuisance. It is high time that the courts start working in the direction of developing jurisprudence to rectify and deal with such situations. The courts do not offer the 'take down' remedy in defamation law which is why there is a surge of reputation management companies like Reputation-Defender and Reputation Hawk. These companies monitor what is being said about their clients online. They provide 'positive content' to boost a client's online reputation and shift the negative content lower in search rankings. Also, they attempt to 'scrub' a client's reputation by getting damaging content removed.[41] However, the permanence of publication online makes this task daunting and difficult. For those worried about the harms caused by cybersmears, the current state of the law is very dispiriting. An angry lover, a disgruntled employee, or simply a mischievous character assassin can start a campaign of lies, and more often than not the victim will have little meaningful recourse against it.

Implications and Conclusion

Anonymity in cyberspace is a very controversial subject. Proponents of the right point to the legitimate and compelling reasons why an

[39]*Doe I v. Individuals* [2008] 561 F. Supp. 2d 249 n.7 (D. Conn. 2008)
[40]*Doe I v. Individuals* [2008] 561 F. Supp. 2d 249 n.7 (D. Conn. 2008) [256]; Ann Bartow, *'Internet Defamation as Profit Centre: The Monetiation of Online Harassment'* (2009) 32 Harv. J. L. & Gender 383, 399
[41]Ann Bartow, *'Internet Defamation as Profit Centre: The Monetiation of Online Harassment'* (2009) 32 Harv. J. L. & Gender 383, 416

Internet users' right to privacy in a public forum should be regarded supreme. At the same time critics of the same argue that the ease with which identities can be hidden in cyberspace, combined with the ability to transmit information across international borders with impunity, facilitates crime and hinders law enforcement.An international convention to solve the controversy of anonymity should be framed by the countries which will inturn lead to discussion in order to set out a comprehensive law to deal with the social and legal implications of online anonymous speech. Another step forward would be to amend the Universal Declaration of Human Rights so that anonymous expression acquires the status of a civil right coupled with certain restrictions. It will be interesting to see how the courts mould the law and take it forward and what implications the same will have on free speech and its expression.

My Right in my Mother's Womb

*Nayana Gautam, Rahoul Mehrotra**

Introduction

Humans tall or short, fat or slim, poor or rich are really different from each other. It is rightly said that everyone is different, but one thing common to all is that "the biggest man you ever see was once just a baby". Further it can also be said that every person was once just a child in the womb of the mother. The different positions and the contradictory provisions of law must be brought to light so as to understand the legal position of the child who is unborn and is in the womb of the mother.

Adults are able to know and understand their rights and are capable of enforcing them in case of any deprivation or infringement of their rights. A child, unable to do so is provided protection under the law. But an unborn child, being totally unaware of the laws of the world, being in a vulnerable position, not having the capability to know it's rights, must have its rights protected by the law and the position of the law on this matter must be clear so as to ensure that there is no ambiguity about the position of the child *'en ventre sa mere'*[1]. Whether the child in the womb of the mother be considered and given the status of a person is also a big question that one may ask. This poses a problem for those who stress the continuity of our existence from conception to adulthood.

The main focus of this paper is on the laws of succession and property vis-à-vis Medical Termination of Pregnancy Act, 1971 and Article 21 of the Constitution of India which guarantees the fundamental right to life.

The ambiguity on the issue of the status of the child who is unborn and is in the womb of the mother looms large. Fallacies and misconceptions are prevalent amongst people about the correct legal status of a child in the womb. The laws where the status of the unborn is almost settled, such as laws of property and succession have been discussed briefly and the myths and contradictions brought out. The

*I LL.B.

[1]French phrase refers to " a foetus in the mother's womb".

authors have tried to elaborate on how it is a hypocrisy to advocate for foetal rights and personhood from the time of conception on one hand and at the same time supporting abortion on the other.

The position of the child En ventre sa mere

Firstly, the position in the matters of succession in India, of the child who is unborn and in the womb of the mother under the secular law and the different personal laws needs to be examined rigorously. Secondly, the provision under the transfer of property act also needs to be dealt with.

Secular law:-

S.27(c) of the Indian Succession Act, 1925, makes a provision for the child who is in the womb of the mother.

It states that -

> *"(c) between those who were actually born in the lifetime of a person deceased, and who at the date of his death were only conceived in the womb, but who have been subsequently born alive."*
>
> As understood by the bare perusal of this clause children who are begotten and not yet born are deemed to be in existence at the time of the death of an intestate.

Hindu Law

S. 20 of the Hindu Succession Act, 1956, reads as under :-

> *"Right of child in womb- A child who was in the womb at the time of the death of an intestate and who is subsequently born alive shall have the same right to inherit to the intestate as if he or she had been born before the death of an intestate, and the inheritance shall be deemed to vest in such a case with effect from the death of the intestate."*

This section makes the reference to the children in the womb of their mother and thereby it speaks of the rights of the child since the moment of conception and not of birth. The child en ventre sa mere if born alive is deemed to be actually born, before the death of the intestate, for the benefits conferred upon him by way of inheritance. Although the general rule is that succession is never in abeyance and the legal fiction comes into operation, the child takes his share of the inheritance, and it is deemed to vest from the date of the death of an intestate.[2]

[2]Mulla, *'Principles of Hindu Law' (14th edn.) 937.*

Muslim Law :

Mohammedan law works on the same principles as of the other personal laws with reference to the child *en ventre sa mere*. It recognizes the *Janin* in the matters of succession. A person who has not been conceived till the propositus dies cannot be his heir. A child who is then in its mother's womb, however, inherits if it is born alive. A child in embryo is regarded as a living person and, as such, property vests immediately in that child. But, if such child en ventre sa mere is not born alive, the share already vested in it is divested and is presumed as if there was no such heir at all.

The Transfer of Property Act, 1882 and the Child in the womb:-

S.13 of the Transfer of Property Act, 1882, reads as:-

" Where on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property."

The transfer of property cannot be made directly to an unborn person for the definition of transfer in S.5 is limited to living persons. Such transfers can be made only by the machinery of trusts. Such intention can be realized by the words "for the benefit of", the trustees being the transferees who hold the property for the benefit of the unborn person. The estate vests in some person between the date of the transfer and the coming into existence of the unborn child.The interest of the unborn child must therefore be in every case preceded by a prior interest; and the section in effect says that the interest of the unborn person must be the whole remainder, so that it is impossible to confer an estate for life on an unborn person. In the illustration to the section the interest created for the benefit of the unborn eldest son is only a life interest and therefore it fails.[3]

S.13 of the Transfer of Property Act, 1882 is almost identical with S.113 of the Indian Succession Act, 1925. S.113 enacts that in order that a bequest to an unborn child should be valid it must comprise the whole of the remaining interest of the testator in the thing bequeathed,

[3]Mulla, *"The Transfer of Property Act, (6TH edn.)107*

if the bequest is subject to a prior bequest.[4]

This makes it clear that the child who was in the womb of the mother is entitled to the property, provided that it is born alive. Now this position, that a child *en ventre sa mere* is entitled to receive the possession of the property, once it is born alive, must be kept in mind while trying to understand the main issue here.

Medical Termination of Pregnancy Act, 1971:-

Let us first have a look at some of the legislations which deal with the termination of pregnancy.

Under the Offences Against the Person Act, 1861, it is an offence to perform an abortion illegally, other than under the Abortion Act. In the Medical Termination of Pregnancy Act, the position is similar and any abortion which is not performed according to the provisions of the act will be a criminal offence.

Under the Infant Life Preservation Act, 1929 the registered medical practitioner can destroy the fetus but only in order to preserve the life of the mother. For the purposes of this Act evidence that a woman had been pregnant for a period of 28 weeks or more shall be, prima facie, evidence that she was at that time pregnant of a child, capable of being born alive.

In 1966, a U. K. parliamentary Bill was introduced which became statute law in 1968 known as the Abortion Act, 1967, being applied to England, Wales and Scotland. It permitted termination of pregnancy by a medical practitioner subject to such conditions as are mentioned, which are similar to those under S. 3 of the Medical Termination of Pregnancy Act, 1971.

Now let us examine the provision under the Medical Termination of Pregnancy Act, 1971. The relevant part of Sub-Section (2) of S. 3 of the Medical Termination of Pregnancy Act, 1971 states that:-

> *"(2) Subject to the provisions of sub-section (4),* ***pregnancy may be terminated*** *by a registered medical practitioner,-*
>
> *(a) where the length of the pregnancy does not exceed twelve weeks, if such medical practitioner is, or*

[4]Mulla, *"The Transfer of Property Act,(6TH edn.)107*

> *(b) where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are,*
>
> *of opinion in good faith, that....."*

The medical practitioners should form an opinion in good faith that continuance of pregnancy would involve risk to the life of the pregnant woman or of grave injury to her physical and mental health and also that there is a substantial risk that the child if born could suffer from such abnormalities as to be seriously handicapped. The Act aims to give protection to the health of a pregnant woman i.e. the mother and the child en ventre sa mere.

After analyzing the status of the child En ventre sa mere vis-à-vis S. 3 of the Medical Termination of Pregnancy Act, 1971, it becomes clear that, a child who is unborn and in the womb of the mother may be aborted, subject to the provisions of the Act. The unborn child is not recognized as a life till it reaches a particular stage.

Art. 21 of the Constitution of India :

The most important fundamental right, i.e. the right to life is enshrined in Art. 21 of the Constitution of India. The right to life which has been guaranteed by this Constitutional provision has received the widest possible interpretation. As in the case of *R. C. Cooper* it has been stated that rights are not made by articles, but articulated by articles. Under the canopy of this article of our Constitution many rights have found shelter, growth and nourishment. Un-enumerated fundamental rights which emanate from the right to life that is enshrined in Art. 21 are ever expanding. To what extent can they be expanded is altogether a different issue. The right to life under this article has been the core of the debate relating to abortion; the right to life of the mother and her right to choose versus the right to life of the child.

Art. 21 of the Constitution of India states that :-

"No person shall be deprived of his life or personal liberty except according to the procedure established by law."

Art. 21 of the Constitution of India is not a water-tight compartment. Adopting liberal interpretation, the Supreme Court has read several rights in Art. 21 to make 'life' more meaningful and worth living. Can

the Supreme Court read in it to regard a child *en ventre sa mere* as a person, as living? If it does, can it guarantee the right to life to it? If it does not, how can the child be given rights such as the right to property from the very day of conception?

The right under this article is guaranteed to a person. Now an unborn child is not regarded as a person. But the position of the child, under the idea of a legal fiction that is created under the various laws of property and succession creates a whole new field to explore. Art.21 of our constitution applies to "person". Should the unborn entity be considered and given the status of a person?

This article if read literally is a colorless article and would be satisfied, the moment it is established by the State that there is a law which provides a procedure which has been followed by the impugned action. But the expression 'procedure established by law' in Art. 21 has been judiciously construed as meaning a procedure which is reasonable, fair and just.

The intricacies of the arguments for and against abortion will make it clear that the right to life which is envisaged under Art. 21 of the Constitution of India is a fundamental right which can be denied to the child en ventre sa mere if it can be shown that the child in the mother's womb is not a person and that there is a due procedure of law which is established that is just and reasonable and not against the basic structure of the Constitution and in conformity with the spirit of other articles like Art.14 and Art.19. So the due procedure established by law which has been enacted or validated by the legislature, cannot be challenged of its constitutionality, unless it is shown that such a process was unjust and unreasonable and it violates other rights which are articulated and protected or which are guaranteed by the Constitution.

Critique :

After analyzing these provisions, it would follow that post 20 weeks, prima facie, the unborn child 'has a life' and is a 'person' and such a right to life must be protected now, as it is guaranteed by our Constitution. It mandates that such a right shall not be denied to a person. But as we have seen, the various laws of succession allow the child to succeed to the property even if at the time of the death of an intestate (or partition) the child was in the womb of the mother and

the right can be enforced once born alive. If the child is still born or not born alive then it cannot succeed and the property devolves the way as if the child never existed.

So is the position of the child *en ventre sa mere* clear in this matter? The very fact that the right to inherit or the right to property is vested in the unborn child from the date of conception and the right to life at such a later stage which may be post 12 or 20 weeks of conception, depending upon the issues and facts and circumstances of each case, is inconsistent. The right to inherit the property is contingent or conditional to the birth of the child 'alive'. So any property which the unborn was entitled to when it was a child *en ventre sa mere* will be vested in it. But under the Medical Termination of Pregnancy Act the child can be terminated and the right to life is only given after 12 weeks and 20 weeks subject to the conditions mentioned in S.3 of the Act.

Thus the question would arise, that whether the right to inherit and succeed to the property, or the right to property which is from the date of conception is given more importance than the fundamental right to life. Can a right which is not fundamental be given to an entity which is not yet even guaranteed its basic right to life? Can it supersede or rather should it supersede the right to life or should such right be given only after the birth? Is a child *en ventre sa mere* a 'person' for the purpose of succession and to inherit or succeed to the property? Then why should he not be allowed to claim the right for under Art.21 of the Constitution of India? Should the property be given to an entity which does not even have the basic and the most important 'right to life'?

Art. 31 (Right to property) was omitted and is not a fundamental right anymore, but Art. 21 is the heart and the soul of the fundamental rights, because there are hardly any rights that can be exercised without having the basic protection of life. Without the right to life, one cannot enjoy fully any other rights. Should there be property rights to an unborn child who is not even capable of being born alive, who is not guaranteed even the right to life yet? These issues need special consideration and rigorous scrutiny so that the right of the child in the womb of the mother can be understood in its entirety.

Conclusion :

The legal understanding of the concept of 'person' or 'personality' revolves around possession of rights and capacity to discharge legal duties. Human beings are the prime claimants of legal personality. Legal personality of natural persons begins at birth and extinguishes with death with the result that pre-birth, post death stages are devoid of any legal persona. This is as per general common understanding and there is a strong difference of opinion here which should be understood.

The issue of when is it wrong to destroy early human life needs careful thought because the development of the human being is a gradual process. To kill a human being is murder. The absence of a sharp line that divides the child en ventre sa mere from the potential adult human creates a problem but the problem becomes even more grave when it comes to the fertilized egg or rather as I may say the 'potential human life'.

Viability is where the United States Supreme Court drew the line in *Roe v. Wade*.[5] The court held that the state has a legislative interest in protecting potential human life. The judges who wrote the majority decision gave no indication why the mere capacity to exist outside the womb should make such a difference to the interest in protecting potential life. After all, if we talk as the court did of potential human life, then the fetus before the time of viability is as much a potential adult human as the fetus after that time. There is no rule, of course, that a potential A has the same value as on X or has all the rights of an X. There are many examples that just show the contrary.

To pull out a sprouting acorn is not the same as cutting down a venerable oak. To drop a fertile egg into a pot of boiling water is very different from doing the same to a live chicken. A Prince may be a potential King, but, he does not now have the rights of a King.In the absence of any general inference from 'A is a potential X' to 'A has the same rights of an X', we should not accept that a potential person should have the rights of a person, unless we can be given some specific reason why this should hold in a particular case. What could the reason be? This question needs serious attention and becomes especially

[5]410 us 113 (1973)

pertinent if we suggest that the life of a person merits greater protection than the life of a being which is not a person.

As a part of the conclusion it may be derived that there is an aura of extreme strangeness and vagueness as well as discomfiture around the discussed issue. But this must not hinder our logical analysis and the conclusive ability to think. This is of extreme practical importance because it would decide the ways in which and the degree to which, law would interact and protect the child en ventre sa mere; also to what extent can one play with the lives of another, the mother and the child in her womb.

COMPULSORY VOTING – THE ANTITHESIS OF DEMOCRACY

*Anurima Shivade**

In July 2015, the Gujarat government passed a controversial legislation and made voting compulsory in local body elections. The questions that cropped up in everyone's mind were - will the other states follow suit? And ultimately, will it be implemented centrally?

The Gujarat Local Authorities (Amendment) Bill was first introduced in the State Assembly in December 2009 and was passed by a majority vote but was thwarted by the then Governor Dr. Kamla Beniwal both in 2010 and 2011 when she sent it back to the State Assembly citing that it violates the principle of personal liberty.

The situation took a turn in November 2014, when Gujarat Governor O.P.Kohli gave his approval to the bill which, among other things, contained a provision to penalise those who fail to vote. A notification was later released which stated that an eligible voter violating the provision for compulsory voting in the local body elections would have to pay a fine of Rs. 100. The defaulter could be exempted from paying the fine if he proves that he had a legitimate reason for his absence.

However, the contentious law hit a hurdle later that same year, when it was stayed until further notice by the Gujarat High Court after a petition was filed challenging the said Act. Even so, the seed of compulsory voting was planted and many started mulling over the idea of making it mandatory at the national level. So will this concept ever come to fruition?

Let us hope not, if we mean to uphold the true essence of democracy.It could be argued that forcing people to express their political views i.e. to vote, will ensure full participation of the citizens of the state and thereby will strengthen democracy. Enforced voting and democracy are quite inconsistent with each other.

Let us consider the example of Australia, one of the well-developed nations where voting is mandatory by law. Any person above the age of 18 in Australia has to be registered as a voter and they have to

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show up at their polling place on the day of the election. If they do not, a hefty fine has to be paid unless they prove that they were indisposed or had some other difficulty which rendered them incapable of making it to the polling place. It is true that the country has one of the highest voter turnouts in the world, about 95% as opposed to its earlier 47% rate which was before voting was made compulsory[1]. Is it really better though, to have a vast number of people voting when it is being done out of compulsion and not out of a sense of responsibility or because they care about their nation? Compulsory voting may create resentment and even greater political apathy in the minds of people in relation to the government. Arguably it might be more desirable to have a 66% turnout rate[2] (the voter turnout rate in 2014 Indian general elections) which was out of choice and free will - the basic tenets of democracy. After going over the statistics, the *Pundits* concluded that in the last four elections in Australia, the results would have been the same regardless of whether voting was compulsory or voluntary.[3]

Moreover, just because it 'appears' to be working in Australia, in that there being a high voter turnout, does not mean it could ever be feasible in India. Our immense population, for one, is not conducive to that. India accounts for 17.31% of the world population whereas Australia does not even amount to 1%.[4]The fact that the state of Chhattisgarh is more populated than the entire country of Australia makes us realise how glaring this gap really is. Reacting to the Gujarat legislation, as the former Election Commissioner of India H.S. Brahma rightly put it in an *Indian Express* interview, *"Let me ask you, what if we have a similar law at the Centre, and out of 83 crore-plus voters, 10 per cent chose not to*

[1]Matt Rosenberg, 'Compulsory Voting' <http://geography.about.com/od/politicalgeography/a/compulsoryvote.html> accessed 20 March 2016

[2]Bharti Jain, 'Highest-ever voter turnout recorded in 2014 polls, govt spending doubled since 2009'
The Times of India (New Delhi, 13 May 2014)

[3]Peter Barry, 'How Compulsory Voting Subverts Democracy'(Quadrant Online, 01 September 2013), <https://quadrant.org.au/magazine/2013/09/how-compulsory-voting-subverts-democracy/>accessed 20 March 2016

[4]'Countries in the world by population (2016)' <http://www.worldometers.info/world-population/population-by-country/ >accessed 20 March 2016

vote? Will you put eight crore voters in jail or impose fines on them? Do we have jails to accommodate eight crore voters?" Considering the figures, it is simply not achievable. We do not possess the resources that will be required to enforce such system. Determining whether aregistered voter did or did not vote will prove to be a very complicated process. Further, if found that he did not cast a vote then there comes the matter of sussing out if the reason for default is valid. Not to mention the amount of manpower, time and money that will be spent on the whole operation.

The right of abstaining from voting forms a part of our freedom of expression *and* right to personal liberty (guaranteed in Art.19(1)(a) and Art.21 respectively of the Indian Constitution) and not having an opinion is also an opinion and forms part of your liberty to choose. Although not casting your vote is not recommended in a modern democracy, the fact remains that as a citizen of the democratic world, that *is* your right and you are free to exercise it. It must be understood that voting is a right and *not* a duty. The Gujarat High Court was of the same opinion when it stayed the legislation making voting compulsory in the local body elections and imposing fines on defaulters. The Court observed that the 'right to vote' itself provided right to refrain from voting.[5]

People have to be convinced about the importance of voting and how beneficial it will be to the country and the people themselves, but making voting mandatory is not the answer. Instead of coercing citizens to vote, the focus should be on the shortcomings of the political system, as to why people are reluctant to vote in the first place and as to why the contesting candidates fail to inspire confidence in the minds of the citizens. If we work on these flaws, there is reason to believe that people would show up of their own accord and vote.

Since elections are based on universal adult suffrage wherein adult citizens are expected to be competent enough to make their own choice then that choice may also include not casting their vote.

In the countries where voting is mandatory the politician need not worry about getting votes and it is immaterial whether they live up to

[5] PTI, 'Gujarat High Court stays compulsory voting rule in Gujarat civic polls' Firstpost (Ahmedabad, 21 August 2015)

their promises to the people or if they have solved the nation's problems for, they will still get the votes as per the law. Whereas in countries with voluntary voting, one needs to work hard to persuade people *just* to vote. Now as to whom they should vote for, is another matter entirely. Thus, the candidates in such a scenario will be more vigilant, more hard working and dedicated to their cause since they need to convince everyone that they are worth going to the poll booth for and casting a vote. And that's the beauty of it.

In a study on voting, scientists Benjamin Highton and Raymond Wolfinger wrote, "Analyses of survey data show no objective increase in turnout by including compulsory voting and simply put the outcomes would not change even if everyone voted."[6]

Another view point that exists is that compulsory voting will enhance democracy because it truly gives way to a representative government, in that, since all qualified citizens vote, all interests are represented. But, in fact, one might argue that the reluctant voters may indulge in random voting out of fear of legal repercussions. Like one would simply check off a candidate at the top of the list or select the easiest option just to satisfy their civic duty. This is a common phenomenon called as a "donkey vote" in Australian politics. Another drawback could be that those who have a strong political motivation will urge these ignorant, indifferent voters to vote for the one *they* want to win. Since these naïve voters will not care about any outcome whatsoever, they could be easily swayed in favour of a particular political party.This will lead to an undesirable form of voting and in no way will it help democracy. And maybe we need to consider that not everyone is qualified to have a say in the running of our country and it is for the best that the uninformed citizens stay out of it.

Some would argue that the NOTA (None Of The Above) option or the right to reject which exists nowadays would solve all of the above difficulties and that it would not take away the right to personal liberty assured to a citizen. If any one is not particularly inclined to vote,

[6] Andrew Gelman, 'What difference would it make if everyone voted?' (andrewgelman.com, 10 July 2008).<http://andrewgelman.com/2008/07/10/what-difference-would-it-make-if-everybody-voted-leighley-and-nagler-disagree-with-wolfinger/>accessed 20 March 2016.

either because he has no trust in any of the candidates or just by reason of general apathy, he could simply hit the NOTA button on the EVM (Electronic Voting Machine). So that way, even though the voting part of the process is compulsory, one is not actually compelled to choose a specific candidate, all the while expressing that they are unhappy with the current political candidates and just the political scenario in general.

The NOTA option is, however, virtually ineffective. Even if this option gets the most number of votes in a constituency, then the candidate with the second highest number of votes is elected. So if there are 99 NOTA votes and a candidate has just one vote, that candidate will be declared the winner and the opinion of the majority will simply be disregarded. This just makesit all the more pointless.

Maybe, a re-election could be conducted in the constituencies where NOTA had more votes than a candidate, if the Election Commission so decides but then that would just be fiscally irresponsible. The already overburdened taxpayers will have to bear the brunt of it.Moreover, the time between the two elections will be fraught with political instability, and without a leader at the helm of the country's affairs, progress will be hindered in all areas.

The only beneficial outcome of this is that it puts pressure on the political parties to step up their game in order to avoid public humiliation they would have to face if they were to receive fewer votes than NOTA. But the effectiveness of this scheme depends only so long as the politicians do really change for the better.

When an element of coercion is introduced in the political system it will rob one of one's own free will and it automatically ceases to be a democracy and will morph into an autocracy instead. Even though the intention behind introducing compulsory voting is to increase political participation, we cannot ignore the fact that it is unhealthy for democracy and does not embody its true spirit.If compulsory voting does become a reality, voting might just end up becoming one of the many tedious chores on our to-do list.

The Law Commission panel concurred on this view and did not recommend compulsory voting. The panel said it was "highly undesirable for a variety of reasons such as being undemocratic, illegitimate, expensive, unable to improve quality political participation

and awareness, and difficult to implement".[7] Succinctly put, it looks like there is hope for democracy yet.

Considering all the arguments regarding the issue, the author humbly reiterates that compulsory voting is not a good idea as far as democracy is concerned; taking someone's choice away will not lead to optimal governance. The human race has fought fiercely against oppression and tyranny for centuries to attain its rightful independence which cannot be jeopardized by implementing repressive techniques. In conclusion, the citizens reign supreme in a democracy and the State cannot subjugate them. And after all, isn't it the government of the people, by the people and for the people?

[7]IANS, 'Law panel against compulsory voting, rights to recall, reject' Business Standard (Delhi, 12March 2015)

Narco Analysis

Deeksha Katarki[*], *Shreya Kunwar*[**]

The Indian Criminal Justice system has an extremely low conviction rate and it is high time that this situation is rectified with emphasis on new state of the art technology. The investigative capabilities of our country's police department need a big boost in order to bring about a positive change and render speedy and adequate justice. One relatively new and important invention of the recent past has been the Narco Analysis test.

Narco Analysis is a chemo physiological test administered to a crime suspect to extract the truth when he is not willing to tell the truth and tells lies in normal interrogation. The interrogation is conducted after administering an injection which consists of a suitable dose of a psycho active drug. The drug is mostly either sodium thiopentothal or sodium amytal. The administration is done under controlled circumstances to eliminate the reasoning power of the subject without affecting his memory.

The Narcotic affects adversely that part of the brain which discriminates between what is good and what is bad for the suspect. In short, the drug suppresses his/her reasoning and thinking powers.

Famous cases in recent past involving the Narco Analysis test-

2006 Noida Serial Murders

The Noida serial murders (also known as the Nithari serial murders) took place in the house of a businessman Moninder Singh Pandher in Nithari, India, in 2005 and 2006. The murders came to light after the bodies of several children were found in the drain and adjoining areas of Moninder Singh's house.

In January 2007, the main accused in the case, Moninder Singh and his servant Surender Koli were brought to the Forensic Science Laboratory in Gandhinagar for Brain mapping, polygraph test and

[*]III BSL LLB
[**]I BA LLB

Narco Analysis.[1]These tests were conducted on them to ascertain the veracity of the statements that they made during their custodial interrogation regarding their involvement in the serial killing of women and children in Nithari.[2]Various confessional statements were made by the accused under the effect of the drug. Surender Koli, the domestic help of Moninder Singh could remember the names of the females he had murdered and also revealed his urge to rape them after they were murdered.

In the Nithari case, Pandher, the man who employed Surender was a co accused. This was because it was believed that he had to have known the happenings in his own home. However the Narco and other tests suggested that he didn't. Although the tests were not admitted as evidence, Pandher was acquitted while Surender was convicted in 5 cases based on the tests.

Arushi Talwar Case

A recent case where the Narco Analysis test was put to use was the Aarushi Talwar case. Avirook Sen, a journalist who wrote the book 'Arushi' about the murder of the 13 year old girl whose parents Rajesh and Nupur Talwar have been convicted for her murder as well as that of their domestic help Hemraj, made the Narco Anaylysis tests public for the first time. The book revealed many facts some of which brought to light the Narco Analysis tests conducted on the domestic helps connected to the Talwars and the fact that they were not considered even though each one of them had revealed in their individual tests that they were present in the house of the Talwars on the night of the murders. The tests done on the parents did not show any involvement on their part in the crime.

Therefore, it is interesting to note that the Narco Analysis test, which is very crucial to the casewas completely ignored under the pretext that they were inefficacious. It is controversially contended by some that when the state is prosecuting someone, and the scientific tests implicate him, the test gains more validity. However if the tests points to the innocence of the accused then efforts are made to prevent the tests from being shown as valid. In the case of the Talwars, the tests

[1]'Noida killers undergo brain-mapping tests' Rediff News (07 January2007)
[2]Pandher undergoes narco-analysis 'The Indian Express (Gandhinagar, 10 January 2007

conducted on the three other helpers have not been released. The Talwars made an application which reached the High Court of Allahabad to release the documents containing the Narco Analysis test but the same was dismissed by the Judge Sudhir Agarwal upholding the decision given by the trial court in the matter.[3]

As we have seen in the above case, Narco Analysis can be vital in solving cases, and if not that, at least in giving some perspective on how the crime could have occurred, however a lot of questions and doubts have been raised with the advancement of technology regarding basic human rights and also the reliability of these tests.

Art. 20(3) of the Constitution of India

The main provision regarding crime investigation and trial in the Indian Constitution is Art. 20(3). It deals with the privilege against self incrimination. This is the law in almost every civilized country. The privilege against self incrimination is a very important and fundamental aspect of common law criminal jurisprudence.

The characteristic features of this principle are-

i. The accused is presumed to be innocent.

ii. It is for the prosecution to establish his guilt.

iii. The accused need not make any statements against his will.

These features emerge from an apprehension that if compulsory examination of an accused were to be permitted then acts of torture may be used to force him into fatal submissions. The privilege thereby enables a person to maintain his privacy under all circumstances.

Art. 20(3) which embodies this privilege reads, "No person accused of any offence shall be compelled to be a witness against himself". This provision contains the following components:

i. It is a right available to the accused.

ii. It is a protection against the compulsion to be a witness, resulting in a person giving evidence that might be against himself.

These two components must exist before the protection of Art. 20(3) can be claimed. If they are missing, Art. 20(3) cannot be invoked.

[3] *Dr. Rajesh Talwar and Another v Central Bureau of Investigation Thru It's Directors and Another* [2013] 83 ALLCC 283

The application of Narco Analysis test involves fundamental questions regarding judicial matters and rights of citizens. Applying this technique in investigation raises important legal issues like violation of an individual's rights and liberties. Subjecting the accused to undergo the test, as has been done by the investigative agencies in India, is considered by many as a violation of Art. 20(3) of the Constitution. If the confession from the accused is derived from any physical or moral compulsion (even if it is under a hypnotic state of mind) it should stand to be rejected by the court. The main issue thus is whether it can be used as a scientific technique in investigations and if it can be admitted as a forensic evidence in the courtroom.

The right against forced self-incrimination, also known as the Right to Silence is thus enshrined in the Code of Criminal Procedure (CrPC), 1973 and the Indian Constitution. In the CrPC, the legislature has given protection to a citizen's right against self-incrimination. S.161 (2) of the Code of Criminal Procedure states that every person "is bound to answer truthfully all questions, put to him by [the police] officer, other than those questions, the answers to which would have a tendency to expose that person to a criminal charge, penalty or forfeiture".

Right to Silence

It is now well established that the Right to Silence is granted to the accused by virtue of the pronouncement in the case of *Nandini Satpathy* v *P.L.Dani,*[4] that no one can forcibly extract statements from the accused who has the right to keep silent during the course of interrogation. Administration of these tests leads to the forcible intrusion into one's mind and this denies the accused his right to remain silent.[5]

Contradictory views taken by the courts in India

In a 2006 judgment *Dinesh Dalmia v State by SPE, CBI* held that subjecting an accused to Narco Analysis does not amount to testimony by compulsion. The court said about the accused: *"he may be taken to*

[4] *Nandini Satpathy v P.L. Dani and Anr.* AIR 1978 SC 1025

[5] Harshit Khare, *'Privilege against self incrimination' (Legal Service India) < www.legalserviceindia.com/.../l466-Privilege-Against-Self——Incrimination...>accessed 20 March 2016.*

the laboratory for such tests against his will, but the revelation during such tests is quite voluntary."[6] The reasoning of the court in this case can be considered false taking the process of Narco Analysis into consideration. Firstly, Narco Analysis is a process by which the accused involuntarily answers questions posed to him during the interview. Secondly, it is incorrect to say that the accused is only taken to the lab against his will because he is in reality also injected with chemicals. The breaking of one's silence, at the time it is broken, is always technically 'voluntary.'[7]Similarly, it can be argued that after being subject to electric shocks, a subject 'quite voluntarily' divulges information. But the act or threat of violence is where the element of coercion is housed. In Narco Analysis, the drug contained in the syringe is the element of compulsion. The rest is technically voluntary.[8]

However, tests like Narco Analysis have immensely improved our investigating abilities. In today's world where crime is becoming increasingly high-tech and dangerous involving more weaponry and money, it is very important to keep in mind the necessity of the society at large and the need for proper investigation that may help keep our citizens safe as against the fear of 'possibly' infringing someone's constitutional rights. However, the drawbacks and faults found in it are hindering it's prospects of being utilized to full extent. Many questions are purposely asked in a manner that prompts incriminatory responses. As long as proper education and information regarding proper and fair conduction of these tests is not known and used by the law enforcement agencies, the Narco Analysis tests will continue to be opposed by the public.

In *Smt. Selvi and Ors* v *State of Karnataka*[9], Mr. G E Vahanvati , Solicitor General of India (and former Attorney General of India) said : *"Narco Analysis is required as a step in investigation. It forms an important basis for further investigation. It may lead to collection of evidence on the basis of what is said during such examination. Material evidence or documents obtained as a result of such examination can always be admissible as evidence."*

[6]*Dinesh Dalmia v State by SPE, CBI* 2006 Cri LJ 2401
[7]*Sriram Lakshman 'We need to talk about narco analysis' The Hindu (2 may 2007)*
[8] *ibid*
[9]*Smt. Selvi and Ors. v State of Karnataka* [2010] AIR 1974 (SC)

Narco Analysis *"is of particular relevance in the context of terrorist-related cases, conspiracy to commit murder and other serious offences, where the investigating agencies get vital leads for follow-up action."*

These tests were meant to assist the investigating agencies in finding out the truth. "If the statement recorded pursuant to the Narco Analysis tests by itself is not used against the person, then it cannot be said that he is being compelled to be a witness against himself."[10]

Therefore, it is seen that only incriminatory statements are hit by Art.20(3). Whether a statement is incriminatory or not will only be known once the test is completed and the statement had been said. If an incriminatory statement is uttered then it will simply not be used as evidence. In this way, the test can be successfully conducted without Art.20(3) ever being violated.

As of today, Narco Analysis tests are being successfully conducted after the necessary permissions from the accused as well as the magistrate are taken. However the debate on whether it is a constitutionally valid solution to solving crimes still rages on, and this situation will continue in every case that comes up till a concrete judgment is delivered by our judiciary. India's commitment to a well functioning criminal justice system can only be successfully shown once the central government makes a clear policy on the use of Narco Analysis.

Process of Narco Analysis

In the Narco Analysis test the mental status of a person is reduced to prevent him from telling lies. The steps prior to administering the Narco Analysis test are –

i. Permission for the test is obtained from the magistrate,
ii. Consent of the subject is recorded to satisfy the need of Art. 20(3) of the Constitution and that of Supreme Court directions that the subject is not being compelled to undergo the test.
iii. Fitness of the subject to undergo the test is checked by a general physician.

There are also a few other specifications that have to be followed while conducting the test, they are as follows.

[10]*'Vahanvati: narco analysis no violation of privacy' The Hindu (23 January 2008)*

The Room –

The test is carried out in an operation theatre so that in case there is a need for medical assistance, it can be provided. A general physician keeps a watch on the subject and an anesthetist administers the drug.

The Drug –

The drug used is usually one known as sodium pentothal in the form of 0.01 per cent solution in pure water. The dose is usually 0.25 to 0.50 gram and can even extend to 1 gram. Dose strength is the most critical part of the test. Excess dose can kill the subject and a lighter dose will not create the desired semi-conscious state. In such a case the subject may pretend to be in a trance without actually being so.[11]

The Examiner –

Prior to the test, a long interview is conducted where the Narco analyst, a forensic psychologist, familiarizes the subject with the various aspects of the test. The psychologist knows the aim of the interrogation and prepares a questionnaire before hand to extract the desired information from the subject. He takes over the subject once semi conscious state is achieved.

Narco Analysis involves a team of three people- the medical professional, the anesthetist and the forensic psychologist.

An imaging expert takes video and audio films of the answers given and he records all the other details of the test. The films so prepared are submitted to the courts along with the report or sent to the requisitioning authorities by the forensic psychologist.

However, Narco Analysis is based upon certain **Presumptions-**

i. The subject has not mixed the truth about the event with his imagination.
ii. He has not rationalized the events of the crime in his subconscious mind.
iii. He is not influenced by the media versions or by the versions of his family and friends.
iv. He has a sharp and long lasting memory and can recall the events even under the influence of the drugs.

[11]B.R. Sharma, *Forensic Science in Criminal Investigation and Trials (Universal, 2014) 1575*

v. The examiner is an unbiased competent expert and has framed non-suggestive questions which can elicit the correct information which is not based on his suggestions.

The failure of one or more of these presumptions has created a lot of controversy which is still ongoing. It questions the scientific nature of Narco Analysis which includes a margin of errors, recognized scientific principles and the recognized scientific fraternity. These controversies have time and again, adversely affected the utilization of Narco Analysis in the fight against crime. Decisions of the courts, which have failed to give a concrete answer to the validity of NarcoAnalysis have only worsened the matter.

Conclusion

As we can see, there are many problems currently in the process and administration of the Narco Analysis test. However, with more inputs and research these problems can be overcome and a decision can be reached. Narco Analysis can undoubtedly prove to be extremely vital to a case, under favorable conditions. It can help the investigator in many ways, including finding answers to important questions like whether the subject under scan is a criminal or a member of a gang, a sympathizer or is he an uninvolved innocent person.

Narco Analysis is still a new technique of investigation and there are no concrete rules as to how it should be used but this system of interrogation can provide for an effective alternative to the horrible methods of torture used in police stations today. Our justice system should be open to the changes and evolution in society and technology and employ these new revolutionary methods that help in solving crime.

Thus to sum up, Narco Analysis is not an end in itself but the means to an end. It has been successfully employed in the past to solve many cases and must be utilized in the same way in the future to unravel mysteries encompassing cases. Even though it is faced with numerous problems, it must still be employed wherever necessary as the results are merely indicative and not conclusive. But the material evidence or documents obtained as a result of such examination can be used as evidence. Therefore, it is indeed an indispensable step in investigations and should not be omitted as it would be instrumental in paving the way for further investigations and this in turn would help in the realization of the ultimate goal, that is, rendering smooth and speedy justice.

Evolution of Law on Live-In Relationships

-*Vivek Narayan*[*]

O'Regan, J. exponentially observed, "Marriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives, which they acknowledge obliges them to support one another, to live together and to be faithful to one another. Such relationships are of profound significance to the individuals concerned. But such relationships have more than personal significance at least in part because human beings are social beings whose humanity is expressed through their relationships with others. Entering into marriage therefore is to enter into a relationship that has public significance as well."[1]

These social institutions are undoubtedly important ones that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of a marriage, though done in numerous ways, gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function.

Living arrangements are becoming increasingly diverse and complex. A live-in relationship is an arrangement of living under which a couple who has not formally established itself as a couple through the institution of marriage, cohabits together for purposes like convenience, testing compatibility, or purely physical purposes. For whatever reason they live together, the *prima facie* point here is to emphasize the legal relations which arise during the course of such cohabitation and the consequences of such relationship.

There cannot be an exact classification of such kinds of relationships; a possible classification might be:

[*]III B.S.L LL.B.

[1]*Dawood and Anr. v. Minister of Home Affairs and Ors*, 2000 (3) SA 936 (CC)

1. Live-in Relationship by choice and live-in relationship by circumstance[2]
2. Live-in Relationship in the nature of marriage and live-in relationship not in the nature of marriage[3]
3. Live-in relationship and dating relationship

Legal rights and liabilities which arise on marriage would be easy to apply to a live-in relationship of the 2nd type, as will be proved below. But before we move on to scrutinizing the above-mentioned aspect, it is imperative to first understand the evolution of the institution of marriage, with special reference to the rights associated with marriage, since this will allow for a better comparative analysis between marriage and live-in relationships, and also help in tracing its roots.

Evolution of Institution of Marriage :

Marriage in ancient times consisted of daughters being disposed of by their fathers, who had unlimited power over them. Nature enjoins monogamy and all cultured nations practice it. The Orientals recognized polygamy, and hence despotism exists there. In the Middle Ages, morganatic or left-handed marriages prevailed, an intermediate state between concubinage and matrimony. It was the lawful union of a single man of noble birth with a woman of inferior station. The children and the wife had no claim to the title or property of the father and husband, but merely received a small allowance. Such union was indisputable, and the offspring was legitimate.[4] In this modern era a hybrid formula for the fast-paced world, for the satisfaction of the physical, mental, economic and social needs of the young, is the institution of the live-in relationship, recognized directly in some countries and indirectly through registration in many more. But internationally it has been accepted as an evolution of the institution of marriage- this may be seen by its inclusion in various laws by these countries.

[2] Prof Vijendra Kumar, 'Live-In Relationship : Impact on Marriage and Family Institutions', (2012) 4 SCC J-19

[3]*D. Velluswamy v. D Patchiammal*, AIR (2011)SC (479).

[4]Wm. Hardcastle Browne, 'The Law of Marriage and Divorce Source', The Yale Law Journal, Vol. 11, No. 7 (May, 1902), pg. 340-353

Marriage being the chief foundation on which the superstructure of society rests, presumption of marriage arising from cohabitation of spouses is a very strong presumption. Where a man and a woman lived together as a man and wife the law will presume until the contrary is proved that they were living together by virtue of legal marriage and not in concubinage.[5] The ways in which people organize their living arrangements are both causes and consequences of social and societal change. From times immemorial there has also existed the institution of concubinage.The evolution of the live-in relationship as an institution creates an interest in the former one as there are chances of confusing these two. Thus it becomes important to understand the essential difference between them. From the Roman era it has been believed,"Whether a given relationship is a marriage or not may therefore be privileged information. The will of both partners is needed to make a marriage; the lack of intention of one partner suffices to reduce the union to concubinage, conceivably unbeknownst to the other"[6] *Avaruddhastree*, as understood by *Vijnaneshwara*, included a *swarini* or adultress kept in concubinage.[7] Essentially living together means that they ought to have lived together for a considerably long period and the paramour visiting the place of the concubine cannot be considered as living together.[8]A live-inrelationship, though it cannot be said to be in the same genre/class as a marriage, is today a factum of life and which cannot be ignored.

Legal scenario

The concrete jurisprudence of this term was evolved from the case of *Lata Singh v. State of UP*[9] which involved a girl eloping with a person belonging to another caste and her brother seeking to harass the couple by malicious litigation. It was observed in *obiter* by the court that,*"There is no dispute that the petitioner is a major and was at all relevant times a major. Hence she is free to marry anyone she likes or live with anyone she likes. There is no bar to an inter-caste marriage under the*

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

[6] Susan Treggiari, 'Concubinage' Papers of the British School at Rome, Vol. 49 (1981), pg. 59-81

[7] *Ammireddi Rajagopal v. Ammireddi Seetharammam*, AIR 1965 SC 1970

[8] *SingaramVelayudha Udayar & Ors v. Subramanlam & Ors*, (1999) 3 CTC 136,

[9] *Lata Singh v. State of Uttar Pradesh*, AIR 2006 SC 2522

Hindu Marriage Act or any other law. Hence, we cannot see what offence was committed by the petitioner, her husband or her husband's relatives." After *S. R. Bommai's obiter* this has to be the next one which has given rise to a live-in-relationship jurisprudence. Until this case, there was no such clear stand taken by the court with respect to this issue; instead there were many conflicting opinions. It has to be noted here that the observation made by the Hon'ble court was not on the question of legality of live-in relationship,but was fundamentally that a major could freely live and marry with anyone. But it no where explains many other incidents which arise out of such a relationship. It also has to be noted that the judgment did not elaborate any explicit principle about the legality of such a relationship.

Though after *Lata Singh* the court debated this aspect in a myriad number of cases, the Supreme Court in *D.Velluswamy's* case has noted the essentials for a live-in relationship to qualify as a common law marriage and with this it has tried to equate it with the institution of marriage assisting the free flow of all the rights accruing through such an institution.

It was held that, *"In our opinion a 'relationship in the nature of marriage' is akin to a common law marriage. Common law marriages require that although not being formally married:*

(a) The couple must hold themselves out to society as being akin to spouses.

(b) They must be of legal age to marry.

(c) They must be otherwise qualified to enter into a legal marriage, including being unmarried.

(d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.

It further observed,*"Not all live-in relationships will amount to a relationship in the nature of marriage to get the benefit of the Act of 2005. To get such benefit the conditions mentioned by us above must be satisfied, and this has to be proved by evidence. If a man has a 'keep' who he maintains financially and uses mainly for sexual purpose and/or as a servant it would not, in our opinion, be a relationship in the nature of marriage"*[10]

[10] *D.Velluswamy v. D Patchiammal*, AIR 2011SC 479

Thus, with this in mind, the author would like to propose the following classification of live-in relationships:

a. Those in the nature of marriage

b. Those not in the nature of marriage (more similar to concubinage which is possible only when both are not married but have multiple relationships)

The abuse of this relationship was seen countrywide and also lead to a lot of false cases being filed against men. This complex institution of live-in relationships begins online and then couples commence living together, a physical relationship. A relationship which ended badly leads to the filing of criminal proceedings for offences punishable under Ss. 376, 417 and 506 of the Indian Penal Code[11] for vindictive purposes.

This situation necessitated clarifying the aspects of law when a live-in relationship would be conflicting with marriage laws. The Supreme Court in *Indra Sarma's* case was concerned with a 'live-in relationship' which, according to the aggrieved person, was a 'relationship in the nature of marriage'. It is that relationship which had been disrupted in the sense that the respondent had failed to maintain the aggrieved person, which, according to the appellant, amounted to 'domestic violence'.

The Court held that apart from the formal system of marriage present in most of the personal laws, the courts recognize a pivotal form of marriage known as *common law marriage* which pre-empts the presence of certain necessary facts which have been described above in *D.Velluswamy's* case. Further, the Court established the distinction between a relationship in the nature of marriage and a marital relationship. It held that, *"Relationship of marriage continues, notwithstanding the fact that there are differences of opinions, marital unrest etc., even if they are not sharing a household, being based in law. But a live-in-relationship is purely an arrangement between the parties unlike, a legal marriage. Once a party to a live-in-relationship determines that he/she does not wish to live in such a relationship, that relationship comes to an end. Further, in a relationship in the nature of marriage, the party*

[11] *Kunal Ganesh Padmakar. v. State of Maharashtra & Ors*, 2015 SCC Bombay 17

asserting the existence of the relationship, at any stage or at any point of time, must positively prove the existence of the identifying characteristics of that relationship."

It also laid out guidelines for testing under what circumstances a live-in relationship will fall within the expression 'relationship in the nature of marriage' under S. 2(f) of the Domestic Violence Act. The guidelines, of course, are not exhaustive, but will definitely give some insight into such relationships:

(1) Duration of period of relationship (2) Shared household (3) Pooling of Resources and Financial Arrangements (4) Domestic Arrangements (5) Sexual Relationship (6) Children (7) Socialization in Public (8) Intention and conduct of the parties.

It is observed that the law regulates relationships between people; it prescribes patterns of behavior and reflects the values of society; the role of the Court is to understand the purpose of law in society and to help the law achieve its purpose. It is to be noted that law of a society is a living organism and based on the given factual and social reality that is constantly changing, the law must change.[12] The need of the urban society in India which has resulted in a changed form of cohabitation was further strengthened when various High Courts have endorsed the view given by the Hon'ble Supreme Court and have tried to stop the misuse of the law by rightly holding that it cannot be used to file false criminal cases against the other partner. Thus, the Supreme Court has given certain amount of validity to this institution, assisting thereby in smooth societal evolution.

[12] *Badshah v. Sou. Urmila Badshah Godse*, 2014 (1) SCC 188

Revisiting Minor's Contractual Incapacity : An E-Commerce Perspective

*Gauri Shidhaye, Ba. Dhaarani**

Introduction

The position of law in most jurisdictions provides that a minor is not competent to contract. However, as minors have an easy access to technology the likelihood of a minor transacting through e-commerce, has increased. It is also difficult to verify the identity of the "contracting minor" in online transaction. This has created difficulties which are peculiar to e-commerce. Some of these difficulties revolve around the validity and enforcement of a minor's e-contract. For instance, specific concerns arising from electronic transactions by minors, were raised in the U.S. cases of *In re Apple in-app purchase litigation*[1]and *Facebook*[2]. In these cases, the companies entered into a contract with the minor's parents, which subsequently led to several inbuilt contracts with the minor based on the parents' stored credit card details.

Therefore, this article analyses the international cases involving enforceability of minor's electronic contracts and explores the possibilities in the Indian scenario, in light of existing precedents. It is argued that the rule of minor's incapacity will hold true in India, in spite of the peculiarities of e-commerce.

General Position of Indian law as to Minor's contractual capacity

S.10 of the Indian Contract Act,1872 provides that the parties must be competent to enter into a contract. S.11 defines the competency of parties and provides that minors are incompetent to contract. The landmark case on minor's incapacity, *Mohori Bibee v Dharmodas Ghose*[3], emphasised that the minor's contracts are *void ab initio*.

In Indian law, a contract, within the competence of the minor's guardian entered into for the benefit of the minor will be valid, generally providing an option of avoidance to the minor, after gaining

* IV BSL LL.B

[1]*In re Apple In-App purchase litigation* Case No. 5:11-CV-01758-EJD

[2]*I.B. v Facebook Inc* Case No. 12-cv-01894-BLF (N.D. Cal. Mar 10, 2015)

[3]*Mohori Bibee v Dharmodas Ghose* [1902-03] 30 IA 114: ILR [1903] 30 Cal 539 (PC).

majority. A minor can enforce a contract which is of some benefit to him and under which he is required to bear no obligation. Also S.68 of the Indian Contract Act provides that a person, who supplies necessaries to a person incapable of contracting, is entitled to be reimbursed through the property of the incapable person.

Arguments for reconsidering the rule of minor's incapacity in e- commerce

The position of Indian law clearly provides that a minor's contracts are void ab initio. This position has to be examined in light of emerging technology.

The rule of minor's incapacity has been criticized by American jurists.[4]The veracity of such critiques becomes more apparent in light of the prevalence of electronic commerce.[5] It is argued that minors are not only techno-savvy, but more proficient with online devices than many adults. Indeed, in many cases it may be the minor who is preying on unsuspecting, less-technologically savvy persons.[6] Therefore the traditional rule of "minor's incapacity" would allow them to wreak havoc on the e-commerce system.[7]

It is also argued that techno-savvy minors are not only able to understand the consequences of terms of use but also attempt to circumvent them. For example, Facebook has admitted that it removes twenty thousand minors a day for misrepresenting their ages.[8] Besides it is practically difficult for merchants to verify the age of the online transacting party. The veil of the web not only prevents online retailers from using visual and aural cues, but deprives them of the opportunity of personally verifying the age proof supplied by minors. As a result, if merchants see the risk of contracting with minors as outweighing

[4]JuandaLowder Daniel, 'Virtually Mature: Examining the Policy of Minors' Incapacity to Contract Through the Cyberscope'.(2008) 43GONZ. L. REV. 239,<http://www.law.gonzaga.edu/lawreview/2008/03/10/virtually-mature-examining-the-policy-of-minors-incapacity-to-contract-through-the-cyberscope/> accessed 20 February 2016.

[5]*ibid*

[6] Larry A. DiMatteo, 'Deconstructing the Myth of the "Infancy Law Doctrine ": From Incapacity to Accountability', (1994) 21 OHIO N.U. L. REV. 481, 485.

[7]Robert G. Edge, 'Voidability of Minors' Contracts: A Feudal Doctrine in a Modern Economy', (1967)1 Ga. L. Rev. 231.

[8]Chang James and Alemi Farnaz, 'Gaming the System: A Critique of Minors' Privilege to Disaffirm Online Contracts' June 2012UC Vol.2 Issue 2Irvine Law Review. <www.law.uci.edu/lawreview/vol2/no2/chang_alemi.pdf> accessed 20 February 2016.

the benefits of engaging in e-commerce,they will have little incentive to fully immerse in the electronic transaction setting. [9]Thus, society will lose the convenience of this technology.[10] The critics of the "doctrine of incapacity" also highlight the need to distinguish between minors and adolescents in cyberspace. Therefore in light of the growth of minor's involvement in e-commerce activities; it is argued that the rule of minor's incapacity is not applicable.

Arguments in favour of perpetuating the rule of minor's incapacity

On the other hand, it is also argued that minors need protection from contractual liability, in light of increased electronic transactions. Mostly arguments in favour of protection of minors relate to the unlevelled playing field between children and major corporations. It is argued that the defence of minority is an essential safeguard when minors possess unequal bargaining powers.

A novel argument revolves around the fact that minors are also heavily involved in generating intellectual property online. Thus the contract law needs to protect minors who may inadvertently transact "intellectual property" online.

Judicial position on enforceability of minor's agreements in e-commerce

There are no judgements in India that determine the enforceability of minor's online contracts. The Delhi High Court in 2013 had asked the Union government to explain how it was allowing children below 18 years to open accounts in social networking sites such as Facebook and Google.[11] This was done in response to public interest litigation. The petitioner's advocate stated that the agreements entered into by minors with the sites were against the Indian Majority Act, the Indian Contract Act and the Information Technology Act.[12]The issue of minor's contractual incapacity was not discussed in the verdict. However the U.S law may provide guidance regarding the enforceability of minors' online agreements.

[9]*Supra note 4*
[10]*Supra note 4*
[11]IANS, 'Facebook not for kids-below 13 years, rules Delhi Court' India Today (New Delhi, 17 July 2013) <http://indiatoday.intoday.in/story/Facebook-not-for-kids-below-13-years-rules-delhi-court/1/291689.html> accessed 20 February 2016
[12]*ibid*

I] Enforcing Contractual terms on a minor

The judicial treatment in the United States validates online transactions entered into by minors. In the case of *A.V. v. Paradigms*[13] , high school students had to accept a click wrap agreement from Turnitin-anti-plagiarism program, for submitting their school work. The terms of use necessitated that the students' papers become a part of the Turnitin's database. However the students included a disclaimer on the face of the documents indicating that they did not consent to Turnitin's archiving of the work.[14] Nevertheless, Turnitin archived the work, and the students brought an action for copyright infringement.[15]The plaintiffs' infancy defence, was not accepted as, the court found that the minors had retained the benefit of the contract.

In a similar case of *EKD v Facebook*[16], the minor plaintiffs challenged one of Facebook's advertising services known as "sponsored stories". A sponsored story is a form of paid advertisement that appears on a Facebook.com user's profile page and that generally consists of another friend's name, profile picture, and an assertion that the person "likes" the advertiser.[17] The plaintiffs alleged that Facebook was misappropriating their names and likenesses for commercial endorsements. The defendant argued that the minors had created a Facebook account and accepted its terms of service (TOS). The district court of Illinois, thereafter upheld the forum selection clause in Facebook's TOS and transferred the case to the District court of California. Thereafter the district court of California also upheld the validity of the forum selection clause, when it was questioned before it. The district court of California stated that as plaintiffs have used and continued to use Facebook.com, they cannot disaffirm the forum-selection clause in Facebook's TOS. The court relied on the principle that the infancy defence may not be used inequitably to retain the benefits of a contract and avoid the obligations. However this case introduces a new loophole when it uses the term, "continued use". Thus it can be utilised to interpret the fact that the minors can avoid a contract when they "discontinue" the use.

[13]*A.V. v. Paradigms Co.*, 544 F. Supp. 2d 473 (E.D. Va. 2008).
[14]*ibid*
[15]*ibid*
[16]*EKD v Facebook* Case No: 3:11-cv-00461-GPM
[17]*ibid*

The reliance on "restitutio in integrum" in the U.S. cases, will not apply in the Indian context. In Indian Contract Law, a minor's contract is *void ab initio*. *Raj Rani v. Prem Adib*[18] reiterated that a minor's promise to act was no consideration as a minor cannot be a promisor, in law. Thus the personal agreement of a minor to share his intellectual property or photographs would be unenforceable in Indian law.

II] Enforcing payment for a consideration enjoyed by a minor

In the famous authority of *Leslie (R) Ltd v. Sheill*[19], it was held that an attempt to recover the money that the minor had procured through fraud was a roundabout way of enforcing the contract; which could not be permitted. However, as accepted in *Mohori Bibee v. Dharmodas Ghosh*[20]; an infant, who invokes the aid of the court for the cancellation of his contract, may be granted relief subject to the condition that he shall restore all the benefits obtained by him under the contract, or make suitable compensation. The position of Indian authorities, as summarised by Subbarao C.J[21] provides, "that a person, who has parted with his goods can trace them back into the hands of the quondam minor and recover them back in specie. But he cannot seek to recover their price or damages, for, if allowed to do so, the court would be enforcing the contract of loan." A party at loss may, however, receive compensatory relief under S.33 of the Specific Relief Act 1963. Thus as minors' contracts are void "ab initio" in Indian law, an action for payment, which amounts to enforcing contractual terms on the minor will fail.

However a person who supplies minor's necessaries is liable to be reimbursed through the minor's estate, according to S.8 of the Indian Contract Act. In the era of digitalisation defining "necessaries" is a crucial question. It may also be argued that Facebook is a necessity. Thus it would be interesting to observe the development of the concept of "necessaries".

III] Refund to minors

Rarely does a situation arise, wherein e-commerce websites have to pursue a minor to enforce the payment for their consideration. Many

[18] *Raj Rani v. Prem Adib* [1949] 51 BOMLR 256
[19] *Leslie (R) Ltd v. Sheill* [1914] 3 KB 607, 618: [1914-15] All ER Rep 511 (CA).
[20] *Supra note 3*
[21] *Gokedab Latcharao v Viswariadham Bhimayya*, AIR 1956 AP 182.

of the e-commerce portals immediately receive payments after the minor has transacted through his parents' credit card. Therefore the issue that arises for consideration is the minors' right to refund after entering into an online transaction. The principle of inequitable retention of benefit by the minor may be relied upon to deny the minors any refund for the products or services procured through e-commerce. The cases of *I.B. v Facebook Inc*[22] and *In re Apple In-App purchase litigation* [23]case revolve around the refund sought by parents for the online purchases made by the minors using their parents' credit card.

In re Apple In-App purchase litigation case, the parents downloaded free or nominal gaming apps and gave them to their kids. However they were unaware that the children could purchase in-app virtual currency for a period of 15 minutes after the authentic password was entered. In this fifteen minute duration, the kids allegedly rang up bills (ranging from $99.99 to $338.72 "at a time").[24]

The parents argued that each in-app purchase was a separate and voidable contract with a minor that may be disaffirmed by the parent or guardian. However Apple argued that although the minors purchased the apps, the relevant contract was the terms of service in place between the parents and Apple, which was a binding agreement.

The court allowed the parents class action suit for restitution of payments. However the court did not finally decide, the perplexing contractual issue, as a settlement was arrived at between Apple and plaintiffs. The district court of California, observed an interesting contract law issue, noting Apple's argument that a contract cannot exist where an offer is made to one party (the parents) but is accepted by another party (their children) and the consideration is supplied by the original offeree (the parents).[25] However the court did not decide this issue.

[22] *I.B. v Facebook Inc* Case No. 12-cv-01894-BLF (N.D. Cal. Mar 10, 2015)
[23] *In re Apple In-App purchase litigation* Case No. 5:11-CV-01758-EJD
[24] Balasubramani Venkat, 'Parents' lawsuit against Apple for In-App Purchases by minor children moves forward — In re Apple In-App Purchase Litigation.' (Technology and Marketing Law Blog, 11 April 2012) <http://blog.ericgoldman.org/archives/2012/04/parents_lawsuit.htm> accessed 20 February 2016.
[25] *ibid*

The *Facebook* case also concerned a class action suit, wherein minors made unauthorised purchases through their parents' credit cards. One of the minor plaintiffs was allowed by his mother to buy a game called, "Ninja Saga"; using her credit card. Subsequently the minor continued to make in-game purchases through virtual currency; unaware of the fact that Facebook had stored his mother's credit card details. Eventually the in-game purchases were charged on the mother's card. In this case the court allowed the motion for an injunction to restrain Facebook from pursuing its in-game purchase policy. However a class action motion for restitution and monetary payment was denied. Thus it is unlikely that the arrival of the final verdict in the *Facebook* case, would clarify the law regarding minor's right to refund in online transaction.

The law in India in this regard is guided by the principle of the well known English precedent of *Valentini v. Canali*.[26] In this case the minor plaintiff occupied the defendant's house and used his furniture for some months and then brought an action for refund of the consideration paid by him. The court while denying the refund noted that the minor could not give back the benefit or replace the defendant in his pre-contractual position. Thus allowing him refund would be sanctioning blatant injustice under the garb of minor's protection.

It is true that a minor cannot be allowed to enjoy a ride in an amusement park or play a game of "Candy Crush" on his I-pad and seek refund of the payments made. However the *Facebook* and *Apple* cases, concern misleading transactions entered with the minor's parents through the minor. Even if it is argued that these transactions are entered into by the minors themselves, it is undoubted that the minors are misguided into believing that their in-app purchases, do not incur additional payments. For dealing with cases such as these, the law provides minors immunity for liability in contracts. It would be ironic, if the emerging law, as reflected by the US cases, validates minors' online transactions.

Conclusion

The change in transacting technology hasn't transformed the position of law regarding minor's incapacity. However law needs to resolve certain grey areas of electronic transactions. In conclusion, the current

[26] *Valentini v Canali* [1889] 24 QBD 166: [1886-90] All ER Rep 883: 59 LJ QB 74.

position of international law and the predicted Indian consequences can be summarised through these illustrations:

1. If a minor buys a "movie" online and the website refuses to allow the download: If there is no agreement to contrary, the website will be bound by the contract, as a minor can be a valid promisee and enforce a contract if the consideration has been paid.
2. If a minor agrees to the terms of use of Facebook, which include the copyright of facebook over poetry posted by the minor: The contract with Face book will be void and Facebook cannot enforce their copyright over the minor's poetry.
3. Minor downloads academic software and refuses to pay for it: The minor will have to return the software or restore the benefit obtained by him. In case the software is a necessity, the minor's estate will be liable.
4. The minor finished attending a series of virtual dance lessons, after paying for them through his parents' credit card. The minor now seeks a refund: The minor cannot ask for refund, as the benefit has been enjoyed.
5. The parent purchases a "Ninja game" and enters his credit card details for the purchase. Thereafter, a minor buys weapons for his Ninja in the online game, through gaming currency. He is unaware that his parents' credit card details were stored and are being charged. : There are no Indian judicial pronouncements in this regard. However these transactions are liable to be voided on account of minor's incapacity under S.11 of the Indian Contract Act, 1872 or misrepresentation by the e-commerce companies under S.19 of the Indian Contract Act, 1872.

The abovementioned illustrations perpetuate the principle of a minor's incapacity by providing that a minor's contract is unenforceable. However a minor cannot retain the benefit of the contract and also seek a refund. Thus minority has to be protected while preventing gross injustice to the seller. The age of e-commerce has created peculiar circumstances, wherein transactions are entered into with the minors under the garb of transacting with their parents. It is recommended that the courts test the 'effect' of such transactions, to ensure that the technological changes do not hamper the legal protection of minor's interest.

Enforcement of Foreign Awards in India: Patent Illegality

Shubham Kumar Sharma[*], *Pabitra Dutta*[#]

The bedrock of any arbitration structure is that the awards rendered are final and not subject to challenge before the courts unless extenuating circumstances arise. In this respect, the UNCITRAL Model Law[1] provides for minimal curial intervention, stipulating that:

> *"[i]n matters governed by this Law, no court shall intervene except where so provided in this Law".*

As a result, the grounds upon which a court may set aside an award or refuse to recognize and enforce the same are limited. Art. 34 of the Model Law and Art. V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards provide the restrictive grounds for such relief.

It is pertinent to state here an important point of distinction between a domestic award and a foreign award. For the sake of brevity, an arbitral award under Part I of the Arbitration and Conciliation Act, 1996 (henceforth referred to as the 'Act') is considered a domestic award[2] and an arbitral award on differences arising between persons of a legal relationship in pursuance of a written arbitration agreement as set forth in the schedule of New York Convention or the territories to which the Convention applies is a foreign award[3].A domestic award may be enforced as a decree of court once it has become final[4]. However, in case of foreign awards, a decree of court must be obtained before the award can be enforced[5]. A difference between both the awards is that a Court may only refuse enforcement of a foreign award but cannot set aside the same while it may do both for a domestic award.

[*]IV B.S.L. LL.B.
[#]V B. S.L. LL.B.
[1]Art. 5.
[2] S.2 (7) of the Act.
[3] S. 44 of the Act.
[4] S. 36 of the Act.
[5] S. 48 of the Act.

The grounds for refusal of enforcement of a foreign award are:

1. The subject matter of difference is not capable of settlement by arbitration under the laws of India.
2. That,it would be contrary to the public policy of India.

It is the facet of "public policy of India" stipulated under the Act that this article seeks to shed light upon.

Public Policy of India

The first opportunity to define the scope of the public policy of India came before the Supreme Court in 1993 in the case of *Renusagar Power Company Ltd. v. General Electric Co*[6]. While giving a narrow interpretation to the same, the Court held that:

> *"Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense that doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to:*
>
> *(i) fundamental policy of Indian law; or*
>
> *(ii) the interests of India; or*
>
> *(iii) justice or morality."*

Thus these three criteria were laid down by the Court for refusing enforcement of a foreign award on the grounds of public policy under the Foreign Awards Act, 1961. Following the judgment in *Renusagar Power Company Ltd.*, the doctrine of public policy was further developed by the Apex Court in the case of *ONGC v. Saw Pipes*[7]wherein it considered the question of 'patent illegality' in determining public policy and held that Courts may set aside an arbitral award if it is opposed to public policy. This is in addition to the usual grounds for setting aside an arbitral award under Art. 34 of the Model Law or Art. V of the New York Convention. However,

[6][1994] SC 860 (AIR).
[7][2003] 2 SC 5 (Arb.LR).

the concept of 'patent illegality' only applies to arbitrations under Part I of the Act, that is domestic arbitrations and international arbitrations with their seat in India.

Doctrine of Patent Illegality

The Doctrine of Patent illegality was elucidated by the Apex Court in *Oil and Natural Gas Corporation Ltd.v. Saw Pipes Ltd*[8].While considering the scope of public policy elucidated in the *Renusagar Power Company*[9] case, the Court laid down additional grounds for setting aside an arbitral award under S. 34 of the Act. The Court held that the term 'public policy of India' requires to be given a wider meaning and that public policy connotes some matter which concerns public good.

It is pertinent to point out here that what is for public good or public interest is not a static concept. The same varies from time to time and can only be determined on a case to case basis. However, the Court evolved the concept of 'patent illegality' as an additional ground for setting aside an award on the ground of public policy further to the three grounds laid down in *Renusagar Power Company* case. The Apex Court reasoned that where an award is patently in violation of statutory provisions, it cannot be said to be in public interest and is likely to adversely affect the administration of justice. In conclusion, the Court held that:

"An award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality, or

(d) in addition, if it is patently illegal."

In summary, an Award can be set aside on the ground of patent illegality if it is so unfair and unreasonable that it shocks the conscience of the Court and is required to be judged void. However, the illegality must go to the root of the matter and should not be merely superficial.

The principle was reiterated with respect to only domestic awards.

[8] *supra 7.*
[9] *supra 6.*

Patent Illegality in Foreign Awards

In summary, the qualifications elucidated through the ratio of the above cases on patent illegality are:

1. Suffers from an illegality that goes to the root of the matter and is not of trivial nature; or
2. Is so unfair and unjust so as to shock the conscience of the court.

However, rejecting the constricted interpretation given in *Renusagar Power Company* case and building upon the wider interpretation in *ONGC v Saw Pipes Ltd.*, the Apex Court held in *Phulchand Exports Ltd v. OOO Patriot*[10] that even foreign awards must satisfy the test of patent illegality before they can be enforced. It is therefore necessary to discuss the case in brief.

The Appellant being an Indian company challenged an award of the International Court of Commercial Arbitration at the Chamber of Commerce and Industry of the Russian Federation, Moscow after the former ruled in favor of the Respondent, a Russian company. The Appellant and the Respondent had entered into a contract through which the appellant had undertaken to supply a specific quantity of polished rice to the Respondent in Russia. The respondent paid the consideration in advance, but the goods did not reach in time. Being aggrieved of the same, the Respondent filed a claim in the Russian Arbitral Tribunal. Subsequently, the respondent filed a petition before the Bombay High Court for enforcement which was met with a challenge on its enforceability as it was 'against public policy'. The single judge bench while rejecting the same held that the same may be enforced as a decree. The appellant then preferred an appeal before the Supreme Court arguing that the wider meaning attributed by the Supreme Court in *Saw Pipes* to the definition of 'public policy' in the context of setting aside a domestic award should also be applied to the definition of the same expression for foreign award.The Supreme Court finally held that a foreign award may be set aside if it is patently illegal. Though on the merits, the Court dismissed the appeal.

This position was further cemented in *Bhatia International v Bulk Trading*[11]*and Venture Global*

[10] [2011] 10 SC 300 (SCC).
[11] [2002] 4 SC105 (SCC).

Engineering v Satyam Computer Services Ltd[12],wherein the Court set aside an arbitral award on the ground of patent illegality. The former raised eyebrows within the arbitration community because it gave the Indian courts an opportunity to intervene in a foreign award as if it were an Indian award. In the latter case, the Supreme Court set aside a London LCIA award on the same ground by holding that since the shares of the company are situated in India, the law to be followed for executing the award shall be validated on the touchstone of public policy as per Indian Law as laid down in *Saw Pipes*.

After these judgments the air among the foreign investors was that of fear of being involved into lengthy and expensive litigation in case of a breach and to have a substantive knowledge of the Indian laws. This was particularly so in respect of the concept of *"patent illegality"* under Indian law, allowing arbitration awards to be set aside on the basis of an error of law. Moreover, the application of S. 34 of Part I of the Act to foreign awards creates a scenario wherein a person seeking to enforce an award must first not only file an application for enforcement under S. 48 of the Act but also meet an application under S. 34 of the Act seeking to set aside the award.

In 2012, the Supreme Court delivered its long awaited decision in *Bharat Aluminium Co. v Kaiser Aluminium Technical Services Inc*[13]and it became another milestone on the topic of public policy. This case is significant in as much as it overrules its earlier decision of which extended the scope of Part I of the Act to foreign arbitrations.

This decision reverses the previous position by holding that Part I of the Act does not apply to arbitrations held outside of India and consequently also that the courts would not be able to render interim or interlocutory relief in assistance of foreign arbitral proceedings as the same fell under Part I.It is important to note that the court did not go as far as to decide that patent illegality was irrelevant to any challenge of an arbitral award. A distinction was drawn between a challenge of a foreign award (refusal of recognition and enforcement) and a challenge of a domestic arbitration award or an international arbitration award where the seat was in India.

[12] [2008] 4 SC 190 (SCC).
[13]CA No. 7019/ 2005 SC

Following *Bharat Aluminium*[14], the Supreme Court has continued to manifest a pro-arbitration and pro-enforcement policy. This decision confirms that parties contemplating arbitration in India face a dilemma. If the seat is in India, parties will have the benefit of the court's assistance in granting interim relief. However, parties also face an expended inquiry into the merits of the Indian award on the pedestal of doctrine of patent illegality. If parties choose to have their arbitrations seated outside India, they may not get the assistance of the Indian courts with respect to interim relief but do not face any appeal on the merits of the award obtained. Fortunately, this predicament was reduced by the Supreme Court by over-ruling the *Phoolchand*[15] judgment in *Shri Lal Mahal Ltd. v. Progetto Grano Spa*[16]. The case has to be discussed at great lengths to get a drift of what the Court has actually said.

Progetto, the Respondents, obtained two GAFTA (Grand and Feed Trade Association) arbitration awards in its favour against the Appellant, Shri Lal Mahal Ltd who were the contractual seller of the grains in question. The awards were made on the basis that the sold grains plainly did not conform to contractual specifications. This was notwithstanding that the contractually appointed certification body had certified the wheat as conforming to specifications. Thereby, the Appellant sought to set aside the awards in London where the arbitration was seated, but failed. The Respondents then sought to enforce the awards in the Delhi High Court and succeeded which was appealed by the Appellant.

The Appellants argued that the Court was within its rights to refuse an arbitral award if it was patently illegal and it was contrary to the terms of the Contract. They relied upon *Saw Pipes* and *Phulchand*, to assert the same.They contended that the expansive construction given to the anecdote 'public policy in India' should also be given here.The Respondents however cited the *Renusagar* case, stating that the scope of the above anecdote was wider in S. 34 of the Act as compared to S. 48(2).

[14]*ibid.*
[15]*supra 11.*
[16]CA No. 5085/2013 SC

The Apex Court in this case was alive to the subtle distinction in the concept of 'enforcement of the award' and 'jurisdiction of the court in setting aside the award'. The Court held that in *Saw Pipes* the term 'public policy' in S. 34 was required to be interpreted in the context of the jurisdiction of the Court. Under S. 34, the validity of the award is challenged before it becomes final. This is in distinction to the enforcement of an award which is already final. The Court held that:

"Having that distinction in view, with regard to Section 34, this Court said that the expression "public policy of India" was required to be given a wider meaning. Accordingly, for the purposes of Section 34, this Court added a new category – patent illegality – for setting aside the award".

The Apex Court held that in case of S. 48, the position in *Renusagar* case must apply to the ambit and scope. While building upon this distinction, the Court noted that the scope of enquiry under S. 48 is not the same as that under S. 34 and S. 48 does not permit review of foreign awards on merits.

The Court further held that:

"While considering the enforceability of foreign awards, the court does not exercise appellate jurisdiction over the foreign award nor does it enquire as to whether, while rendering foreign award, some error has been committed. Under Section 48(2)(b) the enforcement of a foreign award can be refused only if such enforcement is found to be contrary to (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality".

In conclusion, the Court found no reason to overturn the decision and reinstated the position as per *Renusagar* with respect to foreign awards and the wider import as per *Saw Pipes* ceased to exist.

Public Policy: Arbitration and Conciliation (Amendment) Act, 2015

The discourse on 'public policy' and it's relation with foreign awards in India took a positive turn with the enactment of The Arbitration and Conciliation (Amendment) Act, 2015 which was passed by the Rajya Sabha on December 23, 2015. The scope of this paper is confined to the unruly horse of 'public policy' and hence the varying implications of the amendment are not discussed. The Act adds two Explanations to S.48 of the Arbitration & Conciliation Act, 1996 which lay down the tests of public policy in India. The Act now lays down that an award is in conflict with the public policy of India only if:

"(i) the making of the award was induced or affected by fraud or corruption or was in violation of S.75 or S.81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice"

The Act further lays down that what is in contravention with the fundamental policy of Indian Law shall not entail a review on the merits of the dispute. The legislature seems to have been alive to the view held by the Apex Court in *Shri Lal Mahal*[17] case on the distinction between the jurisdictions of the Court in enforcing an award and jurisdiction of the Court in setting aside an award. Accordingly, the Amendment does away with the need of going in to the merits of an award. The authors opine that this should settle the discourse on 'public policy' and 'patent illegality' with respect to enforceability of foreign arbitral awards in India.

Conclusion

The primary advantage of International Commercial Arbitration is that it rules out the jurisdiction of local laws and allows ascertainment of the rules applicable. The New York Convention further seeks to guarantee the enforcement of such awards.

The Supreme Court's wide interpretation of the term 'public policy' and the evolving doctrine of 'patent illegality' sent a hostile message to the foreign investors. In essence, the judgments meant that it was inadvisable to enter into any arbitration agreement that had its seat in India. Moreover, the judicial authority given to Courts in interpreting the term 'public policy' lent too much uncertainty to the enforceability of awards in India. In cases where an Indian party was in default of a contract and it was liable to pay penalty in lieu of the same, enforcing such a penalty would mean outflow of foreign exchange from the country and cause further harm to the Exchequer.

By this logic, all contracts harm 'public policy' and are against the interest of India! It is therefore no surprise that India ranks 178 out of 189 countries when it comes to Contract Enforcement in the *Ease of Doing Business* rankings issued by the World Bank.

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[17] *ibid*

From *Renusagar*[18] to *Shri Lal Mahal*[19], the journey has been a tumultuous one, but one can surely hope for a brighter future. While the Arbitration and Conciliation (Amendment) Act, 2015 has laid down a pro-arbitration beacon for the Alternative Dispute Resolution scene in India, the attitude of the judiciary is yet to be seen in light of this amendment.

Justice Burroughs once described 'public policy' as an unruly horse; when once you get astride it, you never know where it will carry you.

[1]*supra 6.*
[2]*supra16.*

GIFT City- Regulatory Provisions

Prerna Ranjan[*]

Gujarat International Financial Tech-City Company Limited, more popularly known as the GIFT City, is an ambitious project undertaken by the Government of Gujarat to construct a Central Business District in India. It aims to establish a global financial and IT services hub equipped with all modern technologies, innovations and developments. A Finance SEZ will be set up in it which will generate additional economic activity, promote export of goods and services, create employment opportunities, encourage foreign and domestic investment and develop infrastructure.

In 2007, the Percy Mistry Committee Report for the first time explored the idea of establishing an International Financial Centre in India. It said that for the effective establishment of an international financial centre, basic reform of finance regulations was a must.[1]Regulatory authorities such as the Department of Commerce, Reserve Bank of India, Securities and Exchange Board of India and Insurance Regulatory and Development Authority of India were asked to prepare the regulatory frameworks for IFSC.

Problems Currently Being Faced by Companies in India

In India, because of various capital account restrictions, financial regulations, uncertainty of taxation, urban governance and complexity of rules, no city is capable of measuring up to the mark of other Financial Hubs in the global market.The existing system of regulations is very restrictive and prohibits some of those transactions which are regularly carried out internationally.The main reasons that companies do not want to establish business in India are the high rate of taxes, lengthy procedures, numerous compliances, the absence of a speedy dispute resolution mechanism, capital control issues etc. But now, because of the Special Economic Zones Act, all these constraints are being liberalised for the units in an SEZ. This encourages international business corporations to start their activities in India.

[*] IV B.S.L. L.L.B
[1] Puja Mehra, 'Financial SEZs: Move for Capital A/c convertibility', (The Hindu, 23 March 2015) <http://www.thehindu.com/business/financial-sezs-move-for-capital-ac-convertibility/article7024841.ece> last accessed 20th March 2016

Also, in India, financial institutions are scattered which makes it very difficult for them to work together for collective development. Firms find it hard to grow and prosper here due to the lack of quality infrastructure. The GIFT SEZ will be providing world class facilities to the firms and since various types of financial institutions will be situated at the same place it will make it easier for them to coordinate and work together. The aim of this article is to explore the steps taken by the Government and to analyse the regulatory provisions issued by it to facilitate the doing of business in the GIFT SEZ. Mentioned below are the regulations issued specially for units in an International Financial Services Centre.

International Financial Services Centre

The Special Economic Zones Act of 2005 governs the establishment and regulation of the Special Economic Zones within the territory of India. Several incentives are given to the corporations established in these Zones like fiscal benefits, regulatory freedom and supportive infrastructure. The Special Economic Zones Act, 2005 defines an International Financial Services Centre as a Financial Centre which has been approved and established according to the requirements mentioned by the Central Government under S. 18(1) of the same Act.[2]Units in a Finance SEZ may be set up and approved in accordance with the Special Economic Zones Rules, 2006 and Insurance Regulatory and Development Authority of India (Regulation of Insurance Business in Special Economic Zone) Rules, 2015. GIFT SEZ is India's first IFSC. It aspires to cater to India's large financial services potential by offering global firms a world-class infrastructure and facilities. It aims to attract the top talent in the country by providing the finest quality of life.

Provisions in the Special Economic Zones Act, 2005

An SEZ is to be treated as a foreign territory. A Unit within an SEZ may include an existing unit, an offshore banking unit, a unit set up in an International Financial Services Centre etc.

The facilities offered to the units in an SEZ include100% Income Tax exemption on export income for first 5 years and 50% for next 5 years, exemption from minimum alternate tax, an exemption from Central

[2] The Special Economic Zones Act 2005, S. 2(q)

Sales Tax, Service Tax and other State level taxes and levies. They can raise money through external commercial borrowing of upto US $ 500 million in a year without any maturity restriction. Also, there is single window clearance for Central and State level approvals.[3]

Before, the taxes and duties were a major hindrance and there were too many formalities to be carried out, which led to delay and consequently, companies had to spend a lot of money. Owing to the incentives mentioned under the SEZ Act, foreign business corporations who would have otherwise avoided setting up their units in India are now willing to start their businesses in these SEZs.

Regulations of Securities and Exchange Board of India

SEBI, in exercise of the power conferred on it by the Department of Economic Affairs of the Ministry of Finance, has come out with Securities and Exchange Board of India (International Financial Services Centres) Guidelines, 2015. These guidelines are designed to facilitate and regulate financial services relating to securities market in an IFSC.

According to these guidelines, any recognised Indian or foreign stock exchange may form a subsidiary, any recognised Indian or foreign clearing corporation may form a subsidiary and any Indian registered depository or any regulated depository of a foreign jurisdiction may form a subsidiary in an IFSC. Presently, the biggest disincentive, for stock exchanges and depositories, is the requirement that they should transfer 25%of their profits each year to Funds of Clearing Corporations and Investor Protection Fund, respectively. The guidelines have done away with this.[4]Thus, stock exchanges and depositories setting up their units in GIFT City will not be required to comply with the requirements which apply to other parts of the country and this will make it easy and trouble free for them to carry on their operations.

For the issue of depository receipts, the regulation says that a company of foreign jurisdiction wanting to raise capital in a currency other

[3]Ministry of Commerce and Industry, Department of Commerce, Special Economic Zones in India, Facilities and Incentives<http://www.sezindia.nic.in/about-fi.asp>, last accessed 15 February 2016

[4]Securities and Exchange Board of India (International Financial Services Centres) Guidelines (2015) Chapter II Clause 6 <http://www.sebi.gov.in/cms/sebi_data/attachdocs/1427450911533.pdf>last accessed 15 February 2016

than the Indian Rupee has to comply with the provisions of the Companies Act, 2013 and SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009.[5]

The Board may relax certain conditions, with regard to the listing agreement, in respect of debt securities issued under these guidelines if the securities of the issuer are already listed on some stock exchange.GIFT SEZ will help establish a prospering securities and capital market where transactions can be carried out without much hassle and which willultimately contribute to the GDP growth of the country.

Regulations of Reserve Bank of India

The Reserve Bank of India has issued a notification, on 2nd March 2015, in the exercise of power conferred on it by S. 47 of the Foreign Exchange Management Act. By this notification it has framed guidelines for setting up financial institutions in an IFSC. These are the Foreign Exchange Management (International Financial Service Centre) Regulations, 2015.As per this notification, any financial institution or its branch set up in an IFSC and recognised by the Government of India or any Regulatory Authority shall be treated as a person resident outside India and they shall conduct business in such foreign currency and with such persons as may be determined by the concerned regulatory authority.[6]

Setting Up of IFSC Banking Unit

The Reserve Bank has formulated a scheme for the setting up of IFSC Banking Units (IBUs) by banks in IFSCs. Indian banks operating both in the public as well as the private sector and allowed to deal in foreign exchange are eligible to set up IBUs. Prior permission has to be taken from the Reserve Bank by banks interested in setting up IBUs under S. 23(1) (a) of the Banking Regulation Act, 1949. The IBUs are required to function within the risk management and anti-money laundering framework of the bank, subject to monitoring by the board at certain

[5] Securities and Exchange Board of India (International Financial Services Centres) Guidelines (2015) Chapter IV Clause 10 <http://www.sebi.gov.in/cms/sebi_data/attachdocs/1427450911533.pdf>last accessed 15 February 2016

[6] Reserve Bank of India, Notifications,Foreign Exchange Management (International Financial Services Centre) Regulations 2015, Notification No.FEMA. 339/2015-RB, Regulation 3 and 4
<https://rbi.org.in/Scripts Notification User.aspx?Id=9619&Mode=0> last accessed 20th March 2016

intervals. Also, RBI has prescribed the liquidity and interest rate risk management policies which the IBUs are required to adopt.

The Draft Scheme prepared by RBI says that banks wanting to establish IBUs would be regulated by RBI and each bank would be permitted to set up only one IBU in one IFSC. Initially, only Indian banks and foreign banks having a presence in India would be eligible to set up IBUs. The IBUs are to be treated as a foreign branch of an Indian bank for the purposes of application of prudential norms, 90 days Income Recognition Asset Classification and Provisioning norms, adoption of liquidity and interest rate risk management policies.[7] Currently, the commercial banks in India are required to maintain Cash Reserve Ratio and Statutory Liquidity Ratio as per the rates prescribed by RBI, but the IBUs which would be established in GIFT SEZ will be exempt from maintaining these. Thus, the funds available with them can be utilised to the maximum which, in turn, will bring in more income for the IBUs.

RBI acts as the Lender of Last Resort for domestic banks but for the IBUs, in the GIFT SEZ, it shall not provide liquidity or any support as the Lender of Last Resort.This will increase the interaction between the IBUs, as they will have to depend on each other for support, which will lead to their collective growth and build a tie of inter reliance. Also, in GIFT SEZ no transaction by an IBU can take place in Indian National Rupee; they are required to maintain balance sheet only in foreign currency, but a Special Rupee Account to settle administrative and statutory expenses has to be maintained.

RBI has made a lot of relaxations in its provisions to facilitate the setting up of and carrying on the activities by banking units in the GIFT SEZ. Because of these, it has become very easy for financial institutions to start their operations in India.

Regulations of Insurance Regulatory and Development Authority of India

The Insurance Regulatory and Development Authority of India (International Financial Service Centre) Guidelines, 2015 have been issued by the Insurance Regulatory Development Authority India in

[7] Ministry of Finance, Press Information Bureau, International Financial Services Centre (1st March 2015), <http://pib.nic.in/newsite/PrintRelease.aspx?relid=116213>, last accessed 15th February 2016

the exercise of powers granted to it by the Insurance Regulatory Development Authority of India (Regulation of Insurance Business in Special Economic Zone) Rules, 2015. Insurers, both domestic as well as foreign, or reinsurers are to be allowed by the IRDAI to establish units in an IFSC.

Central Government,while exercising the powers conferred on it by S. 2CA of the Insurance Act, 1938, has directed that various provisions of the said Act will not apply to an insurer being an Indian insurance company, insurance cooperative society or body corporate, other than a private company, incorporated outside India being situated in an SEZ. Some of these provisions are mentioned under S. 29, 32B, 32C, 64C - 64H, 64ULA, 101A, 101B, 105B, 118, 120 etc.[8] Thus, an insurance company operating in GIFT City can grant loans or temporary advances, either on hypothecation of property or on personal security or otherwise, and there is no specified percentage of life insurance business and general insurance business that is required to be undertaken by the insurer etc.The powers given to the Authority under the guidelines include the power to call for inspection or investigation of any document or record of the IFSC Insurance Office (IIO). Also, prior approval of the authority is needed for closure of operation by an IIO and it can direct an insurer to close his operations if it feels that the operation being carried out is against public interest.[9]

Criticism

Despite various attempts by the government and the regulatory bodies, the establishment of GIFT city has not become a success yet.

The operationalisation of GIFT city will have to wait till Financial Year 2017, as the Ministry of Finance is trying to solve a maze of taxation issues.Under India's Income Tax Act, units in IFSCs would be subjected to 18.5% minimum alternate tax on book profits. They would also be subjected to a host of transaction taxes, such as capital gains tax (15-40%), securities transaction tax (0.1%), commodities transaction tax (0.01%) and withholding taxes (5-25%).[10]The Ministry of Finance

[8] The Ministry of Finance, Notification S.O. 870(E) dated 27th March 2015

[9] IRDAI (International Financial Service Centre) Guidelines 2015, Clause 16<https://www.irda.gov.in/admincms/cms whats New_Layout.aspx?page=PageNo2465&flag=1>

[10]Prasant Sahu, 'GIFT project hits taxation hurdle', (The Financial Express22nd July 2015), <http://www.financialexpress.com/article/economy/gift-project-hits-taxation-hurdle/105222/> last accessed 15th February 2016

wants relaxation of taxation norms in the IFSC. They say that for us to be able to compete with other Global Financial Hubs, we need to make activities in these centres either completely tax free or very nominal rate of tax should be applicable.The department of revenue is not in favour of giving too much tax concessions, which might result in moving of existing businesses to IFSCs because of tax arbitrage.

Taxation is not the only issue that needs to be resolved. Other issues such as micro-prudential regulations and establishment under FEMA are other key matters that need to be addressed. Some experts believe that building new cities is not the answer to India's ever growing population. They feel that the existing cities are needed to be worked on and improved.

Shirish Sankhe, director at consultant McKinsey and Company, India said "To address India's urbanisation challenge we have to start looking at our existing cities." He also added that new cities will only be a small part of the solution and it will take quite some time to establish them.[11]

Suggestions

The Government should resolve its internal dispute about taxation as soon as possible.The taxes applicable to the units in the GIFT SEZ have to be competitive and it should be at par with other financial hubs; like Dubai, London, New York etc. Only then will it possible for India to come at par with these hubs and to get its financial transactions routed back.Also, for the effective establishment of Finance SEZs, it is important to make our contract laws detailed, with provisions for clear outcomes for a number of possible situations. The legal system should have the expertise to solve contractual disputes and the laws must have high level of certainty.The parties to any dispute should be able to predict the time that would be needed for settlement of the dispute.They should be able to depend on the legal system, and on the general commercial practice will be followed.

[11]Aditi Shah, 'India builds first "smart" city as urban population swells', (Reuters, 14 April 2015) <http://www.reuters.com/article/india-cities-smart-idUSL4N0XB3XU20150414> last accessed 20th March 2016.

Conclusion

GIFT SEZ will play a major role in the development of the financial market and capital market in India. The regulations issued by SEBI, RBI and IRDAI for IFSC are formulated to be flexible and less rigorous than the current ones. This will get financial services, worth billions of dollar, back to India from foreign countries.It will generate extra economic activities, create job avenues, promote exports, increase foreign and domestic investments, bring about large scale developments etc. The work of SEBI, RBI and IRDAI does not end with the establishing GIFT SEZ and issuing regulations. It is very important that they work persistently to review, at regular intervals, the regulatory system concerning the functioning of units in GIFT. They should, also, develop a smooth procedure and machinery for dispute resolution, come up with an efficient bankruptcy process and provide a constant and steady taxation process.

Thus, the establishment of the GIFT SEZ will surely make doing business in India easy and will bring about a new era of corporate law.

The Protection of Children from Sexual Offences Act, 2012 : An Appraisal

Karishma Assudani[*]

"There is no trust more sacred than the one the world holds with children. There is no duty more important than ensuring that their rights are respected, that their welfare is protected, that their lives are free from fear and that they can grow up in peace"

– Kofi Annan

Children are a country's future. Their health, both physical and mental along with security and safety are immensely important for any country's vision for development and progress. But what happens when such tender flowers are sexually abused at an impressionable age? How are they supposed to face the world with an emotional scar left on them at a time when they had not even begun to understand life?

India has the largest child population in the world.The Public Information Bureau, Government of India, estimates that over one-third of India's population (around 42%)is comprised of children below the age of 18 years.[1]

The statistics of child sexual abuse in India reveal the depth of the issue and how children might not be safe even in their own homes and from their own relatives.Fifty three percent of children in India face some form of child sexual abuse.[2] A report called the *'Study on Child Abuse: INDIA 2007'* in 2007 by the Ministry of Women and Child Development, Government of India in collaboration with UNICEF revealed shocking and glaring facts like-

1. Andhra Pradesh, Assam, Bihar and Delhi reported the highest percentage of sexual abuse among both boys and girls.

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[*]IV BSL.L.L.B

[1]Ganga Madappa, 'How should a case of child abuse be dealt with under POCSO' (Citizen Matters.in, 12 August 2014) <http://bangalore.citizenmatters.in/articles/how-should-a-case-of-child-abuse-be-dealt-with-under-pocso?utm_source=copyaccessed>accessed Feb 15,2016

[2]Ministry of Women and Child Development, Government of India 'WCD Survey'<http://wcd.nic.in/childabuse.pdf>accessed 15 Feb 2016

2. 21.90% child respondents reported facing severe forms of sexual abuse and 50.76% faced other forms of sexual abuse.

3. Out of the child respondents, 5.69% reported being sexually assaulted.

4.Children on street, children at work and children in institutional care reported the highest incidence ofsexual assault.

5. 50% of the abuses were by persons known to the child or in a position of trust and responsibility.

Need and Object of the Act

Before the Act came into force, cases of child sexual abuse were dealt with under the following sections of the IPC:

- S.375 (defines rape) and S.376 (provides punishment for rape).
- Unnatural practices under S.377. This is generally invoked when male children are sexually abused. Although forcible sex with a boy is an act of rape, the rape law of the country under IPC does not cover it.
- Outraging (S.354) and insulting (S.509)the modesty of a woman or a girl. However,the modesty of a male child is not protected.
- Obscenity and pornography are dealt under the Young Persons (Harmful Publications) Act, 1956. A young person means a person under the age of 20 years.
- Under S.67 of the Information Technology Act, 2000, publication and transmission of pornography through the internet is an offence.

The abovementioned provisions of the Indian Penal Code (IPC) were used as the law did not make a distinction between an adult and a child.The law was deficient in recognising and punishing other sexual offences, such as sexual harassment, stalking, and child pornography, for which prosecutors had to rely on imprecise provisions such as "outraging the modesty of a woman".

The Ministry of Women and Child Development recognised that the problem needed to be dealt with through less ambiguous and more stringent legal provisions.TheProtection of Children from Sexual Offences Act, 2012 was therefore formulated in order to effectively address the heinous crimes of sexual abuse against children.

Critical evaluation

The following critical analysis will help us answer the question- Is POCSO Act an all comprehensive, wholesome law?

1. Any person (including a child) can be prosecuted for engaging in a sexual act with a child irrespective of whether the latter consented or not.

2. Consensual sexual acts among children are not recognised under the Act.

3. Even a husband and his wife can be prosecuted for engaging in sexual activities if they are below 18 years of age.

4. Judicial interpretation of the provisions of the Act gives it a new meaning thereby setting authoritative or persuasive precedent. Analysing decided cases is also necessary.

(i) A 15-year-old girl left home and married a 22-year-old man. Her mother filed a complaint alleging that the man had kidnapped and sexually assaulted her. In court, the girl admitted to having gone willingly and to having sexual intercourse.[3] The case was decided by judge Dharmesh Sharma (ASJOI), New Delhi District, Patiala House Courts, New Delhi.

Held : A strict interpretation of the POCSO Act 'would mean

- That the human body of every individual under 18 years of age is the property of State and any individual below 18 years of age could not be allowed to have the pleasures associated with one's body.'

It was reasoned that:

- 'The words 'penetrative sexual assault' used in S.3 (defines penetrative sexual assault) of the POCSO Act suggest that where physical relationship or sexual intercourse had taken place with consent of a girl child which is not derived by coercion, assault, criminal force, exploitation, or where the consent is not obtained for unlawful purpose, no offence within the ambit of S. 3 of POCSO Act can be said to have been committed.'

[3] *State v. Suman Dass* (2013) SC No. 66/13

(ii) In yet another case[4], a girl who was between the ages of 14-16 years, married an older man willingly. Here, Judge Dharmesh Sharma made a statement that "in case of critical age between 16 years to 18 years, S.4 (provides punishment for penetrative sexual assault) of the POCSO Act has to be interpreted distinguishing between an act which is per se criminal for being in the nature of coercion, fear, inducement or exploitation committed upon a child; from an act which would otherwise criminalize a person for having done something which is without any malice, ill will or ulterior motives."

Judge Dharmesh Sharma's intention is worth appreciating but the nature of relationship might not be voluntary as the age difference and the imbalance of power undermine the voluntary nature of the same. The reasoning shows an incomplete understanding of the nature of child sexual abuse. Child sexual abusers usually master the art of grooming children and psychological manipulation often entails. This gives way to a rather firm possibility of child sexual abuse being without force,coercion or physical violence.

(iii)A 14-year-old girl was found to have been impregnated by her landlord and the mother filed a complaint later. In court, the girl admitted that they reported the matter only because the man had refused to marry her. During the proceedings, the accused offered to marry her, deposit Rs 30,000 in her name, and provide the mother shelter. When he was released on bail, the couple got married.[5] The judge (T.S. Kashyap) ensured compliance with the undertaking. The accused was acquitted as the girl and her mother retracted their statements.

(iv) In a case[6] decided by Judge Shalini Singh Nagpal in the Special Court of Chandigarh in which the couple was not married but was in a relationship against the wishes of their parents, it was held that having a love affair with the prosecutrix and having conversations with her would not give a license to the accused to commit rape on her person or even to have sexual intercourse with her consent, as consent of the child to penetrative sexual assault is immaterial.'

[4]*State v. Shiva Nand Rai* (2013) SC No. 56/13
[5]*State v. Aas Mohammad* (2013) SC No.78/2013
[6]*State v. Iskhar Ahmed* (2013) SC No. 8300064

The above case laws definitely give rise to serious questions-

1. Did acquittal result in the above cases primarily because the victim and the perpetrator were married?
2. Can an adolescent's right to bodily integrity, privacy, and life be disregarded if she is married?
3. Does being married mean a girl is disentitled from being protected under the Act?
4. Are the judges implicitly applying the 'marital rape' exception in POCSO cases?
5. Are judges providing the accused an option to evade conviction by sanctioning their offer to marry the victim?
6. Should the factors such as the age difference and the nature of the relationship-voluntary or involuntary, not be taken into consideration?

Effect of the Juvenile Justice (Care and Protection of Children) Act 2015 on the Act

The Juvenile Justice Act is in conflict with the POCSO Act. Under the Juvenile Justice Act, in case of heinous offences, if the Board's assessment concludes that the child needs to be treated as an adult, he can be so tried[7].

Illustration: A 17 year old boy elopes with his 16 year old girlfriend against the wish of parents and the two have consensual sex. He can be tried as an adult under rape laws(IPC)because he is above 16.

This will only be possible if the Board's assessment concludes that he should be tried as an adult. But we can say very safely that the possibility is not ruled out entirely. This makes them vulnerable to be treated as adults, sent to an adult prison and other punishment for rape under the IPC.

Conflict between child sexual abuse and child sexuality

(i) The *National Commission for Protection of Child Rights* had stressed on the need for the law to recognise consensual sexual

[7]The Juvenile Justice (Care and Protection of Children) Act, 2015 Ss.15,18(3) and 19

exploration among adolescents by decriminalising it when it is between:

- Children above 12 years when the age-gap was less than two years and
- Children above 14 years when the age-gap was less than three years.

(ii) In *Teddy Bear Clinic for Abused Children v. Minister of Justice and Constitutional Development*[8], the Constitutional Court of South Africa confirmed the following-

(a) Provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, which criminalised consensual sexual conduct of adolescents above 12 years and below 16 years, were unconstitutional.

(b) The imposition of criminal liability on adolescents engaging in consensual sexual conduct was opposed to the right to dignity, right to privacy, and contrary to the best-interests principle.

(c) The categories of prohibited activity were so broad that they included much of what constitutes activity undertaken in the course of adolescents' normal development... the existence of a statutory provision that punishes forms of sexual expression that are developmentally normal degrades and inflicts a state of disgrace on adolescents.'

The Act conflicts child sexuality with child sexual abuse. It fails to respect the intricacies of age, age difference, and child development.

The burden of proof is on the accused to prove his innocence. While this is to ensure relief to the victim, this is a clear departure from the fundamental principle of justice in the Indian Judicial system i.e. "innocent until proven guilty".

Weak Implementation of Strong Provisions

1. Despite provisions for implementation being provided for in the Act,the Act remains relatively unknown.

e.g. (i) in a rape case in Delhi, the Delhi Police included the provisions

[8]*(Case CCT 12/13 [2013] ZACC 35)<http://www.saflii.org/za/cases/ZACC2013)/35.pdf>accessed 14 Feb 2016*

of POCSO Act to the FIR reportedly after two days of the filing of the FIR.[9]

(ii) In the infamous 'APNA GHAR Rohtak shelter home case of May 2012, despite rampant allegations of child sexual abuse of over 100 inmates, reportedly, the provisions of POCSO Act are still not stated to have been invoked against the accused.

2. Pendency of cases- S.28 (1) of the Act proposed formation of special courts for speedy trial of such cases.However, there is a pendency of 95% cases

For instance,

(i) New Delhi District had 54 registered cases. However, only 2 were disposed off(1 conviction,1 acquittal).

(ii) The central district had 82 cases out of which only 5 cases were disposed off (1 conviction and 4 acquittals)[10]

This way, the culprit gets away despite a stringent law having been enacted. Indoctrination, training, familiarisation and actual application by police officers and other stake holders needs to be attended to on an urgent basis. POCSO Actmust not remain an Act of law in oblivion.[11]

Thus, more steps to better implement the law and execute what was planned in the first place would definitely help to check the gross sexual violence against children in India and would help protect the violations it makes to the innumerable fundamental and human rights that the innocent children with a tender age possess.

Appreciable provisions

1. The POCSO Act does not permit any exception like 'Marital Rapes' under the IPC but makes penetrative sexual assault and non-penetrative sexual assault an aggravated offence if by a person related to a child through marriage.[12]

[9]Anil Malhotra 'POCSO- a Child Law in oblivion' (Lawyers update, June 2013) <http://lawyersupdate.co.in/LU/1/1279.asp>accessed 14 Feb 2016

[10]Raj Shekhar, 'POCSO losing teeth without special courts' Times of India (New Delhi ,1 Nov 2013)

[11]ibid

[12]SwagataRaha, 'Love and Sex in the time of the POCSO Act,2012'(In Plainspeak,Talking about sexuality in e global sense1 June 2014)<www.tarshi.net/inplainspeak/voices-love-and-sex-in the -time-of-the pocso-act-2012> accessed 16 Feb 2016

2. Because of the POCSO Act, many stories relating to child abuse in India are coming to the fore-

(i) A truck driver was booked under the act for having promised to marry a 14 year old girl, having had sex with her, then refusing to marry her.[13]

(ii) A 13 year old girl raped by a man twice her age was charged under the Act as well as other provisions of the law after he distributed MMS clips of the act. [14]

(iii) A Times of India report reflected how cases under this Act were piling up at the Civil Court of Bhopal with Madhya Pradesh receiving the maximum cases of sexual assault against children. It brought to notice how the Act was fast-tracking cases and filling lacunaes in the rape laws (S.376). "The special court formed at the district received more than 40 cases under POCSO Act every month" said Syeda Bano Rehman (Session court for POCSO Act judge).[15]

(iv)It acknowledges and engages with sexual crimes of all kinds — real/virtual; penetrative/ non- penetrative; verbal/ physical; homosexual/ heterosexual/ bestial.

(v) It is gender-neutral. Thus, it has been acknowledged that both the victims and the perpetrators can be male or female.

(vi) It sets a time frame for all the stake-holders,thus putting pressure on the Act- implementing agencies to strive for speedy disposal of cases and as less inconvenience as possible is caused to the victim and his family.

Recommendations

(i) Safety should be provided to the child since POCSO Act provides for recording of the child's evidence within 30 days and this period is crucial and the victim's family can be influenced or threatened to withdraw the complaint or tone it down. An amendment to ensure recording of evidence in the first 72 hours on an emergency and immediate basis would protect the victim from duress.On the same lines, witness protection should also be taken into consideration.

[13]'Truck driver held for raping 14-yr-old girl', Times of India (Puducherry, 16 Nov 2014)

[14]*ibid.*

[15]Shilpa Baburaj, 'POCSO Act new weapon against child abuse in MP', The Times of India (Puducherry, 6 Dec,2014)

(ii) S.32 of the Act provides that a Special Court shall complete the trial as far as possible within a period of one year from the date of taking cognizance. Thissection is not mandatory but merely directory.We need a specific time bound system of justice delivery which makes sure that trials are completed in a year and not left to the recourse of "speedy justice as far as possible".

(iii) No person should get an anticipatory bail.Thismakes the process more stringent and helps prevent the accused from trying to circumvent justice or delay the process.

(iv) Social workers, superintendents of residential homes, wardens, teachers and family members and all other stakeholders need training and sensitisation to the issue,especially those in junior ranks who deal directly with the public more than anyone else, so that they do not retraumatize the victim and his family knowingly or unknowingly[16]

Conclusion

What is the point of more and more amendments and new enactments when the already existing laws cannot be implemented? Efforts need to be consolidated and energies focussed.As far as POCSO Act is concerned,it has the potential to deal with the problem of child sexual abuse to a great extent.A few loopholes and lacunaes need to be filled, but all in all,it is a great step towards tackling the present scenario.

In the midst of demands for stricter penalties, expeditious new laws and fast track courts,little is it realised that the answers already lie in the POCSO, where what we lack is implementing the same effectively. The remedy lies in sure shot methods of effective,stricter and more stringent implementation of the provisions of the law so as to deal with the grave acts of sexual violence and the mental and physical harassment that child sexual abuse entails.

[16]Human Rights Watch,Report: Breaking the Silence, Child Sexual Abuse in India (7 February 2013)
<https://www.hrw.org/report/2013/02/07/breaking-silence/child-sexual-abuse->india>accesssed 16 Feb 2016

Considering Amendment for MTP Act

Ankitha Praveen[*] *&Asha Mariam Mathews*[**]

Introduction

S.3 of the Medical Termination of Pregnancy Act, 1971 lays down the conditions under which a pregnant woman can undergo abortion. Currently, a pregnant woman can terminate her pregnancy on the opinion of one medical practitioner if the pregnancy has not exceeded twelve weeks or if the pregnancy is more than twelve weeks but less than twenty weeks on the opinion of not less than two medical practitioners. S.5 also provides for the termination of pregnancy if the opinion is formed on good faith that it is necessary to save the life of the pregnant woman. However there arise a number of situations where termination of pregnancy is required by a woman after twenty weeks and the question gets entangled in the court procedures leaving to the fate whether the cause for abortion falls within the purview of the legislation or not. The paper seeks to present a comparative analysis of the abortion law in India and other countries.

Abortion Law in India

The Medical Termination Pregnancy Act,1971 allows the termination of pregnancies that cause a risk to the life of the woman, affect her physical or emotional well-being, or could steer to the birth of a child with physical or mental disabilities. According to its broad definition, the Act allows women to seek termination of pregnancies resulting from rape or incest, for socioeconomic reasons that render them unable to have a child, or for the failure of contraceptives used by a woman or her husband to limit the size of the family. Under these broad categories, the woman may seek to have an abortion till up to 20 weeks. She may also make the decision to terminate a pregnancy without the influence of her husband and family (except in the case of minors and the mentally ill, both of whom require the consent of one guardian). However, the Act does not recognize the ability of women to act as autonomous agents within the clinical setting. It

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primarily offers protection to all doctors carrying out abortions in good faith and within the limits stipulated by the law, empowering them to make the final decision on abortion.

The Medical Termination of Pregnancy Act was challenged a number of times in various cases. In Niketa Mehta's case, the mother sought to abort her 26-week-old foetus which had been diagnosed with a heart defect and was denied permission by the High Court of Mumbai on the ground that a pregnancy can be terminated after twenty weeks only if there was fatal risk to the mother and not the fetus. The court noted that even if the couple had approached before 20 weeks it would not have been possible to allow abortion, as the medical opinion was contrary[1]. The judgement gave rise to a number of debates, questioning the validity of the provisions of 34 year old legislation amidst the medical advancements.

Another case which posed challenge to the Act was *Chandrakant Jayantilal Suthar v. State of Gujarat* in which the victim, a 14 year old girl who was raped by a doctor, approached the court seeking permission for termination of pregnancy but was denied the same on the purview of S.3 of Medical Termination of Pregnancy Act as her pregnancy was over twenty-four weeks. The arguments put forth by the petitioner were that she was a minor and was not in a position to physically or mentally go through the pregnancy and was in depression[2]. They also stated that, "the studies of the victim would suffer, she would face social stigma and her life would be ruined if permission to terminate the pregnancy was not granted"[3]. However, the girl's petition to the Supreme Court seeking permission for abortion beyond 20 weeks has been accepted as a special case, which is not to be used as a precedent to allow abortions beyond 20 weeks[4].

[1]'High Court refuses permission to abort 26-week fetus 'The Economic Times (Mumbai, 4 August 2008)< http://articles.economictimes.indiatimes.com/2008-08-04/news/27711571_1_niketa-mehta-abortion-control-laws-foetus >accessed 20 February 2016.
[2]ChantrakantJayantilalSuthar v. State of GujaratSCC Online Web Edition<http://www.scconline.com>acessed 18 February 2016
[3]*ibid*
[4]AbantikaGhosh 'In fact: Why India's abortion law needs an urgent update 'The Indian Express [7 August 2015]<http://indianexpress.com/article/explained/in-fact-why-indias-abortion-law-needs-an-urgent-update/ >accessed 18 February 2016.

In yet another case, *Ashaben v. State of Gujarat and Ors*[5], which dealt with a married girl of age 23 years and mother of two, was kidnapped, confined to a particular village and was raped a number of times by the seven accused. By the time she escaped clutches of her kidnapers and lodged a FIR she was twenty-four weeks pregnant. The Judge stated that "Although it is the case of the applicant that since she was in unlawful confinement of the accused persons she had no opportunity to get the pregnancy terminated within the statutory time period as provided in the Act, yet I am unable to accept such submission as the law does not permit the termination of pregnancy beyond 20 weeks except in cases where the life of the mother is in danger."[5]

These are only a few of the number of cases where women, for various reasons, approached the court for permission of termination of pregnancy. The circumstances in each case raise a question of the relevance of time-bar of twenty weekswhich further leads to questions of amendment of the provision, constitutionality of the section, igniting debates about right to life of mother and foetus, right to liberty of mother and foetus and so on.

Comparative Study of Abortion Laws

While Indian law curbs the right to terminate pregnancy at twenty weeks and the health of mother as a parameter for the same, law of certain other countries denies abortion at any stage of pregnancy and puts the interest of the foetus before risks to mother's life. In Ireland, an Indian woman, "Savita Halappanavar died after being admitted, while 17 weeks pregnant with symptoms of contractions prior to a natural miscarriage. During the health service investigation into the death, an unnamed doctor told investigators that even in a case of "inevitable miscarriage", such as Mrs Halappanavar's, Irish doctors had to put the welfare of the fetus before possible risks to the mother's life."[6]

In UK, the Abortion Act 1967 covers England, Scotland and Wales but not Northern Ireland.[7] According to the law, pregnancy can be

[5]*Ashaben v. State of Gujarat and Ors* (Special Criminal Application) Manupatra Information Solutions Pvt.Ltd<www.manupatra.com> accessed 18 February 2016

[6]Bruno Waterfield 'Irish abortion law key factor in death of Savita Halappanavar, official report finds' The Telegraph [13 June 2013] < http://www.telegraph.co.uk/news/worldnews/europe/ireland/10119109/Irish-abortion-law-key-factor-in-death-of-Savita-Halappanavar-official-report-finds.html >accessed 18 February 2016

[7]'Abortion NHS Choices' (NHS Choices, 18 August 2014) <http://www.nhs.uk/conditions/Abortion/Pages/Introduction.aspx> accessed 18 February 2016

terminated during the first twenty-four weeks. The law also lays down certain situations when abortion may be carried out after twenty-four weeks, as in, when it is necessary to save the women's life, to prevent grave injury to physical or mental state of the pregnant woman or if there is a substantial risk so that the child born may suffer from serious physical or mental disabilities. The landmark case which had led to the Act was the *Bourne Case of* 1938[8]. A young woman was gang raped by a group of soldiers and became pregnant. Dr Alec Bourne who had agreed to perform the abortion was prosecuted. The Judge agreed with Bourne's argument that abortion was necessary to preserve the health of the young woman and thus the doctor was not convicted. This case set a legal precedent for performing an abortion to preserve a woman's mental health.

In US after the historical judgement of *Roe v. Wade* and *Doe v. Bolton* "It stands today, American women have the legal right to obtain an abortion in all 50 states, through all nine months of pregnancy, for virtually any reason at all. This has been true since the Supreme Court declared that autonomous abortion rights are built into the Constitution and that legal barriers to abortion are unconstitutional".[9]

"In a data collected and compiled by United Nations in 2011 breaks countries down into five categories, of which we have taken data from the worst three bands.

Six nations – the Holy See, Malta, Dominican Republic, El Salvador, Nicaragua and Chile – do not allow abortion under any circumstances.

A further 13 countries have such tight controls upon abortion that for many it is an impossibility. Among these are nations such as Malawi, Iran and Haiti, which although have general principles set in law that appear to support the right to an abortion should the women's life be in danger, have no legislation.[10]

[8]*ibid*

[9]'U.S. Abortion Law An overview of the history and legality of abortion in the United States' (Abort73.com, 02 March 2015) <http://www.abort73.com/abortion_facts/us_abortion_law/> accessed 18 February 2016.

[10] Rose Troup Buchanan 'International abortion laws: The six nations where it is still illegal to have an abortion' Independent (6 May 2015)<http://www.independent.co.uk/life-style/health-and-families/international-abortion-laws-the-six-nations-where-it-is-still-illegal-to-have-an-abortion-10229567.html> accessed 18 February 2016.

Medical Termination of Pregnancy (Amendment) Bill, 2014

Earlier the Medical Termination Pregnancy Act, 1971, allowed abortions in various circumstances and was considered as one of the conservative laws from the feminist point of view. The Act thus allows healthcare providers rather than the termination of pregnancy. On October 29, 2014, the Ministry of Health & Family Welfare, released a draft of the MTP (Amendment) Bill, 2014, proposed a change from the focus to the Indian abortion discussion from the healthcare providers to women. Such changes will lessen the vulnerability of the women from a clinical atmosphere and also free the Act from various interpretations. The Bill had also proposed to train and allow non allopathic and mid-level health care providers to discharge abortions.

It also shows the methods of abortion clearly than the Medical Termination of Pregnancy Act, 1971, identifying the medical termination of pregnancy as a legal technique of abortion. However, these steps will increase the women to access to care for abortion; other measures proposed by the law would liberalize the law, making it more comprehensive than the 1971 Act.

The proposed Bill will be taken up to the next session of the Parliament and shall be validated next year, if passed. Not only did the Bill recognize a woman's right to self-determination and autonomy, it also represents something to the focus of the abortion law in India from the healthcare provider to the woman undergoing abortion. Such a move may decrease the vulnerability of women within the clinical setting and frees them from subjective interpretations of the abortion law. The author is also in favor of the inclusion of mid-level healthcare providers and from alternative systems of medicine, stating that such a step is both ethical and necessary due to the high rates of unsafe abortion. While the extension of the evolution is that it could trigger ethical debates on eugenic abortions and sex-selective abortions.

If the Parliament passes the Bill without any changes, the Government has got the responsibility of ensuring its proper implementation. The Abortion Assessment Project has found that a large number of unsafe abortions are caused by a lack of knowledge of the 1971 Medical Termination of Pregnancy Act.[11] The Amendment Bill is likely to

[11]Duggal R., Ramachandran V, *'The abortion assessment project – India: key findings and recommendations. . (2004) 24 Suppl. Report Health Matters 122-9.*

improve access to abortion and allows women to gain some control over their sexuality, fertility and reproduction, but this is only possible if women are made aware of the proposed changes.

However, it is the ethical duty of medical bodies to identify the policy changes that might imperil the women's life andher fears with regard to mid-level healthcare providers.[12]

This Bill proposes to bring about significant changes in the scenario of abortion care, and at the same time, marks a step towards a more women-centric, rights-based abortion law in India.[13]

Conclusion

Considering the plethora of cases that approach various courts with the plea to permit abortion, under various reasons, the question whether the present provisions of Medical Termination of Pregnancy Act 1971 metes out justice is to be deeply deliberated about. Whether it is the 'right to life of woman' or is it the 'right to life of foetus' that needs to be weighed also poses a major challenge while considering amendments to the Act . Let us hope, through the proposed Amendment, the Act will seek to safeguard the rights of women under various circumstances.

[12]Jesani A. Iyer, 'Women and abortion' (1993) 28(48) EPW 2591-8.
[13]Shwetha Krishna, 'MTP Amendment Bill, 2014: towards re-imagining abortion care', (2015) Vol 12 IJME

A Nation of Displaced

*AlefiyahShipchandler**

The practice of granting asylum to people fleeing persecution in foreign lands is one of the earliest hallmarks of civilization. War, conflict, generalized violence and human rights violations have resulted in the forced displacement of people since the days of the World Wars. Today, with unprecedented numbers of persons fleeing their home countries and with more than half of the approximate 19 million refugees in protracted situations, having no durable long term solutions, the burden on the international community to seek solutions to such delicate situations has only increased.

With the 2015 "refugee crisis", the position of refugees in International Law has become critical and thus it becomes important to evaluate contemporary international refugee law, highlight the harms of refugees left in limbo and analyse refugee policies of the European Union

The Refugee under International law

The cornerstone of the international refugee protection systems is the "1951 Convention Relating to the Status of Refugees"[1] and the "1967 Protocol to the Convention".[2] International legal protection is thus given to those persons who fulfill the requirements of the refugee criteria as laid down in the 1951 Convention. The Convention defines a refugee, as a person who "owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it".

*II B.A.LL.B

[1]Convention Relating to the Status of Refugees 1951 [adopted 28 July 1951, entered into force 22 April 1954] 189 UNTS 187 (Refugee Convention), <http://www.unhcr.org/3b66c2aa10.html>, accessed 20th March 2016

[2] Protocol Relating to the Status of Refugees 1967, [adopted 31 January 1967, entered into force 4 October 1967] 606 UNTS 267 (Protocol) <http://www.unhcr.org/3b66c2aa10.html> accessed 20th March 2016

In addition the Convention places an obligation on contracting States to respect the principle of non-refoulement[3] and thus all contracting states must consider and assess an application for refugee status and protection before any action is taken to expel a person to his or her country of origin or to any intermediate country where there is a substantial risk that he or she will suffer onwards expulsion to persecution. It also sets out the rights and obligations of state parties in respect of the treatment of refugees.[4]

Principle of non-refoulement

The principle of non-refoulement refers to an obligation put on States to refrain from forcibly returning a refugee to a country where his life or freedom would be threatened on account of certain defined reasons. This principle, has acquired the status of a norm of customary international law.

The central problem is thus this; Member States consider that the non-refoulement obligation applies only to those persons who fulfill two criteria:

(a) They have arrived at the border of the state where they seek protection (or are inside it);

(b) There is no safe third country to which they can be sent. [5]

Both of these criteria are fundamentally territorial and they have led to very unfortunate practices where people seeking international protection are left to die in international waters because no state wants to take on responsibility for their protection claims. Or, they have led to people with international protection claims being pushed back to unsafe countries.

It is an established fact that the Refugee law is essentially a right-based law. However, while refugees may be protected from being sent to those places where they can face persecution, there is no express

[3] Convention Relating to the Status of Refugees 1951 [adopted 28 July 1951, entered into force 22 April 1954] 189 UNTS 137 (Refugee Convention) Article 33

[4]Directorate- General for External Policies, "Current Challenges for International Refugee Law, with a Focus on EU Policies and EU Co-operation with the UNHCR", Policy Department, European Parliament, 2013,<http://www.europarl.europa.eu/RegData/etudes/note/join/2013/433711/EXPODROI_NT(2013)433711_EN.pdf> accessed 20 March 2016

[5]*ibid*

right of "physical" entry to a State. That is persons granted refugee status have a right not to be returned to persecution but apparently no right to enter a State in order to make a claim that would make the right to non-refoulement enforceable.[6]

In this manner there is an interesting parallel between the weakness of claims to physical entry and political membership. States are bound to respect the non-refoulement principle but not bound to permit entry that would make assertion of the principle secure; likewise, states are bound to respect human rights of all persons but not bound to grant membership which would permit the better securing of such rights.

In situations of mass influx, States often face problems which they by law are bound to deal with. In such circumstances it is possible that due to social or financial constraints they are unable to do so. An example of breach of the principle of non-refoulement is often considered to occur as when around 500,000 refugees were returned to Rwanda from Zaire in late 1996, following the refugee crisis caused by the civil turmoil in Rwanda which further prompted Tanzania to also repatriate hundreds and thousands of them. These repatriations came within the context of civil unrest in Zaire, though it was not the first time such actions had been taken. Thus it is considered that forced repatriations of refugees were orchestrated by the governments of Zaire, Tanzania and Burundi.

Protracted Refugee Situations

A protracted refugee situation is one in which refugees find themselves in a long-lasting and intractable state of limbo. Their lives may not be at risk, but their basic rights and essential economic, social and psychological needs remain unfulfilled after years in exile. A refugee in this situation is often unable to break free from enforced reliance on external assistance.[7]

In identifying the major protracted refugee situations in the world in 2004, UNHCR used the 'crude measure of refugee populations of 25,000 persons or more who have been in exile for five or more years

[6]T. Alexander Aleinikoff& Stephen Poellot, "The Responsibility to Solve: The International Community and Protracted Refugee Situations", 54:2 VJIL 196<http://www.vjil.org/assets/pdfs/vol54/Aleinikoff.pd> accessed on 20 March 2016

[7]Executive Committee Of The High Commissioner's Programme Standing Committee, "Protracted Refugee Situation",30th meeting 10 June 2004, available at <http://www.unhcr.org/40c982172.html> accessed on 20 March 2016

in developing countries'. The study excluded Palestinian refugees, who fall under the mandate of the UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), and represent the world's oldest and largest protracted refugee situation.

The reason for protracted refugee situations is political and international inaction both in the country of origin which faces unresolved political instability, and in the country of asylum where the host country is set against local integration. Thus, while their tangible needs are satisfied they are still unable to avail of certain basic human requirements such as legal membership with a community, settled family life etc. The short term nature of various planning and funding programmes is also a contributing factor.

An increasing number of host states respond to protracted refugee situations by containing refugees in isolated and insecure refugee camps, typically in border regions and far from the governing regime. Many host governments now require the vast majority of refugees to live in designated camps, and place restrictions on those seeking to leave the camps for employment or education. This trend, recently termed the 'warehousing' of refugees, has significant human rights and economic implications. [8]

UNHCR has argued that most refugees in such situations live in camps where idleness, despair and, in a few cases, even violence prevails. Women and children, who form the majority of the refugee community, are often the most vulnerable, falling victim to exploitation and abuse.

The various other harms caused by protracted refugee situations include:

1. Children being born in refugee camps and growing up in them.
2. Huge loss in human capital and resources.
3. Risks to physical safety (sexual and gender based violence).
4. Other psychological harms.
5. Security problems for host countries.

[8] M. Smith, 'Warehousing Refugees: A Denial of Rights, a Waste of Humanity', World Refugee Survey 2004, Washington, US Committee for Refugees, 2004

The prolonged encampment of refugee populations has led to the violation of a number of rights contained in the 1951 UN Refugee Convention, including freedom of movement and the right to seek wage-earning employment. Restrictions on employment and the right to move beyond the confines of the camps deprive long-staying refugees of the freedom to pursue normal lives and to become productive members of their new societies. Faced with these restrictions, refugees become dependent on subsistence-level assistance, or less, and lead lives of poverty, frustration and unrealized potential.[9]

In addition to this, protracted refugee situations have an impact not only on the diplomatic relations between the country of origin and the asylum country but it also causes instability in neighbouring countries, triggering intervention, and sometimes spurring armed elements within camps to begin insurgencies or form resistance and terrorist movements. The militarization of refugee camps creates a security problem for the country of origin, the host country and the international community. Arms trafficking, drug smuggling, trafficking in women and children, and the recruitment of child soldiers and mercenaries occur in some of the camps hosting long-standing refugee populations. It is thus true that refugee camps save lives in the emergency phase, but, as the years go by, they progressively waste these same lives.

A majority of Afghan refugees, for example, who fled their country ever since the Afghan conflict, remain in the world's largest protracted refugee situation. The UN refugee chief has noted that the future of some 2.6 million Afghan refugees in the region, many of whom have been living outside their country for over three decades, still hangs in the balance. It was also stressed that traditional approaches are no longer sufficient to fully capitalize on the potential for solutions. Thus in an environment of shrinking humanitarian resources, it is vital to pursue innovative solutions and creative joint advocacy and resource mobilization.

Refugee Policies in the European Union

In Europe, more than 219,000 refugees and migrants crossed the Mediterranean Sea during 2014. That's almost three times the

[9] UNHRC "Protracted refugee situations: the search for practical solutions"<http://www.unhcr.org/4444afcb0.pdf> accessed 20 March 2016

previously known high of about 70,000, which took place in 2011 during the 'Arab Spring'. Nearly half of these arrivals were coming from the Syrian Arab Republic and Eritrea. The European refugee crisis thus began in 2015, when a rising number of refugees and migrants made the journey to the European Union to seek asylum, travelling across the Mediterranean Sea, or through Southeast Europe. The Schengen Area established by the Schengen Agreement, operates very much like a single state for international travel purposes with external border controls for travellers entering and exiting the area, and common visas, but with no internal border controls.

The Dublin Regulation is a European Union (EU) law that lays down the criteria and mechanisms for determining the Member State responsible for examining an application for asylum lodged in one of the Member States by a third-country national. Usually, the responsible Member State will be the State through which the asylum seeker first entered the EU. Asylum seekers who move on to other countries after being registered can be sent back to the responsible nation to be processed, in what are called Dublin transfers.

Throughout the evolution of the Common European Asylum System (CEAS), the Dublin system of responsibility allocation for the examination of asylum claims has been, it is claimed, its 'cornerstone'. The aim of the Regulation is to ensure that one Member State is responsible for the examination of an asylum application, to deter multiple asylum claims and to determine as quickly as possible the responsible Member State to ensure effective access to an asylum procedure.

A close review of EU policy in the area of asylum and the coherence between its internal and external policies reveals that the main objective of the Common European Asylum System (CEAS) is to guarantee a minimum level of international protection in all Member States. On the other hand, there is a very prominent focus on the prevention of abuse and irregular movements of refugees and no legal route of entry for asylum purposes in the EU. As a result, while the CEAS pursues an overall protection goal, the system is rendered inaccessible to its addressees, either through indiscriminate border and migration controls deployed extraterritorially that block prospective beneficiaries *en route* or through the operation of procedural devices,

such as the 'safe third country' notion, that push responsibility away from the Member States.[10]

Since the Refugee crises, Greece and Hungary, where many migrants from the Middle East first reach the union's territory, have been swamped with new arrivals, and the system has started to break down. The European Union has had a moratorium on Dublin transfers back to Greece since 2011, and Hungary unilaterally stopped accepting them in June. Germany decided in August to suspend the Dublin rules for Syrians who manage to reach its soil, and to process them itself. European leaders have been arguing over how to modify the regulation and distribute the migration burden more evenly across Europe, but several countries, especially in Eastern Europe, have resisted proposals for mandatory quotas.[11]

Conclusion

The purpose and aim of Refugee law in the international sphere needs to drastically change. It is necessary to review existing customs and treaties with the goal of finding durable and long lasting solutions to the refugee problem.

The international community must recognize its responsibility to solve these long lasting refugee situations and come up with strategic models to solve the same. Since refugee law and human rights law go hand in hand the burden on the international community is greater still. There is thus an important need for rhetoric and a moral fulcrum for renewed attention to solutions, in turn leading to enhanced funding for returns and local integration as well as more resettlement opportunities.

The duty that countries all around the world thus owe to refugees is not simply to support camps or provide funds, other tangible amenities and provide assistance to refugees; it is to end the miseries that being a refugee brings with it, allow them to live normal happy and self-satisfying lives and thus end their condition of being a refugee.

[10]Directorate- General for External Policies, "Current Challenges for International Refugee Law, with a Focus on EU Policies and EU Co-operation with the UNHCR", Policy Department, European Parliament, 2013,<http://www.europarl.europa.eu/RegData/etudes/note/join/2013/433711/EXPO-DROI_NT(2013)433711_EN.pdf> accessed 20 March 2016

[11] "Explaining the Rules for Migrants: Borders and Asylum" New York Times, (16 September 2016) <http://www.nytimes.com/2015/09/17/world/europe/europe-refugees-migrants-rules.html?_r=0> accessed 20 March 2016

Analysis and Implementation of the Street Vendors Act 2014

*Shubhangi Mishra, Vaishnavi Gadiyar**

Introduction

Street vending has been the backbone of the urban informal sector in India since decades.A street vendor can be defined as a person who offers goods or services to the public without having a permanently built structure but with a temporary static structure or a mobile stall[1]. Studies reveal that around 2.5% of the urban population is engaged in this occupation[2]. These vendors had been facing a lot of harassment at the hands of the local police and municipal authorities as there was no substantial law granting legal rights to them[3]. Even the Supreme Court in its landmark judgment of the *Maharastra Ekta Hawkers Union v. Municipal Corpor ation Of Greater Mumbai*[4] stated that *"street vendors ... are a harassed lot and constantly victimized by the officials of the local authorities, the police, etc., who regularly target them for extra income and treat them with extreme contempt."*

Finally the path-breaking Street Vendors (Livelihood Protection and Regulation of Street Vending) Act, 2014 was enacted with the aim of securing the rights and livelihood of small vendors in the country. The passing of this act was the result of the prolonged endeavor of organizations such as National Association of Street Vendors of India (NASVI) and Self Employed Women's Association (SEWA) which turned out to be a major victory for the vendors.

Legal Aspects

The Preamble of the Indian Constitution states that India shall secure to its citizens justice, social, economic and political and equality of status and of opportunity. Art. 14 of the Constitution statesthat, the

* *II B.A. LL.B.*

[1] Ministry of Urban Employment and Poverty Alleviation, Government of India 'National Policy For Urban Street Vendors, 2004'<http://muepa.nic.in/policies/index2.htm> Last accessed on 20th March 2016

[2]Dr. Dendukuri Indira,A Study of Street Vending Across the Globe,(2014)4IJARCSSE 518.

[3]*K Sundarshan v. Commissioner Corporation of Madras* [1984] AIR Mad292.

[4] [2013] INSC 841.

State shall not deny to any person equality before the law or equal protection of the laws within the territory of India.Art. 19 (1) (g) of the Constitution guarantees to every citizen the right to practice any profession or to carry on any occupation, trade or business. However, it is subject to reasonable restrictions imposed under Art. 19 (6)of the Indian Constitution.The right to life includes protection of means of livelihood. Forcible eviction of hawkers without prior notice is infringement of Art. 21 of the Constitution. The Supreme Court upheld this principle in *Olga Tellis v. Bombay Municipal Corporation*[5]. These provisions guarantee certain basic rights and protects street vendors from any kind of discrimination.

Key Provisions

The Street Vendors Act 2014 deserves credit for striking a fine balance between the livelihood rights of hawkers and the rights to free movement of pedestrians and traffic. Following are the main provisions and their analysis:

This Act provides for the setting up of one or more Town Vending Committees[6]for each local authority, zone or ward for executing the provisions of the Act. This committee, which will be the main policy making body on street vending, comprises municipal authorities, police, the health department and other stakeholders[7]. The TVC is supposed to make recommendations on matters such as the vending fees[8], issue of certificates[9],conduct of the surveys etc. Ironically the municipality becomes the key decision maker and the TVC is merely a puppet.The Act makes it mandatory for all street vendors to register with Town Vending Committees to apply for vending certificates[10]. It was contemplated that the introduction of the provision would prevent excess administrative interference. However the consequences were contradictory as hefty fines were imposed on non-certified vendors[11].

The street vending plan must also determine zones such as restriction-

[5]AIR[1986] BC 180.
[6]The Street Vendors Act,, 2014, S. 22(1).
[7]The Street Vendors Act,, 2014, S. 22(2).
[8]The Street Vendors Act,, 2014, S. 8.
[9]The Street Vendors Act,, 2014, S. 4.
[10]The Street Vendors Act,, 2014, S. 6.
[11]The Street Vendors Act, 2014, S. 28.
[12]The Street Vendors Act, 2014, S. 18.

free, restricted and no-vending zones[12] as well as make provisions to accommodate existing and future street vendors.

Unfortunately these zones can only accommodate a limited number of street vendors and additional vendors are allotted a zone by a lottery system[13].

Lastly this Act states that no hawker can be evicted from his/her spot; however, they may be evicted by the local authorities for non-compliance with the provisions of this Act. The Act also gives them the right to be relocated to a new area or a site to carry out their vending activities[14].This section is being misused by the authorities as it gives them excessive powers leading to bribery extortion and other such malpractices.

Evaluation of the law

The Street Vendors Act 2014 was introduced to give legal rights to protect street vendors. It consists of 39 sections elaborated in 10 chapters. Only two sections, *viz.* S. 12 and S.13 mention the rights available to street vendors.

S. 12(1) declares the right to carry on the business of vending activities in accordance with the terms and conditions mentioned in the certificate of vending. This section makes no contribution to the rights of vendors since the Supreme Court has repeatedly held that street vending is a fundamental right under Indian constitution[15].By virtue of Art. 141 of the Indian Constitution, the decision of the Supreme Court is binding for the whole of India.It needs to be understood that there is vast difference between "right to street vending" and "right of vendors."The parliament must amend S. 12 to bring distinction between rights of street vending and right of vendors. Under this section, right to street vending is given which is repetitive of Supreme Court decisions. Secondly, this section is a blend of rights and restrictions, as it gives thema few rights subject to conditions mentioned in the certificate of vending. Ideally. the section should provide detailed description ofdifferent provisions to protect and safeguard rights of the vendors. The rights should not be limited to

[13]The Street Vendors Act, 2014, S. 4(3).
[14]The Street Vendors Act, 2014, S. 13.
[15]*Sodhan Singh v. Delhi Municipal Corporation* [1992]AIR SC 1153; *Gulamali Gulamnabi Shaikh v. Municipal Commissioner* [1986] GLH 616.

the certificate. Also the state should guarantee protection and conduct regular inspections to ensure that the rights of the vendors are protected.

Contradictory Punishment

A close reading of the act suggests that the punishments given under Ss. 10, 27 and 28 are disproportionate and contradict the claim of the government that it is strongly committed to protecting the rights of the street vendors. According to S. 10, if the street vendor happens to go against the terms of the certificate of vending, then the TVC is entitled to revoke or suspend the certificate of vending. But this seems to be a very vague section as it does not make a distinction between major and minor breach, and awards a uniform punishment. Thus, a minor breach is committed by a vendor may result in his certificate being revoked or suspended, which means he could lose his means of livelihood.S. 10 must be amended and there must be a direct relationship between the breach and punishment otherwise the Act will go against the basic principle for which it was set up and make the vendors vulnerable to punishment and evictions.

S. 27 of the same Act prevents a street vendor from vending their goods when he is incompliant with the certificate of vending. This section is open to different interpretations: one of them could be that vendors without a certificate would not come within the purview of this section. A second interpretation could be, that the officials could abuse their authority and indulge in corrupt practices, since they decide arbitrarily whether a vendor is complying with the rules or not. Law must provide protection to all the street vendors and such discrimination makes it necessary for law makers to amend this Section.

The third punishment that is offered is covered under S. 28.This section imposes fines on those vendors who act against the rules of the certificate. Imposing heavy fines is not a way to safeguard the rights of the vendors such a punishment puts them at a risk of losing their livelihood.Another criticism of S. 28 is that it is unconstitutional. The Act is vesting powers in the local authorities as defined under sec 2(1) (c)of the Act. This means that the local authority has the power to convict a street vendor and also decide the penalty to be paid. The constitutional question that this section raises is whether jurisdiction

over criminal matters can be transferred to a non- judicial entity, composed of officials from the state. This question may only be answered in the negative as the Government cannot interfere in the adjudication process. It is in violation of the principle of separation of powers which is an essential tenet of the constitution. Disassociation between courts and the state is a crucial constitutional imperative.In the Case of *Union of India v R. Gandhi*[16] the Constitutional Bench of the Supreme Court elaborated on how the creation of a non-independent adjudicatory entity would be an unconstitutional exercise of legislative power. Thus, S. 28 by vesting powers in the local authority which is a non-judicial body violates the basic principles of the Constitution. Instead a special tribunal can be set up with all the powers of the local authority.

All these drawbacks call for an amendment to these sections so that there is equality before law and justice can be provided impartially.

Comparative position of law

The following is the status of street vendors in various countries:

Singapore

According to the report of the hawkers department of the government of Singapore (2003) it is the only country in the world, where all the street vendors are licensed[17]. The hawkers department is under a duty to check that there are no unlicensed hawkers. It is also their duty to ensure that the hawkers keep the environment clean and do not obstruct traffic and pedestrians. Moreover regular training courses on food and personal hygiene, and nutrition is provided.

Bangladesh

The number of street vendors in Bangladesh is very large. Street vending is considered an illegal trade and street vendors face constant harassment at the hands of the authorities. In order to ply their trade they are forced to indulge in bribery. Inspite of various unions working to safe guard the rights of vendors, their conditions are still deplorable.[18]

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[16] (2010) 11 SCC 1

[17]Dr. Dendukuri Indira, "A Study of Street Vending Across the Globe" (2014)4 IJARCSSE517.

[18]*supra note 17.*

Srilanka

The position of Street Vendors in Sri Lanka is slightly better than that in India and Bangladesh. Street vendors contribute significantly to the economy of the country. Street vending is not totally illegal and vendors can carry out their trade by paying regular tax to Municipal Council.

Despite paying regular taxes their rights are not adequately safeguarded and they are harassed by local authorities.[19]

Seoul

The situation is no better in South Korea as the Government is insensitive to the problems of the urban vendors. The number of street vendors is constantly increasing but their problem is ignored by the government.[20]

Conclusion

The Street Vendors Act was the first step taken by the Government of India to protect the livelihood of almost 10 million[21] individuals engaged in street vending in major cities of India.Though the contribution made by vendors to the economy is not acknowledged, they economize the expenses of the middle and lower classes, while vending is a source of employment. Thus the step taken by the Government to safeguard their rights and duties is laudable. However, upon further analysis, the Act falls short of its main agenda. It gives excessive powers to the municipal authorities and local bodies and promotes red tape-ism and bureaucracy. The Act is ambiguous in parts and repetitive and provides for harsh punishments calling for amendment of some sections. Despite its drawbacks it is a progressive piece of legislation and with proper implementation can be successful in improving the lives of street vendors.

[19] *supra note 17*
[20] *ibid.*
[21] "Street Vendors in India" (Women in Informal Employment: Globalizing and Organizing (WIEGO)) <http://wiego.org/informal_economy_law/street-vendors-india>, last accessed on 24th January 2016

Legislation by Ordinance: Changes to Section 9 of Arbitration and Conciliation Act, 1996 and their effect

- *Senjuti Mallick*[*]

Introduction

The President of India promulgated the Arbitration and Conciliation (Amendment) Ordinance, 2015 on October 23, 2015 (hereinafter referred to as 'the Ordinance') amending the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act'). The said Ordinance came into force on the date of notification i.e. October 23, 2015. The Ordinance isaimed at achieving the original object of arbitration, which is to makearbitration a more desirable option for settlement of commercial disputes, more user-friendly and cost effective. The Law Commission of India in its 246th Report had recommended various amendments in the Arbitration and Conciliation Act, 1996, in order for India tobecome a hub of International Commercial Arbitration.[1] Many of these recommendations have been incorporated in the new ordinance. The object of this article is twofold – first, to discuss the law relating to ordinances and two, to analyse the changes brought about in S.9 of the Act.

Meaning of Ordinance :

The President has been empowered to promulgate Ordinances based on the advice of the centralgovernment under Art. 123 of the Constitution. This legislative power is available to the President only when either of the two Houses of Parliament is not in session. Additionally, the President cannot promulgate an Ordinance unless he 'is satisfied' that there are circumstances that require taking 'immediate action'. Ordinances are only temporary laws as they must be approved by Parliament within six weeks of reassembling or they shall cease to operate. However, some ordinances have been promulgated numerous times, for example, the Securities Laws (Amendment) Ordinance, 2014 was recently re-promulgated for the

[*] V B.S.L.,LL.B
[1] Press Information Bureau, Government of India, Amendments to the Arbitration and Conciliation Bill, 2015, available at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=126356>

third time during the term of the 15th LokSabha.[2]Re-promulgation of Ordinances raises questions about the legislative authority of the Parliament as the highest law making body. The Supreme Court in *D.C. Wadhwa v. State of Bihar*[3] was examining a case where thestate government (under the authority of the Governor) continued to re-promulgate Ordinances.The Constitution Bench headed by Chief Justice P.N. Bhagwati observed:

> *"The power to promulgate an Ordinance is essentially a power to be used to meet an extraordinary situation and it cannot be allowed to be 'perverted to serve political ends'. It is contrary to all democratic norms that the Executive should have the power to make a law, but in order to meet an emergent situation, this power is conferred on the Governor and an Ordinance issued by the Governor in exercise of this power must, therefore, of necessity be limited in point of time."*

Ordinance as Law

Art. 123(2) provides in clear and explicit terms that an Ordinance promulgated under that Article shall have the same force and effect as an Act of Parliament. A Constitution bench of the Supreme Court in *A.K. Roy v. Union of India & Ors.*[4]held that:

> *"an ordinance issued by the President or the Governor is as much law as an Act passed by the Parliament and is, fortunately and unquestionably, subject to the same inhibitions. In those inhibitions lies the safety of the people."*

There is no qualitative and quantitative difference between an ordinance and an Act of Parliament.[5]Art. 367(2) of the Constitution states that any reference in the Constitution to Acts or laws of or made by Parliament, or to Acts or laws of or made by the Legislature of a State shall be construed as including a reference to an Ordinance made by the President or to an Ordinance made by a Governor as the case may be. This Article read with Clause 30 of the General Clauses Act clearly indicates that when a reference is made to an Act, it shall

[2] Press Information Bureau, Government of India, Securities Laws (Amendment) Bill 2014 Introduced in Lok Sabha, available at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=107974>

[3] AIR 1987 SC 579

[4] 1982 (1) SCC 271; *M/s. Fuerst Day Lawson Ltd. v. Jindal Exports Ltd* (Civil Appeal No/ 3594 of 2001, Decided On 04.05.2001)

[5] M. P. Jain, *'Indian Constitutional Law',(5thedn.), pg.. 209*

be construed to include Ordinances. Under Arts. 123 and 213, subject to the limitation stated therein, an Ordinance promulgated shall have the same force and effect as an Act of Parliament or an Act of a Legislature of a State.

Thus it can be safely construed that an Ordinance operates in the field it occupies, with same effect and force as an 'Act'.

S.9 of Arbitration and Conciliation Act, 1996 after 2015 Ordinance

S. 9 of the Arbitration and Conciliation Act, 1996 provides that a party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before its enforcement, approach a court for interim measures. For instance, interim measures can be sought against any goods which are the subject-matter of arbitration.

The 2015 Ordinance makes two additions to S. 9. Sub-sections (2) and (3) have been newly inserted while the existing section has been condensed as sub-section (1). Sub-sections (2) and (3) provide that after a court has ordered interim measures under S. 9 (1), the arbitral proceedings shall commence within a period of ninety days from the date of such order or within such further time as the court may determine. It has also been provided that once the tribunal has been constituted, the court shall not entertain an application for interim measures, unless the court finds that circumstances exist which may render the remedy provided under S. 17 inefficacious.

S.9 – Retrospective or Prospective Application?

The Union Parliament and State Legislature have plenary powers of legislation within the fields assigned to them and subject to certain constitutional and judicially recognized restrictions can legislate prospectively and retrospectively. In addition to this, there has been a distinction drawn between laws that are substantive and laws that are procedural and this distinction helps determine retrospectivity and prospectivity. 'The general rule' as Halsbury puts it in Vol. 36[6]

> *'...is that all statutes, other than those which are merely declaratory, or which relate only to matters of procedure or of evidence, are prima facie prospective; and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the*

[6](Third edn.) pg. 423

intention of the legislature.'

But this general rule is applicable where object of statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words, sufficient to show the intention of legislation to affect existing rights, it is deemed to be prospective only.[7] In contrast to statutes dealing with substantive rights, statutes dealing with merely matters of procedure are presumed to be retrospective unless such construction is textually inadmissible.[8] Since an Ordinance has the same force and effect as an Act as has been discussed above, these principles apply in the same manner to ordinances aswell.

The Courts too have drawn a distinction between substantive and procedural provisions with regard to new laws being applied retrospectively. In *Smt. Dayawati v. Inderjit*[9] , it was held that:

> *"As a general proposition, it may be admitted that ordinarily a Court of appeal cannot take into account a new law, brought into existence after the judgment appealed from has been rendered, because the rights of the litigants in an appeal are determined under the law in force at the date of the suit. Even before the days of Coke whose maxim - a new law ought to be prospective, not retrospective in its operation - is oft-quoted, Courts have looked with dis-favour upon laws which take away vested rights or affect pending cases.* ***Matters of procedure are, however, different and the law affecting procedure is always retrospective.*** *But it does not mean that there is an absolute rule of inviolability of substantive rights. If the new law speaks in language, which, expressly or by clear intendment, takes in even pending matters, the Court of trial as well as the Court of appeal must have regard to an intention so expressed, and the Court of appeal may give effect to such a law even after the judgment of the Court of first instance."*

In *The Working Friends Cooperative House Building Society v. State of Punjab*[10], the Supreme Court upheld the view cited by the Constitution Bench of the Supreme Court in *Commissioner of Income Tax v. Vatika Township Pvt. Ltd.* [11]stating,

[7] Justice G. P. Singh, *'Principles of Statutory Interpretation', (13th edn., 2012), pg.532*
[8] *ibid, pg.536*
[9] AIR 1966 SC 1423
[10] Civil Appeal No. 8468 of 2015 (SC)
[11] 2015 (1) SCC 1

> *"The obvious basis of the principle against retrospectivity is the principle of 'fairness' which must be the basis of every legal rule as was observed in L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd.* ***Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation.*** *We need not note the cornucopia of case law available on the subject because the aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties."*

Further, the specific question of retrospective application of Ordinances was discussed in *Radiance Fincap v. Union of India*[12], where the Court laid down the ambit and scope of amending acts and their retrospective operation as follows:

i. A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly-defined limits.

ii. Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.

iii. Every litigant has a vested right in substantive law but no such right exists in procedural law.

iv. A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

v. A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in

[12] Decided on 12th January, 2015 (SC) available at <http://www.the-laws.com/Encyclopedia/Browse/Case?CaseId=005102160000> last accessed 20March 2016

operation, unless otherwise provided, either expressly or by necessary implication.

After stating the above, the Court in *Radiance Fincap* went on to hold that,

> *"When a repeal of an enactment is followed by a fresh legislation, such legislation does not affect the substantive rights of the parties on the date of suit or adjudication of suit unless such a legislation is retrospective and a court of appeal cannot take into consideration a new law brought into existence after the judgment appealed from has been rendered because the rights of the parties in an appeal are determined under the law in force on the date of suit.* ***However, the position in law would be different in the matters which relate to procedural law but so far as substantive rights of parties are concerned they remain unaffected by the amendment in the enactment.*** *We are, therefore, of the view that where a repeal of provisions of an enactment is followed by fresh legislation by an amending Act such legislation is prospective in operation and does not affect substantive or vested rights of the parties unless made retrospective either expressly or by necessary intendment.* ***We are further of the view that there is a presumption against the retrospective operation of a statute and further a statute is not to be construed to have a greater retrospective operation than its language renders necessary, but an amending Act which affects the procedure is presumed to be retrospective, unless amending Act provides otherwise....."***

The above was stated in the context of the Land Ordinance taking away the right of the landowners under S. 24 (2) of the Act by inserting a sub-section without giving retrospective application to the same. [13]The effect of this was to remove the period of stay obtained in judicial proceedings from the computation of the five year period to hold that the acquisition proceedings are lapsed. The Court held that such a provision was only prospective in nature and not retrospective.

It is important to note at this stage that S. 9 is a substantive provision which empowers Court to pass interim orders before it.[14]In this

[13] *ibid*

[14] O. P. Malhotra, *'The Law and Practice of Arbitration and Conciliation', (3rd edn.), pg. 478*

author's opinion, the additions made to the existing section still do not change its earlier nature. Even if S.9 is considered to be procedural, its interpretation maybe made in the same manner as is in the case of the Limitation Act. The Limitation Act is generally regarded as procedural but if its application to a past cause of action has the effect of reviving or extinguishing a right of suit, such an operation cannot be said to be procedural.[15] Similarly, S.9 of the Ordinance creates rights and liabilities due to which it cannot classify to be procedural and thus cannot be applied retrospectively.

Generally, every new amendment to an existing Act is born with a savings and repeal clause which settles the position on whether the said amendment will abolish the previous Act/provision entirely and apply prospectively or whether certain provisions will be saved and carry forward into the new Act. This helps to determine the retrospective and prospective application of the amendment to quite a large extent. It is interesting to note that the 246th Law Commission Report suggested that S. 85A read as:

> *"Transitory provisions—(1) Unless otherwise provided in the Arbitration and Conciliation (Amending) Act, 2014, the provisions of the instant Act (as amended) shall be prospective in operation and shall apply only to fresh arbitrations and fresh applications, except in certain situations...."*

None of the exceptions to S.85A provided for the amended S.9 of the Act; which meant that probably S.9 could be given a retrospective effect. But, we saw that S.9 has been rendered a substantive provision, meaning thereby that the application can only be prospective. This creates a very complicated riddle thus making it far trickier to solve. It is very difficult to gauge the true intentions of the legislators – whether the drafters of the Ordinance intended it to apply retrospectively or prospectively?

The amendments brought about by the Ordinance lays down no clear demarcations in the present case and thus, the nature and applicability of S. 9 of Arbitration and Conciliation Act, 1996 stands in limbo. Though the Ordinance was welcomed, the most contentious issue remained - whether it applied to fresh arbitrations or pending

[15] Justice G. P. Singh, *'Principles of Statutory Interpretation', (13th edn.), pg. 538*

arbitration proceedings. However the recent enactment of The Arbitration and Conciliation (Amendment) Act, 2015[16] which received the assent of the President on 31st December, 2015, seems to have brought some respite to this matter and helps in drawing a clearer picture at interpretation. This Act is deemed to have come into force on 23rdOctober, 2015[17] while the Ordinance stands repealed[18]. Further, S. 26 of the 2015 Act states that,

*"Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of S. 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."*This makes it abundantly clear that all the amended provisions that are provided for in the Arbitration and Conciliation (Amendment) Act, 2015 shall be applicable to proceedings that commence after the commencement date i.e., 23rd October, 2015. The natural corollary which flowsis that all proceedings instituted before 23rd October, 2015 shall be governed by the 1996 Act. Therefore, the legal position and applicability of S. 9 also stands free from doubts as it will apply prospectively and not retrospectively. The legislatures, in a way, gave effect to the 'transitory provision' as suggested by the 246th Law Commission Report. Such a step is credit worthy as it puts to rest a lot of debate, discussion and unwarranted confusion and makes the law more effective in application. Thus, Roscoe Pound rightly said, *"the law must be stable, but it must not stand still."*

[16]Arbitration and Conciliation (Amendment) Act, 2015, Ministry of Law and Justice (Legislative Department), available at <http://egazette.nic.in/Write Read Data/2016/167377.pdf> last accessed 20 March 2016

[17] S. 1(2), Arbitration and Conciliation (Amendment) Act, 2015

[18]*ibid, S. 27(1)*

Torture: A Product of State Immunity

- *Aishwarya Salvi, Yojit Pareek*[*]

Introduction

"The sad truth is that most evil is done by people who never make up their minds to be either good or evil."

- Hannah Arendt

A State assumes power when individuals place their faith, surrender some of their freedoms and submit to the authority of the State.[1]Right from USA to North Korea, States have misused their power and committed acts of torture on citizens and non-citizens by justifying these within a legal framework or under the guise of national security.

This essay is a critique of the conflict between state immunity and accountability of state for its inhuman conduct.

Over the years, the international community has started to take cognizance of the acts of torture committed by nation states all over the world and has tried to codify laws to prohibit such acts. Prohibition of torture has been accepted as a fundamental principle of customary international law. However, some States openly violate these laws and whenever the international community has tried to prosecute the misdeeds of a sovereign, the principle of state immunity has always acted as a shield to escape accountability. It is pertinent to note that while developing the international law against torture, the United Nations has taken into consideration immunity of a foreign State in judicial matters.[2]This article will analyze the conflict between state immunity and accountability of a state for its torturous acts.

Torture

To a layman torture means the cruel or inhumane treatment inflicted on someone. Several human rights instruments such as the 1975 United Nations Declaration Against torture[3], the 1984 United Nations

[*]IV B.S.L. LL.B

[1] The social contract or political contract is a theory or model, originating during the Age of Enlightenment that typically addresses the questions of the origin of society and the legitimacy of the authority of the state over the individual.

[2]UN General Assembly, United Nations Convention on Jurisdictional Immunities of States and Their Property, GA/RES/59/38 (December 2, 2004).

Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (UNCAT)[4], the 1950 Convention for the Protection for Human Rights and Fundamental Freedoms[5], the 1985 Inter American Convention to Prevent and Punish Torture[6], the International Covenant on Civil and Political Rights(ICCPR) [7] and the Universal Declaration of Human Rights[8]have tried to define torture.

The first mention of torture was in the International Covenant on Civil and Political Rights (ICCPR).

Art. 7 of ICCPR provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.[9]

However the Human Rights Committee considered that this human rights convention does not contain any definition of the concept covered by Art. 7.Neither does the committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different types of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied.[10]

Art. 5 of the Universal Declaration on Human Rights provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[11]

[3]Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGARES/30/3452 (December 9, 1975)

[4]Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (adopted December 10, 1984, entered into force 26 June 1987) 1465 UNTS 85.

[5]Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocols Nos. 11 and 14, adopted November 4,1950) ETS 5.

[6]Organization of American States (OAS), Inter-American Convention to Prevent and Punish Torture (adopted December 9, 1985) OAS Treaty Series, No. 67.

[7]International Covenant on Civil and Political Rights (adopted December 16, 1996) 999 U.N.T.S. 171

[8]United Nations Declaration on Human Rights (UDHR), UNGA. Res. 217A (III), U.N. Doc. A/810 at 71

[9]Art. 7, *supra note 7.*

[10]Human Rights Committee, Para 4, General Comment 20, Art. 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30

[11]Art. 5,*supra note 8.*

In 1984, for the purposes of describing specific measures against torture, the UNCAT included a definition of torture as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from inherent or incidental lawful sanctions.[12]

New definitions of torture have been codified in international criminal law instruments and have been applied to various cases such as those decided by the International Criminal Tribunal for the Former Yugoslavia (ICTY).

Article 7(2) (e) of the 1998 Rome Statute of the International Criminal Court (ICC)[13] reads:

> *'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.*

On the perusal of the above definitions, it can be seen that the purpose behind the definition under UNCAT is to provide for state responsibility for acts of torture while the definition under the Rome Statute considers individual responsibility. Initially, the focus was only on the conduct of states, but the Nuremburg trials recognized the concept of individual criminal responsibility for the first time. Followed by the Nuremburg trials, in order to develop the rules on individual criminal responsibility under international law, two ad hoc tribunals for the former Yugoslavia(ICTSY) and Rwanda (ICTR) were set up.[14]Further, the International Criminal Court set up under the Rome Statute explicitly defined the liability of individuals for such heinous acts.

[12]Art. 1, *supra note 4.*

[13]UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90

[14]These tribunals worked towards permanent jurisdiction and forming an international criminal code envisaged by the UN General Assembly Resolution 95(I)

Prohibition of torture has become a *jus cogens* norm under international law. But in reality statistics confirm that there are at least 80 countries around the globe that resort to torture and ill treatment on a regular basis.[15]Thus, under the guise of the principle of state immunity, States, without giving due recognition to this *jus cogens* norm, violate their obligations under the Convention on Torture. The United Nations Convention on Jurisdictional Immunities of States and their Property[16] has codified state immunity. The discussion over the elimination of torture concluded that the principle of state immunity was becoming a roadblock to get access to a fair trial against the perpetrator.

Immunity of State Officials from Foreign Criminal Jurisdiction

According to Professor Darius Rejali, while dictatorships may have used torture more and more indiscriminately, it was modern democracies- the United States, Britain and France, who pioneered and exported techniques that have become the lingua franca of modern torture: methods that leave no marks.[17]

It is assumed that state immunity has evolved as a customary international law which has been codified under the United Nations Convention on Jurisdictional Immunities of States and their Property. However, this principle is not a definite concept as states have the liberty to define the scope and limits of sovereign immunity within their domestic laws. Right from United States to Gambia, states have started misusing the defense of sovereign immunity as a shield to do away with their responsibility to prevent torture.

Under customary international law, state officials enjoy immunity from civil and criminal jurisdiction of a foreign state. The doctrine of state immunity has two forms: *Immunity ratione personae* and *Immunity ratione materiae*. *Immunity ratione personae* is an absolute form of immunity, which strictly prohibits control over an act committed under official capacity as well as private acts. The scope of this

[15]The International Rehabilitation Council for Torture Victims (IRCT) made a global analysis of torture based on reports of Amnesty International (2001), Human Rights Watch (2003), United Nations (2002) and US Department of State (2002)
[16]*supra note* 2.
[17]Darius Rejali, 'Torture, American Style'(2007) <http://www.boston.com/bostonglobe/ideas/articles/2007/12/16/torture_american_style/?page=1> last accessed 5 August 2015)

immunity was first discussed in a decision given by the International Court of Justice (ICJ), *Congo v. Belgium*.[18]The court held that, *"in international law it is firmly established that, diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal."* However, in *Pinochet*, the court took a narrow approach towards personal immunity.[19] It was in this case that the House of Lords scrutinized *immunity ratione materiae* and noted that *"though a former head of state enjoys no immunity ratione personae, he or she may continue to enjoy immunity rationemateriae"* (i.e. immunity in relation to acts done as part of his official functions when head of State). This subject-matter immunity *"applies not only to ex-heads of state ... but to all state officials who have been involved in carrying out the functions of the state."*

State Immunity: A *Jus Cogens* Norm?

According to Sulaiman Al-Adsani, a torture survivor, state immunity is the number one barrier in any international case that involves torture. State immunity is a way for torturers to hide behind a veil, calling it'immunity'.

The doctrine of state immunity relates to the protection of a state from being sued in a foreign state. Some commentators are of the view that the ban on acts of torture should be given more importance than state immunity, whereas some believe that immunity should be respected, keeping in mind the relations between states, as what is wrong for one state may be right for another state.

After World War II, Italy adjudicated the civil cases against Germany for World War II atrocities despite Germany claiming immunity. This action on behalf of Italy was challenged in the ICJ (*Germany v. Italy*) and the court upheld the principle of state immunity.[20]However, this decision by the ICJ was met with a series of criticisms from several

[18]Case concerning the Arrest Warrant of 11 April 2000 *(Democratic Republic of the Congo v. Belgium)* [2002] I.C.J. Rep. 3 at para. 51, 41 I.L.M. 536
[19]*R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte* [1998] UKHL 41.
[20]Jurisdictional Immunities of the State *(Germany v. Italy: Greece intervening)* I.C.J. Reports 2012, pg. 99.

commentators for not comprehending the necessity to waive immunity in cases of gross human rights violations.

According to Malcolm N. Shaw, for a custom to be accepted and recognized it must have the concurrence of the major powers in that particular field.[21]While considering state immunity as a custom, the United States argues that this particular rule, though applicable to the international comity is not binding while implementing domestic laws.[22]

In 1978, the United Kingdom enacted the State Immunity Act,[23] which determined state immunity along with twelve exceptions to it. In *Jones v Saudi Arabia*[24], the issue before the House of Lords was whether European courts had the right to entertain proceedings brought out against another state for commission of torture. The Court considered the exceptions and concluded that this case did not meet the criterion for an exception and upheld state immunity by citing the comments made by the Court of Appeal of Ontario in *Bouzari v. Islamic Republic of Iran*. The Court of Appeal stated that the House must consider the balance currently struck in international law between the condemnation of torture as an international crime against humanity and the principle that states must treat each other as equals not to be subjected to each other's jurisdiction.[25]

Additionally, the European Court of Human Rights cited the decision of the ICJ in *Germany v. Italy*[26] and upheld the decision of the House of Lords which further undermined the principle of *jus cogens* to prevent torture.

In 1994, the Canadian court adjudicated the renowned case of *Bouzari v Islamic Republicof Iran.*[27] Canada had enacted the State Immunity

[21] Malcolm N. Shaw, *International Law (6th ed., Cambridge University Press 2008), 80*

[22] Lee M. Caplan, State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory, 97 AM. J. INT'L L. 741, 751 (2003) (discussing Justice Marshall's statement that all exceptions to the full and complete power of a nation within its own territories, must be traced to the consent of the nation itself)

[23] available at <http://www.legislation.gov.uk/ukpga/1978/33> last accessed 05 August 2015

[24] *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya* (the Kingdom of Saudi Arabia) [2006] UKHL 26.

[25] *The Court of Appeal of Ontario in Bouzari v Islamic Republic of Iran* (2004) 71 OR (3d) 675, p. 95.

[26] *supra note 18.*

[27] *supra note 23.*

Act, 1985[28] which was similar to the United Kingdom's State Immunity Act of 1978.[29]In November 2000, Mr. Bouzari attempted to sue the Islamic Republic of Iran for compensation for his kidnapping, false imprisonment, assault, torture, and death threats, and wanted a return of the paid ransom money. He also pleaded in front of the Court to award punitive damages.[30] The Court of Appeal used the 'Real and Substantial Connection Test' and arrived at a conclusion that Ontario did not have the jurisdiction over civil actions for torture abroad.[31]

The United States of America codified the principle of state immunity in the Foreign Sovereign Immunities Act (FSIA), 1976.[32]This act provides for state immunity unless the claim is subject to the exceptions to the Act. On studying the judgments given by the US Courts, it can be seen that the US has the foreign policy that supports state immunity and neglects the dire need to abolish torture.[33] This particular Act was criticized as it did not have an exception for acts of torture. In 1996, the Anti-terrorism and Effective Death Penalty Act was enacted to exclude acts of torture from the purview of state immunity. This Act was further re-codified which included the 'terrorist State exception'. This exception provided forthe deprivation of the Perpetrator State from immunity and would depend on the US government considering the State as a sponsor of terrorism. Although this Act may give individual victims of torture or other human rights violations the opportunity to seek reparations, several conditions should be available to open the US forum to this category of suits.[34]

In *Samantar v. Yousuf*, former Prime Minister of Somalia, Mr. Mohamed Ali Samantar was alleged to have committed a series of torturous acts and killed civilians in Somalia. The Supreme Court held that

[28] available at <http://canlii.ca/t/lgjj> last accessed 05 August 2015

[29] *supra note 21.*

[30] *The Top Five – 2004, available at<http://ojen.ca/sites/ojen.ca/files/resources/Bouzari.pdf> last accessed 05 August 2015*

[31] *Bouzari v. Iran,* 2004 CanLII 871 (ON CA), available at <http://canlii.ca/t/1hdv4> last accessed on 05 August 2015

[32] 28 U.S. Code, C 97, S. 1605 (a) (5).

[33] Parinaz Lak,The International Law of State Immunity and Torture, available at <http://claihr.ca/wp-content/uploads/2015/06/Parinaz-Lak-The-International-Law-of-State-Immunity-and-Torture-June-2015.pdf> last accessed on 05 August 2015

[34] *See Gates v. Syrian Arab Republic,* 580 F. Supp. 2d 53, 54 (US D.D.C.2008); *Rein v. Socialist People's Libyan Arab Jamahiriya,* 162 F.3d 748 (US 2d Cir. 1998)

state officials are not entitled to immunity under the FSIA, 1976 for acts of torture, as the definition of 'foreign state' in 1603 of the FSIA does not include state officials[35] and the Somalian official was not covered by the FSIA. This decision had many implications on the reciprocal immunity of US officials, US relations with other countries like Israel, etc.

On the perusal of the above cases adjudicated by various courts, one can see the inconsistencies existing in the domestic laws of states for punishing state officials guilty of torturous acts. Hence, it is difficult to argue in favor of state immunity as a *jus cogens* norm.

The United Nations Convention On Jurisdictional Immunities Of State And Their Property

The United Nations Convention on Jurisdictional Immunities of States and Their Property[36] was adopted by the General Assembly on 2nd December, 2004 but it has not come into force. As of May 2013, only 28 countries have signed and 13 countries have ratified the Convention. According to Art. 30 of the Convention, there should be at least 30 State parties to the Convention for it to come into force.

According to the report of the Special Rapporteur, Sompong Sucharitkul, of the International Law Commission (ILC) on the topic of immunities of States,[37] there are difficulties encountered in an effort to find uniform rules of international practice on State immunity. One reason is "the diversity of legal procedures and the divergence of judicial practice, which varies from system to system and from time to time". Another reason is that legal decisions on State immunity yield to foreign policy considerations and political relations with the offending State actor.[38]

[35]*Samantar v. Yousuf et al.*, No. 08–1555, United States Supreme Court, 1 June 2010, available at <http://www.refworld.org/docid/4c1748bf2.html> last accessed 5 August 2015

[36]*supra note 2.*

[37]Sompong Sucharitkul, Preliminary Report on the Topic of Jurisdictional Immunities of States and Their Property, UNGAOR, 1979, UN Doc. A/CN.4/ 323, 28

[38]*supra note 32.*

The Convention does not serve the purpose for which it came into existence. The provisions enshrined in the Convention do not really include human rights violations as an exception to the principle of state immunity. Part III of the Convention deal with certain proceedings in which state immunity cannot be invoked such as commercial transactions, contract of employment, intellectual property and industrial policy, etc. This signifies that only transactions which are commercial in nature are included as exceptions to state immunity. Article 11 of the Convention is the only provision that pitches in a solution for states to strike a balance between their sovereignty and human rights obligation by accommodating their human rights obligation to individuals employed to work within their territory and at the same time honor their international obligations towards sending States.[39] However, this provision has its own limitations which fail to serve the purpose of the Convention.

Conclusion

After in-depth study of the changing trends in this area, one can arrive at the conclusion that no state would willingly give up its state immunity to punish its officials for committing torture. Studies show that approximately one fourth of the nation states around the world commit torture on their subjects for various reasons and to escape liability, many states have not signed or ratified the Convention against Torture. Giving up state immunity will affect the international relations of the countries.

Sir ElihuLauterpacht, in his work 'Aspects of the Administration of International Justice' said it was *"essential to stress that litigation is not the only, or even the best way of settling disputes. It is an inescapable fact that issues that divide States are best settled by negotiation and agreement."*[40]There is no strict rule that can be followed to solve the conflict between state immunity and prevention of torture. One should

[39]Philippa Webb, 'Should the 2004 UN State Immunity Convention Serve as a Model/ Starting point for a Future UN Convention on the Immunity of International Organizations?',International Organizations Law Review 10 (2013) 319-331 , available at< http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2556823>last accessed 05 August 2015

[40] Sir ElihuLauterpacht, Aspects of the Administration of International Justice (1991)

look at the issue on a case to case basis because the principle of state immunity and international relations between states are both equally important for maintaining equilibrium.

There is a long way to go to achieve a zero tolerance approach towards instances of torture as victims like Jones[41] and Guantanamo Bay[42] prisoners continue to suffer. A concrete uniform code for exceptions to the principle of sovereign immunity might be a solution through which these people can get the justice due to them. Until we give the sufferers the justice they deserve, world peace will remain a mockery.

[41] *supra note* 22.

[42] *Nick O'Malley,' Terror, Torture and Torpor: Inside Guantanamo Bay with the 'forever prisoners'', The Sydney Morning Herald, (December 13, 2014)*

Alternate Judgement Writing

Re-Arguing The Case Of D. K. Aruna v. State Of Telangana

*MrinaliniPatil, Trisha Roy, Prajval Albuquerque**

The object of this paper is to reargue and encapsulate the missing essence of the case *D.K.Aruna v. State of Telangana*[1] wherein the Supreme Court bench comprising Chief Justice H. L. Dattu, Justice A.K. Mishra and Justice Amitava Roy gave a one word order "Dismissed".[2]The following submissions are made as per our contemporaneous knowledge gathered from news reports wherein the Petitioner urges 'all male' state governments for inclusion of women in the council of Ministers.

After analysing the facts, issues, and arguments made by both the Petitioner and Respondent, the following observations have been made and the following order passed.

Facts

1. This writ petition had been filed for the enforcement of the fundamental rights of working women under Art. 14, 15 and 16. It has come before this court as the contention of the Petitioner that women, though being an integral part of this nation, are being constantly denied a place in the Cabinet Ministry of States like Uttar Pradesh, Delhi, Punjab, Nagaland and Mizoram.
2. The Petitioner has been elected as a member of the legislative assembly to the newly formed state of Telangana and is a legislator of the party which enjoys majority in the house i.e. Telangana Rashtriya Samithi.

*II LL.B.

[1] Writ Petition (Civil) No. 512/2015

[2] Apoorva Mandhani, 'SC refuses to entertain petition to include women in State Cabinets' (LiveLaw.in, August 8, 2015) <http://www.livelaw.in/sc-refuses-to-entertain-petition-to-include-women-in-state-cabinets/> last accessed 20th March 2016

3. The Petitioner has not been offered any ministry in the new Cabinet and hence the Petitioner has filed a PIL in which she seeks remedy from the court in the form of 40% representation for women in the state Cabinet.

Issues :

The issues which we feel are essential to be mentioned and which were argued by the Petitioner and Respondent were:

1. Whether the Public Interest Litigation is maintainable and if the Court is competent to adjudicate upon it.
2. Whether the Court can direct the State Government to include women in the State Cabinet

Contentions of the Petitioner :

1) The Public Interest Litigation is maintainable.

The writ petition under Art. 32 of the Constitution came before the Court because of non-inclusion of women in the State Cabinet which ultimately leads to violation of the fundamental rights of working women under Art.14, Art. 15 and Art. 16.

When the matter came up for hearing, the main argument was with regard to maintainability of the writ petition since it pertained to subject of gender inequality in governance. The maintainability of the petition revolves around and predominantly focussed on one question that is whether there was any violation of fundamental rights of working women under Arts.14, 15 and 16.

Art. 14 which provides that the State shall not deny to any person equality before the law, has been the subject matter of interpretation in a number of cases before this Court as well as the High Courts. In *Glanrock Estate(P.) Ltd. V. State of T.N*[3] the Supreme Court stated that *"A person will be treated unequally only if that person was treated worse than others, and those others must be those who are "similarly situated" to the complainant"*. Thus, where women as a class have been treated worse than others i.e. not granted ministry, Article 14 is violated. This shows that the state legislature had discriminated between men and women. This further violates Art. 15 (1) and 15 (3). The Bombay

[3]*Glanrock Estate(P.) Ltd. V. State of T.N*,(2010)10 SCC 96.

Government enacted a statutory provision reserving a few seats for women in the municipalities. The provision was challenged as discriminatory. Rejecting the challenge in *Dattatraya v. Motiram More*[4], the Bombay High Court pointed out that

> *"A joint operation of Art.15(1) and Art. 15(3) empowers the state to discriminate in favour of women against men but it could not discriminate in favour of men against women"*

The learned counsel appearing on behalf of the Petitioner raised a preliminary contention that the Petitioner has not been offered any ministry. Art. 16(2) *provides that no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.* In *Air India Cabin Crew Association v.Yeshawinee Merchant and Ors*[5]the Supreme Court stated that Art. 16(2) prohibits discrimination only on sex but clause (3) of Art. 15 enables the State to make 'any special provision for women and children'. Art. 15 and 16 read together prohibit direct discrimination between members of different sexes, if they would have received the same treatment as comparable to members of the opposite gender. The two articles do not prohibit special treatment of women. The constitutional mandate is infringed only where the females would have received same treatment with males but for their sex. The Punjab & Haryana High Court took this view in *Shamsher Singh vs. State of Punjab*[6] and upheld the impugned rule under Art. 15(3), holding that, even though the discrimination was based on the ground of sex, it was saved by Art. 15(3). The Court further stated that Art. 14, 15 and 16, being the constituents of a single code of constitutional guarantee, supplementing each other, clause (3) of Art. 15 can be invoked for construing and determining the scope of Art. 16(2). Identical views have been expressed in *Saurabh Chandi v. Union of India*[7], holding that the law is settled that Art.14, Art.15 and Art.16 form part of the same constitutional code of guarantees and supplement each other.

Hence, even if a case fits within the ambit of Art.14, Art.15 and Art.16 would automatically be applicable. It is a proven fact that women

[4]*Dattatraya v. Motiram More*, AIR 1953 Bom 311
[5]*Air India Cabin Crew Association v.Yeshawinee Merchant*, AIR 2004 SC 187.
[6]*Shamsher Singh vs. State of Punjab*, AIR 1970 P& H 372.
[7]*Saurabh Chandi v. Union of India* , (2003) 11 SC 146.

are not equally represented in the Cabinet of the above mentioned states. Thus the Petitioner contends that this lack of women in the cabinet of above mentioned states is violative of Art.14 and 16(2) and at the same time under Art. 15(3), special provisions can be made to stop this discrimination. Thus the Petitioner based on these contentions tried to prove the maintainability of the case.

2) This Court should direct the State Government to include women in the State Cabinet

The Convention on the Elimination of All Forms of Discrimination against Women also reminds us that for the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men, in all fields.[8]India is a party to Convention on the Elimination of All Forms of Discrimination against Women and Art. 253 of India's Constitution bestows upon the legislature competence to enact provisions to give effect to this International Covenant. Thus there is no bar against the implementation of reservation for women in Cabinet posts.

Australia's draft National Action Plan recognizes that 'women are powerful agents of change' and that to achieve sustainable peace and security, women's voices must be heard at all levels and stages of the peace process[9] and in order for women's voice to be heard it is necessary to grant them a place in the cabinet so as to grant them an opportunity to bring about change.

The Panchayats in Metikheda village in Yavatmal district of Maharashtra had done no work at all, till in 1998, the women took over and brought about a total transformation in the village. The women's Panchayat initiated and implemented water supply schemes, additional school rooms, provided fuel and sanitation facilities which reduced the burden of rural women drastically.[10]This again goes on to show that when the matter of public interest and

[8]Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 13 (entered into force 3 September 1981), Preamble. Para. 12

[9] Department of Families, Housing, Community Services and Indigenous Affairs, 'Australian National Action Plan on Women, Peace and Security: Consultation Draft' (2011), 3.

[10]SumitraAhlawat, 'Impact of the 73rd Amendment of the Indian Constitution on Women Empowerment: An Analytical Study' International Journal of Enhanced Research in Educational Development (2013) Vol. 1, Issue 3, 17-20

empowerment of villages comes into picture women have proved their metal.

Art. 16(2) has to be viewed and construed in the particular context of the requirements of the public service as was done in the case of *Mrs.Raghubans Saudagar Singh v. State.*[11] Here the Court stated:

> *"One of the paramount considerations for the public service must necessarily be the efficiency of its employees. The State must select and appoint persons most suitable to discharge the duties of a particular job which they are to hold".*

When this is read with the Metikheda incident it becomes very clear that the demand for reservation in the State Cabinet is not only based on Art.16(2) but also upon the fact that women are just as good, or arguably better, at handling administrative positions as compared to men. Thus the current case is an exception to *Mrs Raghubans v. State* which was applied by the Respondent in her argument.

In *Government of A.P. v. P. B. Vijaya Kumar,*[12] it was held that special provisions contemplated under Art. 15(3), which the state may make to improve women's participation in all activities under the supervision and control of the State, can be in the form of either affirmative action or reservation. The wordings used here are *"in all activities under the supervision and control of the State"*. The cabinet comes under the ambit of state and in the absence of any precedent,it can be safely assumed that reservation in activities may include the activities performed by the Cabinet and thus reservation to women can be granted.

The Petitioner further went on to plead that since under Art.15(3) the state could make laws, hence the court should direct all the states to formulate reservation policy to incorporate 40%women in their state cabinet in order for them to be represented adequately.

Contentions of the Respondent

1) The Public Interest Litigation is not maintainable :

In *Walter Alfred Baid, Sister Tutor (Nursing,) Irwin Hospital vs. Union of India*[13], the Delhi High Court refused to read Art. 15(3) into Art.16

[11]*Mrs.Raghubans Saudagar Singh v. State,* AIR 1972 P&H 117.

[12]*Government of A.P. v. P. B. Vijaya Kumar,* AIR 1995 SC 1648.

[13]*Walter Alfred Baid, Sister Tutor (Nursing), Irwin Hospital vs. Union of India,* AIR 1976 Del 302.

so as to restrict the scope of prohibition contained in Art. 16(2).The Respondent contends that if the state allows reservation in favour of women in cabinet, it would amount to discrimination against men. The state has not acted in a way so as to discriminate men against women. Women can contest elections and are allowed to be a part of the legislative assembly in the State of Telangana as well as in other states mentioned by the Petitioner. No such law has been passed by the state restricting women from taking part in elections. Thus no discrimination is practised against women. Hence in the absence of any violation of fundamental right the Petitioner has no *locus standi.*

In the Supreme Court Circulars [14]which is based on the order dated 19.8.1993 by the CJI, the grounds for filing a PIL are mentioned. The case of Petitioner does not satisfy any of the grounds mentioned therein. Thus, the Respondent pleaded that the PIL was not maintainable.

2) This Court should not direct the State Government to include women in the State Cabinet

In *F. Ghousel Muhiddeen v. Government Of India*[15] it was stated that formation of cabinet is a parliamentary prerogative or custom which is only wielded on the aid and advice of the chief Minister. Formation of a Council of Ministers is an Executive power, and hence the Court cannot direct its formation by Mandamus under Art. 32 or Art. 226 by virtue of Art. 164 and Art. 163. Art. 164 states that other Ministers shall be appointed by the Governor on the advice of the Chief Minister. Who has to be appointed as a Minister, whether a particular community needs representation in the ministry, and the subjects to be allocated in each of the portfolios are all within the domain and absolute discretion of the Chief Minister. Dr. D. D. Basu observes about the above case that "It was held therein that the above provision curtailed the power of judiciary from intervening in matters relating to appointment of Ministers and such matters falls outside the scope of judicial review under Art.226"[16] and in the absence of any

[14]*The Supreme Court of India, 'Compilation of Guidelines to be followed for entertaining letters/ petitions received in this Court as Public Interest Litigation' available at <supremecourtofindia.nic.in/circular/guidelines/pilguidelines.pdf.> last accessed 20th March 2016.*

[15]*Ghousel Muhiddeen, F v. GOI,* AIR 2002 Mad 470.

[16] D.D. Basu, *'Introduction To the Constitution of India' (20thedn Lexix Nexis 2011)*

precedent same can be held true for the Supreme Court.

It is the Executive prerogative of that of the Chief Minister and the Governor. It is no right for which a Mandamus has to be issued. This writ arises when there is a denial of equal protection and opportunity. This right does not see its application beyond the right to contest the election for the Legislative Assembly on a common ground.

Further, taking Art. 361 into consideration, a writ of Mandamus does not lie against the Governor. In *S. Dharmalingam v. His Excellency the Governor of Tamil Nadu*[17], the Madras High Court held that,

> *"Certain Powers are available to the Governor under Article 163(2), which he could exercise in his sole discretion. With regard to the action pertaining to his sole discretion, the immunity of the Governor is absolute and even beyond the writ jurisdiction of the High Court. The power of the Governor with regards to appointment of CM is a power which falls in his sole discretion and therefore court cannot call in question the same"*

Mandamus will not be issued against the Legislature, even where it is going to enact a law which offends against fundamental rights. Conversely, it can not be issued to direct a Legislature to enact a particular law:

In *Narinder Chand Hem Raj v. Lt. Governor & Administrator, H.P*[18], the Court held that no court can give direction to a government to refrain from enforcing a provision of law, just as no court can issue a mandate to a legislature to enact a particular law, even if such a legislature is competent to pass such a law. Similarly in the case of *Supreme Court Employees Welfare Association v. Union of India*[19], mandamus cannot be issued to the Executive to make a particular rule in the exercise of its power of delegated legislation, as the power to frame rules is legislative in nature. Mandamus cannot be issued to violate a law. In Art. 164 (1) there is a clear mention on the manner in which the Council of Ministers is appointed. Any direction for the same will be violation of the existing law.

The remedy demanded is under Art.15 (3) which may be a wider provision in comparison to Art.16(1) and 16(2).

[17]*S. Dharmalingam v. His Excellency the Governor of Tamil Nadu,* AIR 1989 Mad 48.

[18]*Narinder Chand Hem Raj v. Lt. Governor & Administrator, H.P* ,(1971)2 SCC 747.

[19]*Supreme Court Employees Welfare Association v. Union of India,* AIR 1990 SC 334.

With reference to the above contention in the case of *Shamsher Singh v. State of Punjab*[20], the Hon'ble High Court of Punjab and Haryana ruled that "only such special provisions in favour of women can be made under Art.15(3), which are reasonable and do not altogether obliterate or render illusory the constitutional guarantee enshrined under Art.16(2). The Petitioner made the imaginary argument of violation of fundamental right on the ground of gender. The kind of direction sought by the Petitioner is beyond the ambit of judiciary.

To prove the contention that no discrimination in favour of women is permissible in the public service under Art.16(2) of the Constitution on the grounds of sex alone the Respondent relied on the case of *Mrs.Raghubans Saudagar Singh v. State*[21] where the Honourable Judge quoted:

> *"Equally obvious it is, however, that the Constitution bars a discrimination on the ground of sex alone. The language of Art. 16(2) and Art 15(1), as regards the present point is in parimateria. In both the Articles salient significance attaches to the use of the word "only". What is forbidden is discrimination on the ground of sex alone. However, when the peculiarities of sex added to a variety of other factors and considerations form a reasonable nexus for the object of classification, then the bar of Arts. 15 and 16(2) cannot possible by attracted".*

Judgment:

The hypothetical judgment that, in the opinion of the authors, should have been given in light of the above facts and arguments.

"While answering the question of maintainability we feel that the argument raised by the Petitioner is a fully valid one as discussed in the case *Glanrock Estate (P.) Ltd. v. State of T.N.*[22]We fully affirm that women are at par with men but that they are not being given an opportunity to be a part of the cabinet is indeed discrimination *prima facie*. The Respondent in its argument has rightly argued that the state has not perpetrated any such discrimination. We completely affirm the argument, but it cannot be said that where the state has not caused discrimination, there is no discrimination at all. The circular which quotes the grounds has been read thoroughly by us and we state that

[20]*Supra note 6*
[21]*Supra note 7.*
[22]*Supra note 3*

the grounds mentioned are enumerative and not exhaustive in nature. Thus whenever a violation of fundamental rights shall occur with regards to any person or any group of persons, such person or groups of persons are entitled to seek relief from the Supreme Court under Art. 32. Besides, we also uphold the other precedents quoted by the Petitioner with regards to maintainability and declare that where the right has been violated and there is a remedy available in such a situation, *the petition under Article 32 is maintainable.*

The primary question before us is "It sufficient to prove that a right has been violated for the court to pass the writ, which here in this case is Mandamus?" The Respondent's argument that the state has not violated any right nor caused any discrimination becomes relevant here. The entire argument of the Petitioner solely lies on the argument women are not adequately represented and provision for their representation can be made under Art.15 (3). The case of *Shamsher Singh vs. State of Punjab*[23] has been sought to be interpreted by both the Petitioner and Respondent. We conclude that both are right in their own legal positions as special provisions can indeed be made, and hence we have already declared this petition to be maintainable. The Respondent has used the same precedent to show that such relief granted must not be unreasonable. Going by the facts of this case we would like to state that if the state makes such a policy with regards to women it may result in discrimination against deserving member of opposite sex under Art.16 (2). However with regards to the same the Respondent has failed to show how the right is illusory in nature.

The Respondent has stated, with reference to *Mrs.Raghubans Saudagar Singh v. State*[24], that reservation cannot be made only on the grounds of sex alone. The Petitioner however has sought to prove that the above mentioned precedent is not applicable as the current case is an exception to this precedent, and women are in fact better administrators. This Court believes men and women are at par and one isolated incident cannot show that women are better administrators than men. With regards to this matter the Court concludes, people are efficient or inefficient and this is not based on sex but rather on individual potentials.

The Petitioner also referred to Convention on the Elimination of All Forms of Discrimination against Women. With regards to this the

[23]*Supra note 6*
[24]*Supra note 11*

Court wishes to clarify that there is no law which hinders women from/or in any form of political activity to which men can participate. Hence there is no discrimination by state. It may be noted that Art. 253 allows the state to pass any law with regards to international covenants but does not mandate the same.

The above mentioned views are with regards to Chapter 3 of the Constitution. Further we shall analyse the administrative aspects as contended by the Respondent:

The court wishes to clarify that though no particular writ has been pleaded by the Petitioner, but, the only remedy which can be offered is the writ of Mandamus.

This court is in consonance with the stand taken by Madras High Court in *F. Ghousel Muhiddeen v. Government Of India*[25]as the Chief Minister is also a representative of democracy and hence directing or restraining his power will be against the concept of representative democracy.

From the precedent in the case of *Employees Welfare Associations v. Union of India*[26]as mentioned by the Respondent, it is clear that writ of mandamus cannot issue against the Executive. The Governor is a member of the Executive body of the state. Under Article 164 it is his privilege and duty to appoint Ministers on the consultation of the Chief Minister. Hence giving any order to frame the policy regarding reservation for women in cabinet will result in Mandamus being issued to the Executive, 'to appoint 40% of women as Ministers'. From the above precedent the Court cannot pass such an order.

From *Narinder Chand Hem Raj v. Lt. Governor & Administrator, H.P*[27], mentioned by the Respondent, in this case it is clear that the Court cannot mandate the legislature to enact a law. This Court upholds this precedent.

The Court with regards to the present case passes the following Judgment: *No writ of mandamus or order is passed by us directing the state to make any reservation in cabinet.*

We however suggest to the Chief Ministers of all the state to appoint their Cabinet solely on the basis of merit and to not discriminate in any way regarding the same."

[25]*Supra note 15.*
[26]*Supra note 19*
[27]*Supra note 18*

MOOT RESEARCH ARTICLES

Guilty mind- Sine qua non?[#]

Gokul Ashok Thampi, Aayush Mitruka[*] and Sharada Krishnamurthy[**]

A guilty mind always abuses.

Mensrea, literally meaning guilty mind or guilty intention, is a degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission; the fact of an act having been done knowingly, especially as a ground for civil damages or criminal punishment.[1]

Issue

Whether it is necessary for Securities and Exchange Board of India [hereinafter **"SEBI"**] to establish *mensrea* for a violation of the SEBI Act and the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 [hereinafter **"PFUTP Regulations"**] framed thereunder.

Law- status quo

As far as the current position of law is concerned, it is settled both by the Supreme Court and the Securities Appellate tribunal, that *mensrea* is not an essential ingredient for a violation of the SEBI Act and the PFUTP Regulations.

PFUTP Regulations

The PFUTP Regulations are a result of the exercise of powers of the Board as conferred upon it by S. 30 of the SEBI Act. The object of these regulations is to ensure markets are fair, efficient, and transparent

[#]moot research as part of The 3rd KIIT University National Moot Court Competition, 2015 from 18th- 20th September, 2015.
[*]IV BSL LLB
[**]V BSL LLB
[1]Henry Campbell Black, Black's Law Dictionary (9thedn, West Publishing Co. 2009), 1373.

which is closely linked to protecting investors from unfair, manipulative, or fraudulent practices, including synchronized trading, front-running, mis-selling etc.[2]

At the very outset, it may be noted that the provisions of Regulation 3 (b), (c) and (d) of the PFUTP Regulations are in *parimateria* with the provisions of S. 12A(a), (b) and (c) of the SEBI Act and are couched in general term to cover wide range of manipulative practices. The PFUTP Regulations broadly define 'fraud' as *any act, expression, omission or concealment committed whether in a deceitful manner or not by a person or by any other person with his connivance or by his agent while dealing in securities in order to induce another person or his agent to deal in securities, whether or not there is any wrongful gain or avoidance of any loss.*[3]

It is clear from this definition that any act, omission or concealment to qualify as fraud within the meaning of the Regulations need not be committed in a deceitful manner. The Supreme Court has made it amply clear that unless the language of the statute indicates the need to establish the presence of *mensrea*, it is wholly unnecessary to ascertain whether such a violation was intentional or not.[4] The words *whether in a deceitful manner or not* are significant and clearly indicate that intention to deceive is not an essential requirement of the definition of fraud as given in the Regulations. This can be supported by the Securities Appellate Tribunal's [hereinafter **"SAT"**] decision in the case of *Pyramid Saimira Theatre Ltd. v. Securities and Exchange Board of India*,[5] where the Court dealt with the question of whether the element of *mensrea* was indeed required to establish the violation of Regulation 3 and the Court answered in the negative.

SEBI Act

The object of the SEBI Act is to protect the interests of the investors in securities and to promote the development of and regulate the

[2]SECURITIES AND EXCHANGE BOARD OF INDIA MEMORANDUM TO THE BOARD, Clarificatory Amendment to the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Markets) Regulations, 2003, (2013) para-5.

[3] SEBI (Prohibition of Fraudulent and Unfair Trade Practices in securities market) Regulations, 2003, Regulation 2(1)(c).

[4]*The Chairman, SEBI v. Shriram Mutual Fund &Anr.*,[2006] AIR 2287 (SC).

[5]Appeal No. 242/2009, SAT Order dated 7th April 2010.

securities market.[6] Under the scheme of the Act there is no provision warranting the proof of intention or *mensrea* for imputing liability under the Act. The purpose and object of the provisions of Chapter VI A which deals with penalties would be frustrated if *mensrea* is imputed into the same.[7] Even though, the Apex Court in the judgement of *Shriram Mutual Fund* made observations pertaining to Chapter VI A of the Act, the SAT, extending the observations made by the Supreme Court has held that the ratio and the observations made thereunder, however, applies to all the provisions of the Act and the Regulations.[8]

This highlights the erosion of the conventional principle of 'no *mensrea* no penalty', as far as the SEBI Act and the PFUTP Regulations are concerned.

To read into the provisions of the enactments- An alternative view

Although the Supreme Court in the *Shriram Mutual Fund's* case[9], has ruled that, unless the language of the statute indicates the need to establish the presence of *mensrea*, it is wholly unnecessary to ascertain whether such a violation was intentional or not, a slightly contrary view was taken in the case of *Rakesh Agarwal* v. *SEBI*.[10] It opined that though the Regulations do not specifically bring in *mensrea* as an ingredient, however in view of the objective of the SEBI Regulations prohibiting insider trading and the punishments envisaged for the violations thereof, the intention/motive of the insider has to be taken cognizance of. With respect to the current subject matter, considering the gravity of the offence, the Legislature has provided for heavy penalty vide S.15HA and S.24 of the Act. In light of this it can be argued that even though the SEBI Act or the PFUTP Regulations do not expressly necessitate the requirement of *mensrea*, an intent reading of the provisions suggest otherwise. The harsh penalties and penal consequences laid down in the enactments misplace the presumption of penalty without *mensrea*.

[6]Securities and Exchange Board of India Act, 1992, Preamble.

[7]Shriram, *supra note at* 4.

[8]Kaushik Laik, *'Unfair Trade Practicesin Securities Market'* (1st edn.,Taxmann 2013) 410.

[9]Shriram, *supra note at* 4.

[10] [2004] Comp LJ 1 193

Liability in case of intermediaries and other connected persons

Liability of the principal violator is different from the liability that can be pinned to certain class of persons who do not directly engage in manipulative and deceptive practices but aid and abet the same. It has been held that intermediaries and other connected persons cannot be sued or prosecuted for the violation of the PFUTP Regulations for their gross negligence until the **two pronged test** is satisfied, i.e.,

(a) Knowledge of the client's intention to create a false market and

(b) The intention to participate in market manipulation.

Therefore, it is submitted that an intermediary or a connected person in a securities fraud can be held liable only if the two pronged test mentioned hereinabove have been affirmatively concluded against the entity.[11]

A comparison drawn to the laws of the United States

Much of the Indian securities laws have borrowed concepts and principles established in the United States' counterparts. Regulation 3 of the PFUTP Regulation is certainly one of them and is strikingly similar to Rule 10b-5 of the U.S. Securities Exchange Act, 1934.

In the celebrated judgment of *Ernst and Ernst* v. *Hochfelder*[12], the U.S. Supreme Court inferred the requirement of 'scienter' in the context of Rule 10b-5 when it was faced with a question of whether an action can lie under the aforesaid provision in the absence of intention. Scienter, though not much referred to in Indian judicial pronouncements, means *mensrea* or knowledge.

The Court ruled that, when a statute speaks so specifically in terms of manipulation and deception, and of implementing devices and contrivances, scienter was a necessary ingredient for an action under Rule 10(b)/Rule 10b-5[13]. Furthermore, the decision in *Peter E. Aaron* v. *Securities and Exchange Commission*, fortified the requirement of scienter in an action under Rule 10(b).

[11] *Piyush P. Avalani v. SEBI*, Appeal No. 131/2002, Order dated 16th July 2012; *Kasat Securities (P) Ltd. v. SEBI*, Appeal no. 27/2006, Order dated 29th January 2003; *Kishore R. Ajmera v. SEBI*, Appeal No. 13/2007, Order dated 5th February 2008.
[12] *Ernst and Ernst v. Hochfelder*, 425 [1976] U.S. 185
[13] *id.*

Analysis/ Conclusion

The Supreme Court in the case of *Shriram Mutual Fund* has discarded the 'no *mensrea* no penalty' principle to enable imputation of liability as an immediate consequence of guilty conduct. This precedent brings within its ambit even cases of gross negligence and inadvertence. The penalties which have been prescribed are harsh and involve heavy fines. However, the discretion regarding the quantum of penalty still lies with the courts. The question that prevails is if it is fair and just to bring those cases which did not involve any malice under the same umbrella of culpability as those acts which were engineered with the sole intention to deceive and manipulate.

IPO for every Venture#

*Rigved Goregaonkar**

Introduction

India ranks 3rd with more than 4,200 startups and has 2.3X active investors.[1] Active investors in India have increased from 220 in 2014 to 490 in 2015, says NASSCOM's report.[2] The link between the founders of the start-ups and the investors (Venture capitalist/Private Equity investors) is the investment agreement. The purpose of the Investment Agreement, in the context of a venture capital investment, is to provide a legal framework for the relationship of the parties. It also deals with the principal obligations of the management, the Company and the investor at the time the investment is made as well as ongoing obligations for the life of the investment.[3]The article focuses only aspects of the whole investment process, such as investment agreement, investors' approach, and a way for a preferred exit and then linking them to structure and exit which typically falls within the ambit of Mergers & Acquisitions but with certain characteristics of Initial Public Offering.

Term Sheet & Investment agreement

A Term Sheet is a document that outlines the key financial and other terms of a proposed investment. Investors use the Term Sheet to achieve preliminary and conditional agreement to those key terms and form the basis for drafting the investment documents. The investors' Agreement usually contains investor protections, including consent rights, rights to board representation and non-compete

moot research as a part of 8th NUJS-Herbert Smith Freehills National Moot Court Competition, 2015 – 2016- THE WB NATIONAL UNIVERSITY OF JURIDICAL SCIENCES.

* III LLB

[1] NASSCOM-Zinnov report, 'Start-up India – Momentous Rise of the Indian Start-up Ecosystem', Edition 2015, <http://www.nasscom.in/startup-india—momentous-rise-indian-startup-ecosystem>

[2] Samarth Bansal, '2015 was the biggest year for Indian startups', The Hindu (16 January 2016) <http://www.thehindu.com/business/2015-was-the-biggest-year-for-indian-startups/article8114039.ece> accessed 21 March 2016

[3]Paul Gilks, 'Venture capital and the Investor Agreement',(Glovers,September 2008) <http://www.glovers.co.uk/news_article284.html> accessed 21 March 2016

restrictions. It will include the rights attaching to various share classes, procedures for the issue and transfer of shares and holding of shareholder and board meetings. Once agreed by all parties, lawyers use the Term Sheet as a basis for drafting the investment documents. The more detailed the Term Sheet, the fewer the commercial issues which will still need to be agreed during the drafting process.[4]

Investors' perspective: Exit

While formulating an exit strategy, understanding investors' approach is inevitable. "As a venture capital firm, we are not in the business of funding inventors or inventions, we are in the business of funding fast-growing companies," said Rosenbloom a venture partner at Founders Collective.[5] This approach explains the creative and at times aggressive measures adopted while structuring exits where the journey of the investor from the date of investment till the time when it is nearing at an exit has not been as satisfying or fruitful as expected but the fundamentals of the company and the business model still holds water from a long term perspective.

Initial Public Offering - The preferred exit

Globally one of the most popular forms of exit for a Private Equity investor is through the IPO.[6] When an unlisted company makes either a fresh issue of shares or convertible securities or offers its existing shares or convertible securities for sale or both for the first time to the public, it is called an IPO. This paves way for listing and trading of the issuer's shares or convertible securities on the Stock Exchanges.[7] A good return, with good exit, is what PEs live for. Within that, the IPO exit is the most sought-after, as that is when a company gets truly valued by the market. Exits through IPO also look good on the

[4] New Zealand Venture Investment Fund, 'A Guide to Venture Capital Term Sheets', available at: <http://www.nzvif.co.nz/assets/publications/Guide-to-VC-Term-Sheets.pdf> accessed 21 March 2016

[5] Conner Forrest, 'The dark side of venture capital: Five things startups need to know', (TechRepublic, 10 March 2014) <http://www.techrepublic.com/article/the-dark-side-of-venture-capital-five-things-startups-need-to-know/> accessed 21 March 2016

[6]Nishith Desai Associates, 'Private Equity and Private Debt Investments in India', (June 2015) <http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Private_Equity_and_Private_Debt_Investments_in_India.pdf> accessed 21 March 2016

[7]'FAQ's on Primary Market Issuances' 1(a)(i), <http://www.sebi.gov.in/cms/sebi_data/commondocs/subsection1_p.pdf> accessed on 21 March 2016

fund manager's CV[8]. However, most start-ups that raise funds don't end up having an IPO. Some are sold, some shut shop and others carry on as private enterprises.[9] Now lets move on to the rights through which the investor can structure the exit.

A comprehensive investment agreement:

An extensive agreement can facilitate an arrangement under S.391 of the Companies Act, 1956 (S.230 of the Companies Act, 2013) whereby the investor can have an IPO like exit sans an actual IPO of the investee company. In most cases, investment agreement does provide the investor with the right to further invest either in debt or equity of the company in case the company fails to meet certain milestones in due course of time. If no complete financing is ensured, there is a risk that an adverse business development will lead to a lower entry price at a later financing round (down round). The investors try to protect themselves from this with dilution protection clauses, providing for the investors'exclusive right to subscribe to new shares at their nominal value.[10]

Connecting the dots

Based on the preferential right to invest in the further equity and debt, the investor should pump in more cash into the company, so much so that it gains control through majority in number and 3/4th in value of the shareholding. To achieve majority in numbers the investor should infuse funds from several pockets. Once the investor has majority in number and holds 3/4th value of the shareholding then he is legally on the driver's seat of the company. Forthwith the investor needs to search for a company whose shares are listed on any recognized stock exchange, which is interested in the acquisition of the business of the investee company that the investor is now controlling.

[8] Mahesh Nayak, 'Exit Exuberance', Business Today (7 December 2014) <http://www.businesstoday.in/features/private-equity-funds-ready-ipo-on-improved-market-sentiment/story/212413.html> accessed 20 March 2016

[9] AshnaAmbre, 'The Funding Primer: How to start-up moves from incubation to IPO', (livemint.com, 03 June 2015) <http://www.livemint.com/Money/dd8K7FPx6yRzrMpMSw9IqK/The-Funding-primer-How-a-startup-moves-from-incubation-to.html> accessed 21 March 2016.

[10] Dr. Moritz Brocker, 'Dos & Don'ts in agreement with Venture Capital Investors – From the founders perspective', (beiten-burkhardt.com,2015September) <http://www.beiten-burkhardt.com/en/component/attachments/download/4397> accessed 21 March 2016

Once the investor has a company completely under its control then by formulating a scheme of arrangement under S.391, whereby it may either sell the company as a whole i.e. transfer of all the shares or partially i.e. hiving off a division for an exchange of shares of the listed company at a ratio as agreed between the investor and the listed entity. It is pertinent to note that S.391 is a complete code by itself. Once a scheme of compromise and arrangement falls squarely within the four corners of the section, it can be sanctioned, even if it involves doing acts for which the procedure is specified in the other sections.[11] The guiding principle for the court is that the scheme should be fair and the onus lies upon the dissenter to show its unfairness.[12] The endeavor behind all these actions is to have investor with the shares of a listed company whose valuation is expected to shoot up post the completion of acquisition.

If an investor belongs to a business group then it should let another company from the group play the part of the listed company. The whole scheme from a bird's eye view at the group level seems to be a win-win situation where the investor company has exited the target company whereas at the same time another group company still has control over the investee company with an upside of increased valuation. Where an acquirer is part of a conglomerate it is also not a prerequisite that the company should be listed because it is possible under an arrangement between the investee company and the acquirer of conglomerate that the shares, which are to be exchanged as a part of consideration of the scheme, be swapped with that of any other listed company of the conglomerate.[13]

Interest from India based Conglomerates

The event of roping in a listed company for restructuring which is the most crucial part in this whole exercise may not be as difficult as it seems because enterprises have realized the disruptive potential of start-ups and are thus partnering/investing in them. Wipro has setup a $100 million VC Fund to invest in start-ups in data, open source and industrial internet space, whereas IBM is partnering with 100 Indian big data and Internet of Things IOT (Internet of Things) start-

[11] A Ramaiya, *Guide to Companies Act*, (17th ed.Part.3, Lexis Nexis, 2010) 4020.

[12] *Hoare & Co Ltd, Re*, (1933) 1 All ER 105; *Bugle Press Ltd, Re*, (1960) 3 All ER 791 (CA).

[13] *In Re: Thomas Cook Insurance Services (India) Limited* [2015]132SCL255(Bom).

ups.[14] India's top business houses are seeking to diversify and increase their exposure to sectors such as technology and consumer internet that have delivered a number of billion-dollar companies in just a few years. "There is a lot of wealth in India, but, correspondingly, limited investment opportunities," said Nilesh Kothari, managing partner, Trifecta Capital. Family offices here are looking for good investment managers, and have no hesitation in writing large cheques.[15]

Conclusion

The form in which investment is made might not fetch the investor expected return in the same form. If IPO and listed securities of the investee company is not possible then alternatively having listed securities indirectly in association with some other entity can also help the investor achieve its objective.

India also has upcoming Non Banking Financial Companies which are significantly focusing on the 'Venture Debt' business and as this market develops, which is a logical next step after the start up boom that the nation is experiencing, one can expect to see some of these subsequently getting listed on BSE and NSE, thereby replicating the present scenario in USA.

[14] NASSCOM-Zinnov report, 'Start-up India – Momentous Rise of the Indian Start-up Ecosystem', Edition 2015, <http://www.nasscom.in/startup-india—momentous-rise-indian-startup-ecosystem>

[15] BiswarupGooptu, 'Top business houses in India looking to invest in startups', The Economic Times (New Delhi, 10 February 2016) <http://articles.economictimes.indiatimes.com/2016-02-10/news/70509673_1_family-offices-pwc-india-havells-india> accessed 21 March 2016

Minimum Alternate Tax : Is it applicable to Foreign Companies?

*Yalini Ravi, Saee Athalye, Mohith Gauri**

Minimum Alternate Tax (MAT) was introduced in India by the Finance Act, 1987, to tax 'zero tax companies'[1] i.e. companies showing high profits in their books of accounts and paying substantial dividends but paying marginal or no tax using various tax concessions and incentives. After the introduction of MAT, such companies had to pay tax on a percentage of their book profits, computed under the Companies Act. A question arose as to whether the term 'company' in the MAT provision included foreign companies or not. The Authority for Advance Rulings (AAR, constituted under the Ministry of Finance) held in some cases that MAT applied only to domestic companies, while it held in other instances that it applied to foreign companies as well. These inconsistent rulings of the AAR gave rise to a controversy with respect to the scope of the MAT provisions. Through this paper, the authors wish to analyze the current legal position vis-a-vis the applicability of MAT provisions to foreign companies, and shed light upon the effect of this provision on any provision of any tax treaty signed between India and another country.

Applicability of Mat to Foreign Companies :

Section 115JB (1)[2] reads-

> *"(1) Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee, being a company, the income-tax, payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 2012, is less than eighteen and one-half per cent of its book profit, such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income-tax at the rate of eighteen and one-half per cent."*

* III B.S.L LL.B.

Surana and Surana National Corporate Law Moot Competition , 12 – 14 February, 2016

[1] Central Board of Direct Taxes, Circular No. 495, dated 22 September, 1987: (1987) 168 ITR (St.) 87.

[2] The Income-tax Act, 1961

The term 'Company' as defined under Section 2(17) of the Income-taxAct covers domestic and foreign company *"unless the context otherwise requires"*, providing a flexibility to the definition clause.

The AAR, in the ruling of P. No. 14[3] held that MAT applies to foreign companies too.However, the issue of applicability was dealt with in detail only in the cases of *Timken*[4] and *Praxair*[5] wherein they reached the conclusion that MAT provisions would be applicable to only those foreign companies with a Permanent Establishment (PE) or a place of business in India.These rulings attained finality and hence the principle established in these cases should have been followed.[6]

The Finance Minister's speech and explanatory circular[7] and the Notes on Clauses explaining the provisions of Finance Bill, 2002[8] indicate that the legislature intended for MAT to apply only to domestic companies.

Constitution of Permanent Establishments (PE) by Investment advisors

India relies heavily on the OECD Tax Treaty Model and the UN tax treaty model to form international tax treaties with various countries. According to the OECD tax treaty model, there are various avenues through which a PE can be established *viz.* a 'Fixed Place PE', an 'Agency PE', 'Installation PE' and 'Service PE'.[9]Usually, the most common kinds of PEs are 'Fixed Place PE' and 'Agency PE'.

1. Constitution of a Fixed Place PE :

To determine whether an entity has a 'fixed'place of business in India, the following tests have to be applied:

a. Location and Permanency test:

The term "place of business" covers any premises, facilities or installations used for carrying on the business of the enterprise, whether

[3]*In re: P No. 14*, [1998] 234 ITR 335 (Delhi).
[4]*The Timken Company v DIT*, [2010] 326 ITR 193 (AAR).
[5]*Praxair Pacific Limited v DIT*, (2010) 233 CTR (AAR) 350.
[6]*Columbia Sportswear v Director of Income Tax, Bangalore* (2012) 34 ITR 161 (SC).
[7]Central Board of Direct Taxes , Circular No. 495, (22 September, 1987) : (1987) 168 ITR (St.) 87.
[8] Notes on Clauses, Finance Bill, 2002, [2002] 254 ITR (St) 118, 151.
[9]Department of Economic Affairs, Ministry of Finance, Report of the Working Group on Foreign Investment (30th July, 2010) 9.3.1

or not they are used exclusivelyfor that purpose.Such a place has to be under "fixed" use for a substantial period of time. Thus, in the normal course of usage, there has to be a link between the place of business and a specific geographical point.

b. Disposal test :

This test requires the enterprise to have an access to the place of business i.e. it should have a certain amount of space at its disposal which is used for business activities without any hindrance. This also includes places which the non-resident assesses can use as a matter of right.Thus, the *modus operandi* of the companies and the facts of each case must be examined to determine the same.[10]

c. Business carried out through PE :

For a place of business to constitute a PE the enterprise using it must carry on its business wholly or partly through it.[11] The enterprise must depend upon the fixed PE in one way or another for carrying out business in the State in which the PE is located.

2. Constitution of Agency PE:

In some cases, the activities of a dependent agent may give rise to a PE. To constitute a Dependent Agent PE (DAPE), it is first necessary to prove that the agent is a dependent agent and then, to prove that this agent has the authority to conclude contracts on behalf of the Principal; this is the only test recognized by the Supreme Court[12].

I. Dependency test :

An agent is regarded as legally dependent on the principal if his activities are subject to detailed instructions or control by the principal, and as economically dependent if he derives his entire revenue wholly or almost wholly from the principal or if he services only one principal. In terms of the interpretation of the expression, "wholly or almost wholly", the AAR has clarified the meaning in an advance ruling[13] wherein it opined that an agent would be considered wholly or almost wholly dependent economically,only if 90% of the revenue of such an agent accrued from that particular client.

[10] *Renoir Consulting Ltd v CIT*, [2014] 64 SOT 28.
[11]*OECD Commentary, 2, pg. 92.*
[12]*DIT v Morgan Stanley and Co*, 2007 Vol. 109 (2) Bom. L.R. 1348.
[13]*Specialty Magazines (P.) Ltd.*, (2005) 144 Taxman 153 (AAR).

II. Concluding contracts test :

If an agent does not have the authority to conclude contracts on behalf of the principal, there can be no agency PE as per Indian law and jurisprudence.[14]The Income Tax Appellate Tribunal, Delhi[15] and Mumbai[16] benches, has also ruled that concluding contracts is a prerequisite to establish an Agency PE.

The Tussle Between Treaty and Mat Provisions

If the IT Act imposes a tax liability, a Double Taxation Avoidance Agreement (DTAA) entered into by the two States may be resorted to for the negating or reducing it.[17] Such exemptions are provided in almost all DTAAs.[18] In case of difference between the provisions of the IT Act and of an agreement under S. 90 (2), the provisions of the agreement prevail over the provision of this Act and can be enforced by the appellate authorities and the court.[19]

Non-obstante clause of S. 115JB.

S. 115JB (1) begins with a *non-obstante* clause, appended to a section in the beginning to give the enacting part of the section an over-riding effect over the provisions of the Act.[20]However, the argument against the overriding effect of S. 115JB is that of harmonious construction; since S. 115JB in essence wasn't meant to apply to foreign companies, it subsequently applies that it wasn't meant to override sections that deal with the principles of international taxation. S. 90(2) of the IT Act provides that the DTAA provisions will override the provisions of the IT Act (including S. 115JB), if they contain more beneficial provisions for the assessee-company.[21]*Castleton's*[22] interpretation to

[14]*Supra* note 12
[15]*Amadeus Global Travel Distribution SA vDDIT*, ITA No. 2433 to 2145/Del/2000, 1022 to 1024/Del/2005.
[16]*Galileo International Inc. vDCIT*, (2009) 116 ITD 1 (Delhi).
[17]*CIT v Muthaiah*, 202 ITR 508.
[18]Central Board of Direct Taxes,Circular No. 682 (30th March 1994)
[19]*CIT v Vr SRM Firm*, 208 ITR 400.
[20]*UOI v G. M. Kokil* 1984 SCC 196, *Orient Paper and Industries Ltd* v *State of Orissa*, AIR 1991 SC 672, p. 678: 1991 Supp (1) SCC 81.
[21]*CIT v Davy Ashmore India Ltd.*, [1991] 190 ITR 626 (Cal).
[22]*In re.Castleton Investment Ltd.* [2012] 348 ITR 537 (AAR).

the contrary, based on the non-obstante clause in S. 115JB, has been opined to be incorrect.[23]

It is also pertinent to note here that the Supreme Court has held[24] that even though a non-obstante clause is very widely worded, its scope may be restricted by construction having regard to the intention of the Legislature, as gathered from the enacting clause or other related provisions in the Act.

An important principle which needs to be kept in mind during the interpretation of an international treaty is that treaties are entered into at a political level and have several considerations as their bases. The main function of a Tax Treaty should be seen in the context of aiding commercial relations between treaty partners and as being, essentially, a bargain between two treaty countries as to the division of tax revenues between them in respect of income falling to be taxed in both jurisdictions.[25]

Conclusion- Authors' Remarks

The authors believe that the AAR, in *Timken* and *Praxair*, has laid down a sound principle of law, and that the rulings in the case of *Castleton* and *ZD*[26] should not change this settled position of law. Only a foreign company with an established 'place of business' or 'Permanent Establishment' will come under the ambit of S. 115JB. In any other case, a foreign company should not be liable to pay MAT.In our opinion, as far as the over-riding effect of S. 115JB is concerned,the 'over-riding effect' argument fails on all counts, as it does not take into consideration the basic rules of interpretation and the intent of the legislature.

[23]Committee on Direct Tax Matters (A. P. Shah Committee), *Report on Applicability of Minimum Alternate Tax (MAT) on FIIs / FPIs for the period prior to 01.04.2015* (24th August, 2015)
[24]*A.G. Varadarajulu v State of Tamil Nadu*, AIR 1998 SC 1388 p.1392.
[25] David R. Davis, *Principles of International Double Taxation Relief* (London Sweet & Maxwell, 1985) 4
[26]*In re. ZD* [2012] 348 ITR 351 (AAR)

PRESENTATIONS

Access To Knowledge : The Thin Line Between To Copy Or Not To Copy#

K. Ravalee•

Introduction

The prototype of copyright in England came during the middle of the 16th century, when stationers, who desired monopoly rights over their business, approached Queen Mary of England for protection. They feared competition and wanted a royal charter to protect their rights. In 1557, a Royal Charter was granted, that allowed them to seize illicit editions of their books. With the dawn of the 18th century, this rhetoric changed- with the passage of The Act of Anne in 1707. This Act shifted the primary focus of copyright to the protection of creativity and knowledge.[1] The concept of Knowledge as a valuable resource and how it should be made accessible to everyone for free has been a contentious issue the world-over, for a very long time. Continuous efforts have been made to ensure access to knowledge. Access to knowledge has been inscribed in the Universal Declaration of Human Rights, 1948, under Article 27, that seeks to bring about a balance between the right of access and the protection of material interests. In addition to this, there is also the Marrakesh Treaty to Facilitate Access to Publish Works for Persons who are Blind, Visually Impaired or otherwise Print Disabled, which received the assent of World Intellectual Property Organization's (WIPO) from 186 member states, including India, on June 27, 2013. Its main goal is to promote equality of opportunity. This treaty strives to bring about a balancebetween Human Rights and Intellectual Property Rights. The Treaty guarantees

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•TV B.S.L. LL.B.

[1]Nehaa Chaudhari and Varun Baliga, Intellectual Property Rights (published in 2015) Ch. 1.2

visually impaired people speedier access to books and bolsters the solution to *"book famine"* by calling upon contracting parties to implement domestic law provisions permitting reproduction, distribution and making available of published works in accessible formats, such as Braille, with certain limitations and exceptions to the rights of copyright right holders.[2] This is a welcome development especially for countries like India, to ensure that the visually disabled are at par with the rest and don't lose out on knowledge on account of their disability.

The Jurisprudence of Photocopying

Furious debates have always raged around the issue of copyright and access to knowledge. It received special focus in India with the recent, ongoing litigation between students of Delhi University on the one hand and publishers of textbooks (Oxford and Cambridge) on the other.[3] The issue in the instant case arose against a photocopy shop named "Rameshwari Photocopying" situated within the University library that is in the business of photocopying material from the textbooks of the plaintiffs' and selling them as "course packs" to the students. The claim of the Publishing Houses is that their copyright is being infringed as "Rameshwari Photocopying" was selling the course packs and deriving a commercial benefit from the transaction. They demanded damages for the same. On the other hand, the students contend that the black letter of law should be widely interpreted so as to permit them to photocopy the required content,as functional education otherwise would be difficult, given the exorbitant cost of these books.

This raises the following questions. Firstly, whether photocopying is permissible? If yes, then to what extent? Who is to determine "How much is too much"? Before delving into the intricacies of this case, one must look at the bigger picture and analyze how similar issues have been dealt by courts of different jurisdictions.One example is the case of *Basic Books Inc. v. Kinko's Graphics*[4]. Eight publishing houses sued Kinko's copy shop on the ground of copyright infringement. Their

[2]Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, 2013

[3]*University of Oxford and Ors, v. Rameshwari Photocopying Services* (2012)CS (OS) No. 2439

[4]*Basic Books Inc. v. Kinko's Graphics* (1991) S.D.N.Y 758 F. Supp. 1522

claim was that Kinko's was reprinting, without their license, portions from their books, and was offering it for sale in the market as "Course Packs". Kinko's pleaded 'Fair Use'. The United States District Court held that Kinko's act did not satisfy the threshold for 'Fair Use', as Kinko's reprinted critical portions of the books and was rendering a huge blow to the publisher's sales. It held that the permission of the copyright owner is indispensable. This led to the rapid flourishing of intermediary copyright agencies.

The situation changes slightly in the case of *Press v. Becker*.[5] This case involved uploading of course reading material on websites by instructors at the University of Georgia. The publishers, which included Cambridge University Press, argued that uploading of material on websites was tantamount to photocopying of material from books and therefore should be subject to licensing restrictions. A defense of "Fair Use" was raised. The court, whilenot rejecting the claim of Fair use at the outset, fashioned a quantitative threshold that permitted photocopying of 10% of the total book and held that only in the instances of universities breaching this threshold would licenses be required.

Canada's legislation with regard to copyright is on similar lines to that of the Indian one. They allow copying of the work for the purposes of criticism, private study, research and news reporting. The Canadian Supreme Court in the case of *Alberta (Education) v. Canadian Copyright Licensing Agency*[6] by 5-4 majority has called for a liberal interpretation of "Fair Dealing". It held that photocopying of short excerpts from books by teachers for the purpose of elementary and secondary education should be exempted from payment of any additional fee. This decision opens the gates for interpretation of Fair Dealing in universities and colleges too.

The Delhi University Case : Analysis

Now analyzing the case at hand, it is an admitted fact that photocopying of books in schools and colleges is inevitable and indispensable. In the Delhi University case, *prima facie*, it seems to be ruthless on the part of publishers to demand such exorbitant sum of

[5] *Cambridge University Press v. Becker* (2012) N.D.Ga 863 F. Supp. 2d 1190
[6] *Alberta (Education) v. Canadian Copyright Licensing Agency* (2012) SCC 37

money as damages for the mere reason that students photocopied some content from their books. But in reality are the publishers wrong in their claim for license restrictions, when "Rameshwari Photocopier" is making money from the sale of the copyrighted content? The Indian Copyright Law allows for express exemptions against copying. S. 52 describes various circumstances under which copying would not be considered infringement. One such clause is Sub-Section (o), that states that under the direction of a person in charge of a public library, anyone can make up to three copies of a book for the use of the library if such book is not available for sale in India.The books are available for sale in India and therefore, a defense under S. 52(o) does not hold good.

Another issue to be considered is that of students from impoverished and backward economic backgrounds, who cannot be expected to purchase expensive books, and whether they should be allowed to photocopy the required content rather than buying the book.An aspect of public interest also comes into the picture. But it is important to understand here that the right to photocopy material from the book is not being denied. All the Publishers want is for the individuals to take a license to do the same. S. 32A of the Indian Copyright Law, in sub section 1(b) states that, where, in connection with systematic instructional activities, copies of the book are sold in India at a price that cannot reasonably be related to that normally charged in India for comparable works by the owner, any person may apply to the Copyright Board for a license to reproduce and publish such work at a lower price for the purposes of systematic instructional activities.

For those interested in offering course packs, the Indian Reprographics Rights Organization (IRRO) acts as an intermediary for issuing licenses, with copyright tariffs among the lowest in the world, not more than Rs. 10-15 per student annually. Many premier educational institutions in India like Indian Institute of Management (Ahmedabad), Aligarh Muslim University and Jamia Milia Islamia (Delhi) have started procuring licenses for photocopying content from books.

While the claim of the Publishers for license restrictions sounds plausible, equally valid is the claim of the other side that in addition to the annual license fee of intermediaries like IRRO, they have to pay an additional per page tariff to the tune of 50paise. Given that the majority of the Indian population is not sufficiently economically

equipped, this may amount to denying to them access to these books. Moreover setting a cap of 10% or one chapter for copying is *prima facie* arbitrary. What use is obtaining a license when in spite of paying annual license fee and copyright tariff, one is restricted to copying just 10% or one chapter?

The case has opened the floodgates to the interpretation of the scope of "Fair Use". On one hand is the protection of the student's access to these books, and on the other hand is to ensure that it is equitably done so that no one loses in the bargain. The case once decided will have wide -ranging ramifications that might significantly alter the map of Indian copyright law.

Understanding Legal Fictions in a Statute#

*AnwitaDinkar**

Introduction

It is sometimes asserted that the use of fiction in law is now practically obsolete, a thing of the past. Mr. Bentham, who died in 1832, did not believe that the crime of inventing a new fiction was likely ever again to be committed.[1]

He was undoubtedly wrong, as legal fictions today form a very important part of statutes, and the judiciary is bound to interpretlegal fiction in consonance with the purpose for which it is created by the Legislature.A legal fiction is probably best defined as "a legal assumption that something is true, which is, or may be, false- being an assumption of an innocent and beneficial character, made to advance the interests of justice."[2]A legal fiction in an ordinary sense can be said to be a deeming provision which is used in a statute for several general purposes – to legitimise or validate a principle, to give artificial conception to a settled legal principle, to use as an explanation to a provision, to extend or restrict the meaning of a legal provision etc.The law abounds in fictions. It is an assumption created by the legislature with a strong purpose. Hence understanding the operation and effect of legal fiction in a statute becomes absolutely important.

Some illustrations of Legal fiction

1. Corporate Entity :

By legal fiction a corporation is deemed to be a 'person in law'.Chief Justice Marshall in the *Dartmouth College* case in 1819[3], defined a corporation, as "an artificial being, invisible, intangible, and existing only in contemplation of the law."[4] A company shares many, though

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*LL.M.

Presentation in a seminar on 'Understanding Legal Fictions in a statute' on 6th February, 2016

[1]Jeremiah Smith, 'Surviving Fictions' [1917] 27(2) Yale Law Journal 147

[2]Sidney T. Miller, *'The Reasons for Some Legal Fictions' [1910] 8(8) Michigan Law Review 623*

[3]*Trustees of Dartmouth College v. Woodward* [1819]17 U.S. 518

[4] William H.Lough, 'Business Finance, A Practical Study of Financial Management in Private Business Concerns', (Biblio Bazaar,2009)

not all, of its characteristics with that of a natural person. This creation of legal fiction of an independent corporate existence has validated the whole of company law and hence proves to be a very important concept.

2. Constructive Notice :

A notice inferred by law, as distinguished from actual or formal notice.[5] It is the knowledge which the law implies a party to have had, whether he actually had it or not, it is knowledge imputed by construction of law.[6] As a constructive notice is merely inferred by law, it is a fictitious notice and hence a legal fiction; in reality no physical notice actually exists.A common example of constructive notice is found in the company law, where the party contracting with the company is assumed to have notice of the Memorandum and Articles of Association that is filed with the Registrar of Companies. A person is presumed to know the contents of these documents. So the party will be in the same position as if he has read the documents, even if he has not. This is due to the fiction of constructive notice that has been created.

3. Constructive Possession :

Constructive possession is defined as 'Control or Dominion over a property without actual possession or custody of it.'[7] A person may not have actual or physical possession of a movable or immovable property, but if the person has a valid title to it, he is deemed to be its owner. A person has constructive possession over a property if he has the ability to control it.

A very common example would be that of a tenant; even though the tenant has physical possession of the house, the person having title to the house is the true owner. A person who although having no de facto possession, is deemed to have possession in law is sometimes said to have 'constructive possession'.[8]

[5] P. Ramanatha Aiyar, *'Advanced Law Lexicon'*, (Vol. 1, 4thedn, Lexis Nexis, 2013) 1000
[6] K. J. Aiyar, *'Judicial Ditionary'*, (Vol. 1, 16thedn. Lexis Nexis, 2014) 418
[7] P. Ramanatha Aiyar, *'Advanced Law Lexicon'*, (Vol. 1, 4thedn, Lexis Nexis, 2013) 1001
[8] *B. Gangadhar v B.G. Rajalingmam*, (1995) 5 SCC 238

4. Quasi-Contracts :

Quasi Contracts are classified by some English writers as "contracts implied by law" that is to say fictitious contracts.[9] Sometimes also called as constructive contracts, quasi contracts are fictional contracts generally created for equitable purposes; they are not contract in the true sense but share resemblance to contracts. There is no written contract but for certain reasons, especially to do justice, contractual relation between parties are presumed.

Suppose A mistakenly gives money to B, in this case court will impose an obligation on B to return the money to A, even though no written contract exists. This obligation arises due to the existence of the legal fiction of quasi-contract between A and B.

Some Rules for Interpreting Legal Fiction in a Statute :

These rules are not exhaustive and have been developed through judicial decisions.

I. Creation of legal fiction in a statute is a legislative function. The courts must not delve into creation but only interpret the legal fiction which has been created by the legislature.

II. The function of creating legal fiction may be delegated. Delegated Legislation may create legal fictions; this was observed in the case of *Union of India v Jalyan Udyog*[10]

III. A legal fiction can be utilized in several ways wherein the word 'deemed' is used. However the mere use of the word 'deemed' is not in itself sufficient to set up a legal fiction.[11]

IV. In interpreting a provision creating a legal fiction, the court is bound to ascertain for what purpose and between what persons the fiction is to be resorted to.[12]

V. After ascertaining the purpose of creation of a fiction, the court is to assume all facts and consequences which are incidental or inevitable corollaries to give effect to the fiction[13] to construe

[9] *Supra note 7*
[10] AIR 1994 SC 88.
[11] *Consolidated Coffee Ltd. v Coffee Board*, (1995) 1 SCC 312
[12] *State of Bombay v Pandurang Vinayak*, AIR 1953 SC 244
[13] *C.IT., Delhi v S.Teja Singh*, AIR 1959 SC 352

the scope of the fiction.[14]

VI. The judiciary must keep in mind that while interpreting a legal fiction it should not be extended beyond the purpose for which it is created[15] or beyond the language of the section by which it is created[16], not even by importing another fiction.[17]

VII. The fiction may also be interpreted narrowly to make the statute workable.[18]

VIII. Legal fictions when created to validate or for the purpose of only one act (statute), will only cover that act and cannot be used to validate another act[19] (generally, so always opposed to 'unless expressly stated')

IX. A legal fiction should not be employed to defeat law or result in illegality.

X. Legal fiction should not be extended so as to lead to unjust results.

XI. There cannot be a fiction upon a fiction.

Eg : An adopted son by fiction (birth certificate etc) would be the real son of the adoptive father and the wife associated with the adoption, but to say that he will be the real son of all the wives of the adoptive father is a fiction upon a fiction and hence not permitted.

The above principles have received legitimacy over the years and have proved to be very important in interpreting legal fictions in a statute

[14] *East End Dwellings Co. Ltd. v Finsbury Borough Council*, 1952 AC 109
[15] *C.I.T., Delhi v S.Teja Singh*, AIR 1959 SC 352
[16] *C.I.T., Bombay City II v Shakuntala*, AIR 1966 SC 719
[17] *C.I.T., (Central) Calcutta v Moon Mills Ltd.*, AIR 1966 SC 870
[18] *Nandkishore Joshi v Commissioner Municipal Corporation, Kalyan*, AIR 2005 SC 34
[19] *State of Karnataka v K.Gopalkirishna Shenoy*, AIR 1987 SC 861

The Bhopal Disaster : They died without a sound

Karishma Assudani[*]

The Bhopal gas tragedy was one of the world's worst industrial disasters. It occurred on the night of 2–3 December 1984 at the Union Carbide India Limited (UCIL) pesticide plant in Bhopal, Madhya Pradesh. According to ICMR, 521,262, people were affected by the gases. In 1991, 3,928 deaths had been certified. A government affidavit in 2006 stated that there were 558,125 injuries, including 38, 478 temporary partial injuries and approximately 3,900 severely and permanently disabling injuries.[1]The owner of the factory, UCIL, was majority owned by UCC, with Indian Government-controlled banks and the Indian public holding a 49.1 percent stake.

The UCIL factory was built in 1969 to produce the pesticide Sevin (UCC's brand name for carbaryl) and methyl isocyanate (MIC) was to be used as an intermediate.There were 3 underground MIC storage tanks,out of which one tank had 42 tonnes of liquid MIC(one of the most lethal gases on this planet).It was filled upto 75% of its capacity way beyond the corporation's permitted limit of 50%.

The Chemical Reaction

Water entered the MIC tank leading to a highly exothermic reaction which led to the vaporisation of the liquid MIC and a gas leak eventually.[2]

Effects on health

Immediate effects-

Half-blindness, gasping for breath, foaming at the mouth and vomiting, etc.[3]and choking, burning in the respiratory tract, were the immediate effects on health.There was amnesia and sometimes they

[*] IV BSL. LL.B
[1] AK Dubey,'Bhopal Gas Tragedy:92%injuries termed "minor", First 14 News (21 June 2010)<http://www.webcitation.org/5qmWBEWcb> accessed 16 Feb 2016
[2] Ingrid Eckerman ,The Bhopal Saga , Causes and Consequences of the World's Largest Industrial Disaster (Universities Press, 2005) 53
[3] Ingrid Eckerman, The Bhopal Saga, Causes and Consequences of the World's Largest Industrial Disaster (Universities Press, 2005) 86

behaved like they were mad.[4]

Long term-

Eyes: Chronic conjunctivitis,scars on the cornea.

Respiratory tract: abnormal lung function with obstructive disease.

Reproductive Health : leucorrhoea, pelvic inflammatory disease, excessive menstrual bleeding etc.[5]

The Absolute Liability Doctrine

The Supreme Court has evolved the absolute liability doctrine for the harm caused by industries engaged in hazardous and inherently dangerous activities. The Indian rule was evolved in *M C Mehta v Union of India*.[6] This was free from the exceptions of the strict liability doctrinein the English law. The principle of strict liability evolved in England[7] was watered down to a large extent by adding exceptions such as act of God, act of default of the plaintiff, consent of the plaintiff, independent act of a third party and statutory authorization for the tort.

Taking inspiration from A.32 of the Constitution which guarantees the right to move the SC for appropriate writs, orders and directions, the Court led to the evolution of an indigenous tort law.

Causes-

The Corporate Negligence Theory

According to this theory, the disaster is to be attributed to the following reasons-

(i) Under maintained facilities and weak attitude towards safety.

(ii) Corners were being cut to save costs.

(iii) Inefficient and undertrained workforce.

[4]Lapierre, D. and J. Moro, *It was Five Past Midnight in Bhopal* (1st Indian ed.2001,New Delhi: Full Circle Publishing) 376.
[5]Morehouse, W. and A. Subramaniam, *The Bhopal Tragedy.What really happened and what it means for American workers and communities at risk* (The Apex Press,1986)
[6]AIR 1987 SC 1086
[7]*Ryland v Fletcher* AIR 1987 SC 1086.

(iv) Four critical lines of defence which could have avoided or mitigated the disaster were not in place-

(v) Vent gas scrubber

In case of a leak, MIC was supposed to react with sodium hydroxide (caustic soda) in the vent gas scrubber which would have made MIC inert. The scrubber was not in use.[8]

(vi) Flare Tower

The flare tower should have been ready to burn off the MIC as the MIC is highly inflammable. But it was not working.

(vii) Water spray system

Water spray system was undersized. Water was supposed to react with the MIC making it come to the ground.

(viii) Refrigeration system idle.[9]

The MIC was kept at 20 degrees Celsius, not the 4.5 degrees advised by the manual. The exothermic reaction could have been controlled.

(ix) Slip-blind plates

While cleaning pipes, slip-plates in place were supposed to prevent water from leaking from any faulty valves from entering the MIC storage tanks.

In the UCC safety audit of 1982, it was indicated that performance of the workers was not upto the standards.Possible hazards were listed. UCIL prepared an action plan, but a follow-up team was never sent to Bhopal by the UCC. In September 1984, an internal UCC report on the Virginia plant in the USA revealed a number of defects and malfunctions. It warned that "a runaway reaction could occur in the MIC unit storage tanks, and that the planned response would not be timely or effective enough to prevent catastrophic failure of the tanks". This report was never forwarded to the Bhopal plant, although the main design was the same.[10]

[8]Ingrid Eckerman, *The Bhopal Saga, Causes and Consequences of the World's Largest Industrial Disaster* (Universities Press, 2005) 41
[9]*ibid*
[10]Lapierre ,D. and J. Moro, *It Was Five Past midnight in Bhopalm* (1st Indian ed., New Delhi: Full Circle Publishing 2001)

The 'Worker Sabotage' theory

According to this theory,someone deliberately made water enter the tank.[11]

The 'Economy' theory

UCIL needed to be closed down because it was running losses. But that would have required the government's permission. Hence, Mr. Warren Anderson (UCC Chairman and CEO staged a minor leakage but it went out of control.

The Doctrine of *'Parens Patriae'* in Mass Tort Cases

Parens Patriae - The doctrine relates to the rights of a person, real or artificial,to sue and be sued on behalf of another who is incapacitated to take up the case before a judicial forum as effectively as the former can[12].

In order to avoid multiplicity of parties, the Parliament passed the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 (Bhopal Act), and conferred on the Union of India the responsibility of suing parenspatriae on behalf of the victims.

Forum Non Conveniens

The Union of India had to select the forum where it could sue for compensation on behalf of the victims. There were two alternatives

1.US court, where UCC, the parent company of the UCIL (Union Carbide India Limited) had its headquarters and domicile.

2. The district court of Bhopal, where UCIL is located.

The UIO approached the court in the USA justifying their choice on the ground that the Indian courts were not mature enough to handle the matter and that the Indian tort law was in its infancy.[13]

Interim Relief and the Settlement Award

The District Court made an order of interim relief for Rs. 3500 million. Later, the SC reached a settlement and laid down-

[11]Ingrid Eckerman, *The Bhopal Saga, Causes and Consequences of the World's Largest Industrial Disaster* (Universities Press, 2005) 56
[12]S Shantakumar, *Introduction To Environmental Law* (Second edn, Lexis Nexis 2005) 101
[13]*ibid.*

All claims, cause or criminal action against UCC and its subsidiaries stood extinguished,all civil proceedings were transferred to the court and dismissed, and all criminal proceedings, including contempt proceedings were quashed and the accused were deemed to be acquitted.[14]

Warren Anderson was released six hours later after his arrest on a $2,100 bail. He was flown out of Bhopal and India on a government plane.[15] The then Chief Secretary of the State allegedly took these actions, possibly instructed from Chief Minister's office.[16] In response to the Indian Government's summoning Anderson with homicide charges in 1987[17], the Union Carbide said the company was not under Indian jurisdiction.[18]

In 2010, 7 former employees (including managing director, vice-president etc.) of UCIL, all Indian nationals were convicted of causing death by negligence.[19] They were each sentenced to 2 years imprisonment and fined Rs. 100,000 (US$2,124). Shortly after the verdict, all were released on bail.

Conclusion:

The sabotage theory would have been improbable if the maintenance and safety systems like the alarm monitoring system had been working. There is such a mind-boggling series of failures in ensuring safety and precautionary measures that the incident was an accident waiting to happen sooner or later.

Warren Anderson was declared an absconder. He died in 2014. Neither Warren Anderson nor the other 7 UCIL employees faced any consequences for their actions. Warren Anderson should not have been allowed to leave the Indian soil in the first place. Jurisdiction issues could have easily been avoided. The Indian government

[14]*Union Carbide Corporation v Union of India* [1990] AIR 273 (SC)
[15]Suchandana Gupta, 'Chief secretary told me to let Anderson go: Ex- Collector' The Times of India (Bhopal, 10 June 2010)
[16] *ibid.*
[17]Reuters 'India Acts in Carbide Case'The New York Times (Bhopal, India, 17 May 1988)
[18]Rasheed Kidwai 'When the gas leaked, Arjun flew away to pray'The Telegraph (Calcutta,3 July 2012)
[19]'Bhopal trial: Eight convicted over India gas disaster'(BBC News, 7 June 2010) <http://news.bbc.co.uk/2/hi/south_asia/8725140.stm> accessed 15 Feb 2016

betrayed the victims by doing so. If two years is the punishment for causing thousands of death by negligence, the law needs to be amended. A far greater punishment like life imprisonment would be appropriate. The settlement agreement absolved everyone guilty of all the liabilities. Once again, even though compensation might have been for the benefit of the victims, the guilty went scot-free.

Access to Knowledge & Copyright Law#

*-Aayush Mitruka**

As Michael Madison aptly captures :

"Copyright began as knowledge law, and knowledge law it should remain."

The right given by law to creators of literary, dramatic, musical and artistic works and producers of cinematograph films and sound recordings is known as copyright. In other words, it is a bundle of rights including, inter alia, rights of reproduction, communication to the public, adaptation and translation of the work[1]. Copyright protection exists from the moment a work is created in a fixed, tangible form of expression and it immediately becomes the property of the author who created the work.

It aims at ensuring certain minimum safeguards of the rights of authors over their creations, thereby protecting and rewarding creativity. The protection so provided aims at creating an atmosphere conducive to creativity, which induces them and others to create more. Creativity being the keystone of progress, no civilized society can afford to ignore the basic requirement of encouraging the same. Further, economic and social development of a society is dependent on creativity.[2] However copyright law is not rigid and provides for certain exceptions in order to strike an appropriate and viable balance between the rights of the owners and the interest of the society as a whole.

Copyright is relevant to learning materials and knowledge base in several ways. One school of thought about copyright, the utilitarian perspective, conceives of it as a necessary incentive for authors to invest time, intellectual effort and money into producing works of creative expression, including learning materials, to benefit the public at large.[3]In other words, copyright protection itself facilitates the production and distribution of learning material. Another school of

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#Presented in National IPR Seminar Held at ILS Law College on 06th February, 2016

*IV B.S.L LL.B

[1]Indian Copyright Act 1957.

[2]Ministry of Human Resource and Development, Govt. of India, 'Handbook of Copyright Law'

[3]Chris Armstrong,'Access to Knowledge in Africa: Role of Copyright'(IDDC, 2010)

thought conceives copyright as a natural right of authors to control their creative outputs.

Both utilitarian and natural rights- based conceptions of copyright are relevant but there is, however, a growing movement of national and international policy makers, private sector industry leaders, researchers and members of civil society who view copyright from a different perspective. Their focus is not only on protecting copyright-owners, they also pay due attention to the externalities of copyright systems; specifically copyright's implications of enabling or restricting access to knowledge.[4]

Framing the interface between copyright and education through the lens of access to knowledge does not seek to diminish the value of appropriately designed copyright systems. On the contrary, it recognizes copyright's integral role in production and dissemination of knowledge. But the ultimate objective of copyright cannot be the protection of creative works for its own sake; copyright serves a nobler role in furthering broad public policy objectives, such as advancement of learning. The beginning of the 21st century foreshadows a new phase in intellectual property governance from only protection to advancement of knowledge. All societies need knowledge to develop and therefore access to knowledge is critical for developing countries which seek to educate their masses. Access to educational materials especially in the field of higher scientific and technical education is crucial for the development of human resources in order to contribute to the economic progress of developing countries. In order to educate people, schools, universities and libraries need access to affordable teaching and learning material.[5]

Contrary to popular perception, IP regimes are meant to serve not only the private commercial interests of IP owners, but a wider public interest. Prof. Basheer argues that in many ways, intellectual property rights embody a social contract, where the creator agrees to serve the public interest in exchange for a legally guaranteed monopoly.

However, in a number of industries, IP owners often breach this social obligation of providing wide access to knowledge by pricing goods

[4]*ibid*
[5]Consumers International, 'Report on Copyright Access to Knowledge' (Kuala Lumpur, Malaysia)

out of the reach of the 'aam aadmi' and other non- monetary restrictions. Access is to be determined not only by the availability of a product but also by its affordability.

The cost of educational materials when prohibitive inhibits educational opportunities. The possibility of assigning and licensing copyright has enabled the sustenance of various industries, such as the book publishing industry and the music publishing industry. As a result, vast amount of educational materials have been priced at a level that is beyond the reach of consumers. This constitutes a barrier to access to knowledge, hence a denial of the right to education.

The recent Amendment Act of 2012[6] facilitates access to work by enshrining provisions relating to:

- Grant of Compulsory licenses
- Grant of statutory licenses
- Administration of copyright societies
- Fair use provisions
- Access to copyright works by disabled (Compulsory licenses and fair use rights)
- Relinquishment of copyright.

Though over- all amendments are forward looking and aim at an access- enabling, technology friendly dynamic environment, four years down the lane, it remains a legislation yet to be fully implemented because of a non-existing Copyright Board, while some of the provisions are not been adhered to in true spirit by different categories of stakeholdersdue to various reasons. Furthermore, some provisions are already under judicial scrutiny while some are considered too vague to warrant any implementation without clarification from legislature and judiciary.

The ongoing Delhi University photocopy case[7] before the Hon'ble Delhi High Court is a classic example in this regard, which is sure to have wide ranging ramifications on access to knowledge. To quickly

[6]The Indian Copyright (Amendment) Act, 2012.
[7]The Chancellor, Masters and Scholars of the University of Oxford & Ors. v. Rameshwari Photocopy Services &Anr., CS(OS) No. 2439/2012 before the High Court of Delhi

recapitulate the issue: A small photocopying shop attached to Delhi University regularly compiles extracts from copyrighted books and makes it available to students. A group of publishers have sued Delhi University & Rameshwari Photocopy Service for copyright infringement of their works. The battle revolves around the interpretation of fair use doctrine which is recognized as a valid defense to copyright infringement under S. 52[8] of the Act which permits one to "fairly deal" with any copyrighted work for *"private or personal use including research"*.

India being a developing nation does not have access to many books, due to price and stringent intellectual property laws in respective countries. The cost of educational material when prohibitive inhibits educational opportunities, hence the need to ensure that the education materials remain affordable. Thus it would be of paramount importance to see what approach the judiciary adopts in this regard. Judicial interpretations and pronouncements in the near future are likely to clear the mist around many provisions in the statutebook.

[8]*supra note 1*

Fair Dealing in India- Scope and Analysis[#]

- *Karan Singh*[*]

Introduction

Copyright Law has been an ever evolving facet of the Intellectual Property Laws. On one hand, it aims to provide the owner of a copyright monopoly rights against its exploitation. Whereas, on the other hand, it seeks to promote the exploitation of such work in the interest of the public at large.[1]Doctrine of fair dealing in the context of Indian Copyright Act is one such tool that attempts to materialise the essence of the copyright jurisprudence. The concept of fair dealing emanated from the principles of equity that were given a statutory mould later in the United Kingdom ('UK'). It focuses on preventing the stasis of growth of imagination and creativity.

Historical Background And Different Jurisdictions

Fair dealing was first introduced in India in 1914 and it was an exact duplication of S. 2(1) (i) of the British Copyright Act, 1911. However, the scope of fair dealing was widened by the Copyright Act, 1957. It has thereafter been amended several times, the latest amendment being in 2012 in which the doctrine of fair dealing has undergone several modifications under S. 52 of the Act which has come to include an exhaustive list of 'acts'.

Moreover, S. 52 is in compliance with the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) and the Berne Convention as required by every World Trade Organisation member-nation. Art.13 of the TRIPS Agreement provides for a 'three-step test' i.e. exception must be 'special', it must not conflict with normal exploitation, and it must not unreasonably prejudice the legitimate interests of the rights holders. Having stated that, there still

[#]Presented in National IPR Seminar held at ILS Law College on 06th February, 2016

[*]IVB.S.L. LL.B.

[1]*The Chancellor Masters and Scholars of the University of Oxford v. Narendra Publishing House*, 2008 (38) PTC 385 (Del)

remain differences in the domestic laws of different countries with regard to fair dealing. The Indian and UK copyright laws follow a more stringent approach characterized as limited and restrictive as they work in accordance with an exhaustive list of actions.[2]On the other hand, the American law of 'fair use' is more open ended and liberal in construction. It offers an open list of permissible purposes which are interpreted as guideline factors. These factors[(i) the purpose and character of the use, (ii) the nature of the copyrighted work,(iii) the substantiality of the portion used and,(iv) effect on potential market] have been construed liberally depending on the facts and circumstances of each case.[3] The defence of fair use offers a wider approach, with flexibility at the expense of certainty, while fair dealing offers certainty but flexibility pays the price. It is to be noted, however, that the doctrine of fair useis considered the fairest of all as it is the law most in compliance with the TRIPS Agreement.[4]

Fair Dealing vis-à-vis Indian Copyright Laws

Fair dealing has not been defined anywhere in the Act. Judges have time and again attempted to define it for the purpose of a better understanding of issues but they have observed that it is neither possible nor advisable to define the exact contours of fair dealing.[5] For this reason the courts on various occasions have relied on English authority and on the much descriptive words of Lord Denning –

> *"It is impossible to define what 'fair dealing'is. It must be a question of degree. You must consider first the number and extent of the quotations and extracts... you must consider the use made of them... Next, you must consider the proportions... Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression."*[6]

The listed purposes under S. 52 have been interpreted as exhaustiveand certain, for any use not falling strictly within an enumerated purpose

[2]S.52, Copyright Act, 1957
[3]17 USC S.107, US Copyright Code, 2000
[4] Nimmer David, 'Fairest of Them All and Other Fairy Tales of Fair Use, Law & Contemporary Problems, 66 (2003) 263-287
[5]*Super Cassettes Industries Ltdv.Hamar Television Network Pvt. Ltd and Anr*,2011 (45) PTC 70 (Del); *ICC Development (International) Ltd & Anrv. New Delhi Television Ltd*, 2012 (132) DRJ 291
[6]*Hubbardv.Vosper* (1972) 1 All ER 1023

is considered an infringement.[7] Judges have also opined that for disputes related to fair dealing, each case depends upon its own facts and circumstances and therefore, it is impossible to develop a thumb rule for such cases.[8] There are only a few cases that have actually discussed fair dealing and there is a dearth of judicial jurisprudence on copyright matters. Therefore, the first things to be taken into account are the statutory provisions.[9]

However, the last decade has seen a shift from the aforementioned trend. In some cases, the courts have imported the four-point test, as discussed earlier, from the copyright jurisprudence of United States of America.[10] However, courts have cherry picked one or two tests and a rare few decisions have holistically applied every test in one judgment.[11] In the author's humble opinion, this approach of the courts is incorrect. It is opined that the rationale that was relied upon in *Blackwood's* case is correct and the provisions under S. 52 have to be interpreted in a restrictive manner. These provisions are very clear in phraseology and form an exhaustive list. Therefore, if an act doesn't fall within the enumerated grounds, nothing else can be imported from outside to shield it as an exception to an infringement. It appears, that the court in *India TV Independent News Service Pvt. Ltd & Ors.v.Yashraj Films Pvt. Ltd*, while discussing the issue of fair dealing highlighted that fair dealing in India is also determined on the same four factors as enumerated in the US Copyright statute. It also highlighted that *Blackwood's* case had applied the first test of purpose whilst determining fair dealing.[12] Interestingly, in *Blackwood's* case, the Court on the contrary had cautioned against applying US law in India.[13] In the humble opinion of the author, the interpretation of the test of purpose by the Hon'ble Court in the *India TV* case appears to be incorrect. On the flip side, the same Court, earlier, in *Super cassette*

[7]*Blackwood and Sons Ltd and Orsv. AN Parasuraman and Ors*, AIR 1959 Mad 410; Civic *Chandranv Ammini Amma*, 1996 PTC 16 670
[8]*Espn Star Sportsv. Global Broadcast News Ltd and Ors*, 2008 (36) PTC 492 (Del)
[9]*Barbara Taylor Bradfordv. Sahara Media Entertainment Ltd*, 2004 (28) PTC 474 Cal
[10]*supra note 1; India TV Independent News Service Pvt. Ltd & OrsvYashraj Films Pvt. Ltd*, 2013 (53) PTC 586 (Del)
[11]*Supercassette Industriesv. Nirulas Corner House (P) Ltd*, 2008 (37) PTC 237 (Del); E M *Forster and AnrvA N Parasuram*, AIR 1964 Mad 331; *supra note 1*
[12]*supra note 10*
[13]*supra note7*

Industries v. Nirulas Corner House (P) Ltd, had held that the law cannot be extended beyond its meaning and has paid heed to the legislative intent behind excluding a certain category of establishments from the protection provided under S. 52(1)(k).[14]

Moreover, importing the four-point test from the American law may give the judges more freedom to assess fair dealing and possibly extend these factors to the new and emerging areas of technology and copyrightable content but certainty there will certainly be a price. Moreover, the American doctrine of fair use has its 'fair' share of controversies. For instance, it opens space for litigation since what is fair use has to be determined by the courts. Taking into account the sluggish disposal rate in Indian courts, it is imperative that such an open ended doctrine should not be applied in India. Moreover, it has been widely contested that the four-test principle doesn't conform to Art. 13 of the TRIPS Agreement because it requires "any act" amounting to infringement to be tested against the factors of fair use whereas Art. 13 of the TRIPS Agreement contemplates only 'special cases' to be considered for exceptions.[15]

Conclusion

Though Indian courts have borrowed the four-point test from the American Jurisprudence, its application has been restricted to the limited context of each case. Some other factors such as necessity and bad faith have not been considered because they have not caused issue. In the context of Indian copyright jurisprudence, the recent amendment has widened the scope of each underlying provision of S. 52 with regard to the nature and substantiality of an action. For instance, S. 52(1)(o) restricts the scope of fair dealing to copying of not more than three books. It will be fruitful to see the Indian Courts capitalising on thesedistinctive features of fair dealing rather than incorporating fair use. With the dissenting opinions of various High Courts, India awaits its *Folsom v. Marsh*[16] to address the confusion with regard to the meaning and application of fair dealing.

[14]*supra note 11*
[15]Marshall A. Leaffer, *'Understanding Copyright Law'* (6th edn., Lexis Nexis, 2014) *Rule 10.19 International Treaties and the Future of Fair Use, para 3*
[16]Folsomv Marsh, 9 F Cas 342

LEGISLATION HIGHLIGHTS : 2015-16

The Mines and Mineral (Development and Regulation) Amendment Act, 2015

Jelsyna Chacko, II B.A. LL.B

The Amendment brings major reforms in the mining sector including competitive bidding for granting new mining leases, concept of notified mineral and simplifying procedures.

The Mines and Mineral (Development and Regulation) Amendment Act, 2015 has amended certain provisions of the Mines and Minerals (Development and Regulation) Act, 1957. The Amendment has considered recommendations of the Shah Committee, AnwarulHoda Committee on National Mineral Policy, as also the recent Supreme Court judgment in the case of *ManoharLal Sharma* v. *the Principal Secretary and Ors.*[1], which cancelled all coal-block allocations since 1993.

The Amendment aims to promote optimal utilization of India's mineral resources for its industrial growth and create economic surplus. It lays down a comprehensive legislative framework to ensure a fair and transparent manner of allocation, while safeguarding the interests of the local community and people affected by mining activities.

The Amendment focuses on encouraging private investment and take full advantage of the latest technology so as to enable speedy and optimum development of mineral resources.

The salient provisions of the Amendment are as follows:

1. Introduction of category specified as *'Notified Minerals'* under the Fourth Schedule (which includes Bauxite, Iron Ore, Limestone and Manganese Ore). Their utility is specified under the newly released mineral auction rules.
2. A two-stage auction model comprising of a technical bid initially followed by a financial bid has been proposed for

[1] Writ Petition (Crl.) No. 120 of 2012

Notified minerals as against the discretionary method followed earlier.

3. All mining leases would now on be granted for a period of fifty years as against thirty years earlier.

4. There will be no renewal of any mining concession and all mining leases would be put for auction at the completion of the tenure. (Applicable to all minerals other than coal, lignite and atomic minerals).

5. To deal with the problem of pendency of applications, the Amendment Act provides for extension of the lease period up to 31st March 2030 for the captive mines and up to 31st March 2020 for the merchant mines or till the completion of the period of renewal already granted, if any, whichever is later.

6. A mandatory provision is to establish a non-profit body known as the *'District Mineral Foundation'* in all districts where mining related operations take place, in order to address the concerns and work for the interest and benefit of local people.

7. The Amendment has also seeks to setup a *'National Mineral Exploration Trust'* with the objective of using funds contributed by the holders of different mining leases for carrying out extensive exploration exercises, the contribution of which shall not exceed a sum equivalent to two per cent of the royalty rate.

8. It has also simplified the procedures and avoidance of delay and stringent provisions against illegal mining.

9. In addition to the Reconnaissance Permit, Prospecting License, Mining Lease under the 1957 Act, the Amendment creates a new category of mining licence i.e. the *'Prospecting Licence-cum-Mining Lease' (PL-cum-ML)* referred to as the *'Composite Licence'*- two stage-concession for undertaking prospecting operations (exploring or proving mineral deposits), followed by mining operations.

Permits	Under the Old law	Under The Amendment
Reconnaissance Permit (RP)	As per discretion of State Government.	Non-exclusive Reconnaissance Permits (NERP) – to be issued within 30 days after submitting the online application. Data found is to be submitted with Government for auction.
Prospecting License (PL)	RP holder had the first right to PL. Decision as per the discretion of State Government.	PL would be given directly to old RP holders only. New NERP holder will have to submit the data and would have to bid for composite license (PL-cum-LM).
Mining Lease (ML)	PL holder had the first right for ML. Decision as per discretion of State Government.	ML would be given directly to old PL holders only. Now, ML would be awarded through auction only.

Negotiable Instruments(Amendment) Act, 2015

Sarath Chandra Ponnada, I LL.M.

Clarifies the territorial jurisdictional issues for filing of cases for offences committed under Section 138 of the Negotiable Instruments Act, 1881.

The Amending Act is based in the backdrop of the Supreme Court's decision in *Dashrath Rupsingh Rathod* v. *State of Maharashtra*[1] which overruled the decision in *Bhaskaran* v. *SankaranVaidhyanBalan*[2]. In Bhaskaran, the Supreme Court had stated that in accordance with S.178 of the Code of Criminal Procedure, 1973, the jurisdiction for offences of dishonor of cheques u/s 138 of the Negotiable Instruments Act, 1881 (the Act) would vest with the courts where any of the events mentioned under S. 138 have occurred. This lead to misuse by the complainants filing complaints at courts at different places substantially unrelated to the offence, to harass the accused.

The decision in Dashrath therefore sought to obviate misuse of the statute, by restricting the jurisdiction to try an offence under S. 138 of the Act to court of the place, where the branch of the bank on which the cheque was drawn was located. However, this decision created inconvenience for the payee as he/she had to travel to the place of the drawee bank where the cheque got dishonored, defeating the most important quality and advantage of negotiable instrument. The decision also led to a chaotic situation because the judgment had been applied retrospectively.

To protect the interest of the both the parties i.e, payer and payee the Parliament passed the Negotiable Instruments (Amendment) Act, 2015. It specifies the jurisdiction to try an offence under S. 138 of Act. In cases where the payee delivers the cheque for payment through his account, the Amendment facilitates filing of cases only in a court within whose local jurisdiction the bank branch of the payee is situated. However, exception is made in case of bearer cheques which are

[1](2014) 9 SCC 129
[2](1999) 7 SCC 510

presented to the branch of the drawee bank. In such a case, the local court of that branch would get jurisdiction.

The Amendment also mandates centralization of cases against the same drawer. These amendments have been made applicable retrospectively to pending cases.

The Amending Act received the assent of the President on 26th December, 2015.

The Atomic Energy (Amendment) Act, 2015

Pabitra Dutta, V B.S.L. LL.B.

The Amendment redefines a government company perspicuously and restricts the issuing of a license under The Atomic Energy Act, 1962.

The Atomic Energy Act, 1962 ('the Act') act empowers the Central Government to control all the modalities with respect to atomic energy.

Prior to the amendment, a Government company was precluded from entering into Joint Ventures ('JV') with other Public Sector Undertakings ('PSU's') as the resultant JV Company formed by two PSUs may not be subject to the control of the Central Government as a shareholder. To overcome this difficulty, the definition of 'Government Company' was added in the Amendment Act to mean a company in which the paid up capital held by the Central Government is more than 51%. In addition, a company whose Articles of Association empower the Central Government to constitute and re-constitute its Board of Directors may also be construed as a Government Company. This is done with a view to expand the scope of JV's between Nuclear Power Corporation of India Ltd and other PSU's.

The Amendment Act has widened the scope of granting licence to any plant for the production, development and use of atomic energy or to a JV for related research purposes. Further, the amendment also states that any licence granted to a Government Company or a JV shall stand cancelled if it ceases to exist as a Government Company. All assets of such a company shall then vest in the Central Government without any liability and it may take measures for the safe operation of the plant and disposal of nuclear waste vested in it.

The amendment also explicitly casts a duty on the Central Government to take measures for safe and harmless operation and disposal of nuclear material.

The Atomic Energy (Amendment) Act, 2015 received the assent of the President on December 31, 2015.

The Black Money (Undisclosed Foreign Income and Assets) And Imposition of Tax Act, 2015

Sravya Darbhamulla, IV B.S.L. LL.B.

The Act was enacted to deal with the problem of black money, to outline the procedure to tackle the same and to provide for taxation of such undisclosed income and assets.

The Black Money Act, 2015 comprises of 88 sections and comes into force on the 1st of April 2016, save as subject to its provisions. Its extent comprises the whole of India. The provisions of this Act are expected to complement The Income Tax, 1961 ('IT Act') and replace the provisions insofar as they relate to the taxation of foreign undisclosed income.

Chapter IIdeals with the basis of charge, which provides, firstly, that every assesse for every assessment year shall be charged a tax on total undisclosed foreign income and assets of the previous year, at the rate of 30 percent of such income assets[1]. The value of an undisclosed asset shall be the fair market value of such asset (including financial interest in any entity) as determined in such manner as prescribed[2]. It is to be noted that while computing the said foreign income and assets, no deduction in respect of expenditure or allowance shall be allowed, even if such deduction is permitted under the IT Act, 1961[3].

Chapter IIIis titled Tax Management is an extensive delineation of the judicial proceedings under the Act. It discusses the Authorities under this Act, who shall be the same as specified in the IT Act[4]. It also discusses the jurisdiction, conduct of proceedings, powers of authority, orders of assessment and reassessment, recovery and arrears of taxes, and procedure for making, conducting, and disposing of appeals. S. 14 indicates that there is no bar upon the direct assessment of the person on whose behalf or for whose benefit undisclosed income from a source outside India is receivable or undisclosed asset is held, or upon the recovery of any tax or money

[1]S. 3 (1)
[2]S. 3 (2)
[3]S. 5 (1) (i)
[4]S. 6

payable in respect of such property.

Chapter IV deals with the penalties which may be imposed under this Act. Penalty for non-disclosure of foreign assets and incomes would be imposed at three times the tax payable, along with the base rate of 30 percent. Failure to furnish income-tax returns with regard to such assets would be a fine of Rs. 10 lakh; however the same does not apply to assets of value lesser than Rs. 5 lakh. The same penalty would apply to inaccurate or undisclosed details on the forms. A repeat defaulter would be required to pay an amount equal to the amount of tax arrears. If a person does not co-operate with the Tax Authority in answering questions, signing statement, attending hearing or producing documents, he is liable to pay a fine between Rs. 50,000 and Rs. 2,00,000/-.

Under Chapter V, prosecution for offences is envisaged. Imprisonment is prescribed for willful attempt to evade tax, willful attempt to evade tax payment, failure to furnish records or non-disclosure of foreign assets in returns and abetment.

Chapter VI discusses Tax Compliance for undisclosed foreign income and assets. It provides that a person who has such income or assets may declare the same before a date to be declared by the Central Government.

Chapter VII lays out certain general provisionsregarding agreements that may be made by the Central Government with any other country for exchange of information for the prevention of evasion or avoidance of tax or for recovery of tax under this Act.

The scheme of the Act is ambitious and extensive, but it may, as with most legislations against the rich and the elite, be undone by a lack of political will.

The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015

Sruthi Darbhamulla IV B.S.L LL.B.

The Act provides for constitution of Commercial Courts, Commercial Division and Commercial Appellate Division in the High Courts for adjudicating commercial disputes of specified value in view to encourage business ecology in India.

The need to foster a competitive environment for business in India and the growing pendency of cases of a commercial nature in High Courts, led to the enactment of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 ('the Act').

The Act is immense in scope and applies to a variety of commercial disputes ranging from ordinary transactions by bankers, merchants and tradesmen to mercantile agencies and usage, from carriage to agreement for sale of goods, from franchising agreements to insurance, from technological development agreements to intellectual property.

Only commercial disputes of as specified value of Rs. 1 crore or higher will come under the ambit of the Act. To this end the Act also provides for the method of determining value of a commercial dispute, under Chapter III.

Chapter II of the Act provides for the establishment of the following:

1) Commercial courts at the District level.

2) Commercial divisions with one or more benches in High Courts having ordinary Original civil jurisdiction.

3) Commercial Appellate Divisions having one or more Division benches in High Courts.

Appeals from the Commercial Divisions and Commercial Courts lie to the Commercial Appellate Division.

By virtue of Chapter V of the Act, pending suits of commercial nature in the High Court or any civil court in the district are to be transferred to the Commercial Division and Commercial Court respectively.

The judges of the Commercial Courts are to be persons from the higher judicial service of the state, with experience in the area of commercial

disputes, while those of the Commercial Division and the Commercial Appellate Division shall be judges of the concerned High court with pertinent experience.

The Code of Civil Procedure, 1908 has been amended in its application to suits contemplated under this Act, with a view to expedite the process of resolution of commercial disputes. These amendments are to prevail over any rule of the jurisdictional High Court or State amendments to the Code. These amendments relate to filing of plaints and written statements, disclosure, discovery and inspection of documents, summary judgments, case management hearing, arguments, filing of evidence by means of affidavit and the form of this affidavit. Further Rule 1, order XX of the Code, is substituted to the effect that judgements must be pronounced within 90 days of conclusion of arguments.

Certain provisions under Chapter VII also seek to further the efficiency and transparency of this new court system. The Divisions and Courts are directed to maintain data about number of cases and their status on a monthly basis, to be published on the High court website.

The State Government has been directed to provide any necessary infrastructure and may also provide facilities to train Judges of the Commercial Courts and Divisions.

The Act received Presidential assent on December 31, 2015, and came into force on October 23, 2015.

The Companies (Amendment) Act, 2015

Kedar Mendjoge I LL.M

The Amendment seeks to promote ease of doing business in India and addresses concerns of stakeholders post The Companies Act, 2013.

The Companies Act, 2013 posed certain practical difficulties in complying with some of the requirements laid down in the Act and upon issues and suggestions made by various stakeholders, the Government introduced the current amendment.

The Companies Act, 2013 under S. 188 required a special majority of shareholders along with a Directors approval for Related Party Transactions (RPT). Consequently, many RPT's were stuck as they did not received the requisite 3/4th majority which meant that flow of money for companies through sister concerns, group companies and subsidiaries was hindered. The Amendment Act has relaxed these requirements. It has also done away with the requirement of passing a shareholders' resolution for transactions between a holding company and its wholly owned subsidiaries whose accounts are consolidated with such holding company and placed before the general meeting for approval of the members.

Under Ss. 117 and 399 of The Companies Act, 2013, all special resolutions, resolutions for terms of appointment of managing director, winding-up, resolutions in relation to sale of undertaking / borrowings, etc. filed by a company with the Registrar of Companies were open for inspection by any person or to obtain copies. The Amendment Act now states that "... no person shall be entitled under S. 399 to inspect or obtain copies of such resolutions"[1] thus ensuring confidentiality of such resolutions. Audit Committee can give an omnibus approval for RPT under S. 117 (4).

The Amendment Act has removed the requirement of minimum paid-up capital for both Private and Public Company. It has also removed the requirement of a commencement of business certificate from the Registrar of Companies by a Private Limited Company.

The Amending Act received President's assent on 25th May, 2015.

[1] S. 117 (3) clause (g) of the Companies Act, 2013.

JUDICIAL PRONOUNCEMENTS 2015-2016

CASE SUMMARIES

CONSTITUTIONAL LAW

Union of India v. V. Sriharan @ Murugan and Ors.[1]

Sruthi Darbhamulla, IV B.S.L LL.B.

Detailed discussion of remission/commutation of death sentences to life imprisonment with reference to The Indian Penal Code, 1860, The Code of Criminal Procedure, 1973 and the Constitution of India. Also discussed are the relative powers of Centre and State in this regard.

This judgement deals extensively with questions arising from the commutation of death sentences of the convicts in the Rajiv Gandhi assassination case to life imprisonment, and a contemplated remittance of these life-terms.

Rajiv Gandhi was assassinated by a suicide bomber on May 21, 1991 at Sriperumbudur in Tamil Nadu. After a CBI investigation, 26 people were tried and found guilty by the designated Court for multiple offences, leading to death sentences for all the accused.

An appeal to the Supreme Court resulted in 19 being freed and confirmation of death sentence for the rest. By its judgment in *V. Sriharan @Murugan* v. *UOI and ors*[2], the Supreme Court commuted the death sentences awarded to 3 of the convicts to that of imprisonment for life.

The next day, Tamil Nadu Government wrote a letter to the Centre proposing to remit the sentence of life imprisonment imposed on these 3 convicts as well as 3 others convicted in the Rajiv Gandhi case, as they had already served for 23 years.

[1]2015 SCC OnLine SC 653
[2](2014) 4 SCC 242

The Union of India filed a writ petition in the Supreme Court, praying that it quash this letter and the decision of the Tamil Nadu Government. 7 questions relating to imprisonment for life, right to claim remission, appropriate government to exercise powers of remission and matters incidental to the exercise of this power were framed and referred to the Constitution Bench of the Supreme Court.

The Court re-iterated that imprisonment for life was imprisonment for the remainder of the natural life of a prisoner, and that remission for good behaviour, as contemplated by the Jail Manual or the Prisoner's Act, cannot free such a prisoner without remission by the appropriate government under The Code of Criminal Procedure, 1973 (CrPC). It upheld the principles laid down in *Swamy Shraddananda's*[3] case, which envisaged a special category for cases where death penalty is commuted to imprisonment for a term greater than fourteen *years*, or for life, placing them beyond claims for remission.

Further, the court analysed the nature of Centre and State power with regard to remission, discussing articles 72, 73, 161 and 162 of the Constitution, S. 432 and 433 of the CrPC and the definition of appropriate government under ss. 54 and 55 of The Indian Penal Code, 1860. It was held that the appropriate government may exercise its power of remission under CrPC even if the President, the Governor, or the Supreme Court have exercised their powers under Article 72, Article 161 or Article 32 of the Constitution.

The Court clarified that a government may not exercise this power*suomoto*, as it may be used only if the convict makes an application in accordance with S.432 (2), CrPC; thus, this is a mandatory procedure.

Lastly, the word 'consultation' was held to mean 'concurrence' under S. 435(1), which requires the State Government to consult the Centre in certain cases for grant of remission or commutation.

[3]*SwamyShraddananda alias MuraliManohar Mishra v. State of Karnataka* , (2008) 13 SCC 767

M. Palanimuthu v. The Secretary to the Government[1]

Harshavardhan Melanta, I LL.B.

Campus recruitment does not violate Constitutional guarantees of access to public employment.

The Petitioner filed a PIL in the interest of providing employment to persons who had registered themselves in the Government Employment Exchanges, arguing that the recruitment of persons via campus placements violated the Constitutional right to equality of opportunity in matters of public employment. Respondent Parties included the Secretary, Ministry of Defence, the Secretary, Ministry of Petroleum & Natural Gas, the Secretary, Ministry of Human Resources, the Chairman, Indian Oil Corporation Limited, the Chairman & M.D., Hindustan Petroleum Corporation Ltd., the Chairman, Indian Space Research Organisation, the Chairman, Hindustan Aeronautics Limited, Secretary, Department of Higher Education, (Tamil Nadu) and the Director, IIT-Chennai.

The present case is a review application in response to decisions given in September, 2012, filed under Clause XLVII Rule 1 and 2 read with S. 114 of The Code Civil Procedure, 1908.The case was heard in Madras High Court by the Chief Justice of Madras High Court, Sanjay KishanKaul and Justice M. M. Sundresh.

The Petitioner stated that Public Sector Undertakings such as the Respondents have resorted to campus recruitments, thereby denying opportunities to thousands of Graduate and Post-Graduate candidates who were already registered with the Employment Exchanges; and, thus, infringing their right to secure public employment. The Respondents, on the other hand, questioned the maintainability of the petition contending that campus interviews are a supplement to the selection process of suitable candidates via All India Written Examinations, and not a substitute to it.

The Court held that given the current climate of competition, the process of campus recruitment is not arbitrary and has been in existence for over a decade. The Court further stated that the colleges,

[1] 2015 SCC OnLine Mad 7861, decided on 07-09-2015

especially IITs have ensured that the students go through rigorous scheme of tests and interviews during the campus recruitment process.

Further, the Court, in support of the Respondents, added that in the present age, where PSUs are in constant competition with multinational companies, the time-tested method of campus recruitments is beneficial, where talent may be obtained from the pool itself. The Court further added that "catch them early" as the underlying principle behind campus recruitments is not arbitrary and does not infringe any Constitutional guarantees.

Parivartan Kendra v. Union of India[1]

Runu Sharma, IV B.S.L. LL.B

Incorporating the names of the acid victims under the disability list

A writ petition was filed in public interest under Article 32 of the Constitution of India by a registered NGO. The petition highlighted the plight of two Dalit girls from Bihar, who were attacked around midnight of October 2012 by four assailants who threw acid on the face and bodies of the victims while they were sleeping on the rooftop. It was alleged that the four assailants used to harass the elder sister and make sexual advances towards her. In order to take revenge from the elder sister they threw acid on her and in the course of the act the younger sister also got injured. Victim's family was given a mere amount of Rs 2,42,000 lakhs as a compensation by the Bihar Government for treatment, although 5 lakhs had been spent and more was required for the treatment of the victims.

The petitioner through this petition wanted to highlight the plight of the acid attack victims and the inadequacy in the payment of compensation to the victims, and also lack of legal guarantee to free medical care, rehabilitation, and strict laws on sale of acid.

[1] Writ Petition (Civil) No. 867 OF 2013

The Supreme Court directed all the states and UT's to consider the plight of the acid attack victims and take appropriate steps with regard to inclusion of their names under the disability list.

The Court ordered the state to pay an amount of Rs13 lakhs as compensation to the victims and made following observations:

1. Stringent actions to be taken against those supplying acid without proper authorization and concerned authorities be made responsible for failure to keep a check on the distribution of the acid.
2. *Laxmi* v. *Union of India*[2] was referred and court directed that it does not put a bar on the government to award compensation limited to 3 lakhs.
3. Enhancement of the compensation will help victim in rehabilitation and state shall also take full responsibility for the treatment of the victims as per the guidelines stipulated in *Laxmi*.

[2] [2014] 4 SCC 427

CRIMINAL LAW

Monju Roy v. State of West Bengal[1]

Sukrut Mhatarmare, I LL.B.

Liability of the Relatives other than Husband and Parents-In Law of Deceased under S. 304-B

The deceased Shanti Roy was married to Sekhar Roy on 20-04-1994. According to the prosecution, Sekhar Roy, his mother, two sisters and brother raised a demand of Rs. 5000 from the deceased and her family, and since the said demand was not fulfilled the deceased was harassed and kept without food. On 31-07-1995, she committed suicide by pouring kerosene and setting herself on fire. During trial in the lower court, Sekhar Roy, Monju Roy and Anju Roy (sisters of Sekhar Roy), and Tulshi Roy (brother of Sekhar Roy) were found guilty under sections 304-B, 306, 498-A of The Indian Penal Code, 1860 and were awarded life imprisonment. Sekhar Roy did not prefer an appeal to the High Court but the other three appealed and the High Court upheld the conviction and sentenced them to Rigorous Imprisonment for 10 years.

Monju Roy, Anju Roy and Tulshi Roy (Appellants) filed an appeal before the Supreme Court. It was contended that omnibus allegation against all the family members could not be taken at the face value, having regard to the well known tendency of naming all the family members by the family of an unfortunate victim. It was further submitted that allegation of demand for Rs. 5000 was against all family members and no individual role in the harassment of the deceased was specified. The Supreme Court held that:

(i) Even if the Appellants were involved in raising the demand for dowry there is no material evidence that they harassed the victim resulting in her death. The Appellants have not been assigned any role in harassment in the absence of which, presumption under S. 113-B of The Indian Evidence Act, 1872 could not be raised against them.

[1] Criminal Appeal No.1797 of 2012

(ii) Normally it is husband or parents of the husband who may be benefited by the dowry and may be in a position to harass the daughter in law, and not all other relatives; however, no hard and fast rule can be laid down in this regard.

The Supreme Court concluded that given the nature of relationships between Sekhar Roy and the Appellants, there was a possibility that the Appellants were named by way of exaggeration and hence, they deserved to be given benefit of doubt. The appeal was allowed.

Devidas Ramachandra Tuljapurkar v. State of Maharashtra and Others[1]

Sravya Darbhamulla, IV B.S.L. LL.B

The "contemporary community standards" test for determining obscenity is applicable to a stronger degree when notable historical figures are involved.

The judgment is concerned with the issue of whether the poem 'Gandhi Mala Bhetala' ('I met Gandhi') in a magazine titled 'Bulletin' published in the July-August 1994 issue and distributed among members of the All India Bank Association, could give rise to charges under S. 292 (obscenity) of The Indian Penal Code, 1860. In broader terms, the issue was whether the use of the name of a respected historical figure byway of allusion or symbol could be permitted in view of notions of poetic license and freedom of speech and expression.

Per a case lodged by V.V. Anaskar, a member of 'Patit Pawan Sanghtan', Pune, a crime pertaining to the publication of the said poem was registered under S. 153-A and S. 153-B read with S.34 of the Indian Penal Code, 1860, and a chargesheet was later filed for the said offences along with S. 292 (obscenity), IPC against the publisher (the Appellant), the printer and the author (co-accused). The Magistrate discharged the charges under S. 153-A and S. 153-B, but declined to do so for charges under S. 292 The Appellant unsuccessfully petitioned the Additional Sessions Judge and the High Court for discharge, and appeal was made finally to the Supreme Court.

[1] 2015 SCC OnLine SC 486

The evolution of obscenity in American, English and European Community Courts was discussed extensively, as well as the evolution of Indian law, from *Ranjit D. Udeshi v. State of Maharashtra*[2], in which the *Hicklin*[3]test was imported, to *Shreya Singhal v Union of India.*[4]The Judge (Hon'ble Dipak Misra, J.) concluded that the prevalent test was the 'contemporary community standards test', and that the said test would vary as per time, and would depend upon 'attitudinal, cultural and civilizational change'. A distinction was also sought to be drawn between 'poetic licence' and licence as per the language of the law. The freedom of speech and expression was qualified as not being absolute.

The Court held that a new offence or ingredient was not created by bringing a historically respected personality under the scope of section 292; but that the current judicially evolved test for obscenity, i.e. the "contemporary community standards test", meant that words used or spoken by a historically significant person gained signification and made the test applicable to a greater degree. What might ordinarily pass the test may not do so if Mahatma Gandhi were used as symbol, allusion or surrealistic voice, as the test applied with greater vigour in such a case.

Upon the urging of the *amicus curiae* (Fali S. Nariman), the charges against the Appellant-publisher were discharged as he had tendered an unconditional apology, and as against the printer, as he had acted on the direction of the publisher. The charges as against the author were left to be tried by the Magistrate.

[2] (1965) 1 SCR 65
[3] *Regina v Hicklin LR* 1868 3 QB 360
[4] 2015 (4) SCALE 1

Mehboob Ali &Anr.v. State of Rajasthan[1]

Vayshnavi Ganesh, I LL.B.

Extent of admissibility of confessional statement under S. 27 of The Indian Evidence Act, 1872 explained.

The present case was an appeal against the judgement of the High Court of Judicature for Rajasthan, Jaipur Bench, which convicted the Appellants under S. 489C and S. 489B read with S. 120B of The Indian Penal Code, 1860 along with others accused in the case.

Based on an FIR filed on 6th Jan, 2004 in Jaipur, Rajasthan, the accused Puran Mal was found possessing forged currency notes. On interrogation, he revealed that he had received the currency notes from Mehboob, Firoz and Ram Gopal. Fake currency notes were obtained from Ram Gopal's house. On the information provided by Mehboob and Firoz, Anju Ali was arrested and notes were recovered from him. On the basis of Anju Ali's information, Majhar was implicated. He informed the Police that he used to receive the notes from Liyakat Ali who was then arrested. Thus, an entire racket of fake currency notes was exposed and forged notes were recovered from the possession of Puran Mal, Anju Ali, Majhar and Liyakat Ali.

It was submitted on behalf of the Appellants Mehboob Ali and Firoz that there was no currency recovered from their possession and their convictions were illegal as confessions made under police custody were inadmissible.

As per provisions under Ss. 25 and 26 of the Indian Evidence Act, 1872, confessions made in police custody are not admissible as evidence in Court. However, S. 27 states that if the information provided by the accused in such statements leads to a discovery of fact, it may be used as evidence.

Based on earlier judgments in the cases of *State (NCT of Delhi)* v.*Navjot Sandhu alias Afsan Guru*[2] and *State of Maharashtra* v. *Damu Gopinath Shinde & Ors.*[3], it was reiterated by the Court that "discovery of fact" as specified under S. 27 of The Indian Evidence Act cannot be equated

[1] 2015 SCC On Line SC 1043
[2](2005) 11 SCC 600
[3]AIR 2000 SC 1691

only to an object produced or found. Discovery of fact arises once the information provided by the accused establishes his mental awareness of its existence at a particular place.

In the present case, information provided by the Appellants proved the involvement of others accused in the racket and it is evident that they acted in conspiracy with them. Thus, there was a discovery of fact based on the confessions of the Appellants and these facts were not in the knowledge of the police beforehand. The statements are thus permissible as evidence as per the provisions under S. 27 of The Indian Evidence Act.

CORPORATE AND INVESTMENT LAWS

Baleshwar Dayal Jaiswal v. Bank of India[1]

Aakansha Kumar, V B.S.L. LL.B

Debts Recovery Appellate Tribunal can condone delay in filling an appeal under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

The present was concerned with the authority of the Debts RecoveryAppellate Tribunal (Appellate Tribunal) under The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('SARFAESI Act') to condone delay in filling an appeal beyond the period of limitation. The Supreme Court considered whether proviso to S. 20(3) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ('RDB Act')[2] can be applied to dispose an appeal by the Appellate Tribunal under The SARFAESI Act.

The Court observed that:

(i) S. 18(2) of The SARFAESI Act, 2002 clearly states that any disposal of appeal by the Appellate Tribunal has to be in accordance with the provisions of The RDB Act. The proviso to S. 20(3) of The RDB Act authorises the Appellate Tribunal to consider appeals even after limitation period has expired.

(ii) S. 29(2) of The Limitation Act, 1963[3] is not applicable to Tribunal proceedings and is attracted only to proceedings before a court.

[1]2015 SCC OnLine SC 686

[2]Section 20(3) of the RDB Act empowers the Appellate Tribunal to entertain an appeal after expiry of period of limitation, if sufficient cause for not filing the appeal wi thin the period of limitation is shown.

[3]Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of S. 3 shall apply as if such periods were the periods prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law

The Court has strongly taken a stand against the view adopted by the Madhya Pradesh High Court in the case of *Seth Banshidhar Media Rice Mills Pvt Ltd* v. *State Bank of India*[4] that power to condone a delay stood excluded by principle of interpretation that, if a later statute has provided for shorter period of limitation without express provision to condone, it could be implied that there was no power to condone.

The Court held that by virtue of S. 18(2) of The SARFAESI Act, the provisions of the RDB Act stand incorporated in the SARFAESI Act for disposal of an appeal. Consequently, there is no reason why the SARFAESI Appellate Tribunal cannot entertain an appeal beyond the prescribed period even on being satisfied that there is sufficient cause for not filing such appeal within that period.

The RDB Act and The SARFAESI Act are complementary to each other and thus the Appellate Tribunal under The SARFAESI Act has the power to condone delay in filling an appeal.

[4]AIR 2011 MP 205

Madras Bar Association v. Union of India &Anr.[1]

Divyasha Mathur,V B.S.L LL.B

The constitutional validity of National Company Law Tribunal and National Company Law Appellate Tribunal and their functioning under The Companies Act, 2013 was challenged.

This case is a sequel to the 2010 judgement in *Union of India* v. *R. Gandhi, President; Madras Bar Association.* In the 2010 case, the Supreme Court had upheld the constitutionality of the National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT) along with some other provisions. However, the provisions of The Companies Act, 2013 did not fully reflect the observations of the *R. Gandhi* case, hence giving rise to the current litigation.

The principal issues and the relevant observations of the Constitution Bench of the Supreme Court in the aforesaid case are –

(i) Constitutionality of the NCLT and the NCLAT under S.408 and S. 409:

Madras Bar Association (Petitioner) contended that it would be unconstitutional to constitute NCLT and NLCAT to exercise the jurisdiction which is being exercised by the High Court or the Company Law Board. The constitutionality of the creation of these Tribunals was expressly upheld in the 2010 judgement, a binding precedent. Hence, the Court rejected this argument as it operated as *res judicata.*

(ii) Qualifications prescribed to become technical members of the Tribunals under S. 409(3) and S. 411(3):

It was argued that insofar as technical Members of NCLT/NCLAT are concerned, the provisions under The Companies Act, 2013 are almost the same under The Companies Act, 1956, and challenge to those provisions was specifically upheld in the 2010 case. To avoid degradation of the standards for qualifications of the members, the Court observed and reiterated that only officers who are holding the ranks of Secretaries or Additional Secretaries in the Indian Company

[1] (2010) 11 SCC 1

Law Service having at least 15 years of legal/technical expertise are to be considered for appointment of the Technical members. Hence, corrections are to be made in S. 409(3) and S. 411(3) of The Companies Act, 2013 to this effect.

(iii) Structure of the Selection Committee for NCLT and NCLAT under S. 412(2):

Under S. 412(2), the Selection Committee is a five member body; with 2 judicial members including the Chief Justice of India or his nominee as the Chairperson and 3 executive members. The Bench held that instead of a five member Committee, it shall comprise of four members – 2 judicial and 2 executive and the Chairperson would have a casting vote, thereby reaffirming its 2010 judgement.

In this way, the legislative quagmire relating to the NCLT and NCLAT came to an end giving way to the establishment of these tribunals.

INTELLECTUAL PROPERTY RIGHTS LAW

Cipla Ltd. v F. Hoffmann-La Roche Ltd. And Anr.[1]

Shreya Rajlakshmi, IV B.S.L. LL.B.

Revocation of patent on life saving drug dismissed.

This case arises from a claim made by F.Hoffman-La Roche Ltd. (Roche) on March 31, 1991 for the grant of patent in U.S.A. pertaining to *Erlotinib Hydrochloride*, and subsequently filing an application for grant of patent for the same molecule in India, which was granted to it in 2007. Cipla's intention to launch a generic version of Roche's drug, *Erlocip*, compelled Roche to move to the Delhi High Court on its original side seeking to restrain Cipla from marketing *Erlocip*.

Cipla contended that the patent discloses the polymorph A+B of *Erlotinib Hydrochloride*, whereas Roche has a separate product patent in U.S.A (US 221) for Polymorph B of *Erlotinib Hydrochloride*. Further, Roche had unsuccessfully filed a patent application for Polymorph B of *Erlotinib Hydrochloride* in India. Thus, the very filing of a separate patent application is indicative of the fact that Polymorph B of *Erlotinib Hydrochloride* is a separate invention and therefore Cipla manufacturing Polymorph B cannot be an infringement of the IN '774 patent.

In response, the Respondents contended that as long as *Erlotinib Hydrochloride* is present in Cipla's *Erlocip*, it amounts to infringement. Roche has been granted patent for Polymorph B in 40 Countries and had also applied for the same in India and thus, non-intimation of the patent application for Polymorph B resulting in grant of US '221 was due to the bona-fide belief of Roche that the two patents were separate inventions. Roche further argued that the onus was on Cipla to show prima facie obviousness where after the burden would have shifted to Roche. However, the Petitioner has not been able to establish prima facie that the suit patent was obvious.

[1] RFA (OS) Nos.92/2012 & 103/2012

The Court dismissed the impugned judgment passed by the Ld. Single Judge in so far as revocation of IN '577 was concerned. However, keeping in view the fact that the life of the patent in favour of Roche in India would expire in March 2016 the Court did not grant Roche an injunction. The Court also directed Cipla was also held liable to render accounts concerning manufacture and sale of *Erlocip*, for which purpose suit for infringement filed by Roche against Cipla was restored. The Court also directed that that it be listed before the Ld. Joint Registrar for recording evidence of the profits made by Cipla from exploiting the impugned product.

Hawkins Cookers Limited v. Khaitan Pressure Cooker Pvt. Ltd[1]

Jash Vaidya, III B.S.L. LL.B.

The Court considered whether meticulous comparison of Marks is essential to determine infringement.

Hawkins Cookers Limited (Plaintiff) and Khaitan Pressure Cookers Pvt. Ltd. (Defendant) are both manufacturers of pressure cookers. The Plaintiff had a long standing reputation in the market. Both the Plaintiff and Defendant's logo had similar features except for a Lord Krishna photograph and the words used inside the label distinguishing them. The Plaintiffs filed a suit for infringement of its logo against the Defendant, also seeking permanent injunction and damages for economic loss caused to them.

The Defendants contended that the Plaintiffs had abandoned their label and that the present one was not an original art. They also relied on S. 15 of The Copyrights Act, 1957 to contend that the Plaintiff's label was not entitled to protection as it had been used more than fifty times. It is submitted by this author that the S. 15 claim was vexatious and filed in order to camouflage clear infringement.

The Calcutta High Court on 10th April 2015 after minutely comparing both the logos concluded that the two pressure cookers when displayed side by side in the shop look similar thereby constituting infringement. The Court relied upon *Time Incorporated* v. *Lokesh Srivastava & Anr.*[2]and granted an order of permanent injunction against the Defendant and also directed punitive damages amounting to Rs 10, 00,000 in favour of the Plaintiff.

In this Judgment, it may be observed that the Court's approach involved a literal consideration of similarities as against the well-established principle of overall visual, non-meticulous comparison of the two marks in issue. Thus, the Judgment contradicts well-established principles under Intellectual Property law.

[1] C.S. No. 448 of 1990, decided 10th April, 2015
[2]2006 131 CompCas 198 Delhi

PROCEDURAL LAWS

Malati Sardar v. National Insurance Company[1]

Lysha Thomas, I B.A. LL.B

In Motor Vehicles Accidents compensation cases, there is no bar to a claim petition being filed at a place where the insurance company, which is the main contesting parties in such cases, has its business.

This present dispute concerned a case of jurisdiction decided by the Supreme Court of India on 3rd July, 2015.

In 2008, the Appellant's son Mr. DigantaSardar died in an accident while travelling on a motorcycle as the pillion-rider. This motorcycle was hit by a bus which was insured with the Respondent Company at Hoogly in West Bengal. The Appellant filed for compensation from the Motor Accidents Claims Tribunal (MACT/the Tribunal) of Kolkata. While the MACT ruled in the Appellant's favour, the High Court set aside this order on the Tribunal's lack of territorial jurisdiction.

The seminal question before the Supreme Court was whether the Tribunal had jurisdiction when the accident took place outside Kolkata, the Claimant also resided outside Kolkata but the Respondent was a juristic person which carried on its business at Kolkata. The Appellants argued that the Insurance Company was within the territorial limits of the Tribunal as the Principal Office of the Company was within the Tribunal's territorial jurisdiction. The Respondent instead contended that the Tribunal's jurisdiction was not attracted simply on the grounds that its office was situated in Kolkata.

However, the Supreme Court ruled in favour of the Appellant in recognizing that the provisions were benevolent provisions for victims of negligent driving and scrutinizing hyper – technicalities would be pointless as there has been neither failure of justice nor any prejudice regarding either party. Accordingly the impugned judgment of the High Court was set aside and the Tribunal award restored to the Appellant.

[1] Civil Appeal No. 10 OF 2016

PERSONAL LAWS

Bobbili Ramakrishna RajuYadav v. State of Andhra Pradesh[1]

Vaishnavi Raul, III B.S.L. LL.B.

Giving dowry and traditional presents at the time of marriage does not always raise a presumption that its custody is with in-laws.

The Appellant was working as an engineer with G.E India Technology at Bangalore. The Appellant and Syamala Rani (Deceased) married at Vizianagaram on May 7, 2007; after which they were residing at Bangalore. Subsequently, Syamala Rani died under mysterious circumstances on September 6, 2008.

Syamala's father (Respondent) then filed an FIR under sections 304B and498A of The Indian Penal Code, 1860 and sections 3 and 4 of The Dowry Prohibition Act, 1961 against the Appellant. The Respondent also lodged a complaint under S. 6 of The Dowry Prohibition Act, 1961 against the Appellant and his family for not returning the dowry articles even after the death of the deceased. In counter, the Appellant filed a petition under S.482 of The Code of Criminal Procedure, 1973 before the Hyderabad High Court to quash the complaint. After the High Court refused to quash the proceedings, the Appellant moved the Apex Court.

The Supreme Court held that in respect of 'Stridhan', one has to take into consideration the common practice that these articles are sent along with the bride to her matrimonial house. It is common knowledge that these articles are kept by a married woman in her possession and control and is used by her in her matrimonial house. Accordingly, the Supreme Court did not treat such gifts and articles as dowry. Therefore, the Court ordered that the Appellant and his family, who lived independently from the couple, were duty-bound to return the Stridhan to the family of the deceased. But nevertheless, the Supreme Court quashed the criminal proceeding against the Appellant.

[1]2016 43 SCD 250

OTHER LAWS

Sodexo SVC India Private Ltd. v. State of Maharashtra[1]

K. Ravalee, IV B.S.L. LL.B

Sodexo Meal Vouchers are not 'goods' within the meaning of S. 2(25) of Maharashtra Municipal Corporation Act, 1949, and therefore not liable for Octroi or Local Body Tax.

The division bench of A.K. Sikri and R.F. Nariman, JJ., have set aside the order of the Bombay High Court which held Sodexo meal vouchers to be "utility goods" and therefore liable for octroi and Local body tax (LBT). Sodexo appealed before the Supreme Court against this verdict.

The counsel for Appellants, referring to the intrinsic nature of the transaction submitted that the Appellants were merely rendering a service and there was no element of "goods" involved in the said transaction. On the other hand, the counsel for respondents relied on the reasons cited by the Bombay High Court that Sodexo vouchers are capable of being sold, delivered, stored and possessed and hence are utility goods. Thus, the test laid down in *Tata Consultancy Services* v. *State of Andhra Pradesh*[2] has been satisfied.

The Apex court after a detailed perusal of the relevant provisions and judgments, has found the judgment of the High Court incorrect. The Sodexo vouchers are not "sold" by the Appellant to the customers, as wrongly perceived by the High Court; they are pre-printed for a particular customer for distribution among its employees and not transferable at all.An insight into the Policy Guidelines dated March 28, 2014 issued by the RBI to regulate such "paper based vouchers" would clearly indicate that the nature of the transaction is to render service. Further the court stated that the appropriate test would be as to whether such vouchers can be traded and sold separately. The answer is in the negative. Therefore, the test of ascertaining the same to be 'goods' is not satisfied.

For the above mentioned reasons the Apex court found the judgment of the High Court to be incorrect and inadequately discussed, therefore warranting interference. The appeal is allowed and the order of the High Court is liable to be set aside.

[1] 2015 SCC Online SC 1291
[2] (2005) 1 SCC 308

LIC of India v. Insure Policy Plus Services Pvt. Ltd. and Ors.[1]

Pabitra Dutta, V B.S.L LL.B

Insurance policies are freely transferable and assignable in accordance with the provisions of The Insurance Act, 1938.

The Division Bench of the Supreme Court of India held that Insurance policies are freely transferable and assignable in accordance with the provisions of The Insurance Act, 1938 (the 'Act') and that the Life Insurance Corporation of India (LIC) cannot object to the same as a rule of prudence.

The Respondent here was a company which acquired insurance policies by consideration and further sold them to third parties. Two circulars were then issued by LIC to prohibit this, as it wanted to disallow third-parties from making windfall gains by wagering these contracts.

The Apex Court while dismissing the appeal by LIC and upholding the decision of the Bombay High Court held that S. 38[2] of the Act was mandatory and substantive in nature. Also the amendment in 2015 was not retrospective in nature and rights and remedies of assignees that arose prior to the amendment stand protected. Since the policy was drafted by LIC and as it was in a position to disallow assignment of policies, the rule of *contra proferentum* shall apply and global practices permitting assignment shall be sustained. The practice of assignment is prevalent in USA and UK. The above rule basically states that if the terms of a contract are ambiguous or silent on a particular aspect, then the same shall be interpreted against the party which drafted it. In this case, LIC drafted the policy, it was also in a position to include clauses prohibiting assignment; but it did not do so. Hence, now it cannot be allowed to take the defence of public policy to stop its working. Also, the Court held that LIC, in contravention to the concept of delegated legislation be allowed to issue Circulars which are outside the ambit of the Act. It would also be inappropriate to import the principles of public policy into contractual matters.

[1] Civil Appeal No. 8542 of 2009
[2] Assignment and transfer of Insurance Act, 1938

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