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2021-22

Articles

Case Comments

Legislative Comments

Teachers' and PH. D. Research Articles

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Principal's Page

It gives me immense pleasure to present *Abhivyakti* Law Journal 2021-22.

ILS Law College provides an opportunity to the students, researchers, scholars to display their creativity through their writings and research. The opportunity to express themselves in the form of article or any research work actually helps nurture their personality in general and their critical thinking process in particular. The power of expression also gives confidence and the necessary impetus to communicate with society.

The articles in *Abhivyakti* Law Journal are based on varied topics and subject like crypto currency and regulatory developments in India, competition law, concept of complete justice under Indian Constitution, cyber space and extra territorial jurisdiction, evaluation of obscenity, health law and individual autonomy, freebies, and related issues.

The present issue contains various sections comprising of articles and essays by students of undergraduate, teachers and research scholars.

Abhivyakti Law Journal also provides a platform to publish the quality research work undertaken by Ph.D. research scholars at ILS Law College Ph.D. Research Centre. Tremendous work is undertaken by the editorial committee in collecting the quality research articles. The authors of these articles are guided by the editorial board and are given an opportunity to improvise and enhance the quality of their research while writing the articles.

I congratulate all the scholars and the students for their scholarly articles and case comments and legislative comments. I also congratulate the

editorial team headed by Dr. Banu Vasudevan and her team for their hard work and patience while bringing out this volume. I am sure this volume will be well received by academia as well as students.

Dr. Deepa Paturkar
Professor and
Additional Charge, Principal
ILS Law College, Pune

Editorial

We are happy to present the eagerly anticipated edition of the *Abhivyakti* Law Journal for the academic year 2021-22.

This year marks the momentous launch of the centenary celebrations of the Indian Law Society and the College. In its journey through all these years of enduring commitment to academic excellence, the college serves as a testament that an unwavering dedication to disseminating legal knowledge and intellectual discourse, indeed bears fruit for generations to come. May this heritage continue to kindle the flames of intellectual conscientiousness and propel the legal fraternity towards a brighter future.

This year's journal is once again a testimony to the steadfast dedication and brilliance of our students, showcasing their insightful perspectives and legal acumen.

The *Abhivyakti* Law Journal has always been a sanctuary for budding legal minds, a platform where they can showcase their intellectual prowess and ignite meaningful discussions on pressing legal issues. This edition features a remarkable array of articles, essays, case comments, legislative insights, and scholarly research papers, each contributing to the ever-evolving tapestry of legal knowledge.

We extend our heartfelt gratitude to the contributors. The submissions, ranging on a myriad of topics, indeed, demonstrate their insatiable thirst for knowledge and an unwavering determination to comprehend the complexities of our legal landscape. Their thought-provoking insights infuse the pages of this journal with the transformative potential of their words and the lasting impact of their expressions.

Dear readers, we invite you to immerse yourselves in the vast assortment of legal scholarship presented within these pages.

To quote the American writer, William Zinsser: *"Writing is thinking aloud."* So, let us celebrate the power of writing as a means to express thoughts, ideas, and visions in the realm of academia.

And finally, let us remember the wise words of Roscoe Pound: *"The law must be stable, but it must not stand still."*

Faculty Editor
Dr. Banu Vasudevan
Assistant Professor
ILS Law College, Pune

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I, Principal Dr. Deepa Paturkar, hereby declare that the particulars given above are true to the best of my knowledge and belief.

Dr. Deepa Paturkar
Professor and
Additional Charge, Principal
ILS Law College, Pune

Acknowledgments

We congratulate each of the author who has helped us in bringing out yet another interesting and thought-provoking annual edition of the *Abhivyakti* Law Journal 2021-22.

We appreciate the sincere and diligent editorial skills of our student editors.

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ARTICLES

Moving Towards Metaverse : The Indian Framework

Akshya Singh II LL.B.
Preeti Gokhale II LL.B.

Facebook recently rebranded itself as *Meta*, leading to immense speculations regarding its evolution as well as the substantial changes one could expect in terms of social media and the related technological advancements, which would affect all of its users. In December 2021, it was reported[1] that the founder, Mark Zuckerberg said that India and Indians will play a key role in the development of the virtual world over the internet, granting credit to the start-up ecosystem India harbours along with the pool of engineers, developers, and creators in the country, making the plan sound extremely revolutionary and promising, emphasising how India may be at the core of Metaverse. Thus, while this opportunity sounds great for our country, it is natural to be curious about the fact that while India has the expertise as well as the market for it, does India also have the required policies, legislations, and infrastructure in place to protect individual's data and information and regulate private entities? Such initiatives would it be for public benefit, and if not, how far are we from it and what new frameworks do we need to make it work?

Before analysing the implication, it is essential to understand what the terms '*meta'* and '*metaverse'* mean. The word meta is derived from Greek, which encompasses a wide array of meanings, such as "with", "after", "alongside",

[1]Pankaj Doval, *India to be at core of Metaverse,* News, B. and News, I., 2021 [online] The Times of India. Available at: <https://timesofindia.indiatimes.com/business/india-business/india-to-be-at-core-of-metaverse/articleshow/88309480.cms> [Accessed 1 May 2022].

"on top of" and "beyond"[2]. In pop culture, especially in the age of memes, it is used synonymously with the term 'self-referential'. It is however also commonly associated with the term 'metaphysical', a term taken from the subject of philosophy. It refers to an idea, doctrine, or posited reality outside of human sense perception. In modern philosophical terminology, metaphysics refers to the study of what cannot be reached through objective studies of material reality[3]. Now what we often associate with 'not material reality' is 'virtual reality' and here is where Metaverse comes in. The term *metaverse* was coined by Neal Stephenson in his 1992 novel Snow Crash, a speculative epic whose action takes place in two parallel worlds – primary, physical "Reality", and the online, virtual, "Metaverse" existing alongside it.[4]

Metaverse would basically be a hyper real alternate world for people to coexist in. It would incorporate augmented reality (AR), virtual reality (VR) as well as any and all means of communication we could think or imagine of. To exist in such a reality, one would be represented through a 3-D holographic *Avatar* of themselves. The possibilities, as often described, would be beyond our imagination. The Metaverse would have the potential of reading and interpreting expressions as well as brain activity to allow for communication. It would have the potential to even make texting obsolete.

The possibilities that the Metaverse would open to us are innumerable. Something as simple yet, controversial as, self-expression would undergo a drastic change. A person could have a certain kind of built, complexion, abilities, ethnicity, gender and so on in the material reality and could be a completely different person in the virtual reality, by virtue of their *Avatar*. Transportation as we know it could cease to exist. We would be able to hop

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[2]Oglesby, N., 2021. *Facebook and the true meaning of 'meta'*. [online] Bbc.com. Available at: <https://www.bbc.com/future/article/20211112-facebook-and-the-true-meaning-of-meta> [Accessed 1 May 2022].

[3]Pbs.org. n.d. *Glossary Definition: Metaphysical*. [online] Available at: <https://www.pbs.org/faithandreason/gengloss/metaph-body.html> [Accessed 1 May 2022].

[4]*supra* note.2

from one place to another through just a click, similar to teleportation even, of course, though virtual efforts are being made to make it as close to real as possible so that we won't be able to notice any difference at all. We would be moving towards an age of virtual realism. Our existence as professionals is also likely to transform. Work from Home would have a new meaning altogether. Right now, there is a workplace (office) and a home, but now there's potential that one could sit at home and also be in the office in the Metaverse.

So, why are apprehensions still prevalent regarding this new concept? Our lives, for a long time now, have been interlinked with the virtual world, especially with the rise and development of social media platforms, to an extent where many are dependent on it to function in their daily lives. However, we are still not completely merged with tech yet. What Metaverse posits is a complete immersion in augmented reality. Our existence would not be linked to our virtual presence; our virtual presence would be our existence. Humanity would be – digital. Hence, this would come with its own set of challenges.

The first one to be discussed is the company which is building such a universe, Meta, formerly famously known as Facebook. No one is a stranger to the multiple data and privacy issues the company faced and was even formally questioned upon. Ensuring cybersecurity has itself been a big issue with the company. Facebook suffered a massive data breach as the private information of 533 million users was leaked online in 2019. Then in September 2021 Frances Haugen, a whistle blower, a former employee of Facebook leaked tens of thousands of internal company documents to the *Wall Street Journal*, which then published a series of reports that showed Facebook was aware of the negative effects of misinformation and the harm that causes, particularly to the teenage girls, but was doing little to stop it.[5]

[5]Rahel Philipose, *Explained: Who is Facebook whistleblower Frances Haugen, and what has she revealed?* [online]The Indian Express. 2021. Available at: <https://indianexpress.com/article/explained/who-is-facebook-whistleblower-frances-haugen-7556326/> [Accessed 1 May 2022].

Social Media platforms also record, analyse and tap into consumer engagement to not only curate content for them but also to target consumers with certain content and advertisements. The Metaverse would then be collecting more data than any social media platform is at the moment. The creation of an *Avatar* would also employ facial recognition methods, which have great potential to be misused. The reading and analysing of even thoughts would allow 'Meta' to gather information that even the closest person to us in the material reality may not be privy to. Modification and tailoring of not only content but of individuals themselves, breaks the authenticity of existence, which begs the question, could it be called 'reality' at all?

Further to gather this data, the company will have to excessively monitor and moderate the interactions. They won't just be analysing the pages we engage with or the emojis we most use anymore, but also with the expressions we make, our body language and even the thoughts we think. This would entail extreme surveillance of each and every *avatar*. The question here would be, how democratic, free and safe such a space would be, especially when there is criticism for extreme surveillance in the real, material world itself.

Another privacy risk in the Metaverse would be related to transactions. Most believe that in all probability, the currency for financial transactions would be cryptocurrency, which in today's time itself bridled with excessive privacy issues. The Reserve Bank of India recently has expressed its concerns over security and privacy issues, especially when it comes to financial data with respect to cryptocurrency.

In 2021 alone, there have been some large-scale data breaches in India. Such as data of 180 million users of *Domino's* was leaked on the dark web, Covid-19 test results of Indian patients were openly available on Google, a data breach from *Upstox*- one of the biggest stock-broker in India and *Air India* falling victim to a cyberattack which leaked personal information of about 4.5 million customers all over the world – India has seen it all. The Pegasus scandal deserves a special mention here. The fact that India's security forces, judiciary,

cabinet ministers, opposition leaders and journalists, etc. were being spied on through Israeli spyware shook the nation.

At present, India has only one Central Act called the Information Technology Act, 2000[6] in force to govern electronic exchange of data and other electronic means of communication or electronic commerce transactions in India. But it indeed is inadequate and ineffective considering the dynamics of rapidly changing technology.

Upon comparison of the IT Act, 2000 and its subsidiary rules like Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 (SPDI Rules) with General Data Protection Guidelines,[7]the findings are as follows:

1. Whereas the objective of GDPR is to specifically protect natural persons and their rights and freedom upon data processing, the same is absent from the IT Act.
2. The principles given in Art. 5 of GDPR apply to data processing and include various principles like data integrity, protection from unlawful processing, accountability, fairness and transparency. On the other hand, the only collection of information and use find mention in the IT Act.
3. The Art. 4 & Art. 8 of GDPR define consent, list out special conditions for a child's consent and require demonstration of consent by the data controller. None of these are mentioned in the IT Act.
4. Various Articles under GDPR give rights, not provided in the IT Act, like right of access, right to restrict processing, right to data portability, right to object, right to erasure, right in relation to automated decision

[6] Information Technology Act, 2000.

[7]The Centre for Internet and Society, India, n.d. *GDPR and India*. [online] The Centre for Internet and Society, India. Available at: <https://cis-india.org/internet-governance/files/gdpr-and-india> [Accessed 1 May 2022].

making and profiling. They have been explicitly mentioned in GDPR while, in the IT Act they have only been mentioned vaguely.

5. Although, both the legislations provide for compensation and damages, compensation is a right under GDPR but not under the IT Act.

These are just some of the areas that the IT Act along with the SPDI Rules[8] lag behind in. Moreover, while various legislations do exist to protect the intellectual property rights of persons in the real world in India but in Metaverse, protection of intellectual property rights would be a major challenge as the virtual world is a whole different ball game.

If corrective measures are not taken to improve the privacy and security of the data principal then no matter the resources available in India, the business of various entities would get diverted to countries that are safer due to their data protection laws. Considering these inadequacies, the Personal Data Protection Bill of 2019 has now come into existence.

Now coming to the Personal Data Protection Bill, 2019[9]. In the landmark judgment of *Justice K S Puttaswamy v Union of India*,[10] the right to privacy was held to be a fundamental right under Article 21 of the Constitution of India[11]. During the hearing, the Union Government placed on record that they were constituting a committee under the lead of former judge of the Supreme Court, Justice B. N. Srikrishna to examine data protection laws and suggest a framework for the protection of the right to privacy. This committee report led to the introduction of The Personal Data Protection Bill, 2019.

Although certain shortcomings of the IT Act, 2000 have been overcome by the 2019 Bill such as– putting a time limit for the display of privacy policy on the website when data is collected from data principal or other sources, provision

[8] Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011.

[9] The Personal Data Protection Bill, 2019.

[10] K.S. Puttaswamy (Privacy-9J.) v. Union of India, (2017) 10 SCC 1

[11] The Constitution of India.

of giving notice to the data principal when data is collected from a source other than the data principal, stringent rules with regard to consent, but there is still scope for improvement –

- Section 25(1) states that the data fiduciary would decide when to withhold knowledge of a breach from the Data Protection Authority (DPA) and decide whether it is 'likely to cause harm' to the data principal or not. This is arbitrary. Every breach, whether likely to cause harm or not, should be reported to the Authority.
- Similarly, in Section 25(5) the DPA is given the discretionary power of whether to inform the data principal regarding the breach. Whether or not the data principal can take any action to mitigate the harm should not be the qualifier for informing the data principal. They should be informed regardless of anything in case their data is breached. Right to information is a fundamental right under the Constitution of India.
- The Bill places extensive power in the hands of the Government with regard to handling data. This could lead to an authoritarian regime. Sections 35 and 36 place Government agencies outside the ambit of the Bill wherever thought necessary for reasons which can have very wide interpretations, ranging from national security, friendly relations with foreign States, law-and-order, etc.
- In Section 64(1), there is ambiguity with regards to the word 'harm'. It is widely open to interpretation. It would cause great difficulty to the data principal when trying to prove that harm has been caused and it would be equally challenging for the DPA to take necessary actions.
- Under Section 91(1) and (2), the Central Government is not prevented from gathering anonymized personal data or other non-personal data from a data fiduciary or a data processor. There is a lack of clarity on the definition of non-personal data as the Bill does not define the said term. As far as anonymized personal data is concerned, studies show that it is

not irreversible. All in all, non-personal data should be left outside the ambit of the Bill.

This goes on to show that even with this new Bill, India is not quite there, yet. This leads to the question regarding how prepared is India, to accommodate the Metaverse and secure the data and maintain the privacy of its citizens while keeping up with new technology, especially in this increasingly globalised world.

Cryptocurrency and Related Regulatory Developments in India, the US, the UK, Japan and Singapore

Harshal Kshirsagar
IV B.A. LL.B.

Introduction:

The origin of block chain technology is often credited to Satoshi Nakamoto's white paper, "Bitcoin: A Peer-to-Peer Electronic Cash System,"[1] which was published in 2008. However, its roots can be traced back to 1991, when American cryptographers Stuart Haber and W. Scott Stornetta[2] first described the structure of cryptographically secured chain blocks. In 1998, Nick Szabo introduced the world's first decentralized currency, "Bit Gold,"[3] and Stephen Konst theorized about the implementation of cryptographic security chains.[4]

It is evident that the history of blockchain technology is far from recent, with over 40 years of research, development, and applications. In India, the technology was first introduced in 2013 with the establishment of the country's first blockchain start-up.[5] Soon after India's largest private sector bank ICICI and Emirates NRD announced their pilot launch of blockchain network for International remittances and trade finance[6] and then in 2017 the Government of Andhra Pradesh implemented the Blockchain technology in Land Records Department as well as the Transport Department[7]. In 2019, the state of

[1]https://bitcoin.org/bitcoin.pdf

[2]https://www.javatpoint.com/history-of-blockchain

[3]https://www.ledger.com/academy/crypto/a-brief-history-on-bitcoin-cryptocurrencies

[4]https://essay.utwente.nl/73954/7/Penkov_MA_BMS.pdf

[5]https://www.moneycontrol.com/msite/wazirx-cryptocontrol-articles/the-journey-of-cryptocurrencies-in-india/

[6]https://www.infosys.com/newsroom/press-releases/2016/launch-blockchain-pilot-network.html

[7]https://www.newindianexpress.com/states/andhra-pradesh/2019/dec/15/andhra-government-to-adopt-blockchain-tech-to-end-land-record-tampering-2076359.html

Telangana launched Blockchain based Property Registration platform and chit funds registration platform which also bagged prestigious awards in the very next year[8]. The Telangana state has established a Blockchain District to incentivize the investment, provide land at subsidized rates, and provide funding and policy support to Blockchain start-ups[9].

Blockchain offers a vast array of use cases, including international payments, trade finance, insurance, healthcare, real estate, voting systems, and cyber security. Decentralized finance (DeFi) is one such significant application of blockchain, with crypto currency at its core. With a growth rate of more than 2,200,000% from its initial price of $0.9 in July 2010 to a peak of $20,225 in July 2022, Bitcoin has demonstrated its potential for wealth creation.[10]

With this global statistics, in the blockchain segment, the Indian market too is attracting significant foreign direct investment (FDI) due to its favorable conditions, such as young and skilled workforce, and technological expertise. Despite the lack of regulations, investment in the crypto industry has increased from $6.3 million in 2016 to $100 million in 2021, and it is projected to continue to grow.[11]

As Prime Minister Narendra Modi emphasizes that innovation and enterprise will be the key to making India a developed economy.[12] To achieve that vision, the country must tap into this sector. The success of Indian blockchain startups is a testament to the country's expertise in technology, but it now requires government support to roll out the many applications of blockchain technology in a secure, certain, and reliable manner.

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[8]https://government.economictimes.indiatimes.com/news/technology/telanganas-blockchain-based-property-registration-platform-bags-gold-skoch-award/77280206

[9]https://it.telangana.gov.in/wp-content/uploads/2019/05/Telangana-Blockchain-Policy-Draft-May-2019.pdf

[10]https://www.statista.com/statistics/326707/bitcoin-price-index/

[11]https://www.moneycontrol.com/news/business/startup/blockchain-platform-5ire-becomes-indias-105th-unicorn-startup-details-here-8831371.html

[12]https://scroll.in/latest/890081/innovation-will-be-the-foundation-for-economic-growth-says-narendra-modi-at-iit-bombay

It has merits when one points out the Anti-money laundering (AML) concerns of crypto currency but it is equally true that the same are not immutable. By a proper consultation with industry leaders and legal experts and by forming the appropriate regulatory framework these concerns can be addressed effectively and entirely.

It's a welcoming step by the Indian start-ups that they are already taking measures to assuage the concerns of AML, identity theft and all kinds of crimes by implementing self-regulating frameworks till there exist no regulatory framework. But this self-regulation still cannot match the force and vigour of a proper legislation formulated by a law making body of the state.

The government has often disclosed its plans to ban cryptocurrency but the same may not be an effective way to deal with any concerns arising out of this new form of value transfer. Countries like China had banned Crypto currency for the 20th time in 2021[13] and still the number of Chinese investors investing in overseas Crypto exchanges is significant due to its decentralised nature. Since any legislation for banning digital assets can only be effectively implemented if global collaboration is endorsed the lone voice of ban may not carry any vigour in the present scenario. By looking at various leading jurisdictions it does not seem that there is any inclination towards straight away banning crypto. Countries such as the United States, the United Kingdom, Singapore, Japan and Dubai are embracing the technology by enforcing regulatory regime either by way of new legislations or by incorporating them in the existing one.

By doing so, India can ensure a consistent and effective regulatory framework for this innovative technology and reduce the risks associated with its use.

In the next section, we will explore the legislative developments and regulations surrounding cryptocurrencies in India, the United States, the United Kingdom, Dubai, Japan, and Singapore.

[13]https://www.cnbc.com/amp/2021/09/24/what-investors-should-know-about-chinas-cryptocurrency-crackdown.html

India:

In April 2018, the Reserve Bank of India (RBI) issued a statement on Developmental and Regulatory Policies[14], followed by a circular on the same day, prohibited all regulated entities, including commercial and cooperative banks, payment banks, NBFCs, small finance banks, and payment service providers, from dealing in virtual currencies. The statement also indicated the introduction of a Central Bank Digital Currency to address the rising costs of managing fiat paper and metallic currency.[15]

The circular specified that entities regulated by the RBI should not deal in or provide services related to virtual currencies, such as trading, settling, clearing, giving loans against virtual tokens, accepting them as collateral, opening accounts of exchanges dealing in virtual currencies, and other related services. The circular also directed existing entities to end such relationships within three months of its issuance.

Following the circular, two writ petitions[16] were filed in the Supreme Court of India, one by the Internet and Mobile Association of India and another by crypto exchanges and individual crypto traders, challenging the statement and the circular. The petition raised two key questions:

Whether the RBI had the authority to issue such a circular when virtual currencies have not been recognized as legal tender and, therefore, the same will not fall under the RBI's jurisdiction?

Whether the prohibitions imposed by the circular were in line with the permissible restrictions given under Article 19 of the Constitution of India on

[14]https://rbidocs.rbi.org.in/rdocs/PressRelease/PDFs/PR264270719E5CB28249D7BCE07C5B3196C904.PDF

[15]https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NOTI15465B741A10B0E45E896C62A9C83AB938F.PDF

[16]https://main.sci.gov.in/supremecourt/2018/19230/19230_2018_4_1501_21151_Judgement_04-Mar-2020.pdf

the right to practice any profession or carry on any occupation, trade, or business?

The Supreme Court recognized the powers of the RBI under section 36(1)(a) of the Banking Regulation Act, 1949, to caution or prohibit banking companies from entering into any particular transaction or class of transactions. The Court held that for the RBI to regulate the transfer of a good or commodity, it is not necessary that it must have all four characteristics of money. As such, the action of issuing the circular by the RBI was deemed to be within its power.

But then Supreme Court examined the circular on the Rule of Proportionality and held that less intrusive measures were available, as suggested by the stakeholders, and that the RBI had not considered such measures and instead directly prohibited entities from dealing in virtual currencies.

The Court also observed that the RBI had not presented any empirical data showing that entities regulated by the RBI had suffered any losses due to their involvement in dealings related to crypto and that the activities carried out by the petitioner had not been declared unlawful.

Since then, there have been discussions and debates on the regulation of cryptocurrency in India, and the government has been working on formulating a comprehensive regulatory framework. In 2017, the Indian Ministry of Finance set up a high-level inter-ministerial committee to draft a bill to regulate cryptocurrencies[17] and propose measures to ban private cryptocurrencies while proposing a framework for the launch of a central bank digital currency.

The bill, named "Banning of Cryptocurrency & Regulation of Official Digital Currency Bill, 2021," was introduced in the Parliament in March 2021 and seeks to ban all private cryptocurrencies and provide a framework for the launch of an official digital currency by the central bank. The bill has not been passed yet and is still under review by a parliamentary standing committee.[18]

[17]https://pib.gov.in/PressReleseDetail.aspx?PRID=1579759

[18]https://www.mondaq.com/india/fin-tech/1145012/cryptocurrency-bill-2021-the-road-ahead

In addition to the bill, the Securities and Exchange Board of India (SEBI) has also been considering the regulation of cryptocurrencies. Advertising Standards Council of India (ASCI) has also issued Guidelines to regulate advertising of cryptocurrency and allied assets[19]. ASCI has mandated disclaimers in ads for VDAs stating that the "Crypto products NFTs are unregulated and can be highly risky. There may be no regulatory recourse for any loss from such transaction. It has also asked prominent celebrities appearing in crypto advertisements to do their due diligence about the statements and claims made in the advertisement and such celebrities must submit its duly signed written confirmation to ASCI. Whereas SEBI- the most sought after regulator for Crypto assets has called for ban on celebrities advertising Crypto assets.[20]

With respect to the company law regime, companies holding investments in Crypto or Virtual currency along with the source of funds and profit or loss earned through such transactions are now required to disclose their investment in their Financial Statements after 1st April 2021[21]. And under the taxation regime 1% TDS has been levied on payments towards Virtual Digital Assets[22].

Thus the legislative development relating to cryptocurrency in India is still in its early stages, and the government is taking a cautious approach to regulation.

United States:

In the United States, cryptocurrency is regulated at both the federal and state levels. The primary regulatory agency at the federal level is the U. S. Securities and Exchange Commission (SEC), which has classified several

[19]https://images.assettype.com/bloombergquint/2022-02/2b4e13a7-4c2c-4f4a-9672-1db2f8766226/ELP_Update_ASCI_Frame_Guidelines_For_Advertising_And_Promotion_Of_Virtual_Digital_Assets_And_Linked_.pdf

[20]https://www.thehindubusinessline.com/money-and-banking/cryptocurrency/sebi-calls-for-no-celebrity-endorsement-of cryptos/article65416520.ece#:~:text=%E2%80%9CGiven%20that%20crypto%20products%20are,a%20source%20quoted%20SEBI's%20response.

[21]https://pib.gov.in/PressReleasePage.aspx?PRID=1744542

[22]https://incometaxindia.gov.in/communications/circular/circular-no-13-2022.pdf

cryptocurrencies as securities[23] and is responsible for enforcing securities laws and regulations in this space. Other federal agencies, such as the Commodity Futures Trading Commission (CFTC) and the Financial Crimes Enforcement Network (FinCEN), also have jurisdiction over certain aspects of cryptocurrency regulation. At the state level, various states have enacted their own laws and regulations regarding cryptocurrency, including licensing requirements for cryptocurrency businesses operating within their borders. Overall, the regulation of cryptocurrencies in the U.S. is still evolving and there is ongoing debate about the proper approach to regulating this new and rapidly changing industry.

The regulatory landscape in the US has been complex and fragmented, with different regulatory bodies taking different approaches to cryptocurrency. One of the key regulatory developments in the US has been the recognition of cryptocurrencies as a form of property[24]. In 2014, the US Internal Revenue Service (IRS) issued guidance[25] stating that cryptocurrencies would be treated as property for tax purposes, subject to capital gains tax. This has had significant implications for individuals and businesses dealing in cryptocurrencies, as they are now required to report their gains and losses in accordance with the tax laws.

Another key regulatory development has been the introduction of state-level regulations, such as the BitLicense in New York. The BitLicense was introduced in 2015 as a way to regulate virtual currency businesses operating in the state of New York. The license requires virtual currency businesses to comply with anti-money laundering (AML) and know-your-customer (KYC) regulations, as well as other consumer protection measures.

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[23]https://www.coindesk.com/policy/2022/07/21/sec-calls-9-cryptos-securities-in-insider-trading-case/

[24]https://www.irs.gov/individuals/international-taxpayers/frequently-asked-questions-on-virtual-currency-transactions

[25]https://www.irs.gov/pub/irs-drop/n-14-21.pdf

The US Securities and Exchange Commission (SEC) has also taken an active role in regulating cryptocurrencies, particularly with regards to initial coin offerings (ICOs). In 2017, the SEC declared that many ICOs would be considered securities and therefore subject to federal securities laws.[26] This has had a significant impact on the ICO market, with many projects now required to register with the SEC and provide disclosures to investors.

The Commodity Futures Trading Commission (CFTC) has also played a role in regulating cryptocurrencies, as they are considered commodities. In 2015, the CFTC issued an order recognizing Bitcoin as a commodity and therefore subject to federal commodities law[27]. This has had implications for individuals and businesses dealing in cryptocurrencies, as they are now required to comply with CFTC regulations.

But despite these regulatory developments, the US still lacks a comprehensive and unified framework for regulating cryptocurrencies. This has led to confusion and uncertainty in the market, with some individuals and businesses being unclear about what is required of them.

United Kingdom:

Cryptocurrency regulation in the United Kingdom has been a topic of interest in recent years as the use of digital currencies becomes more widespread. The UK government has been proactive in creating a regulatory framework to ensure the safe and secure use of cryptocurrencies while also promoting innovation in the sector.

The Financial Conduct Authority (FCA), the UK's financial regulator, is responsible for the regulation of cryptocurrencies in the country. In April 2017, the FCA published a discussion paper on distributed ledger technology, which included a section on cryptocurrencies.[28] The paper outlined the potential risks

[26]https://law.stanford.edu/wp-content/uploads/2019/01/Mendelson_20180129.pdf

[27]https://www.cftc.gov/sites/default/files/2019-12/oceo_bitcoinbasics0218.pdf

[28]https://www.fca.org.uk/publication/discussion/dp17-03.pdf

associated with cryptocurrencies, such as money laundering and fraud, and called for a proportionate regulatory response.

In October 2018, the FCA issued a statement[29] outlining its approach to cryptocurrencies. The statement made clear that cryptocurrencies are not currently regulated in the UK but that some activities involving cryptocurrencies may fall under existing regulations. For example, the FCA stated that exchanges trading in cryptocurrencies would be subject to anti-money laundering regulations.

In July 2019, the FCA published a consultation paper[30] on its proposed regulatory framework for cryptocurrency and other crypto assets. The paper proposed that all crypto assets should be regulated by the FCA, with a clear definition of what constitutes a crypto asset. The consultation also proposed new regulations for Initial Coin Offerings (ICOs) and the use of crypto assets for investment purposes. In January 2020, the FCA introduced new regulations for crypto exchanges[31]. The regulations require exchanges to register with the FCA, comply with anti-money laundering and counter-terrorism financing regulations, and implement measures to protect consumers. The FCA has also created a "sandbox" for fintech companies, which allows companies to test new products and services in a controlled environment.

In addition to the FCA, the Bank of England has also expressed interest in the development of cryptocurrencies. The bank has established a blockchain research unit to explore the potential of distributed ledger technology, including the use of cryptocurrencies.

In conclusion, the UK government has taken a proactive approach to cryptocurrency regulation, balancing the need to protect consumers with the promotion of innovation in the sector. The FCA's regulatory framework is

[29]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752070/cryptoassets_taskforce_final_report_final_web.pdf

[30]https://www.fca.org.uk/publication/consultation/cp19-22.pdf

[31]https://www.fca.org.uk/news/press-releases/fca-establishes-temporary-registration-regime-cryptoasset-businesses

designed to provide clarity and certainty for companies operating in the cryptocurrency space, while also ensuring that appropriate measures are in place to prevent money laundering and other financial crimes.

Japan:

As a country known for its advanced technology and innovation, it is not surprising that Japan has played a key role in the development and regulation of cryptocurrency.

Japan was one of the early adopters of cryptocurrency, with the first Bitcoin ATM appearing in the country as early as 2014.[32] As the popularity of digital currencies grew, so too did the need for clear and concise regulations to govern the industry. In 2016, Japan became the first country in the world to officially recognize Bitcoin as a currency[33], a move that was widely seen as a positive step for the industry.

Since the recognition of Bitcoin as a currency, the Japanese government has continued to develop and refine its regulations for the cryptocurrency industry. In 2017, Japan's Financial Services Agency (FSA) introduced new regulations for exchanges[34], which aimed to improve security and prevent money laundering. The regulations required exchanges to register with the FSA and comply with a number of security and anti-money laundering measures.

In addition to these regulations, the Japanese government has also introduced a number of measures to encourage the adoption of cryptocurrency. For example, in 2019, Japan's central bank, the Bank of Japan, announced plans to launch a digital version of the yen, a move that would further legitimize the use of digital currencies in the country.

Today, Japan remains at the forefront of the cryptocurrency industry, with a thriving exchange market and a large number of users. The country is home to

[32]https://cointelegraph.com/news/after-four-years-japan-brings-back-its-first-crypto-atm

[33]https://cointelegraph.com/news/japan-officially-recognizes-bitcoin-and-digital-currencies-as-money

[34]https://www.cnbc.com/2017/09/29/bitcoin-exchanges-officially-recognized-by-japan.html

some of the world's largest exchanges, including BitFlyer, which is also one of the most popular exchanges globally. In addition, Japan is also home to a number of well-known blockchain companies and projects, such as the popular Ethereum-based project, OmiseGo.

Despite the positive developments in the industry, Japan's regulations are still in the process of being refined and improved. In recent years, the FSA has faced criticism for its lack of clear guidelines, which has made it difficult for companies to operate in the industry. However, the agency has responded to these criticisms by working to develop a clearer regulatory framework that provides greater clarity and certainty for companies operating in the sector.

Looking to the future, it is likely that the cryptocurrency industry in Japan will continue to grow and evolve. As technology advances and new blockchain-based projects are developed, the demand for digital currencies is likely to increase. The Japanese government is likely to play a key role in the development of the industry, through its continued efforts to refine and improve its regulations and to promote the adoption of digital currencies.

Singapore:

Singapore is a hub for innovative technologies and financial services, and the cryptocurrency industry is no exception. Over the years, the island nation has become a hub for cryptocurrency and blockchain businesses, with a supportive and progressive regulatory framework. The Monetary Authority of Singapore (MAS) is the primary regulator overseeing the cryptocurrency and blockchain industry in Singapore. The agency has a forward-looking approach to the regulation of digital assets, aiming to foster innovation while ensuring the stability and security of the financial system.

The regulatory framework for digital assets in Singapore is largely governed by the Payment Services Act (PSA), which was enacted in January 2020[35]. The

[35]https://www.mas.gov.sg/news/media-releases/2020/payment-services-act-comes-into-force#:~:text=Singapore%2C%2028%20January%202020%E2%80%A6,the%20use%20of%20e%2Dpayments.

PSA establishes a licensing regime for payment services providers, including those that deal with digital currencies. Under the PSA, digital payment token (DPT) service providers are required to hold a license from the MAS, regardless of the size of their operations. The MAS has the power to revoke or impose conditions on a license if it finds that the provider has failed to comply with the regulatory requirements.

The PSA also sets out a number of requirements for DPT service providers, including the obligation to implement measures to mitigate money laundering and terrorist financing risks, maintain adequate records of transactions, and provide regular reports to the MAS. The PSA also requires DPT service providers to establish effective corporate governance, risk management, and internal control systems, and to ensure the protection of customers' funds.

In addition to the PSA, the Securities and Futures Act (SFA) is also relevant to the regulation of digital assets in Singapore. The SFA governs the issuance and trading of securities, including digital assets that are considered to be securities. The MAS has the power to regulate the trading of digital assets if they are deemed to be securities.

Guidance on Initial Coin Offerings (ICOs):

The MAS has issued guidance on the regulatory treatment of Initial Coin Offerings (ICOs) in Singapore. The agency has stated that ICOs may be subject to the SFA if the tokens offered are considered to be securities. If the ICO is deemed to be a securities offering, the issuer must comply with the requirements of the SFA, including the obligation to prepare a prospectus, appoint an independent auditor, and appoint a trustee to hold the proceeds of the offering in trust.

The MAS has also warned that some ICOs may be scams, and has advised investors to be cautious when considering investment opportunities in digital assets. The agency has stated that it is important for investors to understand the risks involved, including the potential for loss of their entire investment, as well

as the potential for regulatory action against the ICO issuer if it fails to comply with the relevant legal and regulatory requirements.

When talked about Cryptocurrency exchanges in Singapore they are regulated under the PSA. The MAS has stated that cryptocurrency exchanges that deal in digital currencies that are considered to be securities must be licensed under the SFA. The MAS has the power to revoke or impose conditions on a license if it finds that the exchange has failed to comply with the regulatory requirements.

The MAS has also stated that cryptocurrency exchanges must implement measures to mitigate money laundering and terrorist financing risks, maintain adequate records of transactions, and provide regular reports to the MAS. The agency has also warned that cryptocurrency exchanges may be vulnerable to cyber-attacks and has advised exchanges to implement robust cybersecurity measures to protect customers' funds.

The regulatory developments relating to cryptocurrency in Singapore are aimed at fostering innovation and growth in the digital assets industry while ensuring the stability and security of the financial system. The MAS has taken a forward-looking approach to the regulation of digital assets, balancing the need for innovation

Conclusion:

Thus, Cryptocurrency has seen various levels of regulatory developments across different jurisdictions. India has taken a cautionary approach while the United States has a fragmented approach with different states having different rules, the United Kingdom has a balanced approach towards regulation, focusing on consumer protection and AML/CFT requirements while Japan has been a pioneer in cryptocurrency regulation, legalizing and regulating the industry since 2017. Dubai has taken a proactive approach towards regulation and is positioning itself as a hub for blockchain and cryptocurrency and Singapore has a pro-innovation approach towards regulation and has established itself as a hub for fintech innovation.

Considering the need of regulatory uniformity across these jurisdictions India can use various global platforms, such as the Financial Action Task Force (FATF), the International Organization of Securities Commissions (IOSCO), and the G20 which India is currently hosting, to promote collaborative efforts in international regulations for cryptocurrency. These platforms provide opportunities for countries to exchange information and coordinate their regulatory approaches, which can help to reduce regulatory inconsistencies and increase the effectiveness of regulatory measures.

In the FATF, India can work with other member countries to develop international standards for the regulation of cryptocurrency and share best practices for implementation. The IOSCO, which comprises of securities regulators from around the world, provides a platform for regulators to cooperate and coordinate their regulatory efforts in the financial sector. India can use IOSCO to share its experience and knowledge on cryptocurrency regulation and seek assistance in areas where it may need more expertise.

The G20, which is a forum of the world's largest economies, is another platform that India can use to promote international regulation of cryptocurrency. India can work with other G20 countries to promote international regulatory cooperation and align their regulatory approaches. This can help to ensure a level playing field for businesses and reduce the risk of regulatory arbitrage.

Thus for now it is evident that different jurisdictions have adopted different approaches towards cryptocurrency regulation, and it will be interesting to see how the regulatory landscape evolves in the future. As the cryptocurrency market continues to grow, it is imperative that regulators find the right balance between fostering innovation and protecting consumers. Ultimately, the objective should be to promote the growth of a secure and transparent cryptocurrency market that benefits all stakeholders.

Commitments and Settlements under Competition Law in India: Filling the Gaps using Lessons from Foreign Jurisdictions

Khushi Agarwal
III B.A.LL.B

The Government of India has introduced the Competition (Amendment) Bill, 2022 (**Competition Bill, 2022**)[1] in the Indian Parliament, proposing wide-ranging changes to the Competition Act, 2002 (**Act**). The Competition Bill, 2022, a successor to the Competition (Amendment) Bill, 2020, is largely based on the recommendations made by the Competition Law Review Committee in 2019.[2] Further amendments have been proposed now by the Parliamentary Standing Committee on Finance in its 52nd Report (**Standing Committee Report**).[3]

The Competition Bill, 2022, *inter alia*, proposes a new mechanism for 'settlements' and 'commitments' in the Indian antitrust regime, allowing the parties under investigation before the Competition Commission of India (**CCI**) to offer commitments in respect of the alleged contravention or settle the matter with the CCI before a final order is passed.

With long drawn inquiries/appeals spanning years,[4] the increasing levels of penalties that the CCI has levied in the recent past,[5] and the contemporary

[1]Competition (Amendment) Bill, 2022, Bill No. 185 of 2022 (India).

[2] Ministry of Corporate Affairs, Government of India, Report of the Competition Law Review Committee (26 July 2019). (**CLRC Report**)

[3] Lok Sabha, Departmentally Related Standing Committee on Finance (2022-2023), 52nd Report on the Competition (Amendment) Bill, 2022 (13 December 2022).

[4] The CCI Annual Report 2020-2021 acknowledges that 253 appeals were pending at the National Company Law Appellate Tribunal (**NCLAT**) as on March 31, 2021. Appeals preferred by the National Stock Exchange and DLF Limited have been pending before the Supreme Court since 2014 and 2016, respectively.

[5]Penalty of INR 200 crores imposed on Maruti Suzuki India Limited in Suo Motu Case No. 01 of 2019 by the CCI; INR 223.48 crores on MMT-Go and INR 168.88 on OYO in Case Nos. 14 of 2019 and 01 of 2020; and INR 1337.76 crores on Google LLC in Case No. 39 of 2018.

debate about relative efficacy of antitrust remedies imposed on tech companies,[6] the proposed scheme of commitments and settlements aims to achieve the twin objectives of ensuring procedural economy and efficiency of enforcement action[7] as well as adding to India's image of being a business friendly nation.[8]

In recent years, around 33[9] competition authorities (including Singapore, European Union (**EU**), United Kingdom (**US**), United States (**US**) and Germany) have been given the power to terminate investigations in antitrust cases based on commitments and settlements offered by the parties. Till 2016, the European Commission (**EC**) adopted 35 commitment decisions in a total of 57 antitrust cases (cartel cases not included) (**61.4%**)[10] while Singapore adopted 11 commitment decisions in a total of 28 enforcement cases (**39%**).[11]

This paper aims to highlight the gaps in the proposed regime under the Competition Bill, 2022 and focuses on the lessons that India can learn from such mature jurisdictions to make the draft provisions more robust.

A. Inclusion of Cartels within the Scope of Proposed Settlements and Commitments Regime in India

While the Competition Bill, 2022 provides that the scheme of both settlements and commitments would only be restricted to the inquiries that have been initiated by the CCI for the contraventions under Section 3(4) or Section 4 of the Act, the Standing Committee Report has recommended that the settlement

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[6] UK House of Lords (2016), "Online Platforms and the Digital Single Market", 10th Report of Session 2015-16, <https://publications.parliament.uk/pa/ld201516/ldselect/ldeucom/129/129.pdf>, paras 188 and 191.

[7] CLRC Report, *supra* note 2.

[8] Standing Committee Report, *supra* note 2, at page 42, para 3.51.

[9] OECD, Commitment Decisions in Antitrust Cases, Background Note by the Secretariat (June 2016) <https://one.oecd.org/document/DAF/COMP(2016)7/en/pdf>, page 6.

[10] OECD, Commitment Decisions in Antitrust Cases - Note by European Union (23 May 2016), page 06, para 23. (**OECD Note – EU**)

[11] OECD, Commitment Decisions in Antitrust Cases - Note by Singapore (23 May 2016), page 04, para 09. (**OECD Note - Singapore**)

procedures should also be available in cases of offences under Section 3(3) of the Act, i.e. for cartelization.

Such a recommendation is in line with the international best practices. For instance, in the EU, the commitment decisions do not establish an infringement but aim to resolve the suspected antitrust concerns by imposing certain commitments on the companies. On the other hand, settlement decisions establish the existence of an infringement, require its termination and impose a fine.[12] As such, while commitment decisions are permitted in all antitrust cases except cartels[13] (because in cartels, the very nature of the infringement calls for a fine and the EC cannot settle where it intends to impose a fine),[14] a settlement procedure is available for cartels.[15] Similarly, in Germany, while settlements apply only to cartels, commitments can happen in all types of cases, except cartels.[16]

Similar to the position in the EU and Germany, and following the recommendation of the Standing Committee Report, the settlements regime should be expanded to cover cartels in India.

Further, while cartels have traditionally been considered to be a *per se* violation under the Act, it has been recognized in Singapore that in the modern business world, adopting a commitment decision in sophisticated modes of horizontal cooperation between competitors (for example, airline alliances) will allow

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[12] European Commission, "Antitrust: Commission introduces settlement procedure for cartels – frequently asked questions", MEMO/08/458 (30 June 2008). (**MEMO/08/458**)

[13] European Commission, "Antitrust: commitment decisions – frequently asked questions", MEMO/13/189 (8 March 2013). (**MEMO/13/189**)

[14] Council of the European Union, Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Recital 13 (**Regulation No 01/2003**).

[15] Council of the European Union, Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases, read with Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, 2008/C 167/01 (July 2008).

[16] International Competition Network, Anti-Cartel Enforcement Template – Germany (May 2020). (**ICN Template - Germany**)

efficiencies to be reaped while mitigating the harm on competition.[17] As such, the CCI should consider allowing commitments in cartel investigations on a case-to-case basis.

Further, even if there is a leniency regime provided for under Section 46 of the Act for parties involved in a cartel, and as opposed to the concerns raised by the Ministry of Corporate Affairs (**MCA**),[18] the settlement regime for cartels will complement the leniency regime in India:

a. Leniency applications can only be filed before the submission of the report of the Director General (**DG**) to the CCI, whereas settlement applications can only be filed after the receipt of the DG report by the party.

b. The leniency regime aims at discovering cartel cases and collecting evidence to discharge the CCI's burden of proof, whereas settlements aim at expediting the procedure to allow efficient use of CCI's resources.

c. In the EU, under the leniency regime, the reduction of the fine varies widely depending on the timing and significant added value of the information and evidence provided by the parties. On the other hand, all parties settling in the same case receive equivalent reductions of the fine (10%), because their contribution to procedural savings is considered to be equivalent.[19]

   Similarly, in Germany, while levying penalty in the case of cartels, a settlement declaration is considered as a mitigating circumstance under which a fine can be reduced by a maximum of 10%.[20] If an application for leniency has been filed, the settlement reduction of 10% is deducted

[17] OECD Note – Singapore, *supra* note 11, at page 05-06, para 15.

[18] Standing Committee Report, *supra* note 2, at page 39, para 3.47.

[19] MEMO/13/189, *supra* note 13.

[20] Bundeskartellamt, Information Leaflet, Settlement procedure used by the Bundeskartellamt in fine proceedings (February 2016). (**Bundeskartellamt Information Leaflet**)

from the amount of fine which has already been reduced.[21]

As such, the presence of both settlement mechanism and leniency regime in India is not necessarily likely to interfere with each other, but will rather complement one another.

B. Requirement of Preliminary Statement of Concerns in the case of Commitments

Under the Competition Bill, 2022, a party must apply for a commitment after the CCI has passed an order under Section 26(1) of the Act but before the DG investigation report is provided to the party.

Under the Act, an order passed under Section 26(1) of the Act is a mere administrative order where the CCI is not required to provide a detailed reasoning.[22] On the other hand, as part of the investigation, the DG is expected to examine all the allegations and is allowed to also expand the scope of the investigation. For example, he may choose to investigate a violation of Section 4 of the Act even where the order passed under Section 26(1) of the Act only found a *prima facie* violation of Section 3(4) of the Act. Therefore, before the DG Report is released to the parties, they are unlikely to be clear on all the allegations, which in turn is likely to impact the efficacy of commitments offered by them.

In the EU, while the parties are encouraged to signal their interest in discussing commitments at the earliest possible stage, commitments are accepted even in a case where a 'Statement of Objections' has already been sent to the parties.[23] A 'State of Play Meeting' is held to allow the parties to understand the theory of harm and the underlying factual evidence[24] and copies of preliminary

[21] ICN Template – Germany, *supra* note 16.

[22] CCI v. SAIL, (2010) 10 SCC 744, para 91.

[23] European Commission, Antitrust Manual of Procedures, Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU (March 2012), page 179. (**DG Manual of Procedures**)

[24] *id.*

assessments are forwarded by the Hearing Officers.[25] The only limitation here is that the EC cannot accept commitments when its investigations have reached a stage where an infringement has been found and a fine should thus be imposed.[26]

Similarly, in the UK, for commitments to be accepted by the Competition Markets Authority (**CMA**), the case must be at a stage where the competition concerns are readily identifiable. This allows the CMA to provide the parties with a summary so that they can understand its concerns and offer commitments which are right for the case.[27]

Following the same in India, there should be a positive obligation upon the CCI to share a statement of concerns (one that is more reasoned that an order passed under Section 26(1) of the Act) with the parties.

C. Admission of Guilt– With/Without Prejudice in Cases of Settlements and Commitments

Under the Competition Bill, 2022, it is unclear whether the settlement/ commitments process involves an admission of contravention and liability by the concerned party. Similarly, on one hand, the Standing Committee Report provides that "*any matter, cartels or otherwise, that reaches the settlement stage, would have been an anti-competitive one*," while on the other, it provides that an "*admission of guilt should not be mandated.*" Clarity on this ground is required because such an admission may have repercussions on other avenues of business for the party (such as inability to participate in tenders, increased scrutiny from other regulators, director disqualifications, etc.).

In both the EU and Germany, while a settlement decision (in cartel cases) establishes an infringement and requires an admission of guilt from the parties, a commitment decision (in cases of abuse of dominance and vertical restraints)

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[25] DG Manual of Procedures, *supra* note 23, page 27.

[26] Regulation No 01/2003, *supra* note 13, Recital 13.

[27] OECD, Commitment Decisions in Antitrust Cases - Note by United Kingdom (23 May 2016), page 04, para 14. (**OECD Note – UK**)

does not establish an infringement and does not require any such admission.[28] The EC notes that typically parties opt for a settlement decision when they are convinced of the strength of the EC's case based on their own internal audit. In such cases, they may be ready to admit their participation in a cartel to get a reduced fine.[29] On the other hand, a commitment decision only describes the concerns found in the investigation and merely concludes that there are "*no longer grounds for action*" by the EC.[30]

Following the same approach, under the proposed framework in India, it is important to make it clear that settlements are with prejudice (only in case of cartels and not Section 3(4)/4 of the Act) while commitments are without prejudice.

D. Appeals

Under the Competition Bill, 2022, the CCI's orders pertaining to any commitment/settlement applications (including rejections) are not appealable. While the Standing Committee Report has proposed that the applicant should be allowed to apply to the CCI to revisit the settlement/commitment after the final order is passed as one last opportunity, there is no recommendation regarding a provision for an appeal that can be preferred before an appellate forum, i.e., the NCLAT.

Such a bar on appeals in both successful/ unsuccessful cases of settlements/ commitments raises questions vis-à-vis the requirements of ensuring that the principles of natural justice are upheld as well as is likely to leave parties unwilling to participate in such a mechanism where the CCI, in the name of effectiveness, may use its bargaining power to request commitments which it

[28]Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, 2008/C 167/01 (July 2008), para 20(a); Bundeskartellamt Information Leaflet, *supra* note 20; ICN Template – Germany, *supra* note 16..

[29] European Commission, Cartel Cases Settlement Procedure.

[30] Regulation No 01/2003, *supra* note 13, Recital 13.

knows are over-reaching and may unduly restrict the ability of undertakings to compete on the market.

In the EU, both the settlement and commitments decisions of the EC can be appealed before the General Court within two months of their adoption.[31] Such appeals are limited to the questions of law,[32] for example, whether the settlement/commitment decision is proportionate to the conduct being investigated or not.[33]

In the UK, the CMA's guidance on investigation procedures explicitly prohibits the parties from making an appeal against a settlement decision passed by the CMA.[34] A commitment decision may be appealed on the grounds "*as to whether there has been a competition law infringement, interim measures decisions and decisions on the imposition of, or the amount of, a penalty*."[35]

In Germany, while appeals are not allowed in case of commitments,[36] after a settlement has been reached and the proceeding is concluded by way of a short decision, settled parties can appeal the settlement decision in courts. In case the addressee of the fine files an appeal, the Bundeskartellamt withdraws the short decision and issues a detailed fine decision.[37]

Under the proposed regime in India, as the CCI enjoys wide discretion in deciding whether to accept or reject proposed commitments, an appeal should be allowed as to the legality of such a rejection. Similarly, should the CCI mandate that an admission of guilt be there in the case of a successful

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[31]MEMO/08/458, *supra* note 12; European Union, Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01, Article 256.

[32] OECD Note – EU, *supra* note 10, at page 5, para 21.

[33]Alfrosa v. Commission, Case T-170/06 of 2006 (European General Court).

[34] Competition Markets Authority, Guidance on the CMA's investigation procedures in Competition Act 1998 cases (10 December 2021), Section 14.8.

[35]Section 46 of the Competition Act 1998 (UK) read with Competition Markets Authority, Guidance on the CMA's investigation procedures in Competition Act 1998 cases (10 December 2021), Section 15.13.

[36] ICN Template – Germany, *supra* note 16.

[37]Bundeskartellamt Information Leaflet, *supra* note 20.

settlement/commitment, it is inherently determining the rights and liabilities of the parties, and hence, a provision of judicial review is essential to ensure scrutiny of the decisions adopted by the CCI.

E. Compensation Applications

Under the Competition Bill, 2022, where an application for settlement/commitment is successful, given that there is no right to appeal before the NCLAT, it is unclear if eligible third parties can still seek compensation (under Section 53N of the Act) for loss or damage caused to them by the actions of parties under investigation. In this light, the Standing Committee Report has recommended that there should be a provision to provide compensation to the affected consumers.

However, unless there is protection to the settlement applicant from Section 53N of the Act, the settlement provision may be a non-starter for the parties. This is in line with the international best practices. For example, the Department of Justice's (**DoJ)** consent decrees and the Federal Trade Commission's (**FTC**) consent orders do not constitute "*any evidence against or admission by any party regarding any issue of fact or law*." As such, third parties cannot use an agency's settlement in private lawsuits for damages.[38] Similarly, in Singapore, since the acceptance of a commitment does not lead to an infringement decision, no private action can be taken.[39]

Therefore, unless there is a clear finding of infringement (for example, in case of a settlement in a cartel), compensation applications should not be allowed under the Act.

F. Withdrawal of Settlement / Commitment Applications

Under the Competition Bill, 2022, there is no clarity as to whether a party can withdraw a commitment/ settlement obligation/ application after (a) the

[38] OECD, Commitment Decisions in Antitrust Cases - Note by United States (23 May 2016), page 07, para 27. (**OECD Note – US**)

[39] OECD Note – Singapore, *supra* note 11, at page 07, para 21.

application has been filed but the CCI has not passed an order on the same; or (b) after the CCI has passed an order on the application.

Due to a material change in circumstances during the pendency of the commitment/settlement application, the applicant may not any longer be in a position to comply with the proposed commitment/settlement. At a later stage, the applicant may also assess that it is in a worse-off state than it would have been had it not submitted the application. Similarly, even after the final order has been passed by the CCI allowing the commitment/settlement, due to a material change, the applicant may not be in a position to comply with the order.

In such a situation, the EU allows the parties to stop the settlement discussions at any time before a final order is passed.[40] In the US, any party subject to a FTC consent order may seek its modification if there has been a material change in facts or law have changed, rendering the order inequitable or unnecessary.[41] In contrast, because the consent decrees passed by the DoJ are approved via court orders, the DoJ cannot unilaterally modify or terminate them and the parties must petition the court for a modification or termination.[42]

Following the same in India and in line with the recommendation by the Standing Committee Report, to ensure that the "voluntary" nature of the negotiations is maintained, the parties must be allowed to withdraw their applications in case of a material change of facts before a final order is passed by the CCI. After a final order is passed, they should be allowed to apply for a modification/termination before the CCI. No adverse inference should be drawn against a party withdrawing/terminating its application.

G. Requirement of Accompanying Regulations

While resolving an antitrust case through a negotiated settlement/commitment decision can be very appealing, excessive reliance on an inadequate procedure can lead to suboptimal outcomes for markets as well as the legal system. As

[40]MEMO/08/458, *supra* note 12.

[41]FTC Act § 5(c), 15 U.S.C. §45(b); and FTC Rule 2.51, 16 C.F.R. §2.51.

[42] OECD Note – US, *supra* note 38.

noted by the MCA, the CCI will have to eventually release detailed regulations governing the settlement and commitment mechanism to reduce arbitrariness and ensure accountability.[43]

Firstly, it has to be ensured that the remedies imposed as part of settlements/ commitments are "*feasible, implementable, effective and proportional to the violation […] and overall […] must be self-regulatory, i.e. be transparent, checked and accounted for by all the market participants*".[44] This becomes particularly important where the CCI may require the parties to commit to structural remedies as well. In the EU, in the cases of both settlements as well as commitments, structural remedies can only be imposed "*where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy*".[45] Along the same lines, some guidelines (along the lines of the Lesser Penalty Regulations) should be prescribed so as to limit the discretion of the CCI in imposing fines in the case of a settlement.

Secondly, the Competition Bill, 2022 provides that an order of settlement and commitment may be revoked by the CCI. However, to introduce finality and certainty, a limitation period should be introduced in the Act beyond which the order cannot be revoked.

Conclusion – Way Forward for India

Settlements and commitments are an important procedural tool in competition law as they allow the competition agencies and the parties under investigation to resolve their disputes effectively, quickly, and thoroughly. However, for their successful implementation, it is important that these processes are transparent, predictable, and industry-friendly. While the introduction of these

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[43] Standing Committee Report, *supra* note 2, at page 35.

[44] Botswana Competition and Consumer Authority, Monopolisation and Abuse of Dominance Guidelines (August 2013). *See also* European Commission, Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, O.J. [2011] C 308/6 (October 2011).

[45] Regulation No 01/2003, *supra* note 13, Recital 12 and Article 7.

tools under the Competition Bill, 2022 is a welcome step and reflects the increasing maturity of the antitrust regime in India, further consideration and multi-sector consultation is required to ensure that the proposed amendments do not curtail rights of various industry stakeholders and compromise on establishing an effective competition regime in India.

The Widest Virtue of Article 142 of the Constitution of India: Is "Complete Justice" Beyond Justice?

Manas Pimpalkhare
IV B.A.LL.B

Introduction:

The Article 142 of the Indian Constitution grants the Supreme Court the power to deliver "complete justice" in its broadest sense. It is a part of Chapter IV, which brings together all powers of the Union Judiciary. The question arises, how does the Supreme Court determine a case when "complete justice" is sought by parties? Are there any boundaries that the Supreme Court justices consider when interpreting Article 142? Where do they set the limit?

This essay aims to explore the nature and boundaries of Article 142, its judicial purpose, and the limitations that the Justices of the Supreme Court face when interpreting it. The essay will also examine the relationship between Article 142 and other laws.

The author aims to shed light on the reasons behind the inclusion of "complete justice" in the Constitution, which was created to uphold justice in the country. The essay will review some precedence and attempt to understand the significance of Article 142.

What is article 142?

Article 142 reads[1]:

142. **Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc.—**

(1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or

[1] The Constitution of India, Article 142.

matter pending before it, and any decree so passed order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.

(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

Upon examining the text of the statute, we observe that the term "complete justice" is undefined and used in a general sense. This raises the question: is that intentional? The scope of "complete justice" under Article 142 is deliberately vague[2]. This suggests that the powers granted to the Supreme Court under Article 142 endorse two features:

1. Article 142 cannot be diluted by existing legal provisions.
2. Article 142 allows the Supreme Court to dispense justice that can serve as the law of the land in cases where substantive law is lacking, until legislation is enacted to govern the issue.

Is Article 142 superior to other laws?

In order to discuss the powers of Article 142, we will analyze two judicial precedents.

In the case of *Mohd. Anis v. Union of India*[3], the Supreme Court addressed the issue of whether it had the power to direct the Central Bureau of Investigation (CBI) to investigate a cognizable offense committed within a state without the consent of the state government, or whether the powers of the Delhi Special

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[2] Justice S.A. Kader, Former Judge, High Court of Madras, *ARTICLE 142 OF THE CONSTITUTION OF INDIA – ITS SCOPE AND AMPLITUDE*, paragraph (12), Madras Law Journal - Civil (Journal Article), 2010, Volume 2, LexisNexis 2022 *ARTICLE 142 OF THE CONSTITUTION OF INDIA – ITS SCOPE AND AMPLITUDE* 2010 2 MLJ 19

[3] Mohd. Anis v. Union of India, 1994 Supp (1) SCC 145

Police Establishment Act would limit the Supreme Court's ability to dispense complete justice in the matter.

Article 142 was invoked here because it gives the Supreme Court exceptional powers to provide complete justice. The Court ruled that Article 142 cannot be overridden by provisions of the Delhi Police Establishment Act, 1946, as doing so would prevent the Court from taking action in the public interest. This case established the precedent that Article 142 can take precedence over other laws if invoked for the public interest or a public welfare cause.

However, the Supreme Court must always consider the facts of the case to determine if public interest is genuine. The Court must examine the facts carefully to determine if the counsel's request for complete justice under Article 142 is based on genuine public interest.

In the case of *Nidhi Kaim v. State of Madhya Pradesh*[4], also known as the "Vyapam Scam" case, the Supreme Court deliberated whether MBBS students who had fraudulently obtained admission to medical colleges should be allowed to keep their degrees.

The argument made by the students' counsel, that increasing the number of doctors in society serves the public interest, was rejected by the Supreme Court in the case of *Nidhi Kaim v. State of Madhya Pradesh* (also known as the "*Vyapam Scam*" case). The Court cancelled the students' admissions and did not grant any relief. This demonstrates that the application of Article 142 in dispensing "complete justice" is not arbitrary, but rather determined by the factual circumstances of the case. In order for the Supreme Court to render complete justice under Article 142, it must first determine the authenticity of the public interest in the matter.

Is article 142 a concrete measure for filling up legal lacunae?

The Supreme Court can exercise its authority under Article 142 in situations where there is no existing law to govern a matter. The scope of Article 142

[4] Nidhi Kaim v. State of M.P., (2017) 4 SCC 1

encompasses instances where the Court deems it necessary to issue orders or posit delegated legislation to address the absence of law. In the seminal case of *Vishaka v. State of Rajasthan*[5], the Supreme Court upheld its power of Judicial Activism and entailed that the directions issued by the Court would constitute as law of the land if there is no legislation present governing the matter, until the legislative congress births statutes governing it[6].

In India, there are only a few legal gray areas where legislation is lacking. It is in these areas that the Supreme Court has the power to issue orders under Article 142 to fill the gaps and "complete" the justice delivered across the nation. This represents the power bestowed upon the Apex Court through Article 142.

The boundaries of Article 142

The use of Article 142 is bound by clear limits, as demonstrated in the case of *Nidhi Kaim v. State of Madhya Pradesh*. In this case, the Division bench of the High Court deliberated on the issue of relief for the students, but both the judges agreed that the students had committed fraud. The students' case was not granted relief under Article 142 because their actions were fraudulent and therefore, the penalty imposed was justified.

The Indian judiciary upholds the principle of providing relief to the wrongdoer[7], but in this case, the Court chose not to do so because the students had been involved in a fraudulent act for a substantial period. Thus, the use of Article 142 is dependent on the facts of the case and whether they align with public interest, truth, and fairness.

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[5] Vishaka v. State of Rajasthan, (1997) 6 SCC 241

[6] Justice S.A. Kader, Former Judge, High Court of Madras, *ARTICLE 142 OF THE CONSTITUTION OF INDIA – ITS SCOPE AND AMPLITUDE*, paragraph (4), Madras Law Journal - Civil (Journal Article), 2010, Volume 2, LexisNexis 2022 *ARTICLE 142 OF THE CONSTITUTION OF INDIA – ITS SCOPE AND AMPLITUDE* 2010 2 MLJ 19

[7] DD Basu: Commentary on the Constitution of India, 9th ed, Vol 7, Articles 36 - 79, (18.9.2022, 9:58PM),[Art 72] Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases –

The Blurring Lines of Extraterritorial Jurisdiction in Cyberspace

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Shweta Shukla III B.A.LL.B.

Introduction

The debate on extraterritorial jurisdiction is long-drawn and can be traced back to the S. S. Lotus case of 1927, where the Permanent Court of International Justice held that, *"jurisdiction cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention."*[1] Over time, a generally-accepted prohibition on the use of extra-territorial enforcement jurisdiction has been witnessed.[2]

This article suggests that the very nature of cyberspace and cybercrime call for the rules of extraterritorial jurisdiction to be reconsidered, to allow States greater flexibility, efficiency and precision in their responses to the crime. It examines how recent State actions and policies amalgamate traditional theories of international law with States' current needs and accordingly, the changes suggested would supplement the existing regime which is built on the principle of mutual cooperation between states.

Cyberspace and the Budapest Convention

The ease of access to information and the profound use of the internet has made cyberspace more pervasive than ever. The developments in information technology and communications have given rise to unprecedented economic

[1] The Case of the SS 'Lotus' (France v. Turkey), Judgement 1927 PCIJ (ser. A) No. 10, 18-19 (September 7).

[2] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 ICJ 3 (February 14), Separate Opinion of Guillaume, 4, joint sep. op. Higgins, Kooijmans and Buergenthal, at 54, and diss. op. Van den Wyngaert, 49; *Report of the International Law Commission*, UNGAOR, 58th Sess, UN Doc A/CN.4/SER.A/2006/Add.l (Part 2), Annex 5, 6, 22, & 32; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 478–479 (8th ed. 2012); Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y. B. INT'L. L. 145, 145–151 (1972–1973).

and social changes, but they also have a dark side: the emergence of new types of crime as well as the commission of traditional crimes by means of new technologies.[3] Borders are no longer boundaries to this flow.[4] This is because viruses or malware attacks directed at a particular country's computers may not be limited to that country, because either the malware has not been programmed carefully or other factors may cause the malware to spill-over to computers in other countries.[5] Criminals are increasingly located in places other than where their acts produce their effects.[6]

The Budapest Convention was drafted and adopted to bridge this gap. It allows for States to access stored computer data extraterritorially in only two situations:

1. Where the data is publicly available (open source);[7] or
2. Where the State has obtained consent from the person with the authority to disclose the data.[8]

The drafters of the Budapest Convention noted that situations beyond the two mentioned were "neither authorized nor precluded."[9] They agreed not to regulate other situations until further experience had been gathered and further discussions could be held.[10] The International Group of Experts that drafted the Tallinn Manual 2.0 agreed that a State's law enforcement authorities may not hack into servers in another State to extract evidence or disinfect bots there that are being used for criminal purposes without the territorial State's agreement, unless doing so is permissible under a specific allocation of authority under

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[3] Council of Europe, *Explanatory Report to the Convention on Cybercrime*, ETS 185, 5, [hereinafter *Explanatory Report to the Budapest Convention]*.

[4] *Explanatory Report to the Budapest Convention*, *supra* note 3, 6.

[5] Peter Sommer & Ian Brown, *Reducing Systemic Cybersecurity Risk*, OECD (Jan. 14, 2011), available at <http://www.oecd.org/gov/risk/46889922.pdf>.

[6] *Explanatory Report to the Budapest Convention*, *supra* note 3, 6.

[7] Convention on Cybercrime, 23 November 2001, ETS No. 185, Art. 32(a).

[8] *Id.*, at Art. 32 (b).

[9] *Explanatory Report to the Budapest Convention*, *supra* note 3, 293.

[10] *Explanatory Report to the Budapest Convention*, *supra* note 3, 293.

international law.[11] Despite the lack of an all-encompassing and ever-binding international convention, States have been proactive in protecting their territories from cybercrime. Under international law, States can utilize the 'effects doctrine' and the 'protective principle' to justify retaliations or retorsions to cybercrime that are not explicitly authorized.

The Effects Doctrine and the Protective Principle

The effects doctrine deals with acts, including cyber operations, that do not originate, conclude, or materially take place in the State in question, but have effects therein.[12] This form of jurisdiction must be utilized in a reasonable fashion and with due regard to the interests of other States.[13] As such, a State can utilize this jurisdiction when:

1. it has a clear and internationally acceptable interest in doing so;
2. the effects which it purports to regulate are sufficiently direct and intended or foreseeable;
3. the effects are substantial enough to warrant extending the State's law to foreign nationals outside its territory; and
4. the exercise of this jurisdiction does not unduly infringe upon the interests of other States, or upon foreign nationals, without a significant connection to the State that purports to exercise such jurisdiction.[14]

Under the protective principle, States have the right to subject cyber activities engaged in by aliens abroad to their prescriptive jurisdiction when such acts

[11]MICHAEL N. SCHMITT, TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS (CUP 2017) [hereinafter *Tallinn Manual 2.0*], Rule 11, 7.

[12]*Tallinn Manual 2.0, supra* note 11, Rule 9, 10.

[13]*Tallinn Manual 2.0*, *supra* note 11, 13.

[14] Michael Akehurst, *Jurisdiction in International Law*, 46 Brit. Y. B. Int'l. L. 145, 198–201 (1972–1973).

compromise their national security,[15] financial solvency and stability, or other vital national interests,[16] such as elections.[17]

These two principles allow States to have a wide-range of powers to enact legislations for their own interests and to, ultimately, enforce them. Although controversial, they have been a significant part of international law for decades. Cyberspace allows miscreants to exploit the strict confines of territorial jurisdictions to operate from multiple territories. Cybercrimes are often orchestrated so as to materially take place within multiple states, allowing all of them to assert jurisdiction over the crime. With the rise in cybercrimes, international law can find answers in these dormant theories.

How States Exercise Extraterritorial Prescriptive and Adjudicative Jurisdiction

Although extraterritorial jurisdiction may be prohibited in the traditional sense, concessions have been made considering the unique nature of cyberspace. These concessions are especially important to deal with situations in which the location of data is unknown or unknowable, or where acquiring consent would unduly jeopardize the investigation, or when it is simply impractical given the rapid mobility of the data being sought. Consent should not be required if and when law enforcement is merely accessing data that the device automatically downloads from the cloud — even though there is the possibility that some parts of that data may be located out of the investigating country's domestic borders.[18] The challenges and limitations of dealing with cybersecurity incidents, especially when one considers that an incident may impact a directly affected States' own population as well as other countries, suggest that, at a

[15]MALCOLM N. SHAW, INTERNATIONAL LAW 499 (8th ed. 2017); Joyce v. Director of Public Prosecutions, 15 ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES 91–104 (1953).

[16]LASSA OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW 466-467 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); *Tallinn Manual 2.0*, *supra* note 11, Rule 10, 10.

[17] *Tallinn Manual 2.0*, *supra* note 11, Rule 4, 16.

[18] Jennifer Daskal, *Transnational Government Hacking*, 10 J. NAT'L SEC. L. & POL'Y 677, 679 (2020). [hereinafter *Jennifer Daskal*]

minimum, the directly affected State ought to report the incident and share relevant information with other relevant actors.[19] Coordination of communication and exchange of information is thus essential to effective disaster response.[20]

A. United States (U.S.)

American jurisprudence has held that international law permits jurisdiction under the protective principle and the effects doctrine, even if the harmful act is thwarted before its ill-effects are actually felt in the target State.[21] It has even held the passive personality test to be valid, although controversial.[22]

In 2016, amendments were made to the Federal Rule of Criminal Procedure 41.[23] The amended Rule now specifies that a judge can issue a remote access search warrant if the location of the device or data is unknown and has been concealed. This provision provides another exception to the otherwise accepted geographical limitations on judicial authority to issue search warrants.[24]

U.S. law does not explicitly address the more controversial set of issues, i.e., in what circumstances courts can issue warrants for extraterritorially-located data accessible from territorially-located devices.[25]

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[19] Oren Gross, *Cyber Responsibility to Protect: Legal Obligations of States Directly Affected by Cyber-Incidents*, 48 CORNELL INT'L L.J. 481, 506 (2015).

[20] Eduardo Valencia-Ospina (Special Rapporteur on the Protection of Persons in the Event of Disasters), F*ifth Report on the Protection of Persons in the Event of Disasters*, 22-24, 101, U.N. Doc. A/CN.4/652 (April 9, 2012).

[21] *See*, Monika B. Krizek, *The Protective Principle of Extraterritorial Jurisdiction: A Brief History and an Application of the Principle to Espionage as an Illustration of Current United States Practice*, 6 BU INT'L L. J. 337, 345 (1988); *See also* United States v. Evans et al, 667 F Supp 974, 980 (SDNY 1987).

[22] United States v. Yunis, 681 F Supp 896 (D.D.C. 1988); 924 F 2d 1086 (DC Cir 1991), Ahmad v. Wigen, 726 F Supp 389 (ED NY 1989).

[23] Amendments adopted by the U.S. Supreme Court by order dated April 28, 2016, transmitted to Congress by the Chief Justice on the same day (578 U.S.; Cong. Rec., vol. 162, p. H2147, Daily Issue, Ex. Comm. 5232; H. Doc. 114–127), and became effective December 1, 2016. The amendments affected Rules 4, 41, and 45.

[24] FED. R. CRIM. P. 41(b)(6).

[25] *Jennifer Daskal, supra* note 18, at 692.

In *Riley v. California*, the U.S. Supreme Court gave a test of location of data for determining the permissible scope of search in a criminal investigation.[26] However, the same court has also aided in the development of jurisprudence justifying extraterritorial enforcement actions. In several cases, courts have concluded that officers, who are lawfully on the premises of a home, can answer a ringing telephone and listen in– irrespective of the location of the speaker on the other end.[27] And in the context of wiretapping, the U.S. courts have held that the territorial nexus is satisfied as long as the listening occurs within a judge's territorial jurisdiction, regardless of where the conversation takes place.[28] In at least one case, a court has concluded that the Wiretap Act[29] can, as a result, authorize the listening into a conversation that takes place wholly overseas, on the grounds that the interception took place in the U.S..[30]

As per the CLOUD Act, territorially-located providers are required to turn over all responsive data within their "possession, custody, or control, regardless of whether such [data] is located within or outside of the United States,"[31] in response to a compelled disclosure order issued pursuant to the Stored Communications Act.[32]

B. India

In *GVK Industries Ltd. v. ITO,*[33] the Supreme Court of India had the opportunity to consider the implications of Article 245(2) of the Constitution of India. In

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[26] Riley v. California, 573 U.S. 373 (2014).

[27] *See, e.g.*, United States v. Vandino, 680 F.2d 1329, 1335 (11th Cir. 1982); United States v. Kane, 450 F.2d 77 (5th Cir. 1971).

[28] See, e.g., United States v. Henley, 766 F.3d 893(8th Cir. 2014), at 911-12; United States v. Luong, 471 F.3d 1107 (9th Cir. 2006), at 1109-10; United States v. Jackson, 207 F.3d 910 (7th Cir. 2000), at, 914-15, vacated on other grounds, 531 U.S. 953 (2000); United States v. Denman, 100 F.3d 399 (5th Cir. 1996), cert. denied, 520 U.S. 1121 (1996); United States v. Tavarez, 40 F.3d 1136 (10th Cir. 1994), 1138; United States v. Rodriguez, 968 F.2d 130 (2d Cir. 1992).

[29] The Electronic Communications Privacy Act of 1986 (ECPA, codified at 18 U.S.C. § 2510 et. seq.).

[30] United States v. Cano-Flores, 796 F.3d 83 (D.C. Cir. 2015), cert. denied, 136 S.Ct. 1688 (2015).

[31] CLOUD Act, 103(a)(1) (codified at 18 U.S.C. 2713).

[32] The Stored Communications Act (SCA, codified at 18 U.S.C. Chapter 121 §§ 2701–2712).

[33] GVK Industries Ltd. v. ITO, (2011) 4 SCC 36.

considering whether the Income Tax Act, 1961 could apply extraterritorially, the Court held that the Indian parliament is not constitutionally permitted to legislate on extra-territorial aspects that have no impact on or nexus with India.[34] However, the extent to which an extraterritorial cause or aspect could be said to have such an impact on or nexus with India was defined very broadly by the Court to include, events, things, phenomena (however commonplace they may be), resources, actions or transactions, and the like – that occur, arise or exist or may be expected to do so "when these would, have, or are expected to have, some impact on, or effect in, or consequences for: (a) the territory of India; or (b) the interests of, welfare of, wellbeing of, or security of inhabitants of India, and Indians." It permits an enormous scope of action.

C. Australia

An Australian legislation authorizes the issuance of so-called covert "computer access warrants" — enabling law enforcement to, among other things, remotely access data and devices.[35] Consent is required if the location of data is known to be in a foreign State but, if the location of the data is unknown or cannot be reasonably determined, consent is not required.[36]

The legislation takes a different approach when dealing with indirect access. It explicitly authorizes law enforcement to serve technical assistance warrants on companies that are located outside of Australia's borders — so long as they provide services or products used by Australians — without requiring consent of the foreign government.[37] These assistance warrants, in turn, can require

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[34] *Id.* at 367.

[35] Telecommunications and Legislative Amendments (Assistance and Access) Act 2018 (Cth) sch 2 pt 1 div 4, 87 (Austl.), available at <https://perma.cc/G68R-V25X>.

[36] Explanatory Memorandum, Telecommunications and Other Legislation Amendments (Assistance and Access) Bill 2018 (Cth) 591-98 (Austl.), available at <https://perma.cc/8KF2-452L> (explaining situations in which consent is needed).

[37] Telecommunications and Legislative Amendments (Assistance and Access) Act 2018 (Cth)sch 1, part 15, ss 317C, 317L (Austl.), available at <https://perma.cc/G68R-V25X>; Explanatory Document, Telecommunications and Other Legislation Amendments (Assistance and Access) Bill 2018 (Cth) 9 (Austl.), available at <https://perma.cc/92J6-6W2Y>.

providers to take steps that will assist in collecting data, without any limitation on the data's location.[38]

D. United Kingdom (UK)

Recent UK legislation permits the issuance of "equipment interference warrants" — namely, warrants that permit "interference" with computer systems and devices in order to obtain communications content and other data.[39] The legislation draws inspiration from the effects doctrine principle for extraterritorial jurisdiction. Law enforcement chiefs can issue such warrants, but only if "there is a British Islands connection."[40]

With respect to indirect access, the same legislation also explicitly authorizes issuing warrants that require disclosing non-content data on operators of telecommunication systems outside the UK, given there is sufficient jurisdiction to serve the order.[41] Service providers can be excused if it is not "reasonably practicable" to comply.[42] This exception may allow the State to plead necessity to let go of their obligations under customary international law that require obtaining consent from the respective foreign State.[43]

In most of the signatory States to the Budapest Convention,[44] law enforcement agencies can directly access the data from a suspect's computer, if the

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[38] Telecommunications and Legislative Amendments (Assistance and Access) Act 2018 (Cth) sch 1, part 15, ss 317C, 317L (Austl.), available at <https://perma.cc/G68R-V25X>; Explanatory Document, Telecommunications and Other Legislation Amendments (Assistance and Access) Bill 2018 (Cth) 9 (Austl.), available at <https://perma.cc/92J6-6W2Y>.

[39] Investigatory Powers Act 2016, c. 3, no. 99 (UK).

[40] *Id at* 107.

[41] *Id at* 85.

[42] *Id at* 66.

[43] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts,* November 2001, Supp. No. 10 (A/56/10), chp. IV.E.1, Art. 25.

[44] Finland, *see* Penal Code, Chapter 38 § 8; Lithuania, *see* Lithuania Criminal Code, Article 8*;* Portugal, *see* Portuguese Law on Cybercrime (Law no. 109/2009, from 15 September 2009); Poland, *see* Penal Code from 06 June 1997 , Chapter XXXIII – Offences against the Protection of Information, articles 266 -299 corresponding to articles 2– 6 from the Budapest Convention; Sweden, *see* Penal Code Chapter 4, Section 9 (c); Turkey, *see* Turkish Criminal Code No. 5237; Chile, *see* Chile Law No 19.223; Bosnia and Herzegovina, Montenegro, *see* Criminal Code, 2003; Cyprus, *see* The Cyprus Law No 22 (III) - 2004 ratifying the Convention on Cybercrime;

jurisdiction in which the computer data is stored is not apparent.[45] If it is clear that computer data is stored in another jurisdiction, the law enforcement authorities of seven countries[46] can still access the data; in ten countries[47] that would not be permitted, unless a suspect cooperates voluntarily as foreseen in Article 32 (b) of the Convention. This also applies to accessing the password of the suspect.[48] These countries have a liberal approach to transboundary access and a wide-range of activities can be pursued while acting in 'good faith.'[49] In some States, the foreign authorities would have to be notified,[50] while in others, it is not necessary.[51] Even service providers may directly answer requests received from the law enforcement authorities of another country.[52]

The Question of Violation of Sovereignty

A traditional understanding of international law very clearly restricts a state from exercising unilateral extraterritorial enforcement jurisdiction. Principles of international law relating to the territorial integrity and independence of States prevent organs of one state from being physically present or performing their functions in the territory of another state without the consent of the latter

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Japan, *see* Unauthorized Computer Access Law, 2013; Hungary, *see* Act C of 2012 on the Criminal Code; USA, *see* Federal Rules of Criminal Procedure. With respect to the Czech Republic, Estonia and Germany it depends on the specific circumstances, *see* Penal Code of Republic of Estonia, 2001; *see* Network Enforcement Act, 2017 and German Criminal Code 1986, 202.

[45]Council of Europe, Cyber-Crime Convention Committee, *Transborder access and jurisdiction: What are the options?* 6 December 2012, 138-142. [hereinafter *Transborder Access*]

[46]*Transborder Access*, *supra* note 45; *Supra* note 44, Finland, Portugal, Poland, Chile, Montenegro, Japan, USA; *See*, Portuguese Law on Cybercrime (Law no. 109/2009, from 15 September 2009).

[47]*Supra* note 44, Czech Republic, Lithuania, Germany, Sweden, Turkey, Bosnia and Herzegovina, Japan, Hungary, Estonia and the Netherlands. In Cyprus, it depends on the type of data. For social networks it would be permitted.

[48]*Transborder Access*, *supra* note 45, 139.

[49]*Transborder Access*, *supra* note 45, 153.

[50]*Supra* note 44, Czech Republic, Portugal, Poland, Chile, Bosnia and Herzegovina, Montenegro.

[51]*Supra* note 44, Lithuania, Sweden, Turkey.

[52]*Transborder Access*, *supra* note 45, 158.

state.[53] In practice, if State A's enforcement personnel merely set foot in the territory of State B, State A may be made liable for breach of territorial sovereignty. The rationale behind such a high threshold can be discerned by examining the instances of exercise of such jurisdiction.

States have sent representatives into the territory of another State in order to enforce their criminal law, by *inter alia* conducting investigations[54] or arresting suspects on the territory of other countries with respect to terrorism, cybercrimes, and drug trafficking, or even while conducting cross-boundary assassinations and targeted killings.[55] However, the nature of activity in cyberspace differs substantially from the transboundary activity of states in the traditional sense. This difference further reinforces the need to update the standards to qualify certain state actions as a 'violation of sovereignty.'

Since the stance on remote cyber operations is still unsettled under international law, their lawfulness can be assessed by the degree of infringement upon the target State's territorial integrity.[56] Remote cyber operations violate the sovereignty of a State when they result in physical damage to infrastructure, cyber or otherwise.[57] Cyber operations that result in repairing or replacing physical components of cyber infrastructure are a violation because such consequences are akin to physical damage or injury.[58] In addition to physical damage, remotely causing a loss of functionality of cyber infrastructure located in another State sometimes constitutes a violation of sovereignty.[59]

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[53] U. N. Charter Art. 2, 4; *See* Island of Palmas case (Netherlands/ United States of America), UNRIAA, vol. II (Sales No. 1949.V.I), 829-871, at 838 (Perm. Ct. Arb. 1928).

[54] For instance, the U.S. acknowledged having conducted recent investigations on Russian territory to search for some data on the ground that would otherwise have been lost, *See* P. L. Bellia, *Chasing Bits Across Borders*, UNIVERSITY OF CHICAGO LEGAL FORUM, 35, 40 (2001).

[55] Menno T Kamminga, *Extraterritoriality*, MPEPIL 1040, 26 (September 2020).

[56] *Tallinn Manual 2.0*, *supra* note 11, Rule 4, 10.

[57] *Tallinn Manual 2.0*, *supra* note 11, Rule 4, 11.

[58] *Tallinn Manual 2.0*, *supra* note 11, Rule 4, 13.

[59] *Tallinn Manual 2.0*, *supra* note 11, Rule 4, 13.

Remote cyber operations also violate the sovereignty of a State when they interfere with or usurp the inherently governmental functions of another State.[60] Here, physical damage is not necessary to qualify as a violation of sovereignty since the target State has the exclusive right to perform those functions,[61] including law enforcement activities.[62]

The Unilateral Exercise of Extraterritorial Enforcement Jurisdiction

The rationale behind unilateral hacking is that sometimes, the source State refuses to cooperate and other times, the enforcement machinery in the source State will simply take too long and run the risk of evidence being destroyed or anonymized.[63] Instances like the 2007 Estonia cyberattacks,[64] the 2010 Iran nuclear power plant cyberattack,[65] the 2014 hack of Sony Pictures,[66] the 2016 U.S. Democratic election interference,[67] and the 2018 sabotage of the Pyeongchang Olympics[68] prove that problems in cyberspace involve circuitous proxies, blind alleys, and false narratives about the supposed hacker's identity. This makes tracing Internet Protocol (IP) addresses, to obtain lawful consent

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[60] *Tallinn Manual 2.0*, *supra* note 11, Rule 4, 15.

[61] *Tallinn Manual 2.0*, *supra* note 11, Rule 4, 15.

[62] *Tallinn Manual 2.0*, *supra* note 11, Rule 4,18; See, Stephen Wilske and Teresa Schiller, *International Jurisdiction in Cyberspace: Which States May Regulate the Internet?*, 50 FED COMMUN. L. J. 117, 174 (1997); Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL L. REV. 1, 82 - 83 (1996).

[63] Jack Goldsmith, *The Internet and the Legitimacy of Remote Cross-Border Searches*, University of Chicago Public Law and Legal Theory Working Paper No. 16, 1, 1 (2001), available at <The Internet and the Legitimacy of Remote Cross-Border Searches by Jack Landman Goldsmith :: SSRN>.

[64] Damien McGuinness, *How a Cyber Attack Transformed Estonia*, BBC (Apr. 27, 2017), available at <https://www.bbc.com/news/39655415>.

[65] *Stuxnet 'Hit' Iran Nuclear Plans*, BBC (Nov. 22, 2010),

https://www.bbc.com/news/technology-11809827.

[66] Kim Zetter, *Sony Got Hacked: Here's What We Know and Don't Know So Far*, WIRED (Dec. 3, 2014), available at <https://www.wired.com/2014/12/sony-hack-what-we-know/>.

[67] Andy Greenberg, *Russian Hacker False Flags Work - Even After They're Exposed*, WIRED (Feb. 27, 2018), available at <https://www.wired.com/story/russia-false-flag-hacks/>.

[68] Andy Greenberg, *The Untold Story of the 2018 Olympics Cyberattack, the Most Deceptive Hack in History*, WIRED (Oct. 17, 2019), available at

<https://www.wired.com/story/untold-story-2018-olympics-destroyer-cyberattack>/.

for remote access, excruciating and even pointless if the devices are located in the State that conducted the attack.

Due to concerns for territorial sovereignty, most attempts to takedown transnational cybercrime have been the result of concerted efforts of various nations' law enforcement agencies, multinational companies, and researchers.[69] Despite this, there have been a few instances where States have utilized extraterritorial enforcement jurisdiction unilaterally to protect their interests and prevent massive harm.

In 2000, when Russian hackers were found to be breaking into computer networks in the U.S. and Russia refused to assist the U.S. in redressing these crimes, the U.S. then obtained a search warrant and downloaded incriminating information from hackers' computers in Russia.[70]

In 2021, the U.S. military's hacking unit, Cyber Command, took offensive action (including hacking devices) without consent to disrupt Eastern European

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[69] *Coordinated Law Enforcement Action Leads to Massive Reduction in Size of International Botnet*, U.S. DEP'T OF JUSTICE (Apr. 27, 2011), available at <https://www.justice.gov/archives/opa/blog/coordinated-law-enforcement-action-leads-massive-reduction-size-international-botnet>; *Fortinet Threat Landscape Research Shows Two New Malware Variants Targeting Facebook Users*, FORTINET (May 5, 2011), available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiNi9iSmZP3AhVpKqYKHSwmC70QFnoECAYQAQ&url=https%3A%2F%2Finvestor.fortinet.com%2Fstatic-files%2F932d8ed1-d073-4278-8b30-310e3c0e326b&usg=AOvVaw3b5hS7pATB1hWMIc0C0JQd>; Kim Zetter, *FBI vs. Coreflood Botnet: Round 1 Goes to the Feds*, WIRED (Apr. 26, 2011), available at <https://www.wired.com/2011/04/coreflood-results/>; Brian Krebs, *FBI Scrubbed 19,000 PCs Snared by Coreflood Botnet*, KREBS ON SECURITY (June 21, 2011), available at <https://krebsonsecurity.com/2011/06/fbi-scrubbed19000-pcs-snared-by-coreflood-botnet/>; James Wyke, *Was Microsoft's Takedown of Citadel Effective?*, NAKED SECURITY (June 12, 2013), available at <https://nakedsecurity.sophos.com/2013/06/12/microsoft-citadel-takedown/>; James Vincent, *$500 Million Botnet Citadel Attacked by Microsoft and the FBI*, THE INDEPENDENT (June 6, 2013), available at <https://www.independent.co.uk/tech/500-million-botnet-citadel-attacked-by-microsoft-and-the-fbi-8647594.html>;

[70] See Allison Linn, *FBI's Elaborate Hacker Sting Pays Off: High-Tech Gambit Nets 2 Russians*, CHI TRIB 20 (May 10, 2001).

and Russian cybercriminal groups that launched ransomware attacks on U.S. companies.[71]

Conclusion

The question in all of the above scenarios is whether international law permits these very expansive assertions of regulatory competence.[72] The answer is yes - either under the name of the effects doctrine or the protective principle.[73] The history of international jurisdiction is one of the law accommodating the nations' felt needs to take steps within their borders to redress local harms caused from abroad that cannot otherwise be addressed.[74] The very nature of cyberspace makes tracking criminals and mitigating harm immensely more difficult. States' unfettered access to any device anywhere in the world should never be permitted under international law. However, due to the need for unique solutions to combat ever-evolving cybersecurity threats, obtaining remote access to devices and utilizing extraterritorial enforcement jurisdiction is the need of the hour. States have recognized this and seem to have accepted these methods as prudent and justifiable under international law. What the world needs now is an amendment to the Budapest Convention or the creation of a new, global cybercrime convention to legitimize actions that could still be considered to fall under the 'grey' areas of international law.

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[71] Sean Lyngass, *US military's hacking unit publicly acknowledges taking offensive action to disrupt ransomware operations*, CNN (Dec. 6, 2021), available at <https://edition.cnn.com/2021/12/05/politics/us-cyber-command-disrupt-ransomware-operations/index.html>.

[72] Kohl, U 2015, Jurisdiction in Cyberspace, in N Tsagourias & R Buchan (eds), *Research Handbook on International Law and Cyberspace*, Research Handbooks in International Law Series, Edward Elgar Publishing, 30-54 at 47.

[73] *Id.*

[74] *Supra* note 63, at 12.

PM-CARES Fund - A State under Article 12?

Pallav Sinha
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The Prime Minister's Citizen Assistance and Relief in Emergency Situations Fund (PMCARES Fund) was announced on March 28, 2020, and since then has been shrouded by secrecy and suspicion regarding its formation, utilization of funds, the various exemptions it has received, and its use of government resources like personnel, space, emblems, and domain names.

Donations in the PMCARES Fund have been made eligible for benefits under Section 80G of the Income Tax Act, 1961[1]. Donations made by companies towards the fund qualify for Corporate Social Responsibility (CSR) benefits under the Companies Act, 2013.[2]

Further, the funds has been exempted from the provisions of the Foreign Contribution (Regulation) Act, 2010 (FCRA)[3], and a separate account has been created for receiving foreign contributions sourced from the PMCARES Fund. It is noteworthy how a Non-Governmental Organization has been granted such an exemption under FCRA when it was merely a few days old.

It is writ large that the government's administration and management of this fund and the funds received from various sources like citizens, private limited companies, Public Sector Undertakings, etc. have been utilized for government functions like upgrading infrastructure, buying vaccines, etc.

It is perplexing that the government claims no relation and control over the fund and obstinately refuses to reply to the various queries under the Right to Information Act, 2005.

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[1] The Income Tax Act,1961 (Act 43 of 1961) section 80G.

[2] The Companies Act, 2013 (Act 18 of 2013).

[3] The Foreign Contribution (Regulation) Act, 2010 (Act 42 of 2010).

In light of these facts, the author argues that PMCARES Fund is indeed a state under Article 12 and that it is a public authority under Article 2 (h) of the Right to Information Act, 2005 and it has been unjustifiably using national emblem and resources for a supposedly private fund.

The author contends that the PM-CARES Fund is a State under Article 12 of the constitution[4]. The trust deed executed by none other than the Prime Minister says that it has been established for charitable and noble purposes and goes on to explicitly state that-

1. It is not created by or under the Constitution of India or by any law made by the parliament or by any state legislature.

2. It is neither intended to be or is owned, controlled or substantially financed by any government or an instrumentality of the government

3. There is no control either of the central or any state government, either direct or indirect in the functioning of the trust whatsoever.

4. The composition of the board of trustees consisting of holders of public office ex officio is merely for administrative convenience and for smooth succession to trusteeship and is neither intended to be nor in fact result into any governmental control in the functioning of the trust in any manner whatsoever.

Thus, explicitly negating even the slightest chance of public scrutiny of a fund, it has so visibly sought donation from the masses in the name of the government.

All these specifications in the trust deed have been deliberately inserted to not attract any of the guidelines as laid down in *Ajay Hasia v Khalid Mujib*[5]. The parameters laid down in *Ajay Hasia's* case for categorizing a body as 'State' under the Constitution of India, include share capital and its source, governmental character of the body due to the financial assistance it receives, whether it enjoys a monopoly status conferred upon it by the State, deep and

[4]Constitution of India, Article 12

[5]AIR 1981 SC 487

pervasive state control and whether the functions performed by the body are of public importance so as to classify the body as an instrumentality of the state.

A comparison with a similar fund is relevant, that is, the Prime Minister's National Relief Fund (PMNRF), founded in 1948, after an appeal made by the then Prime Minister, Pt. Jawaharlal Nehru in the wake of the partition. Both the PMNRF and PMCARES Fund operate *mutatis mutandis*. The author therefore contends that if one can work, so can the other and if one doesn't work, so shouldn't the other.

In *Aseem Takyar v. the PMNRF*, a single judge bench of the Delhi High Court held the PMNRF to be a public authority under the purview of Sec. 2(h) of the RTI Act, 2005[6]. But a two-judge bench[7] delivered a split judgement in which S. Raveendra Bhat J. held that the PMNRF is indeed a public authority. He reasoned that a fund with functionaries like the Prime minister and the finance minister cannot be a private one. The matter is pending before a third judge in the Delhi High Court. By virtue of Justice Bhat's reasoning, one could argue that the PMCARES fund, given its similarities with the PMNRF, should fall under the definition of a public authority under the RTI.

Surprisingly the official position has been one of denial. Information which was not even in the form of a third-party information under RTI was not provided. For instance, regarding the query as to how a private trust got the 'gov.in' domain name, the Ministry of Electronics and Telecommunication was debarred by the Prime Minister's office from sharing the information.

Ironically, the government's stand that the PMNRF– and by extension, PMCARES Fund – are in the nature of 'private trusts' still cannot justify the denial of information to the public under other provisions of law.

Section 19 of the Indian Trusts Act, 1882[8] mandates the trustees to:

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[6] Right to Information Act, 2005 (Act 22 of 2005) Section 2(h)

[7] 2018 SCC On Line Del 9191

[8] Indian Trusts Act,1882(Act 2 of 1882) Sections 5,6 and 8

a. keep clear and accurate accounts of the trust property and

b. at all reasonable times, at the request of the beneficiary to furnish him with full and accurate information as to the amount and nature of the trust-property.

Any 'private trust' the Prime Minister heads is, should be created for the benefit of the public at large. Every citizen therefore becomes a constructive beneficiary, and hence the 'private trust' is a 'public charity' under Section 92 of the Code of Civil Procedure, 1908[9].

The denial of information citing privacy, too, is susceptible to legal challenges; for it enables the government to run an account immune from the constitutional rigors of parliamentary regulation under Article 283[10], exempt from audit by the Comptroller and Auditor-General under Article 151[11], and fair public disclosure under Article 19 (1)(a)[12] of the Constitution.

One could back the supposedly 'public' nature of these funds based on three broad features:

1. Funds received into a private trust which are raised on the basis of public office acquire a conspicuously public character. Their very nomenclature- a Prime Minister's fund gives an unmistakable impression of them being government bodies.

2. Appointment of cabinet members as trustees expands the scope of their ministerial office beyond the constitutional mandate. Such positions, held *ex-officio* are attached to the public office, and therefore, are not of a private character.

3. Thirdly, exemptions granted under the Income Tax Act, the FCRA, the use of domain name (gov.in), use of the national emblem, and the use

[9] Code of Civil Procedure,1908 (Act 5 of 1908) no. 92

[10] Constitution of India, Article 283

[11] Constitution of India, Article 151

[12] Constitution of India, Article 19(1)(a)

> of the PMO's premises cannot possibly be attributed to a private trust. Various automatic opt-ins for donations by central government employees, receiving funds from various PSUs, Army, Navy, the Air Force and various national and multinational companies is possible only if the fund is being publicized and has the government backing.

Now, it is pertinent to note that the Consolidated Fund of India under Article 266 (1) is a repository of all revenue and capital receipts, whereas the Contingency Fund under Article 267 is an imprest for any unforeseen expenditures, and Article 266 (2) says that all other public moneys received by or on behalf of the Government of India or the Government of a State shall be entitled to the Public Account of India or the Public Account of the State as the case may be. Article 266 (2)[13] read with Article 284 (a)[14] provides that funds received or deposited with the government, other than revenues or public moneys raised or received shall be paid into the Public Account of India or the Public Account of a State as the case may be. Funds not *per se* under the ownership of the government but deposited under its administration constitute a public account. Therefore, public donations sought and collected using public office and which are so inextricably connected to the government and under deep and pervasive government control must fall within the ambit of Article 266(2) of the Indian Constitution.

Sections 5, 6, and 8 of the Indian Trusts Act,1882 read together mean that the trustees merely hold and administer the property of the trust for the ultimate transfer to the beneficiaries. Therefore, in case of funds such as PMNRF and PM CARES, once the trusteeship is *de facto* with the state, the trust property becomes a public account under Article 266(2) of the Constitution.

The argument does not stand that for operational efficiency during crises as funds in the public account should be exempt from the routine legislative

[13] Constitution of India, Article 266(2)

[14] Constitution of India, Article 284(a)

rigours unlike the consolidated fund and the contingency fund which requires an *ex ante* and *ex post* vote respectively.

The PMCARES Fund must fall within the boundary of the Constitution- it is a State under Article 12 of Constitution.

The reasons are as follows; -

1. The Fund was created by the Central Government and the Prime Minister along with his senior most cabinet colleagues as the trustees of the Fund. Just because the deed says that the Fund is not an instrumentality of the State, the fact that the fund is run from the PMO, by the PM *ex officio*, by appointing a government servant as its officer does not change.
2. It is instructive to look at various communications by the Hon'ble Vice President and other functionaries who have called it the National Fund in their addresses.

The Fund serves a necessary public purpose and the use of the national emblem and the Prime Minister's photo along with the domain name indicate official sanction to the Fund and it lends the Fund credibility in the eyes of the public. The amount of money the Fund has received is a testimony to the fact that the public at large hasn't donated to a nondescript privately run public charitable trust but to a public charitable trust promoted by the Prime Minister and which has gotten crores of contributions from various prominent citizens and corporations within hours of its announcement.

It was argued in *Samyak Gangwal v CPIO, PMO*[15] that constitutional functionaries in their official capacity cannot create structures which are immune to the constitutional mandate. The functionaries cannot contract outside the Constitution by creating a private trust.

[15]Samyak Gangwal v CPIO, PMO (WP No.3134 of 2021)

The PMCARES Fund by evading RTI queries and refusing parliamentary scrutiny is setting a very unhealthy precedent for the holders of public office.

Since, the trust deed was executed by none other than the Prime Minister, the commonsensical argument is that how can such a high government functionary create a trust which is private and outside the reach of the Constitution.

Among evidences to suggest why the PM-CARES Fund is one established and actively promoted by the Government of India and it is a public authority under RTI Act 2005 are the following-

1. Indian embassies abroad have been seeking donations for the Fund.
2. It has been given exemption under the Foreign Contribution (Regulation) Amendment Act (FCRA),2010.
3. The union government has actively sought contributions for the fund specifically from various public sector undertakings and corporate houses.
4. Thousands of crores raised in the name of the Fund have been spent on purchasing ventilators, oxygen cylinders, vaccines, among other things in the fight against COVID-19 using government machinery and resources.

When the Union Government has so zealously sought donations for the Fund, the constitutional safeguards like accountability, judicial review etc. spring into action.

The Fund not only has a public purpose but it will also run in perpetuity and parallel to the government funds. The Prime Minister is constitutionally bound to work for statutorily created funds like NDRF (created under the National Disaster Management Act, 2005). If he is the trustee of a private trust which has identical objectives, how far can this arrangement work?

Looking at the parameters laid down in the *Ajay Hasia* case, it is further clear that the PMCARES Fund has deep and pervasive government control. The Prime Minister alongwith his three cabinet colleagues form the Board of Trustees and the very fact that the members are the trustees in their *ex officio* capacities is proof enough to indicate that they are bound by the letter and spirit of the Constitution.

In *Pradip Kumar Biswas*[16], a seven-judge bench of the SC held CSIR to be an 'Authority' under Article 12 of the Constitution of India by considering the facts that the Government of India has dominant control over the governing board of CSIR and the PM is the *ex-officio* president of CSIR and thus making government control ubiquitous.

Therefore, the author contends that PMCARES falls under the definition of 'other Authorities' in Article 12. In *Rajasthan SEC v. Mohan Lal*[17] the Supreme Court of India held that the expression "other authorities" should not be construed narrowly.

P. N. Bhagwati, J. in *Ajay Hasia*[18] maintained that *"the courts should be anxious to enlarge the scope and width of fundamental rights by bringing within their sweep every authority which is an instrumentality or agency of the government or through the corporate personality of which the government is acting".*

The question which then arises is that whether the central government would widely publicize that PMCARES is not a government owned fund? If it is not owned by the Centre, it should give up its use of the name PM and should also not use the national emblem and the domain name gov.in. Not only that, it

[16]Pradeep Kumar Biswas v Indian Institute of Chemical Biology, 2002 5 SCC 111

[17]Rajasthan State Electricity Board v Mohanlal AIR 1967 SC 1857

[18]Ajay Hasia v Khalid Mujib AIR 1981 SC 487

should also change its address from the PMO and no secretarial support should be provided to the Fund.

As challenges continue regarding the legality of the Fund, one should ponder over the wider consequences of the establishment of such Funds in the future. Implications of governmental accountability, unwarranted favourable treatment, violation of fundamental rights of the citizens, efficacy in responding to the crises for which they are created cannot be brushed under the carpet.

The Conception and Evaluation of "Obscenity" In India

Rahul Joshi
II B.A.LL.B.

Introduction

A generalization of any social phenomenon in the Indian context is indeed a grave misdeed, because the unique and unparalleled social reality of India, at times demands, that even the most objective social concepts, be dissected and diversified, to be made adaptable and applicable within the Indian context. Indian social diversity, is not merely on an apparently differentiable basis. It is even more spectacular and dominant on socio-psychological levels. It consists of a unique and exotic blend of the multi-generational and multi-phased population, that at times, even overrides the strong and rigid apparent diversities. It essentially consists of people living in different time frames, varied generations, and people living in different phases of human evolution altogether. It consists of a sharp and astounding level of diversions of thought processes and ways of life, surprisingly enough, coexisting in solidarity.

Thus, to have a generic, all-encompassing, and inclusive interpretation of any social phenomenon is indeed impossible, unless it is interpreted so vividly, that it eventually ends up creating altogether a newer conceptualization according to the respective case itself. And in addition to it, when the concepts like "Obscenity" are dealt with, which are inherently subjective in nature, attaining an all-inclusive and at the same time pragmatic interpretation of it is indeed a herculean task. The aim of the law is hence to transcend such diverse boundaries, interpret them in case specific ambits, analyze the larger social ramifications, balance the fundamental rights and duties, and thus advance the legislative intent behind the concerned statutes.

Existing Legal Conception of Obscenity and Foreign Influences:

Obscenity is something that is "extremely offensive under contemporary community standards of morality and decency; grossly repugnant to the generally accepted notions of what is appropriate."[1] According to Indian laws "a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or (if its effect, or where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt person, who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it."[2]

For the first time, the Supreme Court dealt with the effect and impact of the provision in the backdrop of the challenge to the constitutional validity of the same, in *Ranjit D. Udeshi v. the State of Maharashtra*.[3] Before the Constitution Bench, a contention was canvassed about the constitutional validity of Sec292 IPC in which the court stated that "obscenity is treating with sex in a manner appealing to the carnal side of human nature or having that tendency. Such a treating with sex is offensive to modesty and decency but the extent of such appeal in a particular book etc. are matters for consideration in each case." The test to determine obscenity was the Hicklin's Test, given by the Queen's Bench in Britain. According to the test of obscenity, it is seen "whether the matter charged as obscenity tends to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."[4]

In the early 70s, in the case *Chandrakant Kalyandas Kakodkar v. the State of Maharashtra*,[5] the court stated that *"the concept of obscenity would differ from country to country depending on the standards of morals of contemporary*

[1]Black's Law Dictionary.

[2] Section 292, The Indian Penal Code, 1860.

[3] Ranjit D. Udeshi v. State of Maharashtra, (1965) 1 SCR 65.

[4] Regina Vs Hicklin, (1868).

[5] Chandrakant Kalyandas Kakodkar v. State of Maharashtra, (1969) AIR 1970 SC 1390.

society." The court considered three facets, namely, morals of contemporary society, the fast-changing scenario in our country and the impact of the book on a class of readers, but not on an individual.[6] In this case, the test adopted to determine obscenity was the Roth Test, applied by the American Courts. "It analyses whether (a) that the dominant theme taken as a whole appeal to prurient interests according to the contemporary standards of the average man; (b) that the motion picture is not saved by any redeeming social value; and (c) that it is patently offensive because it is opposed to contemporary standards."[7]

In the recent case of *Director General of Doordarshan v. Anand Patwardhan*,[8] Supreme Court considered the law, popularly used, presently in the United States, given in Miller's Case. Thus, by taking a liberal view the court said that *"a material may be regarded as obscene if the average person applying contemporary community standards would find that the subject matter taken as a whole appeal to the prurient interest and that taken as a whole it otherwise lacks serious literary artistic, political, educational or scientific value."* In this case, the test adopted to determine obscenity was the Community Standards Test which states that "triers of fact are asked to decide whether 'the average person, applying contemporary community standards would consider certain materials 'prurient,' it was considered to be unrealistic to require that the answer be based on some abstract formulation."[9]

Relative Obscenity:

In a society like India, where history, culture, and traditions still play a dominant and decisive role, the liberal ambit for the creators, around anything related to such elements, shrinks substantially. Such social features are conceived by and dealt with extreme sensitivity by its followers, because many

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[6]*Id.*

[7]Roth v. United States, 354 U.S. 476 (1957).

[8] Director General of Door darshan v. Anand Patwardhan, (2006) 8 SCC 433.

[9]Marvin Miller vs. State of California, 413 U.S. 15 (1973).

times the very identity and dignity of a particular social group is connoted around such historical and cultural aspects. Hence anything published with a legitimate creative discourse may override the sensitive ambits of decency and thus may land in the offensive depiction of the same. Unlike any other social elements, historical and cultural elements are perceived at an elevated level of social consciousness, hence the limitations and restrictions on anything published regarding them also increase. In recent times it is observed that the issue of obscenity in such circumstances, often escalates to a level, hurting the sentiments of a particular social group and eventually ending up in a larger law and order issue. Also, it does not thus restrict itself to be a mere issue concerning social morality and decency, but an issue of internal security. The constitution too makes a note of, due regard to the national heritage and social solidarity and harmony. In recent times it is observed that obscene depiction, often transgresses the liberal creative ambits and enters the avenues of hate speech, destroying social tranquility. The Indian courts do prefer to take certain immediate interim measures to curb any further escalation.

Also in the case of historically respected and verifiably regarded characters, it's not merely the 'personal' or individualistic caricature that is dealt with. Whether or not wantonly, the elaborate connotation of their contributions, influences, perception, and ideals, remain attached to their character. Obscene depiction of such a personality inevitably engulfs the very multidimensional figure of the person, and eventually leads to an adverse diminishing effect on the perception of such figure thereafter. Depiction of such personalities in the above-mentioned fashion would eventually lead to deprivation and corruption of the minds of the readers and will lead to the inevitable erosion of morality and decency. Such personalities have been repeatedly hailed and ascribed to, by the Supreme Court, in one or the other forms, as the torch bearers of the existing moralistic conception of the society we live in. Any 'Contemporary Indian society cannot be considered to be devoid of the influences and conceptions of the contributions made by such historical personalities.

Hence, "when the name of historically regarded personalities is alluded to or used as a symbol, speaking or using obscene words, the concept of 'degree' comes in. The contemporary community standards test becomes applicable with more vigour, to a greater degree, and in an accentuated manner. What can otherwise pass the contemporary community standards test for use of the same language, it would not be so, if the name of such personalities is used as a symbol or allusion or surrealistic voice to put words or to show him doing such obscene acts."[10] Obscenity, in such circumstances, is also seen in a glare as disrespectful and deliberately insulting in nature. It is to be noted that the Constitution too, under Article 51A, acknowledges the importance of values, ideas, and teachings that inspired our freedom struggle and continues to guide us in the process of making our country, the symbols of such ideas are to be treated with even more sensitivity and reverence.

Social Media and Obscenity:

Obscenity-related laws and overall available statutory infrastructure, some-what prove to be un-useful and ineffective when it comes to online content, especially on social media. With the advent of the digital revolution in India, the viewership and access to content via the internet have increased exponentially. However, the lack of any concrete legislative framework to curb the actions of content creators has ended up creating an online platform full of unrestricted obscene and filthy content. Many times, the broad guidelines and restrictions of respective online platforms do come into the picture, but are equally redundant. Many creators rather prefer publishing their content on OTT platforms, to circumvent and escape the censorship actions, that might curb their creative liberty.

Social media has now become a platform for the dissipation of online hate, notwithstanding the community guidelines of the respective platform. In form of abusive comments, sex threats, sexually abusive language, objectionable photo-shopping, vulgar language, offensive gestures, mentally disturbing and

[10]Devidas Ramachandra Tuljapurkar v. State of Maharashtra (2015) 6 SCC 1.

sexually threatening online trolling, etc. obscenity has now made an irreversible impact and hijacked the online content. It has grown so rampantly that the use of such obscene depictions has now been normalized, enjoyed, and ill-heartedly accepted by the online viewing community. This essentially means that the content itself has diminished the community standards at such a low level that at a prima facie level, one cannot find the said content against the newly developed 'online community standards.' However, it is to be noted that, such online community members are nothing but part of larger non-online social groups themselves. And the online inception of such hateful obscenity, unfortunately, manifests largely into the advanced numbers of social evils and sexual crimes.

Way Forward :

With changing times and increasing complexities of our society, the tests adopted by Indian courts, from Foreign Courts, tend to be insufficient to address the India-specific concerns, and that too for obvious reasons. Hence some more specific tests and parameters, adaptable and focused on Indian society must be adopted. According to the facts and circumstances of the case, a few more tests can be put to use, to analyze and decide the presence of obscenity in the said content. Such tests are nothing but a more specific version of the already existing precedents, Constitutional directives, and legislative intents behind all existing laws regarding obscenity in India.

1) Specific Community Standards Test :

Analyzing the obscene depiction of any figure, which is accepted and regarded by a particular community, in the glare of the entire remainder community at large, may lead to grave transgression of the unique and personal specific standards of the said community. The Constitution too expects the citizens, to consider and overcome communal differences and strive to maintain social harmony.

Test : Any content, depicting a respected and verifiably regarded character, accepted by any particular community, transgresses the established Specific

Community Standards of such community, must be considered obscene, notwithstanding the contemporary standards or the remainder community at large.

Example 1: if community A considers covering the heads of women with a veil, as an essential practice of its community, then portraying any leading and regarding woman figure of community A, without a veil, will amount to obscene depiction.

Explanation 1: The said 'specific community standards must be established, historically observed, and followed, by a substantially large number of people, of a specifically distinctive community, and must not be set aside by the prevailing law.

2) Fundamental Policy Test: -

Existing public policies and penal legislations explicitly include the 'actions' done by its citizens in its ambits and thus try to control and regulate them. However, blatant promotion and portrayal of the acts prohibited under such legislation would amount to frustrating the very purpose of the law, which is to prevent and deter the transgressors of the law. It hereby diminishes the authority and dignity of the rule of law. Although not explicitly mentioned, any depiction or portrayal, promoting any act, prohibited by any law or public policy, instigates and promotes such acts, which are too punishable under the law. Such portrayals are injurious to social well-being.

Test:- Any material, which depicts any conduct or publishes any content, which is against the public policy of India, shall be considered obscene as contemplated under the said section.

Essentials:-

i. It must promote, depict, publish, and portray any content without condemning such conduct.

ii. Such content must be against the established and existing laws and public policy of India

Explanation 1: - Public policy means and includes Fundamental Public Policy (derived from existing penal laws and other Special Legislations) which includes laws prohibiting- rape, outraging modesty of women, child abuse, verbal and physical assault, domestic violence, indecent representation of women, stalking, voyeurism, mental and physical cruelty, acid attacking, human trafficking, prostitution, gang rape, eve-teasing, bullying, ragging, promoting violence between two communities, etc.

Explanation 2 – Here, the said test is to be applied notwithstanding any appreciable artistic merits in the said content. It must come under strict liability, since deprivation and corruption of the human mind, is the direct consequence of such portrayal.

3) Reasonable Expansion of Standards Test:-

Although the society is expected to undergo change and face several external influences, since the composition of our society is such, that as discussed earlier, the generalization and an inclusive interpretation of contemporary community standards of our society at large, would essentially lead to the imposition of unacceptable alien standards for an unprepared contemporary social condition. The Constitution expects citizens to develop a scientific and reformed outlook. It thus implicitly paves way for a reasonable expansion and upgradation of existing community standards.

Test: - The obscenity of any alleged content must be determined based on reasonably forwarded, contemporary community standards, which shall be construed under the following directives:-

i. The standards shall not be based on such elements which are already depraved and are further open to any such deprivation and negative influences.

ii. The standards must be a reasonable progression of the existing social conceptions and standards, and must not amount to the radical imposition of alien standards.

iii. Other existing Laws, Constitutional Ideals, Public Policies, and Governmental Initiatives must also be taken into consideration.

iv. The intention must not be driven to accept obscenity as a normal discourse, but to broaden the inclusive ambits of legitimate, futuristic social possibilities.

Conclusion

The conception of obscenity has observed a steady, progressive, and rational change in Indian society and its legal discourse as well. The Indian courts have tried their level best to overcome the classic dichotomy of individual fundamental rights and reasonable restrictions in the light of the larger public interest. By duly making use of the development of related jurisprudence in the countries outside India, the courts even tried to legitimately expand the creative ambits and relax the judicial determinants, with a liberal and rational outlook. It however needs more advancement in its interpretation and statutory infrastructure, to deal with India's specific circumstances. It also needs to maintain pace with the ever-increasing complexities of the newly advancing social life in our country.

Space: The Final Frontier[1]

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To explore strange new worlds, to seek out new life and new civilizations, to boldly go where no man has gone before - "*The Space arena is expanding its horizons, literally and figuratively*," – towards discovering the entire universe. With India's upcoming Gaganyaan mission, SpaceX's rapid rise, and the inventions of robotic space fleets, the world of space is entering new domains. While the human mind is caught in awe, the legal aspects are caught off guard. The pace of space development has rendered the present conventions and treaties governing space law redundant.

The Emerging Issues

The Treaties and Conventions

According to the Registration Convention of 1976[2], the registration information required for launching a space object is - the name of launching state(s), the registration number of the space object, the date and location of the launch, the basic orbital parameters, and the general function of the space object. Owing to the general advancements in the space and technology industry this information is no longer adequate to keep tabs on the use of the satellites released in space. Today, the machines sent to space are capable of much more than providing broadband services, maps, images or any other basic technology.

There needs to be an evaluation and regulation of the features for checks on ulterior motives. The use of space technology for internationally wrongful acts like spying, as a means of warfare, cyber-attacks, data breaches and nuclear

[1] Moot Presentation in the Manfred Lachs Space Moot Court Competition, 2022.

[2] Convention on Registration of Objects Launched into Outer Space, Sep. 15, 1976, 1023 U.N.T.S. 15, art II.

launches have become a viable option for countries. Beyond considering just about such technological misuses, it is imperative that more information be gathered about the space objects to predict possible errors, as the liability and responsibility lie with the states concerned. This article will further discuss the liability standards in space law.

The Space Debris Mitigation Guideline[3] offers certain guidelines for minimization of potential malfunctions during operational phases. The Liability Convention has not prescribed a minimum standard of care to be maintained while preparing for launching space objects. Hence, the state governments incur the responsibility of overlooking compliance to the provisions of space treaties while sending out space missions.

It is still an early stage of growth in the space science and technology industry. The Outer Space Treaty[4] does not include every type of damage that might arise but employment of wide and open-ended definitions increases the scope for providing solutions to any future issues that may arise. According to Malcolm N. Shaw,[5]activities in outer space are termed as 'ultra-hazardous' and therefore, states are expected to have a higher standard of care in this industry. All that is required for a state's liability to arise is the existence of damages. It can arise for damages occurring on the surface of the earth or to aircrafts in orbit. The liability is automatic, unlimited and absolute owing to the 'ultra-hazardous nature' of such transactions.

These treaties include a category of 'space objects' that were not even envisaged at the time of the adoption of the treaty. Newer technology like the 3D printing mechanism is not the traditional way of space object construction and is difficult to be charged under the Liability Convention.[6]

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[3] Space Debris Mitigation Guidelines of the Committee on the Peaceful Uses of Outer Space, art 5.2.2, IADC-02-01 Rev. 3, Jun. 2021.

[4] Convention on Registration of Objects Launched into Outer Space, Sep. 15, 1976, 1023 U.N.T.S. 15, art II.

[5] MALCOLM N. SHAW, INTERNATIONAL LAW, 673 (9th ed., University of Cambridge, 2021)

[6] Convention on International Liability for Damage Caused by Space Subjects, Mar. 29, 1972, 24 U.S.T. 2389, 961 U.N.T.S. 187, art. III. [hereinafter **Liability Convention**].

Commercial aspect prioritized over compliances

The private domestic space sector is actively promoted to new satellite operators by the registry of the states, through mechanisms like low registration fees and by requiring minimal information as to the purpose and function of spacecraft, or their ownership and control. States act as a 'flag of convenience' for new satellite systems, as the identities and nationalities of the owners of the space objects are shielded from disclosure. These factors may lead to lack of checks and balances such as the national registries of objects launched into space being incomplete and not up to date.

The space sector still remains a largely state-centric matter and when applicant companies or underdeveloped nations do apply to nations with the necessary infrastructure, they often rely on the technical representations and internal reports of applicants seeking authorizations and help without further independent verification. Therefore, a huge burden which lies on the states can be diverted to private space sectors if better regulations and a strict compliance system are formulated.

The Redundancy of Applicable laws

The present laws regarding the space industry are highly unreliable and redundant in nature. The enforceability of such laws has been a significant question for a long time. Countries often fail to adhere to many rules regarding the space laws and do not offer any clarity on registrations of the satellite or the space station. This ambiguity leads to many barriers in the dispute resolution and therefore, states should be made liable for the same.

The Cape Town Convention[7] defines the ambit of the launching state's liability and the state responsibility it occurs. The Outer Space Treaty outlines the international liability of states for national activities in outer space. It states that, a State Party which procures or facilitates the launching of an object into outer space, is internationally liable for damage to another State Party to the

[7] Cape Town Convention on International Interests in Mobile Equipment, Nov. 16, 2001, 2307 U.N.T.S. 285, art 4. [hereinafter **Cape Town Convention**].

Treaty. A State government bears international responsibility for private operations, which broadens the scope of international responsibility of entities in outer space.[8]

The Liability Convention[9] has acquired the status of a customary international law, given its nature and interpretations which emphasize that the States Parties bear international responsibility for national activities on the Moon irrespective of the agencies being governmental or by non-governmental entities. The reasoning for this is that all agencies operate under the authority and continuing supervision of the respective governments according to present laws and treaties of the space).

The convention prohibits any non-authorized, unregulated activity in space and puts the onus of regulating the activities of private entities on the authorizing state party. In any circumstances of damages or adverse incidents, the liability system is outlined to be non-fault based and unlimited in nature, which ensures that the victims receive the requisite compensation in full. If in any circumstance, damage is caused by the space object of a launching state on the surface of the earth or to aircraft in flight, the launching state shall be absolutely liable for compensation. This is supported by the preamble to the Liability Convention, which states that the parties to the convention recognize the need to elaborate effective international rules and procedures concerning liability, in order to ensure that prompt payment of a full and equitable measure of compensation is made to victims of such damage in compliance with the terms of the Convention.

It also ensures that the measure of compensation to be paid to the injured state must restore it, "*to the condition which would have existed if the damage had not occurred.*"[10] One may plainly interpret from this the victim-centric nature of the treaty, as has been done by a variety of scholars. Since the object of the

[8]MANFRED LACHS, THE LAW OF OUTER SPACE - AN EXPERIENCE IN CONTEMPORARY LAW MAKING122 (Nijhoff Publishers 1972).

[9]Liability Convention*, supra* note 5.

[10] Liability Convention*, supra* note 5, art. XII.

treaty is to efficiently protect victims from damages caused by space objects, it naturally follows that "damage" must be interpreted widely enough to include both direct and indirect damage to meet the object and purpose of the treaty.

To avoid incurring liability from the Liability Convention, a state must prove in the context of its space activities that it made every possible effort to avert the occurrence of harm to the injured state. The latest emerging activities in space, such as robotic space objects for orbit refueling, repair and repositioning of satellites, offer great potential. However, it is vital that the technology be well developed and not causes any accidents or damage to other space objects. Such concepts should not be used in order to interfere with the space objects of other nations, engage in spying, destroy property or take advantage in any form.

Shifting our focus to another concept, of deorbited objects re-entering the earth's atmosphere by propulsion. This process should be highly controlled and a risk analysis has to be conducted efficiently, in order to ensure that no accidents are caused by the objects re-entering the earth's atmosphere.

The obligation of such due diligence encompasses not only the adoption of appropriate rules and measures, but also the expectation to exercise a certain level of caution in the enforcement and consideration for the rights of others. The issue here is that the standard of measuring such a due diligence is ad hoc. Naturally then, when we talk about 'ultra-hazardous' activities i.e., those concerned with outer space, a higher level of due diligence is required or it results in negligence. The definition of neglect[11] clearly stands to point the omission of standard care that a launching state should show towards its space object. There is an obligation to apply measures and maintain a level of caution while dealing with technology employment in space. The Draft Articles on Responsibility of States for Internationally Wrongful Acts[12] discuss the due care that the states have to employ to prevent committing an internationally wrongful act. It also notes that there are certain primary duties which have to

[11] Def neglect - Fault, BLACK'S LAW DICTIONARY (11th ed. 2019).

[12] *id.*

be ensured 'to prevent an event' like this. Therefore, due care is an obligation defined by the ARSIWA.

Instances of Evident Lapses in Law

Direct and Indirect Damages

In multiple, real life scenarios, we have been able to see the loopholes that persist in the present space laws. These inadequacies in the law have created unjust scenarios for various parties over time. An example of this is the *Cosmos 954* case,[13] where a Soviet satellite's debris fell in the territory of Canada. In such 'direct impact' cases, the proximity of the space object or its remnants is a clear indication of the cause of damages. The settlement of the *Cosmos 954* incident constitutes the subsequent state practice wherein, the Canadian government addressed a claim for compensation to the Soviet Union under the Liability Convention. The settlement of $3 million as agreed upon by the countries in this case reaffirmed the compensability for damages. Nevertheless, the ambiguity regarding whether, under the Liability Convention, indirect damages, for which there is only a hypothetical causal connection with a particular space activity can be claimed still remains, and is highlighted particularly through this case.

Despite these mentions, it can be inferred that the states cannot escape their duty towards paying damages to an affected party by claiming either no responsibility or liability for the actions, which should have been given due care. Neither the Outer Space Treaty nor the Liability Convention refers to causation; even so, causation is central to claims for compensation. Eminent authors such as Marco Pedrazzi[14]and Bin Cheng[15] opine that, one of the factors for liability to arise does include damage and a proximal causal link between

[13] Settlement of Claims Between Canada and the Union of Soviet Socialist Republics for Damage Caused by "Cosmos 954", Apr. 2, 1981

[14] Marco Pedrazzi, *Outer Space, Liability for Damages*, Max Planck Encyclopaedias for Public International law, (2008);

[15] Bin Cheng, *International Liability for Damage Caused by Space Objects*, *in* I Manual On Space Law, 115

the space object of the party and the damage suffered by the injured state. In such a scenario, the claimant state must demonstrate that the damage suffered flows from the space object. In situations where there is damage on Earth, and the launching State is known, the provisions of the Liability Convention can be applied easily.

Principles involved in interpreting statutes lead to arbitrariness

According to Alexander Soucek[16], the Liability Convention applies the 'compensation principle' on the basis of the international law rule of *restitutio in integrum*.[17] But in situations where *restitutio in integrum* is not possible, the position of international jurisprudence is clear that full monetary compensation must be provided to cover the damages sustained by the Claimant state. Cologne Commentary states that the traditional position which exists under international law, whereby the scope of liability of parties remains severely restricted, is not applicable and the Liability Convention recognizes the universal character and a general principle of international law of the compensation mechanism. The 'good faith' principle, according to the International Court of Justice, is among the principles of creating and acting in accordance with the legal obligations.

It is essential that a treaty should be read with the objective of serving its purpose to ensure that correct interpretations are made. The purpose of the Liability Convention is stressed in its Preamble,[18] which, according to the Vienna Convention on Law of Treaties,[19] is considered as an integral part of the text of a treaty. The rationale pervading the Liability Convention is that any breach of duty entails an obligation to repay the damages caused under a principle of international law. Therefore, these treaties and customs have to be

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[16] Alexander Soucek, *International Law, in* Outer Space In Society, Politics And Law, 342 (Christian Brünner, Alexander Soucek eds., 2012).

[17] *2 Cologne Commentary*, pp. 495.

[18] *supra* note 8.

[19] Vienna Convention on the Law of Treaties, Jan. 27,1980, 1155 U.N.T.S. 331

interpreted in basic terms and the drafting history of the treaty has to be given high regards.

Conclusively, the United Nations Space Treaties holds that the countries have a responsibility as well as a liability for the space related actions of their citizens or companies which are based in their territory. Here, the relevance of whether it is a responsibility or a liability diminishes; to quote Frans G. von der Dunk, "*the long-standing debate over the difference between responsibility and liability have limited scope in space law.*" States, in the space sector, have to supervise all entities as they have to bear financial liability even for their private entities.[20] The discussion related to liabilities and remedies becomes meritless due to the limited options articulated in the Cape Town Convention[21] and as the Protocol On Matters Specific To Space Assets[22] are largely ambiguous and stagnant, and do not provide remedies for the newly emerging issues.

Established principles in space law

Negligent actions, as stated in the *Pulp Mills* case[23] can be defined as those that lack the required standard of care.[24] This case establishes the standard for negligence, namely, due diligence, which is an obligation to encompass rules and measures. It extends to ensure a specified level of caution for safeguarding the rights and safety of others. The 'due regard' principle outlined in the Outer Space Treaty imposes a duty on the states exploring and conducting activities in outer space to take the interests and rights of other states into account. First seen in the Chicago Convention of 1944,[25] which deals with the field of air law and then subsequently included in the Outer Space Treaty, this obligation is

[20] Unregulated space - SPACE SAFETY REGULATIONS AND STANDARDS (Joseph Pelton, Ram Jakhu eds., 2010) at 267 &

[21] Cape Town Convention

[22] Protocol on mobile equipment specific to space assets, Mar. 9, 2012

[23] Pulp Mills on the River Uruguay (Arg. v. Urug.), Judgment, 2010 I.C.J. 135, pp. 69 (Apr. 20).

[24] IRMGARD MARBOE, SOFT LAW IN OUTER SPACE: THE FUNCTION OF NON-BINDING NORMS IN INTERNATIONAL SPACE LAW 125-135 (2012).

[25] Chicago Convention on Civil Aviation, Apr. 4, 1947, 15 U.N.T.S 295, art. 3(d).

widely accepted as binding. The degree of care is measured ad hoc in each case, allowing it to appropriately meet the demands of a variety of specific cases. In instances of non-repayment of certain dues charged up against a space asset, the Space Asset Protocol[26] states that, the debtor, shall acquire the space object and take control of it. The debtor's rights covered by a rights assignment to the creditor, are to be given no later than the specified waiting period or the date on which the creditor would receive the dues by way of termed contract or by possessing, taking control of the debtor's rights as per the contract. the financial means of gains or rights of the debtor. The repositioning of satellites may be viewed as a potential military weapon; however, it is a part of the evolving space and robotic technology and geo-positioning. It helps in events of non-repayment to aid entities entitled to their due credit.

The complexities can arise when the general international rules are applied, such as in the *Fisheries Jurisdiction* Case, 1951[27] where a stance was pronounced against interference with activities of other States. To solve the issue arisen in this case, the Outer Space Treaty specifies that when conducting activities in outer space, State parties to the treaty shall be guided by the principle of cooperation. It is firmly established in legal doctrines that international cooperation is an obligation rather than an aim, and that this principle is binding on states. Cooperation is thus a principle enshrined in the Outer Space Treaty and as a foundational principle of the United Nations Committee on Peaceful Uses of Outer Space[28] and the International Telecommunications Union constitution[29], this principle holds great value.

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[26] *Supra* note 18

[27] Fisheries Jurisdiction Case (U.K. v. Ice.), Judgment, 1974 I.C.J. 3 (Feb. 2).

[28] Space Debris Mitigation Guidelines of the Committee on the Peaceful Uses of Outer Space, art 5.2.2, IADC-02-01 Rev. 3, Jun. 2021

[29] Constitution and Convention of the International Telecommunication Union as amended by the 2010 Plenipotentiary Conference, Preamble, (2011).

Analysis of the present situation

There remains severe mistrust among countries due to the vast abilities space holds to conduct hostilities, misappropriation of assets of other nations or engage in espionage. However, a collective understanding and rational consensus on the reworking of space laws is the need of the hour. This will lead to nullifying the liabilities created by space law on the nations. It is time that the private sector, after careful consideration and making appropriate standards of care, takes over. The enormous magnitude of technological capabilities that the private sector has to offer is largely untapped, indicating the need for dynamic and adaptive laws in the fast-moving technological world.

On a concluding note

The rules of space law hold the principle of international cooperation as an important prerequisite for any State to conduct activities in outer space. The legal doctrines prescribe that international cooperation is a legal obligation. These principles are of binding character on states parties. All of this goes on to show the importance that cooperation holds in the ambit of space law. When a country does not cooperate, engages in a lack of mutual information sharing, or refuses to disclose information, it creates a sense of wariness among other countries about their space activities. There might be consideration that the technologies in space might be employed for military purposes. This lack of cooperation or offering of clarity makes detection of any nuclear proliferation more difficult and can create loopholes for space becoming potentially militarized.

The Outer Space Treaty lays out that activities in outer space shall be carried out for the benefit of the interest of all countries. Any activity is allowed in space as long as it is in the pursuit of the benefit of mankind at large. The ambit of space is largely open to all countries to develop and use for peaceful purposes.

In view of this article, it can be understood that there exists a grey area in the liability standards while operating in the space arena. Thus, it becomes the

responsibility of each country to co-exist without harming others' interest beyond the planetary territories as well. As Captain Kirk was known for his command, "Execute!" Let us hope to make and execute space laws that give better insight into liability standards for adverse incidents occurring beyond the planetary limits.

Time to Ban Cigarettes? Public Health Law and Individual Autonomy

Tanvi Srivastava
II B.A.LL.B.

Introduction:

The issue of controlling tobacco use has been a global challenge since its harmful effects were recognized. In India, 29% of adults (Nearly 267 million) 15 years and above use tobacco, as reported by the Global Adult Tobacco Survey India 2016-17[1]. The high stress levels and availability of tobacco make it particularly popular among young people, leading to a youth epidemic. Tobacco use increases the risk of chronic diseases such as cancer, lung disease, cardiovascular disease, and stroke, causing 1.35 million deaths annually in India. India is also the second largest producer and consumer of tobacco globally.[2]

Article 47 of the Indian Constitution states that the improvement of public health shall be among the primary duties of the State and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health[3]. The preamble of the act reaffirms to expedite prohibition on the consumption of cigarettes and other tobacco products which are injurious to health as enjoined by article 47 of the Constitution[4]. To fulfill this constitutional obligation, the State has enacted The Cigarettes and Other Tobacco Products Act, 2003 (COTPA), with the objective of curbing the consumption of tobacco products. The Act, in line with Article 47, features provisions such as

[1] *Tobacco*, (Dec. 23, 2021), www.who.int/india/health-topics/tobacco

[2] Ibid

[3] The Constitution of India 1950.

[4] The Cigarettes and Other Tobacco Products Act 2003, Preamble.

mandatory warning labels on cigarette packages, a ban on smoking in public spaces, a ban on selling cigarettes to minors, and restrictions on sales near educational institutions. However, the efficacy of these laws is still up for debate.

Problems with COTPA 2003

Over time, various shortcomings have been identified in COTPA. The act fails to address the distribution of loose cigarettes, which leads to their sale, cheap prices, and illicit trade. Additionally, the act is unclear on the legality of hookah bars, due to the allowance for DASs. Despite the law, tobacco advertising remains prominent at many points of sale and is widely disregarded and poorly enforced[5]. Moreover, the act does not provide a means of verifying age, leading to cigarettes being sold carelessly and made accessible to young people. Such procedural inadequacies in the current legislation highlight the need for better regulation. The question arises: can the severe problem posed by cigarettes be solved by implementing a complete ban in the country?

Ban: The Appropriate Remedy:

A ban on cigarettes serves the public interest. This proposed ban aligns with the state's responsibilities under the Directive Principle of State Policy (DPSP) and, as a welfare state, prioritizes public interest.

However, a ban on cigarette sales may conflict with the fundamental right to free trade guaranteed by Article 19(1)(g) of the constitution. This right is subject to reasonable restrictions imposed by the state in the interests of the general public. Matters related to public welfare, convenience, and safety, such as public order, health, morality, and economic stability, are considered public interests. The Supreme Court has emphasised in *Vincent v UOI*[6], that a healthy body is the very foundation of human activities Additionally, Article 47, a

[5]Khariwala SS, Garg A, Stepanov I, et al. Point-of-Sale Tobacco Advertising Remains Prominent in Mumbai, India. Tob Regul Sci. 2016;2(3):230-238. doi:10.18001/TRS.2.3.3

[6]Vincent v. UOI, AIR 1987 SC 990.

Directive Principle, highlights the improvement of public health and prohibition of harmful drugs as one of the primary duties of the state.

In *Goodwill Paint & Chemical Laboratory*[7], it was held that trade or business involving danger to public health and safety such as trade in poison can be regulated. The nature of trade in poison is such that nobody can be considered to have an absolute right to carry on such trade. It is a business which can be even termed as inherently dangerous to health and safety of society in view of its rampant misuse and sale to the poor, weak and helpless as an intoxicant. A law in such circumstances can regulate the trade. Given the harmful nature of tobacco which kills, smoking and exposure to second-hand smoke kill about 1.2 million Indians each year.[8] Restriction of sale of cigarettes will not violate the fundamental right.

The proposed ban on tobacco raises the question of its conformity with Article 47, which requires restrictions to be reasonable. "Reasonable restriction" means that limitations placed on an individual's enjoyment of their rights should not be excessive or arbitrary, but instead necessary for the public's interest. According to the Global Adult Tobacco Survey India, 2016-17, 29% of all Indian adults over the age of 15, or 267 million people, use tobacco. Given the harmful nature of tobacco which kills, smoking and exposure to second-hand smoke kill about 1.2 million Indians each year a restriction on the sale of cigarettes will not violate the fundamental right.

The decision in *Pratap Pharma Pvt Ltd v UOI*[9] affirmed that a total ban can be imposed on the manufacture of drugs that are harmful to health. Despite the reasonable restrictions in place under the COTPA, 2003, the growing health effects and addiction among the population require stronger social control to protect public health. The ban is now a social necessity to better regulate the use of tobacco products, given the increasing usage patterns among the

[7]Goodwill Paint & Chemical Laboratory v. UOI, AIR 1991 SC

[8]www.newindianexpress.com/states/karnataka/2022/mar/24/secondhand-smoke-exposure-causes-tremendous-economic-burden-in-india-study-2433722.html. (Mar. 24, 2022).

[9]Pratap Pharma Pvt Ltd v. UOI, AIR 1997 SC 2648

population and the goal of reducing harm from these products. The state has the right to prohibit trade that is illegal, immoral, or harmful to the public health and welfare through regulating legislation, as outlined in Article 19(6) of the constitution.

In the case of *T.K. Abraham v State of Travancore-Cochin*[10], the court ruled that tobacco is as harmful as liquor, thereby negating any right to trade in it. Furthermore, the principle of "*Salus populi suprema lex*" or the safety of the people being the supreme law, coupled with India's role as a welfare state, prioritizes the public interest and health over all else. In light of the damaging effects of tobacco, a ban is deemed to be the most appropriate solution to the growing smoking epidemic and safeguarding public health.

Ban: Not an Ideal Solution:

It is crucial to consider that while a ban on tobacco products may address the health concerns associated with its consumption, it may also infringe upon the fundamental right to privacy and bodily autonomy guaranteed under Article 21 of the Indian Constitution. The landmark case of Justice *K.S. Puttaswamy vs. Union of India*[11] established that the right to privacy is inherent in the right to life and liberty as stated in Article 21. As such, any illegitimate intrusions into an individual's privacy are not allowed under this article.

A complete prohibition on the consumption of cigarettes and other tobacco products even in confined, restricted, and protected spaces like one's own house is clearly an infringement of one's privacy. The State violates citizens' right to privacy under Article 21 of the Indian Constitution by preventing them from consuming what they want. The state under its duty has given citizens an informed choice as every citizen has the right to self-determination.

[10]T.K. Abraham v State of Travancore - Cochin, AIR 1958 Ker 129

[11]Justice K.S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors, (2017) 10 SCC 1, AIR 2017 SC 4161

Prohibiting tobacco consumption in public spaces may be a reasonable restriction, but a total ban on the same is a violation of one's fundamental rights. Health has in one way been linked to the right to privacy wherein everyone is entitled to their respect and dignity. Therefore, every person is entitled to control his/her own body and health which also includes various other elements.

India is both the second largest consumer and producer of tobacco.[12] The average annual revenue collected from tobacco products, including GST, compensation cess, excise duty, and NCCD, is estimated to be around Rs 53,750 crore based on the last three years.[13] A sudden ban on the tobacco industry could result in significant job losses, a decrease in GDP and tax income, and negatively impact India's international standing.

Moreover, such a ban could lead to the emergence of tobacco black markets, illegal exports and imports, and create a bigger problem than the current situation. For this reason, the state is taking a gradual approach to reducing tobacco usage, rather than an outright ban. This has been done through restrictions on direct and indirect advertising, regulation of trade and commerce, restrictions on usage in food products, and restrictions on public smoking, among others.

Smoking uptake and habits are influenced by a range of factors, including low income, inadequate housing, unemployment, childhood exposure to nicotine, financial stress, anxiety and depression, as well as parental and peer influence.

Quitting smoking is a challenging task, hindered by heavy nicotine dependence, limited knowledge of the dangers of smoking, limited access to cessation services, cost and wait time for nicotine replacement therapy (NRT), lack of support from family and friends, low confidence in quitting, and social norms that view smoking as acceptable. An outright ban on cigarettes may only

[12] *Supra* 1

[13] www.cbic.gov.in/resources//htdocs-cbec/excise/cx-circulars/cx-circulars-2022/Circular_No_1082_03_2022-CX.pdf.

worsen the situation by causing withdrawal symptoms among addicted individuals who need help and support from the government to overcome their addiction.

The state should work to curb the use of tobacco in the country, reducing economic and employment dependence, and addressing prevalent use. This can be achieved through a balanced approach that considers both public health laws and the right to privacy. This can help to determine whether a ban or extreme restrictions are justified.

Relation between Public Health Law and Individual's Autonomy:

Public health definitions have evolved to include not just physical and mental health but also equity and the creation of a supportive environment that encourages healthy choices. For example, the new Swedish public health policy seeks to provide equal opportunities for good health across the community, including goals for physical activity, healthy eating, sexual health, substance abuse, workplace health, and environmental health.[14]

However, intervention may be justifiable if the individual's chosen behavior is detrimental to their health. Most smokers do not intend to shorten their lives, but instead choose smoking for its immediate benefits. Yet, the long-term consequences of smoking, such as chronic health problems, can undermine the smoker's quality of life.

Balancing personal autonomy with ethical principles such as benevolence and care is a challenge in public health. In some cases, ethical values may take precedence over autonomy. The public health field must consider whether measures designed for the greater good may reasonably infringe on personal autonomy.

John Stuart Mill, the renowned liberal philosopher of the 19th century, believed in the application of liberal thought to all aspects of life. When it comes to

[14]https://www.government.se/4acda4/globalassets/government/dokument/utrikesdepartementet/sv arbete m global halsa english final.pdf

personal conduct, Mill championed complete individual freedom as long as it did not harm the community. However, he recognized the community's right to intervene if an individual's behavior threatened the community's welfare. Mill believed that the state could act to protect individuals from self-harm, such as smoking, if it was known to cause harm. This balance between individual freedom and community welfare represents Mill's nuanced approach to the issue.

COVID-19 has dramatically altered the relationship between public health and individual autonomy. In cases where vaccinations are mandatory, the government can justify violating personal privacy rights in order to protect the public from illness and disease. The principle of "communitarian health" takes precedence over individual autonomy in these instances, as the overall health of the population depends on the health of each individual.

We all rely on a network of social surroundings, but the exclusive pursuit of private interests undermines it. Such conduct might raise the issue of whether a smoker is acting in the capacity of a responsible autonomous agent. In fact, Feinberg emphasised that part of ensuring that the decision to smoke is an autonomous one is to confront smokers with the unpleasant medical facts about the harm they are bringing to themselves[15]. A large portion of tobacco public health policy appears to be supported by the idea that nicotine addiction controls smokers.

However, it is important to recognize that personal autonomy should not be completely disregarded in public health policy. Smokers, for example, should be informed about the negative health consequences of their behaviour and be given the opportunity to make an autonomous decision. This can be achieved by presenting the facts in an objective manner, rather than simply relying on the assumption that smokers are addicted and powerless to change their habits.

[15]https://academic.oup.com/bmb/article/91/1/7/313871

While it is true that some public health measures may infringe on individual liberties, it is also possible to go too far in this direction. Convenient policies that affect a large portion of the population may harm individual freedoms and not be the most effective solution. Alternative, targeted approaches may require more effort and resources, but they can better protect individual autonomy while still achieving the desired public health outcome.

Conclusion:

It's important to understand that individuals are not only recipients of healthcare services provided by the government, but also have obligations to the community. Public health laws serve to remind people of their responsibilities to society and provide a framework for individuals to contribute meaningfully to the community. This is why stricter regulations to prevent harmful behaviors, such as smoking, are justified. However, the impact on individual freedoms should be minimized. The state should implement well-planned regulations that ultimately lead to a ban on smoking, protecting present and future generations from its harmful effects.

No More Freebies?

Vedang Vinay Tonapi
II LL.B.

The Issue:

Amongst the noble professions practiced in the world, the medical profession stands apart. The medical practitioners, be it doctors, pathologists, researchers or the hospital staff is revered in a fiduciary capacity by the patient and its kin. The relation of the patient with the doctor cannot be explained in legal terms. At times the doctor's word affects the patient more positively than the medicines. This is evidently seen in India, where the entire household has a 'family physician'. Sometimes even an expert's opinion is double-checked with that of a family physician. However, the incentives in the world affect everyone, including the medical professionals. Medical professionals are often incentivised by the pharmaceutical and allied industry by free travel, expensive holidays, gold coins, electronics, clothing etc. (referred to as 'freebies' in this article) It will be unfair to state that every professional is affected by these incentives. This possesses a serious conflict of interest. This has also indirectly created a monopoly for branded pharmaceuticals as they could afford to give more freebies.

Owing to this, the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (hereinafter, "2002 Regulations") were formulated. Regulation 6.8[1] categorically disallowed the freebies for self or family, received from the pharmaceuticals and allied health care industry. The 2002 regulations came into effect on the 14th of December 2009, seven years after they were formulated, when they were published in the official gazette. These 2002 regulations affected only the medical practitioners, since Medical Council of India had no jurisdiction over the pharmaceutical and allied companies. Thus the companies had no deterrent to stop giving these freebies to the medical practitioners. To protect the consumers, as a step forward, on 22nd February

2022, the Apex court adjudicated on a Special Leave Petition filed by the Income Tax Department which primarily dealt with the disallowance of business expenditure of freebies given to the medical practitioners. This judgment not only has a larger commercial impact but an even larger social impact. The judgment dealt with complex issues of medical ethics, the law of contracts, public policy, morality and taxation.

The primary issue addressed in ***Apex Laboratories Pvt. Ltd. v. Deputy Commissioner of Income tax, Large taxpayer unit II***[1]**,** is that of disallowability of expenditure incurred during the financial year 2009-10.It is the same period during which the 2002 Regulations came into force. On 1st August 2012, the Central Board of Direct Taxes (CBDT) issued a clarificatory notification stating that the expenditure by the pharmaceutical industries is ineligible as an expenditure while calculating profit for the purpose of taxes[2]. When an expenditure is disallowed and added back to the income, the profit to the extent of such expenditure increases and is taxable at the rate applicable to the entity, plus the interest till the date of payment of such tax. On 22nd November 2012, the CBDT issued a show-cause notice[33] to Apex Laboratories, as to why the expenditure of INR 4.73 Crore incurred during FY 2009-10, shall not be disallowed and added back to the taxable income.

What did the rivals submit?

Apex Laboratories contended that the 2002 Regulations were only applicable to the medical practitioners. For this, reliance was placed on the Delhi High Court's decision in the case of *Max Hospital Pritampura v. Medical Council of India (MCI)*[4], where it stated that the MCI had no jurisdiction over the hospital and hence the hospital was not bound by its guidelines. The basic argument that

[1] Apex Laboratories v. Deputy Commissioner of Income Tax, Large Tax Payer Unit - II, 2022 SCC OnLine SC 221.

[2] Central Board of Direct taxes, Inadmissibility of expenses incurred in providing freebees to Medical Practitioner by pharmaceutical and allied health sector Industry, Circular No. 5/2012 [F. No. 225/142/2012-ITA.II], Issued 1st August 2012

[3] Apex Laboratories, Supra 2

[4] Max Hospital Pitampura v. Medical Council of India, 2014 SCC OnLine Del 143

was raised by the counsel, questioned the jurisdiction of CBDT to expand the scope of the 2002 Regulations and make it operable to pharmaceutical companies and allied healthcare. The Income Tax Act is not a social reform statute and needs a stricter interpretation and the scope of its action cannot be widened beyond the reins of taxation. Another contention was that the applicability of the clarificatory circular is prospective in nature, that is to say, expenditure after 22nd November 2012 was disallowed. Further, the counsel referred to a Supreme Court's decision in the case *of Dr.T.A. Quereshi v. Commissioner of Income Tax, Bhopal*.[5] In this case, the cost of heroin, seized by the authorities, was allowed as a deduction. Another case cited was the *Commissioner of IncomeTax v. Khemchand Motilal Jain, Tobacco Products (P) Ltd*.[6] wherein, a ransom paid to the abductors was allowed as a business expense, by the Madhya Pradesh High Court.

The Income Tax Department was clear about the disallowance of the expenditure owing to the nature of the regulations and the intent with which they were drafted. The intent was to curb the malpractices surrounding the freebies given to the medical practitioners and the adverse impact on the consumers' pockets due to the purchase of these expensive branded drugs. Income Tax Department cited the case of the *Commissioner of Income Tax v. Kap Scan and Diagnostic Centre Pvt. Ltd*[7], where Punjab & Haryana High Court disallowed commission paid to the doctors for referring the patients to the diagnostic centre. High Court laid emphasis on the provisions of Sec 23 of the Indian Contract Act, 1872, that renders a contract void if the object or the consideration of the agreement is illegal or opposed to public policy.

[5] T.A. Quereshi (Dr.) v. CIT, (2007) 2 SCC 759

[6] Commissioner of Income-tax, Jabalpur v. Khemchand Motilal Jain, Tobacco Products (P.) Ltd, [2011] 13 taxmann.com 27 (Madhya Pradesh)

[7] Commissioner of Income-tax v. Kap Scan and Diagnostic Centre (P.) Ltd., [2012] 25 taxmann.com 92 (Punjab & Haryana)

Held that,

Explanation 1 to Section 37 of the Income Tax Act, 1961 clearly states that, *"any expenditure incurred for any purpose which is an offence or which is prohibited by law, shall not be deemed to have been incurred for the purposes of the business or profession, thus not allowing the expenditure."* The Honorable Supreme Court analyzed the meaning of the term 'offence', which is not defined in the Income Tax Act, 1961. Section 2 (38) of the General Clauses Act, 1897 states that an offence is any act or omission which is made punishable by the law for the time being in force. Further referring to the provisions of the Indian Penal Code, 1860, Section 43 states that the term 'illegal' means everything which is an offence or which is prohibited by law or which is a ground for a civil action. Thus, Explanation 1 to Section 37 is wide enough to account for all activities that are illegal or prohibited by law or are considered an offence by any law for the time being in force. The 2002 Regulations were, however, not applicable to the Pharmaceutical companies and allied healthcare providers. Thus the question regarding the validity of the CBDT circular was addressed by the Supreme Court. Referring to the book by Justice G. P. Singh on the Principles of Statutory Interpretation, the Supreme Court invoked the doctrine of *'Quandoaliquidprohibetur ex directo, prohibetur et per obliquum',* that which one cannot do directly, cannot be done indirectly. When an affirmative law is made, directing a thing to be done in a certain way, there is an implied prohibition that the same thing shall not be done in any other way. The legislature and the executive, while giving effect to the intent of the legislation, can use all reasonable means to make such legislation effective. Thus, the legislative intent to bar the medical practitioners from accepting any freebies cannot be given a colour of a legal act by allowing the expenditure on freebies. The Supreme Court further relied on the maxim *'ex dolomalo non orituractio'*, which restrains any court from aiding any party that roots its cause of action in an illegal or immoral act. Thus, the Apex court disallowed the expenses incurred by Apex laboratories for giving freebies like gold coins, LCDs, refrigerators, expensive hotel stays, foreign trips etc.

Honourable Supreme Court concurred with the decision of the Punjab and Haryana High Court in *Kap Scan and Diagnostic Centre*[8], and emphasized the judgment's reasoning that receiving freebies by a professional is against the public policy. Once, the receipt of such freebies is held unethical, the corollary to this would be unethical, as giving of such gifts induces the doctors and the medical professionals to violate the Medical Council Act, 1956 and the Rules thereof. While understanding and giving effect to a legislation, the lacunae in one law cannot be used to defeat the other arm of the law. While clarifying the other two judgments as quoted by the appellant, the Supreme Court held that the principle laid in the case of *T.A. Qureshi*[9] was not applicable in this case as 'business losses cannot be equated with the ongoing 'business expenditure'. In the case of *Khemchand Motilal Jain*[10], a ransom paid to the kidnappers was out of coercion and helplessness. Further, the assessee was not a participant in the crime out of freewill. Hence, the expenditure on account of paying such ransom is not the same as giving freebies, since the latter is a matter of a larger social issue.

Affordability of Medicines

Since the word of the doctor is considered the final, many times consumers end up buying the expensive drug instead of the cheaper alternative. The Honorable Supreme Court while taking cognizance of the 'Parliamentary Standing Committee on Health and Welfare' explained how the cost of the freebies is embedded in the price of the drug. The reason is simple; the drug companies want to maintain their profit margins. The freebies form consideration for the doctors, who in turn prescribe the expensive branded medicines.

In India, the penetration of insurance is substantially less. Life insurance with endowment has a major chunk of the pie, as it is seen as an investment and offers tax breaks. Although the picture is changing, the idea of an insurance-

[8]Kap Scan and Diagnostic Centre, Supra

[9] T. A Quereshi, Supra

[10]Khemchand Motilal Jain, Tobacco Products (P.) Ltd, Supra

funded medical treatment is yet to catch steam, especially in the semi-urban and rural areas. Out-of-pocket expenditure ("OOPE") still constitutes a major portion of the total healthcare related expenditure. In 2013-14, pharmaceutical expenditure contributed 51.67% of the total health-care related OPPE. This number fell to 43.12% in 2015-16, even as the spending in both private and government hospitals rose in rupee terms. It is estimated that the rising costs of medicines may make it difficult for many to buy the medicines that they need, while pushing many into poverty[11].

In order to set an upper bar on the prices of the essential drugs, the National Pharmaceutical Pricing Authority (NPPA) controls MRP of certain essential drugs and prevents manufacturers from increasing the prices of non-scheduled drugs by not more than 10% per year[12]. Recently the government placed a 30% margin cap on the 42 life-saving cancer medications, in Feb 2019. Thus manufacturers had to adjust the retail price where the trade margins could not exceed 30%[13].

Are the doctors' concerns ill-found?

It cannot be denied that the doctors often prescribe the medicine which they know or of the drug manufacturer that they trust. The reason for this trust stems from the fact that these manufacturers often cater to USA's FDA and EU's regulations for their manufacturing processes. To categorise the quality of the drugs, a reference has to be made to The Drugs and Cosmetics Act, 1940. Drugs which are legitimately manufactured by a company, but fail the quality of the standards tests, like the assay tests (determining the right amount of pharmaceutical ingredients) or the dissolution tests (the time taken for active

[11] Sakthivel Selvaraj, Habib Hasan Farooqui, Anup Karan (2018), "Quantifying the financial burden of households' out-of-pocket payments on medicines in India: a repeated cross-sectional analysis of National Sample Survey data, 1994–2014," BMJ Open 8, no. 5, Issued On 31st May 2018

[12] National Pharmaceutical Pricing Authority, The Drugs (Prices Control) Order, 2013, Paragraph 20, Issued on 15th May 2013.

[13]National Pharmaceutical Pricing Authority, The Drugs (Prices Control) Order, 2019, Paragraph 19, Issued on 27th February 2019

pharmaceutical ingredients to be released from the dose), are called substandard drugs. In spurious drugs, the active pharmaceutical ingredient is replaced by another substance or they are counterfeit of existing drugs. Adulterated drugs have been contaminated by outside substances that compromise the safety and effectiveness of the drug. Falsely labelled or misleading labels are under the category of misbranded drugs. In a survey conducted by CDSCO in 2009[14], having a sample size of around 24,136, 4.75% of drugs were found to be substandard. Further, in a survey conducted by the National Institute of Biologicals (NIB) during 2014-16,[15] it was 3.16%. In both the surveys 0.05% of the drugs were found to be spurious. A study back in 2015[16] also found that 15.62% of the sodium diclofenac tablets, a common anti-inflammatory, were substandard. Another study in Northern India found that 13.04% of the sampled amoxicillin, a common antibiotic to be substandard[17]. This data is concerning because it substantiates that a large population of the country has been exposed to substandard drugs, unknowingly. The reason behind the poor quality of the drugs has largely been regulatory. Drugs are a subject of the Concurrent List (Entry 19) of the Seventh Schedule to the Constitution of India. Hence, the Centre as well as the individual States have their own standards and licenses for manufacturing these drugs. Even Section 21 of the Drugs and Cosmetics Act, 1940 gives authority to both the centre as well as the states to appoint the inspectors. Shortage of inspectors, the low inspector to manufacturing unit ratio, corruption, time lag between inspections etc. are various reasons why substandard drugs are sold in the market.

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[14] Brooking Survey: Medicines in India: Accessibility, Affordability and Quality Page no: 30 https://www.brookings.edu/wp-content/uploads/2020/03/Medicines-in-India_for-web-1-1.pdf

[15] Ibid

[16] Khan, Ahmed, Roop Khar, and Malairaman Udayabanu. "Pilot Study of Quality of Diclofenac Generic Products Using Validated In-House Method: Indian Drug Regulatory Concern." Journal of Applied Pharmaceutical Science, July 11, 2015, Page 147-153

[17] Khan, Ahmed, Roop Khar, and Malairaman Udayabanu. "Quality and Affordability of Amoxicillin Generic Products: A Patient Concern." International Journal of Pharmacy and Pharmaceutical Sciences 8, no. 1, December 02, 2015, Page 386-390

Doctors, thus have two grounds to prescribe branded generic drugs. First being the questionable quality of the drugs of the unknown brands and secondly the freebies offered by the manufacturers for prescribing their drugs.

Impact of the judgment and the way ahead:

Considering the aspects of affordability and quality of the medicines, concluding whether the generic medicines are as good as branded ones, is difficult. The days of people being alien to the concept of branded and generic medicines is long gone, although the preference has not changed much. In an article in the Journal of Pharmacy, June 2018[18], it was found that 72% of the samples knew about generic medicines. Amongst them, 65% knew the difference between generic and branded medicines. 67% agreed that generic medicines are cheaper. However, only 35% of them responded positively to preferring generic medicines. The reason being that ⅔ of the patients believed that the quality of the generic medicines is not up to that of the branded ones.

The CBDT circular of 2012[19] has clarified that the expenditure in respect of the freebies will not be eligible for any tax deductions. While most public companies may be complying with this circular, the same cannot be said with certainty about the private companies as the data is not public. Further, companies not being eligible for tax, won't stop them from giving these freebies. Companies may recover the whole cost of such expenditure instead of the post-tax amount of expenditure, like earlier. What is more interesting is understanding if there was a deviation from the principles of 'Literal or Strict Interpretation'. Literal interpretation in tax law simply means that the state cannot tax what is beyond the scope of the statute. There are no presumptions in the tax law, nothing is to be implied. One has to rely on the words that are written in the statute. The reason behind this is quite logical, if the executive is able to go beyond the statute and levy and collect taxes, there will be a lot of

[18] Tripathi and Bhattacharya: Generic vs Branded Medicines: Indian Journal of Pharmacy Practice, Vol 11, Issue 2, Apr-Jun, 2018 Page no 93

[19] Central Board of Direct Taxes: Inadmissibility of Expenses, Supra

uncertainty in the business environment. Moral views and subjective rules cannot apply to tax law; they have to be based on the established legal principles. As per G.P. Singh's, Principles of Statutory Interpretation, when the literal interpretation leads to absurd or unintended results, then to avoid such absurdity, the language of a statute can be modified to give effect to the legislative intent.[20] This rule also applies to taxing statutes. Principles of equity and taxation are strangers. However, an attempt has to be made in order to bridge the gap between them in cases where the construction leads to equity rather than injustice. This shift from literal interpretation to purposive interpretation has diminished the privilege of a taxing statute. One has to see how the courts in the coming times interpret the tax laws. But going by the trend, literal interpretation will always be the rule, and purposive interpretation will be an exception.

[20] Justice G P Singh, (IN) G.P. Singh: Principles of Statutory Interpretation, https://advance.lexis.com/api/permalink/d517d908-2d7b-4e30-9daa-1a6206e222e2/?context=1523890

Bad Bank: The Ultimate Solution to India's NPA Woes?

Yamini Jain
V B.A.LL.B

Introduction

The concepts of NPAs and 'bad loans' are crucial to the understanding of a bad bank setup. NPAs are essentially those credit facilities that have ceased to generate income for the banks via interests or repayment of the principal loan amount, and has remained past due for a specific period of time (generally 90 days in India)[1]. Concurrently, a bad loan or bad debt is an amount owed to a creditor that is unlikely to be paid, or in respect of which the creditor is not willing to take action to recover for any reason.

The NPA crisis in India has persisted with a steep rising curve. The Financial Stability Report, 2021 published by the Reserve Bank of India ("RBI") projects a sharp increase of gross NPA ("GNPA") ratio from 7.5% to 13.5% in September 2021 under the baseline scenario, which might escalate to 14.8% in a severe stress scenario.[2] These projections are suggestive of the possible economic impairment dormant in banks' portfolios, and highlight the need of proactive building up of adequate capital to withstand potential deterioration of asset quality.

In order to raise adequate capital, banks may pursue several channels, including deleveraging as has been done in the past. The banks have a responsibility to maintain the leverage ratio prescribed by the Basel Committee on Banking

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[1] *Master Circular - Prudential norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances*, RESERVE BANK OF INDIA (Jul. 1 2015), https://rbidocs.rbi.org.in/rdocs/notification/PDFs/101MC16B68A0EDCA9434CBC239741F5267329.PDF (Pg. 1).

[2] *Press Release of the Financial Stability Report 2021*, RESERVE BANK OF INDIA (Jan. 11 2021), https://rbidocs.rbi.org.in/rdocs/PressRelease/PDFs/PR92249126040B81448D6B4BFFC88889EDCA8.PDF

Supervision in the 2010 Basel III package of reforms.[3] However, capital-starved banks would be burdened with the predicament of maintaining the Capital Adequacy Ratio whilst reducing their leverage ratio in order to avail the fruits of higher credit growth.[4]

These steps, though necessary and proper, may be insufficient. The scarcity of capital, overleveraged banks, and unsalable assets would still carry too much risk. The investors in turn would also remain wary owing to the stagnancy of illiquid assets with a bank. The Government of India has, thus, proposed the formation of a bad bank in an ARC/AMC format in its Union Budget of 2021, so as to deal with such predominant issues faced by the banks arising from the core of the NPA crisis.[5]

Bad Bank and its Organizational Models

A division of assets through a bad bank can help stricken institutions to ring-fence their core businesses and prevent their contamination by toxic assets. This allows a bank to reduce its risks and to deleverage so as to create a sound business model in future. A clear separation of assets on the basis of their quality could also help banks regain investors' trust by offering more transparency in the core business of the bank and lowering their monitoring costs.

While contemplating the establishment of a bad bank, a bank should make definite choices on the aspects of asset scope, its organizational model, business case, portfolio strategy or asset value realization, and the operating model.

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[3] *Basel III Capital Regulations – Implementation of Leverage Ratio*, RESERVE BANK OF INDIA (Jun. 28 2019), https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NT225300D983EA7684ED7878E617BAD4CF529.PDF

[4] *Explainer | Why 'leverage ratio' is so important for banks*, MONEYCONTROL (Jun. 10 2019, 12:33 PM), https://www.moneycontrol.com/news/business/moneycontrol-research/explainer-why-leverage-ratio-is-so-important-for-banks-4079521.html

[5] Speech of Nirmala Sitharaman, *Budget 2021-22*, GOVERNMENT OF INDIA, 15 (Feb. 1 2021), https://www.indiabudget.gov.in/doc/Budget_Speech.pdf.

These choices must be made in consideration of the impact on funding, capital relief, cost, feasibility, profits, timing and government backing.[6]

An overview of the available organizational models of a bad bank for the resolution of NPAs is a prerequisite to fully understand and analyze the intricacies of the proposed framework of bad bank by the GoI. The four popular models of bad banks[7] are:

On-balance-sheet guarantee

In this structured solution, a bank keeps a part of its portfolio protected against losses, typically by a second-loss guarantee issued by the government. This model can be implemented promptly whilst minimizing the requirement of upfront capital, however, it results in only a limited transfer of risk. The balance sheets would still account for such bad assets thereby having no effect on investor interest. It could be employed as a preliminary measure to stabilize a bank so as to derive a more comprehensible solution. The Citibank in 2009 used this strategy by quarantining its responsible assets and operations in its subsidiary, Citi Holdings, where government guarantees were furnished as a first step to ring-fence the economic risks on the balance sheet.[8]

Internal Restructuring Unit

The bank with more than 20% toxic and non-strategic assets of its balance-sheet can, under this scheme, ensure better management, efficiency and clear incentives by placing the restructuring and workout of assets in a separate internal unit/bank. Employing this on-balance-sheet method, though lacks efficient transfer of risk, sends a clear signal to the market by offering more transparency into the bank's performance. The Dresdner Bank transferred

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[6] Gabriel Brenna et. al., *Understanding the Bad Bank*, MCKINSEY & COMPANY (Dec. 1 2009), https://www.mckinsey.com/industries/financial-services/our-insights/understanding-the-bad-bank

[7] *Id.*

[8] John Maxfield, *After 8 Years, Citigroup Is Closing Its "Bad" Bank*, THE MOTLEY FOOL (Jan. 19 2017, 07:47 AM), https://www.fool.com/investing/2017/01/19/after-8-years-citigroup-is-closing-its-bad-bank.aspx

€ 35.5 Billion in toxic loans and shares which had lost strategic relevance to an internal restructuring unit ("IRU").[9]

Special Purpose Entity

A bank, in this off-balance-sheet structured solution, offloads its unwanted assets into a Special Purpose Entity ("SPE") thereby taking it off its balance sheet. This SPE is usually government-sponsored. This strategy is best assumed for small, homogeneous set of assets as structuring credit assets into an SPE is a complex move and impractical for many banks. The UBS followed this approach in 2008 when it transferred £ 24 Billion worth of illiquid securities to an SPE funded by the Swiss National Bank ("SNB"). The SNB also injected around € 3.9 billion to recapitalize its former national banking champion.[10]

Bad-bank spinoff

In a bad-bank spinoff, the bank shifts its toxic assets into an external legal entity which ensures maximum risk transfer and increases bank's strategic flexibility, prerequisites in attracting investor attention. Though being one of the most familiar and thorough models, the complexity and cost of operation of such a spinoff is very high owing to the need of a separate organizational structure that is at par with the legal and regulatory requirements. The predicament of asset valuation and transfer is a daunting array along with the non-availability of adequate funds for such a bad bank. Hence, this method is usually adopted as a last resort measure when other measures prove insufficient in resolving all toxic and non-strategic assets. For all these reasons, government backing plays a significant role in creating a common legal and regulatory framework and by extending support through funding or loss guarantees.

The most pioneering example of a bad-bank spinoff is that of Mellon Bank ("MB"). In 1988, MB sold $ 1 billion in loans to a newly created subsidiary

[9] Dorothea Schäfer et. al., *Bad Bank(s) and the recapitalisation of the banking sector*, 44 Intereconomics 215, 218 (2009), https://www.econstor.eu/bitstream/10419/66159/1/72703149X.pdf.
[10] Haig Simonian, *Swiss to fund $60bn 'bad bank' for UBS*, FINANCIAL TIMES (Oct. 17 2008), https://www.ft.com/content/92a97876-9b4b-11dd-ae76-000077b07658

called the Grant Street National Bank ("GSNB") at a discount. This gave way to MB to raise fresh capital and revive its operations, whereas GSNB focused on resolution of such bad loans under a separate management. However, MB was an entirely private entity and had no government involvement in the process.[11]

Prerequisites for a Successful Bad bank: International Examples

A more realistic understanding of a bad bank indicates that it will, in all likelihood, end in losses. If such losses are lower, they can be effectively compensated by appreciation of value in other areas. The government, hence, has a good chance of recouping its investments in a bad bank if the following prerequisites are satisfied:

i. toxic and nonstrategic assets have been acquired at a low price;

ii. an active mechanism for management of these assets is available;

iii. industry experts and professionals should be closely involved in its operations;

iv. sufficient time is available; and

v. extensive regulatory and governance structures have been implemented prior to the commencement of its operations.[12]

Swedish Model for Bank Resolution

Sweden's approach to the resolution of its banks in early 1990s is a model for today's policymakers. During the financial crisis of 1991-1993, the Swedish Parliament or the *Riksdag* sought to establish an independent Bank Support Authority, the *Bankstödsnämnd* ("BSA") in 1992. It was approved with an open-end funding, which underpinned the credibility of the bank resolution policy, and was staffed by professionals. Banks that turned to the BSA were

[11] Ira Dugal, *Bad Bank: An Idea From The Good Ol' Banking Book*, BLOOMBERG QUINT (Oct. 07 2016, 07:18 PM), https://www.bloombergquint.com/opinion/bad-bank-an-idea-from-the-good-ol-banking-book

[12] John, *supra* note 8.

obliged to maintain complete disclosure of their financial standing and to keep their books open to scrutiny, which facilitated the resolution policy and received public acceptance. The resolution policy aimed at aiding banks by keeping the bank owners and managers at stake for raising capital.

Two major banks at higher risks were taken over by the government with an aim of re-privatizing them. Their assets were split into good and bad, and the latter were to be resolved by the AMCs set up by the BSA. The government applied cautious market values while transferring assets from banks to the AMCs, thereby putting a floor under the valuation of such assets. This was majorly supported by monetary and fiscal policies, and was a huge success resulting in very low costs to taxpayers. The thriving Swedish banking sector was largely privatized and became profitable shortly after the crisis.[13]

Germany's Equalization Claims

The 2009 proposal of bad bank by the German government constituting a Special Purpose Vehicle ("SPV") and Consolidation model, has been criticized on various grounds. However, it was not the first time that Germany was hit by a severe balance sheet problem in the financial sector. Both after the Second World War and fall of the Iron Curtain (German Reunification), unequal conversion of assets and liabilities had left many banks and FIs de facto insolvent. In both situations, equalization claims ("EC") were used to settle these imbalances, which would otherwise have left most FIs heavily indebted. The rationale behind ECs was to temporarily swap toxic assets with government bonds with an open maturity date. This, thereby, leaves total losses with the banks, and also avoids the problem of evaluating the toxic assets in advance. These bonds were non-tradable, paid a low interest, and were eventually redeemed by the German government. The application of these ECs,

[13] Lars Jonung, *The Swedish model for resolving the banking crisis of 1991-93: Is it useful today?* , VOX^{EU} (Mar. 14 2009), https://voxeu.org/article/how-fix-banks-lessons-sweden

though discreet, has proven to be an effective instrument in both instances without any serious repercussions on the real economy.[14]

The Indian Bad Bank?

NPAs in India are extensively subjected to the provisioning norms of the RBI. This imposes a pragmatic responsibility on banks, especially Scheduled Commercial Banks ("SCB"), to make provisions on the NPAs on the basis of their broad classification as substandard, doubtful and loss assets. Considerations should also be placed on the intervals between accounts becoming doubtful of recovery, its recognition as such, realization of the security, and the erosion in the value of security charged, while making such provisions.[15]

Owing to the high level of provisioning by public sector banks ("PSB") of their stressed assets, the Union Budget of 2021-22, with an aim to clean up bank books, proposed to set up an "ARC and AMC to consolidate and take over the existing stressed debt and then manage and dispose of the assets to Alternative Investment Funds ("AIF") and other potential investors for eventual value realization."[16]

ARC-Bank deals in general

In order to understand the structural and operational nuances of the proposed bad bank in an ARC-AMC format, it is crucial to recognize the mechanism with which the loan sale transactions are dealt with in general. ARCs, in such transactions, have to pay the bank at least 15% of the agreed amount in cash and SRs. ARCs are expected to focus on restructuring or recovering those loans

[14] Ulrich van Suntum et. al., *Bad banks: A proposal based on German financial history*, 35 European Journal of Law and Economics 367, 375(2013), https://www.researchgate.net/publication/241013367_Bad_banks_A_proposal_based_on_German_financial_history
[15] Master, *supra* note 1, at 21.
[16] Speech, *supra* note 5.

via legal mechanisms to serve the interest on such SRs and redeem the instruments while the SR-holding bank pays an annual fee to the ARC.[17]

Potential framework of proposed ARC-AMC bad bank

Although the structure of the bad bank is not finalized yet, banks are likely to transfer their stressed loan assets to the proposed ARC-AMC entity, instead of selling bad loans, which it would eventually restructure and sell to investors.[18] The phased modalities of the said setup would include transferring of bad assets to ARCs at net book value (value of asset – provisioning already done) against cash and SRs. Such bad assets would then be managed by AMCs where dedicated professionals would try and resolve the assets, which would buy banks sufficient time and relaxation to revive its lending operations.[19] The urgency of this move lies in the fact that with passage of time, the value of certain assets is likely to be eroded. The SRs issued even with a partial government backing would be comparable to quasi-sovereign securities, thereby attracting banks' cognizance and preference.

Efficacy of proposed ARC-AMC structure

India's prior experience with bad bank in the case of IDBI Limited ("IDBI") in 2004 has left mass cynicism against it. After the acquisition of its bad loans by a government fund, not much value could be realized from such assets and nor did the IDBI's lending operations improve.[20] However, with proper

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[17] Sugata Ghosh, *Transferring sticky loans: Fully provided NPAs may go to proposed bad bank*, ECONOMIC TIMES (Feb. 22 2021, 08:10 PM), https://economictimes.indiatimes.com/industry/banking/finance/banking/fully-provided-npas-may-go-to-proposed-bad-bank/articleshow/81143764.cms

[18] Atmadip Ray, *Proposed bad bank can only be used as a one-time tool to clean up banks' balance sheet*, Economic Times (Mar. 13 2021, 05:12 PM), https://economictimes.indiatimes.com/news/economy/policy/proposed-bad-bank-can-only-be-used-as-a-one-time-tool-to-clean-up-banks-balance-sheet-cea-kv-subramanian/articleshow/81484162.cms

[19] Ashutosh Kumar, *Govt won't fund ARC, AMC bad bank model: Banking Secretary*, BUSINESS TODAY (Feb. 2 2021, 11:44 PM), https://www.businesstoday.in/sectors/banks/no-govt-equity-for-arc-amc-bad-bank-model-banking-secretary/story/430059.html.

[20] Radhika Merwin, *Why LIC-owned IDBI Bank's troubles are far from over*, THE HINDU BUSINESS LINE (Aug. 17 2019), https://www.thehindubusinessline.com/markets/stock-markets/why-lic-owned-idbi-bank-has-fallen-sharply-today/article29107668.ece

implementation of the proposed ARC-AMC entity and drawing from the abovementioned examples of Germany and Sweden along with other international instances, the move could positively prove to be effective as:

i. Partially private ownership of bad bank shall improve price discovery and contribute to the transparency of the sale of stressed loans by banks.

ii. Only partial ownership of government banks shall reduce the burden on exchequer.

iii. Sovereign guarantee on SRs would attract private banks to infuse capital in the bad bank.

iv. Allowing AIFs' investment in the bad bank would widen the capital pool thereby including market participation.

v. The various credit guarantee schemes introduced by the GOI to improve accessibility of cheaper credit to micro, small and medium enterprises ("MSME") may see fruition, since banks would be adequately capitalized to lend to MSMEs.[21]

Asset Scope and Asset Value Realization

One of the major issues however, is ring-fencing the scope of the assets that can be transferred to such bad bank, and the realization of maximum value from resolution of such assets. There are a dozens of ARCs in the market, although with limitations in capital flow to acquire large assets. Banks are not very happy with the ARC sales as the value realization from these stressed loans is very low. The proposed bad bank would have the onus to better than both the Insolvency and Bankruptcy regime and the existing ARCs, in terms of pricing and faster recovery/resolution.[22]

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[21] Anish Mashruwala et. al., *Can 'bad bank' save our stressed economy?* , ECONOMIC TIMES (Mar. 13 2021, 10:18AM), https://m-economictimes-com.cdn.ampproject.org/c/s/m.economictimes.com/small-biz/money/bad-bank-need-of-the-hour/amp_articleshow/81478979.cms.

[22] Anand Adhikari, *Budget 2021: How bad bank model of ARC, AMC, AIF would work*, BUSINESS TODAY (Feb. 1 2021, 01:25 PM), https://www.businesstoday.in/union-budget-

As far as the scope of assets to be transferred is concerned, banks need to address two broad categories of risks of default, i.e., substantial mark-to-market risk or risk from ratings-drift under Basel II. Further, to maximize asset value realization, banks could adopt the portfolio strategy by employing either passive rundown, transactions, or workout mechanisms. To determine the best strategy in the given situation, the government could incorporate the impact of each into the business case analysis by way of net present value ("NPV") calculations, profit and loss ("P&L") impact, effect on capital funding, risk implications, targets and understanding trade-offs.[23]

Concluding Remarks

The objective of the proposed bad bank, though laudable, it ought to be subjected to the test of realism and pragmatism. It could only be employed as a one-time tool for the clean-up of bank's balance sheets saddled with stressed loans. Recurring use of such model might give wrong incentives to bankers to undertake risky lending transactions. It should help create a vibrant local market for bad assets and should not be reduced to a NPA housing entity to provide minimum support prices for assets.[24]

Instituting a bad bank would only act as a huge quarantine centre for NPAs, which can be treated via distressed debt funds with risk appetite to acquire them and temporarily relieve banks from the longstanding and now worsened NPA crisis. The vaccine to combat future NPA explosion, however, lies in enhancing underwriting skills, and oversight mechanism to arrest the deterioration of the quality of credit.[25]

2021/decoding-the-budget/budget-2021-how-bad-bank-model-of-arc-amc-aif-would-work/story/429862.html

[23] Gabriel, *supra* note 6.

[24] Saloni Shukla, *Bad bank will be a new ARC set up by PSBs: Shaktikanta Das*, ECONOMIC TIMES (Feb. 26 2021, 09:47 AM), https://economictimes.indiatimes.com/industry/banking/finance/banking/bad-bank-will-be-a-new-arc-set-up-by-psbs-rbi-governor-shaktikanta-das/articleshow/81220091.cms

[25] *Why Budget proposal for setting up of a bad bank is a good idea*, ECONOMIC TIMES (Feb. 2 2021, 01:50 AM), https://economictimes.indiatimes.com/industry/banking/finance/banking/why-budget-proposal-for-setting-up-of-a-bad-bank-is-a-good-idea/articleshow/80639840.cms

CASE COMMENTS & LEGISLATIVE COMMENTS

The Surrogacy (Regulation) Act, 2021

Bodhita Sen
II LL.B.

The Surrogacy (Regulation) Act, 2021 (Act) received the President's assent on December 25, 2021 and came into force on January 25, 2022. The object of the Act is the regulation of the practice and process of surrogacy and for matters connected therewith or incidental thereto.

Key features of the Act:

The Surrogacy Clinics have been regulated in the following manner-

Only a registered Surrogacy Clinic can conduct activities related to surrogacy and surrogacy procedures;

Storage of human embryo or gamete is only allowed for legal purposes as prescribed under the Act; and

The following are prohibited under the Act-

- Commercial surrogacy;
- Advertisement or promotion of surrogacy;
- Abortion during the period of surrogacy unless as prescribed; and
- Conduction of sex selection.

Surrogacy and surrogacy procedures have been regulated in the following manner-

- Surrogacy is only permitted in the following cases-
- When the intending couple has a medical indication necessitating gestational surrogacy;
- It is for altruistic purposes only;
- The surrogate mother has been insured by the intending couple/ woman, for a period of 36 months by such amount that covers the postpartum delivery complications, if any;
- The surrogate mother has been issued a certificate of eligibility on the fulfilment of the following conditions-
- On the day of implantation, she is a married woman between the age of 25 to 35 years with a child of her own;
- She is willing to undergo the surrogacy procedures;
- She is to not provide her own gametes during the procedure;
- She can only act as a surrogate mother for once in her life; and
- She has received a certificate of medical and psychological fitness for surrogacy and surrogacy procedures from a registered medical practitioner.
- The intending couple or woman shall receive a certificate of eligibility on the fulfilment of the following conditions-
- The female in the couple is between the age of 23 to 50 years and the male in the couple is between 26 to 55 years;
- They don't have any surviving children whether biological, adopted or through surrogacy, although a child who is mentally or physically challenged or suffers a life-threatening disorder or a fatal illness with no permanent cure is not included in this provision; and

- "Intending woman" means an Indian woman who is a widow or divorcee between the age of 35 to 45 years and who intends to avail the surrogacy.
- A written consent of the surrogate mother is to be obtained after all the known side effects and after effects of the surrogacy procedures have been explained to her which can be withdrawn as prescribed;
- The intending couple or woman are prohibited from abandoning the child born out of surrogacy;
- The child will be deemed to be the biological child of the intending couple or woman and will be entitled to all the rights available to a natural child;
- Establishment of the National Assisted Reproductive Technology and Surrogacy Registry;
- Constitution of the Assisted Reproductive Technology and Surrogacy Board at the national, state and union territory level;
- Appointment of appropriate authorities at the state and union territory level;
- Any contravention or its continuation under the Act shall be punishable with imprisonment and fine as prescribed; and

The Central Government in the exercise of its powers under section 50 of the Act has made rules for carrying out the provisions of the Act called the Surrogacy (Regulation) Rules, 2022.

Conclusion

After years of being unregulated, the process of surrogacy has finally been regulated by the passage of this Act, which intends to safeguard the interests of the surrogate mother, the child and the intended couple or woman. However, the exclusion of the queer community, unmarried heterosexual couples and unmarried women who don't come under the definition of "intended woman" under the Act from availing themselves of the services of surrogacy restricts their right to parenthood.

India has legalized surrogacy since 2002 and has since become a hub for transactional surrogacy due to lower medical costs for treatment and consideration to be paid to the surrogate mothers in spite of the high maternity mortality rates as compared to other countries.[1] The Act should have regulated these commercial contracts to safeguard the interests of the surrogate mothers who mostly belong to the oppressed social classes instead of completely prohibiting them, thus denying them a legitimate source of income.[2]

Unless such reforms are implemented, the reproductive rights of people who can give birth and the right to parenthood of every individual in India, regardless of gender, sexuality and marital status, they remain inaccessible in spite of the passing of this Act.

[1]Dr. Ranjana Kumari, Surrogate Motherhood- Ethical or Commercial, Centre for Social Research, 44, https://wcd.nic.in/sites/default/files/final%20report.pdf

[2]Diksha Tekriwal, Lacunae in the Surrogacy (Regulation) Act, 2021, The Leaftlet, (SEP. 20, 2022, 12.16 PM), https://theleaflet.in/lacunae-in-the-surrogacy-regulation-act-2021/

Kerala Union of Working Journalists v. Union of India & Ors.[1]

Kartikeya Anshu
III B.A.LL.B.

Introduction

This case centers on a Writ Petition of *habeas corpus* for the release of alleged detenue Sidhique Kappan, who is stated on the record to be a journalist and a member of the petitioner organisation. The petitioner contended that the arrestee had been taken into illegal custody without serving any notice or order. Additionally, a further application was filed for interim directions and release amidst the duration of the proceedings on account of Sidhique Kappan's deteriorating health.

In observing the facts and merits of the case and coming to its eventual judgement, the Supreme Court of India while deciding on the maintainability of the Writ Petition made observations on the Fundamental Right to Life and its applicability to undertrials.

Facts

A Writ Petition instituted under Article 32 of the Constitution of India was filed in the Supreme Court under the contention that the alleged detenue Sidhique Kappan was taken into illegal custody on 05.10.2020 at 16.50 hours, without serving any notice or orders as envisaged under Section 107 of the Code of Criminal Procedure, 1973 (Cr. P. C.). Subsequently, the petitioner organisation filed an application for interim directions and release of Sidhique Kappan on bail taking his deteriorating health conditions into account.

The State of U.P. responding in a counter affidavit dated 20.11.2020, strenuously opposed the allegations of the petitioners, and in a supplementary

[1] 2021 5 SCC 311.

affidavit dated 09.12.2020, claimed that the alleged detenue had been lawfully arrested; *'under Sections 107 and 151 Cr.P.C. and thereafter in FIR No. 199/2020 dated 07.10.2020 registered at Police Station Manth District Mathura under Sections 153A, 295A and 124A of the Indian Penal Code, Section 17, 14 of Unlawful Activity prevention Act, 1967 and Sections 65, 72, and 76 of Information Technology Act, 2008.'* Application by the petitioners for the release of the alleged detenue on bail for medical grounds was also contested by the State of U.P.

Issues Before the Court

1. Can the Writ Petition for release be held maintainable in the given circumstances?
2. What reliefs are available for the detenue in his current state of deteriorating health?

Observations

The facts and evidence presented to the Court by the Respondent-State invoked a record of the alleged detenue being presented to a judicial court after arrest, an FIR registration thereafter, a complete investigation, and a 5000-page charge sheet. Observed that the alleged detenue had other alternative remedies for the contention of his grievances including but not limited to the right to approach the competent court for the granting of bail and/or the High Court under Article 226 of the Indian Constitution and/or Section 482 of the Cr.P.C. Noting that the accused was legally detained, the Court limited itself to providing, given the circumstances and in keeping with the reliefs as sought in the application filed by the Petitioner, adequate healthcare to the alleged detenue.

Taking note of the flailing and precarious health condition of the undertrial, the Court observed the necessity of providing immediate and appropriate medical assistance. The Court directed that Sidhique Kappan be transferred to either Ram Manohar Lohia Hospital or to All India Institute of Medical Sciences (AIIMS) or to any other Government hospital in Delhi. Thereafter, due

treatment, he could always be transferred back to Mathura Jail as and when the doctors found him to be suitably fit for discharge after his medical treatment.

Responding to the arguments presented by the Solicitor General of India, Tushar Mehta, that all other prison inmates and detainees were receiving similar and appropriate medical care, the Court declared that 'the most precious Fundamental Right to Life unconditionally embraces even an undertrial' and reasoned that the directions of the Court are in keeping with the particular circumstances of the case. However, that other prisoners were receiving similar medical treatment was not the reason alone to prompt the Court to provide such a remedy.

Conclusion

In this case of *Kerala Union of Working Journalists vs. Union of India*, the Hon'ble Court found it inevitable to allow the Writ Petition filed by the petitioner organisation. Thus, in taking note of the arrestee's medical condition and in giving directions for relief as it deemed appropriate, the Court restated that the Fundamental Right of Life and Personal Liberty under Article 21 as preserved by the Constitution of India embraces even an undertrial.

Arbitration and Conciliation Amendment Act, 2021

Manaswi Kedar
I B.A.LL.B.

The Arbitration and Conciliation Amendment Act, 2021 (the "Amendment") ultimately got parliamentary approval on **March 10, 2021,** following a number of contentious debates. The Arbitration and Conciliation (Amendment) Ordinance, 2020, which went into effect on November 20, 2020, while the parliament was not in session, was supposed to be replaced by the Amendment. The Amendment Bill,2021 was introduced in Lok Sabha on February 4, 2021, and was subsequently passed by the Lok Sabha on February 12, 2021. It then received the assent of the President on March 11, 2021. The Bill, which sought to bring about two new changes to the principle legislation – Arbitration and Conciliation Act, 1996 (the 'Act') received mixed reactions from the stakeholders. And after a series of discussions, the Parliament effectively elevated the position of the Act of 1996.

The new additions are first, the unconditional stay on the enforcement of domestic awards and second, removal of the Eighth Schedule under the Act, regarding the qualifications of arbitrators.

Unconditional stay on Awards –

The 1996 act provided Section 34, which talks about the application of setting aside an arbitral award. And under Section 34(2)(b), an award can be challenged and set aside if it conflicts with public policy of India. Courts have interpreted this provision to mean an automatic stay on arbitral award which was granted the moment an application for setting aside the award was made. However, an amendment in 2015 rendered that under Section 36, an application to set aside an award under section 34 does not automatically stay the enforcement of such award, but the court has the power to grant the stay, subject to such conditions as may be deemed fit.

[1]Section 36(3) has undergone significant modification as a result of the Amendment's adoption of a new proviso. When the Court determines that a *prima facie* case exists, this proviso specifies that the- *(i) the arbitration agreement or contract which is the basis of the award; or (ii) the making of the award was induced or affected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge to the award under Section 34.*

It should be noted that Section 36 is part of the Act's Part 1 that deals with domestic award enforcement.

Qualifications of the Arbitrators –

Section 43-J specified certain qualifications, experience, and accreditation for a person to qualify as an arbitrator. [2]Section 43-J *Norms for accreditation*, introduced the Eighth Schedule into the Act. The Eighth schedule stated that –

A person shall not be qualified to be an arbitrator unless he— *(i) is an advocate within the meaning of the Advocates Act, 1961 having ten years of practice experience as an advocate; or (ii) is a chartered accountant within the meaning of the Chartered Accountants Act, 1949 having ten years of practice experience as a chartered accountant;* so on and so forth.

The schedule became a part of broad criticisms as it was not only restrictive but also unjustly prohibitive of the appointment of foreign arbitrators. It departs from the principle of party autonomy as well. This issue was remedied by the 2021 Amendment, which completely eliminated the Eighth Schedule. The qualifications, experience, and standards for accreditation of arbitrators shall be such as may be established by the regulations, according to Section 43J, which has the Eighth Schedule now missing. The placement of the section suggests that the Arbitration Council of India will frame the "Regulations."

[1] Chapter VIII of Arbitration and Conciliation Act,2021

[2] Substituted by Act 3 of 2021, S.3, for S. 43-J (w.r.e.f. 4-11-2020)

Conclusion

Both the new changes are a welcome step towards the development of arbitration in India. Considering the fact that the first addition that deals with Section 36, which falls under part I of the Act, leaves a void for applications to set aside foreign awards that are dealt in Part II of the Act, under Section 48, the provision would only impact international arbitration where India is the seat. It undoubtedly leads to a gap regarding the enforcement of all Awards arising out of arbitration with an offshore seat. However, notably the 2019 Amendment Act prescribes the formation of an arbitration council of India and the 2021 Act suggests that the Arbitration Council of India will frame the regulation regarding the qualification of arbitrators which is likely to attract more attention to India as an international seat for arbitration since foreign investors will no longer be deprived of their right to choose an arbitrator (even foreign).

Vikash Kumar v. Union Public Service Commission[1]

Sejal Kishor Patil
II B.A.LL.B.

Facts

Vikash Kumar, the appellant, intends to pursue a career in civil services. The appellant has a disability in the form of dysgraphia which is also known as writer's cramp. In the upcoming 2018 UPSC exams, UPSC issued rules for CSE 2018 exams. The instructions provided that all candidates must write their papers in their own hands and will not be allowed the help of a scribe. But they also provided exceptions that blind candidates, candidates with locomotor and cerebral palsy disabilities are allowed to have a scribe.

Appellant applied for scribe in the application of CSE 2018, but on 15th March 2018 appellant received a letter from UPSC, stating his application for Scribe had been rejected because he couldn't meet the criteria of 40% benchmark disability.

Issue

The main issue of this case is scope of the definition of a person with disability and does not the person with writer's cramp avail service of a scribe?

Arguments

From the Appellant :

The CSE Rules 2018 are unable to recognize that people with a Writer's Cramp have difficulty writing and thus should be granted a facility of a scribe. Other institutions in India such as the Institute of Chartered Accountants of India and University of Delhi recognize Writer's Cramp as a disability for which candidates can avail service of a scribe.

Rights of Persons with Disability Act, 2016 (RPWD) plays a key role in determining the person with a disability. Section 20(1) of the Act states: *"No*

[1] (2021) 5SCC 370.

Government establishment shall discriminate against any person with a disability in any matter relating to employment".

Thus, this act applies to all persons with disabilities and is not limited to persons with only benchmark disabilities. Hence, even without a disability certificate, the appellant would be entitled to measures of reasonable exemptions such as the service of a scribe for a professional, UPSC examination.

From the Respondent:

According to the Ministry of Social Justice and Empowerment (MSJE), Writer's Cramp is not a disability, but only a difficulty in writing. The MSJE had also issued comprehensive instructions on 26th February 2013 on the conduct of written examinations for persons with disabilities. It describes that the service of a scribe should only be allowed to a person with disability of 40% or more than.

In the RPWD Act, there's a list of disabilities and specific accommodation can be provided to them only. However, Writer's Cramp is not explicitly mentioned in the list of specified disabilities in the Schedule of the RPWD Act, 2016. Thus, the guidelines issued by CSE for UPSC, 2018 examination on 29th August 2018 are not applicable to persons suffering from Writer's Cramp.

Judgement:

Hon'ble Dr Chandrachud, M.R. Shah JJ, the two-Judge bench gave the verdict in the case.

The Supreme Court judgment in *Vikash Kumar v. UPSC* held that individual suffering from dysgraphia or writer's cramp is entitled to a scribe in the Civil Services Examination.

Reasoning:

From the constitutional point of view:

Part III of the Constitution does not explicitly talk about a person with a disability but, the golden triangle of Articles 14, 19 and 21 have applicability to the disabled.

It shows a critical difference between a person with a disability and a benchmark disability.

In this context, this Court in judgment *Jeeja Ghosh v. Union of India*[2] noted that a key component of equality is principle of reasonable differentiation and specific measures must be undertaken.

Justice A K Sikri stated in the above judgement: *"The principle of non-discrimination seeks to ensure that all persons can equally enjoy and exercise all their rights. Equality implies preventing discrimination and goes beyond remedying discrimination against groups suffering systematic discrimination in society. In concrete terms, it means embracing the notion of positive rights, affirmative action and reasonable accommodation."* [3]

The RPWD Act 2016 has a more inclusive definition of "persons with disability" than it was under the 1995 Act. Section 2(s) of the RPWD Act 2016 provides wider scope that includes a person with Writer's cramp.

It is clear from the RPWD Act, 2016 that "person with a disability" and "person with benchmark disability" are treated as separate categories because individuals have different rights and protections.

Conclusion:

This case paved the way for a 'positive' discrimination in the interest of the society. It is important to note that in a dynamic society, definitions stated long ago certainly needs to be upgraded with time. Thus, definition of a 'person with a disability' which had a narrow application in the RPWD Act, 1955 now has a wider ramification under the Act of 2016. A 'person with a disability' may have a specific kind of disability and may also face specific kind of problems. This difference requires special accommodation. Recognizing this difference will justifiably pave the way for substantive equality.

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[2]Jeeja Ghosh & Anr Vs Union of India & Ors, (2016)3 SCC 761 (India)

[3]https://www.livelaw.in/pdf_upload/vikash-kumar-vs-union-public-service-commission-ll-2021-sc-76-389034.pdf

TEACHERS' AND Ph.D. RESEARCH ARTICLES

Have the States Found Their Magic Potion? An Analysis of the Growing Use of Security Exception in the International Trade Regime

Ms. Divya Mittal[1]

When Harry Potter, Ron Weasley and Hermione Granger used the Polyjuice Potion to disguise themselves and break into Gringotts Wizarding Bank, little did they know that the disguise potion would gain so much popularity in the Muggle world. The Polyjuice Potion had an intriguing quality, it enabled its user to assume the physical appearance of some other person and thereby easily deceive them. In the international trade regime, the task of this magical potion is taken over by the national security exception. The States are increasingly using the security exception to disguise their restrictive trade measures in the otherwise liberal trade markets.

The objective of this paper is two-fold. Firstly, the paper seeks analyse the text of the national security exception under the WTO in the light of the cases decided as well as pending before the GATT/WTO Dispute Settlement Panel. And secondly, the paper also seeks to shed light on the growing reliance by the States on the national security in exception in their Free Trade Agreements (FTAs). It is therefore necessary to evaluate the impact of the expanding use of national security exception on the multilateral trading system and to ensure that it doesn't become a magic potion for protectionism.

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Uncoding the Security Exception

Before we delve into the intricacies of the national security exception and why the use of the same is controversial, it is necessary to understand the WTO and its exceptions in the historical context.

The World Trade (hereinafter referred to as WTO) was established on January 1, 1994 by an agreement during the Uruguay Round of the multilateral trade negotiations. The Uruguay Round was the last in the chain of negotiations under the auspices of the General Agreement on Tariffs and Trade (GATT), the predecessor to the WTO. The main intention of the negotiators was to establish a new, liberal and non-discriminatory trading system for the newly independent and growing economies of the world.

Consequently, when the WTO was established, it was founded on the strong principles of non-discrimination namely reduction of tariff and non-tariff barriers, market access, Most Favoured Nation (MFN) principle and National Treatment (NT). It is further argued that due to the growing globalization and the establishment of WTO, the traditional notions of sovereignty are called into question due to the fact that such demanding principles of the WTO require the States to adhere to them and therefore make it difficult for the States to implement domestic economic policies without considering the WTO principles of non-discrimination.[2]

However, the principles of non-discrimination are not absolute. Since its embodiment in the GATT 1947, Article XXI, commonly known as the "Security Exception" is shrouded in controversy, initially due its abandonment, then due to its 'self-judging' nature and now due to the excessive reliance of the States on it. Article XXI has now become an easy safeguard for sovereign power and therefore finds its place in almost every trade agreement being negotiated. Currently around ten disputes are pending with the WTO Dispute

[2]Ji Yeong Yoo & Dukgeun Ahn, *Security Exceptions in the WTO System: Bridge or Bottle-Neck for Trade and Security*, 192 Journal of International Economic Law (2016).

Settlement Body mainly for the invocation of the national security exception as a defence for their WTO-incompatible policies.

Here, it is pertinent to elaborate upon the actual text of Article XXI which deals with the security exception:

> Nothing in this Agreement shall be construed
>
> a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
>
> b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
>
> i. relating to fissionable materials or the materials from which they are derived;
>
> ii. relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
>
> iii. taken in time of war or other emergency in international relations; or
>
> c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

The text of Article XXI has raised numerous questions regarding its ambit and scope since its inclusion. Concerns regarding the misuse of the security exception go back to the Charter of the International Trade Organization (ITO) which was the trailblazer for establishment of GATT. [3] For instance, the record of the preparatory meetings of GATT demonstrate the view of a commentator

[3]Peter Van den Bossche & Werner Zdouc, The Law And Policy of the World Trade Organization Text, Cases And Materials, Cambridge University Press (3rd ed. 2013).

from the Netherlands, who claimed that, ".....kind of exception very difficult to understand, and therefore possibly a very *big loophole* in the whole Charter."[4] The inclusion of the exception was however supported by the delegates from the United States of America hoping that the States would exercise self-restraint in the use of the exception and would invoke it only in times of dire emergency.

Nevertheless, the 'hopeful situation; envisaged by the US is no longer applicable given the fact that nearly ten disputes are currently pending at the WTO on the grounds of the invocation of the security exception. The WTO Dispute Settlement Panel has given its ruling in the first of these disputes involving Ukraine's challenge to Russian measures against traffic in transit[5] soon followed by another decision given in the dispute between Saudi Arabia and Qatar where Qatar challenged Saudi Arabia's acts preventing Qatar from protecting their Intellectual property.[6] This was soon followed by the then Trump government's announcement to impose tariffs of 25 per cent on steel and 10 per cent on aluminium citing national security concerns. This resulted in a series of complaints by countries across the world against these anti-free trade measures. These situations remind us of the disguising act by Harry Potter and his friends' by use of the Polyjuice Potion, where the US is disguising its trade protectionism in the wrapper of national security. If this situation continues, very soon a majority of the countries will use this Polyjuice Potion and thereby end up defeating the very purpose and existence of the WTO.

[4]U.N. ESCOR, 2d Sess., 33d mtg. at 19, U.N. Doc. E/PC/T/A/PV/33, https://docs.wto.org/gattdocs/q/UN/EPCT/APV-33.PDF (July 24, 1947).

[5] WTO Doc. WT/DS512/7, (April 29, 2019), Panel Report, *Russia — Measures Concerning Traffic in Transit*.

[6] WTO Doc. WT/DS567/11, (Apr. 25, 2022), Panel Report, *Saudi Arabia-Measures Concerning the Protection of Intellectual Property Rights*.

The Evolution of the Security Exception at the GATT/WTO Dispute Settlement:

It was in May 1985, for the first time in the history of GATT's establishment that the Dispute Settlement Body of the GATT in a dispute brought into by Nicaragua against the restrictions by the U.S. of Nicaraguan-origin products made a ruling concerning the invocation of the national security exception by the USA.[7] USA strongly persuaded the Panel in the favour of non-justiciability of Article XXI, thereby resulting in no ruling by the Panel. However, the Panel noted that, "… GATT could not achieve its basic aims unless each contracting party, whenever it made use of its rights under Article XXI, carefully weighed its security needs against the need to maintain stable trade relations." [8] In another case relating to *Sweden — Import Restrictions on Certain Footwear*[9], the GATT Council expressed concerns over the Members' arbitrary use of the security exception to shield their domestic protectionism. This was followed by a long hiatus of non-usage of the security exception by the WTO member States until 2018 where there is a sudden explosion of cases before the Dispute Settlement Body, all involving the use of Article XXI. The first in the series to break the hiatus is the *Russia — Measures Concerning Traffic in Transit* case[10] where the WTO Panel discussed the invocation of article XXI by Russia.

In the continuance of Russia-Ukraine dispute over Crimea, Russia inflicted transit restrictions over Ukraine in January 2016 thereby severing key markets from Ukraine in Central Asia and the Caucuses, which its exporters could only reach by Russian roads and rail transport networks. Following this Ukraine initiated proceedings before the WTO Panel. Although the Panel decided in favour of Russia, however it made a significant observation relating to article

[7] L/6053 (Oct. 13, 1986), Panel Report, *United States — Trade Measures Affecting Nicaragua*.

[8] *Id.* at 6

[9] GATT Doc. L/4250 (Nov. 17, 1975), GATT, *Sweden — Import Restrictions on Certain Footwear*.

[10] *Id.* at 4

XXI.[11] The Panel cleared the air regarding the justiciability of article XXI and held that the exception in not self-judging and it can be tried before the Panel like any other provision of the WTO. The Panel's ruling is important for several reasons, the first being that it has opened the Pandora's Box of the national security exception.

The Russia-Ukraine ruling was soon followed by the invocation of article XXI by the United Arab Emirates, the Kingdom of Bahrain and the Kingdom of Saudi Arabia in three disputes initiated by Qatar.[12] The panel clarified its jurisdiction in all these disputes and has declared that the invocation of national security exception cannot be a unilateral act and are not subject to a member State's self-determination, rather all such disputes involving national security exception are justiciable before the WTO dispute settlement mechanism.

The last in the series is the *U.S. Section 232 Measures on Steel and Aluminium Products*[13]case. India, China, European Union, Mexico, Canada, Norway, Russia and Switzerland have individually approached the WTO Dispute Settlement Body against the U.S.A citing the imposition by the U.S. of duties of 25% and 10% on imports of steel and aluminium products, respectively as violative of GATT/WTO provisions. In the instant case, the U.S. is defending

[11] Tania Voon, *Russia—Measures Concerning Traffic in Transit*, 114 American Journal of International Law 96–103 (2020).

[12] *Id.* at 5

[13] WTO Doc. WT/DS/544/1 (Apr. 9, 2018), Request for Consultations by China, United States — Certain Measures on Steel and Aluminium Products; WTO Doc. WT/DS/547/1 (May 23, 2018), Request for Consultations by India, United States — Certain Measures on Steel and Aluminium Products; WTO Doc. WT/DS/548/1 (June 6, 2018), Request for Consultations by the European Union, United States — Certain Measures on Steel and Aluminium Products; WTO Doc. WT/DS/550/1 (June 6, 2018), Request for Consultations by Canada, United States — Certain Measures on Steel and Aluminium Products; WTO Doc. WT/DS/551/1 (June 7, 2018), Request for Consultations by Mexico, United States — Certain Measures on Steel and Aluminium Products; WTO Doc. WT/DS/552/1 (June 19, 2018), Request for Consultations by Norway, United States — Certain Measures on Steel and Aluminium Products; WTO Doc. WT/DS/554/1 (July 2, 2018), Request for Consultations by the Russian Federation, United States — Certain Measures on Steel and Aluminium Products; and WTO Doc. WT/DS/556/1 (July 12, 2018), Request for Consultations by Switzerland, United States — Certain Measures on Steel and Aluminium Products.

itself claiming section 232 of its Trade Expansion Act (The Act)[14], which authorizes the President of the U.S. to impose import restrictions to protect U.S. national security. The Act of 1962 allows for investigations under section 232 by petition, self- initiated by the Commerce Department, or initiated at the request of any government department or agency.

The Trade Expansion Act further lists the various factors that must be considered in the course of such investigation "in the light of the requirements of national security" which include domestic production needed for projected national defence requirements, the capacity of domestic industries to meet such requirements, existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defence, the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth, and the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries and the capacity of the U.S. to meet national security requirements.

The Act also stresses on the need to take into consideration "the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports shall be considered," in determining the impact of the weakening of the domestic economy on national security. This was followed by the release of a Presidential Memorandum that started off investigations under article 232 of the said Act in respect of steel and aluminium and concluded that "core industries such as steel, aluminium, vehicles, aircraft, shipbuilding, and semiconductors are critical elements of our manufacturing and defence industrial bases, which we must defend against unfair trade practices and other abuses". [15] This raises a significant question in

[14]Trade Expansion Act of 1962, H. R. l1970 (Oct. 11. 1962).

[15]Presidential Memorandum for the Secretary of Commerce, Aluminium Imports and Threats to National Security, WHITE HOUSE (Apr. 27, 2017),

the multilateral trading system i.e. whether a member State can unilaterally determine the rules of trade and violate the basic principles on which the multilateral trading system is based? The rulings of the WTO Panel will provide a major roadmap with respect to the future invocation of article XXI and only time will tell the sustainability of the national security exception.

The use of Security Exception in FTAs: Reality or Myth?

The various cases highlighted above under the WTO regime have discussed the justiciability as well as the scope of the security exceptions and raised varied and numerable questions before the international community.

Concurrently, it is also necessary to draw the reader's attention to the increased use of national security exceptions in agreements beyond the multilateral trade regime of the WTO i.e. in the Free Trade Agreements (hereinafter referred to as FTAs) signed between States. Since the publication of ex-President Trump's tariffs on imports of steel and aluminium into the U.S., and his threat to extend these to a wider category of products has unfurled, the discussion on the security exception has further gained center stage in international trade law.

Here it is pertinent to note the unconfined language of the security exception used in the FTAs by discarding the list of circumstances constituting essential security (as under Article XXI(b) of GATT 1994 entered into by the US has raised many eyebrows.

This is further seen in the text of the Comprehensive and Progressive Agreement of Trans Pacific Partnership (hereinafter referred to as "CP-TPP"), under which Article 29.2 states as follows:

Nothing in this Agreement shall be construed to:

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https://www.whitehouse.gov/presidentialactions/presidential-memorandum-secretary-commerce/ (which asks the Secretary of Commerce to initiate section 232 investigations on aluminium imports); Presidential Memorandum for the Secretary of Commerce, Steel Imports and Threats to National Security, WHITE HOUSE (Apr. 20, 2017),

https://www.gpo.gov/fdsys/pkg/DCPD-201700259/pdf/DCPD-201700259.pdf.

a) require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or

b) preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

From the text of this article it is clear that it allows for any action that a country directs is for the "protection of its own essential security interests", without having to establish whether or not it is related to war or other emergency, or whether it relates to traffic in arms or ammunition, etc. This gives a very wide spectrum to the countries to use this exception.

On the other hand, the European approach to the security exception is slightly different which continues to use the text as used under the GATT and sets out the circumstances for exercise of the security exception. Furthermore, the FTAs entered into by Japan continue to use the language of article XXI of GATT thereby specifying the circumstances like situations of war, military use and for maintaining international peace. It is also observed that in some situations the circumstances are further expanded to invoke security exceptions to include the protection of critical public infrastructure, including communications, power and water infrastructure, from deliberate attempts to disable or degrade such infrastructure. [16]

Other such recent examples include the EU-Mexico Free Trade Agreement, Agreement between the United States of America, the United Mexican States, and Canada, EU-Japan Economic Partnership Agreement and the Cooperation and Facilitation Agreement between the Federative Republic of Brazil and the United Arab Emirates.[17]

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[16] Agreement on Comprehensive Economic Partnership among Member States of the Association of Southeast Asian Nations and Japan, ASEAN-Japan, art. 8, Apr. 14, 2008; Comprehensive Economic Partnership Agreement between Japan and the Republic of India, Japan-India, art. 11, Feb. 16, 2011.

[17]United States-Mexico-Canada Agreement, Art. 32.1, adopted on Nov. 30, 2019. https://trade.ec.europa.eu/doclib/docs/2017/october/tradoc_156329.pdf.

From the above instances it is clear that the contemporary FTAs are carving out an unfettered regime from which any kind of judicial scrutiny can be easily eliminated. Such an approach is a clear misuse of the Polyjuice Potion to break the basic norms of the GATT/WTO regime. It is also significant to note that approach towards the security exceptions differs between the western nations and other sovereigns. The US approach is much more unconstrained thereby subject to greater abuse whereas on the other hand the approach if India, Japan, ASEAN is more WTO conforming which is likely to ensure greater stability of a rules-based system, and thus keeps the door open for judicial scrutiny.

The Future?

It can thus be concluded that the use of national security as a ground for protectionist measures can be clearly traced to the U.S. and President Trump's actions but the story does not end with it. This issue today requires in depth analysis and discussion. It is now time to lift our head from the mere issue of justiciability of this exception to more complex issues like that of the need for growing protectionism by the sovereign States in their trade dealings with one another. This is also indicative of the need for the trade rules and principles to evolve with the changing times and the growing realities. We need to understand that the springboard for the growing protectionism is the 2008 financial crisis which made the trading partners look inwards and bring greater security to their domestic producers. Furthermore, the 2018 World Trade Report points out that the stark upsurge in the use of restrictive trade measures is attributable to the G20 countries who have suddenly taken a flip in favour of protectionism due the emergence of China and other Asian economies.

Professor Dani Rodrik from Harvard Kennedy School of Government in an article written by him argues that the WTO has become dysfunctional. He claims that the root cause for this is the over-reach of trade agreements to

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EU-Japan Economic Partnership Agreement, signed on July 17, 2018, entered into force Jan. 17, 2019,

https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/32_Exceptions_and_General_Provisions.pdf,

Cooperation and Facilitation Agreement between the Federative Republic of Brazil and the United Arab Emirates Art. 25(3), adopted on Mar. 15, 2019.

address beyond the border aspects such as rules constraining domestic policies in subsidies, health and safety and intellectual property, and a variety of domestic regulations that may have an adverse impact on imports.[18] He argues that trade agreements need to be reinvented on the basis of recognition of economic diversity.[19]

This brings us to the last question i.e. how should the international trade regime adapt to the changing realities? Well, the answer lies in the understanding that the State's first need to stop considering liberalized trade rules and protection of domestic industry as antithesis of each other. Undoubtedly the countries do feel a need to protect their domestic industries, however this is possible under the existing of the WTO. Moreover, the States should rely on the less offensive procedures under article IX (Safeguard Measures) of the GATT/WTO than use the Polyjuice potion to completely disregard the multilateral trading system.

Some FTAs also shed light on "critical public infrastructure" as a ground of security exception thereby expanding its scope beyond the traditional GATT approach. This indicates a need to bring an amendment in the text of Article XXI which uses a rather narrow approach, included mainly to deal with the post-World War II era. Today, the nature of threats has expanded and is no longer limited to merely war or other traditional conflict situations.

With the emergence of contemporary threats to a nation's national security like climate change, cyber warfare, pandemics, etc., the security exception must also accordingly undergo amendments. The text of the security exception further needs to be refined to allow strict judicial scrutiny of its invocation and not allow this unilateral action by the States. Once these changes are made only then will the security exception not be used as the Polyjuice Potion to fool their other trading partners!

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[18] Dani Rodrik, *The WTO Has Become Dysfunctional*, Financial Times, Aug. 5, 2018, https://www.ft.com/content/c2beedfe-964d-11e8-95f8-8640db9060a7.

[19] *Id.* at 11

Implementation of Forest Rights in PESA Area of Maharashtra

Ms. Vaishali Bankar[1]
Dr. Tejaswini Malegaonkar[2]

Introduction:

Maharashtra is the third largest State by area and second most populated. Konkan coastal area and Deccan plateau by Sahyadri range of Western Ghat, Satpura hills and Bhamragad-Chiroli-Gaikhuri ranges are divided the forest lands amongst 36 administrative districts throughout the State of Maharashtra. Mainly, the forest areas are located at Western Ghats, Satpura hills and Gondwana regions. Total population of Tribal is nine percent.

To provide speedy settlement claims, customary and traditional rights, livelihood, housing and education and other essential services to the tribal, etc., the Parliament has enacted the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (2 of 2007) (hereinafter "**Forest Rights Act**") and the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Rules, 2007 made thereunder by the Ministry of Tribal Affairs, Government of India, so as:

> "to recognise and vest the forest rights and occupation in forest land in forest dwelling Scheduled Tribes and other traditional forest dwellers who have been residing in such forest for generations but whose rights could not be recorded and also to provide for a framework for recording the forest rights so vested and the nature of evidence required for such recognition and vesting in respect of forest land."

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Constitutional provisions:

Directive Principles obligate the State to take certain directions to promote the welfare of the people and achieve economic democracy as well as give directions to the Legislature and Executive to exercise their power. In the Constituent Assembly, Dr. Ambedkar had said *"that a party which failed to implement these principles would stand to lose in the next elections*."[3] As a part of such Directive Principles, Art. 40 of the Constitution of India provides that the State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.[4] "*The expression 'village' connotes ordinarily an area occupied by a body of men mainly dependent upon agriculture or occupation subservient thereto.*"[5] Article 40 of the Constitution requires the State to take steps to organise village panchayats and to confer on them powers and authority as may be necessary to enable them to function as units of self-government. Article 40 does not give guidelines for organising village panchayats.[6] The village panchayats however organised have to be equipped with such powers and authority as may be necessary to enable them to function as units of self-government.[7]

To provide effective legal instruments so that to develop and uplift the tribal, the Government of India had appointed a number of Committees to survey thoroughly. Amongst them the Balwant Rai Mehta Committee was appointed in January 1957, and the said Committee has recommended to establish the scheme of 'democratic decentralisation', which ultimately came to be known as *Panchayat Raj.* subsequently, the National Development Council in January

[3]M.P. JAIN, INDIAN CONSTITUTIONAL LAW 1596 (Wadhwa and Company, Nagpur, 5th ed. 2003).

[4]INDIA CONST. art. 40.

[5]DD BASU, SHORTER CONSTITUTION OF INDIA 631 (LexisNexis, 15th ed. 2018).

[6]P M BAKSHI, COMMENTARY ON CONSTITUTION OF INDIA 374 (Universal Law Publisher, 2nd ed. 2016).

[7] State of Uttar Pradesh v. Pradhan Sangh Kshetra Samiti, AIR 1995 SC 1512.

1958[8] Ashok Mehta Committee, G V K Rao Committee, L M Singhvi Committee, Thungon Committee and Gadgil Committee, appointed, time to time. The Rajiv Gandhi Government introduced the 64th Constitutional Amendment Bill in Lok Sabha in July 1989 but Rajya Sabha was not approved. Then V P Singh Government introduced the Bill in Lok Sabha in September 1990, but it lapsed. Thereafter, Narasimha Rao Government introduced it in Lok Sabha in September 1991 and finally it was passed as the 73rd Constitutional Amendment Act, 1992, which come into force on the 24th April 1993.

To give effect to the said Article 40, the Parliament has enacted the Constitution (Seventy-third Amendment) Act, 1992, after ratification by the State Legislatures as required by Art. 368 and by that amendment, a new Part IX has been added to the Constitution consisting of Arts. 243 to 243-O as well as Eleventh Schedule have also been added thereof. The said 73rd Amendment has introduced a panchayat system at the grass roots level. Such a panchayat system had been based on State Legislation so as to strengthen the panchayat system up to grass root level by giving it a constitutional base.

To facilitate the safety of the interest of the vast tribal population in India, a high level committee was constituted under the chairmanship of Shri Dileep Singh Bhuria, Member of Parliament, in June 1994 and the said committee was examine certain issues regarding tribal societies, their own customary laws, traditional practices, community culture, political and administrative systems and submitted its report in January 1995.[9]

On the basis of the Bhuria Committee Report, the provisions of such Part IX of the Constitution relating to the panchayats to the Scheduled Areas has been further extended by the enactment of the Provisions of the Panchayats

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[8]M LAXMIKANTH, INDIAN POLITY FOR CIVIL SERVICES EXAMINATIONS 38 (McGrow Hill Education (India) Private limited, Chennai, 5th ed. 2018).

[9]NotanBhusan Kar, *PESA Act and Tribal Welfare in the Era of Globalization*, *in* TRIBAL SELF-GOVERNANCE PESA AND ITS IMPLEMENTATION 86 (Nupur Tiwari ed., 2016). [hereinafter "**NotanBhusan Kar**"]

(Extension to the Scheduled Areas) Act, 1996 (Act 40 of 1996) (hereinafter "**the PESA Act**"). The term of the Scheduled Areas has been defined in Art. 244(1) which inter alia provides that the provisions of the Fifth Schedule shall apply to the administration and control of the Scheduled Areas and Scheduled Tribes in the State. Art. 243-G provides *inter alia* that a State may, by law, endow *panchayat* with such powers and authority to function as institutions of self-government and for the devolution of powers and responsibilities upon *panchayat*. Eleventh Schedule has provided the subject matters, such as agriculture, land development, minor irrigation, animal husbandry, fisheries, social forestry and farm forestry, minor forest produce, small scale industries, *khadi* and cottage industries, housing, drinking water, fuel and fodder, roads, waterways, electrification, non-conventional energy sources, poverty alleviation programme, education, libraries, cultural activities, markets and fairs, health and sanitation, family welfare, women and child development, social welfare, welfare of weaker section, public distribution system, maintenance of community assets, etc., which prepare plans for economic development and social justice and also to implement various schemes. The Governor shall annually make a report to the President of India regarding the administration of the Scheduled Area of the State.[10] The President of India has in exercise of powers conferred by clause 6 of the Fifth Schedule to the Constitution, by order, rescinds the Scheduled Areas (Part A States), 1950 and the Scheduled Areas (Part B States) Order, 1950 and in consultation with the Governor of Maharashtra, published in Gazette of India, Extraordinary, PART II- Section 3-sub-section (1), dated the 2nd December 1985, at page 8, published Government Notification, Ministry of Law and Justice (Legislative Department), vide G.S.R. 876(E), declaring that the Scheduled Areas (Maharashtra) Order, 1985. District Thane, Palghar, Nashik, Gondia, Dhule, Ahmednagar, Pune, Nanded, Nandurbar, Raigarh, Amravati, Yavatmal,

[10]DR. S K AWASTHI, THE CONSTITUTION OF INDIA 1304 (Dwivedi Law Agency, Allahabad, 5th ed. 2016).

Gadchiroli and Chandrapur[11] of the State of Maharashtra to be the Schedule Area for the purpose of the provisions of the PESA Act.

Historical Background:

The British had imposed restrictions on local forest dwelling communities declaring that the forest is a national property. They controlled forests for commerce and national development. They had nothing to do with conservation as well as community development. The Indian Forest Act, 1878 and other related laws were general enactments regulating the forests during the British India regime. To consolidate these laws relating to forests, transit of forest produce and duty leviable on timber and other incidental provisions relating thereto, the Indian Forest Act, 1927 (16 of 1927) has been enacted and come into force with effect from the 21st September 1927. Thereafter, the Government of India has enacted the Forest (Conservation) Act, 1980 (69 of 1980) with effect from the 27th December 1980, with a view to prevent the deforestation which causes ecological imbalance and leads to environmental deterioration. In *T.N. Godavarman Thirumulpad v. Union of India*, the Supreme Court in its order dated the 3th October 2002, observed that, "*a Compensatory Afforestation Fund may be created in which all monies received from the user agencies shall be deposited."*[12]The Court directed that the **"***Fund shall be utilised for plantations, protection of forests, wildlife protection and other related activities".* With a view to comply with the directives of the Hon'ble Supreme Court, the Government of India has enacted the Compensatory Afforestation Fund Act, 2016 (38 of 2016) and the Compensatory Afforestation Fund Rules, 2018 made thereunder.

Forest Rights:

Sub-section *(1)* of section 3 of the Forest Right Act have been provides, *inter alia*, the following forest rights to, -

[11] Tribal Sub-Plan in Maharashtra, A Diagnostic Study Conducted by the Tata Institute of Social Sciences, Mumbai, at page iv (2015).

[12]T.N. Godavarman Thirumulpad v. Union of India, W.P. (C) No. 202 of 1995.

(a) hold and live in the forest land;

(b) community rights;

(c) ownership access to collect, use and dispose of minor forest produce;

(d) other community rights, such as fishing, traditional seasonal resources, etc.;

(e) community tenures of habitat and habitation;

(f) on disputed lands of any nomenclature.

(g) convert of *patta* or leases or grants on forest lands to titles.

(h) settlement and conversion of all forest villages, old habitation, surveyed villages and other villages in forests.

(i) protect, regenerate or conserve or manage any community forest resource.

(j) recognised by any traditional or customary law.

(k) access to bio-diversity and community right to intellectual property and traditional knowledge related to bio-diversity and cultural diversity;

(l) any other customary or traditional rights excluding hunting or trapping or extracting a part of body of any species of wild animal.

(m) rehabilitation including alternative land.

Sub-section *(2)* of the said section has imposed the duties on the Government to provide schools, dispensary or hospital, *anganwadis*, fair price shops, electric and telecommunication lines, tanks and other minor water bodies, drinking water supply and water pipelines, water or rain water harvesting structures, minor irrigation canals, non-conventional source of energy, skill upgradation vocational training centres, roads and community centres.

The Governor of Maharashtra has by issuing notification in pursuance of his legislative powers conferred by sub-paragraph (1) of Paragraph 5 of the Schedule Vth of the Constitution, and accordingly modifies the provisions of

the Forest Rights Act, in its application to the State of Maharashtra, providing that "*to enable tribal and other traditional forest dwelling families to build houses in the neighbourhood forest area."* This provision was inserted with a view to prevent the migration of forest-dwelling families outside their native villages and to provide them housing by extending the village site into forest land in their neighbourhood.

Guidelines on Forest Rights Act:

The Government of India, Ministry of Tribal Affairs[13] has issued the Guidelines on the implementation of the Forest Rights Act, with a view to ensure effective implementation the provisions of the Act and rules made thereunder and for the purpose issued in this regards, the following guidelines,-

(1) Process of Recognition of Rights.- Officials of Revenue and Forest Department should remain present when the Forest Rights Committee visit site for verification of claims; in case of rejection or modification of claim by the Gram Sabha or Sub-Divisional Level Committee or District Level Committee, communicate the aggrieved person so that he should be enable to file petition before the appropriate Committee within sixty days; Sub-Divisional Level Committee or District Level Committee should remand such rejected or modified claim for reconsideration, etc.;

(2) Minor Forest Produce. - All non-timber produce of plant origin, including bamboo, brush wood, stumps, cane, tussar, cocoons, honey, wax, lac, tendu or kendu leaves, medicinal plants and herbs, roots, tubers, etc. of the Minor Forest Produce should be providing market, remuneration, transport, processing by the State Government;

(3) Community Rights. - State Government may convert all forest villages, unrecorded settlements and old habitations into revenue villages, and

[13] The Government of India, Ministry of Tribal Affairs, vide No. 23011/32/2010-FRA [Vol.II (Pt.)] (12 July 2012).

also provide land for schools, health facilities, public spaces, etc., and to maintain its records;

(4) Protection against Eviction, Diversion of Forest Lands and Forced Relocation. - Ministry of Environment & Forest, vide letter No.11-9/1998-FC(pt), dated the 30th July 2009, directed State Government to complete the process of settlement of rights under the Forest Rights Act relating to the diversions of forest land for non-forest purposes under the Forest (Conservation) Act, 1980;

(5) Awareness-Raising, Monitoring and Grievance Redressal.- State Nodal Agency should plans to conduct trainings for revenue, forest, tribal welfare department's field staff, officials, Forest Rights Committees, panchayat representatives, etc., so that the awareness about various provisions of the Act and rules should be spread at village levels.

District-wise analysis:

As per the citizens report the performance of the claims received, pending, approved and rejected at various levels in the Gadchiroli District has implementing above 60 percent of its minimum potential, only two district with above 33 percent implementation, nine district with less than 30 percent implementation and 21 districts with zero or near zero implementation, which includes Ahmednagar, Chandrapur, Dhule, Gondia, Kolhapur, Nashik, Pune, Raigad, Satara, Thane and Yavatmal[14]. The Tribal Commissionerate of Maharashtra has up to November 2016, received a total 6264 claims that were approved at the DLC level, 5741 titles have been distributed with 523 titles yet

[14] Maharashtra CFR-LA, Promise and Performance: Ten Years of Forest Rights Act in Maharashtra: Citizen's Report and Performance of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (CFR Learning and Advocacy Group Maharashtra, National Community Forest Rights-Learning and Advocacy process, March 2017), available at www.fra.org.in.

to be distributed. Districts like Yavatmal and Thane have more than 60 percent of the titles which are yet to be distributed.[15]

Hurdles for implementation:

The second Administrative Reforms Commission has stressed on the effective implementation of the PESA. Moreover, international organizations too had stressed the right to self-determination for these groups.[16] For that purpose, it is necessary to make the State legislations in consonance with customary laws, social and religious practices as well as traditional management practices of community resources of the tribal.[17] Therefore, it is important to examine the various provisions of the Maharashtra Land Improvement Schemes Act (XXVIII of 1942); the Bombay Money-lenders Act, 1947 (Bom. XXXI of 1947); the Maharashtra Prohibition Act (XXV of 1949); the Maharashtra Police Act (XXII of 1951); the Maharashtra Village Panchayats Act (III of 1959); the Maharashtra Fisheries Act, 1961 (Mah.I of 1961); the Maharashtra Industrial Development Act, 1961 (Mah. III of 1962); the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961 (Mah. V of 1962); the Maharashtra Land Revenue Code, 1966 (Mah. XLI of 1966); the Maharashtra Forest Produce (Regulation of Trade) Act, 1969 (Mah. LVII of 1969); the Maharashtra Housing and Area Development Act, 1976 (Mah. XXVIII of 1977); the Maharashtra Irrigation Act, 1976 (Mah. XXXVIII of 1976); the Maharashtra Forest Development (Tax on Sale of (Forest-produced by Government or Forest Development Corporation) (Continuance) Act, 1983 (Mah. XXII of 1983); the Maharashtra Transfer of Ownership of Minor Forest Produce in the Scheduled Areas, and the Maharashtra Minor Forest Produce (Regulation of Trade) (Amendment) Act. 1997 (Mah. XLV of 1997), as these State Acts have been correlated with the implementation and administration in the PESA area.

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[15]*id.*

[16]Notan Bhusan Kar, *supra* note 7, at 105.

[17]Notan Bhusan Kar, *supra* note 7, at 167.

The trends have emerged particularly in areas where CFR rights have been claimed and Gram Sabhas have started asserting these rights toward governance and management of CFR forest.[18] The management of conservation of forest with local and sustainable governance, CFR management strategies and plans, implementation of plans through District Convergence Committees, assertion of rights over non timber forest produce, issues of the particularly vulnerable Tribal Groups (PVTGs) and habitat rights of the media gonds, reviewing and correcting faulty CFR titles, reclaiming the resource of water bodies as CFR in control of Gram Sabhas, engendering forest governance through FRA are the hurdles while implementing the provisions of FRA.

Challenges:

There is a lack of awareness about the CFRs particularly in the PESA areas. There is a lack of dedicated staff at the State and District level committees. Lack of trust between Gram Sabhas and Forest Department. There is a very high rate of rejection of claims, discrepancies in the titles and title corrections, conversion of forest villages into revenue villages, etc. The Compensatory Afforestation Fund Act, 2016 has released around 42000 crore rupees to the State for carrying out compensatory afforestation, primarily in lieu of diversion of customary forests of tribal lands.[19]

Implementation:

The Office of the Secretary to the Governor of Maharashtra has to provide housing area to the tribal so that to stop migration of the Forest Dwelling Scheduled Tribe families and other traditional Forest Dwelling families outside the native habitats and to provide stability in tribal lives, modified suitably the provisions of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (2 of 2007)[20] by issuing Notification, dated the 23 September 2020, in this regard.

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[18]Notan Bhusan Kar, *supra* note 7, at 167.

[19]Notan Bhusan Kar, *supra* note 7, at 167.

[20] Notification issued by the Office of the Secretary to the Governor of Maharashtra, published in *Maharashtra Government Gazette* (23 September 2020).

The Supreme Court in *Samatha v. State of Andhra Pradesh*[21] has struck down the mining leases so granted, and held that the Government lands, forest lands and tribal lands in Scheduled Area cannot be leased out to non-tribal or to private industries. In *Nandini Sundar v. State of Chhattisgarh*,[22] has struck down the recruitment of Special Police Officers, held that the human rights of local population and human rights activists cannot be violated on the pretext of counter-insurgency. In *Orissa Mineral Corporation Limited v. Ministry of Environment and Forests,*[23] SC held that the provisions of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, are protecting the tribal autonomy, cultures and economic empowerment, to attain social, political and economic justice, and good governance for all. An issue involved in Biological Diversity Ac, 2002 and Regulations 2014 require Indian entities, and not only those with a foreign element, to pay a fee for fair and equitable benefit sharing with tribal communities for the use and development of bio-products constituting their traditional knowledge.

Review Meeting:

Minutes of the Review Meeting held between 7th June 2021 to 14th June 2021, under the Chairmanship of Secretary, Tribal Affairs, Government of India, has been communicated vide F.No.11015/02/2019-Grants, Ministry of Tribal Affairs (Grants Division), on the 7th July 2021[24]. In the said meeting, on behalf of the State of Maharashtra, Shri Anup Kumar Yadhav, Secretary of the Rural Development Department, had represented. In the said meeting discussed various issued under the schemes of the Ministry, such as, Sharing of Best Practices which can be adopted, Status of submission of proposals for 2021-22 financial year after due approval of Empowered Committee, Uploading data on Diagrams (www.grants.tribal.gov.in), EMRS (www. emrs. tribal.gov.in) and

[21]Samatha v. State of Andhra Pradesh, AIR 1997 SC 3297.

[22]Nandini Sundar v. State of Chhattisgarh, AIR 2011 SC 2839.

[23]Orissa Mineral Corporation Limited v. Ministry of Environment and Forests, 2013 (6) SCC 476.

[24] Ministry of Tribal Affairs (Grants Division), F.No.11015/02/2019-Grants (7 July 2021).

Scholarship Portal, Identification of land for EMRS sanctioned between 2018-19 and 2020-21 and to be sanctioned during 2021-2022, Progress of construction of EMRSs under State Board, Adoption of RR framed by NESTS to be adopted by State Societies, Scholarships, Initiatives taken in tribal areas in view of Covid 19 crisis, Invitation to National and International achievers/celebrities as "Special invited Guests" to the Republic Day Parade, 2022, Integrated village development scheme, FRA, NCST Annual Reports Compliances, Status of National Tribal Policy and Xaxa (HLC) Committee, Monitoring of State TSP, etc.

Agenda 9 on FRA directs all the States that the petition in Supreme Court still is pending, therefore, requested to all State Governments "*to ensure that the contents of their respective affidavits filed in the Court be adhered and also keep in mind the timelines that have been submitted to the Court*" and also discussed on the "*data on rejection of cases should be thoroughly examined and reasons for rejection should be documented for each case*".

> "The State Government of Maharashtra has been uploading the implementation of FRA in FRA Portal. However, discrepancies [declining titles/land figure (CFR) in MPR found after May, 2020 to April 2021. The State Government was, therefore, advised to send correct MPRS for the said period.
>
> In respect of review of rejected claims, the State Government was advised to ensure that due process of law (communication of reasons for rejection at each leve, etc.) has been followed in the process to be prepared before the Supreme Court hearing. 1752 cases under FRA were reported to be pending in the State. Success stories of bamboo plantation/fishing on FRA land Community Forest Management success stories were brought out

and the State was requested to formally share these stories with FRA Division of MOTA."[25]

Conclusion:

The implementation of the provisions of the CFR rights in Maharashtra is quite satisfactory insofar as the Gadchiroli District is concerned. But the rest of Maharashtra needs to implement the CFR rights more effectively with the help of Gram Sabhas, Adivasi Movements, Civil Society Groups, Tribal Development Department, Governor's office, Block and District administration. Needs to spread the awareness programme throughout Maharashtra at all levels, so that every Tribe must know its provisions and importance. Needs to provide livelihood, food and water security together with socio-cultural integrity. To provide information relating to convention on Biological Diversity and climate change. The Government institutions are crucial to provide good governance, mobilization and resource management. Necessary to stop the conflicting policies of notification on Village Forest Rules, leasing out forest lands to FDMC without Gram Sabha's consent, supporting JFM committee in recognised CFR villages and diversions of forests for non-forest purposes against the wish of the affected Gram Sabha's consent, etc. The Tribal Development Department of the Government of Maharashtra is a nodal agency, and therefore, this nodal agency implements its policies effectively, in the interest of the Tribal.

[25] *id.*

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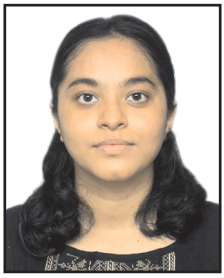

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