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# PEER REVIEW PANEL



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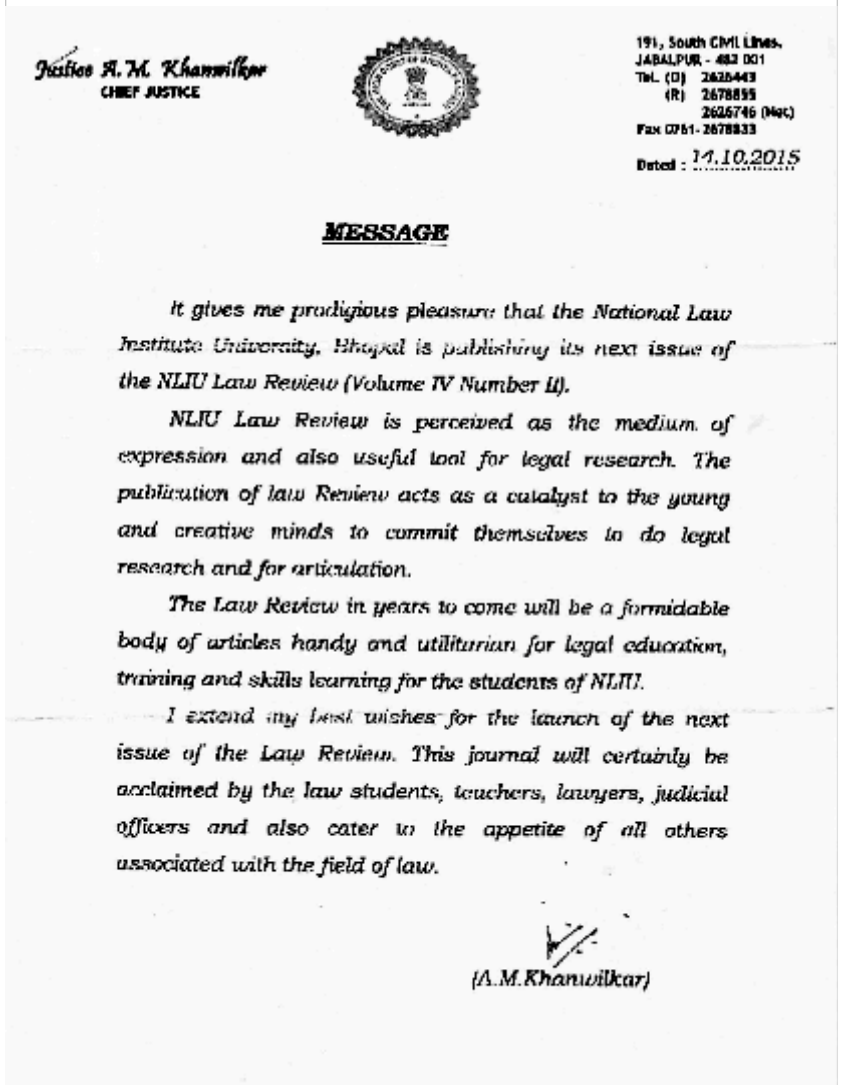
# MESSAGE FROM THE PATRON-IN-CHIEF



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Dated : 14.10.2015

**MESSAGE**

It gives me prodigious pleasure that the National Law Institute University, Bhopal is publishing its next issue of the NLIU Law Review (Volume IV Number II).

NLIU Law Review is perceived as the medium of expression and also useful tool for legal research. The publication of law Review acts as a catalyst to the young and creative minds to commit themselves to do legal research and for articulation.

The Law Review in years to come will be a formidable body of articles handy and utilitarian for legal education, training and skills learning for the students of NLIU.

I extend my best wishes for the launch of the next issue of the Law Review. This journal will certainly be acclaimed by the law students, teachers, lawyers, judicial officers and also cater to the appetite of all others associated with the field of law.

(A.M.Khanwilkar)

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# MESSAGE FROM THE PATRON

With the immense pleasure I place NLIU Law Review, Volume IV, Issue II in your hands. A reflection of the intellectual prowess of the legal fraternity, I hope that this edition will prove to be an asset for further research in the field. The research circumventing myriad of topics and their related aspects diversify the legal literature. The versatile opinions on different subjects from students and academicians help in dissemination of knowledge stipulating deliberations on them.

The journal aims towards bringing awareness among the legal fraternity to contribute to the legal literature by way of articles, essays, case notes or even a book review. Though the journal has support and guidance of legal luminaries, the contributions are further evaluated by a Peer Review Mechanism. The mechanism entrusts to form different Boards for a swift and steady evaluation and evict any probability of error or plagiarism.

I would like to thank the Patron-in-Chief of the Law Review, Hon'ble Shri Justice Ajay Manik Rao Khanwilkar, Chief Justice, High Court of Madhya Pradesh for providing students with his valuable guidance in this endeavour. I am even grateful to Prof. Ghayur Alam for his constant encouragement and support to students throughout the production of this edition. Atlast, I appreciate students for their ardent contribution for this special issue. I hope that they will further contribute with utmost zeal and intellectual fervour in the upcoming issues of the Law Review.

**Prof. (Dr.) S.S. Singh**
**Director**
**National Law Institute University**

# Message From the Faculty Advisor

This is Volume IV Issue II of the NLIU Law Review. First of all, I am thankful to the students involved who have worked with dedication and commitment in this endeavour. Through this Law Review we are working towards the aim of encouraging and inculcating a spirit of legal research and scholarship in the student community.

The articles included in this Issue are selected for they seek to provide new perspectives to ongoing debates. The issues covered in these articles have a wide range. An article titled *'Future of Internet Governance: Multilateralism, Multi-Stakeholderism or a Third Path?'* discusses the emergence of internet and the legal norms and regulations relating thereto. The current models of internet governance are discussed and a new model is suggested in the light of the inadequacies of earlier models. Another article, *'Analysis of the Inherently Flawed Case of Dashrath Rupsingh Rathod: A Fascinating Paradox of a Judgment Falling Against the Interests of the Aggrieved',* discusses a recent judgement of the Supreme Court and its implications on the territorial jurisdiction of a Court to try an offence under Section 138 of the Negotiable Instruments Act, 1881. The denouncement of International Centre for Settlement of Investment Disputes Convention by Latin American countries is discussed in *'Defending the ICSID: Understanding Latin America's Denunciations In Context And Examining Scope For Reform'*. The article titled *'Unilateral Clauses in Arbitration: Validity and Enforcement'* discusses issues relating to enforcement and validity of such clauses. It identifies the jurisdictions upholding the validity or invalidity of such clauses. Another article, *'Looking "Through" to a "Commercial Rationale": Reviewing The GAAR Implications Of DIT V. Copal Research And Others',* seeks to identify the line between 'tax planning' and 'tax evasion' in the light of the provisions of the General Anti-Avoidance Rules. In *'Communal-Secular Dichotomy: Are the Communal Violence Bills Adequate to Tackle the 'Frankenstein's Monster'?',* the

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authors discuss the communal-secular dichotomy and question the efficacy of the communal violence bills in tackling what they call the 'Frankenstein's Monster'. The article goes on to discuss the causes of communal violence in India and makes suggestions for reform that may be undertaken to deal with this problem.

We take this opportunity to thank the Patron-in-Chief, Hon'ble Justice Ajay Manik Rao Khanwilkar, Chief Justice of Madhya Pradesh High Court for his support and good wishes. We thank Prof. (Dr.) S.S. Singh, the Director of National Law Institute University, Bhopal for his encouragement and guidance. The contributors whose articles are included in this Issue deserve special mention and thanks for making this endeavour a success.

We also invite comments and criticism on the articles published in this Issue. Kindly feel free to make suggestions and comments for improving the quality and help generate debates.

**Prof. (Dr.) Ghayur Alam**
**Faculty Advisor**

# Editorial Note

The present issue of Law Review attempts to explore previously untouched territories across laws around the globe. The various articles included in this issue deal with problems that have been, and still are, relevant to development of laws in contemporary India and the world. The aim of this law review is to encourage debate, discussion and dialogue regarding ongoing legal issues. The articles in this copy of the journal are wide ranging in their areas of law, and they seek to present a new and previously unexplored dimension of the ongoing debates and discussions.

The reader will find an article discussing the exploration of the interpretation of Intellectual Property Rights with reference to the Constitution of India. This problem acquires significance due to the established need for a more developed IPR jurisprudence in India, on account of globalization and dissolution of international boundaries. Looking at this through the Constitutional glass lends a new perspective to the problem.

In light of the recent crash of the US private spacecraft, Virgin Galactic in space, it becomes imperative to address issues such as product liability of manufacturers of space products under international as well as domestic space law regimes. With the advancement in space technology and increased access to space products, a problem arises with regard to financial and technical complications in space products and assigning responsibility for such defaults. Considering the fact that space law will only expand in its magnitude and scope in the future, it becomes necessary to develop legal instruments in order to determine liability for such defaults.

In another article, the recent case of

*DIT* v. *Copal Research Limited* has been critically analyzed in the light of its impact on the offshore transfer of Indian assets. The Delhi High Court, in this landmark judgment, held that the profits arising from the sale of shares of overseas entities which derive a majority of their value from Indian assets shall fall

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beyond the scope of taxation under the Indian taxation laws. The positive and negative effect consequences of this judgment need to be analysed due to the fact that it has a great impact upon the international investor community.

An article on umbrella clauses in international investment arbitration delves into the issue of whether a broad, or a restrictive, approach is desirable when considering the scope of BIT protections and the extension of such protection to contractual obligations. This is done in light of two judgments which support opposing points of view, and the article attempts to decide which view is more desirable and why.

The problem of corporate criminal liability has been raised in another article. This paper attempts to explore the various theories of corporate criminality and justify whether holding the corporation, and not its employees, liable is a viable concept. Considering the expanding scope of corporate culture in India, it becomes essential to review the liability of such structures whenever a crime is committed against the society.

The Law Review team wishes that the present issue is successful for all the readers and hopes that the collection of articles on various contemporary issues proves to be both useful as well as appreciable. We welcome any suggestions to improve the same.

**Editorial Board**

# CRYING OUT FOR LEGISLATIVE ATTENTION: THE INADEQUATE CHILD MARRIAGE LAWS OF INDIA

*Abhinav Kumar and Arundathi Venkataraman*

*The laws relating to child marriage in India have been ineffective in curbing this rampant social evil. Statistics reveal consistently high levels of child marriage even till today. The previous law on child marriage – the Child Marriage Restraint Act, 1929 – was deferential in its approach and thoroughly unsuccessful in eliminating the practice of child marriage. Consequently, in 2006, the Parliament enacted the Prohibition of Child Marriage Act. Yet, as this Paper argues, the prevailing Act is equally ineffective, since it creates a legal position which is as ambiguous and uncertain as under the previous legislation. Particularly prominent is the issue of validity of child marriages. The current legislation adopts a prohibitive-punitive approach, in that it merely penalizes the solemnization of such marriages and is silent as to their validity. Consequently, the judiciary has found its hands tied, and has been compelled to accord legitimacy to the practice of child marriage. This is detrimental to society and this Paper argues that the legislature must adopt a sterner stance to eliminate the practice. Further, as it stands today, even in its well-meaning provisions, the Act betrays non-application of mind on part of the legislature, and raises several pertinent issues that are subsequently discussed. First, the Paper analyzes the specific issue of legitimacy of children borne out of child marriages. The evidently hurried drafting gives rise to inconsistency, both within the Act and between the Act and prevailing Hindu personal law. Secondly, the Paper questions the constitutionality of the legitimacy provision of the Act. It is argued that as per its present wording, the relevant provision is unconstitutional. Further, the legislation is riddled with several inconsistencies and anomalies that hinder its efficacy. This is evidenced by, inter alia, the inequality between genders created by its penal provisions,*





*the confusion generated by its reference to the Indian Majority Act, and its inconsistency with the Indian Penal Code. In light of these flaws, the Paper suggests that the Legislature take immediate remedial action to refine the Statute and give it more teeth to eliminate the social evil of child marriage.*

## I. Introduction

A recent UNICEF Report stated that India has the second highest number of child marriages in the world, with 43% of Indian women having been married before the age of 18.[1] Another recent study[2] reported that young women who married before the age of 18 were twice as likely to report being beaten, slapped or threatened by their husbands as girls who married later. They were also three times as likely to report being forced into sexual intercourse without their consent in the previous six months.

These statistics confirm the continuing nature of the social evil of child marriage in India, and only a minuscule portion of its hazards. A retrogressive practice that remains firmly entrenched in Indian society, the problem of child marriages can be traced to the complex matrix of religious traditions, social practices, economic factors and deeply rooted prejudices. The chief amongst the reasons, as per the Law Commission, is poverty and culture, and patriarchal traditions and values.[3] No matter how it is defended, it is indisputable that child marriage is a gross violation of human rights, and akin to child abuse. This is particularly true for females, since in most cases child marriage is the precursor of frequent and unprotected sexual activity leading to serious health consequences such as anaemia, maternal/infant mortality and HIV/AIDS.[4] Further, the rights of young children, particularly in terms of education, are severely hampered by a child marriage.

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1 *India has second-highest number of child marriages:* UNICEF, THE HINDU, 12th September 2014, available at: http://www.thehindu.com/news/international/south-asia/46-of-south-asian-girls-marry-by-18-unicef/article6403721.ece, accessed 13th September 2014.

2 International Centre for Research on Women, *Child Marriage and Domestic Violence,* available at: http://www.icrw.org/files/images/Child-Marriage-Fact-Sheet-Domestic-Violence.pdf, accessed 30th October 2014.

3 Law Commission of India, 205th Report, *Proposal to Amend the Prohibition of Child Marriage Act, 2006 and other Allied Laws,* p. 17. (hereinafter Law Commission Report)

4 *Id* at 10.

On the legal side, however, the continued occurrence of child marriages clearly points to shortcomings in the law, and a lack of legislative and political will[5] to eradicate the same. Against this backdrop, the present Paper is an attempt to critique India's laws on child marriage, with particular focus on the statute currently in force, the Prohibition of Child Marriages Act, 2006 ['PCMA']. As subsequent Parts will show, the apparent deference of the Parliament to cultural traditions – evident in its drafting of statutory provisions – and the absence of stringent provisions in the PCMA and earlier statutes have allowed child marriages to continue unchecked.[6]

This paper is divided into 7 Parts. Part II will provide a brief history of child marriage law in India, with reference to the Child Marriage Restraint Act, 1929 ['CMRA'] and the Hindu Marriage Act, 1955 ['HMA']. Part III will provide a comprehensive overview of the PCMA itself. Subsequent parts shall critically analyze specific aspects of the legislation which require further scrutiny- Part IV will examine the legal validity of child marriages, while Part V will engage questions related to legitimacy of children begotten of a child marriage. Part VI will scrutinize certain anomalies inherent in the PCMA which urgently require legislative attention. Part VII will offer a brief concluding analysis, and make suggestions to strengthen the prevailing law.

## II. Legal History of Child Marriage

### *A. Rukhmabai And Phulmonee*

While considering the legal history of child marriage law, we may

[5] India has clearly demonstrated a lacklustre approach to the issue of child marriage. For instance, India was recently subjected to intense criticism for not being a co-sponsor to the UN Resolution on Child, Early and Forced Marriage (adopted in September 2013). Indian delegates defended the official stance by issuing official statements to the effect that India is not in a position to eliminate child marriage completely due to high poverty levels. The adoption of such flimsy justifications clearly shows a lack of political will towards the issue and leaves little hope for the eradication of child marriage in India. See, Child Marriage in India: Achievements, Gaps and Challenges, available at: http://www.ohchr.org/documents/issues/ women/wrgs/forcedmarriage/ngo/haqcentreforchildrights1.pdf, accessed 23rd October 2014.

[6] Though the PCMA contains several penal provisions aimed at preventing child marriages, conviction rates continue to be dismal. For instance, in 2010, only 111 cases were reported under the PCMA, and only 11 convictions were secured. *See, National Crime Records Bureau* in UNICEF Information Factsheet on child marriage, November 2011, available at: http://www.unicef.org/india/Child_Marriage_Fact_Sheet_Nov2011_final.pdf, accessed 23rd October 2014.





first consider two famous cases that brought the issue into the limelight. The *Rukhmabai* case in Maharashtra and the *Phulmonee* case in Bengal raised significant questions about the age and issue of consent in Hindu marriage, and crystallised public opinion against early marriages.

In *Rukhmabai,*[7] one Dadaji Bhikaji filed a suit for restitution of conjugal rights against Rukhmabai, a 22-year old woman who had been married off to him when she was 11 years old. Since they had never cohabited after their marriage, he sought to compel her to live with him and consummate the marriage. However, Rukhmabai resisted the action on the grounds that she could not be compelled to be tied to a marriage that was conducted when she was of a tender age, and thereby incapable of giving consent. At the time, arguments grounded on consent in respect of marriage were completely novel and unheard of in India. Yet, dismissing the action, Pinhey, J. of the Bombay High Court observed:

> *It seems to me that it would be a barbarous, a cruel, a revolting thing to do to compel a young lady under those circumstances to go to a man whom she dislikes, in order that he may cohabit with her against her will; and I am of opinion that neither the law nor the practice of our Courts either justified my malting such an order, or even justifies the plaintiff in maintaining the present suit.*[8]

This dismissal was, however, appealed and the case was ultimately settled out of Court. However, Rukhmabai's controversial stance sparked unprecedented public debate, and she went on to become a leading voice against child marriage.[9]

Within the space of a few years, the famous and brutal case of *Phulmonee*[10] saw an 11-year-old girl die of haemorrhages after her 35-year-old husband forcibly had sexual intercourse with her. Unanimous medical opinion found that Phulmonee's injuries were caused by violent sexual penetration which her immature body could not sustain.[11] Though

[7] Dadaji Bhikaji v. Rukhmabai, (1885) 9 ILR Bom 529.

[8] *Id* at ¶2.

[9] SUDHIR CHANDRA, ENSLAVED DAUGHTERS: COLONIALISM, LAW AND WOMEN'S RIGHTS 15-41 (Oxford University Press, 1998).

[10] Queen Empress v. Huree Mohan Mythee, (1891) XVIII Indian Law Reporter (Calcutta) 49.

[11] Centre for Reproductive Rights, *Child Marriage in South Asia* (Briefing Paper) 22 available at: http://reproductiverights.org/sites/crr.civicactions.net/files/documents/ChildMarriage_BriefingPaper_Web.singlepage.pdf, accessed 25th October 2014.

the perpetrator was eventually only charged with grievous hurt and not rape in accordance with colonial law,[12] this case sparked popular demand for raising the age of consent for sexual intercourse and marriage, and galvanized public opinion against child marriage.[13]

Both *Rukhmabai* and *Phulmonee* - cases of the 19th century – were precursors to the subsequent discourse and legal interventions with respect to child marriage in 20th century India, and continue to be invoked in debates regarding child marriage even today.

### *B. Child Marriages: A Legislative History*

The legal history of child marriages in India covers the CMRA (1929), the HMA (1955) and the recently enacted PCMA (2006). The thrust of these laws has been to penalize persons partaking in, abetting and actively encouraging child marriages. The following is an overview of the legislative history of child marriage.

#### *1. Child Marriage Restraint Act, 1929*

In 1929, the colonial government first attempted to act against the horrors of child marriage, by way of the CMRA. However, as its provisions show, the CMRA assumed a preventive-punitive approach to this social evil rather than a stringent prohibitive approach, limiting its effectiveness.

To begin with, the CMRA defined a child marriage as one in which the girl is below 14 years of age *or* the boy below 18 years of age,[14] irrespective of the parties' religion. In its effort to discourage such marriages, the Act prescribed a fine of Rs. 1000 for a man between 18 and 21 who married a girl below the age of 14.[15] An enhanced penalty of 30 days of simple imprisonment and/ or a fine of Rs. 1000 was applicable if the man in question was above 21.[16] Corresponding liability would accrue to the parents of the girl,[17] as well as the person solemnizing the marriage.[18]

[12] *Id* at 23.
[13] *Supra* note 5 at 42.
[14] Child Marriage Restraint Act 1927, § 3. (hereinafter CMRA)
[15] *Ibid.*
[16] *Id* at § 4.
[17] *Id* at § 5.
[18] *Id* at § 6.





It is amply clear that the CMRA was only aimed at preventing the *solemnization* of child marriages, and conspicuously avoided declaring such a marriage void or voidable. Unfortunately, this deference to a plainly regressive custom has set the tone for all child marriage legislation in India, including the PCMA.

A subsequent amendment to the CMRA in 1949, increased the minimum age of parties, and enhanced the punishment for violations thereof. The age for girls was increased to 15, while for boys, it was retained at 18. As per the enhanced punishment, a boy between the ages of 18 and 21 marrying a girl below 15 would be punished with 15 days' Simple Imprisonment and/or a fine of Rs. 1000. A man over 21 guilty of the same would be punished with 3 months' Simple Imprisonment and an unspecified fine. The same penalty would be applicable to the parents, custodian or guardian of the girl as well as the person solemnizing the marriage. The CMRA was amended again in 1978, further increasing the ages of parties –18 for girls and 21 for boys. This corresponds to the current minimum age for marriage under the HMA. With the advent of the PCMA in 2006, the CMRA was repealed.

#### *2. Hindu Marriage Act, 1955*

Section 5 (iii) of the HMA establishes the minimum age for marriage for Hindus at 18 and 21 for females and males respectively, in conformity with the 1978 amendment to the CMRA. The penalty for contravention thereof, applicable to both parties to the marriage, is 2 years' Rigorous Imprisonment and or/ fine upto Rs. 1 lakh.[19]

## III. The Prohibition of Child Marriage Act, 2006: Overview and Key Provisions

The Preamble of the PCMA states that it is *"An Act to provide for the prohibition of solemnization of child marriages and for matters connected therewith or incidental thereto"*. To this end, the Act provides for the appointment of Child Marriage Prohibition Officers by the State Governments and empowers them to prevent and prosecute the solemnization of child marriages. Additionally, they are mandated to create awareness as to the evils of the practice of child marriage.

[19] Hindu Marriage Act 1955, § 18(a). (hereinafter HMA)

As per the definitions provided in the Act, a child is *"a person who, if male, has not completed twenty-one years of age, and if female, has not completed eighteen years of age"*.[20] Further, a child marriage is quite simply *"a marriage to which either of the contracting parties is a child"*.[21] It is additionally prescribed that the interpretation of *minor,* wherever it is used in the Act, is in accordance with the Indian Majority Act, 1875.[22]

The other operative parts of the Act, which form its crux, penalize child marriages, determine the status of certain child marriages and the rights and duties of the parties to such a marriage. A child marriage solemnized before or after the commencement of the Act is voidable at the option of the contracting party who is a child at the time of the marriage.[23] This petition for annulment should be filed before the child completes two years of attaining majority.[24] The effect of such a decree does not extend to a child begotten or conceived of the marriage before the annulment: these children are legitimate for all purposes.[25]

A male adult above the age of 18 is liable to rigorous imprisonment for up to 2 years and a fine up to Rs. 1 lakh for knowingly contracting a child marriage.[26] Apart from Section 3, certain specific circumstances affect the validity of a child marriage. S. 12 provides that a child marriage is void when the child in question is taken or enticed out of the keeping of the lawful guardian, is compelled or deceitfully induced to go from some place or is sold or trafficked or used for immoral purposes.[27] The Act further provides that an injunction order may be passed to prevent the solemnization of a child marriage.[28] A marriage which is solemnized in contravention of such injunction order is also void.[29]

The next Parts deal with certain obstacles to the success of the PCMA. The first of these issues establishes that the legislation does not have enough teeth, since it merely penalizes the vice that it seeks to curtail. The second deals with the sensitive topic of legitimacy, which has

[20] Prohibition of Child Marriage Act 2006, § 2(a). (hereinafter PCMA)
[21] Prohibition of Child Marriage Act 2006, § 2(b).
[22] Prohibition of Child Marriage Act 2006, § 2(f).
[23] Prohibition of Child Marriage Act 2006, § 3(1).
[24] Prohibition of Child Marriage Act 2006, § 3(3).
[25] Prohibition of Child Marriage Act 2006, § 6.
[26] Prohibition of Child Marriage Act 2006, § 9.
[27] Prohibition of Child Marriage Act 2006, § 12.
[28] Prohibition of Child Marriage Act 2006, § 13.
[29] Prohibition of Child Marriage Act 2006, § 14.





social and economic ramifications. Thereafter, the Paper deals with some of the anomalous situations created by the Act, which hinder its implementation.

## IV: The issue of Validity: The Principle Barrier to the Eradication of Child Marriage

Child marriage laws in India have consistently been perceived as thoroughly inadequate. In this respect, the efforts of the legislature appear to be deferential, and seek to *discourage* child marriages rather than take decisive steps to ban them. This line of critique is most apt in terms of the validity of child marriages, a controversial question of law that has caused outrage amongst women and child activists[30] and distinct judicial discomfort.[31]

Historically, child marriages have been considered legally valid. From the outset, the legislative intention appears to have been to make participation in a child marriage punishable, without disturbing the actual validity of the marriage. This position has been consistently upheld by the judiciary. For instance, in the pre-CMRA (1891) judgment of,[32] the Madras High Court indicated that the minority of the parties would not affect the validity of the marriage.[33] This position was accorded legislative sanction with the enactment of the CMRA in 1929. Though the punishments were made more rigorous over time, the Act remained silent on the validity of a child marriage, implying that irrespective of the punishment of the concerned persons, a marriage contracted in violation of its provisions would remain valid. This conclusion received judicial recognition on a number of occasions. In *Munshi Ram* v. *Emperor,*[34] commenting on the CMRA, the Court noted that:

[30] Sana Shakil, *Child Marriage not Void, but Voidable,* THE TIMES OF INDIA, 2nd November 2013, available at: http://timesofindia.indiatimes.com/city/delhi/Child-marriage-not-void-but-voidable-Court/articleshow/25141870.cms, accessed 20th October 2014.
[31] Court on its own Motion (Lajja Devi) v. State, (2013) CriLJ 3458, where the Court acknowledged its inability to declare certain child marriages invalid.
[32] Venkatacharyula v. Rangacharyula, (1891) ILR Madras 316.
[33] In this case, the marriage of a girl was solemnized without the consent of her father, after her mother had falsely informed the priest that the father's consent had been obtained. The Court, however, held that if all the relevant ceremonies had been duly conducted, it would be a valid marriage, notwithstanding the minority or other incapacitation of the parties.
[34] Munshi Ram v. Emperor, (1936) AIR All 111.

> *"The Act aims at and deals restraint of the performance of the marriage. It has nothing to do with the validity or invalidity of the marriage. The question of validity and invalidity of the marriage is beyond the scope of the Child Marriage Restraint Act, 1929".*

Similarly, *Moti* v. *Beni*[35] was a case involving the custody of a girl of 13 years, who was married to one Moti. The District Magistrate had ordered that since the girl was only 13, she could not be legally married and the proper custodian was her mother, and not her husband. The High Court, however, reversed this order, and, while criticizing the lower Court for acting without jurisdiction, remarked:

> *"It is true that celebration of this marriage may have contravened the provisions of the Child Marriage Restraint Act, 1929; but marriage of a child is not declared by the Child Marriage Restraint Act, 1929 to be an invalid marriage. The Act merely imposes certain penalties on persons bringing about such marriages".*

This position was reiterated by the Orissa High Court in 1961,[36] with the Court categorically stating that the CMRA does not invalidate a marriage despite its being solemnized in contravention with the provisions of the Act.

The enactment of the Hindu Marriage Act, 1955 did little to impugn the validity of child marriages. Though S. 5(iii) prescribes the age limit for a valid marriage, a marriage solemnized in contravention of the same is neither void under S. 11,[37] nor voidable under S. 12.[38] The only legal consequence for the violation of S. 5(iii) is punishment under S. 18(a) of the Act.[39]

The validity of child marriages under the HMA has been repeatedly recognized by Courts.[40] Judges have constantly reiterated that the

35 Moti v. Beni, (1936) AIR All 852.

36 Birupakshya Das v. Khajubehare, (1961) AIR Ori 104.

37 As per § 11 of the HMA, only those marriages solemnized in contravention with §§5(i), 5(iv) or 5(v) are declared to be void.

38 § 12, HMA refers to a number of grounds, relating *inter alia* to impotency and mental capacity. However, it does not mention the age criterion.

39 § 18(a), HMA prescribes for "every person who procures a marriage for himself or herself" in contravention of § 5(iii) a punishment of rigorous imprisonment of upto 2 years, or fine upto Rs. 1 lakh, or both.

40 Kalawati v. Devi Ram, (1961) AIR HP 1; Ma Hari v. Director of Consolidation, (1969) AIR All 623.





legislature, in its wisdom, has omitted incorporating any provision dealing with the invalidity of child marriages, and it is not the duty of the Court to fill the legislative gap.[41] The validity of child marriages has been recognized in other proceedings as well. For instance, in a bigamy proceeding under S. 494 of the Indian Penal Code, the defendant pleaded before the Full Bench of the Andhra Pradesh High Court[42] that his first marriage was a nullity since it had been contracted when he and his wife were 13 and 9 years of age respectively. Considering the scheme of the HMA, the Court observed that neither S. 11 nor S. 12 makes any reference to the violation of the age rule. Consequently, it held that the silence of the legislature about the legal effect of the violation of S. 5(iii), save for punishment under S. 18, clearly indicates the absence of legislative intent to nullify child marriages. The validity of a child marriage with respect to the HMA was subsequently recognized by the Apex Court in *Smt. Lila Gupta* v. *Laxmi Narain & Ors,*[43] and more recently, by the Delhi High Court,[44] which stated that its judgment was based on public policy, and that the legislature was conscious of the fact that if marriages performed in contravention of the age restriction are made void or voidable, it could lead to serious consequences and exploitation of women.

The enactment of the PCMA certainly raised hopes of a more aggressive legislative stance towards child marriages. In a significant departure from the earlier position, a child marriage has been made voidable at the option of the child contracting party.[45] However, it is clear from the scheme of the Act that the legislature has limited itself to voidability and has stopped short of declaring child marriages void.[46] The implication is that a child marriage, once solemnized, shall remain valid, subject to the acquiescence of the child party. This legal position has been expressly recognized by the Law Commission, which observed in respect of the PCMA:

41 Premi v. Dayaran, (1965) AIR HP 15.

42 Venkata Ramana v. State, (1977) AIR AP 43.

43 Smt. Lila Gupta v. Laxmi Narain & Ors, (1978) 3 SCC 258.

44 Manish Singh v. Govt. of NCT of Delhi & Ors., (2006) 1 HLR 303.

45 *Supra* note 22 at § 3(1).

46 There is, however, a limited set of circumstances under which a child marriage shall be void. S. 12 of the PCMA prescribes that if a child, being a minor, is (*inter alia*) sold for the purpose of marriage or married in the course of trafficking and so on, such marriage shall be null and void.

> *The law, however, does not make a marriage invalid whether it is performed when the child is an infant or later at puberty or adolescence.*[47]

Though this new approach certainly constitutes progress from the prior legal position, it is fraught with problems of its own. Primarily, it allows for a child "…of 10, 11, 12, or 13 years (to be) married and subjected to sexual and other forms of abuse which normally have lasting and irreversible mental and physical consequences."[48] Further, in declaring only voidability of such marriages, the legislature has effectively placed the burden of eradicating child marriage upon child parties. Though S. 3(2) provides in the case of a minor child party that a petition may be presented by the child's guardian or next friend along with the Child Marriage Prohibition Officer, it is clear that the initial burden is upon the child to not only be aware of his or her right, but also to come forward with the intention to exercise the same. In light of the rampant illiteracy and poor socio-economic conditions prevalent in India, the viability of such a mechanism does not inspire confidence. Subjecting the validity of child marriages to the acquiescence of the child party is rendered meaningless if one conceives of a scenario in which both families involved are in favour of the marriage and consequently neglect or actively suppress the child's wishes. In such a situation, it is impractical and patently unfair to expect the child to possess the means and capacity to approach the Court.

## V: Provisions Regarding Legitimacy of Children Borne out of a Child Marriage: Inconsistent and Potentially Unconstitutional

The PCMA envisages a blanket protection for all children borne out of child marriages[49] as far as their welfare and financial stability is concerned. Under S. 5, the district court seized of the matter is given unbridled power to pass an order regarding the custody of children borne out of child marriages. The only guiding principle for the court at the time of passing such an order is the best interest of the child.[50] The same holds true for determining the biological parents' access to their child.[51]

47 *Supra* note 5 at 13.
48 *Id* at 25.
49 *Supra* note 22 at § 5.
50 *Id* at § 5(2).
51 *Id* at § 5(3).





However, this blanket protection is restricted to issues of custody and maintenance. With respect to matters of legitimacy and inheritance, the PCMA creates great confusion, as it accords differential protection to children begotten of child marriages that are void (under Sections 12 and 14) and those borne of voidable marriages (under S. 3). While children borne of marriages that are voidable at the option of either *child-parent* party are legitimate under the Act, the legislation is silent as to the legitimacy of children borne out of void marriages. This is one of several instances wherein the Act betrays non-application of mind on part of the legislature.

### *A. Inconsistency Within The Act*

Section 3 of the PCMA renders a child marriage voidable at the option of the child party. However, this is not the only provision that contemplates the termination of a child marriage. Under S. 12, a child marriage is null and void when the child (a) is taken or enticed out of the keeping of the lawful guardian; (b) is induced to from any place by force or deceitful means; or (c) is sold for the purpose of marriage or is sold, trafficked or used for immoral purposes after the marriage. Further, under S. 14, any child marriage which is solemnized in contravention of an injunction order prohibiting the solemnization of such a marriage is *void ab initio.* Thus, under the PCMA, a child marriage stands terminated by the operation of three provisions: Sections 3, 12 and 14. However, S. 6, which accords legitimacy to children begotten of a child marriage, makes direct reference only to S. 3. This creates a disparity between the children begotten out of voidable marriages which are subsequently annulled and those borne out marriages that are *void ab initio.* There appears to be no rational basis for this difference.

One might argue that this lacuna can be filled by a Court by extending the application of Section 6 to those marriages which are void by operation of Sections 12 and 14. This argument would be founded upon rules of interpretation applicable to social welfare legislations.[52] However, such a reading would be incorrect as the rule regarding welfare legislations is subservient to the cannon of

53 Employees State Insurance Corporation, Regional Director v. Ramanuja Match Industry, (1985) AIR SC 278; Regional Provident Fund Commissioner v. Shiva Metal Works, (1965) AIR SC 1076.

construction which mandates that no word of the statute should be rendered meaningless.[53] Section 6 specifically refers to voidable marriages. There is no reference to marriages that are *void ab initio.* Thus, to broaden Section 6 to confer legitimacy upon all children, irrespective of the void or voidable nature of their parents' child marriage, would be to supplant the words of the legislature, a practice that is strongly discouraged.

The inability to use beneficial construction and extend the application of Section 6 to marriages that are void under Sections 12 and 14 is accentuated by the principle of *expressio unius est exclusio alterius.* That is to say, the express inclusion of only children borne out of voidable marriages is the exclusion of children borne out of void child marriages. This is reinforced by the fact that while dealing with custody, Section 5 covers children borne out of all child marriages, whereas Section 6 clearly restricts itself to only voidable marriages. Thus, as far as legitimacy is concerned, the PCMA presents an anomalous position.

### *B. Unconstitutionality Of Section 6 The PCMA.*

Under Hindu law, S. 16 of the HMA makes provisions for the legitimacy of children. Prior to the 1976 amendment to the HMA, S. 16 accorded legitimacy only to those children born out of marriages solemnized after the HMA came into force. This provision, therefore, created an unfounded distinction between similarly placed children based solely on the point of time of their parents' marriage. However, *after* the 1976 amendment, this irregularity was rectified, and all children were accorded legitimacy irrespective of any other consideration.

This state of affairs was noted by the Supreme Court in *Parayankandiyal Eravath* v. *K. Devi.*[54] While considering the post-1976 S. 16, the Court read the non-obstante clause therein to imply that Section 16(1) of the HMA stood delinked from the preceding Section 11. The implications of this dictum are wide and pertinent to the following analogy that the authors seek to draw between S. 16, HMA and S. 6, PCMA.

[53] Harbhajan Singh v. Press Council of India, (2002) AIR SC 1351; Sakshi v. Union of India, (2004) 5 SCC 518.

[54] Parayankandiyal Eravath v. K. Devi, (1996) DMC 82 (SC).





Since Section 16(1) is completely independent of Section 11, the operation of the HMA with respect to legitimacy is far wider than the grounds for nullifying a marriage under Section 11. Though S. 11 limits the power of the Court to declaring only marriages solemnized *after* the commencement of the Act as void, this distinction does not apply to questions of legitimacy. That is to say, under the HMA, a child is considered legitimate irrespective of the time that his or her parents' marriage was solemnized. This is against the common law principle that the offspring of a marriage which is null and void is *ipso jure* illegitimate. In fact, the 1976 amendment to the HMA has been opined to have clearly superseded the common law doctrine regarding legitimacy.[55] Prior to the amendment, the vice of Section 16 was that it created a distinction between equally placed offspring – between those whose parents had contracted a void marriage before the commencement of the HMA and those whose parents indulged in a void marriage after the commencement of the Act. In *Parayankandiyal Eravath,* the Supreme Court specifically noted that this mischief in the unamended Section 16 would have rendered it unconstitutional. The Court further noted that this vice had been undone by the 1976 amendment to Section 16, in the following words:

> *...(S. 16, as it is today) "stands on its own strength and operates independently of other sections with the result that it is constitutionally valid as it does not discriminate between illegitimate children similarly circumstanced and classifies them as one group for the conferment of legitimacy."*

Based on the above analysis, it is submitted that a clear analogy lies between the unamended S. 16, HMA and the present S. 6, PCMA, as the latter too creates a discrepancy between equally placed children simply based on whether the marriage of their *child-parents* was void or voided by a decree of the Court. Therefore, a case for the unconstitutionality of S. 6, PCMA is clearly made out. However, until a dispute as to its constitutionality arises in a petition and is determined by the Supreme Court, the provision will remain in force as it is, giving rise to several issues.

[55] RANGANATH; JOHN D MAYNE MISRA, MAYNE'S HINDU LAW & USAGE, (Bharat Law House, 16th Ed, 2008.

### C. *Inconsistency with the HMA.*

The HMA on the other hand *automatically* grants legitimacy to all children irrespective of whether the marriage of their parents was voided by Court or was *void ab initio*.[56] This proposition finds support in the jurisprudence of several Courts.[57] As discussed before, the PCMA confers legitimacy only on a child whose *child-parent* has voided the marriage by an application and is silent on the legitimacy of children borne out of marriage *void ab initio.*

Thus, the conflict between HMA and the PCMA is apparent. It is highly likely that in any litigation as to the legitimacy of children begotten through a void child marriage, the Courts will either have to ignore the personal laws of the parties and decide in accordance with the PCMA or consider only the personal laws of the parties. There is no scope for a harmonious interpretation of both legislations.

## VI: Anomalies created by the PCMA

By and large, the PCMA reflects insufficient application of mind by the legislature, for it creates the possibility of a number of anomalies and contradictions with the provisions of other laws in force. This Part, therefore, will examine the prominent anomalies so created.

### A. *Section 9: Penalty for the Male Contracting Party and Allied Issues*

To begin with, the PCMA retains the punitive-prohibitive thrust of the CMRA. In this respect, S. 9 of the Act punishes a male adult above the age of 18 who contracts a child marriage with rigorous imprisonment of up to 2 years and/or a fine up to Rs. 1 lakh. Notably, there is no parallel provision punishing a female adult party who contracts a child marriage. Therefore, the effect of S. 9 is that *only* the adult male party shall be punishable under the PCMA. This provision creates a fair bit of confusion, for the following reasons.

[56] *Supra* note 21 at §§16(1), 16(2).

[57] Bhogadi Kannababu v. Vuggina Pydama, (2006) AIR SC 2403; Sarojamma v. Neelamma, (2005) AIR NOC 422 (Kant); Sivaraman v. Rajeshwari II (2005) DMC 581 (Mad).





***First,*** S. 9 imposes a penalty on a male contracting party above the age of *18.* Going by the definition under the PCMA,[58] a male remains a child up to the age of 21. This implies that a male of 19, who approaches the Court to have his marriage dissolved, may be granted a decree *and at the same time,* may be punishable under the Act despite his statutory status as a child. The legislature could have easily avoided this anomaly by preventing a clash between the statutory concepts of "child" and "majority." That is to say, if, consistent with the definition of a child, S. 9 imposed a penalty on an adult male above 21 years, then a child would at the very least not be liable to punishment while approaching the Court to correct the error of the child marriage! Alternatively, if the definition of *child* was harmonized with the Indian Majority Act, 1875, then a male party above 18 approaching the Court would no longer be a child, and would therefore be validly liable to punishment.

***Secondly,*** the penalty under S. 9 must be evaluated in light of the aforementioned object of the PCMA[59] and its secular nature. Though a female contracting party cannot be punished under the PCMA, a remedy against a *Hindu* female contracting party is available under S. 18 of the HMA, which is gender neutral in its imposition of punishment for contravention of S. 5(iii). The absence of punishment for females under the PCMA, which is a secular legislation, makes the punishment that may be incurred – and the consequent deterrent effect – specific to the religion of the concerned party. For example, as per Muslim Personal Law, 15 is deemed to be the acceptable age for females to marry.[60] Therefore, a Hindu female of 15 may incur punishment under S. 18 of the HMA, but a Muslim female of 15 will not, in light of the PCMA and personal law. This dichotomy defeats the purpose of the PCMA, which is to prevent marriages from occurring before the parties have reached a particular age across religions. Even assuming perfect implementation of the Act, this anomaly may lead to the absurd situation in which child marriages are prevented within one religious community but proliferate unchecked within another.

[58] §2(a), PCMA reads, *"(a) 'child' means a person who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age.*

[59] "To prohibit the solemnization of child marriages" as per the Preamble – a broad mandate which is secular in nature.

[60] Tahra Begum v. State of Delhi & Ors., (2013) 1 RCR (Civil) 798, ¶3.

*B. Effective Limitation on Approaching the Court*

S. 3(1), which makes the marriage voidable at the option of the child party, is certainly an improvement upon the earlier position of law. Yet, the practical application of S. 3(1) is impeded by S. 3(3). As per the latter provision, a petition under S. 3(1) must be presented before the child completes two years of attaining *majority.* "Majority" ordinarily (and with reference to the Indian Majority Act, 1875[61]) means the age of 18 years. This implies that a petition under S. 3(1) must be presented before the person completes 20 years. However, the definition of "child" under S. 2(a) of the Act reads:-

> *"(a) 'child' means a person* ***who, if a male, has not completed twenty-one years of age,*** *and if a female, has not completed eighteen years of age.*

The anomaly created by reading these provisions together is clear. A female ceases to be a child upon attaining the age of majority, that is, 18 years. However, a male between 18 and 21 is legally a major, but a child by statutory definition. Thus, for example, a male of 20-and-a-half would be precluded from presenting a petition under S. 3(1), since 2 years would have elapsed since his attainment of majority. Therefore, S. 3(3) creates a situation where a person who is yet statutorily a child cannot avoid the marriage, thereby defeating the entire purpose underlying the Act.

*C. Inconsistency with the Indian Penal Code*

Another major contradiction exists between the PCMA and the Indian Penal Code. Under Exception 2 to S. 375 of the IPC, sexual intercourse with a wife not under 15 years is not punishable as rape; implying that a man can carry on sexual relations with his wife, who may be, for example, between 15-18 years of age. Such a wife would still be a child under the PCMA. Moreover, as noted by the Law Commission, though sexual activity with a wife under 15 years is punishable under the IPC, a marriage with a girl under 15 would be upheld as valid under the PCMA. As such, the present law of child marriage appears to legitimize sexual activity between an adult and a child that would otherwise be punishable as rape, by according the relationship between them a valid status in the eyes of law. It has, therefore, been suggested that the age of consent under rape laws should be the same as the minimum age for

[61] *Supra* note 22 at §2(f).





marriage and all marriages below this age should be void.[62]

Despite the enactment of the PCMA, therefore, various issues related to *child* marriage – legal as well as practical – still require to be addressed. The legislature, therefore, must urgently consider these anomalies and seek to correct them by harmonizing the law of *child* marriage with that of majority, personal law and penal law

## VII: Conclusion

From the preceding sections, it is amply clear that the PCMA is riddled with confusion and contradictions. Much like the CMRA before it,[63] the provisions of the PCMA, as they stand, may simply not be enough to prevent or check the occurrence of child marriages in India.[64] The present data[65] on the rampancy of child marriages is testimony to the weakness of the law before this social evil. Therefore, it is submitted that the PCMA urgently requires legislative attention.

In its present form, the PCMA tacitly permits child marriage and in fact lays the foundation for child abuse by failing to invalidate such marriages.[66] It is amply clear that the prohibitive-punitive approach that informed the CMRA and has subsequently informed the PCMA has failed to meaningfully tackle, or even engage with, the underlying mischief. Therefore, the authors recommend that *first,* the legislature take a decisive stance by clearly defining what constitutes a child marriage, and subsequently declaring all child marriages void, and not merely voidable.[67]

[62] *Supra* note 5 at 25.

[63] In a study by UNICEF, it was found that the number of prosecutions did not exceed 89 in any one year. See, Maggie Black, *Early Marriage, Child Spouses,* UNICEF, INNOCENTI RESEARCH CENTRE, Digest no.7, 2001, p.9.

[64] A recent survey reported that the PCMA had brought about only around 400 convictions in 2012. See, Sana Shakil, *Child Marriage not Void, but Voidable,* THE TIMES OF INDIA, 2nd November 2013, available at: http://timesofindia.indiatimes.com/city/delhi/Child-marriage-not-void-but-voidable-Court/articleshow/25141870.cms, accessed 12th September 2014.

[65] *Supra* note 1.

[66] *Supra* note 5 at 42.

[67] The Law Commission has recommended (at p. 43) that marriages of parties under the age of 16 should be made void, and those between 16 and 18 years of age be made voidable. Considering the present rampancy of child marriages, this is indeed a useful *via media* for the legislature to consider. However, the authors believe that this would continue to be a half-baked approach, and ultimately that if the age of marriage is to be harmonized with *at least* the age of majority, the legislature would do well to adopt this approach right from the outset.

Though such a step would undoubtedly require a considerable amount of political will, it would go a long way in eradicating the *social evil* that is child marriage. *Secondly,* the authors recommend that the conflict between the concepts of "child" and "majority" be reconciled and harmonized. One way to achieve this would be to delete the differential definitions of "child" for male and female and have a uniform definition of "child" as a person who is below the age of 18 years.[68] This would, in turn, resolve the conflict inherent in the PCMA due to its present definition of "child" (for males) and its clash with "majority" as mentioned in various parts of the Act.

Additionally, the authors are of the opinion that in the absence of a uniform civil code, the prevention of child marriage falls into a special category of family law, since it directly relates to the prevention of human rights violations. Consequently, in order to prevent a distorted or religion-specific application of *at least* child marriage law, it is recommended that the age requirement for marriage be harmonized across personal laws. In this respect, we may refer to the laudable judgment of the Delhi High Court in *Court on its own Motion (Lajja Devi)* v. *State,*[69] whereby the Court comprehensively stated that the PCMA shall override all personal laws. It is accordingly submitted that well-thought out and sustained legislative action, highlighting the need to prevent child marriages irrespective of social or religious differences, would alleviate this problem on the whole rather than in a fragmented manner. *Lastly,* corresponding amendments must be made to the HMA – both to make the age requirement uniform for both genders and to declare marriages solemnized in violation of the same as void – and the IPC, in order that child marriage and related concerns, such as the sexual exploitation of children, can be effectively curbed.

[68] "There is no scientific reason for the difference in age of marriage between boys and girls." Law Commission Report, p. 45. This also finds support in Article 1 of the UN Convention on the Rights of the Child [Convention on the Rights of the Child, Art 1, *entered into force* Sept. 2, 1990, 1577 UNTS 3] as per which a child is defined as any person below the age of 18.

[69] Court on its own Motion (Lajja Devi) v. State, (2013) Cri LJ 3458.





# FUTURE OF INTERNET GOVERNANCE: MULTILATERALISM, MULTI-STAKEHOLDERISM OR A THIRD PATH?

*Agranee Kapoor and Angeline Benny*

*Every resource that has been unearthed over the centuries due to human innovation has become subject to extensive regulations, whether formal or informal to control its consumption. The Internet which is an intangible resource has become the latest to join the fray. Be it the self-imposed rules of the developers and users during the early stages or the governmental and organisational restrictions that followed its proliferation in the recent decades, the Internet has also attracted its fair share of norms and deviations. The increasing nature of circumventions of the governance model in place leads us to question the suitability of the paradigm we have adopted. This paper aims to discuss the current models of Internet governance in place, drawbacks of the current models and derive a feasible model that learns from and builds upon the inefficiencies of the previous ones, a possible Internet Governance 2.0.*

## I. Introduction

Internet governance is an issue that has been discussed for numerous reasons and has assumed importance due to the widespread usage of internet worldwide. Internet Engineering Task Force (IETF) and Internet Corporation for Assigned Names and Number (ICANN) are two associations that are most common when it comes to the issue of governance. However, the debate on this issue exists simply because of such institutions and our belief that a resource as important as the internet cannot be left in the hands of such institutions, which continue to be manipulated by global powers to a large extent.

The internet has provided for easy accessibility and connectivity amongst people worldwide. It is essential to understand that it has proved to be a tool that has revolutionized communication and has helped facilitate easy access to information. It has allowed people to transcend physical boundaries in mere blips and done away with the barriers which

hampered easy interaction in earlier times.

While the internet has proved to be useful in most areas, it has resulted in a sense of fearlessness and this means that it has caused breach of certain norms that form part of an unwritten cyber code. In order to control this unruly and uncensored activity, there has been growing concern over whether the internet ought to be governed or not. This raises a number of questions; who decides whether such governance is required? Who has the right to create a distinction between what information one can access or not? Which model of internet governance would be most appropriate in the current scenario?

## II. Models of Internet Governance

There are multiple ways that have been suggested and various models proposed on how to govern the internet. They include cyberspace or spontaneous ordering, which talks about a system that is premised on the idea that the internet is a self-governing realm and cannot be controlled by any government.[1] The widely talked about model, which is based on the code or software that governs most internet activity. In Larry Lessig's words *'the Code is Law'*[2]*;* which basically implies that the internet code is written in a way that it controls the way one reacts to the web. It regulates the behaviour of individuals and the manner of their behaviour.[3]

### *A. Multilateralism and Multi-Stakeholderism*

The most widely spoken of systems are those of multilateralism and multi-stakeholderism. The former seeks to enforce a system of governance that involves national control by legal regulation over the virtual world; while the latter aims at including nations as well as transnational organisations in the process of governance. In contrast to the multilateralism mode of governance that emphasizes the role of the

1 Lawrence B. Solum, *Models of Internet Governance* (September 3, 2008), Illinois Public Law Research Paper No. 07-25; U Illinois Law & Economics Research Paper No. LE08-027, University Of Illinois, available at SSRN: http://ssrn.com/abstract=1136825, accessed 19th June 2014.

2 Lawrence Lessig, *Code is Law: On Liberty in Cyberspace* (January 2000), Harvard Magazine, available at: http://harvardmagazine.com/2000/01/ code-is-law-html, accessed 19th June 2014.

3 *Ibid.*





state, multi-stakeholderism attempts to grant an equal footing to other organizations including the private sector, civil society, intergovernmental and other international organizations, as defined by the Tunis Agenda set during the 2003–2005 World Summit on the Information Society.[4] The model agreed upon sought to reduce the influence of national governments on the global internet policy and recognize the equally, if not more significant contributions of the technological and academic community to the evolution and proliferation of internet over the years.

### *B. Issues Within Multi-Stakeholderism*

#### *1. Hierarchy Among Organizations in the Tunis Agenda*

However paragraph 35 of the Agenda, which dealt with the management of Internet was counterproductive to the very ideals of the model as it divided the resources among the various stakeholders. The States and intergovernmental organizations received the public policy matters while the private scientific community was to continue with advancements in the resource itself. The civil society was relegated to playing an important role in "community matters".[5] This artificial division between the political and the practical matters created a hierarchy in the control of the Internet. The hierarchy continued with the status quo by placing the national governments on top with broader policy issues.[6]

#### *2. Conflict Between Policy and Technical Matters*

This allocation of specific jobs to stakeholders creates problems in execution due to the interlinked nature of policy and technical matters. For instance, World Wide Web Consortium's (W3C) tracking preference working group wanted to develop a Do Not Track or DNT standard which would determine how a website would respond to the 'Do Not Track' request generated by users when they clicked the I Agree button.[7] While consumer privacy activists pushed for honouring

4 *Tunis Agenda for the Information Society,* available at http://www.itu.int/wsis/docs2/tunis/off/6rev1.html, accessed 19th June 2014.

5 *Ibid.*

6 Musiani, F. and Pohle, J., *NETmundial: only a landmark event if 'Digital Cold War' rhetoric abandoned,* Internet Policy Review, (3) 1, available at: http://policyreview.info/articles/analysis/netmundial-only-landmark-event-if-digital-cold-war-rhetoric-abandoned, accessed 19th June 2014.

the request, the industry took a diametrically opposite stance as tracking user data was the backbone of their customized advertising scheme. This led to an impasse regarding this matter in the W3C as the technological community is restricted to purely technical matters while the standard involves a policy decision regarding user privacy and data collection by third parties.

*3. POWER PLAY*

Within the broadly grouped government and intergovernmental stakeholders themselves, there exists a power play between the developed and developing nations accentuated by the strong presence of the U.S.A since the inception of the Internet. The American Internet Freedom rhetoric depicts authoritarian states as a threat to Internet freedom and access. In reality, its own censorship and security surveillance are much more extensive and affect citizens who live outside its borders.[8]

### *C. ISSUES WITHIN MULTILATERALISM*

Multilateralism too has multiple chinks in its armour as argued by Post and Johnson who stated that the Internet required a separate set of 'online only' rules due to the distinct nature of its architecture that makes it beyond the territorial jurisdiction of any one State.[9] Though a given domain name may be related to the actual physical location of the computers, it does not necessarily reflect the physical location in its domain name. For example, a change in the physical address of the computer may not result a corresponding change in the domain name which may still continue to be linked to the previous location.[10] In addition to this, the extraterritorial nature of information flow on the

[7] Jeremy Malcolm, *Advertisers tracking consumers online: Do Not Track at the W3C,* CONSUMERS INTERNATIONAL, available at: http://a2knetwork.org/ advertisers-tracking-consumers-online-do-not-track-w3c, accessed 18th June 2014.

[8] Sunil Abraham, *Who Governs the Internet? Implications for Freedom and National Security,* YOJANA, available at: http://cis-india.org/internet-governance/blog/yojana-april-2014-sunil-abraham-who-governs-the-internet-implications-for-freedom-and-national-security, accessed 19th June 2014.

[9] *The Principles for User Generated Content Services: A Middle-Ground Approach to Cyber-Governance,* HARVARD LAW REVIEW, Vol. 121, No. 5 (Mar., 2008), pg 1390-91, available at: http://www.jstor.org/stable/40042693, accessed 19th June 2014.

[10] David R. Johnson and David G. Post, *Law And Borders: The Rise of Law in Cyberspace,* 48 STANFORD LAW REVIEW 1367 (1996), available at: https://cyber.law.harvard.edu/is02/readings/johnson-post.html, accessed 19th June 2014.





Internet also restricts States from claiming jurisdictions. It is not possible to regulate each bit of information that may cross a border and even if it were possible, the sheer volume of information flow would provide a sufficient barrier to effective enforcement of the same.[11]

Also, the logical nature of information exchange is independent of physical geographical location of the computers and servers. If an argument is put forth to regulate content online due to the effect they have on citizens of a particular country, it is futile as the same content is available to anyone, anywhere as long as they have an Internet connection. Therefore, the territorial jurisdiction could be claimed by almost any territorial authority. This in effect, leads to no State having control over the Internet.[12]

### *D. THE PREFERRED MODEL OF INTERNET GOVERNANCE*

Despite its drawbacks, the model of multi-stakeholderism has been widely favoured as seen in the recent NETMundial[13] conference for a model of wider inclusion, hosted in Brazil. We see both approaches marked with an ulterior motive to establish supremacy in the control over this resource. Therefore it seems apt that a third path must be taken up which eliminates the possibility of concentration of power in a few hands and is wholly inclusive of the most important stakeholders in this debate; the consumers.

## III. Aim of Models of Internet Governance

The most fundamental question that arises is what are these models aiming to accomplish and the answer is simple: the power to define right and wrong. A system of governance is one that regulates activity on the internet based on a pre-established notion of right and wrong. If we conform to any of these models, it could mean that we are complying and accepting with these notions. While it may not be incorrect to do so, it is definitely not entirely right since we are confining ourselves to the boundaries set by such definitions which may be rigid and inflexible. We are allowing organisations or nations to decide what information must be

[11] *Ibid.*

[12] *Supra* note 10.

[13] Leo Kelion, *Future of the internet debated at NetMundial in Brazil,* BBC, 3rd April 2014, available at: http://www.bbc.com/news/technology-27108869, accessed 19th June 2014.

filtered and in what manner. The internet was created with an aim to provide easy access and these norms and regulations defeat the purpose that it was designed for. We, as free individuals are capable of deciding what we require and what we do not. Having our choices governed by anyone is curtailing this fundamental freedom.

### *A. ISSUES WITH INTERNET GOVERNANCE*

The most worrying aspect about governance is the means used to regulate and filter the content that we receive. For instance, Deep Packet Inspection (DPI)[14] is a new technology aimed at facilitating better usage of the internet. It tries to introduce the 'intelligent' into the 'dumb' network.[15] A network is supposed to work on the end to end principle[16] by which, the information has to be delivered across the network without interception at any point and with the assumption that interpretation will occur at the ends of the network. Lawrence Lessig employs a nice metaphor for describing the end-to-end principle:

> *"Like a daydreaming postal worker, the network simply moves the data and leaves interpretation of the data to the applications at either end. This minimalism in design is intentional. It reflects both a political decision about disabling control and a technological decision about optimal network design."*[17]

While claiming to be an instrument which would help manage bandwidth better, DPI actually has access to all information and this violates the privacy of all individuals. In fact, any technology deployed to sift through data transfer and internet activity of individuals could be misused. The control of nations or transnational organisations over technology as of now would also imply allowing them in our private spheres and trusting them with personal information. Any system of governance that monitors information, blurs the line between public and

14 Ralf Bendrath and Milton Mueller, *The End of the Net as We Know it? Deep Packet Inspection and Internet Governance* (4th August 2010), available at SSRN: http://ssrn.com/abstract=1653259 or http://dx.doi.org/10.2139/ssrn.1653259, accessed 19th June 2014.

15 *Ibid.*

16 *Ibid.*

17 LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 32 (Basic Books 1999).





private sphere, implying that the right of keeping things private would no longer be ours.

## IV: Self-Regulation

These factors call for self-regulation on the Internet, which may manifest itself in website or ISP introduced guidelines for usage.[18] It is the basis of the open source approach to Internet Governance. Lessig talks about how users could circumvent existing regulations in open source code merely by rewriting it and thus, frustrating government's attempts at control.[19] Post and Johnson have also put forth the idea of the Internet forming its own legal institutions in lieu of the existing, external ones. In support of this position, they have cited examples of private, non-sovereign imposed and yet effective regulations like those against flaming and mail-bombing in the community.[20] Hence, self-governance is more appropriate to the medium in comparison to the traditional governmental governance.

### *A. THE NEED FOR SELF-REGULATION*

There is an inherent conflict between the internet's original goal of assuring unfettered global communications and limiting connectivity based on trust relationships.[21] It is our belief that the Internet does not require a centralised authority or institution to govern its functioning or regulate the activity that occurs. In fact, the system of peer to peer governance[22] is more suitable to the current situation and would lead to a better organised and more systematic network. The development of tools has to be carried out in a manner that the basic aim is not to decide what information is being exchanged rather, with whom it is being shared. There must be a shift from what matter is transferred, to the people or individuals to who receive this matter.

It does away with the central problem of according an institution to

18 *Supra* note 9 at 1393.

19 *Id* at 1395.

20 *Supra* note 9 at 1392.

21 David R. Johnson and Susan P. Crawford and John G. Palfrey, *The Accountable Net: Peer Production of Internet Governance,* VIRGINIA JOURNAL OF LAW AND TECHNOLOGY, Vol. 9, No. 9, 2004, available at SSRN: http://ssrn.com/abstract=529022 or http://dx.doi.org/10.2139/ssrn.529022, accessed 19th June 2014.

22 *Ibid.*

delegate certain matter as harmful and in fact, increases peer accountability. The problems we are faced with today are present because some organisations wish to impose costs on others, who do not possess the same views on how governance must be carried out. Regulating a group of deviant actors seems more reasonable than creating rules on a global scale which seek to manage the activity of people on the internet. If such rules are formulated, it will result in a conflict of opinions and dissent against the institution involved in the process, since they will have absolute power to determine what constitutes harmful or undesirable information.[23]

It is essential to understand that the end-to-end principle has worked efficiently for certain reasons and continues to do so. This is because it encompasses the function of the internet as it was originally aimed to be. It was supposed to serve as the technology that assisted in the relay of information without any restrictions and with absolute power placed in the hands of the users. It is necessary to revert to that model of governance where, the use of virtual resources is in the hands of its users. It is their right to decide what information to accept and what to discard.

Emphasis must be laid on the fact that our ISP's must accept traffic only from "peers" or trusted sources. This ensures that while we are the ones governing ourselves, we are also entirely accountable. The internet is not like the television, where we have no control over the data that we receive. There are routers and firewalls which can be set in a way to refuse all packets that are not from trusted sources. Any model of governance aiming at regulating activity is be likely to be wrong about the real desires of the individuals when compared to the people themselves.[24]

### *B. Tragedy of the Commons*

The very design of the Internet architecture provided 'commons' (the end to end network design or the internet code) for its subsequent development and innovation through a decentralized process. This commons is now constrained by restrictions imposed by various external organizations as a part of their individual agendas. How do we prevent

[23] *Supra* note 20.
[24] *Ibid.*





this seemingly imminent tragedy of the Commons[25] due the counteractive nature of these restrictions on the Internet?

The most crucial point that we have understood is that in order to find a solution to the tragedy of commons, is to acknowledge that the most important stakeholders are the people or the global population. Thus, we cannot simply assume that any of the models that have been used till date are valid until we assess them critically keeping in mind the masses.

#### *1. ACTOR CENTRED INSTITUTIONALISM*

In order to analyse the policies that are currently in use and can be improved, the approach that should be taken is that of 'actor centred institutionalism' (ACI).[26] It has its roots in rational choice institutionalism; accepting the fact that the decisions to be taken in this sphere cannot be mathematical as in the case of the game theory, but must be guided on interactions and orientations of the various actors involved.

#### *2. GAME THEORY*

Game theory has been used to explain ACI, emphasising the need to understand the role of actors and their mutual interactions as central to the process of deciding upon policies to govern the internet.[27] For instance, as seen in pure coordination games i.e. initiating coordination amongst a large group of people, self-governing arrangement ensure efficiency. On the other hand, games involving harm caused due to free riding need binding mechanisms for collective action. Therefore, it can be concluded that different aims need different approaches or different "modes of interaction".[28]

## V: Conclusion

The internet was a common resource which was meant to be used by common people in order to suit their common requirements. The onset of the struggle to control has somehow led to the tragedy of commons and

[25] Garrett Hardin, *The Tragedy of the Commons,* SCIENCE, New Series, Vol. 162, No. 3859, 13th December 1968, available at: http://www.jstor.org/stable/1724745 , accessed 19th June 2014.
[26] FRITZ WILHELM SCHARPF, GAMES REAL ACTORS PLAY: ACTOR CENTRED INSTITUTIONALISM IN POLICY RESEARCH (Westview Press, 1997).
[27] *Supra* note 14.
[28] *Ibid.*

order needs to be restored by assessing the situation impartially. This requires initiation of coordination as well as a binding mechanism, both of which can be achieved through a model that incorporates peer governance and self-regulation.

Our position can be best summed up in the words of Judge Easterbrook who said

> *"If you don't know what is best, let people make their own arrangements."*

29 Frank H. Easterbrook, *Cyberspace and the Law of The Horse,* 1996 U CHI LEGAL F 207, 2, available at: https://www.law.upenn.edu/law619/f2001/week15/easterbrook.pdf, accessed 19th June 2014.





# UNILATERAL CLAUSES IN ARBITRATION: VALIDITY AND ENFORCEMENT

*Anu Srivastava*

*Unilateral arbitration clauses are being rapidly used in various financial contracts to provide one of the parties a unilateral option to choose between arbitration and court proceedings. However, it may not always be prudent for the parties to include such clauses in their contracts because of the various issues relating to enforcement and validity of such clauses. While most jurisdictions have upheld the validity of such clauses, there have been instances where such clauses have been declared as being invalid on the grounds of non-mutuality, unconscionability, procedural inequality and potestativité.*

*The essay aims at analyzing the issues relating to the validity of such clauses in various jurisdictions focusing on the developments under English law and Indian law followed by two controversial decisions given by the French and the Russian Courts. While the position of such clauses is far from reaching a conclusion with respect to validity, it depends on the facts and circumstances, position of the parties, the jurisdictions to which the parties are amenable to, the proper law of the contract and the law of the seat which need to be considered while drafting such clauses.*

*The position in India poses further complications due to conflicting opinions of High Courts on the validity of such clauses. The question of public policy also creates problems while looking at domestic and international arbitrations. It therefore becomes imperative for parties to consider such arbitration clauses carefully with reference to India as a seat of arbitration or as a place of enforcement.*

## I. Introduction

The principle of party autonomy is the bulwark of the mechanism on which arbitration proceedings work. Based on the principle, parties

are free to choose the laws, forum, mode, manner, procedure and other aspects of an arbitration agreement. However, the principle of party autonomy does not extend to the extent of granting absolute freedom to violate mandatory laws which govern the arbitration proceedings. Unilateral arbitration clauses are one such type of arbitration clauses where the balance between a party's choices of an ADR mechanism needs to be weighed carefully against the legal validity, enforcement, unconscionability and procedural equality of such clauses.

One sided, split-option, hybrid, unilateral or asymmetric arbitration clauses are the nomenclature given to the type of optional arbitration clauses[1] where only one of the parties has the choice of referring the matter to arbitration or commencing proceedings before a Court.[2] Such clauses are generally of two types – clauses which provide an option to arbitrate or those which provide for an option to litigate. In the former case, all disputes are referred to litigation but one of the parties to the dispute is given the choice to commence arbitration proceedings. In the latter case, there is a binding arbitration agreement between the parties which provides for settlement of disputes but one of the parties retains the option to go to Courts. The important feature of both types of clauses is the lack of choice or non-mutuality with respect to the dispute resolution mechanism wherein one party has the right to bring an action either before a Court or an Arbitral Tribunal but the other party is deprived of this right.

This non mutuality or one sidedness of an arbitration clause arises as a result of unequal commercial position of parties in certain kinds of finance contracts where one party (generally the party with the unilateral option) is seen to have taken more risks pertaining to the contract. Depending upon the jurisdiction to which such clauses are amenable, the position of the parties and the drafting of the arbitration clause, unilateral clauses have been held as valid or invalid. Whereas most jurisdictions would uphold the validity of an unambiguous unilateral arbitration clause, two recent decisions of the French[3] and

1 Simon Nesbitt & Henry Quinlan, *The Status and Operation of Unilateral or Optional Arbitration Clauses,* 22 ARBITRATION INTERNATIONAL, 134-135 (2006).

2 Deyan Draguiev, *Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability,* 31 (1) JOURNAL OF INTERNATIONAL ARBITRATION, 21-22 (2014).

3 X v. Banque Privée Edmond de Rothschild Europe, (2012) Cass. Civ. (1ère) (French Cour de cassation).





the Russian Courts[4] have considered such clauses to be invalid or unconscionable. This has raised a number of questions with respect to the implementation such clauses, essential ones being those of validity and enforcement. There may be instances where a particular unilateral clause although valid as per the law of the seat might be refused to be enforced in a different jurisdiction due to public policy considerations of non-mutuality, inequality and unconscionability. Another important question arises regarding the effect of invalidating a unilateral clause. Would this imply that the entire arbitration agreement is invalid or would the courts confer a similar option to choose the forum on the party deprived of such option?

Some of these issues would be addressed during the course of this essay accompanied by a discussion on the validity and enforceability of unilateral arbitration clauses in various jurisdictions. The effect of the Russian and French decisions on the international community regarding the validity of such clauses has also been considered.

## II. Jurisdictional Analysis of Unilateral Clauses

### *A. England*

Case laws and available literature suggests that unilateral arbitration clauses would be held as valid and enforceable in England. Initial cases did suggest that a unilateral arbitration clause may be void for non-mutuality and not providing bilateral rights of reference but subsequent developments have rejected the non-mutuality arguments.

The question of mutual rights of parties in case of an arbitration agreement was delved upon by the English courts in *Baron v. Sunderland Corporation*.[5] The case related to the implementation of the remuneration scales for school teachers as per the Burnham Report. The clause in the Report provided that the remuneration for teachers would be determined according to the scales and other provisions contained in the Report. The Report further provided for a Committee of Reference and the relevant clause read as follows:

4 Russkaya Telephonnaya Kompaniya v. Sony Ericsson Mobile Communications Rus Ltd. Liability Co., (2012) Decision No. 1831/ 12, Supreme Arbitration (Commercial) Court of Russian Federation.

5 Baron v. Sunderland Corporation, (1966) 1 All ER 349.

*"There shall be appointed a joint committee of reference consisting of 10 members nominated by the representatives of local education authorities... and 10 members nominated by the representatives of the teachers... and any question relating to the interpretation of the provisions of this report brought forward by a local authority acting through the authorities' panel or by any association of teachers acting through the teachers' panel... shall be considered and determined by the joint committee."*

Mr. Baron, a teacher claimed that he was entitled to additional salary in accordance with the provisions of the Report before the Court. The local educational authorities however, claimed that the aforesaid clause was an arbitration clause and sought for the court proceedings to be stayed to enable the matter to be referred to arbitration. The stay was refused by the Court of Appeal on the ground that the said clause did not provide for bilateral rights of reference. The Court noted that an arbitration agreement must always provide both the parties with the option to refer matters to arbitration. There was a complete lack on mutuality in the said matter and the clause was held as invalid.

This was followed by the judgment in *Tote Bookmakers Ltd.* v *Development and Property Holding Co. Ltd.*[6] but subsequently reversed in *Pittalis* v *Sherefettin.*[7] Both the cases involved similar rent review clauses which gave the tenant an option to refer the determination of rent to an independent surveyor in case he disagreed with the rent as determined by the landlord. The landlord on the other hand did not have any such option to refer the matter to an independent surveyor.

In *Tote Bookmakers*[8] the decision of the Court of Appeal in *Baron*[9] that an arbitration agreement must always provide for bilateral rights was regarded as ratio by the Court and the Judge considered himself to be bound by the aforesaid decision. However, in *Pittallis*[10] the Court overruled the decision in *Tote Bookmakers*[11] and held that there was no

6 Tote Bookmakers Ltd. v. Development and Property Holding Co. Ltd., (1985) 2 WLR 603.
7 Pittalis v. Sherefettin, (1986) QB 686.
8 *Supra* note 6.
9 Baron v. Sunderland Corporation, (1966) 1 All ER 349.
10 *Supra* note 7.
11 *Supra* note 6.





reason to render an arbitration agreement invalid because it conferred only on one of the parties a right to refer the matter to arbitration. In reaching this conclusion, the Court of Appeal relied on two judgments that were delivered prior to that of *Baron*,[12] namely, *Woolf v Collis Removal Service*[13] and *Heyman* v *Darwins.*[14] As per the decision in the former case, a unilateral clause is in essence mere machinery which even though one-sided would not make them invalid. In the latter case, it was categorically stated by the Court that arbitration clauses may be of varying natures and the parties are at a liberty to decide and define the matters which they want to refer to arbitration. Therefore, *Pittallis*[15] considered the observation made in *Baron*[16] as an *obiter* which was not binding upon the Court and unilateral arbitration clauses were recognized as being enforceable and valid.[17]

It has however been noted that these cases did not lay down a general acceptance for validity and enforcement of unilateral arbitration clauses. They were accepted as being valid only because upholding them seemed appropriate given the peculiar facts of these cases. For instance in *Pittalis,*[18] the tenant's unilateral right to refer the assessment of rent arbitration was upheld because the landlord was protected by his own assessment of rent. The dispute would arise only if the rent as assessed by the landlord was not acceptable to the tenant. Therefore, it was reasonable for the tenant to have a unilateral right to have the rent assessed by an arbitrator. This issue was highlighted in *RGE (Group Services) Ltd. v Cleveland Offshore Ltd.*[19] which followed *Pitallis*[20] and the position of unilateral arbitration clauses still suffered from some uncertainty with respect to their validity being upheld in all factual contexts and not just those similar to *Pitallis*.[21]

The confirmation to the validity of unilateral arbitration clauses

12 *Supra* note 9.
13 Woolf v. Collis Removal Service, (1948) 1 KB 11.
14 Heyman v. Darwins, (1942) AC 356.
15 *Supra* note 7.
16 *Supra* note 9.
17 Simon Nesbitt & Henry Quinlan, *The Status and Operation of Unilateral or Optional Arbitration Clauses,* 22 ARBITRATION INTERNATIONAL, 136 (2006).
18 *Supra* note 7.
19 RGE (Group Services) Ltd. v. Cleveland Offshore Ltd, (1986) 11 Con LR 78.
20 *Supra* note 7.
21 *Supra* note 7.

being applicable to all factual circumstances was finally laid down by *NB Three Shipping Ltd v Harebell Shipping Ltd.*[22] The arbitration clause in this case conferred jurisdiction on English Courts to settle disputes between the owners of the vessel and the charterers. The owners had an additional unilateral right to refer the dispute to arbitration. The charterers (NB Three Shipping) commenced proceedings in the High Court while the owners (Harebell Shipping) wanted to exercise their right to refer the dispute to arbitration and sought for a stay on the High Court proceedings. The owners relied on *Pittalis*[23] to assert their case while the charterers contended that the exercise of the unilateral right to refer the dispute to arbitration could have been exercised only if the owners brought the claim before the Court. Morrison J. while dismissing the contention of the charterers clarified that the validity of unilateral clauses as laid down in *Pittalis*[24] was not limited to specific clauses based on the same factual context. As per *Heyman* v *Darwins*[25] the parties were free to agree on any type of dispute resolution mechanism even if it meant conferring unilateral rights of reference on one of the parties.[26] He further went on to explain that the unilateral option was not open ended. If the Owners took a step towards the action or led the Charterers to believe that the option would not be exercised, the option would cease to exist.

After the decision in *NB Three Shipping* the status and operation of unilateral clauses was accepted as being valid and enforceable for all circumstances. However, a subsequent question arose with respect trumping the reference to arbitration in situations where a unilateral arbitration clause would provide for disputes to be referred to arbitration while providing one of the parties with the right to bring proceedings in a Court. The validity of such clauses was addressed in *Debenture Trust Corp Plc.*v *Elektrim Finance BV and others.*[27] A Unilateral arbitration clause providing an option to one of the parties to bring the dispute before Courts was upheld in this case, provided, that the party with the option

22 NB Three Shipping Ltd. v. Harebell Shipping Ltd., (2005) 1 Lloyds Rep. 509.
23 *Supra* note 7.
24 *Supra* note 7.
25 *Supra* note 14.
26 The same was also observed in Lobb Partnership Ltd v. Aintree Racecourse Co. Ltd (2000) BLR 65 '…there is no reason in principle why parties to a contract should not agree to give either of them a unilateral option to elect to arbitrate or litigate any claim for relief so as to bind the other to arbitration or litigation, as the case may be …'
27 Debenture Trust Corp Plc.v. Elektrim Finance BV and others (2005) 1All ER 476.





had not participated in arbitration proceedings. In such cases, the party with the option to bring a claim before the Courts could also trump the arbitration proceedings if they had been commenced by the other party. However, the right to bring the dispute before State Courts would be considered to have been waived if such party proceeded with the arbitration proceedings.

Unilateral clauses to arbitrate have received recognition by Courts in England. However, certain issues may arise with respect to the operation of these clauses in Consumer disputes where the Consumer might be considered to be as occupying a weaker position with respect to negotiation.[28] The unilateral arbitration clauses providing an additional right to one of the parties to bring the dispute before State Courts might also be considered to be pathological for lack of certainty of a binding agreement to arbitrate.

### *B. India And Other Jurisdictions*

There has been a slight ambiguity in India with respect to the validity of unilateral clauses. While earlier High Court cases on the point seem to suggest that such clauses are not valid and enforceable in India, more recent judgments look upon such clauses favorably.

*Union of India* v *Bharat Engineering Corporation*[29] considered a unilateral arbitration clause to be a contract of option which was contingent upon the exercise of that option and became binding only when the option was exercised. The said arbitration clause between the Railways and their Contractors conferred upon the Contractor a unilateral option to refer the dispute to arbitration. The Delhi High Court considered the definition of an 'arbitration agreement' under Section 2 (a) of the Arbitration Act 1940 and held that it does not contemplate a contingent agreement or an agreement to agree in the future. The Court placed reliance on *Heyman* v *Darwins*[30] and concluded that for an arbitration agreement to be born, both parties must promise to submit differences to arbitration. As there is a like promise on each side, the contract is bilateral and promises become binding by mutual acceptance and create an immediate agreement. The

28 The Unfair Terms in Consumer Contracts Regulations, 1994 (Statutory Instrument No. 3159 of 1994).
29 Union of India v. Bharat Engineering Corporation, (1977) ILR 2 Delhi 57.
30 *Supra* note 14.

law does not contemplate an arbitration agreement which is contingent or conditional or confers an option. This view taken by the High Court seems to be incorrect[31] and the reliance placed by the Court on *Heyman* v *Darwins*[32] also seems to be opposed to the interpretation of the same case as given in *Pittalis*.[33]

In another judgment of the Calcutta High Court,[34] the Court specifically differed from the Delhi High Court's decision and upheld the validity of a unilateral arbitration clause. As per the arbitration agreement, the petitioner Bank had the option to go to arbitration or not. The Court noted the decision in *Bharat Engineering Corporation*[35] and held that the position of law as laid down in the case has been dissented from by various authors and judgments.[36] The court took the view that in spite of option clause, the arbitration agreement remains valid. The Court concluded that there was valid arbitration agreement between the parties but both the parties had agreed that when future disputes will arise it would only be the privileged party who would have the right to make the reference, but the privileged party could also render the arbitration agreement infructuous by not exercising its option. This 'option' would not negative the existence of the arbitration agreement but would only restrict its enforceability.

The validity of unilateral arbitration clauses was further upheld in *Jindal* v *Fuerst Day Lawson*.[37] The arbitration clause in the said case provided the Buyer (Respondent) an option to either commence arbitration proceedings or to bring the dispute before the High Court in England. The judgment delivered by the Delhi High Court marks a significant departure from the case law decided earlier on the same point. The Court noted the aforementioned English Case Laws on the validity of unilateral arbitration clauses and held that there is no dispute as to the

31 As discussed earlier, there is substantial case law in England to suggest that unilateral arbitration clauses would be valid.

32 Heyman v. Darwins, (1942) AC 356 held that the parties were free to agree on any type of dispute resolution mechanism even if it meant conferring unilateral rights of reference on one of the parties.

33 *Supra* note 7.

34 New India Assurance Co. Ltd. v. Central Bank of India & Ors., (1985) AIR Cal 76.

35 Union of India v. Bharat Engineering Corporation, (1977) ILR 2 Delhi 57.

36 The Court relied on the judgment in Chetoomal Bulchand v. Shankerdas Girdharilal, (1929) AIR Sind 83 and Mulchand Sobhraj v. Radhakishin Parumal, (1926) AIR Sind 27.

37 Jindal Exports Ltd. v. Fuerst Day Lawson Ltd., MANU/DE/3204/2009.





validity of such clauses anymore. The Court rejected the contentions raised by the Petitioners that unilateral arbitration clauses were against the public policy of India and would also be hit by Section 28 of the Indian Contract Act, 1872.[38]

The court decided in consonance with legal position in England with respect to unilateral arbitration clauses and also noted that mutuality was no longer a requirement for an arbitration clause to be binding. Further, the Court went on to say that,

> *"Even if the English law did not apply, then also upon a proper construction of the Disputes Resolution Mechanism as contained in Clause 17 of the General Conditions of Purchase, there was an irrevocable open offer by the grantor of the option, namely, the petitioner to submit differences to arbitration and the power of acceptance vested in the option holder namely, the respondent. When the option was exercised and the offer accepted, the arbitration mechanism became mandatory with full implications thereof. Consequently, in my view, the petitioner's submissions that there was no legally valid arbitration agreement, is contrary to the facts of the case and untenable in law."*[39]

In the absence of a Supreme Court judgment confirming the validity of unilateral arbitration clauses, the status of such clauses are far from being resolved. It is important to note that the judgment given by the Single Judge of the Delhi High Court in *Fuerst Day Lawson*[40] is at variance with that of the Division Bench decision in *M/s. AVN Tubes Ltd.*[41] The Court in the former case extensively relied on English cases with respect to the validity of unilateral arbitration clauses and upheld the validity of such clauses. A probable reason for this could be the nature of the arbitration clause which allowed disputes to be brought before Courts

38 Reliance was placed on M/s. AVN Tubes Ltd. v. Bhartia Cutler Hammer Ltd., (1992) 2 Arbitration Law Reporter 8 where the Delhi High Court had considered the cumulative value of all the clauses which would affect arbitration and had held that the said agreement was clearly unilateral and not enforceable in a Court of Law.

39 *Supra* note 37.

40 *Ibid.*

41 M/s. AVN Tubes Ltd. v. Bhartia Cutler Hammer Ltd., (1992) 2 Arbitration Law Reporter 8.

in England. In the latter case however, the Division Bench in a short judgment held that unilateral arbitration clauses could not be upheld as being valid. There does not seem to be a general consensus in Indian Courts which could provide for a conclusive validity being granted to unilateral clauses.

The question of public policy also looms large when such clauses are considered in the Indian text and more so, when the threshold of public policy differs between domestic and International Arbitration.[42] The enforcement of a foreign award arising from a unilateral arbitration clause may not be refused on the grounds of public policy but given the lack of case law upholding the validity of arbitration clauses, it seems to be open for Indian Courts to set aside a domestic award arising from a unilateral arbitration clause on the ground of it being patently illegal.[43] This lack of clarity on the status and operation of unilateral arbitration clauses raises far greater concern for parties while choosing to designate India as the 'seat' for arbitration proceedings.

International Law Firm Clifford Chance has analyzed the effectiveness of arbitration clauses in about 40 jurisdictions.[44] The survey notes that such clauses have been somewhat effective in most countries except for Bulgaria, Poland, Russia and Romania. In most civil law continental jurisdictions, arbitration clauses are considered as procedural agreements and are required to fulfill certain mandatory requirements for their validity. The refusal to uphold unilateral clauses in such jurisdictions mostly occurs when there are significant imbalances between the parties or one of the parties is at a manifest disadvantage.[45]

[42] Oil & Natural Gas Corp. v. Saw Pipes, (2003) 5 SCC 705; Venture Global Engineering v. Satyam Computer Services, (2008) 1 SCR. 501; Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc, (2012) 9 SCC 552; Shri Lal Mahal Ltd v. Progetto Grano Spa, (2014) 2 SCC 433.

[43] Renusagar Power Co. Limited v. General Electric Company, (1994) Supp (1) SCC 644.

[44] Marie Berard, *Unilateral Option Clauses In Arbitration: A Survey As To Their Effectiveness,* CLIFFORD CHANCE, 25th Februry 2013, available at: http://www.cliffordchance.com/briefings/2013/02/unilateral_optionclausesinarbitration.html.

[45] Deyan Draguiev, *Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability,* 31 (1) JOURNAL OF INTERNATIONAL ARBITRATION 19, 25-32 (2014).





## III. The French and the Russian Cases: Questioning the validity of Unilateral Clauses

Despite ample jurisprudence to support the validity and enforcement of arbitration clauses, recent judgments from the French Cour de Cassation in *X* v *Banque Privée Edmond de Rothschild Europe*[46] and the Supreme Arbitrazh Court of the Russian Federation in *Russkaya Telephonnaya Kompaniya* v *Sony Ericsson Mobile Communications Rus Ltd. Liability Co.,*[47] have considered such unilateral arbitration clauses as being invalid.

In the *Rothschild*[48] case, a French National Mrs. X who was residing in Spain had a bank account with Edmond de Rothschild Europe's Luxembourg Branch. The clause in question provided that all disputes would have to be brought before Courts of Luxembourg with the Bank reserving the right to bring an action before the Courts of the client's domicile or any other court of competent jurisdiction. The Bank raised an objection before the French Court that the clause was incompatible with the relevant Private International Law Rules, in this case, Article 23 of the Brussels I Regulation.[49]

The Cour de Cassation while upholding the decision of the French Court of Appeal held such clauses to be invalid on the ground of being *potestative* in nature. The Court of Appeal had considered such clauses to be invalid on the ground that although the Brussels Regulations allow a party to choose between different jurisdictions, it was not within their discretion to select whatever Court they want to. The Cour de Cassation however, shifted the focus to the potestative nature of the clause while declaring it to be invalid.

[46] *Supra* note 3.

[47] *Supra* note 4.

[48] *Supra* note 3.

[49] Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and The Recognition And Enforcement Of Judgments In Civil And Commercial Matters, Official Journal L 012, 16/01/2001 P. 0001 – 0023. Article 23, Paragraph 1 of the Brussels I Regulation: If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.

Under French law, the doctrine of *'potestativité'* is applied in situations where the performance of a contract depends upon the discretion of and is controlled by only one of the parties. Such types of contractual clauses are considered to be invalid and void. The same was considered by the Cour de Cassation while declaring the unilateral clause as being invalid. This was a stark departure from earlier case laws on the same point where French Courts had upheld unilateral arbitration clauses.[50]

The stance adopted by the French Court while declaring the clause as invalid has been widely criticised on the grounds of incorrect interpretation of the Brussels Regulation and Conflict of Law Rules. The criticism has also stemmed from the arbitration perspective because the purpose of invalidating contractual clauses due to potestative nature is to save a party from suffering from a manifest disadvantage and to avoid the one-sided exercise of discretionary power by the other party. The doctrine aims to avoid unconscionability and inequality of parties. However, potestative considerations should not be applied in a manner so as to render an arbitration agreement invalid which had been negotiated and agreed to by the parties. The commercial purpose of such clauses is lost when they are declared as being invalid because in most situations the unilateral right is given to the party which is in a commercially weaker position. Moreover, considerations of party autonomy lose their importance when such clauses are declared as being invalid even though specifically agreed to by the parties.[51]

A probable reason for the approach taken by the French Court in this case could be the said case was of the nature of a consumer dispute and the Court did not want to uphold the validity of the unilateral clause due the inherent inequality of bargaining power between the parties. It was however open for the Court to make a distinction for consumer disputes and other similar matters where it would be unconscionable to uphold the validity of such arbitration clauses.

[50] See Société Sicaly v. Société Grasso Stacon NV, Bull. (1974) I No 143, p. 122 Cass. Civ. (1ère) (French Cour de cassation); Société Edmond Coignet v. COMIT, Bull. (1990) I No 273, p. 193, Cass. Civ. (1ère) (French Cour de cassation).

[51] Maxi Scherer & Sophia Lange, *The French Rothschild Case: A Threat for Unilateral Dispute Resolution Clauses,* KLUWER ARBITRATION BLOG, 18th July 2013, available at: http://kluwerarbitrationblog.com/blog/2013/07/18/the-french-rothschild-case-a-threat-for-unilateral-dispute-resolution-clauses/#fn-7823-20.





The Russian Supreme Arbitrazh Court (SAC) also held a unilateral arbitration clause to be invalid in the *Sony Ericsson* case.[52] The Court here was concerned with an arbitration clause that provided for disputes to be settled by the ICC London with the seat of arbitration being in London. Sony Ericson had the additional right to seek the recovery of its claims before every competent court.

While looking into the validity of the clause the SAC held that for a fair dispute resolution procedure it was mandatory that the parties should have equal rights to present their case before adjudicatory bodies and even arbitral tribunals. The Court looked into the European Convention on Human Rights 1950 and relied on judgments given by the European Court of Human Rights[53] in coming to the conclusion that such clauses would be contrary to the principles of procedural equality of parties, would be adverse to the nature of dispute resolution process and would lead to a breach of balance between the parties.[54] The clause was therefore held as being invalid because it was unconscionable.

The judgment of the SAC has been criticized as a judicial power grab where Russian Courts have been accused of protecting their sovereignty from encroachment by foreign jurisdictions.[55] It is pertinent to note in this context that while the SAC did consider unilateral arbitration clauses as unconscionable, the clause was not struck down or declared invalid. The SAC held that such unilateral options were invalid and not the entire arbitration clause. Therefore, the option of commencing arbitration proceedings or court litigation was provided to both the parties and not just Sony Ericsson, the 'unilateral' option was converted to a 'bilateral' option.

Both the French as well as the Russian Courts did not uphold unilateral arbitration clauses. However, both of them considered the effect and operation of such clauses differently. Whereas one of the Courts declared the entire clause as being invalid, the Russian SAC

[52] *Supra* note 4.

[53] Batsanina v. Russia, Judgment of the European Court of Human Rights on 26 May 2009, Application No. 3932/02; Steel and Morris v. The United Kingdom, Judgment of the European Court of Human Rights on 15 February 2005, Application No. 68416/01.

[54] *Supra* note 51.

[55] Charles Clower, *Russian Court Move Seen as Power Grab,* THE FINANCIAL TIMES, 4th December 2012.

converted the unilateral option of reference into a bilateral one. The approach taken by the Russian court has been appreciated because the Court managed to maintain a balance between not allowing unconscionability in commercial clauses and yet upholding the intention of the parties to arbitrate the disputes between them.

## IV. Aftermath of the French and Russian decisions: Issues for Consideration

The judgments of *Rothschild*[56] and *Sony Ericsson*[57] cases have caused much debate and deliberation across various jurisdictions. The decision of the English High Court in *Mauritius Commercial Bank Ltd* v *Hestia Holdings Ltd and Another*[58] has clarified the position under the English law continued to be the same even after the decision of the French Cour de Cassation. The contentions in this case sought to declare the arbitration clause as being invalid due to its one sided nature while relying on the *Rothschild*[59] case. The clause was also argued to be hit by public policy as enshrined under Article 6 of the European Convention on Human Rights which provided for equal access to justice for all. While rejecting the contentions, the High Court clarified that the position under English law continued to be the same and there was ample jurisprudence to support the same.[60]

The position in England has remained unchanged even after the decision in the aforesaid two cases. However, it is yet to be seen if the position in other countries would be affected by them. It may be said that the decisions in *Rothschild*[61] should be read as only being applicable to consumer disputes where upholding unilateral clauses would render one party at a manifest disadvantage, and the decision in *Sony Ericsson*[62] should be read as being limited only to situations of standard form contracts where there is no opportunity given to the parties to negotiate. Despite the restrictive interpretation of these two

56 *Supra* note 3.
57 *Supra* note 4.
58 *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd and Another* (2013) EWHC 1328 (Comm).
59 *Supra* note 3.
60 With respect to Article 6, the Court held that it is directed to access to justice within the forum chosen by the parties, not to choice of forum.
61 *Supra* note 3.
62 *Supra* note 4.





judgments, a number of questions continue to pose a threat to the validity of unilateral arbitration clauses or at least to the parties who wish to resort to such clauses.

Firstly, issues of enforcement are bound to arise while considering unilateral arbitration clauses. Although valid in a particular jurisdiction, the awards arising out of such clauses might be refused to be enforced at another jurisdiction where the enforcement is sought because such other jurisdiction might look at unilateral clauses from a different perspective. It may be another problem for the party seeking the enforcement to show that the said unilateral clause does not violate the public policy of the place of enforcement.[63] For instance, continental jurisdictions look at arbitration clauses as procedural agreements and thereby certain conditions need to be fulfilled for their validity. There may be no such requirement at another country such as England. As a consequence, the public policy requirements of the two jurisdictions would be different.

Secondly, when two jurisdictions with different opinions on unilateral clauses are involved, a party might file a pre-emptive suit in a jurisdiction which considers unilateral arbitration clauses as being invalid while at the same time it may seek to reap the benefit of the other jurisdiction which considers unilateral clauses to be valid. It may also happen that a party might institute proceedings in courts of one of the jurisdictions which does not consider unilateral arbitration clauses as valid seeking to declare the clause as invalid and to trump the arbitration proceedings already commenced by the other party so on the ground that the Court seized with the matter would be the competent forum to adjudicate the matter in accordance with the relevant rules of Private International Law.[64]

Therefore, it is important that unilateral arbitration clauses are carefully drafted keeping in mind the various jurisdictional approaches to the validity of such clauses. Position of the parties, wording of the clause so as to avoid it being treated as pathological and the jurisdictions involved are some of the important considerations attached with the

63 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article V (10th June 1958) 330 U.N.T.SA
64 Deyan Draguiev, *Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability,* 31 (1) JOURNAL OF INTERNATIONAL ARBITRATION, 40-41 (2014).

effective operation of such clauses. The jurisprudence on such clauses is yet to crystallize, more so, in the Indian context and it is yet to be seen how such clauses are interpreted in various other countries. However, it is beyond doubt that unilateral arbitration clauses are valid in a number of jurisdictions and would continue to be valid as such. Indian Courts are most likely to follow the UK approach while the anti-unilateral clause jurisdictions are likely to limit invalidating such clauses only to cases when there is an inequality of bargaining power between the parties. Most important of all, the drafting of the arbitration clause will be a decisive factor in determining the efficaciousness and validity of such unilateral clauses.





# LOOKING "THROUGH" TO A "COMMERCIAL RATIONALE": REVIEWING THE GAAR IMPLICATIONS OF DIT V. COPAL RESEARCH AND OTHERS

*Devarshi Mukhopadhyay*

## I. Introduction

*"Taxes are what we pay for civilized nations"*[1]

One of the founding attributes of the Indian foreign investment market structure in the post liberalization period is an inherent state of policy flux, marked by a significantly grey area of law, between explicit tax mitigation measures allowed by the law in force and the willful breach of statutory tax impositions.[2] While it continues to remain a seemingly daunting policy

[1] Oliver Wendell Holmes Jr, in the case of CompanIia General de Tabacos de Filipinas v. Collector of Internal Revenue, 275 U.S. 87 (1927).

[2] Sanja Sanghvi, *Resolution of Vodafone tax case must to protect India's image,* BUSINESS TODAY, March 2014.

challenge to cull out *that* very thin line between tax *"planning"* and tax *"evasion",* the Indian scenario surrounding the liability of capital gains tax in the context of indirect transfers has remained in a state of tussle between the law making authorities and the judicial interpretation\examination of international transactions.[3] While on one hand, the application of the *"look at"* test in the matter between *Vodafone International Holdings B.V vs. Union of India*[4] marked the validity of avoidance arrangements so long as a holistic viewing of the entire transaction qualified it to not be a mere sham or a colorable exercise,[5] the judgment saw a sharp knee jerk reaction from the legislature, retaliating through the introduction of the retrospective amendment to Section 9 of the Income Tax Act.[6] As a result of the addition of Explanation 5[7] to Section 9(1) (i) of the Act, a capital asset being any share of interest in a company registered or incorporated outside India, would always be deemed to have been situated in India, so long as it derived either directly, or indirectly a *"substantial"* amount of its value from assets situated within the territory of India.[8] Naturally, this legislative move triggered massive concerns of uncertainty and pessimism from the international investor community, who were caught unaware in the web of retrospective tax liabilities, although they were *prima facie* not guilty of using colorable devices, designed to avoid taxes.[9]

By deconstructing the judicial pronouncement in the recent judgment of the Delhi High Court in the matter between *DIT V. Copal Research and Others,*[10] the objective of the author is twofold: First, to examine the implications of this judicial reasoning on the *"main purpose test"*[11] envisaged by the currently dormant GAAR provisions, contained in Chapter 10 A of the Act and to examine the likely consequences of this pronouncement on the pending special leave petition in the Supreme Court of India in the matter between *Sanofi Holdings vs. Department of*

3 Wei Cui, *Taxing Indirect Transfers: Improving an Instrument for stemming Tax and Legal Base Erosion,* THE VIRGINIA TAX REVIEW, Volume 33, (2014).
4 Vodafone International Holdings B.V v. Union of India, (2012) 6 SCC 613.
5 *Ibid.*
6 See The Finance Act, 2012.
7 Income Tax Act 1961, § 9(1)(i),
8 *Ibid.*
9 See A. Henderson, *The Case for Indirect Taxation,* THE ECONOMIC JOURNAL, Vol. 58, Issue 232 (1948).
10 DIT v. Copal Research and Others, (2014) 270 CTR (DEL) 223.
11 The "main purpose test" is contained within the text of § 96, Income Tax Act 1961 (draft GAAR).





*Revenue*[12] and second, to analyze the impact of this judgment on the scope of *"badges of indicia"* test in the draft GAAR. The author argues that the rare judicial analysis carried out by the Court in deciding the validity of the *"commercial rationale"* in the transaction in question, through the implicit application of the New Zealand model of assessment in such circumstances (as was observed in the cases of *Challenge Corporation; Accent Management Ltd. vs. Inland Revenue* and *Peterson vs. Commissioner of Inland Revenue)*[13] , significantly limits the territory of Section 96 of the Act, which seeks to cast the taxation net on international acquisitions that are structured in and routed through international subsidiaries.[14] The argument of the author is centered on the fact that there exists scope of abuse through subjective interpretation by the Revenue, given the fact that phrases such as *"main purpose"* are left undefined within the text of the law. The author further argues that the espoused judicial rationale shall also have a conclusive impact on the matters *sub judice* in similar contexts, *Sanofi* being one of them.[15] The third and final leg of the author's analysis will be to prove that the *"bona fide"* test contained in Section 96 of the Act (one of the requirements of the "*tainted elements* test"[16]) will be significantly controlled by this judicial pronouncement considering that the Court has read *commercial substance* and *bona fide means* (the use of the Double Taxation Avoidance Agreement[17] primarily) into one mode of examination.

## II. Brief Statement Of Facts

The present dispute arises from a complex factual matrix[18] involving the Moody Group Limited ("Moody-UK") which is a company incorporated in the United Kingdom and Copal Partners Ltd, Jersey ("CPL Jersey"), (which held 100% shares in Copal Research Ltd, Mauritius [CRL Mauritius]). Now, CRL Mauritius held 100% of the shares in its subsidiaries Copal Research India Pvt Ltd, India (CRIL India) and Copal Market Research Ltd, Mauritius (CMRL Mauritius). CMRL Mauritius held 100% shares in Exevo Inc, USA (Exevo USA) and Exevo USA held

12 Sanofi Holdings v. Department of Revenue (2013) 257 CTR (AP) 401.
13 See Challenge Corporation, Accent Management Ltd. vs. Inland Revenue, (2007) BCL 728 (CA).
14 Income Tax Act 1961, § 96.
15 *Supra* note 11.
16 Income Tax Act 1961, § 96 (1)(a-d).
17 The India-Mauritius Double Taxation Avoidance Arrangement.
18 The factual matrix has been provided from the text of the Judgment.

100% shares in Exevo India Pvt Ltd, India (Exevo India).[19]

The transactions in question involved Three Share-Purchase Agreements (SPA's) which facilitated the sale of shares of the units of Copal Group to the units of the Moody Group wherein Moody-UK aimed at acquiring the 67% share ownership of the Copal Group in CPL Jersey and its 100% share-ownership in CRIL India and Exevo USA.[20]

SPA-I - CRL Mauritius sold its entire 100% shareholding in CRIL India to Moody's Group Cyprus Ltd. (Moody-Cyprus). SPA-II – CMRL Mauritius sold its entire shareholding in Exevo USA to Moody's Analytics Inc. (Moody-USA). SPA-III - Sale of approximately 67% of the shares of Copal-Jersey to Moody-UK.[21]

An application was filed with the Authority for Advance Rulings ("AAR") arguing that the transactions involved the overseas entities carrying out an indirect transfer of the share ownership of the Indian Entities, thereby attracting the scope of Section 9 of the IT Act, which discusses the taxability of income accruing or arising directly or indirectly from the transfer of a capital asset situated in India.[22] With the AAR ruling in favour of the assessee, the Revenue Authority filed a writ petition before the Delhi High Court challenging the decision.[23]

In order to outline the theoretical territory of the present discussion, one must necessarily examine the operation of both the look *"through"* and the look *"at"* test, in terms of the impact that these doctrines have had, on shaping the Indian scenario relating to income tax jurisprudence, especially in the context of international transfer taxation. By carrying out this examination, the author seeks to provide sufficient context in order to adequately comprehend the implications of such decisions in the years to come.[24]

19 Ernst and Young, *India's Delhi High Court rules 50% as benchmark to evaluate "substantial value" on taxation of indirect transfers,* GLOBAL TAX ALERT, (11th September, 2014).

20 Director of Income Tax v. Copal Research Limited (2014) 270 CTR (Del) 223 at ¶4.

21 *Id* at ¶5-6.

22 *Id* at ¶7.

23 *Id* at ¶1.

24 The reason as to why this outline has been provided, is to ensure that the subtle legal differences between the two approaches, as propounded by both the judiciary as well as the legislature is adequately provided to the reader.





## III. Revenue Structures In The Indian Indirect Transfer Debate: A Flittering Judiciary?

As Lord Tomlin notes, in the landmark 1936 case of the *IRC V. the Duke of Westminster, "every man is entitled, if he can, to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax".*[25] The operation of the Westminster Principle, as the ratio dicidendi of this case is popularly known as, allowed the assessees in question, to structure their financial arrangements in a manner that would minimize their tax liability, so long as the structuring was within the boundaries of the black letter law (emphasis added).[26] The primary criticism for the often used legal justification of the Westminster paradigm was that the statements of Tomlin, when he states that *"this so called doctrine of the substance seems to me to be nothing more than an attempt to make a man pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is not legally claimable",*[27] do not confer a positive legal right on the assessee individual or corporation the explicit right to design avoidance mechanisms , but only speak about *"denying the right of the Revenue to artificially maximize the burden of tax on an individual".*[28]

While on one hand, several tax experts, including Ben Saunders,[29] argue that the use of this principle as a legal justification to avoid tax was void on the grounds that the statements of Lord Tomlin were read out of context, the principle was followed as good law, until 1982 when the matter between *W.T Ramsay Ltd. v. I.R.C*[30] was examined before the House of Lords and led to the subsequent clarification to the Westminster Principle. This particular case, dealing with the question of the design of intermediary financial structures to willfully create a tax avoidance

25 IRC v. the Duke of Westminster, (1935) ALL E.R (259) (House of Lords).

26 J. Tiley, *Tax Avoidance: A Change in the Rules,* CAMBRIDGE LAW JOURNAL, Vol. 41 (1982).

27 *Supra* note 22.

28 *Ibid.* Also see Tax Research United Kingdom, The Duke of Westminster is Dead, 10th August 2012.

29 *Ibid.*

30 W.T Ramsay Ltd. v. I.R.C, (1982) AC 300 (House of Lords).

scheme, significantly contributed to the reduction of formalism in fiscal matters, as was later reiterated by Lord Steyn and Lord Cooke in the matter between *IRC V. McGuckian (1997).*[31]

With the operation of what was a purposive interpretation of any commercial arrangement, it was in the opinion of the House of Lords that *"it is the task of the Court to ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions intended to operate as such, it is the series or combination which may be regarded"*.[32] As a result of such a line of judicial thinking, a significant impact was caused on several commercial arrangements, operating through the self-cancellation of transactions which had very little actual commercial or business rationale, apart from the overarching intention of tax avoidance. In fact, the judicial response to the Ramsay principle, as was observed subsequently in the matters of *IRC vs. Burmah Shell* (1982),[33] as well as *Furniss vs. Dawson* (1984),[34] provided the Revenue with adequate scope to cast the taxation net on financial arrangements which had no real commercial substance.[35]

The judicial trend in India is one that followed a similar line of precedent, as did the United Kingdom. In the pre Ramsay era, the Supreme Court endorsed the Westminster principle, as was observed in the 1968 decision of the court in the matter between *CIT vs. A Raman,*[36] whereby the Court held that *"avoidance of tax liability by so arranging commercial affairs that the charge of tax is distributed is not prohibited",* and the 1940 case of *Bank of Chettinad vs. CIT,*[37] whereby the High Court at Bombay resorted to the opinion of Lord Cairns in the matter between *Partington vs. Attorney General*[38] (1869) to say that *" if the person sought to be taxed, comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind. On the other hand, if the Crown, seeking to recover the tax,*

[31] IRC v. McGuckian, (1997) I W.L.R 991.
[32] *Supra* note 27.
[33] IRC v. Burmah Shell, (1982) STC 30.
[34] Furniss v. Dawson, (1984) AC 474.
[35] Mihir Desai, *Foreign Direct Investment in a World of Multiple Taxes,* JOURNAL OF PUBLIC ECONOMICS, Vol. 88 (2004).
[36] CIT v. A Raman, (1968) 67 ITR 11 (SC).
[37] Bank of Chettinad v. CIT, (1940) 8 ITR 522 (SC).
[38] Partington v. Attorney General, (1869) LR 4 HL 100.





*cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be"*.[39]

In the 1986 Supreme Court decision however, in the matter between *McDowell and Co. Ltd. vs. Commercial Tax Officer,*[40] the legality of colorable devices to avoid the payment of taxes was held to be nil. The Court, relying heavily on the line of reasoning adopted in the matter between *C.I.T (Gujarat) vs. B.M Kharwar,*[41] reiterated that the *"if the parties have chosen to conceal by a device, the true legal relation resulting from the transaction, it is open to the taxing authorities to unravel the device. But the legal effect of the transaction cannot be displaced by probing into the substance of the transaction"*.[42] The legal position which emerges from the case is that unless the assessee had resorted to colorable devices to avoid the tax in question, the taxation net could not be cast on him/her (the Court observes that *"tax planning is legitimate provided that it is within the framework of the law. It is the duty of every citizen to pay the taxes honestly without resorting to subterfuges"*).[43]

While the concurring opinion of Justice Chinappa Reddy expounded further on the *"dubious methods"*[44] often resorted to by taxpayers in the opinion of the Court, the general theme which emerges from his concurring opinion is that obtaining a tax benefit was impermissible unless it was explicitly bestowed by the law on the assessee. In fact, the words of the Judge, when he says that *"our normal meticulous methods of statutory construction tend to lead us astray by concentrating too much on verbal niceties and paying too little attention to the provision as a whole",*[45] provide sufficient basis for a model of taxability examination which required the purposive interpretation of the statute, using not just the golden rule of interpretation, but also the mischief rule.[46] While one could possibly contend that the position of the

[39] *Supra* note 35.
[40] McDowell and Co. Ltd. v. Commercial Tax Officer, (1986) 154 ITR 148 SC.
[41] C.I.T (Gujarat) v. B.M Kharwar, (1969) AIR 812.
[42] *Supra* note 38.
[43] *Ibid.*
[44] *Ibid.* See the separate and concurring opinion of Reddy, J. at 38.
[45] *Ibid.*
[46] The mischief rule of legal interpretation involves the examination of the real intent of the lawmakers or law framers in a given set of facts and circumstances.

Judge in this matter is not explicit by virtue of him stating that *"there is no equity in a tax",*[47] (which naturally also implies the absence of equity from the point of view of the tax collector), a simpler position emerges when he goes to the extent of asking if *"the Ghost of Westminster should be allowed to rear its head in India".*[48]

## IV: From Mcdowell To Azadi: Clarifying The Indian Position On "Suspect Jurisdictions" And The "Ghost Of Westminster"

As a result of the *McDowell* opinion, the discretionary authority granted to the Revenue expanded significantly, resulting in the incorporation of the judgment within the tax policies of the Government. The position of law in operation, therefore, was largely unsettled for a period of time before the validity of Circular 789 of the Central Board of Direct Taxes, issued on April 13, 2000, came into examination in the case of *Azadi Bachao Andolan vs. Union of India.*[49] There were two pivotal issues which were addressed in this case and which served as a clarification to the prevailing uncertainty about the demilitarization of the Revenue's aggressive taxation policies. Firstly, the Court, relying heavily on the line of examination followed by the Calcutta High Court in the matter between *CIT vs. Davy Ashmore,*[50] reiterated the stance of the Court where it had upheld the validity of Government Circular No. 333 of 1982. This circular, which stated that *"the correct legal position is that where a specific provision is made in the Double Taxation Avoidance Agreement, this provisions will prevail over the general provisions in the Income Tax Act, 1961",*[51] provided a much needed judicial response to the concerns of the international business community, and their capital gains liability, especially in what the Chinese Revenue Authorities call *"suspect jurisdictions".*[52]

As a result of this opinion, the earlier position of the Karnataka High Court in the case of *CIT vs. R.M Muthaiah* was also explained to fit the

47 *Supra* note 45.
48 *Ibid.*
49 Union of India v. Azadi Bachao Andolan & Anr., (2004) 10 SCC 1..
50 CIT vs. Davy Ashmore, (1991) 190 ITR 626 Calcutta.
51 *Ibid.*
52 *Supra* note 3.





income tax concerns which plague the Indian foreign investment structure at present.[53] As per the facts of this particular case, the question before the court was the over-riding nature of the Double Taxation Agreement entered into between the governments of India and Malaysia, with respect to the taxing power of the Income Tax Act, 1961. The response of the Court was one that was primarily investor friendly, stating that *"the agreement would take away the power of the Indian government to levy tax on the income in respect of certain categories as referred to in certain articles in the Agreement".*[54] In addition to the abovementioned case, mention is also found of the decision of the Federal Court of Australia in the matter between *Commissioner of Taxation vs. Lamesa Holdings,*[55] where the investigation was centered on the taxability of a Netherlands Company under the Australian Income Tax Act, which sold the shares in an Australian Company and was directed to pay taxes on the profits so earned. On further examination into the rule of law envisaged by Article 13 (Alienation of Property) of the DTAA, the Company was held not liable to pay tax within the Australian jurisdiction.[56]

In addition to this clarification that was much needed within the contextual framework of the prevailing uncertainty, the Court went on to observe its second most important holding in the case, when it upholds the Westminster principle, stating categorically that "*the reliance on Furniss, Ramsay and Burmah Oil by the respondents in support of their submission is to no avail",* although it had managed to create *"a temporary turbulence".*[57] The final statements of the Court in which it says that despite having *"anxiously scanned"* the *McDowell* decision, it found no real legal basis for holding it as legally sound, sealed the validity of the Westminster Principle in India, with the Court saying that *"unless abrogated by an act of Parliament, we think that this legal principle would continue to hold good".*[58]

53 CIT vs. R.M Muthaiah, (1993) 202 ITR 508 Karnataka.
54 *Ibid.*
55 See JOHN TILEY, GLEN L., ADVANCED TOPICS IN REVENUE LAW (Hart Publishing, 2013).
56 *Ibid.*
57 *Supra* note 49.
58 *Ibid.*

## V. Laying out the Operational Framework for the Indian GAAR: "Look at or Look Through"?

The *Azadi* decision was generally received well by the foreign investor community, especially in the context of those business giants which found it increasingly difficult to cope with the logistical and statutorily complex compliance structures in countries such as India or China.[59] However, although the Supreme Court decided to propound the spirit of a holistic judgment of complex international financial structures through the *"look at"* approach in the Vodafone tax dispute, the tussle between the judiciary and the legislature viz. indirect transfers continues to plague the minds of the international business community even today. Therefore, both *Azadi* and *Vodafone* mandated that unless the transaction in question was a sham when viewed holistically, the Revenue would have to allow such avoidance arrangements.[60] With the Revenue seeking to enforce the *"look through"* approach (and thereby cast a wider tax net) through the currently dormant GAAR Provisions, contained in Chapter 10 A of the Income Tax Act, the present case of *DIT vs. Copal Research and Others,* raises complex difficulties for the full-fledged operation of the provisions of the GAAR in India.[61]

## VI: The "Colorable Exercise" Scrutiny: Identifying the "Commercial Rationale"

The High Court at Delhi, while examining the three Share Purchase Agreements in question, carries out a fairly detailed and articulate *"sham transaction/colorable exercise"* scrutiny, in order to ascertain whether or not the separate execution of the share purchase agreements, was designed specifically for the purposes of tax avoidance or whether there was sufficient business motive behind *that* particular structuring of the transaction. The liberal and investor friendly interpretation of the Court is well reflected when it observes that the simpliciter sales of Copal Jersey to the Moody Group would result in the Moody Group acquiring only 67% of the shares of both CRIL as well as Exevo U.S.A, which was contrary to the original business plan of acquiring 100% shareholding in

[59] Matthews George, *Use of the Corporate Vehicle for Tax Planning,* NUJS LAW REVIEW, (2010). Also see K.R Girish, *Controlled Foreign Corporations-Is India Ready for this Tax Regime?* THE HINDU, 16th April, 2007.

[60] *Ibid.*

[61] Income Tax Act 1961, Chapter 10A.





the abovementioned Companies.[62] If one were to follow the fallacious reasoning of the Revenue, several problems would arise. First, 33% of the shares in Copal Jersey were held by banks and financial institutions and the simpliciter sales of these shares to the Moody Group would therefore be to a maximum extent of only 67%.[63] Therefore, the only way for the Moody Group to acquire a 100% shareholding in CRIL and Exevo U.S.A (and therefore Exevo India) was through the execution of separate share purchase agreements, structured through the Mauritius route, since the selling Company was incorporated in Mauritius.

In fact, the suspicion raised by the Revenue surrounding the timing of these transactions, was also put to rest when the Court observes that the distribution of upstream dividend to the shareholders of CRIL and Exevo U.S.A wouldn't have been possible if separate agreements were not executed before the final share purchase transaction.[64] On the question of the timing of these transactions therefore, the Court upheld the validity of the actions of the assessees, contrary to the Revenue's contentions that SPA-1 and SPA-2 were executed one day prior to SPA-3 simply to (a) obtain the benefits of the Indo-Mauritius DTAA and therefore to avoid capital gains liability (b) that the entire transaction should be viewed in conjunction since the only real purpose of the transactions was a step by step transfer of interests to the Moody Group.

Secondly, by virtue of the application of both the Economic Substance Doctrine and the Step Transaction Doctrine (both implicitly borrowed from the American school of income tax jurisprudence and applied by the Court in this case),[65] the Court makes an examination of whether or not the Mauritius Companies were *"shell companies",*[66] in order to determine the credibility of the Mauritius route and the Revenue's argument that the route was resorted to only for purpose of obtaining a definite benefit under the India-Mauritius DTAA.[67] Having

[62] The argument that was accepted by the Court is that original business plan of acquiring complete interest in the downstream subsidiaries in India would not be possible through the U.S route, since interest of only 67% vested with the Copal Group shareholders. The rest 33% was held by banks and other financial institutions.

[63] See the full text of the judgment for a complete flowchart of the reasoning.

[64] From the text of the judgment.

[65] Philip Sancilio, *Clarifying the Notably Abstruse: Step Transactions, Economic Substance and the Tax Code,* COLUMBIA LAW REVIEW, (2013).

[66] A shell company is a vehicle for corporate transactions without individually having significant operations or assets.

[67] The India-Mauritius Double Taxation Avoidance Arrangement.

ascertained that both CRL as well as CMRL were operating financially through the provision of financial and market research services, with the aid of Category 1 Global Business Licenses, the Court held that there was sufficient evidence to retain the individual corporate identities of the entities in question (thereby satisfying the *"test of agency"* as stated in *New Horizon Ltd. vs. Union of India* by the Supreme Court in 1995) Clearly, there was a definite *"commercial rationale"* behind the structure in question and the business objective that was sought to be obtained wouldn't have been possible through the route suggested by the Revenue. Further, as a result of the investment structure existing for a considerable period of time, the Revenue could not validly contend that the structure was devised solely for purposes of tax avoidance.[68]

## VII: Restricting the Territory of Abusive Discretion: Examining Section 96 of the Income Tax Act 1961

What is interesting to note, and what becomes pivotal to the Indian Revenue on multiple counts, is the manner of the examination of the Court, in applying what is primarily a New Zealand model of analysis. In addition to the general over-riding nature of Chapter 10 A, a closer examination of Section 96 (Impermissible Avoidance Arrangement) explains that an arrangement will be treated as impermissible if (a) the main purpose of the arrangement if to obtain a tax benefit and (b) the arrangement must fulfill one or more of the conditions laid down in Section 96(1) (a) to (d). Now, although the Draft guidelines specify that the burden of proof in both cases shall lie on the Revenue, the author contends that the subjective element within the text of Section 96 is fundamentally problematic for the investor community, for the reason explained below.

If the provisions of Section 96 are interpreted subjectively, there is always a possibility of the commercially motivated assessee also being dragged into the ambit of the GAAR, by virtue of the fact that (a) the meaning of *"main purpose"* can be very widely construed so as to lead to an abuse of discretion and (b) assuming that if an arrangement has both commercial as well as tax reasons, the GAAR must not be applicable, but which can very well happen by the current wording of Section 96, because of a very fine line between tax avoidance being the *main purpose*

[68] *Supra* note 36.





and the *ancillary purpose.* The High Court at Delhi in this case, implicitly applies the test of *"whether or not the transaction would have been entered into if not for the resultant tax benefit",* when it carries out the detailed analysis of the resultant business benefits from the simpliciter sale of shares of Copal Jersey.

By virtue of the Court observing that a 100% control couldn't be obtained by the Copal Group through a simpliciter sale of shares from Copal Jersey to the Moody Group, it becomes evident that although the capital gains tax liability through the Mauritius route was significantly low, the transaction would still have to be structured in the same manner for the 100 % control to exist. This particular mode of assessment, borrowed primarily from the two landmark New Zealand cases of *Challenge Corporation vs. Commissioner of Inland Revenue* (2007)[69] and *Peterson vs. Commissioner of Inland Revenue* (2006).[70], significantly reduces the element of subjectivity in Section 96, which therefore reduces the scope of taxability and abused subjectivity by the Revenue. To put it simply, an inherent element of subjectivity exists within Section 96, especially because wide discretion is granted to the Revenue in ascertaining the *"main purpose"*[71] of the transaction. By adopting the jurisprudence emerging from New Zealand, and asking the question of whether the transaction would have been entered into *despite no tax advantage,* the Court in this case has reduced the scope of Section 96, by drastically reducing the subjective element. It is highly likely that this decision will tilt the balance in favour of *Sanofi Holdings*[72] in the pending Special Leave Petition in the Supreme Court, and shall restrict the scope of abusive discretion by the Revenue in future litigation.

Now, consider a situation where the Revenue seeks to cast the taxation net on the assessee, on the grounds that the transaction in question was structured through the Cayman Islands (very low capital gains tax). Irrespective of whether or not there was a valid commercial motive otherwise, the Revenue could still hold the assessee liable because it could possibly prove that the means used ( the Cayman

[69] Challenge Corporation vs. Commissioner of Inland Revenue, (2007) BCL 728 (C.A).
[70] Peterson vs. Commissioner of Inland Revenue, (2005) 22 NZ TC 19098 (PC).
[71] Income Tax Act 19961, § 96.
[72] *Supra* note 13.

Islands route) was not *"bona fide"*[73] (read: designed to avoid tax), because of Section 96(1)(d). Now, the Court, by virtue of holding that the business motive existed independently of the Mauritius route and that the Mauritius route was a credible route from a commercial viewpoint, we may infer that a subsidiary arrangement structure was itself a part and parcel of having a valid *"commercial rationale"*. Therefore, even in a case where the Revenue sought to enforce the *bona fide* test as divorced from the *commercial rationale* test, it shall probably not be able to do so, considering that the purpose and the means of the particular transaction have been clubbed into only one model of examination, that is the *commercial rationale* test. As a result of this higher threshold, the taxing scope of the Revenue will significantly decrease, since using an international subsidiary route is also a part of having a *"commercial rationale"*.

## VIII: Concluding Remarks: Towards an Investor-Friendly Paradigm?

While the usage of corporate vehicles for purposes of tax planning shall carry sufficient uncertainty until the full-fledged operation of the GAAR provisions, judicial intervention in restricting the scope of abusive discretion marks an important liberal and pro-investor stand by the Courts in this country. The often used artificial distinctions used by the Revenue for purposes of a wider tax net, often prove detrimental to the interests of the country, especially in an inbound foreign investment market like India. The author, through the two primary submissions welcomes the decision of the High Court at Delhi, and contends that the well-reasoned decision shall give the Indian income tax jurisprudence a new face in the current legislative context of the GAAR. The method of examination adopted by the Court in the present instance is a reflection of the judicial intention of giving international transactions extra space within the regulated Indian market conditions and is an excellent sign for the inbound foreign investment market in India.

[73] Income Tax Act 1961, § 96(1)(d).





# REVISITING THE VODAFONE CHAPTER ON OFFSHORE TRANSFER OF INDIAN ASSETS: A COMMENT ON THE DIT V. COPAL RESEARCH LIMITED CASE

*Dhruv Tiwari and Anand Swaroop*

*The Delhi High Court, in a path breaking pronouncement recently, held that the profits arising from the sale of shares of overseas entities which derive a majority of their value from Indian assets shall fall beyond the scope of taxation under the Indian taxation laws. The High Court, while delivering its watershed judgment on taxation of indirect transfer of assets, touched upon the issues of interpretation given to Explanation 5 to Section 9(1)(i) of the Income Tax Act, recourse taken to non-binding international instruments and tax avoidance. The order of the Delhi High Court comes as a much needed relief for the international investor community. In the light of the aforementioned aspects, the present case commentary critically analyzes the judgment of the Delhi High Court on the offshore transfer of Indian assets. The commentary begins with the background of the entire case which includes appreciation of the facts of the case; the issues involved therein, the contentions of the parties and the order passed by the Court. The authors then move on to a critical and multi-dimensional analysis of the order, taking into account the hits and misses of the Court while delivering the same. In conclusion, the authors deal with the implications of the said pronouncement within the context of future transactions and arrangements to be entered into by overseas corporations. More specifically, the authors discuss how this decision of the Delhi High Court has contributed in solving the dubitable problem of tax avoidance by giving a background of the same.*

## I. Introduction

The recently delivered judgement of the Delhi High Court in *DIT v. Copal Research Mauritius Limited*[1] has turned out to be a landmark judgment having far-reaching effects on India's taxation paradigm concerning the offshore transfer of Indian assets. In this progressive ruling, it was decided that the gains from the sale of shares of overseas entities, when the underlying Indian assets are transferred, become non-taxable under the Indian taxing statute. More importantly, it has helped in resolving the controversy surrounding the connotation of the word 'substantially' as incorporated under Explanation 5 to Section 9(1)(i) of the Income Tax Act, 1961 (the Act). The Delhi High Court while delivering this historic judgment delved into various sources like the OECD Guidelines, the Shome Committee Report and the Direct Tax Code, 2010 (DTC 2010).

## II. Background of the Case

### *A. Brief Facts*

The petitions in the present case pertain to the sale of shares of the Copal Group constituents to the Moody Group constituents in three different transactions. These Writ Petitions have been filed by the Revenue Department challenging the ruling of the Authority for Advance Rulings (AAR) wherein it was held that *the capital gains arising out of the sale of shares of an Indian company sold by a Mauritius company to a Cyprus company and the sale of shares of a US company sold by a Mauritius company to another US company were not liable to tax in India in the hands of seller companies.*[2] Here, the Copal Group consists of Copal Partners Limited, Jersey (Copal-Jersey), Copal Research Limited, Mauritius (CRL), Copal Market Research Limited, Mauritius (CMRL), and Copal Research India Private Limited, India (CRIPL). The Moody Group comprises of Moody's Group UK limited, United Kingdom (Moody-UK), Moody Group's Cyprus Limited, Cyprus (Moody-Cyprus), and Moody's Analytics Inc. Co., United States (Moody-US). Lastly, the Exevo Group has incorporated Exevo Inc., United States (Ex-US) and Exevo India Pvt. Ltd., India (Ex-India).

[1] Director of Income Tax (International Tax) v. Copal Research Limited, (2014) 270 CTR (Del) 223.

[2] In Re: Moody's Analytics Inc., (2012) 348 ITR 205 (AAR).

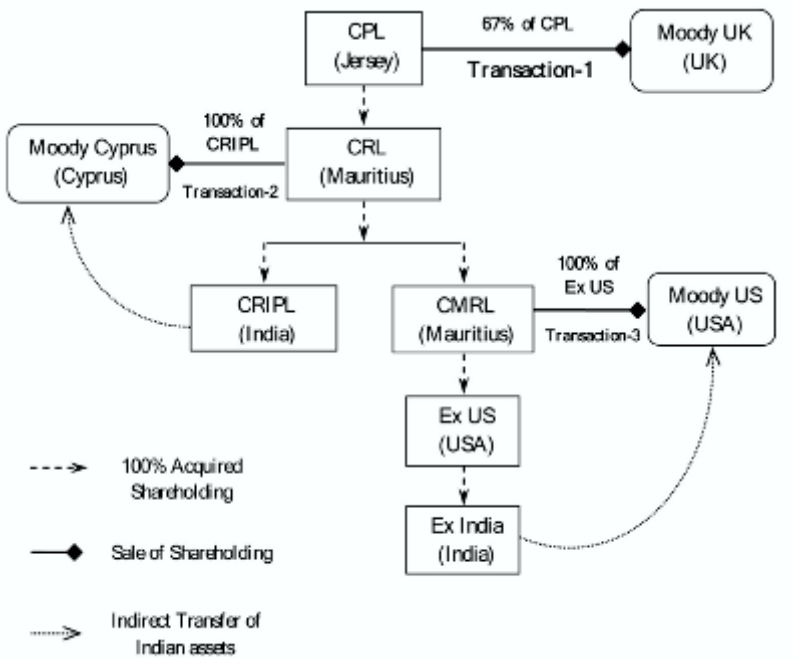




### *B. Transactions Involved*

Transaction-1 involved the sale of shares of CRIPL by CRL to Moody-Cyprus. CRIPL was the 100% subsidiary of CRL, whose entire shareholding in CRIPL, was transferred to Moody-Cyprus for a fixed consideration along with certain 'earn-out' payments.

Transaction-2 involved the sale of shares of Ex-US by CMRL to Moody-




US. CMRL being the 100% subsidiary of CRL, held 100% shareholding in Ex-US, which was a 100% shareholder in Ex-India. The transaction took place in return for a fixed consideration and 'earn-out' payments. Transaction-3 was the last transaction and it was effected a day after Transaction-1 and Transaction-2. This transaction involved the transfer of 67% shareholding of the shareholders of the Copal Group in Copal-Jersey, which was the ultimate holding company of the Copal Group, to Moody-UK. The banks and financial institutions continued to hold the remaining 33% of the shares in Copal-Jersey.

### *C. Contentions Raised By The Parties*

The Revenue Department primarily contended that Transaction-1

and Transaction-2 were intentionally made one day prior to Transaction-3 in order to transfer the entire business of the Copal Group without attracting any tax liability in India. Had Transaction-1 and Transaction-2 never happened, Transaction-3 would have attracted the levy of direct tax under Explanation 5 to Section 9(1)(i) of the Act. Under the said legal provision, an asset in the form of shares in a company incorporated outside India is deemed to have been situated in India if such an asset substantially derives value from the assets located in India.[3] Gains arising from the sale of shares in CPL in the hands of shareholders of Copal Group would be taxable under the 1961 Act as the said gains would be deemed to have arisen in India, but for the sale of 100% shares of CRIPL and Ex-US through Transaction-1 and Transaction-2, the same could not be taxed. The main intention was to structurally transfer the entire business of the Copal Group, along with all the downstream subsidiaries, to the Moody Group without paying any income tax, which unambiguously shows that Transaction-1 and Transaction-2 were transacted without any *commercial substance* as the real transaction was Transaction-3.[4] This can be supported by the fact that sellers in Transaction-1 and Transaction-2 are Mauritian entities, thus, the tax chargeable on gains arising from the sale of 100% shares in the hands of the Mauritian entities could be avoided on account of the India-Mauritius Double Taxation Avoidance Agreement (DTAA).

On the contrary, the assessee submitted that Transaction-1 and Transaction-2 happened as Moody Group wanted to acquire 100% shareholding in CRIPL and Ex-US. And, only 67% shareholding in CPL was transferred through Transaction-3 to another entity of Moody Group, which suggests that Transaction-3 is independent of Transaction-1 and Transaction-2.[5]

### *D. Question Involved*

The major question which the Delhi High Court considered was *whether Transaction-1 and Transaction-2 for the sale of 100% shares of CRIPL and Ex-US are designed prima facie for avoidance of income tax under the 1961 Act?*

[3] Income Tax Act 1961, § 9, Explanation 5.
[4] *Supra* note 1, ¶ 13.
[5] *Id* at ¶ 14.





### *E. Ruling of the High Court*

Rejecting the contention given by the Revenue Department, the Hon'ble High Court observed that it would be absurd to conclude that on the one hand entities of Moody Group have paid for the assets of CRL and CMRL under Transaction-1 and Transaction-2, while on the other hand another entity of the same Moody Group is paying a lump-sum amount to re-acquire a significant part of the consideration paid earlier. Relying upon the arguments of the respondent, the Court stated that by virtue of Transaction-1 and Transaction-2, the shareholders of Copal Group received 67% dividend out of the fixed consideration for the sale shares of CRIPL and Ex-US as well as sale proceeds for the sale of shares of Copal-Jersey.[6] This would not be commercially achieved only by the simplicitor sale of shares through Transaction-3. Therefore, the entire arrangement in question had not been structured with a purpose of tax avoidance as there would be no commercial substance if only Transaction-3 had happened.[7]

Furthermore, the High Court has considered the argument raised by the Revenue Department by assuming that even if the sale of shares of Copal-Jersey takes place without selling the shares of CRIPL and Ex-US, there would be no incidence of tax under the Act. Thereby, the High Court has made an effort to interpret the word 'substantially', as mentioned under Explanation 5 to Section 9(1)(i), to the extent that gains arising from the sale of shares of an overseas company are said to derive their value substantially from the Indian assets if such value constitutes 50% of the total sales consideration.

## III. Critical Analysis

In an endeavour to construe the word 'substantially', the Honourable Delhi High Court has given due consideration to various modes of interpretation. Manifestly, this judgment is considered to be the first landmark decision on indirect transfer of offshore assets; nonetheless, it raises several doubts regarding the binding nature of this decision as the Court has assigned meaning to the word 'substantially' by assuming the fact that Transaction-3 has happened without the occurrence of Transaction-1 and Transaction-2. According to the Court, had the

[6] *Id* at ¶ 19.
[7] *Id* ¶ at 20f.

transaction been designed in the manner suggested by the Tax authorities, still, the gains arising from the sale of shares to Moody UK by the Copal Jersey shareholders would not have attracted tax liability under Section 9(1) of the Act because their value could not be derived substantially from the Indian assets. Taking into account the said assumption, the Court pronounced that the word 'substantially' stands for 50% value of the total assets of an overseas entity, by using different legal sources. Now, the moot point arises as to whether the said legal sources are sufficient enough to be considered as an opposite legal basis for such an interpretation. This aspect is analysed through various legal perspectives.

### *A. Restrictive Interpretation Given To The Charging Section*

The entire issue revolves around the charging section, i.e. Explanation 5 to Section 9(1)(i) of the Act which has been of retrospective effect through Finance Act, 2012.[8] According to the provisions contained in Explanation 5 to Section 9(1)(i), the sale of the shares of an overseas or foreign company which derives a minimal part of its overall value from the Indian assets, cannot be deemed to be situated in India.[9] The Delhi High Court observed that Explanation 5 to Section 9(1)(i) of the Act provides a restrictive meaning. It does not enlarge the scope of the section so as to bring under the umbrella of tax, those profits on income, which arise from the transfer of assets situated outside India and derive a majority of its value from such assets. Section 9(1) was enacted with the object to impose tax on gains arising out of the sale or transfer of capital assets situated in India. Enlarging the scope of the aforementioned section to levy tax on the income not arising in India is therefore unjustified as Explanation 5 creates a legal fiction.[10] A legal fiction is a fact assumed or created by the courts for a particular purpose,[11] and the scope of the same cannot be extended beyond the definite purpose for which it has been created.[12]

[8] Finance Act 2012, § 4(a).

[9] *Supra* note 3, § 9 Explanation 5 which reads as: Explanation 5.—For the removal of doubts, it is hereby clarified that an asset or a capital asset being any share or interest in a company or entity registered or incorporated outside India shall be deemed to be and shall always be deemed to have been situated in India, if the share or interest derives, directly or indirectly, its value substantially from the assets located in India.

[10] *Supra* note 1, ¶ 27f.

[11] CIT, Kanpur v. Mother India Refrigeneration Industries (P) Ltd., (1985) 4 SCC 1.

[12] CIT, Bombay v. Amarchand N. Shroff, (1963) AIR SC 1448.





It is well settled by the Supreme Court of India that a legal fiction operates only within the ambit of the purpose for which it was created.[13] Thus, the scope of Explanation 5 cannot be extended to include the income arising from the transfer of assets situated overseas and not deriving major value from Indian assets. Any extension of the scope would lead to absurdity. This reasoning of the Delhi High Court was premised on the theory of 'doctrine of territorial nexus' which is a recognized principle for the determination of tax jurisdiction of income. In the case of *Electronics Corporation of India Ltd. v. CIT,*[14] it was held that the Indian courts must apply and enforce the law with the available machinery, and they are not authorized to question the legislature's authority in making an extra-territorial law. The same principle has also been upheld in a plethora of other celebrated decisions like *CIT v. Eli Lilly and Co. (India) P. Ltd. and Ors.,*[15] and *Hoechst Pharmaceuticals Ltd. v. State of Bihar.*[16] The Supreme Court of the country has also reiterated the same view in *GVK Industries Ltd. v. ITO,*[17] wherein it concluded that the power of the Parliament to make laws are under check and the Parliament does not enjoy unfettered authority to make laws having no nexus with India whatsoever. The powers of the Parliament remain circumscribed to the extent they have a connection with India. Giving due consideration to the aforementioned rules for interpretation, the Delhi High Court held that the expression 'substantially' occurring in Explanation 5 to Section 9(1)(i) must be read as *'principally', 'mainly'* or at least *'majority'*. Nevertheless, it is to be noted that the said legal provision was inserted as a measure for tax avoidance as a result of the Supreme Court decision in the *Vodafone* episode.[18] Though it is a legal fiction created by the legislature, but at the same time, it is a charging section, basing on which taxes are levied on indirect transfer of underlying Indian assets. Therefore, giving a restrictive interpretation would be fatal for the Indian Revenue authorities which would positively have an adverse impact on India's economy.

### *B. The Non-Binding Value Of International Instruments*

The Hon'ble Delhi High Court, in the instant case, held that if a company is incorporated overseas and there are profits arising from the

[13] CIT v. Vadilal Lallubhai, (1972) 86 ITR 2 (SC).

[14] Electronics Corporation of India Ltd. v. CIT and Anr., (1990) 183 ITR 43 (SC).

[15] CIT v. Eli Lilly and Co. (India) P. Ltd. and Ors., (2009) 312 ITR 225 (SC).

[16] Hoechst Pharmaceuticals Ltd. v. State of Bihar, (1985) 154 ITR 64 (SC).

[17] GVK Industries Ltd. v. ITO, (2011) 332 ITR 130 (SC).

[18] Vodafone International Holdings B.V. v. Union of India & Anr., (2012) 6 SCC 613.

sale of its shares, then the company will not be taxable if it derives less than 50% of its value from Indian assets.[19] In order to support this, the Court has taken the aid of two international conventions, viz. The United Nations Model Double Taxation Convention between Developed and Developing Countries (UN Convention) and the OECD Model Tax Convention on Income and on Capital (OECD Convention). Article 13 of the OECD Convention provides for the right to levy taxes on capital gains arising out of the sale of shares to only that country where such shares are deriving more than 50% of their value from the underlying assets situated in that particular country.[20] Especially, Article 13 of the UN Convention interprets the term 'principally' in relation to the ownership of an immovable property, as the value of such immovable property exceeding 50% of the aggregate value of all the assets owned by the company.[21] However, it is pertinent to note that the aforementioned conventions are merely *'Model'* taxation instruments. In the official commentary on OECD Convention, which is also reiterated in the UN Convention's commentary, it has been categorically mentioned that since the levy of tax on capital gains varies from country to country, thus it would be better to leave to the Contracting States to determine the methodology, suitable to them, for levying tax on capital gains.[22] This clearly shows that these international instruments are merely illustrative in nature as the deciding factor would be the municipal law followed in the legal system of the Contracting States.

Under the Indian legal system, the conventional way of interpreting a statute is to seek the 'intention' of the legislator[23] because a statute needs to be construed according *to the intent of them that make it.*[24] Explanation 5 to Section 9(1)(i) was inserted with a retrospective effect through Finance Act, 2012, but notes to the clauses of the Finance Act, 2012 are silent on the aspect of ascertaining the legislative intention behind such a retrospective amendment.[25] In such circumstances, external aids for

19 *Supra* note 1, ¶ 33.
20 The OECD Model Tax Convention on Income and on Capital 2014, Art. 13, ¶ 4.
21 The United Nations Model Double Taxation Convention between Developed and Developing Countries 2011, Art. 13, ¶ 4(b).
22 Commentary on the United Nations Model Double Taxation Convention between Developed and Developing Countries, Department of Economic & Social Affairs, United Nations, 226 (2011).
23 Commercial Tax Officer, Rajasthan v. Binani Cements Ltd. and Anr., (2014) 8 SCC 319.
24 Girdharial & Sons v. Balbirnath Mathur, (1986) 2 SCC 237.
25 Notes on clauses, 96 (2012-13), available at: www.indiabudget.nic.in.





construction of statutes would certainly come to an aid. Explanation 5 was inserted in order to override the decision of the Supreme Court in the *Vodafone case.*[26] So that the ramifications of this judgement would not cause any serious hardship on the Revenue Department of the Government, the Parliament amended Section 9 of the 1961 Act with its retrospective operation effective from April 1, 1962 vide Finance Act 2012 by inserting Explanation 5 and thereby clarified the position misbalanced by the *Vodafone* judgement.[27]

The Delhi High Court has relied upon the recommendations given by the Shome Committee wherein the Committee has suggested that the word 'substantially' used in Explanation 5 should be defined as a threshold of 50% of the total value derived from the assets of the company.[28] The said proposal was made after analysing the similar provision existing in the DTC 2010.[29] Although the Court has relied upon the forthcoming provision of the DTC 2010, however, the Hon'ble High Court has overlooked the recommendations made by the Standing Committee on DTC 2010 in its March 2012 report. The Standing Committee has specifically observed that the 50% threshold, as mentioned under DTC 2010 which provides for a 50% threshold of global assets to be located in India for taxation of income through indirect transfer, is too high.[30] Based on this, the Direct Taxes Code, 2013 (DTC 2013) now provides for a 20% threshold as the value of the underlying Indian assets held by an overseas company out of its global assets.[31] The reason given for such a reduction in threshold was that there might be a possibility that an entity having 33.33% assets in 3 different countries will not get taxed anywhere.[32]

26 *Supra* note 18.
27 *Supra* note 8, § 4.
28 Draft Report of the Expert Committee on Retrospective Amendments Relating to Indirect Transfer, October 2012, available at: www.incometaxindia.gov.in/archive/DraftReport_10102012.pdf.
29 The Direct Taxes Code 2010, Bill No. 110 of 2010, clause 5(4)(g).
30 49th Report of the Standing Committee on Finance (2011 -2012), Ministry of Finance (Department of Revenue), Government of India, March 2012, available at: http://164.100.47.134/lsscommittee/Finance/49_Final%20DTC%20Draft%20report.pdf.
31 The Direct Taxes Code 2013, clause 5(3)(ii).
32 Significant changes in the proposed Direct Taxes Code, 2013, Income Tax Department, Government of India, available at: http://www.incometaxindia.gov.in/Lists/Press%20Releases/Attachments/153/BreakingNews_changesDTC2013_31032014.pdf.

This issue would certainly raise several doubts on the decision given by the Delhi High Court, which can be understood through the facts in hand. In the immediate case, the Court has assumed that 67% shares of Copal-Jersey would be transferred to Moody-UK (Transaction-3) without there being any sale of shares of CRIPL and Ex-US (Transaction-1 & Transaction-2). That means the sales consideration for Transaction-3, i.e. USD 93,509,220[33] would not represent the economic benefits of Transaction-1 and Transaction-2, but the value of the Copal-Jersey shares would definitely include the value of shares of CRIPL and Ex-US. Total sales consideration for Transaction-1 and Transaction-2 is USD 42,582,740[34] which includes the underlying shares of CRIPL and Ex-India (assets situated in India). In a situation where only Transaction-3 had happened then 67% of USD 42,582,740 would be the value of those underlying Indian assets, which would come as USD 28,530,436. And, the amount of USD 28,530,436 is only 30.5% of USD 93,509,220 which is the total value of shares of Copal-Jersey. By putting 50% threshold as the limit for the word 'substantially', the High Court held that since the total value of shares of the seller entity (Copal-Jersey) is not deriving more than 50% value from the underlying Indian assets, and only 30.5%, the entire transaction is not attracting the tax liability under Explanation 5 to Section 9(1)(i). The authors would like to comment that had the Hon'ble High Court considered the similar provision of DTC 2013 based on the Standing Committee report and connoted the word 'substantially' with 20% threshold, the conclusion would be that the entire transaction would be liable for income tax under Explanation 5 to Section 9(1)(i).

This shows that the decision of the Hon'ble High Court reflects a limited yet partially correct legal reasoning.

## IV. The Incurable Malady of Tax Avoidance

The entwinement of tax planning, tax avoidance and tax evasion sometimes play a major role in determining the true intention behind a particular transaction or an arrangement. Tax planning (or mitigation) refers to reducing the tax liability by utilising all the available deductions

[33] *Supra* note 1, ¶ 7.
[34] *Supra* note 1, ¶¶ 5 and 6.





and exemptions. *A Tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning.*[35] On the contrary, Tax evasion is *"a situation where a person makes an attempt to reduce his tax liability by deliberately suppressing the income or by inflating the expenditures showing the income lower than the actual income and resorting to various types of deliberate manipulations"*.[36]

The ambiguous concept of tax avoidance lies between tax planning and tax evasion. Going by the literal meaning assigned to tax avoidance, it is *"a legal act of taking advantage of legally available tax planning opportunities in order to minimize one's tax liability by intentionally taking recourse to fraudulent measures"*.[37] In his concurring opinion, Justice Chinnappa Reddy stated that tax avoidance is nothing but *"an art of dodging tax without breaking law"*.[38] Under tax avoidance, the assessee adjusts its affairs in such a manner that, without committing an offence of tax evasion, it defeats the basic purpose of the taxing statute for which it was enacted. The principle laid down in the *Duke of Westminister* case suggests that the Court cannot go beyond the underlying principles of tax legislation. However, with the passage of time, the practices adopted by Multinational Enterprises showcase a thread of bypassing the letter of law by avoiding tax liability. Justice Chinnappa Reddy laid emphasis on making a departure from the principle laid down in the *Duke of Westminister* case by declaring the tax avoidance as illegal provided that it is done with an intention to defeat the essence of a taxing statute.[39] The same concept has again been observed by the Supreme Court in the celebrated *Vodafone* case wherein it was stated that the *Duke of Westminister* principle as well as the *McDowell* principle are in the context of colourable devices.[40] The *Vodafone* case also dealt with the indirect transfer of underlying Indian assets. There, the Supreme Court held that since the transaction in question was nothing but a share transfer between two non-residents thus, no tax liability

[35] CIT v. A. Raman & Co., (1968) 67 ITR 11 (SC).
[36] THE INSTITUTE OF COMPANY SECRETARIES OF INDIA, TAX LAWS AND PRACTICE, 539 (2013).
[37] BLACK'S LAW DICTIONARY, 1599 (2009)'.
[38] McDowell & Co. Ltd. v. CTO, (1985) 154 ITR 148 (SC).
[39] *Ibid.*
[40] *Supra* note 18, ¶ 64.

could be imposed under Section 9(1)(i) of the Act as the said provision could not be expanded to cover the indirect transfer of assets underlying in India.

At the time of the *Vodafone* episode, the Apex Court had its own limitation as at the time of judgment, Explanation 5 to Section 9(1)(i) was not in existence, and the Court categorically stated that since the DTC Bill, 2009 dealt with indirect transfer of capital assets, so there was no need to import the word 'indirect' into the existing Section 9(1)(i).[41] But, in the immediate case, the Delhi High Court already had the legal provision incorporated, but uncertainty lay with regards to the interpretation of the word 'substantially'. The said decision has not contributed in unravelling the issue of tax avoidance, as such. It has opened the floodgates for various overseas entities to structure their business operations in such a manner that the indirect transfer of offshore shares would not cross the 50% threshold so as to attract tax liability.

With the purpose of curing the problem of tax avoidance, the Indian government has introduced the General Anti-Avoidance Rules (GAAR) vide the Finance Act, 2012.[42] GAAR generally consists of a set of rules which empowers the Revenue Authorities to invalidate any arrangement or transaction having no commercial substance other than achieving tax benefits.[43] However, these rules will come into effect only from the Assessment Year 2016-17. Till then, the Indian judiciary has all sorts of discretionary power to interpret the provisions of taxing statutes using their own methodology in order to determine whether any transaction or arrangement is a sham transaction or not, which was entered into with the sole aim of tax avoidance.

## V. Conclusion

It can be concluded that the case being India's first landmark taxation of indirect transfer of Indian assets in the post-Vodafone era, has definitely raised various questions and initiated debates. However, it is yet to be seen how the investor climate will be affected in the country by the decision and will the floodgates of more foreign investment

41 *Id* at ¶ 71.
42 *Supra* note 8, § 41.
43 *Supra* note 3, Chapter X-A, § 95 - § 102.





opportunities open. But the case is definitely going to change the existing scenario. It projects the importance of displaying commercial rationality involved in undertaking a transaction to justify the non-intentional design of the transaction to avoid tax. However, it is too early to predict if the interpretation given by the Court regarding Explanation 5 to Section 9(1)(i) of the Act would be accepted by other Courts and will the reasoning sustain. But, the weighing of the international investor community's interests as well as the principles of the domestic tax regime by the Delhi High Court, while giving the decision, will be widely accepted and appreciated.

Nevertheless, whatever be the changed scenario, corrective measures or lacunae, the international investor community is going to welcome the decision wholeheartedly.

# EXAMINING EUTHANASIA: IS THERE AN ANSWER?

*Tia Jose and Keshavdev J.S*

*The uncertainty that is looming large over India's stand on euthanasia can be settled only by enacting a statute regarding the same as well as by revising certain existing laws. Decriminalizing of attempt to commit suicide, though believed to provide impetus to the call for formulation of a euthanasia regime in the country, will remain ineffective with regard to the same as long as Section 306 dealing with abetment of suicide is not altered. Almost four years after the judgement in Aruna Ramachandra Shanbaug v. Union of India and Others, Euthanasia is still unchartered territory for the Indian Parliament. Can we wait any longer, or rather, should we wait any longer? Increase in the number of euthanasia petitions across the country point towards the shift in the general mentality towards euthanasia. Drawing inspiration from the recent developments in foreign jurisdictions, a comprehensive legislation must be drafted, settling the issue once and for all. It is high time we put our moral reservations on euthanasia behind us and start viewing death as an inevitable biological function. In the wake of stronger and more urgent demand from the public for a detailed legislation on euthanasia, the Parliament is deliberating on the matter and has also called for the opinion of each State. While drafting this would-be iconic statute, the Legislature must not ignore the fact that the Shanbaug judgement, in spite of laying down several guidelines, does not cover the finer aspects of euthanasia. It is these finer aspects that this paper seeks to discuss. The fact that Euthanasia requires two consulting adults, the patient and the Doctor, remains ignored, and concentration on the implications to the patient alone precludes any objective analysis of Euthanasia legislation. The social relevance quotient associated with euthanasia being high, the Parliament must ensure that the imminent legislation reaches*





*the grass root level so as to include all affected parties within the loop.*

## I. Introduction

*I am the master of my fate. I am the captain of my soul.*[1]

An individual's right to life and liberty is one of the most basic rights accorded by the Constitution of India through Article 21. The two aspects contained in Article 21, that is, life[2] and liberty form two essential components in a discussion on the concept of 'euthanasia'. Since Article 21 of the Constitution casts an obligation on the State to preserve life, euthanasia may be regarded as an alien concept with respect to the duties entrusted on the State. When such an obligation is entrusted on the State, the question of sanctioning euthanasia is quite unfathomable. Then again, mere animal existence isn't really the right that Article 21 protects.[3]

As rightly opined by Dr. M. Indira and Dr. Alka Dhalunder the caption ''Meaning of life, suffering and death'' as read in the International Conference on Health Policy, Ethics and Human Values held at New Delhi in 1986,

> *"Life is not mere living but living in health. Health is not the absence of illness but a glowing vitality; the feeling of wholeness with a capacity for continuous intellectual and spiritual growth. Physical, social, spiritual and psychological wellbeing is intrinsically inter-woven into the fabric of life. According to Indian philosophy, that which is born must die. Death is the only certain thing in life."*[4]

The issue of euthanasia was, for the longest time, one of the most under-discussed, yet one of the most pressing matters in India, but the very same issue reverberated throughout the length and breadth of the nation consequent to the public attention that was concentrated towards a passive euthanasia petition filed by Ms. Pinki Virani on behalf of Ms.

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1 William Earnest Henley, *Invictus.*

2 Pt. Parmanand Katara v. Union of India & Ors., (1989) AIR 2039 (SC).

3 Kharak Singh v. State of U.P & Ors., (1964) 1 SCR 332.

4 COLIN GONSALVES, VIJAY HIREMATH, REBECCA GONSALVEZ, PRISONERS' RIGHTS, VOLUME II, 301 (Socio Legal Information Cent, 2011).

Aruna Ramchandra Shanbaug. The Court's observations in *Aruna Ramchandra Shanbaug v. Union of India*[5] and Othersand along with the developments and discussions that ensued by way of various other Public Interest Litigations such as *Common Cause(A Regd. Society) v. Union of India,*[6] and by general public outcry has made Euthanasia one of the most humane debates the Country has ever seen.

## II. Background

The most felicitous manner to start a discussion on euthanasia is by differentiating suicide from euthanasia. In *Maruti Sripati Dubal v. State of Maharashtra*[7] a clear distinction between suicide and mercy killing were brought forth by the Bombay High Court. It was observed that since the role of one's self is on a higher pedestal in cases of suicides; it is the termination of one's own life by an act of his. On the other hand, in cases of euthanasia, another individual contributes substantially to the termination of a person's life. "Mercy-killing thus is not suicide and an attempt at mercy-killing is not covered by the provisions of Section 309" of the Indian Penal Code which –before its repeal- dealt with the punishment for an attempt to commit suicide. The distinction made by the Court left out of its ambit, the concept of 'physician- assisted suicides'; the difficulty in compartmentalizing 'physician- assisted suicides' into the category of suicides or mercy- killing/ euthanasia in the strictest sense was not addressed by the Court while discussing this case. The most obvious difference between 'physician- assisted suicide' and euthanasia is that in the former, the patient takes active steps to terminate his own life with assistance from a medical professional but in the latter, it is the medical professional whose action leads to the termination of the patient's life.

More light was thrown upon the conceptual differences between suicide and mercy- killing by stating that "euthanasia or mercy-killing is nothing but homicide, whatever the circumstances in which it is affected. Unless it is specifically exempted, it cannot but be an offence."[8] Taking a softer stand on attempts to commit suicide, it was held by the Court that

[5] Aruna Ramchandra Shanbaug v. Union of India and Others, (2011) 4 SCC 454. (hereinafter Shanbaug)

[6] Common Cause (A Regd. Society) v. Union of India, 2014 (3) SCALE 1.

[7] Maruti Sripati Dubal v. State of Maharashtra, (1987) 1 BomCR 499. (hereinafter Dubal)

[8] *Ibid.*





Section 309 of the Indian Penal Code is ultra vires the Constitution owing to its arbitrariness, discriminatory nature etc., resulting in it being in violation of Articles 14 and 21. Citing these reasons, the Court declared that Section 309 of the Indian Penal Code must be struck down.

The above- mentioned case was closely followed by *Chenna Jagadeeshwar & Anr. v. State of Andhra Pradesh*[9] wherein the Andhra Pradesh High Court held that the right to life guaranteed under Article 21 of the Constitution may not be construed to include the right to die; therefore the constitutional validity of Section 309 of the Indian Penal Code was upheld. The much- needed deliberation on the negative aspect of a phenomenal Fundamental Right guaranteed by the Constitution took place in this case but the conflicting views expressed by the Bombay High Court and the Andhra Pradesh High Court led to confusion on matters related to the negative aspect of the right to life. The ambiguous language of the Supreme Court while rendering judgements made matters even worse. For instance, an observation made in *Vikram Deo Singh Tomar v. State of Bihar*[10] stating that "every person is entitled to a quality of life consistent with his human personality. The right to live with human dignity is the fundamental right of every Indian citizen". This observation conveys at least two interpretations:

- Right to life under Article 21 includes the right to live with human dignity and this Article seeks to preserve and protect life.
- Human dignity is an essential component of the right to life under Article 21; therefore it is quite possible to conclude that a man shall have the right to let go of his life in a dignified manner if he wishes to end his existence which is merely a state of prolonging death through medical assistance, that is, if he is in a Permanent Vegetative State.

In *P. Rathinam v. Union of India,*[11] the prevailing confusion was laid to rest, only to kick up even greater mayhem later on, by the Supreme Court holding that the right to life under Article 21 includes the right to die. It was held that Section 309 of the Penal Code deserves to be effaced from the statute book to humanise our penal laws and that Section 309 violates Article 21, and so, it is void.

[9] Chenna Jagadeeshwar & Anr. v. State of Andhra Pradesh, (1988) Cri. L.J. 549.

[10] Vikram Deo Singh Tomar v. State of Bihar, (1988) Supp. SCC 734.

[11] P.Rathinam v. Union of India, (1994) 3 SCC 394.

The Apex Court, in this case, brought our attention to the aspect of voluntary consent in a case of euthanasia by discussing a Supreme Court of Nevada decision, i.e., *Mckay v. Bergstedt*[12] where it was held that where the individual's interest in refusing medical treatment outweighs the state's interests, a competent, irreversibly disabled, but non-terminally ill adult, subject to certain procedural guidelines, may refuse life- sustaining treatment.[13]

A later decision of the Apex Court, *Gian Kaur v. State of Punjab,*[14] overruled the earlier two Judge Bench decision of the Supreme Court in *P. Rathinam v. Union of India.* The Court held that the right to life under Article 21 of the Constitution does not include the right to die which was in direct contrast to the holding in *P. Rathinam.* The Constitution Bench of the Indian Supreme Court in *Gian Kaur* held that both euthanasia and assisted suicide are not lawful in India.[15] The Court set out that permitting termination of life of a person about to die or in a vegetative state is inconsistent with Article 21, stating thus:

> *"A question may arise, in the context of a dying man, who is terminally ill or in a persistent vegetative state that he may be permitted to terminate it by a premature extinction of his life in those circumstances. This category of cases may fall within the ambit of the 'right to die' with dignity as a part of right to live with dignity, when death due to termination of natural life is certain and imminent and the process of natural death has commenced. These are not cases of extinguishing life but only of accelerating conclusion of the process of natural death which has already commenced. The debate even in such cases to permit physician assisted termination of life is inconclusive. It is sufficient to reiterate that the argument to support the view of permitting termination of life in such cases to reduce the period of suffering during the process of certain natural death is not*

[12] Mckay v. Bergstedt, (1990) 801 P.2d 617.

[13] Anthony J. Dangelantonio, *McKay v. Bergstedt,* 7 ISSUES L AND MED 351, available at: http://heinonline.org/HOL/Page?handle=hein.journals/ilmed7&div=37&g_sent=1&collection=journals#369.

[14] Gian Kaur v. State of Punjab, (1996) 2 SCC 648.

[15] Arsalaan. F. Rashid, Balbir Kaur, O.P. Aggarwal, *Euthanasia Revisited: The Aruna Shanbaug Verdict,* 34 JOURNAL OF INDIAN ACADEMY OF FORENSIC MEDICINE 168 (2012).





> *available to interpret Article 21 to include therein the right to curtail the natural span of life."*

This decision cannot be taken to be a model judgement as it is ambiguous in nature as far as the issue of physician- assisted deaths are concerned; it only left the issue open to a plethora of opinions from various interest groups. In the very same case, the Supreme Court approved of the decision of the House of Lords in *Airedale*, and observed that euthanasia could be made lawful only by legislation. By stating thus, the Court excused itself of any future criticisms that may ensue on account of a subsequent legalizing of euthanasia and/ or related matters.

Though the constitutional validity of Section 309 of the Indian Penal Code had been challenged before Courts on various occasions, an ancillary issue of the validity of Section 306 was never disputed as a main objection. In *Naresh Marotrao Sakhre v. Union of India,*[16] the constitutional validity of Section 306 of the Indian Penal Code which makes abetment to suicide a punishable offence was challenged. Citing the observation of the Bombay High Court in *Dubal* on how the decriminalization of abetment of suicide may pave way for euthanasia or mercy killing in particular, this Court held that Section 306 of the Indian Penal Code is constitutional and is not in conflict with the values enshrined under and the rights sought to be protected by Articles 14 and 21 of the Constitution.

The Kerala High Court, in *C.A. Thomas Master v. Union of India,*[17] observed that "it is difficult to construe Article 21 to include within it the 'right to die' as a part of the fundamental right guaranteed therein. 'Right to life' is a natural right embodied in Article 21, but suicide is an unnatural termination or extinction of life and, therefore, incompatible and inconsistent with the concept of right to life. Discussions with respect to similarity or dissimilarity of the 'right to life' with other rights such as the right to 'freedom of speech' and the like to provide a comparable basis to hold that the 'right to life' also includes the right to die took place while delivering the judgement of this case. Right to die was held to be inconsistent with the right to life. It was only in 2007 that a breakthrough of some sort was achieved with regard to Euthanasia.

[16] Naresh Marotrao Sakhre v. Union of India, (1995) Cri. L.J. 96 (Bom).

[17] C.A. Thomas Master v. Union of India, (2000) Cri. L.J. 3729.

## III. Attempt At Legislation

The Euthanasia (Permission and Regulation) Bill introduced in the Lok Sabha in 2007 was the first attempt to regulate the practice of Euthanasia in India. Since thousands of Patients every year are routinely assisted to die by doctors,[18] and considering the fact that it is not uncommon for Doctors to say "Here's some medication, and make sure you don't take more than 22 pills because 22 pills will kill you,"[19] even if the practice is regulated, it cannot be reasonably said that there will not be misuse of the same. However, it is necessary to maintain a check on the issue, and this is rendered impossible in the absence of legislation. Furthermore, if legislation sanctions Euthanasia, it will also provide uniformity in the adjudication of Euthanasia cases,[20] since the scope of the term 'Euthanasia' goes much beyond the Patient and the Physician, and invokes careful considerations in Criminal law.[21]

Though the Euthanasia (Permission and Regulation) Bill was a humane attempt at reform for those who had "no hope of recovery",[22] and sought to introduce sufficient checks and balances at the institutional level so as to prevent misuse by "unscrupulous elements",[23] it failed to receive the assent of both Houses of Parliament and lapsed. Furthermore, subsequent to the proposal being made in the Lok Sabha, the 196th Law Commission Report advocated that Active Euthanasia and Physician-Assisted Suicide should remain illegal,[24] and promoted the legalisation of Passive Euthanasia for the 'Terminally ill' with sufficient safeguards instead.

18 P.V.L.N Rao, *Is Euthanasia Ethical,* THE HINDU, 25th November 2003, available at: http://www.thehindu.com/thehindu/op/2003/11/25/stories/2003112500341600.htm.

19 Lisa Belkin, *Doctor tells of First Death using his suicide device,* THE NEW YORK TIMES, 6th June 1990, available at: http://www.nytimes.com/1990/06/06/us/doctor-tells-of-first-death-using-his-suicide-device.html.

20 Tania Sebastian, *Legalization of Euthanasia in India with specific reference to the Terminally Ill: Problems and Perspectives,* 2 JILS 341 at 365, available at: http://jils.ac.in/wp-content/uploads/2011/12/Tania-Sebastian.pdf.

21 See VIII.

22 Euthanasia (Permission and Regulation) Bill, No. 55 of 2007, Statement of Objects and Reasons.

23 *Ibid.*

24 Law Commission of India, One Hundred and Ninety Sixth report on Medical Treatment to Medically ill Patients (Protection of Patients and Medical Practitioners) 2006, available at: http://lawcommissionofindia.nic.in/reports/rep196.pdf.





This must be viewed as a step being taken back from legalising one of the oldest and most sensitive issues debated in the public sphere. Considering the fact that Active Euthanasia is illegal in most countries in the absence of enabling legislation,[25] and the fact that societal perception regarding Euthanasia is now widely in support of such legislation, it can be reasonably said that the view supporting Passive Euthanasia alone is anachronic. The Judiciary has rightfully abstained from providing an opinion on the matter since it is essentially a consideration for the Legislature, and have, in the meantime, provided a set of guidelines to be followed until there is concrete legislation on the subject, through its judgement in Shanbaug.

## IV: What happened in Shanbaug?

The Supreme Court of India, while rendering the judgement in *Shanbaug,* relied heavily on the House of Lords decision in *Airedale NHS Trust v. Bland*[26] which has been followed in innumerable cases in the United Kingdom. The law is fairly settled in the UK in the case of incompetent patients; artificial life support system may be withdrawn by doctors acting on the basis of informed medical opinion, if it is in the best interest of the patient.

Detailed deliberations took place in this judgement as regards the competency of a person to give consent to passive euthanasia of a terminally ill person on his behalf. The Court held that the decision to discontinue life support must be taken either by the parents or the spouse or other close relatives, or in their absence, such a decision can be taken even by a person or a body of persons acting as a next friend. It can also be taken by the doctors attending to the patient. The Court, while stating this, attached utmost relevance to the protection of the interests of the concerned patient.[27]

Following the holding in *Airedale,* the Indian Supreme Court declared the High Court to be the competent authority to approve the withdrawal of life support to an incompetent person.[28] This is in the interest of the protection of the patient, protection of the doctors, relative and next friend, and for reassurance of the patient's family as well as the public.

25 Shanbaug at ¶ 39.

26 Airedale NHS Trust v. Bland, (1993) 3 All ER 537.

27 Shanbaug at ¶¶136,137.

28 *Id* at ¶ 138.

It was declared by the Bench that the guidelines in the instant case were to be the law of the land until the Parliament made legislation on it. In both *Shanbaug* and *Gian Kaur,* the Court had pointedly opined that since the issues involved went beyond the scope of legal interpretation and construction, it was the prerogative of the Parliament to enact a law on the subject to bring about clarity and remove confusion.[29]This case may be considered as a phenomenal one inasmuch as it attempted to include several aspects concerned with euthanasia though it failed to comprehensively discuss and reach a conclusion on the socio-ethical implications of legalizing the same. Owing to the lack of enthusiasm on part of the Legislature to enact upon the matter in furtherance of the *Shanbaug* judgement, more petitions flowed in, of which the most relevant one has been discussed below.

### *A. Common Cause (A Regd. Society) v. Union of India 2014 (3) SCALE 1*

The NGO Common Cause petitioned the Supreme Court that a person afflicted with a terminal disease should be freed from agony by withdrawing artificial medical support provided to him. In this case, judgements rendered by the Supreme Court in *Gian Kaur* as well as *Shanbaug* were carefully analysed by the Supreme Court but it could not reach a conclusion on the question involved and referred the matter to a Constitution Bench of the Supreme Court for an authoritative opinion.

The five-judge Constitution bench of Supreme Court, on 15 July, 2014 issued a notice to the State Governments and Union Territories seeking their opinion on legalizing passive euthanasia. The Bench reasoned that States and Union Territories must also be heard because the issue not only involves the issue of constitutionality of euthanasia but also involves questions of morality, religion and medical science.[30]

In light of these two decisions and widespread movements for law reform, it seems that legislation on Passive Euthanasia is fast approaching. This is *prima facie* a step away from the progressive bill

[29] Sunil Garodia, *Why Procrastinate on the Issue of Euthanasia?,* THE INDIAN REPUBLIC, 24th July 2014, available at: http://www.theindianrepublic.com/tbp/procrastinate-issue-euthanasia-100043893.html.

[30] *The Issue of Euthanasia in India and Around the World,* JAGRANJOSH, 18th July 2014, available at: http://www.jagranjosh.com/current-affairs/the-issue-of-euthanasia-in-india-and-across-the-world-1405688672-1.





introduced in 2007. However, a recent news report indicated that there has been no new proposal for Euthanasia Legislation in Parliament till date despite the SC guidelines regarding the same.[31]

## V. Euthanasia Vis-À-Vis Decriminalisation Of Attempt To Commit Suicide

Another allied issue that has sparked off debates concerning the right to die is the decriminalisation of Section 309 of the Indian Penal Code, which embodied the crime of 'Attempt to Commit Suicide.' Deletion of the "anachronistic"[32] Section 309 has come pursuant to Courts denouncing the same, terming it on some occasions as "a blot on our statute book", and observing that it was "barbaric to punish a person who took the extreme step of trying to end his life owing to acute frustration, and there was a need to counsel, not punish, such unfortunate people."[33] Deletion of the said crime from the statute book does not automatically legalise Euthanasia. In fact, as of now, a person who wishes to commit suicide is not deterred from doing so by virtue of the existence of any law, but a person who wishes to die, but is unable to do so by owing to his illness is denied this inherent right of autonomy, by the lack of statutory law regarding the same.

However, decriminalization of the said offense has provided new impetus to the longstanding movement for legalization of Euthanasia. MP of the Lok Sabha, Mr. A. Sampath, who promoted decriminalization of Attempt to commit suicide, opined that a radical and pragmatic approach should be adopted with regard to the subject, and also suggested that there was a strong chance for a system with adequate safeguards to be put in place, as regards Euthanasia.[34]

[31] *Govt. Endorses SC Guidelines on Passive Euthanasia,* THE HINDU, 25th December 2014, available at: http://www.thehindu.com/news/national/govt-endorses-sc-guidelines-on-passive-euthanasia/article6723278.ece.

[32] Law Commission of India, Two Hundred and Tenth Report on Humanization and Decriminalization of Attempt to Suicide, 2008 at 39.

[33] Sudhanshu Ranjan, *A humane reform,* THE DECCAN CHRONICLE, 20th December 2014, available at: http://www.deccanchronicle.com/141220/commentary-op-ed/article/humane-reform.

[34] Subodh Ghildiyal, *Decriminalization of Suicide attempt rekindles debate on Euthanasia,* THE TIMES OF INDIA, 11th December 2014, available at: http://timesofindia.indiatimes.com/india/Decriminalization-of-suicide-attempt-rekindles-debate-on-euthanasia/articleshow/45464717.cms.

Despite the SC legalizing Passive Euthanasia under exceptional circumstances, the law regarding the same will be uncertain and insufficient until it is given expression in a statute. The SC guidelines on the same were implemented only as a temporary measure until the Parliament implements a statute, and therefore stays silent about a number of essential considerations. Therefore, while enacting this legislation, the Government might have to look to the west, where the law regarding the same is much more certain and developed. For instance, as regards installing adequate safeguards, the concept of a 'living will' recognized in the US, in the nature of an advance medical directive to one's next of kin and caregivers to the effect that in the event of the incapacitation of the executant, he should not be subjected to extraordinary life prolonging treatments or procedures so that the agony and process of dying is not unduly extended, is one concept which may be considered in India as well. Similarly, even in the execution of Passive Euthanasia, measures such as "Deep and Continuous Sedation until Death", presently being debated in France, may be considered.

Legalization of Euthanasia and casting clarity on the law relating to Euthanasia is only a humane reform considering stories such as those of S. Seethalakshmi who recently died a miserable death in her hospital bed, seven months after giving an application seeking permission for Euthanasia before the Chennai High Court.[35] The question is, how many more people need to die before this humane reform is made?

## VI. A Qualified Right to Die?

*Darkling I listen, and for many a time*

*I have been half in love with* ***easeful*** *death,*

*Called him soft names in many a mused rhyme,*

*To take into the air my quiet breath;*

*Now more than ever seems it rich to die,*

*To cease upon the midnight with no pain...*[36]

[35] *Patient in coma dies at GH,* THE HINDU, 16th December 2014, available at: http://www.thehindu.com/news/cities/chennai/patient-in-coma-dies-at-gh/article6695008.ece.

[36] John Keats, *Ode to a Nightingale.*





The most popular argument used by Ethicists and Legislators alike, with regard to Euthanasia, is that even though every man has a right to life, he does not have a right to die. That being said, it is also an accepted principle that exercise of the right to refuse medical treatment does not amount to attempt to commit suicide. Where a 'competent patient' takes an 'informed decision' to allow nature to have its course, he is, under common law, not guilty of 'attempt to commit suicide'.[37] However, considering certain decisions such as the decision of the Kerala High Court in the case of *Dr. T.T. Thomas v. Elisa,*[38] wherein it was observed by the Court that ''(...) there can be instances where a surgeon is not expected to say that 'I did not operate on him because, I did not get his consent'..(Such as) emergency operations where a doctor cannot wait for the consent of his patient (...)'', it may be said that there does exist a grey area in the law relating to Consent in India. Considering Indian jurisprudence on the subject would be insufficient to resolve this conflict, as in comparison, the law relating to Euthanasia and physician-assisted suicide is much more developed in other jurisdictions.

Quoting Judge Cardozo, from as early as 1914, ''Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages.'' [39] This might, in other terms, be said to be a reflection of the principles of consent as a defence against the intentional torts of assault and battery. A liberty interest in withholding or withdrawing medical treatment is grounded in the common law right of informed consent to medical treatment and its logical corollary of the right not to consent.[40] Therefore, in the absence of informed consent, an intruding physician, despite his honourable intentions, may be liable for the tort of battery. In addition to this defence arising out of the Common Law, there have been instances of foreign Courts using a Constitutional basis to validate the exercise of the right to refuse medical treatment.

[37] Law Commission of India, One Hundred and Ninety Sixth report on Medical Treatment to Medically ill Patients (Protection of Patients and Medical Practitioners), 2006.

[38] Dr. T.T. Thomas v. Elisa, (1987) AIR Ker 52.

[39] Schloendorff v. Society of New York Hospital, (1914) 105 N.E., 93.

[40] Susan Machler, *People with Pipes: A question of Euthanasia,* 16 U. PUGET SOUND L. REV 781 (1991).

For instance, as can be seen in the case of *Quinlan*,[41] similar to the common law rights, the constitutional rights are also grounded in the notion of consent and the patient's ability to accept or refuse. Consequently, patients may have a privacy right or liberty interest in preventing unwanted bodily intrusions by others in the form of medical treatment. However, there do exist, and courts have recognized, certain compelling interests overriding the right to control one's own body. As with all other rights, the individual's right to privacy is not absolute and must be balanced against countervailing state interests; that is, the preservation of life, the prevention of suicide, the protection of the interests of innocent third parties and the maintenance of the ethical integrity of the medical profession. Since substantive due process allows a state to interfere with an individual's rights, when there is a compelling state interest, the rights of the individual must be balanced against the state interest in preserving life.[42] These interests may not appear so substantial, however, when examined in light of those suffering from a terminal or an incurable disease desiring premature death.[43]

The confusion of case law in the area of refusal of treatment underscores the need for legislation. The courts have not adequately clarified the discretion that an individual has over his life. Any attempt to reconcile the cases would be in vain. The only viable alternative is legislation. No longer are reproaches to euthanasia legislation based on alarmism and religious grounds sufficient to outweigh the need for consistency in the law.[44]

## VII: Sanctity Of Human Life Debate

> *"The right to privacy is an 'expression of the sanctity of individual free choice and self-determination as fundamental constituents of life. The value of life as so perceived is lessened not by a decision to refuse treatment, but by the failure to allow a competent human being the right of choice.*[45] *"*

41 In Re Quinlan, (1976) 429 U.S. 922.
42 *Supra* note 40 at 793.
43 William H. Baughman, John C. Bruha, *Euthanasia: Criminal, Tort, Constitutional and Legislative Considerations,* 48 NOTRE DAME L. REV. 1203 (1973).
44 *Ibid.*
45 Norwood Hospital v. Munoz, (1991) 564 N.E.2d 1017.





It may be said that the most compelling state interest involved where patients desire to refuse medical treatment is preserving the sanctity of human life. The law generally looks upon attempts to terminate life prematurely as the work of an unsound mind and permits States to interfere to prevent such acts and to punish those who aid in such undertakings.[46] On the other hand, the law swears to protect the fundamental right of privacy and the freedom of choice to each and every individual. This conflict may be well observed by considering the decisions of United States Courts in the cases of *Heston*[47] and *Munoz.*[48]

In *John F. Kennedy Memorial Hospital v. Heston,* the court ordered the blood transfusion of an unmarried woman, a Jehovah's Witness, who, for religious reasons, refused the blood transfusion. The court based its decision on a compelling state interest in sustaining life and avoiding liability of the hospital due to its acquiescence in the refusal. On the other hand, in *Norwood Hospital v. Munoz,* the court weighed the state's interest in preserving life, but it concentrated not merely on saving a life, but on preserving the quality of life. Thus, in recognizing the value of quality of life, the *Munoz* court took into consideration the fact that she believed, by virtue of her religion that receiving a blood transfusion would preclude resurrection and everlasting life,[49] and therefore held that the intrusive nature of a blood transfusion lessened the value of her life. To add further authority to the decision in *Munoz,* the decision in *Eriksson v. Dilgard*[50] unqualifiedly extended the right to refuse medical treatment without expanding upon the rationale of the same. The statement "it is the individual who is the subject of a medical decision who has the final say"[51] is of wide ambit, and fails to reflect the interests of the State.

Suffice to say that even in factually similar situations, Courts have provided judgements which are diametrically opposed in its very nature. The court's development of the concept of compelling state interest in sustaining life is *prima facie* based on a rather sweeping conclusion that there is no difference between suicide and passive submission to death.[52]

46 *Supra* note 43.
47 John F. Kennedy Memorial Hospital v. Heston, (1971) 58 N.J. 576.
48 *Supra* note 45.
49 *Supra* note 40 at 801.
50 Eriksson v. Dilgard (1962) 252 N.Y.S.2d 705 (Sup. Ct.).
51 *Supra* note 45.
52 *Supra* note 43 at 1257.

Be that as it may, it is ironic that an analysis of the *"sanctity of life"* involves essentially an inquiry into the quality of life. Several Courts have refused to evaluate the quality of a patient's life in cases that involve permanently unconscious patients, and they considered only the patient's intent.[53] Nevertheless, courts apparently have little difficulty evaluating the ''sanctity'' or ''value'' of life when it concerns a competent patient, even when that patient is still capable of making that judgment alone and is clearly expressing his or her intent.[54] Perhaps because competent, functioning individuals are still *"involved in mankind,"* we are reluctant to let them die without questioning their judgment, or worse perhaps, we do not want to articulate the precise moment when it is agreed that life is no longer worth living.[55]

*"For I am involved in mankind",* seems to be a rather cruel test for determining whether a man's life is worthy of living, which sounds awfully and frighteningly similar to *"destruction of life not worth living."* This phrase, founded by Karl Binding, was popular in Germany and was used to describe not only the patient's own attitude toward life but also his objective uselessness to the community.[56] Binding primarily favored destruction of institutionalized idiots by state action for the purpose of relieving society of a burden, as he preferred to think of it. This project was hugely popular with large segments of the German public, and it was later developed by Hitler into his notorious program of mass destruction of mental patients, wherein he licensed the murder of 2,75,000 people whom he labeled as "useless eaters." This, however, had to be revoked later by Hitler himself upon overwhelming public protest. German post-war decisions condemned the killing of insane persons whose ''killing was licensed'' by the Nazi regime ''because their life was of no 'value','' as ''killing in the service of a cynical utilitarianism'' rather than ''assistance rendered to the incurably ill.''[57]

The phrase *"Destruction of life not worth living"* sparks off an allied and important psychological angle to the Euthanasia debate. This terminology fails to describe the patient's attitude towards his own life,

[53] In re Estate of Longeway, (1989) 549 N.E.2d 292, 299 (Ill.).

[54] McKay v. Bergstedt, (1990) 801 P.2d 617, 624 (Nevada); Bouvia v. Superior Court, (1986) 225 Cal. Rptr. 297 (Cal. App.).

[55] *Supra* note 40 at 801.

[56] Helen Silving, *Euthanasia: A Study in Comparative Criminal Law,* 103 U. PENN L. REV, 350 (1954).

[57] *Ibid.*





but on the other hand, evaluates his "objective uselessness" to the community, or, put another way, concentrates on the aspect of relieving society of a burden. As was infamously said, "drugs used in assisted suicide cost only about $40, but it could take $40,000 to treat a patient properly, so that they will exercise the "choice" of assisted suicide."[58]

Killing may even be said to be easier and cheaper than the alternative of providing care to the patient. In fact, a reading of the Supreme Court's decision in *Shanbaug* wherein it quoted certain passages from *Airedale* in approval,[59] would indicate that passive Euthanasia has come to be seen more as a resource allocation measure that is devoted to keeping alive people who have negligible chance of survival owing to incurable diseases exempting the possibility of medical miracles, whereas these resources could alternatively be devoted to give attention to the curable diseases or funding preventive medicines.[60] It is possible therefore that validating legislation may be viewed in wrong light, as economically beneficial to the state exchequer and not an ethical acknowledgment of the right of the terminally ill.[61]

Granted, the test to determine whether a person may be legally permitted to die as we know it does not license active killing of persons for the benefit of others, but if the rationale behind Euthanasia is "to render assistance to the incurably ill", the test evolved to permit or reject a plea for the same need not take into consideration the utility of the individual. The crux of the semantic problem arises in attempting to differentiate between ''allowing death to occur'' and what the writers persist in calling ''voluntary'' or ''passive'' euthanasia. Those who would prefer some form of euthanasia even though they qualify their name for it and emphasize that it is undertaken with the consent or approval of the patient and with the most merciful or compassionate of motivations are still nevertheless speaking of the *taking* of a human life. To make this very same taking of life more palatable, they further qualify their chosen terms so that it is limited to only terminally ill persons who are doomed to die in a matter of days anyway. No matter how many qualifiers are added to their definitions, they are, in essence and in fact, talking about

[58] *Arguments against Euthanasia,* EUTHANASIA, available at: http://www.euthanasia.com/argumentsagainsteuthanasia.html, accessed 7th October 2014.

[59] Shanbaug at ¶73.

[60] BRAD HOOKER, RULE-UTILITARIANISM AND EUTHANASIA (Blackwell Publishing, 1997).

[61] *Supra* note 20 at 369.

"permitting death to occur."[62] Merely because humans perceive or wish to perceive the real nature of their actions as something which is not morally reprehensible sadly does not make it so.

## VIII. Criminal Implications

It is said that the most harmless among the various forms of Euthanasia consists in relieving the pain of a patient doomed to die without shortening his life duration. Barth refers to it as "pure" euthanasia.[63] However, even this form of euthanasia raises certain theoretical legal problems. Euthanasia presents an irreconcilable paradox in the code of medical ethics in the form of a contradiction within the Hippocratic Oath itself because while delivering the same, there is an explicit promise on part of specialists to prolong and protect life even when a patient is in the late and most painful stages of a fatal disease. Thus, while an attempt to prolong life violates the promise to relieve pain, relief of pain by killing violates the promise to prolong and protect life.

More importantly, a discussion of Euthanasia raises the theoretical legal issue of ascertaining "motive," a topic which has been blissfully neglected in our criminal jurisprudence. This principle is embodied in the maxim, *"actus non facit reum, nisi mens sit rea",* meaning, an act does not make one guilty unless the mind is also blameworthy. *Mens rea* is the state of mind indicating culpability, which is required by statute as an element of a crime.

Though *mens rea* is an indispensable requirement to establishing guilt, sadly, in the case of Euthanasia, the attitude of the actor is blatantly disregarded, and a conviction on guilt is based on superficial grounds.[64] An actor is dangerous, where, in the light of the circumstances, it may be assumed that he would act similarly in other situations.[65] The true mark of murder would be the depraved mind or the dangerousness of the actor.[66] However, one cannot ignore the fact that Euthanasia, performed at the request of the patient, is an exceptional situation not comparable to other situations in everyday life. Attributing *mens rea* to a mercy-killer seems

62 *Supra* note 43.
63 *Supra* note 56 at 351.
64 *Ibid.*
65 *Id* at 355.
66 *Supra* note 20 at 352.





rather inconsistent with logic where mercy is his primary consideration.

Furthermore, bearing in mind the fact that our legal system is an individualistic legal system, it is imperative that Silving's observations in his ground-breaking study *'Euthanasia- A Study in Comparative Criminal Law',* be given due consideration: *"We believe that man is endowed with an innate personal dignity and that he is an end in himself and not a mere means serving extraneous social ends, such as those of the state, or even those of fellow human beings. This implies that there can be no exculpation or reduction of penalty in cases in which death is administered for the benefit of a person or a number of persons, however large. Respect for human dignity, furthermore, implies recognition of the human will as a value. From this recognition follows the decisive significance of the patient's consent or request in the evaluation of euthanasia cases."*[67]

This highly individualistic philosophy of criminal law draws a very clear distinction between active conduct and non-feasance. It does not, for instance, impose a general affirmative duty of rendering assistance to a person in peril. The affirmative duties it imposes are rare and specific, as in the medical profession. The problem arises when, where there is a specific duty to act, failure to do so should be regarded, under exceptional circumstances such as those which might occasion euthanasia, as equivalent to an affirmative act.

Pursuing this line of thought would naturally lead to the question of criminal liability in those exceptional cases where the law deems that the physician had a positive duty to act[68] and his refusal to act without the consent of the patient had led to the inevitable death of the patient. Here, the essential consideration is that the law is faced with deciding issues firmly rather than refer merely to moral obligations of the doctors, because a deliberate omission which causes death may also expose the medical practitioner to the allegation that his conduct is criminal. It is not a sufficient reassurance for a doctor, in the present state of the law, to be told that his proposed conduct was medically ethical. He is entitled to know about civil or criminal liability under the law.[69]

67 *Id* at 355.
68 TT. Thomas v. Elisa, (1987) AIR Ker 52.
69 Law Commission of India, One Hundred and Ninety Sixth report on Medical Treatment to Medically ill Patients (Protection of Patients and Medical Practitioners) 2006, 71.

Even though it is perfectly within the bounds of the law for a *mentally competent* adult to refuse medical treatment, it is in fact the physician's judgement regarding the patient's mental competency that is significant. The definition of a 'competent patient' has to be understood by the definition of 'incompetent patient'. 'Incompetent patient' is a minor or a person of unsound mind or a patient who is unable to weigh, understand or retain the relevant information about his or her medical treatment or unable to make an 'informed decision' because of impairment of or a disturbance in the functioning of the mind or brain or a person who is unable to communicate the informed decision regarding medical treatment through speech, sign or language or any other mode.[70] Patients with life-threatening illnesses often have greatly impaired capacity to make rational judgments about complex matters. Potent emotions, such as fear, anguish or despair, are frequently present, though when they are recognised and treated adequately by competent doctors, the reason for a request to be killed will often disappear. To accept requests for death at face value without providing adequate care would be a form of patient abandonment, by taking advantage of their vulnerability in such states. In so doing, their autonomy would be abused, in the name of honouring it.[71]

Due consideration should also be given to the propositions laid down by L.J Butler in the regarding mental capacity, which were also incidentally referred to in the 196th Law Commission Report as fundamentals governing mental capacity: *"A person lacks capacity if some impairment or disturbance of mental functioning renders the person unable to make a decision whether to consent to or refuse treatment. That inability to make a decision will occur when (a) the patient is unable to comprehend and retain the information which is material to the decision, especially as to the likely consequences of having or not having the treatment in question; (b) the patient is unable to use the information and weigh it in the balance as part of the process of arriving at the decision. If (...) a compulsive disorder or phobia from which the patient suffers stifles belief in the information presented to her, then the decision may not be a true one."*[72]

[70] *Id* at 421.

[71] Brian Pollard, *Human Rights and Euthanasia,* BIOETHICS, 1998, available at: http://www.bioethics.org.au/Resources/Online%20Articles/Other%20Articles/Human%20rights%20and%20euthanasia.pdf.

[72] Law Commission of India, One Hundred and Ninety Sixth report on Medical Treatment to Medically ill Patients (Protection of Patients and Medical Practitioners) 2006, 108.





Who is to decide whether the physical and mental agony that a person encounters during the course of his ailment has had a substantial detrimental impact on the psychological state of the patient; so much so that he wishes for nothing more than he wishes for his own death even if there exists the slender possibility of his revival? In such cases, the information that a patient is presented with by the physicians may even be absolutely immaterial to him. His consent would be influenced by the pain he is enduring much more than the information he is presented with.

Another interesting question that is posed by Euthanasia, apart from the subjective element of altruistic motive which might bear on the character of the actor and the extent of his blame-worthiness, is determining the proper objects of criminal protection and their correct classification in accordance with the degree of protection they deserve.[73] It is to be understood that the most diverse acts have been referred to under the common term ''Euthanasia.'' From this very same diverse classification arises the necessity of drawing a distinction between euthanasia in the sense of killing of an incurably ill person for the purpose of putting an end to his misery, and euthanasia in the sense of destruction of life which is ''not worth living'' because it is socially useless. The prevalence of Euthanasia, despite it being prohibited under the law, further augments the case for drawing such a distinction, and even in doing so, further distinctions must be drawn between death resulting from non-feasance and by affirmative conduct, and between euthanasia with or without the consent or request of the deceased. Euthanasia encompasses acts which are seemingly related to each other and are indeed referred to under the same name, and therefore, there is a need for a sound diversification of crime demonstrates the need for a sound diversification of crime.[74]

However, this is not a simple task either and requires careful consideration. Suggestions such as those propounded by Glanville Williams, which maintain that since immunity should be granted to physicians who administer euthanasia in good faith and that there is no need for legislation, are myopic.[75] In fact, doing so would be to confer too

[73] *Supra* note 56 at 351.

[74] *Ibid.*

[75] GLANVILLE WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 326 (Cambridge University Press, 1957).

much discretion on the doctor[76] and such an alternative to legislation cannot be said to be within a common man's expectation that the law should be lucid and consistently applied. Merely suggesting that a physician should be presumptively immune for administering euthanasia only deals with one facet of the problem. The implications of euthanasia are broader than the physician's liability.[77]

It has also come to be understood that Euthanasia, when administered with the consent or upon demand of the deceased, borders on two significant concepts of criminal law, which bear both on motive and on the objective elements of criminal behaviour: assistance in suicide and the special crime of ''homicide upon request,'' which is unknown in Indian law. Many commentators assert that active euthanasia as an intentional act, which is the direct cause of death, raises more serious issues and requires careful restrictions, if not unconditional prohibition. According to this view, active euthanasia is equivalent to murder because of the intent to kill. Likewise, this position considers passive euthanasia to be less reprehensible than active euthanasia because it is the result of an omission rather than a positive act. On the other hand, the opposing school of thought argues that the failure to act itself constitutes an act.

Absent *mens rea,* the case might not be characterized as Murder. However, the relevant question that arises here is not the culpability of the actor, but whether such an action of depriving life is ethically less objectionable than that of a physician who, while acting at the request of the patient, after mature deliberation and careful weighing of his medical chances, arrives at the conclusion that there is no hope of recovery or for him, and thereafter, guided by such sympathy, applies euthanasia in accordance with what he regards as his medical conscience?[78] Then again, it may be argued that physicians should never be guided by the emotion of compassion, and should at all times apply a dispassionate and impersonal scientific judgment.[79]

[76] Kamisar, *Some Non-Religious Views Against Proposed ''Mercy-Killing'' Legislation,* 42 MINN. L. REV 969 (1958).
[77] *Supra* note 43 at 1259.
[78] *Supra* note 56 at 353.
[79] *Ibid.*





## IX: Terminal Illness

This discussion of Euthanasia would be incomplete in its very essence without providing a special reference to the concept of 'Terminal Illness'. The boundary of euthanasia, earlier being restricted to 'patients', has gradually expanded to include 'persons'. Moreover, a new problem has cropped up with the difficulty in defining who may be in excruciating pain or unbearable agony so as to be regarded as 'incurably ill' attracting the termination of his life on compassionate grounds. The crux of the issue is that all the definitions available have led to ambiguity and it has become virtually impossible to neglect the possibility of misuse in the event of legislation. Most countries that have legalized euthanasia (in any form) consider terminal illness as an essential prerequisite to allow such act. The prime question that needs to be addressed in this regard is, at what juncture of a disease it would be legal, moral, and ethical to condemn a man to die? In light of the importance attached to the idea of 'Terminal Illness' in the current milieu, a list of definitions of the said term from around the globe shall be discussed below, in order to assess the generally accepted notion with regard to the term. However, before we delve into the various definitions that have been made available to us today, it is imperative that these definitions be read in the light of the traditional definition or understanding – for lack of a better word – of the concept of Terminal Illness. Traditionally, such a condition was understood to be one without cure and which will result in death, whether life-prolonging therapy is administered or not.

Jumping to Indian Jurisprudence on the subject, as provided in Section 2(m) of the Medical Treatment of Terminally Ill Patients (Protection of Patients and Medical Practitioners) Bill, 2006, terminal illness means:

- such illness, injury or degeneration of physical or mental condition which is causing extreme pain and suffering to the patients and which, according to reasonable medical opinion, will inevitably cause the untimely death of the patient concerned, or
- which has caused a persistent and irreversible vegetative condition under which no meaningful existence of life is possible for the patient.[80]

[80] Law Commission of India, One Hundred and Ninety Sixth report on Medical Treatment to Medically ill Patients (Protection of Patients and Medical Practitioners) 2006, available at: http://lawcommissionofindia.nic.in/reports/rep196.pdf.

For how much time should a patient live for his death to be one that is not untimely? And who is to impose this death sentence?

The U.K. Social Security Contributions and Benefits Act, 1992 regards a person to be "terminally ill" at any time if at that time he suffers from a progressive disease and his death in consequence of that disease can reasonably be expected within 6 months.[81] On a similar note, the Oregon Death with Dignity Act states 'terminal disease' to be an incurable and irreversible disease that has been medically confirmed and will, within reasonable medical judgment, produce death within six months.[82] A question that naturally follows in this sense is what constitutes reasonable medical judgement?

The Oregon Death with Dignity Act considers the opinions of the concerned person's attending physician and consulting physician to be reasonable medical judgement. As per the Revised Code of Washington, a person can be termed to be in terminal condition if it is so certified by the attending physician.[83] Lord Falconer's Assisted Dying Bill as introduced in the House of Lords in June, 2014, requires certification from a registered medical practitioner to brand a person "terminally ill".[84]

In the Netherlands, where euthanasia is legal, terminal illness involves ''concrete expectancy of death''.[85] One may call this definition vague, as there is no yardstick that is laid down to stamp a person terminally ill. However, on the face of it, deeming a person's life worthless of living if he cannot live for a certain set time period, would also contradict settled moral and ethical principles.

It is also important to note that in the winter of 2001-02, the Michigan Legislature enacted 15 bills comprising what has been called the ''End-of-Life Care Amendments'' of 2001 which commented upon

81 Social Security Contributions and Benefits Act 1992, available at: http://www.legislation.gov.uk/ukpga/1992/4/enacted.

82 The Oregon Death with Dignity Act 1997, available at: https://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Pages/ors.aspx.

83 The Natural Death Act 1979, available at: http://app.leg.wa.gov/rcw/default.aspx?cite=70.122.030.

84 The Assisted Dying Bill, HL Bill 6, 2014, available at: http://www.publications.parliament.uk/pa/bills/lbill/2014-2015/0006/lbill_2014-20150006_en_2.htm#l1g2.

85 *Terminal Illness,* THE LIFE RESOURCES CHARITABLE TRUST, available at: http://www.life.org.nz/euthanasia/abouteuthanasia/abouteuthanasia4.





the largely time- bound definition of ''terminal illness'' as a disease that limits life expectancy to less than six months. It was pointed out to be problematic because the causes of death have been consistently shifting to chronic longer term conditions, such as heart disease, stroke, diabetes, and Alzheimer's disease. In such cases, it would be difficult to accurately determine when patients with these diagnoses are ''terminally ill.''[86] The terminology, ''terminally ill patient'' has now been replaced with ''patient with reduced life expectancy due to advanced illness'' under the Michigan law.

Of course, the pronouncements and discussions have expanded in length and have encompassed various new aspects. However, like many other allied issues raised by Euthanasia, they have essentially failed in providing any real clarity as opposed to the traditional understanding.

## X. Conclusion

The Encyclopaedia of Crime and Justice defines euthanasia as 'an act of death which will provide relief from a distressing or intolerable condition of living.'[87] In its pure meaning, Euthanasia was traditionally used as a vehicle signifying painless death to patients, who were terminally ill, for whom life would be more painful than death. With changing times, the definition has come to encompass impulses of suicide and its inviolability has degraded so as to regard this as a subset of murder or a licence authorized with a right to kill.

Probably the story of Jack Kevorkian yields a perfect example. He was a Euthanasia Activist who believed that if a Doctor's conscience said that the law was immoral, he needn't follow it.[88] Admittedly, his ultimate aim was to make Euthanasia "an enjoyable experience" for the patient.[89] He assisted in the death of over 130 of his Patients, and avoided conviction for over 8 years, until he was finally convicted for second degree murder in 1998. A study released by the New England Journal of Medicine revealed that only 25% of his patients were terminally ill, and

86 Robert C. Anderson, *End of Life- Care: Legislation Removes Barriers for the Terminally Ill,* MICHIGAN BAR JOURNAL 18 (2003), available at: https://www.michbar.org/journal/pdf/pdf4article559.pdf.

87 KADISH, SANFOR H., ENCYCLOPEDIA OF CRIME AND JUSTICE, Vol 2. (Free Press, 1983).

88 Larry King, *Jack Kevorkian: Hero or Killer?,* CNN, available at: http://edition.cnn.com/TRANSCRIPTS/0706/04/lkl.01.html.

89 *Supra* note 19.

in fact 75 percent of the 60 Kevorkian-assisted deaths that were investigated were of victims who were not suffering from a potentially fatal disease, while 5 had no discernible disease at all.[90]

This underscores the need to understand that although at least two persons are involved in euthanasia, both of whom will have to make an autonomous decision, only the autonomy of the patient is discussed. If there is anything that the Kevorkian example teaches us, it is that the doctor is a separate moral agent, with autonomous responsibility for his or her own actions, particularly those with undoubted moral content, and this autonomous responsibility will always be more determinative of the performance of Euthanasia than the patient's, since it will not happen without a consenting Doctor. However, this autonomy totally escapes examination.[91]

Euthanasia, in its varied interpretations, has been subject to plenty of legislative and judicial debate in the past. This is evidenced by the fact that the issues presented by euthanasia first came for consideration in the 196th Law Commission Report on The Medical Treatment of Terminally-Ill Patients (Protection of Patients and Medical Practitioners) Bill as much as twenty six years back, and was revisited again in its 241st Law Commission Report on Passive Euthanasia, following the judiciary's exculpation of the present legal position on the subject in *Shanbaug.* The notice issued by the Supreme Court to the States for their views on the issue of passive euthanasia and the allied right to die with dignity is another clear indication of the fact that the debate concerning euthanasia may fast be approaching its end, as one cannot ignore the present scenario which sees impending legislation on the subject. Therefore, there is a necessity for replacing our neurotic attitudes toward death and viewing death as "a biological function."[92] It is only in this context that the merits of euthanasia legislation can be clearly and objectively perceived.

Therefore, it is our submission that when the issue of euthanasia is finally decided upon, the answers must also be provided to the finer questions posed by the same. For instance, if at all euthanasia is to be

[90] Lori A. Roscoe, Julie E. Malphurs, L.J. Dragovic, Donna Cohen, *Dr. Jack Kevorkian and Cases of Euthanasia in Oakland County, Michigan,* 1990–1998, 343 NEW ENGL J MED 1735, (2000).

[91] *Supra* note 69.

[92] Morris, *Voluntary Euthanasia,* 45 WASH L. REV. 239 (1970).





legalized, it is up to the Legislature to provide clarity on whether euthanasia accepts that a person's qualified right to die is in fact not curtailed by the society's intrinsic need of protecting life and its sanctity. This might well be perceived as a move away from a pseudo-utilitarian form and the society's paradigm shift to what one may call a truly individualistic system. Of even more concern is the grey area that exists in connection with defining the term 'terminally ill', as this is the most material aspect of any discussion on Euthanasia. 'Consent' and the parameters that vitiate consent need to be defined, particularly in relation to a terminally ill patient who has no means of expressing his consent by reason of him having no relatives, or any other factor. This calls for a discussion on the criminal aspects of Euthanasia and the scope of the physician's reasonable medical judgement in making such decision may have to be addressed.

Suffice to say that much needed legislation is impending and this calls for careful consideration of a catena of finer legal issues. Whether they will be addressed, only time will tell.

# UMBRELLA CLAUSES IN INTERNATIONAL INVESTMENT ARBITRATION: ADOPTING A NARROW OR BROAD INTERPRETATION FOR MUTUAL PROTECTION OF INVESTORS AND HOST STATES

*Krithika Radhakrishnan and Ritwik Mukherjee*

*International investment law finds its niche within the significant fields of international arbitration and trade law. The developing importance of foreign investments has grown in modern times and is facilitated by Bilateral Investment Treaties which exist between nations. These treaties have a double-sided objective– on one hand, they promote foreign investments in a host state, and on the other, they envisage to protect rights and interests of the investor who seeks to set up such an investment. A contentious issue, which has been a hot topic of debate over the past decade, pertains to the scope and extent of BIT protections. While one, the broad approach, advocates that BIT protections should be extended to contractual obligations, another approach adopts a more restrictive view and asserts that protections under the BIT must extend only to substantive obligations which arise from the treaty itself. The question of elevation of contractual breaches to a treaty breach is dependent on the presence of a so-called umbrella clause in the treaty. The method of interpretation of such a clause is a question which has been placed before several Tribunals, though no single consistent view has emerged as yet.*

*This paper will analyse the two decisions of ICSID Tribunals in the cases of Société Générale de Surveillance v. Islamic Republic of Pakistan and Société Générale de Surveillance v. Republic of Philippines where the Tribunals opined opposing views– a restrictive view in the former and a broader approach in the latter– and will delve into the reasons as to which approach is more desirable.*





## I. Introduction

Investment Arbitration is a burgeoning new field in international arbitration which seems to have emerged as a replacement to the two conventional forms of dispute resolution between an investor and a host State diplomatic protection and litigation in domestic courts. These two methods have proved to be more or less futile as the needs of one party is generally overlooked. Diplomatic protection offers little remedy to the investor and can be invoked only once all other local remedies have been exhausted by the investor. Litigation in the host State's domestic courts also lacks the objectivity which an investor seeks mostly due to the fact that domestic laws of the host State would apply and this would be prejudicial against the investor. To meet this procedural gap, international investment arbitration has emerged on the borderline between public international law and domestic law. In the words of Prof. Schreuer, international investment arbitration offers an objective international judicial procedure on the basis of internationally accepted standards that grants direct access to the investor without having to depend on its State of nationality.[1]

Any international investment is based on an agreement between two countries, generally in the form of an investment treaty. When the treaty exists between only two countries, it is known as a Bilateral Investment Treaty (BIT) or Bilateral Investment Programme Agreement (BIPA). BITs generally contain an arbitration clause, which is essentially an offer by the State party to eligible investors; it does not, however, establish jurisdiction of a Tribunal by itself. The investor may take up this offer by formally accepting it or merely by instituting proceedings against the host State, which is an implied acceptance.[2]

An offer of jurisdiction by the host State to the investor gives the investor a wide scope of acceptance if accepted in narrow terms, the claim may relate only to investment disputes arising out of the BIT itself. On the other hand, if accepted on broader terms, the claim may relate to any other contract incidental to the BIT as well. This sort of acceptance is

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1 Christoph Schreuer, *The Relevance of Public International Law in International Commercial Arbitration: Investment Disputes*, available at: http://www.univie.ac.at/intlaw/pdf/csunpublpaper_1.pdf, accessed 28th August 2014.

2 Tokios Tokeles v. Ukraine, International Centre for Settlement of Investment Disputes, (2004) Case No. ARB/02/18, p. 94-100.

directly dependent on the presence of an umbrella clause in the BIT and this poses issues regarding the extent of jurisdiction under the BIT of an arbitral Tribunal.

An umbrella clause may be worded in several different ways, hence giving rise to complex scope of interpretation.

Some treaties simply state that 'each party hall observe any obligation it may have entered into with regard to investments';[3] while some are worded more complex 'each Contracting Party shall observe any particular obligation it may entered into with regard to investments of investors of the other Contracting Party'[4]

Investment treaty arbitrations not only involve BITs, but also investor-State contracts. The extent of jurisdiction under a BIT is never fixed; while some only cover disputes "relating to an obligation under this agreement" (i.e. only claims arising out of the BIT), others may extend to "any dispute relating to investments", or even a general international law obligation on the part of the host State to "observe any obligation it may have entered into" or "constantly guarantee the observance of the commitments it has entered into". These clauses which give rise to further obligations for the host State to observe are known as 'umbrella clauses' or *'pacta sunt servanda'*.[5] Clauses of this kind have been added to BITs to provide extra protection to investors against unfair practises by the host State. These clauses are known as umbrella clauses because they put contractual commitments under the treaties' protective umbrella.[6]

A particular act of the host State may constitute a breach of contract as well as a violation of international law.[7] These two breaches may or may not be mutually exclusive. A state may breach a treaty without breaching the contract or *vice versa*. Whether there has been a breach of

[3] Treaty between United States of America and the Kingdom of Morocco Concerning the Encouragement and Reciprocal Protection of Investments of 29 May 1991, Art. 11(3).

[4] Agreement between the Government of Hong Kong and the Government of the Republic of France for the Reciprocal Promotion and Protection of Investments of 30 November 1995, Art. III.

[5] Also recognised in the Vienna Convention, Art.26 which states "Every treaty in force is binding upon the parties to it and must be performed by them in good faith".

[6] *Supra* note 1.

[7] SPP v. Egypt, Award, (1992) 3 ICSID Reports 189, 228/229, p. 164-167.





the treaty and whether there has been a breach of contract are to be addressed as different issues.[8] Hence, the jurisdiction of a Tribunal may be invoked in case of contractual breach by the host State in any of the following situations:

- The investor is able to prove that the breach of the contract has amounted to violation of the BIT standards. For e.g. if a contractual breach amounts to expropriation, breach of fair and equitable standards, breach of full protection and security, etc.
- The arbitration clause in the BIT is not only restricted to violations of the BIT but also covers disputes related to investments in general.
- The BIT contains an express umbrella clause, thus converting a breach of contract into a breach of the treaty.[9]

It is always up to the claimant, i.e. the investor, to institute proceedings against the host State on the basis of any kind of violation of rights. However, the first defence sought by the host State before a Tribunal will typically be the lack of jurisdiction on the grounds of an umbrella clause.

Although these umbrella clauses have existed since the 1950s,[10] the first time any such clause was examined and evaluated was with the *Société Générale de Surveillance, S.A.* cases. The two leading cases have resulted in two opposing judgements of the exact same clause by adopting a narrow approach in one and a broad approach in the other. Each approach has been upheld by a series of other Tribunals. The most contentious jurisdictional issue faced by Tribunals is whether and under what circumstances these umbrella clauses place contracts between the host State and the investor under the treaty's protection.

The first ICSID case that addressed the issue of an umbrella clause was that of *Fedax NV v. Republic of Venezuela* in 1998,[11] based on a BIT between the Netherlands and the Republic of Venezuela. Although the Tribunal was unaware of the presence of an umbrella clause and did not

[8] Vivendi, Decision on Annulment, (2002) 6 ICSID Reports 340, 365, p. 95, 96.

[9] *Supra* note 1.

[10] OECD Working Papers on International Investment 2006/03, Interpretation of the Umbrella Clause in Investment Agreements.

[11] Fedax NV v. Republic of Venezuela, (1998) 37 ILM 1391.

carry out a comprehensive examination of the clause or its application, it simply gave a plain meaning to the clause and stated that the commitments should be observed under the BIT and to the promissory note contractual document. It further found that Venezuela was under the obligation of "*honour precisely the terms and conditions governing such investment, laid down mainly in Article 3 of the Agreement, as well as to honour the specific payments established in the promissory notes issued.*"[12] The first time a Tribunal actually evaluated the scope, effect and application of an umbrella clause was in 2003 in the case of *SGS v. Pakistan*.[13] However, shortly after this, the position became uncertain in 2004 with the Decision on Jurisdiction by the Tribunal in *SGS v. Philippines*[14] which provided the opposite interpretation of the clause.

Though they have provided opposing views on the umbrella clause, the final decision of the Tribunals in both the SGS cases have been followed in a number of other leading cases. However, before delving into these cases and an analysis as to which approach is more desirable, it is essential to first study these two individual cases.

## II. Significance of an Umbrella Clause With Emphasis On Wording and Its Location in a Bit

The most controversial issue with regard to umbrella clauses is whether, and under what circumstances, they place contracts between a host State and an investor under the protection of the BIT existing between the host State and the home State of the investor.

A typical modern umbrella clause is found in the British Model Treaty, which reads-

> *"Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party."*

The language of the umbrella clause in both the German Model Treaty and the Energy Charter Treaty are identical; while the NAFTA Agreement does not even contain such a clause, neither does the 2004 US Model Treaty nor the French Model Treaty. Moreover, the wording of

[12] *Id* at 25, 29.
[13] SGS v. Pakistan, (2003) ICSID Case No. ARB/01/13.
[14] SGS v Philippines, (2004) ICSID Case No. ARB/02/6.





umbrella clauses in treaties is not uniform. Some treaties simply state-

> *"Each Party shall observe any obligation it may have entered into with regard to investments."*[15]

On the other hand, some clauses may be worded more complex *"... each Contracting Party shall observe any particular observation it may have entered into with regard to investments of investors of the other Contracting Party, including provisions more favourable than those of this Agreement."*[16]

It is quite evident that there is a disparity in the language used in umbrella clauses in different investment treaties. This directly implies that the specific wording of the clause is crucial to determine its scope, effect and extent of application. Any minute loophole may be identified in the clause and hence used by the claimant to assert the Tribunal's jurisdiction or conversely, may be used by the host State to evade jurisdiction.

Almost all umbrella clauses reflect the intention of the parties to include within the protection of the BIT, all obligations undertaken by the State. Moreover, the mandatory nature of the clause is a commonality between all BITs.

> *"Each Contracting Party shall observe any obligation..."*[17]

> *"A Contracting Party shall, subject to its law, do all in its power to ensure that a written undertaking..."*[18]

The presence of such clauses gives rise to the chief issue in any jurisdiction proceedings- whether a breach of contract may be elevated to a breach of treaty, for breach of an obligation mentioned in the said clause.

The placement of an umbrella clause within the BIT has been a point of variance in the treaty practice. This may even play a role in determining which approach broad or narrow to utilise in order to interpret the clause. The common practice is usually one the following three:

[15] *Supra* note 3.
[16] *Supra* note 4.
[17] German Model BIT 1991(2), Art. 8(2); British Model Treaty; Germany-Pakistan BIT 1959, Art. 7; US-Senegal BIT; US-Panama BIT; UK-Egypt BIT 1975.
[18] Australia- Poland BIT 1991, Art. 10.

- Within an article that specifies all the substantive protections under the treaty, such as the Netherlands Model BIT[19] as well as several BITs concluded by the United Kingdom, New Zealand, Japan, Sweden and the US.
- Within a separate provision entitled "other commitments", which separates it from the substantive provisions by dispute resolution clauses as well as a subrogation clause. A majority of BITs concluded by Switzerland follow this framework, such as the Mexico-Switzerland BIT 1995 in addition to BITs concluded by Mexico.[20]
- Within a separate provision altogether, separate from the substantive protections, but before the dispute resolution clauses. This structure has been followed in the German Model BITs.[21]

It is still uncertain as to the effect of the placement of the umbrella clause in the overall framework of a BIT. For instance, the International Centre for Settlement of Investment Disputes (ICSID) Tribunal in *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*[22] was of the opinion the placement of the umbrella clause near the end of the Switzerland-Pakistan BIT indicated that it was the intention of the Contracting Parties not to provide a substantive obligation and if they intended to do so, they could have done so by placing it along with the other 'first order' obligations.[23] On the other hand, the Tribunal in *SGS Société Générale de Surveillance S.A. v. Philippines*[24] opined that although the placement of the clause may be "entitled to some weight",[25] it still did not consider this factor vital enough to utilise in its interpretation.

The natural argument of any investor while invoking jurisdiction under the BIT is that the host country's consent extends to all the treaty

19 Netherlands Model BIT, Art. 3.
20 France-Mexico BIT 1998, Mexico-Switzerland BIT 1995, Belgium and Luxembourg-Mexico BIT 1998.
21 German Model BIT, Art. 8.
22 *Supra* note 13.
23 *Id at* 170.
24 *Supra* note 14.
25 *Id* at 124.





provisions, including the umbrella clause, and that the investor-state contract is one of the obligations or commitments that the host State is obligated to observe under this clause. A Tribunal is hence faced with the question of whether or not the investor has a double-sided claim the primary substantive BIT claim and second, the contract claim that is elevated to a treaty claim by virtue of the umbrella clause. The significance of the umbrella clause is that it potentially tilts the debate in favour of the investor and impliedly burdens the host state to demonstrate that an investor-state contract is not one of the obligations or commitments encompassed by the umbrella clause. This was the exact issues faced by the Tribunals in both *SGS v. Pakistan*[26] and *SGS v. Philippines*[27] whether the consent in the BIT extends to contract-based claims in addition to treaty-based claims.

## III. Analysis of SGS Cases

The SGS cases are the two most landmark cases where Tribunals were faced with the issue of deciding the scope of an umbrella clause. An interesting fact is that both Tribunals adopted two completely opposing views as to the interpretation of very similar clause, from the Pakistan-Switzerland BIT[28] and the Philippines-Switzerland BIT.[29] Both decisions have been adopted in several other cases in the following years, but the debate as to which method is more desirable continues till date.

### *A. SGS (Société Générale De Surveillance S.A.) v. Islamic Republic Of Pakistan*[30]

An ICSID Tribunal, in this landmark case, adopted a narrow or restrictive view of interpreting the umbrella clause and finally rejected jurisdiction over the contract claims. The Tribunal did nevertheless accept jurisdiction over the BIT claims; however, only the former is relevant for the current analysis. Before going into the reasoning of the Tribunal, a brief background of the case is necessary to understand the same.

26 *Supra* note 23.
27 *Supra* note 25.
28 Agreement between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and Reciprocal Protection of Investments, Art. 11.
29 Agreement between the Swiss Confederation and the Republic of Philippines on the Promotion and Reciprocal Protection of Investments of 1997, Art. X(2).
30 *Supra* note 13.

The dispute between SGS Société Générale de Surveillance S.A. and the Government of Pakistan arose from a Pre-Shipment Inspection (PSI) Agreement signed by both parties on 29 September 1994, whereby both parties agreed that SGS would provide pre-shipment inspection services with respect to goods to be exported from certain countries to Pakistan.[31] After around two years, Pakistan notified SGS that the contract would be terminated. After communications between the parties failed, SGS filed a suit in the domestic court of Switzerland against Pakistan. However, Pakistan successfully argued that as per the PSI Agreement, the parties had chosen to arbitrate any disputes arising out of the contract before an arbitral tribunal in Pakistan.[32] Meanwhile, Pakistan had instituted arbitral proceedings as per the Agreement; SGS, however, objected to the PSI Agreement arbitration, and in addition filed counter-claims against Pakistan for alleged breaches.[33] Six months later, SGS notified Pakistan that it was invoking Article 9(2) of the Switzerland-Pakistan BIT, the dispute resolution clause, providing for ICSID arbitration.[34]

Amongst several alleged claims under the BIT such as failure to ensure fair and equitable treatment of SGS' investment and measures amounting to expropriation without providing fair and adequate compensation, the most contentious issue of the arbitration was with respect the umbrella clause contained in Article 11 of the BIT. SGS' assertion was that Pakistan violated the said Article by failing to guarantee observance of its contractual commitments. Article 11 of the BIT reads

> *"Either Contracting Party shall constantly guarantee the observance of commitments it has entered into with respect to the investments of investors of the other Contracting Party."*[35]

SGS contended that contractual claims come within the ambit of the BIT and therefore the ICSID Tribunal should decide on the contractual claims in addition to the purely BIT claims. Pakistan's major objections

[31] *Id* at 11.
[32] *Id* at 22-25.
[33] *Id* at 26-27.
[34] *Id* at 32.
[35] *Id* at 97.





were that the ICSID Tribunal could not have jurisdiction when the parties have expressly agreed to submit disputes elsewhere and that the Tribunal could not investigate the claims under Article 11 until the Pakistan arbitral tribunal had first determined whether or not there was in fact a contractual breach.[36] SGS further insisted that the umbrella clause effectively 'elevates' the purely contractual claims to the level of claims of a breach of Treaty.[37]

The Tribunal rejected the argument that Art.11 of the BIT elevated a mere contractual breach to a treaty breach. The primary explanation afforded by the Tribunal was that in principle, a breach of contract could not amount to a breach of international law. Moreover, the legal consequences of the approach adopted by the claimant in order to interpret Art.11 were held by the Tribunal to be *"so far-reaching in scope, and so automatic and unqualified and sweeping in their operation, so burdensome in their potential impact upon a Contracting Party"*. They further stated that in order to provide such an effect to the said Article, there must be clear and convincing evidence of the shared intent of both Contracting Parties in incorporating the Article, which is absent in this case.[38]

The Tribunal presented four arguments in support of their proposition. First, that the broader view of the clause would also cover non-contractual obligations arising under the laws of the host state, including the smallest types of commitments and would thus lead to a flood of lawsuits before international tribunals. Second, it would amount to incorporating an unlimited number of State contracts as well as other municipal law instruments setting out State commitments, including unilateral commitments, to an investor of the other Contracting Party. Third, the Tribunal considered that the location of the umbrella clause towards the end of the treaty as separate and distinct from the substantive obligations further showed the intention of the parties to not include it as a substantive treaty obligation. And finally, it pointed out that the benefits of the dispute settlement provisions of the contract would clearly flow to the investor. The State's invocation of the contractually specified forum could easily be defeated by the investor, who would in turn have the choice of forum selection either under the BIT or the specific contract.[39]

[36] *Id* at 48-49.
[37] *Id* at 54.
[38] *Id* at 167.
[39] *Id* at 166, 168-169.

The claimant finally contended that without a liberal application of this clause, it would be rendered completely useless. Again, the Tribunal rejected this argument and stated that under exceptional circumstances, a violation of certain provisions of a contract between an investor and a state might also amount to a treaty violation by infringing a clause. For instance, in a case where a State takes steps to impede the ability of the investor to pursue its claims under the contract's dispute resolution clause, or if they refused to go to arbitration at all leading to blatant denial of justice.[40]

Therefore, ultimately, the Tribunal narrowly construed the umbrella clause in Art.11.1 of the BIT and stated that contractual disputes could not be elevated to a treaty claim unless in exceptional circumstances.

### *B. (SGS Société Générale De Surveillance S.A.) v. Republic Of Philippines*[41]

In this case also, the contractual relationship giving rise to the dispute between SGS and the Philippines was similar to that in the previous case. In 1991, the two parties entered into a contract, known as the Comprehensive Import Supervision Service (CISS) Agreement, by which SGS would provide pre-shipment inspection services of the imports to Philippines, including verification of the imported goods' quality, quantity and price.[42] From 1986-1998, new agreements were entered into and after 1998, the CISS Agreement was extended twice.[43] In 2000, SGS' services under the Agreement were discontinued; following which SGS submitted claims to the Philippines for money unpaid on the contract, a total amounting to approximately US $140 million plus interest.[44]

When attempts for amicable settlement failed, SGS submitted a request for arbitration to ICSID, invoking the dispute resolution clause in the Switzerland-Philippines BIT, contending breach of fair and equitable treatment, expropriation as well as breach of the host state's obligations under the umbrella clause in Article X(2) of the BIT.[45] The Philippines,

40 *Id* at 172.
41 *Supra* note 14.
42 *Id* at 12-13.
43 *Id* at 13-14.
44 *Id* at 14-15.
45 *Id* at 16.





denying jurisdiction of the tribunal, argued that the dispute was purely contractual in nature and therefore subject to the forum selection clause i.e. Article 12 in the CISS agreement, which required disputes to be heard before the domestic courts of the Philippines.[46] Further, the Philippines relied on the decision in *SGS v. Pakistan*, contending that an umbrella clause was insufficient to transform a contract claim to a treaty claim.

In response, SGS argued that the ICSID's jurisdiction was found in Article 25(1)[47] of the ICSID Convention, which provided for jurisdiction over a legal dispute arising directly out of an investment when there is express consent by the parties in writing which in this case, is the Switzerland-Philippines BIT[48] and therefore the tribunal has jurisdiction over contractual claims arising *inter alia* out of the umbrella clause. Article X (2) reads

> *"Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party."*[49]

SGS primarily argued that the effect of an umbrella clause is to elevate a breach of contract to a treaty claim under international law, while maintaining that the tribunal may consider contractual issues in determining claims based on a BIT, even if they have different legal bases.[50] While acknowledging the conclusion of the tribunal in *SGS v. Pakistan* which only recognised accepting jurisdiction over contractual claims in exceptional circumstances, the *SGS v. Philippines* tribunal contrasted the differences in the umbrella clauses in the two BITs. It held the wording of Article X (2) to be more clear and specific.[51]

The tribunal offered a few arguments in support of this broad interpretation of the umbrella clause. First, the text of the provision is phrased in mandatory language by using the word 'shall', just as in other substantive provisions imposing obligations on the parties.[52] Further, the tribunal stated that the phrase 'any obligation' is wide enough to include

46 *Id* at 17, 22.
47 ICSID Convention, Article 25(1).
48 *Id* at 16, 46.
49 *Id* at 34.
50 *Id* at 64-65.
51 *Id* at 119-120.
52 *Id* at 115.

obligations arising under national law with regard to an investor-state contract.[53] The tribunal went on to state that on interpreting the actual text of the clause, it would appear that each Party to the BIT must observe any legal obligation it has assumed, or will assume in the future, with respect to specific investments covered under the BIT.[54]

Second, any uncertainty regarding the scope of Article X(2) should be resolved in favour of protecting investments, since this is the overriding purpose of a BIT.[55] Moreover, for binding obligation or commitments of the state, such as investor-state contracts, to be brought within the framework of the said Article is consistent with the object and purpose of the BIT.[56] Finally, the tribunal opined that if the parties had intended to limit the umbrella clause to only certain kinds of obligations, they were free to stipulate such restrictions in the BIT, but did not do so.[57]

The tribunal clearly addressed the justification and reasoning provided by the tribunal in *SGS v. Pakistan* and stated its differing opinion for certain reasons. Of them, one was with respect to the location of the umbrella clause in the BIT, the tribunal did not agree with the former tribunal that this was a decisive factor in determining jurisdiction.[58] In addition, the tribunal addressed the concern of the *SGS v. Pakistan* tribunal regarding the detrimental effect a broad interpretation would have of overriding the dispute settlement clause in investor-state contracts. While agreeing with this concern, the tribunal refused to accept that this effect would flow from a broad interpretation of the umbrella clause.[59] While dealing with whether the forum selection clause of the Agreement was overridden by the BIT, the tribunal gave two reasons for its disagreement. Firstly, the general wording of the provision makes it applicable to investment agreements, whether concluded prior to or after the entry into force of the Agreement. It therefore cannot be presumed that the general provision has the effect of overriding specific provisions of particular contracts, which are freely negotiated by the parties. The second consideration derives from the character of an investment protection agreement as a framework treaty in tended to

[53] *Id* at 115.
[54] *Id* at 115.
[55] *Id* at 116.
[56] *Id* at 117.
[57] *Id* at 118.
[58] *Id* at 124.
[59] *Id* at 123.





support and supplement the negotiated investment agreements between host state and investor, not to override or replace them.[60]

### *C. Evolution Of Later Judgements*

Since the ICSID tribunal in 2003 decided the case of *SGS v. Pakistan*, several others have chosen to follow suit. The position taken by *SGS v. Pakistan* has been supported by several ICSID tribunals. One such is *Joy Mining v. Egypt* where the tribunal found that an umbrella clause not prominently inserted into a BIT cannot operate to transform a contract claim to a treaty claim, unless there exists a clear violation of the rights and obligations under the treaty, or the contractual breach is of such magnitude that it may trigger the Treaty protection.[61] The tribunal held that there was a missing link between the contract and the treaty that would prompt treaty protection and an umbrella clause is insufficient for the same.[62]

In another case of *CMS v. Argentina*, analyzing the Argentina-United States BIT, the tribunal opined that not all contract breaches result in breaches of the Treaty, even when there is an umbrella clause present.[63] While treaty protection is not available to purely commercial aspects of a contract, the umbrella clause may elevate a contract claim to a treaty claim only when there is significant interference by the government or public agencies with the rights of the investor.[64]

The decision was followed again in 2006 by two nearly identical cases- *El Paso v. Argentina* and *Pan American v. Argentina*[65] also followed *SGS v. Pakistan*'s narrow interpretation of the umbrella clause in interpreting the United States-Argentina BIT. While agreeing with the arguments put forth by the *SGS v. Pakistan* tribunal, the *El Paso* tribunal further added that a narrow reading of the umbrella clause was necessary to prevent a state's minor commitments from being transposed to international treaty obligations.[66]

[60] *Id* at 141.
[61] Joy Mining Mach. Ltd. v. Egypt, (2004) Award on Jurisdiction, ICSID Case No. ARB/03/11, 81.
[62] *Id* at 81.
[63] CMS Gas Transmission Co. v. Argentine Republic, (2005) Award, ICSID Case No. ARB/01/8, 299.
[64] *Id* at 299.
[65] Pan American BP v. Argentina, Decision on Preliminary Objections, 27 July 2006.
[66] El Paso Energy International Company v. Argentina Republic, (2006) Decision on Jurisdiction, ICSID Case No. ARB/3/15,76.

Several other ICSID tribunals have, on the other hand, chosen to follow the approach of *SGS v. Philippines.* For instance, in *L.E.S.I.-DIPENTA v. Algeria*, the tribunal in 2005 accepted jurisdiction over a contractual claim on account of a BIT umbrella clause.[67] Again in 2005, *Eureko B.V. v. Poland* laid importance the imperative wording and broad scope of the BIT as determining factors in finding that a BIT encompassed all of a state's obligations, including investor-state contracts.[68] The tribunal in *Sempra Energy International v. Argentina* found that certain claims were simultaneously contract claims and treaty claims and the connection between the two was strengthened by the umbrella clause. The tribunal favoured the *SGS v. Philippines* approach based on the Treaty, the contract and the context of the investment.[69]

The *Noble Ventures v. Romania* tribunal decided that an umbrella clause clearly references contracts entered into between the host state and investor.[70] The tribunal insisted on the specificity of each umbrella clause, and emphasized that the wording in the umbrella clause very clearly referred to investment contracts.[71] In addition, the tribunal emphasized the object and purpose of investment treaties as consistent with Article 31 of the Vienna Convention.[72]

## IV. Which Approach is More Desirable?

While considering which approach would be more desirable, the primary requirement would be to peruse the BIT as a whole, rather than isolate an individual clause and scrutinise it independently. It is imperative to understand the object and purpose of a treaty to get a comprehensive understanding of the same. It can be reasonably assumed that the purpose of most investment treaties is tied to the desirability of foreign investments, which could mutually benefit both the host state and the investor investing in the state. It would seek to provide conditions necessary for promotion of foreign investment and conversely provide

67 Consorzio Groupement L.E.S.I.-DIPENTA v. People's Democratic Republic of Algeria, (2005), ICSID Case No. ARB/03/8.

68 Eureko B.V. v. Republic of Poland, Partial Award on Liability of 19 August 2005, 255.

69 Sempra Energy International v. Argentine Republic, (2005), Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB/02/16, 101.

70 Nobel Ventures Incorporated v. Romania, (2005), ICSID Case No. ARB/01/11, 59.

71 *Id* at 51.

72 United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.





an environment to channel in more foreign investment into the host state. The Vienna Convention,[73] in Article 31, lays down rules for interpretation. These rules include the object and purpose of the treaty along with good faith.[74] Tribunals have generally interpreted treaties in light of their object and purpose by referring to their preambles. The purpose of an investment treaty as highlighted in the preamble is to promote the mutual protection of investments and to draw attention to the nexus between an investment-friendly environment and the flow of foreign investment.

At the outset, the author deviates from the approach of both SGS tribunals while interpreting the respective umbrella clauses. In each case, the tribunal has perused the clause as it is, with very fleeting references to the object and purpose of the entire BIT. The tribunals have isolated the umbrella clause and have read it as it is, breaking up the clause into segments and laying varying degrees of significance on each. Rather than reading the single umbrella clause in isolation, the authors advocate interpretation along the lines of the VCLT. Strict adherence to Article 31 of the VCLT lays utmost importance on the object and purpose of the BIT while deciding which approach to adopt while interpreting an umbrella clause.

Having established the foundation of interpretation the object and purpose of the BIT which is to mutually promote and protect investments, the approach adopted in *SGS v. Philippines* is more desirable than that adopted in *SGS v. Pakistan* in the opinion of the authors. Before validating the *Philippines* tribunal, the authors will first set out the points of disagreement with the *Pakistan* tribunal and the reasons for the same.

The first issue to address is with respect to the placement of the umbrella clause in the treaty. The *Pakistan* tribunal opined that the location of the umbrella clause towards the end if the BIT was significant in determining the intent of the Parties. The tribunal stated that since the umbrella clause was placed away from the other substantive obligations, it cannot be considered a 'first order' obligation. Moreover, the reasoning

73 *Ibid.*

74 "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose", Art. 31, Vienna Convention on the Law of Treaties.

of the tribunal was that since the substantive provisions were separated from the umbrella clause by a subrogation clause as well as the dispute resolution provisions, the Article was not meant to set out a substantive obligation.[75] While the reasoning is appreciated, the authors disagree with the significance laid upon the position of the umbrella clause. Even if the obligations under an umbrella clause are not considered as 'first order' obligations, they may be classified as supplementary or incidental obligations, which are still entitled to protection under the BIT, irrespective of its position amid the arrangement of sections.

The next issue is with regard to the *Pakistan* tribunal's reason that the legal consequences of a broad approach would be 'so far-reaching in scope' and 'so burdensome in their potential impact upon a Contracting Party'. The tribunal went on to state that the broad interpretation would encompass non-contractual obligations, including an unlimited number of State contracts as well as other municipal law instruments setting out several State commitments. In the authors' opinion, this reasoning of the tribunal is flawed. Primarily, adopting a broad approach to interpreting an umbrella clause does not necessarily imply opening the avenue for every obligation the State has entered into. A broad approach advocated by the claimants and then the *Philippines* tribunal merely suggests that contracts entered into between an investor and the host State must be honoured and given treaty protection; it does not suggest providing treaty protections to each and every obligation of the State. These protected obligations would extend only to contracts between that particular investor, i.e. the claimant in the case in progress, and the host State, with respect to certain investments. Moreover, by virtue of the existence of a BIT between the investor's country and the host State, such investors are in any case entitled to protection under the Treaty.

The *Pakistan* tribunal has also thrown light on the possibility of misuse of the forum selection clause by the investor, as the investor benefits from the choice of forum selection under both the BIT and the contract. The tribunal has addressed a valid concern at this juncture, but the authors find insufficiency to refuse jurisdiction based on this one concern.

The tribunal finally states that the umbrella clause must be invoked only in exceptional circumstances. Again, the authors disagree with this

[57] *Supra* note 13.





assertion as the almost complete neglect of a clause in a treaty is completely irrational. The drafting and insertion of the clause would be completely pointless if there were such few circumstances in which it could be invoked. Keeping in mind the object and purpose of a BIT, overlooking an umbrella clause in the lack of any exceptional case, would defeat the presence of such a clause.

The sound reasoning and fulfilment of the purpose of the BIT leads the authors to believe that the approach of the *Philippines* tribunal is more desirable as it successfully protects an investment and allows overall protection of rights of the investors. Moreover, the wording of the umbrella clause implies that observance of all kinds of obligations, whether within the treaty or a contractual obligation are necessarily to be complied with. While adopting the broad interpretation, investments are being protected and the rights of the host state are being hindered in no way. In fact, it would be more desirable for a tribunal constituted under the BIT dispute resolution clause to entertain contractual breaches, amounting to treaty breaches. This would in turn save large amounts of money and time of the parties.

Furthermore, while entering into BITs, Contracting Parties have the option of expressly excluding certain kinds of obligations/commitments from the purview of an umbrella clause. Failure to exercise this right at the time of entering into the BIT cannot then be sought as a defence when the investor invokes jurisdiction under the umbrella clause. Moreover, contracts between an investor and a host state are signed after a BIT exists between the two countries in most cases. At the time of entering into the contract also, parties have the option of specifying certain grounds when the jurisdiction under the forum-selection clause of the contract may be invoked.

At this point, the concern regarding the overriding effect of the broad approach over the forum-selection clause must be addressed. It is important to note that the mere presence of an umbrella clause in a BIT does not by default eliminate the forum-selection clause in the contract. This clause can certainly be invoked in cases where a contractual breach does not amount to a treaty breach. Although the protection under the treaty is available when there is significant interference of the rights of the investor under the treaty, purely commercial aspects of a contract might not be protected by the treaty. The umbrella clause in the BIT is a general protection afforded to an investor in case a contractual claim

violation of treaty rights. This however does not obliterate the validity of the specific forum-selection clause in the contract in case of disputes arising out of the contract. Therefore, there exists no possibility of an overriding effect of an umbrella clause over the contract's forum-selection clause.

## V. Conclusion

As can be seen from the abovementioned cases, the approach of tribunals to interpreting an umbrella clause has fluctuated between both the broad and restrictive views. There exists no fixed rule for such interpretation till date. Tribunals are still given the discretionary power to rule on their jurisdiction based on their own perusal of the clauses in the BIT. The terminological difference between 'treaty claims' and 'contract claims' is widely utilised by tribunals to understand what breaches are purely commercial and contractual in nature and what infringements are blatant violations of the treaty. The crucial determining factor at this point is whether a contract claim amounts to a treaty claim by virtue of the presence of the umbrella clause in the BIT.

Keeping in mind the overall interests of an investor making an investment in the host state, relying on the obligations promised by the latter through the existing bilateral investment treaty, a tribunal must ideally adopt a wider interpretation to an umbrella clause, thus bringing within its ambit contract breaches that lead to treaty violations.





# ANALYSIS OF THE INHERENTLY FLAWED CASE OF DASHRATH RUPSINGH RATHOD: A FASCINATING PARADOX OF A JUDGMENT FALLING AGAINST THE INTERESTS OF THE AGGRIEVED

*Ruchi Verma and Shanya*

*Through this article the authors try to establish an unprecedented contention that a recent judgment pronounced by the Apex Court in Dashrath Rupsingh Rathod v. State of Maharashtra is inherently flawed and hampers the interests of the aggrieved in relation to the issue of territorial jurisdiction of a court to try an offence under Section 138 of the Negotiable Instruments Act, 1881. The authors would thereby suggest their humble yet original recommendations to tone down the damage that has already been done and to ward off a consequential disaster. As per the judgment passed by the Hon'ble Judges, currently, a complaint under Section 138 of the N.I.A, 1881 is maintainable only in the Court within whose jurisdiction the drawee bank is situated. However, this attracted widespread reaction from all across the nation as it bent the law heavily in favor of the accused. Thus, this article seeks to critically analyze the issue of commission of an offence under section 138 of the Act. Starting with the legislative intent of the parliament, the article opens up to discuss the shortcomings in the interpretation of the issue by the Hon'ble judges while deciding the matter. Secondly, it deals with the practical repercussions and economic consequences arising out of the judgment. And lastly, the authors have also highlighted the court's failure to appreciate certain important issues, ranging from "jurisprudential aspects" to question of territorial jurisdiction of courts in relation to dishonor of "at par cheques." Consequently, public interest, commercial transactions and economy of our country have suffered a huge set back. Keeping in mind legal incongruities outlined*

*above along with the practical applicability of their recommendations, the authors suggest an immediate re-consideration of the issue by both the legislative and judicial authority with an aim to balance the ends of justice.*

## I. Introduction

The Supreme Court of India recently delivered a landmark judgment[1] pertaining to the territorial jurisdiction of a court to try an offence under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "the Act"). The Apex Court has made it abundantly clear that a complaint under section 138 of the Act is maintainable only in the Court within whose jurisdiction the drawee bank is located. However, the authors would go on to establish this groundbreaking contention that this crucial judgment is logically flawed and runs contrary to the statement of objects & reasons as well as the legislative intent of the Act. Simultaneously, the authors would try to prove that this impactful judgment would have serious repercussions on the smooth functioning of commercial transactions nationwide and thereafter, adversely affect the economy of the country. Therefore, the authors seek to critically analyze the judgment and suggest the building up of a consensus in favor of the introduction and incorporation of appropriate legislative measures required to mitigate this situation.

## II. Facts of the Case

The Hon'ble Supreme Court of the country received a number of appeals filed under Section 138 of the Negotiable Instruments Act, 1881 pertaining to the question related to a court's territorial jurisdiction in criminal complaints. Every appeal comprised of dissimilar facts and circumstances, although, the question of law involved remained the same i.e. what should be the place of judicial investigation for the trial of offences under Section 138 of the Act read with Section 177 to 179 of the Code of Criminal Procedure, 1973.

Previously, a division bench of the Apex Court in the case of *K. Bhaskaran v. Sankaran Vaidhyan Balan*[2] had held that a trial for the criminal offence of dishonor of a cheque, as per Section 138 of the Act

[1] Dashrath Rupsingh Rathod v. State of Maharashtra & Anr., (2014) 9 SCC 129.
[2] K. Bhaskaran v. Sankaran Vaidhyan Balan, (1999) 7 SCC 510.





could be taken up before a court within the local limits of which any of the hereafter provided five acts were committed: (i) presentment of the cheque to the bank; (ii) drawing of the cheque; (iii) giving a notice in writing to the drawer of the cheque and thereby demanding payment of the cheque amount; (iv) returning the cheque by the drawee bank; and/or (v) failure of the drawer of the cheque to make payment of the cheque amount within the statutory period. Bhaskaran's decision gave the rationale that offences as provided under Section 138 could be said to originate only upon the satisfaction of all the above stated five acts and since Section 178 (d) of the Code of Criminal Procedure provided that where an offence consists of several acts done in different local areas, it may be enquired into or tried by a court having jurisdiction over any such local area. Therefore, a complainant could come under any such court.

Although the Supreme Court became inconsistent with its own previous decisions made in the Bhaskaran's case, this case was finally overruled, in the decision of the Supreme Court in the case of Dashrath Rupsingh Rathod. In the current case, the Supreme Court relied heavily on its two important decisions pronounced previously, one was the judgment of *Shri Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd.*[3] case, decided by a three-judge bench and the other was the *Harman Electronics (P) Ltd. v. National Panasonic India (P) Ltd.*[4] case, decided by a division bench.

In the case of Ishar Alloy the court held that it was not sufficient that the presentment of the cheque by a payee to his bank was within the period of validity of the cheque. In fact, the cheque has to be brought to the drawee bank within the cheques period of validity for any offence to fall within the ambit of Section 138. This case has been decided prominently unlike to the Bhaskaran's case, though it hasn't overruled it entirely. The latter was never even considered while decided the Ishar Alloy case.

In Harman Electronics, it was held that the return of the cheque by the drawee bank itself constitutes an offence under Section 138 and the conditions imposed in the Proviso of the section are only conditions that are to be complied with by the complainant before the court gets entitled to take cognizance of the matter. It was observed that the issue of receipt

[3] Shri Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd., (2001) 3 SCC 609.
[4] Harman Electronics (P) Ltd. v. National Panasonic India (P) Ltd., (2009) 1 SCC 720.

gave rise to a cause of action under Section 138 but the issue of notice did not. It was also held that allowing submission of a cheque for deciding jurisdiction of a court would lead to the harassment of a drawer of the cheque.

Owing to all the above mentioned factors, the Court in the present case relied on Ishar Alloy to hold that if what was relevant was the submission of the cheque to the drawee bank, it logically followed that the venue of the drawee bank (not the payee's bank), could bestow jurisdiction upon a court alone.

Finally, the Supreme Court said that on reading of Section 138 of Act along with Section 177 of Code of Criminal Procedure, which states that "every offence shall ordinarily be inquired into and tried by a court within whose local jurisdiction it was committed", there is certainty that the return of the cheque by only the drawee bank embodies the offence and indicates the place where the offence was committed.

## III. Judgment

The Hon'ble Supreme Court, while dealing with the issue of territorial jurisdiction of a court to try a matter under section 138 of the Act, held that in cases of dishonor of cheque, only those courts within whose territorial limits the drawee bank is situated would have the jurisdiction to try the case. The Supreme Court has summed-up the law relating to the offence punishable under Section 138 of the Act, in the following manner:[5]

i. "An offence under Section 138 of Negotiable Instruments Act, 1881 is committed no sooner than a cheque drawn by the accused on an account being maintained by him in a bank for discharge of debt/liability is returned unpaid for insufficiency of funds or for the reason that the amount exceeds the arrangement made with the bank.

ii. Cognizance of any such offence is however forbidden under Section 142 of the Act except upon a complaint in writing made by the payee or holder of the cheque in due course within a period of one month from the date the cause of action accrues to such payee or holder under clause (c) of the proviso to Section

[5] *Supra* note 1, at ¶31.





138.

iii. The cause of action to file a complaint accrues to a complainant/payee/holder of a cheque in due course if:

   a. The dishonored cheque is presented to the drawee bank within a period of six months from the date of issue.

   b. The complainant has demanded payment of the cheque amount within thirty days of receipt of information by him from the bank regarding the dishonor of the cheque, and

   c. The drawer has failed to pay the cheque amount within fifteen days of receipt of such notice.

iv. The fact constituting the cause of action does not constitute the ingredients of the offence under Section 138 of the Act as well.

v. The proviso to Section 138 simply postpones/defers institution of criminal proceedings and taking of cognizance by the Court till such time that the cause of action in terms of clause (c) of the proviso accrues to the complaint.

vi. Once the cause of action accrues to the complainant, the jurisdiction of the Court to try the case will be determined by reference to the place where the cheque is dishonored.

vii. The general rule stipulated under section 177 of CrPC. applies to cases under Section 138 of the negotiable Instrument Act. Prosecution in such cases can, therefore, be launched against the drawer of the cheque only before the Court within whose jurisdiction the dishonor takes place except in situations where the offence of dishonor of the cheque place except in situations where the offence of dishonor of the cheque punishable under Section 138 is committed along with other offences in a single transaction within the meaning of Section 220(1) read with Section 184 of the Code of Criminal Procedure or is covered by the provisions of Section 182(1) read with Sections 184 and 20 thereof."

Further, the following issues arise out of the judgement of the Hon'ble Supreme Court in Dashrath Case that require immediate consideration in the light if the grave consequences and strict

interpretation adopted by the respected judges. The issues can be summed up as following:

*A. Civil Law Concepts-Not Strictly Applicable*

The Court cautioned that the phrase "cause of action" in Section 138 should not be assigned the same interpretation provided under civil law. Discussing the scope and application of Sections 177-179 of the CrPC, the Court held that the territorial jurisdiction in criminal matters, including under the Act, is determined solely by location of the commission of offence.[6]

*B. Jurisdiction With Court Where Drawee Bank Is Situated*

The Court held that under Section 138 of the Act, the offence is committed when the drawee bank returns the cheque unpaid. The proviso to Section 138 of the Act, merely postpones the prosecution of the offender till the time that he fails to pay the amount within 15 days of the statutory notice.

The place of commission of the offence would be the place where the drawee bank is located (and, consequently, where the cheque is dishonored). Thus, courts of such place would have the territorial jurisdiction to try the offence under the Act.

The Court clarified that nothing would prevent an aggrieved person from availing other remedies under the Indian Penal Code or the CrPC. Where a payee was able to establish that the inducement for accepting a cheque which subsequently was dishonored had occurred where he resides or transacts business, he will not have to suffer the travails of journeying to the place where the cheque had been dishonored.[7]

*C. Pending Cases*

Having decided the issue of appropriate territorial jurisdiction, the Court considered the various options available in regard to the cases that are pending before the various Courts in India. The Court held that:

i. Where proceedings had progressed to the stage of recording of evidence or beyond, the proceedings would continue before the

[6] *Supra* note 1, at ¶14.
[7] *Supra* note 1, at ¶¶15-19.





same courts and it would be deemed that the Court had transferred the case from the Court of proper jurisdiction to the Court where such case was pending.

ii. For the remaining cases, including where the accused had not been properly served, the complaints would be returned to the complainants for filing in the proper court. If such complaints are filed within 30 days of their return, they shall be deemed to have been filed within the limitation period (unless the initial complaint was itself time barred).[8]

## IV. Critical Analysis of the Judgment in Light of Prevailing Law

*A. Legal Provisions*

*1. Section 138 of the Negotiable Instruments Act, 1881*

138. Dishonor of Cheque for insufficiency, etc., of funds in the account**:** Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing of the credit of that account is insufficient to honor the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this session shall apply unless-

a. The cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.

b. The payee or the holder in due course of the cheque, as the case may be makes a demand for the payment of the said amount of money giving a notice in writing to the drawer of the cheque,

[8] *Supra* note 1, at ¶20.

within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid.

c. The drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation: For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability."

Statement of Objects and Reasons

The Act was enacted and Section 138 thereof incorporated with a specified object. The statement of objects and reasons appended to the bill explaining the provisions of the new Chapter read as follows:[9]

"This Clause [Clause (4) of the Bill] inserts a new Chapter XVII in the Negotiable Instruments Act, 1881. The provisions contained in the new Chapter provide that where any cheque drawn by a person for the discharge of any liability is returned by the bank unpaid for the reason of the insufficiency of the amount of money standing to the credit of the account on which the cheque was drawn or for the reason that it exceeds the arrangement made by the drawer of the cheque with the bankers for that account, the drawer of such cheque shall be deemed to have committed an offence. In that case, the drawer, without prejudice to the other provisions of the said Act, shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque or with both. The provisions have also been made that to constitute the said offence-(a) Such cheque should have been presented to the bank within a period of six months of the date of its drawl or within the period of its validity, whichever is earlier, and (b) The payee or holder in due course of such cheque should have made a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque within fifteen days of the receipt of the information by him from the bank regarding the return of the cheque unpaid; and (c) The drawer of such cheque should have failed to make the

[9] The Banking Public Financial Institutions and Negotiable Instruments laws (Amendment) Act 1988, § 4 has inserted Chapter XVII in the Negotiable Instrument Laws (Amendment) Act, 1988; Discussed in Narayandas Bhagwandas Patani v. Union of India, (1993) 3 BomCR 709.





payment of the said amount of money to the payee or the holder in due course of the cheque within fifteen days of the receipt of the said notice.

In order to ensure that genuine and honest bank customers are not harassed or put to inconvenience, sufficient safeguards have also been provided in the proposed new chapter."

These provisions were incorporated with a view to encourage the culture of use of cheques and enhancing the credibility of the instrument. However, the Courts were unable to dispose of the cases in a time-bound manner in view of the procedure contained in this act. Therefore, considering the recommendations from various institutions, subsequently, additional provisions in the Act[10] were incorporated with the following objectives:

"The proposed amendments in the Act are aimed at early disposal cases relating to dishonor of cheques, enhancing punishment for offenders, introducing electronic image of truncated cheque and a cheque in the electronic form as well as exempting official."[11]

Further, the Apex Court in the case of *Dalmia Cement (Bharat) Ltd. v. M/S Galaxy Trades & Agencies Ltd. & Ors.,*[12] has reiterated the objective and legislative intent behind incorporation of section 138 of the Act. The Court held that-

"The Act was enacted and Section 138 thereof incorporated with a specified object of making special provision by incorporating a strict liability so far as the cheque, a negotiable instrument in concerned. The law relating to negotiable instrument is the law of commercial world legislated to facilitate the activities in trade and commerce making provision of giving sanctity to the instruments of credit which could be deemed to be convertible into money and easily passable from one person to another. In the absence of such instruments, including a cheque, the trade and commerce activities, in the present day would, are likely be adversely affected as it is impracticable for the trading community to carry on with it the bulk of currency in force. To achieve

[10] There was further amendment in the Act by The Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002.

[11] *Id* at ¶4-5.

[12] Dalmia Cement (Bharat) Ltd. v. M/S Galaxy Trades & Agencies Ltd. & Ors., (2001) 6 SCC 463.

the objectives of the Act, the legislature has, in its wisdom thought it proper to make such provisions in the Act for conferring such privileges to the mercantile instruments contemplated under it and special penalties and procedure in case the obligations under the instruments are not discharged."[13] The laws relating to the Act are, therefore, required to be interpreted in the light of the objects intended to be achieved by it despite there being deviations from the general law and the procedure provided for the redressal of the grievances to the litigants. Efforts to defeat the objectives of law by resorting to innovative measures and methods are to be discouraged, lest it may affect the commercial and mercantile activities in smooth and healthy manner, ultimately affecting the economy of the country."[14]

Thus, it can be safely concluded that the legislative intent for incorporation of Section 138 appears to be to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable Instruments. Additionally, the Hon'ble Supreme Court has also carved out the standard of interpretation that must be adopted, while dealing with cases pertaining to dishonor of cheque under Section 138 of the Act.

## V. Failed Justice

### *A. Legal Position*

In the light of the above provisions, legal precedents and legislative intent behind incorporation of Section 138 of the Negotiable Instrument Act, 1881, the authors humbly submit that the present judgment under consideration suffers from following incongruities and thereby runs contrary to the objects and intention of the Act. The same can be proved in the light of following contentions:

We, further contend that the judgment under construction (Dashrath) suffers from the following incongruities and runs the contrary to the objects and intention of the Act. The analysis of the same is provided below:

a. According to the Dashrath case, complaint under Section 138 of

[13] *Id* at ¶3.
[14] *Ibid.*





the Act is maintainable only in the court within whose jurisdiction the drawee bank is located. The ratio is based on the premises mentioned hereunder:

The court relying on Ishar Alloy's case logically extended to the question of jurisdiction of the court to take cognizance and held that since "the bank" as mentioned in Clause (a) of the proviso to Section 138 of the Negotiable Instruments Act, 1881 is the drawee bank and thus the "dishonor of the cheque would get localized at the place where the drawee bank is situated. Presentation of the cheque at any place, we have no manner of doubt, cannot confer jurisdiction upon the Court within whose territorial limits such presentation may have taken place."[15]

The court then relying on *Harman Electronics (P) Ltd. v. National Panasonic India (P) Ltd*.[16] held that the proviso appended thereto simply certain further conditions, which must be fulfilled for taking cognizance of the offence and would not constitute an offence by itself.[17] The relevant excerpt is as follows:

"The proviso is an exception to the general rule is well settled. A proviso is added to an enactment to qualify or to create an exception to what is contained in the enactment. It does not by itself state a general rule. It simply qualifies the generality of the main enactment, a portion which but for the provision would fall within the main enactment."[18]

b. However, it is our humble submission that the offence under Section 138 is initiated when the drawee bank returns the cheque unpaid as mentioned in the main part of Section 138 of the Act. But, it is noteworthy that the offence gets completed only when the conditions provided in the proviso as appended to Section 138 are fulfilled i.e. upon failure of the drawee to pay the demanded amount within 15 days of the receipt of notice served by the complainant.

c. The contention proposed by us are based on logical and legal interpretation laid down in the following judgments of the Hon'ble Supreme Court and in consonance with the statement

[15] *Supra* note 1, at ¶3.
[16] Harman Electronics (P) Ltd. v. National Panasonic India (P) Ltd., (2009) 1 SCC 720.
[17] *Supra* note 1, at ¶5.
[18] *Supra* note 1, at ¶14.

of objects and reasons as enumerated by the Bill[19] that has incorporated Chapter XVII of the Act. The contentions are:

Firstly, the Apex Court in Dashrath case has wrongly interpreted the proviso appended to Section 138 by holding that the proviso thereto is simply imposing certain further conditions, which must be fulfilled for taking cognizance of the offence and would not constitute an offence by itself.[20] In this process, the respected judges interpreted the proviso contrary to the Statement of Objects and Reasons appended thereto and the legislative intent of the act that states otherwise.[21] The stated intention of the legislature is provided below for your consideration.

Further, in the case of *Dalmia Cement (Bharat) Ltd. v. M/S Galaxy Trades & Agencies Ltd. & Ors.,*[22] the court held that "the laws relating to the Act are, therefore, required to be interpreted in the light of the objects intended to be achieved by it despite there being deviations from the general law and the procedure provided for the redressal of the grievances to the litigants. Efforts to defeat the objectives of law by resorting to innovative measures and methods are to be discouraged, lest it may affect the commercial and mercantile activities in smooth and healthy manner, ultimately affecting the economy of the country."[23]

So, the judges in Dashrath case, in the process of providing convenience to the accused and reducing pendency of cases overlooked the stated intention, objects and reasons of the act and interpreted Section 138 and its proviso in disharmony with the legislature.

Secondly, while highlighting the rule of interpretation in case where a statue when construed can lead to two possible constructions, the Apex Court, in case of *Kanai Lal v. Paramnidh*[24] said- "It must always be borne in mind that the first and primary rule of construction is that the intention of the Legislature must be found in the words used by the legislature." It is also added that –"When the materials words are capable of two constructions, one of which is likely to defeat or impair the policy of the Act whilst the other is likely to assist the achievement of the said policy, then the Courts would prefer to adopt the latter construction.

19 *Supra* note 9.
20 *Supra* note 3.
21 *Supra* note 9.
22 *Supra* note 5.
23 *Supra* note 7.
24 Kanai Lal v. Paramnidh, (1957) AIR SC 907.





In the present case, the proviso under consideration is capable of two constructions on being construed. The one as provided by the Dashrath case and the other as enumerated in the precedents[25] before Dashrath case. Hence, as stated in the judgments above, the permissible interpretation of the statute is to construe the Act in a manner which might be regarded as near to the object, reasons and legislative intent of the Act. However, in this case, the respected judges have construed the Act in a manner that defeats the intention and objects of the Act.

Thirdly, it is also noteworthy that, in the case of *Richardson v. Austin*,[26] the Court held that there is nothing more dangerous and fallacious in interpreting a statute than first of all to assume that the legislature had a particular intention was, and then having made up one's mind what that intention was, to conclude that the intention must be expressed in the statute and then proceed to find it.

In the present case, the Hon'ble Judges in Dashrath case have assumed that the legislature has by virtue of the proviso appended to section 138 indented to put an additional qualification that needs to be fulfilled for taking cognizance of the offence and concluded that the same has been provided by the proviso appended thereto. Thus, pronounced that the commission of offence takes place only in the main provision while the proviso only states the conditions for prosecution.[27]

Fourthly, as contemplated above, Dashrath case have clearly specified that eh proviso appended to section 138 of the Act, draws an exception to the generality of the enacting part of the provision.[28] However, with due regard to the assumption relied upon by the judges, we fail to appreciate the rationale behind the same. As per Dashrath case, parliament appended the proviso in order to provide safeguards to save the honest drawer to make amends and escape prosecution. However, on a plain reading of objects and reasons appended to the Bill,[29] a different intention is stated thereto which states

"In order to ensure that genuine and honest bank customers are not

25 See K. Bhaskaran v. Sankaran Vaidhyan and Anr., (1999) 7 SCC 510; Prem Chand Vijay Kumar v. Yashpal Singh and Anr., (2005) 4 SCC 417.
26 Richardson v. Austin, (1911) 12 CLR 463.
27 *Supra* note 1, at ¶¶5-9.
28 *Supra* note 1, at ¶9; Supra note 1, at ¶12
29 *Supra* note 9.

harassed or put to inconvenience, sufficient safeguards have also been provided in the proposed new Chapter. Such safeguards are-

a. That no court shall take cognizance of such offence except on a complaint, in writing, made by the payee or the holder in due course of the cheque;

b. That such complaint is made within one month of the date on which the cause of action arise; and

c. That no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate or a Judicial Magistrate of the first class shall try any such offence."[30]

Thus, a differentiation is drawn between proviso as safeguards enumerated in the Statement of objects and reasons appended to the bill. While section 142 is enacted to provide necessary safeguards and conditions for taking cognizance by the Court, the proviso is appended to provide for the ingredients of the offence. Thus, it can be safely concluded that Section 142 and not the proviso as appended to Section 138 is determining factor for cognizance of offence and that proviso therein states as to what constitutes as an offence under section 138.

Fifthly, it is worthwhile to mention here that the proviso not only acts as an exception but also as a qualifying aid[31] and in few cases even as a substantive clause. In the case of *Commissioner of Income Tax v. Nandlal Bhandari & Sons.,*[32] it was observed that

"Though ordinarily a proviso restricts rather than enlarges the meaning of the provision to which it is appended, at times the legislative embodies a substantive provision in a proviso. The question whether a proviso is by way of an exception or a condition to the substantive provision, or whether it is in itself a substantive provision must be determined on the basis of substance of the proviso and not its form."

In Dashrath case, with an aim to conclude in favor of the erroneous assumption taken up by the Hon'ble judges as mentioned hereinabove, the respected judges have erred in appreciating the substance of the

[30] *Ibid.*

[31] Kedarnath Jute Manufacturing Co. v. Commercial Tax Officer, Calcutta and Ors., (1966) AIR SC 12.

[32] Commissioner of Income Tax v. Nandlal Bhandari & Sons, (1973) 47 I.T.R.





proviso over from. This ultimately resulted in bypassing the inherent intent and object of appending proviso thereto as laid down in the Bill.

Therefore, the proviso thereto constitutes an ingredient of the offence, and acts as a determining criteria for completion of offence rather than acting as an exception to the generality of the enacting part of the provision.

## VI. Practical Consequences

In light of the above legal principles, precedents and judgment, with due respect to the Hon'ble judges, the author humbly submits that the following consequences arise of the judgment which required immediate attention and reconsideration to meet the ends of justice:

a. Firstly, the payee/complainants are put in undue hardship because the ruling in question is taking into account the convenience of one party of the dispute, ("the accused") while the convenience of the other party viz. complainant/payee is totally ignored. This situation arising out of the judgment largely favors people who dishonor cheques written by them. Hence, it is the payee who will have to go to several locations for filing complainants. This will also lead to increase in expenses of the complainant in terms of advocate's fee as the complainant will be forced to engage more advocates and legal personnel's across India for pursuing its case.

As a result, it will eventually cause hardship, harassment and inconvenience to payees, who in good faith accept cheques towards the payment of the goods and services.

b. Secondly, the direction of the Court concerning refilling of a class of complaint to proper jurisdiction, as enumerated in the judgment will in fact, lead to further delay in disposal of cases. The rate of increase of cheque bouncing cases under section 138 can be logically inferred from the statistic presented in the 213th Report of the Law Commission of India.[33] As per the report, more than 38 lakh cheque bouncing cases were pending before various courts as of October 2008. Thus, the direction of re-filing of the Court will in due course will in due course will result

[33] Damodar S.Prabhu v. Syed Babalal H., (2010) 5 SCC 633, p.2, ¶4.

in return of lakhs of cases for being filed in the court having jurisdiction over the drawer's bank. This may lead to further procedural red tape and consequential delay.

c. Thirdly, the law relating to negotiable instrument act is the law of commercial world, legislated to facilitate the activities in trade and commerce and aimed to provide sanctity to the instrument s of credit. The same is provided in the statement of objects and reasons as appended to the Bill.[34] However, the ramifications arising out of this judgment, consequently, leads to defeating the objective and intent of the act in the following manner:

i. The drawer of the cheque will not be serious about enduring that the cheque written by him is honored as the law has become accused friendly without providing much safeguard to the complainant. This will eventually lead to a situation that was prevailing before year 1988, causing dilution of acceptability of cheques in commercial transaction.

ii. The ruling will also discourage the companies, financial institutions and vendors and other persons from accepting a cheque towards the settlement of their dues. Thus, they would demand the payment through alternate means vis. Demand draft, direct bank transfers etc. As a result, the parties availing of services or goods will not be inclined to bear the additional cost of bank charges. These charges will then pass on to the supplier/vendor/service provider, as the case may be.

Accordingly, in the wake of present judgment, the commercial transaction will suffer a huge set back thereby clearly defeating the object of this Act.

d. Fourthly, another important objective of the Negotiable Instrument Act is to promote smooth functioning of the banking activities and financial transactions, ultimately affecting the economy of the Country. However, the judgment has jeopardized the interest of the banking industry thereby affecting the economy of the country. The consequences on the

[34] *Supra* note 9





economy can be summed up as following:

i. Asset quality of banks is one of the most important indicators of financial stability of an institution. Banks work robustly towards classification and provisioning of its assets in order to achieve effective appropriation of recoveries in a uniform and consistent manner.[35] However, in respect of accounts where there are potential threats for recovery due to frauds committed by borrowers, the likelihood of slippage of an asset to a Non-Performing Asset increases manifold. Thus, Reserve Bank of India inter alia has provided for following guidelines to tackle this situation:

- Banks are strongly encouraged to take recourse to legal remedy when they encounter malfeasance on the part of the borrowers.[36]

- In conformity with the prudential norms, provisions should be made on non-performing assets on the basis of classification guidelines and compute time for turnover of asset.[37]

ii. It is noteworthy that over the last few years, NPA is rising at an alarming rate. Identifying the same, Minister Arun Jaitely recently called banks to step up their credit flow and reduce bad loans.[38] However, after the judgment of Dashrath Case, the banks and financial institutions have faced a serious set-back. The situation arising out of the judgment largely favors people who dishonor cheques written by them. Banks and companies as a practice accept cheques towards payment of the loans extended. Now, In case of dishonor of cheques, it is the payee who will have to go to several locations for filing complaints and recovering his money. This will lead to the following grave

[35] Reserve Bank of India, Master Circular: RBI/2014-15/74.

[36] *Study on preventing slippage of NPA Accounts*, Reserve Bank of India, Ref. DBS.CO.OSMOS/B.C./4/33.04.006/2002-2003, Sept. 12, 2003, p. 4, ¶ b.

[37] Reserve Bank of India, Master Circular: RBI/2013-14/18.

[38] BS Reporter, FM asks banks to step up credit flow, reduce bad loans, BUSINESS STANDARD, 21st November 2014, New Delhi, available at: http://www.business.standard.com/article/economy-policy/fm-asks -banks-to-step up-credit-flow-reduce-bad-loans-114112001136.1.html.

consequences:

- Increase in provisioning: Taking into consideration the strict interpretation proposed by the judgement, possible time lag and cumbersome litigation, the Banks and financial institutions will be forced to take stringent measures including increase in provisioning, policies and guidelines in order to recover money from its borrowers. Consequently, it will adversely affect the profitability of the institutions and credit flow to the priority sectors and failure to meet targets.[39]

- Increase in recovery time- Owing to re-filing considerations at a place where the drawee bank is situated, the banks and financial institution will be forced to pursue the same at proper jurisdiction. This in turn will increase the recovery time of the genuine amount due, thereby transforming the assets to non-performing assets and decrease in liquidity.[40]

iii. The Foreign Direct Investment and Business by SMEs & Entrepreneurs will also suffer due to cumbersome litigation procedure and potential threat of dilution of acceptability of cheques. It can be depicted as following:

- Finance Minister, Arun Jaitely highlighted that India has tremendous opportunity to attract foreign investment and that a large number of international entrepreneurs are working towards expansion of their business in India.[41]

- As regards to Indian entrepreneurs and SMEs, the share of Micro, small and Medium Enterprise (MSME) contribution to GDP will significantly increase from the current 8% to 15% by 2020 and the contribution to India's GDP stands around 8% for the year 2011-12. Identifying the important role played by the entrepreneurs and SMEs in propelling the Indian economy, it is of utmost importance to maintain the

[39] *Credit Market*, Reserve Bank of India, p. 126.
[40] *Supra* note 36 at 6.
[41] *Supra* note 38.





credit flow from banks and financial set ups to such units.[42]

- However, the judgment in hand has potential to create impediments towards the same due to cumbersome litigation. Foreign entrepreneurs who may exchange their goods and services be readily accepted mode of negotiable instrument i.e. Cheques are likely to face severe consequences in case of dishonor of cheque by a fraudulent client. Hence, an entrepreneur, already at a nascent stage of its business, will be over-burdened with additional expenses to recover its legitimate sum. As a result, there is a likelihood of facing a set-back in terms of FDI by foreign entrepreneurs due to lack of effective options for pursuing a case under section 138 of the Act and biased approach towards accused.

Hence, the cumulative effect of the above issues will lead to creating impediments and restraining the banks form funding new investments that our economy rightly needs.[43] Therefore, in the light of the above considerations, there is an immediate need to balance the possibilities in a better way in order to facilitate the intent and objective of the act and prevent adverse impact on our economy.

## VII. Un-Addressed Issues/Contentions

The Hon'ble Judges failed to take note of the following aspects while pronouncing the judgment that provides a greater thrust to reconsider the judgment with utmost priority:

### *A. Jurisprudential Aspect*

This Act is a special law and the provisions therein have been inserted to regulate the growing business, trade, commerce and industrial activities of the country. Further, it aims to promote greater vigilance in financial matters and to safeguard the faith of the creditor in the drawer of the cheque which is essential to the economic life of a

[42] Saurabh Gupta, *Share of MSME in GDP may reach 15% by 2020: Study by KPMG,* 28th October, 2014 available at: http://www.smetimes/news/top-stories/2014/Oct/28/share-of-msme-in-gdp-may-reach-15-pc-by-2020-study631653.html.
[43] Talk by Dr. Raghuram G. Raja at the 3rd R. Varghese Kurien Memorial Lecture at IRMA, Anand on 25th November 2004.

developing country like India.[44] However, in present case, the Judges have only taken into perspective the hardship and inconvenience suffered by the accused thereby acting against the essence of criminal jurisprudence.

It is noteworthy that this Act and the provisions herein are incorporated with one of the objectives being to prevent dishonesty on part of the drawer of Negotiable Instrument Act. Additionally, if need arises, the Statute should be interpreted in light of the object and intent of the act and a balanced approach should be adopted by the Court while interpreting the judgment.[45] Thus, any judgment that runs contrary to the established rule of interpretation must be reconsidered by the legislative Bodies and Supreme Court as it leads to grave injustice.

### *B. At Par Cheques & E-Cheques*

Another aspect that was not taken into consideration while pronouncing this judgment pertains to at-par cheques and e-transaction that form the bulk of commercial transactions these days.

In Dashrath Case, the Court observed that-[46]

"…in our discernment, it is also now manifest that traders and businessmen have become reckless and incautious in extending credit where they would heretofore have been extremely hesitant, solely because of the availability of redress by way of criminal proceedings. It is always open to the creditor to insist that the cheques in question payable at the creditor's convenience."

Therefore, it is clear that by issuing of cheques payable at all branches, the drawer of the cheque had given an option to the banker of the payee to get the cheques cleared from the nearest available branch of bank of the drawer. Thus, there is ambiguity with respect to the fate of "at par cheques" in the recent light of application of this judgment.

Similarly, bulks of commercial transactions are happening by electronic media by virtue of e-cheques. However, the Judges have also failed to deal with the issue of territorial jurisdiction in case of dishonour of e-cheques which is an issue of deep concern.

44 *Supra* note 33.
45 Krishna Janardhan Bhatt v. Dattatraya G. Hegde, (2008) 4 Mh.L.J. 354 (SC).
46 Supra note 1, at ¶4.





## VIII. Conclusion & Suggestions

In the light of the above issues and contentions, it can be concluded that there are serious repercussions that arise from this judgment. It not only leads to affecting the economy of the country by casting following consequences including setback in commercial and financial transactions, acceptability of cheques, cumbersome litigation, hardship to complainant etc. but has also caused grave injustice. The Hon'ble judges have pronounced the judgment in light of an erroneous assumption and are in direct contravention to the stated intention of the legislature as enumerated in the Statement of Objects and Reasons of the Bill. Further, it has also failed to address some of the very crucial issues affecting the commercial transaction in the country including the issue of territorial jurisdiction pertaining to dishonour of "at par cheques" and "e-cheques."

Thus, the situation demands immediate attention in order to safeguard the interest of the public at large and maintain the sanctity of cheques in commercial transaction. Secondly, the judiciary and legislature should take note of the sensitivity of the issue and ambiguity that has arisen due to Dashrath case and address the same as the earliest. Thirdly, the law ministry should hold discussions with trade and commerce bodies in order to elicit broad spectrum of suggested measures and incorporate necessary changes, keeping in mind object and intention of the Act and the rights of both the parties i.e. (complainant and the accused). Fourthly, section 138 of the Act should be reconsidered in light of its object of enactment and legislature should lay guidelines, providing power to courts to try the offence at places where the cause of action has substantially arisen and not merely incidentally, in addition to where the drawee bank is situated.

# THE NEW SCOPE OF 'DEBENTURES' UNDER THE COMPANIES ACT, 2013: DOES IT COVER COMMERCIAL PAPER?

*Shriya Nayyar*

*Since its enactment on August 29, 2013, the Companies Act 2013 ("2013 Act") has progressively gained notoriety for opening up a can of worms and unsettling the status quo on many previously settled legal positions. One such debate concerns the changed definition of 'debentures' under the 2013 Act which, according to some, has blurred the distinction between negotiable instruments and marketable securities and could lead to the inclusion of negotiable instruments like Commercial Paper ("CP") within the ambit of 'debentures'. This issue has much relevance in commercial circles as a CP issuance is one of the most common routes taken by corporates and NBFCs for short-term investments and working capital. Many in corporate circles have expressed concerns that owing to this change, a CP issue could now require compliance with norms related to debentures under the 2013 Act. However, no clarity on this issue has emerged from the MCA. In this comment, the author has tried to reconcile this debate by conjointly reading the 2013 Act with the Securities Contract (Regulation) Act, 1956 ("SCRA"). It is the author's analysis that the changed definition is not an attempt to include all negotiable instruments within the ambit of debentures. Instead, the definition merely attempts to align the 2013 Act with prior judicial pronouncements of the Supreme Court. However, upon a conjoint reading of the 2013 Act with the SCRA, it may now be possible to include a CP within the ambit of a debenture.*

## I. Genesis of the Controversy

The contentious definition of 'debentures' in the 2013 Act which kick-started this controversy is Section 2(30).[1] It reads as follows:

[1] Section 2(30) was notified by the MCA on 12th September 2013.





'debenture' includes debenture stock, bonds and any other instrument evidencing a debt, whether constituting a charge on the assets of the company or not.

The parallel provision under the Companies Act 1956 ("1956 Act") was Section 2(12), which read as follows:

'debenture' includes debenture stock, bonds and any other securities of a company, whether constituting a charge on the assets of the company or not.

Thus, while in the 1956 Act a debenture could only be a 'security', under the 2013 Act, it has now been amended to include 'any other instrument evidencing a debt'. In the light of this, many believe that CP will now be covered in the definition of debentures.[2] However, to resolve this, one must find affirmative answers to the following 2 questions:

1. Are all instruments evidencing debt now debentures?
2. Has the scope of 'debentures' expanded in any way or are the changes merely syntactical?

## II. Resolving the Controversy

In attempting to resolve this controversy, one must invariably start at its source. The reason for many believing that CPs can now be included within debentures is the fact that a CP is essentially a promissory note and promissory notes themselves are an acknowledgement of debt. Section 4 of the Negotiable Instruments Act, 1881 defines a 'promissory note'[3] and illustration (b) to this section stipulates that a promissory note is an acknowledgement of a debt.[4] The same has also been held in several judicial pronouncements and is a settled position of law.[5] However, while

[2] Maneka Doshi, Companies Act, 2013: NBFC Fundraising Tough, ON THE FIRM, 14th April 2014, available at: http://thefirm.moneycontrol.com/story_page.php?autono=1069181.

[3] Negotiable Instruments Act 1881, § 4: A promissory note as an instrument in writing (not being a bank-note or a currency note) containing an unconditional undertaking signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument.

[4] Illustration (b) to Section 4: "I acknowledge myself to be indebted to B in Rs. 1,000 to be paid on demand, for value received."

[5] Bal Mukund v. Munna Lal Ramji Lal, (1970) AIR P&H 516; Shah Chimanlal Jagjivandas v. Khambhla Savji Bechar (1955) AIR Sau 74; BHASHYAM & ADIGA, THE NEGOTIABLE INSTRUMENTS ACT 60-70 (Bharat Law House, 19th ed. 2012).

one may make a preliminary argument based on this premise, it certainly cannot settle the debate once and for all. This is because such an assumption leads to the fallacious premise that any negotiable instrument evidencing debt can also be included in the definition of debentures. This leads us to the first question raised above: Did the legislature intend to include any and all negotiable instruments within the ambit of debentures?

This seems highly unlikely. Instead, the change proposed in the 2013 Act seems to be aimed at achieving an altogether different purpose. The changed definition doesn't seem so out of context when considered in light of the Supreme Court's judgment in the 1990 case of Narendra Kumar Maheshwari v. Union of India, which defined debentures as an acknowledgement of debt, with a commitment to repay the principal with interest.[6] Since the Supreme Court anyway defined a debenture as an acknowledgement of a debt, the intent seems to be to align the Companies Act with this position. Thus, most likely, the inclusion of the phrase 'any other instrument evidencing a debt' is merely an attempt to include all instruments which essentially acknowledge a debt but are known by different names, within the meaning of debentures. Thus, to assume that the changed definition includes any and all negotiable instruments within the ambit of debentures seems incorrect.

The next question which naturally arises is this: Whether the ambit of debentures has changed at all or is the change merely syntactical? It is this question which lies at the heart of this debate and demands a deeper scrutiny. Since it does not seem that the intent of the legislature was to include all negotiable instruments within debentures, it is unlikely that the underlying concept of debentures has undergone change. In light of this, a possible solution to this conflict can be given by construing 'debentures' on a combined reading of the 2013 Act and the SCRA. This is because a debenture is essentially a 'security' under the SCRA and its true import cannot be estimated in isolation with the SCRA. For the purposes of both the 1956 and the 2013 Act, 'securities' has been defined in Section 2(h) of the SCRA.[7] Section 2(h)(i) of the SCRA defines 'securities' to include "shares, scrips, stocks, bonds, debentures,

[6] Narendra Kumar Maheshwari v. Union of India, (1989) AIR SC 2138.

[7] This is reflected in Section 2(81) of the 2013 Act (notified by the MCA on 12 September, 2013) and Section 2(45AA) of the 1956 Act.





debenture stock and other marketable securities of a like nature". Thus, it would not be wrong to say that only those instruments evidencing a debt which are also securities can be debentures under the 2013 Act.

This naturally leads one to another question: What are securities? Interestingly, although the SCRA defines securities, the same is not an exhaustive definition. According to the Supreme Court in Sudhir Shantilal Mehta v. Central Bureau of Investigation, the definition is inclusive and must be interpreted expansively.[8] The Apex Court has also held that to fall within this definition, a security must be "marketable", and that for this purpose, "marketable" means "saleable", i.e. a security which is capable of being freely bought and sold in a market regardless of whether it is listed in a stock exchange.[9] However, to determine the true import of a 'security' under SCRA, a decisive test was laid down by the Gujarat High Court in Essar Steel Ltd. v. Gramercy Emerging Market Fund,[10] where the court had to decide whether floating rate notes (FRNs) were securities. In deciding this, the Court laid down the following test:

"The fundamental purpose underlying Securities Acts is to eliminate serious abuses in a largely unregulated securities market. There is virtually limitless scope of human ingenuity especially in the creation of the numerous schemes devised by those who seek the use of money of others on promise of profits. The inclusive definition of the term 'security' is wide enough to include within that definition many types of instruments that might be sold as an investment. The term 'Note' is relatively broad to encompass instruments having different characteristics depending on whether issued in a consumer context as a commercial paper or in some other investment context. If the notes are issued in a commercial or consumer context, they will not be treated as securities while those issued in investment context would be securities. Whether the Note is issued in investment context can be ascertained on the basis of the circumstances surrounding the transactions. In order to determine whether a transaction involves a 'security', the transaction has to be examined to assess the motivations that would prompt a reasonable

[8] Sudhir Shantilal Mehta v. Central Bureau of Investigation, (2010) 155 Comp Cas 339 (SC).

[9] Naresh K. Aggarwala and Co. v. Canbank Financial Services Limited, (2010) AIR SC 2722; Bhagwati Developers Private Ltd. v. Peerless General Finance & Investment Co. Ltd., (2013) 5 SCC 455.

[10] Essar Steel Ltd. v. Gramercy Emerging Market Fund, (2003) 116 CompCas 248 Guj.

seller and buyer to enter into it. If the seller's purpose is to raise money for the general use of a business enterprise or to finance substantial investments and the buyer is interested primarily in the profit the note is expected to generate, the instrument is likely to be a 'security'. On the other hand, if the note is exchanged to facilitate the purchase and sale of a minor asset or consumer goods, or to advance some other commercial or consumer purpose, such note cannot be classified as 'security'. One other factor to be examined would be whether the Note in question is an instrument in which there is common trading for speculation or investment and how is it views by the investing public."

Thus, to be a security, an instrument must both be marketable and used in an investment context. When one adopts such an approach, it becomes possible to include a CP within the ambit of a debenture without destroying the status quo. This is because:

Firstly, a CP is a "marketable" instrument. The RBI's treatment of the instrument makes this abundantly clear.

Secondly, a CP is used in the investment context in India. The RBI Master Circular on Commercial Papers, which presents the regulatory framework for CPs in India, sees CPs as a "source of short-term borrowings and an additional instrument for investors".[11] Although it uses the term "investment", this could indicate either of the two contexts and is ambiguous. To complicate matters further, while laying down the above test, the Gujarat High Court in Essar Steels also mentioned that CPs are used in the consumer context. Yet, this observation of the court is merely an obiter and cannot be treated as a decisive pronouncement on the subject. Moreover, one can argue that a CP is used in an investment context. The thrust of this argument can be derived from the accounting treatment given to CPs in India. Under Section 133 of the 2013 Act, the Central Government is required to notify accounting standards to be used by companies in preparing their financial statements.[12] Since the Central Government hasn't notified any accounting standards under the 2013 Act

[11] RBI Master Circular- Guidelines for Issue of Commercial Papers dated 1st July 2014.

[12] Section 133, Companies Act 2013: The Central Government may prescribe the standards of accounting or any addendum thereto, as recommended by the Institute of Chartered Accountants of India, constituted under section 3 of the Chartered Accountants Act, 1949, in consultation with and after examination of the recommendations made by the National Financial Reporting Authority.





so far, the MCA has clarified that till such standards are notified, the standards notified under the 1956 Act shall continue to prevail.[13] Accordingly, accounting for investments is currently covered by AS 13. According to the ICAI, under AS 13, CP is seen as a current investment and is to be covered as a separate head under 'Investments' in a company's annual financial statement.[14] This provides a strong indication that CP is used in the investment context and can thus be covered under 'securities' in the SCRA. This would also justify its coverage under debentures.

## III. Inclusion of CPs in Debentures- Opening Another Can of Worms?

Based on the discussion above, one can reasonably conclude that there exist some potent arguments to justify the inclusion of CPs in the ambit of debentures. However, even if CPs are included within debentures, the problems won't end there. In fact, that would open yet another can of worms under the 2013 Act. Some possible issues which could arise are as follows-[15]

a. Would provisions related to private placement under Section 42 of the 2013 Act now also apply to CPs? If so, this would automatically mean companies won't be able to do a new CP issue without the previous one having closed. However, this seems counterintuitive since in practice, a CP issue usually closes and ends on the same day.

b. If provisions related to private placements apply to CPs, privately placed CPs will also not be exempt from the requirement of creating a Debenture Redemption Reserve ("DRR") and putting 50% of the money raised through the CP issue into the DRR ahead of redemptions. Likewise, the liquidity requirement of having 15% of the total redemptions at

[13] Ministry of Corporate Affairs, General Circular No. 15/2013, dated 13th September, 2013.

[14] Compendium of Opinions, Vol. XII, Expert Advisory Committee, ICAI, New Delhi, Query No. 1.21; Compendium of Opinions, Vol. XIX, Expert Advisory Committee, ICAI, New Delhi, Query No. 28.

[15] *Supra* note 2; Nidhi Bothra, *The Changing Defintion of Debentures*, available at: http://indiacorplaw.blogspot.in/2014/05/guest-post-changing-definition-of.html, accessed 14th May 2014.

the beginning of each year would also apply to a CP, since this now applies to a debenture.

c. Will issue of a CP need a Board Resolution under Section 179(3) of the 2013 Act or would it need a special resolution as per Section 42 of the 2013 Act?

One possible resolution to this problem could be under Section 1 (4) (e) of the 2013 Act, which states that the provisions of a Special Act shall prevail over the provisions of the Companies Act, 2013. Considering the fact that a CP issuance is regulated by RBI under the powers derived from the RBI Act, which is a special Act, a CP is likely to continue to be regulated by the RBI and not under the 2013 Act.

## IV. Concluding Remarks

On the basis of the foregoing analysis, we can conclude that although a CP can potentially be covered under the 2013 Act, there is still no clarity on the same. This uncertainty shall continue to prevail till such a time as the MCA decides to clarify on the same. However, in the meantime, it seems that a large number of companies have decided to err on the side of caution. According to public disclosures on websites of several companies, a CP issue is now being seen as a debenture and governed by Sections 42 and 71 of the 2013 Act. In order to enhance ease of business and bring clarity on this issue, the MCA must swiftly clarify the same. However, until this happens, the matter remains open to debate and further interpretation.





# DEFENDING THE ICSID: UNDERSTANDING LATIN AMERICA'S DENUNCIATIONS IN CONTEXT AND EXAMINING SCOPE FOR REFORM

*Soumya Cheedi*

*Starting with Bolivia in 2007, most of the countries in Latin America have proceeded to denounce the ICSID Convention and withdraw from the membership of the ICSID. This has led to questions as to whether the ICSID is being delegitimized. The question of the greater consequences of these denunciations is something that will only be answered by time. Meanwhile anyone wishing to understand these developments must also pay heed to the various political forces and factors involved at play, both in Latin America, and ICSID.*

*This paper analyses the various reasons cited by Latin American nations before, during and after the course of their withdrawals and denunciations. It places those reasons in the context of the political and ideological conditions of those countries as well as within the larger framework of investment arbitration. This paper defends the ICSID system, on the primary basis that these denunciations are not about the problems with the ICSID system as much as they are about how these countries have fared before it in disputes.*

*However, this paper also acknowledged that there is scope for reform and improvement in the ICSID system. As such, it suggests reforms in the form of an appellate mechanism, and provides reasons for why this is the most important reform that the ICSID can undertake, and how it would prove useful not only for ICSID, but also for the investment arbitration regime as a whole.*

## I. Introduction

The International Centre for Settlement of Investment Disputes ('ICSID') was established in 1966, and it facilitated its first case in 1974.[1] Latin America and ICSID did not have comfortable beginnings; in 1964 when the Board of Governors of the World Bank was approving the first draft of the ICSID Convention,[2] most Latin American countries[3] voted against it in what has since been referred to as the "No-de-Tokyo".[4] ICSID's primary purpose was to encourage international investment by protecting investors against arbitrary actions by States, and these countries were not as enthusiastic as others to attract foreign investment. Also, they did not wish to give foreign investors any sort of safeguards that their own citizens did not have.[5] The Calvo Doctrine[6] was strongly established in these countries and they did not believe that their courts lacked the competency to try disputes involving foreign investors especially when their own citizens were only entitled to approach the same courts.[7]

However, as the world entered the 1980s, these countries' positions changed. They became more accepting of foreign investment, and this led to their signing of multiple bilateral treaties. Perhaps it was almost natural that they would also make a marked departure from their previous stance regarding ICSID, and between 1981 and 2000, most of the Latin American countries signed the ICSID Convention.[8]

1 Holiday Inns S.A. and others v. Morocco, (1974), ICSID Case No. ARB/72/1.

2 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 14th October 1966, 17 UST 1270. (hereinafter Convention)

3 Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Republic Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela.

4 Nicolas Boeglin, *ICSID And Latin America:: Criticisms. Withdrawals And Regional Alternatives*, available at: http://cadtm.org/ICSID-and-Latin-America-criticisms, accessed 4th July 2013.

5 Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 COLUM. J. TRANSNAT'L L. 123 (2003).

6 The Calvo Doctrine is a body of international rules regulating the jurisdiction of governments over aliens and the scope of their protection by their home states, as well as the use of force in collecting indemnities.

7 Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 COLUM. J. TRANSN'L L. 123 (2003).

8 The earliest Latin American state to sign it was Paraguay in 1982 and the last was the Dominician Republic in 2000.





However, this tale was not to be a happy one. 27% of all cases registered in the ICSID involved a South American state as a party.[9] As of mid-2013, of the 429 cases before ICSID (decided and pending), 50 involved Argentina, 36 involved Venezuela, Ecuador was involved in 13 and Bolivia was involved in 4.[10] These countries, plagued with the scourge of constantly changing political regimes, and debilitating economic crises had nationalized several projects which foreign entities had been running and had made unilateral changes to contracts signed with foreign investors.[11] Aggrieved, these foreign parties began to approach ICSID to conduct arbitration proceedings as provided for either in the BITs or contracts. The tribunals constituted by ICSID passed awards worth millions of dollars against these countries.

Given the financial burden that these awards were imposing, it is not very surprising that the Latin American countries begin to express distrust in the ICSID system once again. Bolivia announced its denunciation of ICSID in May 2007, and the denunciation was deemed effective in November of the same year. Ecuador's denunciation became effective in January 2010. Venezuela's withdrawal became effective in July 2012. Argentina, which was involved in more ICSID cases than any other Latin American country withdrew from the ICSID early last year.[12]

Interestingly, these countries have not denounced the system of international investment arbitration itself. In fact, following the entry into force of the UNASUR Treaty, the signatories have also considered setting up an arbitration centre to retain investor confidence. ICSID is so closely tied up with international arbitration system that the advantages and disadvantages of both are concurrent for the most part. It then makes for an interesting debate as to why these countries would choose to denounce ICSID, but not show disillusionment with investment arbitration. In Part II, this paper examines the most common reasons cited by these countries for withdrawing from the ICSID. It is also argued

9 The ICSID Case Load Statistics (Issue 2012-1), available at: https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English51.

10 *Supra* note 4.

11 Diana Marie Wick, *The Counter-Productivity of ICSID. Denunciation and Proposals for Change*, 11 J. INT'L BUS. & L. 239 (2012).

12 Oscar Lopez, *Smart Move: Argentina to Leave ICSID*, 1 CORNELL INT'L LAW JOURNAL, 121 (2012).

that most of these are not 'problems' peculiar to the ICSID mechanism, but should be viewed within the larger framework of international arbitration. This paper acknowledges that the ICSID mechanism is not perfect, and that there is scope for reform. The reasons that the Latin American countries give for denouncing the system may be indications of where ICSID could better itself. In Part III, the paper will suggest the means by which the ICSID system can be reformed as to be more inclusive of the concerns of various stakeholders.

## II. Latin America Leaves the ICSID-Examining the Reasons

Even prior to Bolivia's withdrawal and denunciation from the ICSID in 2007, several Latin American countries expressed their displeasure with the mechanism. This part examines these various criticisms, and attempts to address them by analysing them within the larger framework of investment arbitration.

### *A. Encroachment Upon State Sovereignty*

A majority of the cases against Latin American countries were a result of their expropriation measures damaging the business interests of investors in those countries.[13] These countries claim now that their natural resources are solely their property and that foreign direct investment encourages imperialistic and capitalist tendencies by allowing foreigners to gain a certain degree of control over these resources.[14] Because of this, they believe that they have the absolute right to decide upon regulatory policies and sanctions.[15] As bringing the dispute before the ICSID allows investors an opportunity to claim compensation for this expropriation and unilateral imposition of sanctions, these states view ICSID as an unnecessary evil that attempts to obstruct governance of their state as they deem fit.

[13] For example, See Alexandra Ulmer and Corina Pons, *Venezuela ordered to pay Exxon $1.6 billion for nationalization*, REUTERS, 9th October 2014, available at: http://www.reuters.com/article/2014/10/09/us-venezuela-exxon-idUSKCN0HY20720141009; Alexandra Ulmer, *Gold Reserve says awarded $740.3 mln in Venezuela Brisas arbitration*, REUTERS, 22nd September 2014, available at: http://www.reuters.com/article/2014/09/23/venezuela-arbitration idUSL3N0RO01120140923.

[14] Ignacio Vincentelli, *The Uncertain Future of ICSID in Latin America*, 16 LAW & BUS. REV. AM. 409 (2010).

[15] *Ibid.*





Two things may be said here. The first is the more obvious; these countries would have known that entering into BITs and the ICSID system would mean that they were agreeing to provide investors with an external recourse. The second is that neutral adjudication by alternative dispute methods is an implicit feature of international investment itself. While discussing the demerits of the investment regime is beyond the scope of this paper, it is necessary to examine why a body like ICSID and procedures like arbitration were deemed necessary. Before the 20th century, European powers would send their warships to states that had wronged their citizens, thus indulging in an exercise that came to be known as "gunboat diplomacy".[16] It is interesting to note that most of these measures were carried out against the Latin American states. Even in the early 20th century, an investor who had been wronged in a foreign state could only hope that he would receive some compensation through diplomatic channels. In the later 20th century, these measures were seen as straining the general relations between states, hence it was deemed necessary to create an independent, unbiased mechanism to arbitrate upon these issues, and this encouraged the development of international investment law. This was why the creation of ICSID was essential, especially for the Latin American states.

The ICSID is simply a procedural body; it provides the necessary facilities for conducting the arbitration.[17] It cannot be held responsible for the underlying principles on which the investment and investment arbitration regime functions. When these Latin American countries signed multiple BITs and the ICSID Treaty, they did not express any problems with the investment regime. It seems that countries could only begin to see the problems with the ICSID system after awards were granted against them to the order of several million dollars. States, which with full knowledge of ICSID's functioning and with full consent entered into these agreements and treaties with other states, can hardly be allowed to allege violation of sovereignty when the regime is no longer advantageous to them. This is akin to the boy crying wolf.

### *B. Outsourcing the Adjudication Process*

These states also dislike the fact that adjudication of disputes, a

[16] SURYA P. SUBEDI, INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE 97 (Hart Publishing, 2 ed., 2008).

[17] Leon E. Trakman, *The ICSID Under Siege*, 45 CORNELL INR'L L.J. 603 (2013).

judicial function, has been outsourced.[18] This is a remnant of the philosophy of the Calvo Doctine, which espoused that jurisdiction over disputes of foreign investments would lie with the country in which the investment was made. The Calvo Doctrine has its roots in the belief that foreign investors should not be given the benefit of legal recourse that the country's own citizens do not enjoy. By adopting it, the Latin American countries made it clear that according to their political ideology, legal recourse by any investor would have to be sought in local courts first.

It seems almost strange that these countries would find this problematic now, years after they voluntarily stopped following the Calvo Doctrine and joined the ICSID. It is possible that when they decided to consider the ICSID mechanism as a means of dispute resolution, they did not anticipate the heavy payments that would be awarded to their investors against them. These countries should not be alleging that an independent entity[19] is problematic because of the fact that it is independent, when it is that very characteristic that allows it to adjudicate and give decisions without bias towards any one party. There is a greater chance of the national court of a country being biased towards its own government in a dispute against a foreign investor than of an independent international body being so. This risk is even greater in Latin America where the dominant philosophy is that of state ownership of natural resources. It is obvious that the independence of the adjudicating body cannot be compromised upon when the parties to the dispute include states or state entities.

### *C. The Allegations of Investor Bias*

However, it so happens that the Latin American states do not believe that the ICSID is an unbiased entity. They reason that the ICSID is aligned too closely with the World Bank[20] to be truly neutral, and its bias leans towards wealthy, developed nations and their investors. In fact, these states have declared that they have "no confidence" in the ICSID

[18] Carlos G. Garcia, *All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration*, 16 FLA.J. INT'L L. 301 (2004).

[19] Independent in the context of it not being a close part of any state, such as a domestic court.

[20] The ICSID is a part of the World Bank Group and the President of the World Bank Group is the chairman of the ICSID Administrative Council.





mechanism and that it does not provide for a fair and balanced dispute resolution system for developing countries.[21]

Again, this allegation seems to contain more rhetoric than merit. Although it is true that the ICSID has close connections with the World Bank, the rules, doctrine and arbitrators in ICSID arbitration are comparable to that of non-ICSID arbitration as far as procedure is concerned. The procedural framework itself does not contribute to any sort of bias towards the investor. Further, there is a good amount of research to show that States do no worse in ICSID facilitated arbitration than they do in a non-ICSID one.[22] Looking at numbers, as of 2012, Argentina had won six out of the ten resolved cases, and "a dozen more claims"[23] against it had been withdrawn. Hence, there seems to be no weight in the argument that ICSID has an investor bias.

Even if we believe that these Latin American countries are not exaggerating their experience of bias in ICSID, these experiences cannot be superimposed as to be true for developing nations.[24] Many other developing nations who are members of the ICSID may face different circumstances, and since the reasons for their disputes might differ from those of the Latin American countries, it is difficult to understand how ICSID may be deemed as having a pro-investor, anti-developing nation bias based on the experiences of a few countries.

### *D. The Problem of High Costs*

The Latin American countries have also cited high costs as a reason for denouncing ICSID. They believe that the investment claims brought before the ICSID are "notoriously …expensive".[25] Further, they claim that investment arbitration is "neither speedy nor cost effective".[26]

As mentioned above, these countries also assert that ICSID has a close relationship with the World Bank. Although this does not cause

[21] Gus Van Harten et al., *Public Statement on the International Investment Regime,* 31st August 2010.

[22] Susan D. Franck, *The ICSID Effect? Considering Potential Variations in Arbitration Awards*, 51 VA. J. INTL'L 826 (2011).

[23] *Come and Get Me,* THE ECONOMIST (Feb. 18, 202), available at: http://www.economist.com/node/21547836.

[24] *Supra* note 22.

[25] *Supra* note 18.

[26] *Ibid.*

the investor bias that they allege, this close relationship ensures that the World Bank funds the ICSID Secretariat so that all its day- to- day administrative costs are managed, and this actually brings down the cost that will have to borne by the parties to a dispute.[27] As opposed to ICSID, if these countries wished to refer their disputes to ad hoc tribunals (which, hypothetically, will not have the investor bias which they allege exists in ICSID) they will incur even greater costs then they are incurring in ICSID as the administrative costs will also have to borne by them.

It is possible that these countries do not wish to seek recourse in ad hoc tribunals. They might be attempting to seek recourse elsewhere, by creating an entity such as the UNASUR Arbitration Centre.[28] This will prove problematic for them on two levels. One, they will still bear the administrative costs, either indirectly as founders of the Centre, or directly, as parties to a dispute and two, if their problem is that investment arbitration itself is not speedy or cost effective, then simply redirecting claims to another entity supervising arbitration will not change the status quo.

### *E. The Issue With Confidentiality*

A lack of transparency and enough accountability in arbitration proceedings have been cited as reasons for denouncing ICSID.[29] Confidentiality in proceedings is one of the most fundamental features of any arbitration, whether commercial or investment, whether ICSID or non-ICSID.[30] In fact, one of the reasons arbitration is desired is because of this confidentiality it provides to the parties. However, it is acknowledged that when states are involved as parties in their sovereign capacity and the award impacts the lives of ordinary citizens of the state, there must be a degree of transparency.

It is also important to understand and acknowledge that ICSID provides for a greater degree of transparency in its arbitration

27 *See* Organizational Structure of ICSID, available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&action, accessed 29th July 2014.

28 UNASUR stands for the Union of South American Nations. Its constitutive treaty entered into force on 11th March 2011.

29 *Supra* note 11.

30 James Harrison, *Recent Developments to Promote Transparency and Public Participation in Investment Treaty Arbitration*, UNIVERSITY. OF EDINBURGH LAW SCHOOL. WORKING PAPER NO. 2011/01, 2011, available at: http://papers.ssrn.com/sol3/papers.





proceedings than non-ICSID mechanisms.[31] For example, in an arbitration governed by the UNCITRAL, the existence of the case itself might be kept confidential.[32] ICSID does not do this, and even its awards are accessible.

On examination of the above, it must be conceded that these 'problems' are not unique to the ICSID alone, but are basic features of the investment arbitration regime.

However, it does not appear as though Latin American countries have a problem with investment arbitration itself. In fact, they have actively been involved in the development of the UNASUR Arbitration Centre.[33] The UNASUR Centre principles are framed in such a way that the factors which these countries found so problematic in the ICSID would not exist within its framework.[34] By doing so, they have not only changed the principles of investment arbitration are they are understood, but they have also essentially done away with the advantages that investment arbitration offers, and consequently, with any stimulus that it may have offered towards foreign investment.

If these states would argue that they have a problem with the investment system itself, then they must be prepared for the ramifications of such a policy. Investors would not be comfortable with putting their capital into a country when they cannot even be assured of proper legal protection and an impartial mechanism to seek recourse from. Critics of the ICSID might argue that Brazil and Australia attract considerable foreign investment in spite of not being members of the ICSID. It is important to remember that Australia is a developed nation and Brazil is the 6th largest economy in the world. They have a very different system of governance and governmental policies. Their courts are considered much more impartial. In comparison, the Latin American countries are medium level developing countries with unstable political regimes.

31 *Supra* note 18.

32 Claudia M. Gross, *Current Work of UNCITRAL on Transparency in Treaty-Based Investor-State Arbitration*, available at: http://www.oecd.org/investment/internationalinvestmentagreements/46770295.pdf, accessed 30th July 2014.

33 Antoine P. Martin, *ICSID v. UNASUR: same game, new rules?*, 30th July 2014, available at: http://internationallawnotepad.wordpress.com/2013/04/30/icsid-v-unasur-same-game-new-rules, accessed 30th July 2014.

34 For example, the tribunals constituted by the UNASUR Arbitration Centre will not have jurisdiction over the economic effects of internals laws of any state.

Investors may not have the same sort of faith in their judicial systems as they do for that of Australia and Brazil.

## III. Potential for Improvement- How ICSID Can Change For the Better

One of the most problematic features of the ICSID system is its lack of an appeals system.[35] In non-ICSID arbitration mechanisms, a party which feels that the award rendered is unfair or unjustified may approach a domestic tribunal for judicial review. While acknowledging that this is not possible in the ICSID regime which aims for an independent adjudication process that is insulated from any potential 'domestic biases', the problems with the present annulment system should be considered.

ICSID awards can only be reviewed by an annulment committee which is constituted as per procedures stipulated by the ICSID Convention itself.[36] As per the ICSID Convention, an unsatisfied party may apply for an ad hoc annulment committee to be constituted.[37] However, such a committee can only annul an award on five specified grounds, which are largely procedural in nature, thus excluding scope for substantive review.[38]

The problem with this system is two-pronged. *One*, an ad hoc committee is constituted to look into an award only when it is *prima facie* problematic due to one of the listed reasons, and *two*, the ad hoc committees can only annul the award and cannot substantially review them.[39] It is necessary to examine how these problems can be rectified without compromising on the essential nature of ICSID.

35 The World Bank, *Bolivia se va del CIADI* (English Translation), (Nov. 3, 2007), available at: http://go.worldbank.org/2L60II0X80, accessed 29th July 2014.

36 ICSID Convention, Article 53 - The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.

37 ICSID Convention, Article 52.

38 Article 52 of the ICSID Convention lists the grounds when the tribunal rendering the award was improperly constituted, when a tribunal member was found to be corrupt, when there is a serious departure from the fundamental rules of procedure, when the tribunal manifestly exceeds its powers or when the tribunal does not justify the award that it renders.

39 Compania de Aguasdel Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, (2002) ICSID Case No. ARB/97/3, Decision on Application for Annulment ¶247.





A plain reading of the five limited basis on which the award can be annulled makes it evident that the annulment is possible only on the basis of procedural flaws. Therefore, if the unsatisfied party is able to prove that a procedural breach existed, and has the award annulled, it leaves the dispute unsettled, and parties are back to square one. The parties then need to resubmit their dispute to ICSID for adjudication once again. This process is *prima facie* more time consuming and expensive when compared to a process of appeals where the original award could be modified, if the appellate tribunal found such an action necessary. This would shorten the entire process that the parties have to go through.

However, if the annulment committee also upholds the original award, then there is no scope for an unsatisfied party to seek recourse from elsewhere. This could prove problematic in many ways, for example, the enforcement of the award might prove difficult if the losing party is unsatisfied with the award and feels that it did not get a fair hearing. An appeals mechanism would at least ensure that parties do not feel that they have suffered as a result of an incomplete adjudication process or lack of fair hearing.

ICSID is often criticised for the inconsistency of the awards that it delivers.[40] ICSID panels are constituted independently for each dispute and there is no principle of *stare decisis*. However, because different arbitrators sit on different disputes, two tribunals may give two differing judgements in two different cases which have identical or similar fact situations. A policy which is interpreted in one manner by one Tribunal may be interpreted in a different manner by another Tribunal and a State would stand to lose both ways and end up paying heavy fines.[41] This would extremely problematic for any country, especially a developing

40 Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005).

41 The best possible examples of such a scenario are the *SGS cases*. The ICSID tribunal in SGS *SocigtgGengrale de Surveillance S.A. v. Islamic Republic of Pakistan*, said that an umbrella clause in a BIT would not elevate a breach of contract into a breach of the treaty itself. However, the tribunal in *SGS Socit Gondrale de Surveillance S.A. v. Republic of the Philippines* concluded that a breach in contractual commitment could be made into a breach of a treaty if the treaty contained an umbrella clause. The factual situation in both these cases was almost identical. However, the inconsistency in the interpretation of how umbrella clauses could be used lead to much uncertainty among States as well as investors.

country like those in Latin America. A consistent set of awards and principles is essential for any system that is based on the consent and trust of its members. The ICSID system is based on trust (through consent) and the Latin American denunciations are a fine example of what happens when this trust is lost.

Having an appeals process as opposed to annulment process might contribute towards bringing some consistency into this system. ICSID could ensure that the appellate body focuses on creating a coherent body of principles, by having a pool of arbitrators to choose from to hear the appeals.[42] Further, each independent ICSID tribunal is vertical in terms of power to the other, but an appellate body would be superior to the tribunals. Because the adjudicators would be from a common pool, and the appellate body would be a superior independent body, it would most likely produce consistent decisions. Of course, this is only possible if the appellate body is allowed to review awards substantially, not merely on a procedural basis. Tribunals will also begin to produce decisions that are consistent with the appellate body's rulings, thus harbouring in a certain degree of predictability.

The more viable option for ICSID is for it to create such a system for safeguards for the parties involved, rather than suffer a widespread denunciation of the system. However, the creation of such an appeal system should not be construed as a sign of weakness or a compromise, because it can only serve to improve the ICSID mechanism and create a healthier environment on which investment disputes can be resolved.

## IV. Conclusion

It is unfortunate that several Latin American countries have withdrawn from and denounced the ICSID. The ICSID provides an independent body for adjudication, and thus, contributes greatly to the international investment regime by encouraging foreign investment by guaranteeing an unbiased dispute resolution system. The withdrawals and denunciations are a relatively new development, hence it remains to

[42] The Appellate Body of the WTO Dispute Settlement Body would be a good model to focus on. Disputes between WTO members are settled by panels, and a party who is unhappy with the decision may appeal to it. The Appellate Body's decision is final and must be accepted by the parties to the dispute. The Appellate Body is made up of a standing body of seven persons.





be seen whether they will have a greater impact on ICSID or the withdrawing states.

It seems more likely that the ICSID will emerge unscathed. It is a strong mechanism, which has been able to produce a conducive environment for dispute resolution. The reasons which the states gave for withdrawing from the Convention have been countered in this paper. The ICSID mechanism does not encroach upon State sovereignty to any degree than that which the states themselves consented to. This consent was given when they agreed to become members of the ICSID, and thus, agreed to outsource their investment disputes to an external, independent body which would be bias-free. That ICSID shows a pro-investor bias is mostly political and diplomatic rhetoric. Accessing statistics which evidence this and analysing them is made possible because of the transparency which the ICSID offers *vis-à-vis* other arbitration systems. ICSID assured enough transparency as is required for accountability without compromising on confidentiality. Finally, ICSID costs are much lower than what they would be for a non-ICSID tribunal or an ad-hoc tribunal.

Having defended the core principles of ICSID, which in a sense are necessary for international investment to flourish, it is necessary to acknowledge that there is an area where the ICSID might consider amending its principles. This is its annulment system. An unsatisfied party cannot appeal an award, but can only ask for it to be annulled on the basis of a procedural wrong as specified by the Convention itself by an ad hoc annulment committee. This also means that there is no requirement of consistency for ICSID tribunals to follow. This is problematic, and the creation of an appeals mechanism might give countries the satisfaction of knowing that they have a suitable recourse. Further, they will also be assured that and that their dispute is being resolved on the basis of a coherent set of principles and decisions because their decision can be reviewed on a substantive basis by the appellate tribunal.

Finally, as developing countries with suffering economies and much political turmoil, the Latin American countries might bear the brunt of their withdrawals. It is possible that they might be willing to reconsider their denunciations if the ICSID makes the suggested changes. However, there is a requirement of acceptance of their part that the other aspects which they found problematic could be faced by them before any other

Tribunal, and not only in an ICSID one.

This mutual compromise, for lack of a better term, will prove beneficial not only to ICSID and Latin America, but also to the investment arbitration regime as a whole.





# CUT FROM THE SAME CLOTH: THE PHILOSOPHIES OF INTELLECTUAL PROPERTY RIGHTS AND THE INDIAN CONSTITUTION

*Suktika P.Banerjee and Sharngan Aravindakshan*

*India is new to the field of intellectual property law. While much of the Western world already has an established jurisprudence on the subject, India is only just scrambling to join the race. The recent amendment of our domestic laws to comply with the WIPO's intellectual property laws is only the first step taken on the road to the fully developed field of intellectual property.*

*But whether the amending of legislations or statutes such as the Indian Patent Act or the Copyright Act, etc. would alone be sufficient to develop our own jurisprudence and keep pace with the rapid changes that are taking place in the field of intellectual property law, is questionable. In this regard, it would be pertinent to take a look at the supreme law of the land, the Constitution of India and examine its compatibility with intellectual property law. One would say it certainly is compatible, seeing as how it provides for patents, copyrights, trademarks and designs as a subject in the Union List. This by itself, however, is not enough. The Constitution needs to be in sync with the true spirit of the intellectual property. And for that, one needs to see if the philosophies for intellectual property, which embody the spirit of intellectual property, can be read in consonance with the Constitution.*

*The authors have attempted a comprehensive analysis of the main provisions in the Constitution which have potential for interpretation or those that could be interpreted along the lines of the philosophies. Through a study of case laws and scholarly works, the authors will try to identify the implications of the Constitution bearing such philosophies on everyday IP law. Finally, the authors would attempt to determine the role played by case laws in this regard.*

## I. Introduction

The recent landmark decision in *Novartis* v. *Union of India*[1] has brought the rapidly burgeoning field of intellectual property rights into the limelight once again. The exceedingly difficult question of balancing the need to promote research and development in science and technology and keeping private monopoly of essential commodities at the minimum was answered by the Supreme Court in this case.[2] Ultimately, the Court chose to protect better access to affordable drugs[3] and ruled to keep private monopoly limited. In essence, the Right to Health under Article 21 of the Constitution was prioritized over private monopoly as well as India's intellectual property commitments to the outside world. In the aftermath of this epoch-making case, a much larger question is being asked and furiously debated. Is the supreme law of our country, in other words, the Constitution of India, in sync with intellectual property rights? Have we incorporated the philosophy behind intellectual property into our Constitution? And if we have, is it sufficient to enable us to deal with issues of importance, of the like discussed in the *Novartis AG*[4] matter?

It is a common misconception that the Indian Constitution is not in line with, or does not recognize the principles embodied by intellectual property rights. After all, the words "intellectual property rights" find no place in the Indian Constitution. Understandably, it is possible that nascent India was more concerned with down-to-earth tangible property rights rather than intellectual property rights and as such, while drafting the Constitution of India, detailed provisions regarding the same did not percolate into the Constitution.[5]

However, the Constitution does indeed deal with intellectual property and not just in one instance. The various provisions in the Constitution that deal with the different aspects of intellectual property include the Right to Property,[6] Entry 49 of the Union List,[7] Article 51A of

1 Novartis AG v. Union of India, (2013) AIR SC 1311.
2 *Ibid.*
3 Amy Kapczynski, *Engineered in India — Patent Law 2.0,* THE NEW ENGLAND JOURNAL OF MEDICINE, (2013), available at: http://www.nejm.org/doi/full/10.1056/NEJMp1304400, accessed 18th October 2013.
4 *Supra* note 1.
5 DR. AVINASH SHINDE, INTELLECTUAL PROPERTY MANUAL, 2004.
6 CONSTITUTION OF INDIA 1950, Article 300A- Persons not to be deprived of property save by authority of law.
7 CONSTITUTION OF INDIA, 1950, Schedule 1, Union List, Entry 49.





the Fundamental Duties,[8] Article 51 of the Directive Principles of State Policy,[9] etc.

The authors will deal with each of these aspects in detail. But first, what is intellectual property and why should the law of any country be in sync with its philosophy?

Intellectual property is the creative work of the human intellect[10] and consists of the results of human creativity.[11] Its subject matter is formed from new ideas generated by man. New ideas may be applied in as many ways as the human mind can conceive. Their application to human needs and desires can be of considerable benefit to mankind. New ideas can be embodied in familiar things such as books, music and art, in technical machinery and processes, in designs for household objects and for commercial ventures, and in all other sources of information. The list is infinite, as is the potential for discovery of new means of expression. Once applied to human needs, the value of ideas ranges from the industrial and commercial to the world of literature, art and design and contributing to technological, economic, social and cultural progress. Protecting the development and application of new ideas aids realization of the benefits which can be derived from them.[12]

The philosophy or the reasons behind the development of intellectual property is similar, if not identical to the growth of property in its basic form. This is because intellectual property shares much of the origins and orientation of all forms of property.[13] The philosophies or justifications for intellectual property typically take one of three forms: the Lockean Theory of Labour, the Personality Theory and the Utilitarian theory.[14] Now, the question is whether the Indian Constitution conforms to these theories when it deals with intellectual property law?

8 CONSTITUTION OF INDIA, 1950, Chapter IV-A, Art. 51A, Fundamental Duties.
9 CONSTITUTION OF INDIA, 1950, Chapter IV, Art. 51, Directive Principles of State Policy.
10 DR. V. K AHUJA, LAW RELATING TO INTELLECTUAL PROPERTY RIGHTS, (Lexis Nexis, 2007).
11 CATHERINE COLSTON AND JONATHAN GALLOWAY, MODERN INTELLECTUAL PROPERTY LAW, (Routledge, 2010) at 2.
12 *Ibid.*
13 Justin Hughes, *The Philosophy of Intellectual Property,* 77 GEO. L.J. 287, available at: http://www.justinhughes.net/docs/a-ip01.pdf, accessed 18th October 2013.
14 'Intellectual Property', The Stanford Encyclopedia of Philosophy, available at: http://plato.stanford.edu/entries/intellectual-property/#JusCri, accessed 18th October 2013.

First, in examining whether the Lockean Theory of Labour and the Indian Constitution are in consonance, the most obvious reference seems to be the Right to Property. The right to property, although one of the many rights granted to us by the Indian Constitution, is perhaps the least celebrated. Overshadowed by its more prominent cousins in Chapter III, which includes the Right to Life and Personal Liberty and the Right to Freedom of Speech and Expression, all of which have been given a higher status of a Fundamental Right, the Right to Property seems less significant especially so after its relegation from the status of a Fundamental Right to that of a mere legal right in the Constitution.[15] Nevertheless, an understanding of property and its constitutional aspects is essential to be able to fully appreciate its basis for intellectual property.

## II. The Lockean Justification For Intellectual Property

Reference to Locke's two treatises of Government is almost obligatory in essays on the constitutional aspects of property.[16] For Locke, property was a foundation for an elaborate vision that opposed an absolute and irresponsible monarchy.[17] The Lockean justification for property is embodied in his 'Labour Theory'. According to Locke, there existed a nature in which goods were held in common through a God-given grant.[18] God granted these bounties for the enjoyment of humans, but they could not be enjoyed in their natural state.[19] Some labour had to be exerted on them so that they could be converted into a state for the use and enjoyment of human beings. It is this labour that adds value to the goods, making it a product of whoever exerts that labour. Thus, they are converted into private property.

Article 300A of the Constitution grants the right to property in India,

15 Art. 19(1) (f) was omitted by Section 2 of the Constitution (44th Amendment) Act, 1978 and retained as a constitutional right under Art. 300-A of the Constitution of India.

16 *Supra* note 9.

17 P. LASLETT, 'TWO TREATISES OF GOVERNMENT' (JOHN LOCKE, SECOND TREATISE OF GOVERNMENT), (Cambridge University Press, 1963) at 138-40.

18 *Ibid.*

19 Hamilton, *Property- According to Locke*, 41 YALE L.J. 864, available at: http://www.jstor.org/stable/790784, Locke's theory of property based on popular perception in the seventeenth century that all property derives from "magnanimity of a bountiful creator"; government established by compact can have no other goal than to preserve possessory rights of citizens without doing prejudice to property rights of others in the same natural property, accessed 18th October 2013.





which is as follows: *"Persons not to be deprived of property save by authority of law.-No person shall be deprived of his property save by authority of law."* This clearly means that no one can be deprived of his property, thereby granting the owner absolute rights over his property. The 5th Amendment in the American Constitution has a similar clause. It states: "*No person shall be held to……. nor be deprived of life, liberty, or property, without due process of law….*"[20]

Both these clauses protecting the right to property can be justified using Locke's theory. Locke believed that the very existence of the Government was to protect basic rights such as life, liberty and property. According to Locke, consent-based civil society governments are established so that individual rights to liberty, life and property can be safeguarded.[21] Thus, individuals can obtain security in producing and possessing the fruits of their *own labour*, consistent with respect for equal rights of others.[22]

Of course, one could argue that in our country the Government also has the right to acquire private property, implying that perhaps the labour one exerts on one's property could be rendered meaningless by the State. The words "*save by authority of law"* do indeed seem to be granting the Government arbitrary powers to acquire private property. But it is in actuality, extremely difficult. The Government can only acquire property through the "*authority of law"*, in other words, legislation. If such legislations do not meet constitutional standards, they will be immediately struck down. Even if the legislations are satisfactory, actions based on the legislations must also pass extremely strict standard tests.[23] Hence, in most

20 CONSTITUTION OF THE UNITED STATES OF AMERICA, Fifth Amendment.

21 Randy May and Seth Cooper, *The Constitutional Foundations of Intellectual Property*, THE FREE STATE FOUNDATION, 'PERSPECTIVES FROM FSF SCHOLARS', Vol. 8, No. 13, available at: http://www.freestatefoundation.org/images/The_Constitutional_Foundations_of_Intellectual_Property_050813.pdf, accessed 18th October 2013.

22 *Ibid.*

23
- Pritam P. Hans and Chandralekha Mukherji, *Spotting a Safe House,* MONEY TODAY, September 2011, available at: http://businesstoday.intoday.in/story/greater-noida-land-acquisition-troubles-hit home-buyers/1/18137.html, accessed 18th October 2013. "The Allahabad High Court, which in May struck down land acquisition by the Greater Noida Industrial Development Authority (GNIDA), an Uttar Pradesh government undertaking, in Shahberi village."; *Call for rational land acquisition policy*, TIMES OF INDIA, 14th July 2013, available at: http://articles.timesofindia.indiatimes.com/2013-07-14/hyderabad/40568994_ 1_land-acquisition-act-land-allotments-singur,

cases, the property that one obtains by exerting labour remains one's own.

Thus, the right to property in the Indian Constitution also has Lockean justifications. The same justification holds good for intellectual property rights. This is because the word "property" in Art. 300A includes "intellectual property" as well. Property, in this Article, means only that which can by itself be acquired, disposed of or taken possession of.[24] Subject to this limitation,[25] it is designed to include private property in all its forms[26] and "*must be understood both in a corporeal sense as having reference to those specific things that are susceptible of a private appropriation and enjoyment*....."[27] Thus, the word 'property' connotes everything which is subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal.[28] It thus includes intellectual property rights. The same was reaffirmed by the Supreme Court in *R.C. Cooper* v. *Union of India*[29] and *Entertainment Network India Ltd. (ENIL)* v. *Super Cassette Industries Ltd. (SCIL)*[30] where it held that "*the ownership of any copyright like ownership of any other property must be considered having regard to the principles contained in Article 19(1) (g) read with Article 300A of the Constitution, besides the human rights on property.*"

It naturally follows thence, that if the right to property can be justified using the Lockean theory of labour, then intellectual property rights that form part of the right to property are justified by the same. This essentially means that the Constitution of India has, through the Right to Property, incorporated the Locke's philosophy of intellectual property rights.

accessed 18th October 2013.

- Justice Gopala Gowda, in a lecture in NALSAR University, said, "Mere invoking of words like public purpose before slapping a land acquisition notice is not enough. It has to pass several constitutional tests, the judge said, and hoped that the new Land Acquisition and Rehabilitation Act would meet the growing aspirations and changed circumstances."

24 Chiranjit Lal v. Union of India, (1950) SCR 869 (925).

25 Dwarkadas v. Sholapur Co., (1954) AIR SC 119.

26 Commr., H.R.E v. Lakshmindra, (1954) SCR 1005.

27 State of W. B v. Subodh Gopal, (1954) SCR 587.

28 D D BASU, COMMENTARY ON THE CONSTITUTION OF INDIA, Vol. 8, 2011 (LexisNexis Butterworths Wadhwa, Nagpur, 8thEdn).

29 R. C.Cooper v. Union of India, (1970) SCR 3 530.

30 Entertainment Network India Ltd. v. Super Cassette Industries Ltd., (2008) 4 ALD 47 (SC).





## III. Other Constitutional References to Intellectual Property

Now, another aspect in the Constitution regarding intellectual property rights is the Chapter on Fundamental Duties. Part IV A of the Constitution is the Chapter on Fundamental Duties. The distinguished jurist Durga Das Basu stated that the purpose behind incorporating Article 51A in the Constitution was to eradicate superstitions in which India is deeply soaked and to remove the bone of religious fanaticism, regional chauvinism and linguistic frenzy which have ever plagued India and retarded her unification into a cohesive society.[31]

On the face of it, it does not seem as if Article 51A has anything to do with intellectual property rights. But, it can also be argued that it forms another constitutional basis for intellectual property rights. Article 51A (h) is as follows:

> "*It shall be the duty of every citizen of India to develop scientific temper, humanism and the spirit of inquiry and reform.*"

The words "scientific temper" refers to the call for the diffusion of "science mindedness" throughout the population.[32] It was maintained by India's early leaders, primarily Nehru, that the growth of scientific temper was measured by the extent to which ordinary people were using the methods of science to life's problems.[33] Further, in *AIIMS Students Union* v. *AIIMS Management*[34] the Supreme Court categorically ruled that every citizen of India is fundamentally obliged to develop a scientific temper and a spirit of humanism.

As has already been discussed previously, the main objective of intellectual property is to generate ideas that can be applied in a myriad of ways for furthering development. Developing "scientific temper" can be interpreted to mean development of society through science and the *use of intellectual property*. Thus, another constitutional basis for

31 *Supra* note 28 at 4216.

32 SRIRUPA ROY, *BEYOND BELIEF: INDIA AND THE POLITICS OF POSTCOLONIAL NATIONALISM, (Duke University Press Books* 2007) at 125

33 *Ibid.*

34 AIIMS Students Union v. AIIMS Management, (2000) AIR SC 3262: Also see Ashok Kumar Thakur v. Union of India, (2008) 56 BLJR 1292.

intellectual property and the rights associated with it can be found in the Fundamental Duties, namely Article 51A (h).

It is fascinating to note that it is the Utilitarian Basis for intellectual property that this aspect conforms with and not the Lockean theory of labour. Under the utilitarian theory, intellectual property rights are considered as "an appropriate means to foster innovation"[35] provided that protections be provided for a limited term so as to balance the social welfare loss of monopoly exploitation.[36] The Chapter on Fundamental Duties has been incorporated in the Constitution for social change and improvement. This can be seen from Durga Das Basu's 'Commentary on the Constitution of India' where he says "*duties are observed by individuals as a result of dictates of the social system and the environment in which one lives…*"[37]

The utilitarian theory has much the same purpose. It seeks to provide rights, for a limited period perhaps, to authors and inventors, so that they are encouraged to innovate. The ultimate intention is for the betterment of society. It is in this way that Article 51A (h) conforms with the utilitarian basis for intellectual property rights. Intellectual property related aspects can even be found in the Directive Principles of State Policy.

The importance attached to Treaties and International Obligations is emphasized in Article 51 of the Indian Constitution. As a Directive Principle of State Policy, it mandates the fostering of respect for international law and treaty obligations in the dealings of organized people with one another.[38]

The World Intellectual Property Organization (WIPO) was established in 1970, following the entry into force of the WIPO Convention in 1967, with a mandate from its Member States to promote the protection of intellectual property throughout the world through cooperation among States and in collaboration with other international organizations. One of the most important agreements within the WTO is

35 Peter S. Menell, *Intellectual Property: General Theories* at 129, available at: http://encyclo.findlaw.com/1600book.pdf, accessed 18th October 2013.

36 Mathew M. Lievertz, *Intellectual Property: Policy for Innovation, not 'fairness'*, available at: http://www.academia.edu/1929510/Intellectual_Property_Policy_for_Innovation_Not_Fairness, accessed 18th October 2013.

37 *Id* at 4224.

38 S. Jagganath v. Union of India, (1997) AIR SC 811.





the Trade-Related Aspects of Intellectual Property or the TRIPS Agreement, which mandates that all WTO members adopt and enforce certain minimum standards of IPR protection.[39] The main objective of TRIPS was to maintain the uniformity of intellectual property rights across the globe. India signed the TRIPS agreement in 1996, meaning that India was put under the contractual obligation to amend its intellectual property laws in compliance with TRIPS. Hence, the Patents Act, The Copyright Act and the Trademarks Act were all subsequently amended in order to bring it on par with TRIPS.

Article 51 of the Constitution speaks of creating and enforcing laws on par with international treaties. The idea behind the creation of TRIPs, and the various other treaties as signed between member states of WIPO was to regulate IP law and create uniformity throughout the world, for better regulation and enforcement. This regularization and uniformity of Indian IP laws in accordance with the TRIPS, required by Article 51, would lead to the aforementioned ideals being fulfilled.

This particular intellectual property related aspect of the Constitution is not without a philosophical basis either. It is backed by the Utilitarian justification for intellectual property rights. The philosophy propounded by most Utilitarians can be summed up with Jeremy Bentham's famous phrase, "*The greatest good for the greatest number, show that utilitarian theories are concerned with maximizing benefit to society*."[40] The Utilitarian justification for intellectual property rights embodies the same principle. For society's benefit, intellectual property utilitarians seek to award incentives in exchange for a requisite degree of valuable artistic, scientific, and technological creation.[41] Simply put, they wish to reward innovators in return for the right to use their innovation. This in turn increases innovation.

This theory claims that governments should assign limited

39 Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, (1994).

40 Jeanne C. Fromer, *Expressive Incentives In Intellectual Property,* 98 VA. L. REV. 1745, available at: https://www.law.stanford.edu/sites/default/files/event/265497/media/slspublic/Expressive_Incentives_in_Intellectual_Property_1.pdf, accessed 18th October 2013.

41 Joseph P. Liu, *Owning Digital Copies,* 42 WM. & MARY L. REV. 1245, available at: http://scholarship.law.wm.edu/wmlr/vol42/iss4/5, accessed 18th October 2013.

intellectual property rights to creators, inventors, and discoverers and that these rights should be strongly enforced against violators. This practice of allocating and administering strong intellectual property rights is believed to maximize the incentive to create, innovate, and discover. It is assumed that by maximizing these incentives, the quality and quantity of social goods generated will be maximized. Thus, Article 51 of the Constitution, which required domestic legislation to be in accordance with TRIPS, is also in line with the Utilitarian theory. This is because the objective of uniform patent protection under TRIPS is to promote international trade and investment in an increasingly interdependent global market. The protection granted not only to patents but also the processes as under the amended Indian Patent Act, 1970 would protect innovation, which in turn would promote research and development, leading to social welfare. This is in principle what the utilitarian theory of aims for.

Articles 51, 253 and Entry 12-14 of List 1 in the Constitution of India, which speak of putting the Indian laws on par with international conventions and treaties, have put the various IPR related domestic laws on par with TRIPS. The aim of TRIPS to make a stronger IPR regime has been achieved by awarding innovation through various changes being made in domestic laws, for example, the concept of product patenting was brought back and patents are now to be granted for 20 years. Hence, there is more incentive for people to innovate. This in turn leads to maximizing social welfare. Thus, we can say that Article 51 of the Constitution mandating compliance with TRIPS, when read along with the international standards for intellectual property, is in complete consonance with the utilitarian theory of IPR.

One of the strongest debates against the TRIPS, which can also be construed as an argument against the Utilitarian theory, is that such strong IPR laws would actually retard competitiveness, hence reducing innovation, thereby hampering society's development. It can be seen that the courts are also grappling with how to balance the pro-innovation and anti-competitive effects of IPR. This was evident in the case of *Cipla v. Roche*,[42] where the judge opined that where the granting of an injunctions against, 'life saving drugs' would affect the public at large, the court should not grant an injunction against that drug. Also, in *Novartis v.*

[42] F. Hoffmann-La Roche Ltd. and Anr. v. Cipla Limited, (2008) MIPR 2 35.





*Union of India,* the Supreme Court had to choose between monopolization of the product and the welfare of the people of the country and other countries. In such a situation, the courts said that, "The government fulfilling its commitment under the TRIPS agreement notwithstanding, **a patent regime where all the gains achieved by the Indian pharmaceutical industry are dissipated and large sections of Indians and people in other parts of the world are left at the mercy of giant multinational pharmaceutical companies, should not be brought in**."[43]

However the argument that such strong IPR laws would affect innovation, thereby defeating the Utilitarian theory, does not hold water because there has been an increase of 9.67% in the filing of patents and 2.38% increase in the filing of trademarks in the year 2011-2012 alone. [44] Had the TRIPS been against innovation and the Utilitarian theory, it would have affected the rate at which new products were introduced and the same would have lowered after TRIPS. This has not occurred. Hence, the Utilitarian Theory of IPR can be seen to have worked out in practice in the Indian scenario. Perhaps not in a perfect manner, but it can be seen that it is in theory the most acceptable form for the current Indian scenario.

## IV. Conclusion

As has been explained so far, the fact that the Constitution of India is not completely devoid of the philosophies behind intellectual property rights is clear. Case laws too support this fact, namely, the case of *Novartis AG v. Union of India* in the Madras High Court. The constitutional validity of Section 3(d) of the Indian Patents Act was challenged as arbitrary and violative of Article 14 of the Constitution. The Court upheld the validity of Section 3(d) of the Act. The Court further looked into Article 51 of the Constitution and while holding that it did not have the jurisdiction to look into the matter of Indian IP laws not complying with TRIPS and that the Petitioners must take recourse to the WTO for any relief, it also mentioned that Article 51 could be a source of intellectual property law, seeing as how it mandates the compliance with TRIPS.

[43] *Supra* note 1.

[44] Annual Report Of The Office Of The Controller General Of Patents, Designs, Trademarks And Geographical Indication' (2011-2012) available at: http://ipindia.gov.in/cgpdtm/AnnualReport_English_2011_2012.pdf.

The *Novartis AG* judgement by the Supreme Court is a testament to the philosophies of intellectual property law as well. Although many criticize it as a retrograde step in the development of intellectual property law, it is in fact, very much in sync with the philosophies behind intellectual property law, especially the utilitarian theory.

The refusal to grant rights to Novartis has been criticized by many as a backward step in the promotion of innovation, thereby not in keeping with the philosophies of intellectual property rights. After all, theories such as the Utilitarian theory do state that limited rights need to be given to authors, inventors and the like so that more and more people are encouraged to innovate for the sake of the betterment of society.

This is the strongest argument put forth by critics of this ruling, that denying Novartis patent rights has an adverse impact on investments and more importantly *innovation*, in drug research and development in India.[45] In fact, the Executive Vice President of the Global Intellectual Property Center, US Chamber of Commerce, Mark Elliot said, "The decision against patent rights in India today will negatively impact businesses' ability to invest in tomorrow's medical and technological advancements."[46] He further stated that the decision was a "symptom" of "inadequate protection of intellectual property rights in India."[47] Spokespersons from Pfizer, a pharmaceutical company, said that they were "disappointed" with the judgement and are "concerned" of the environment for innovation and investment in India.[48]

Such cause for worry is unwarranted. The ruling by the Supreme Court is, in spirit, on par with the philosophies of intellectual property. The Utilitarian theory states that limited rights need to be granted to authors, inventors and the like so that society can benefit from more innovation. The Supreme Court stated the same. It did not deny Novartis

45 PVX Law Partners, *Analysis of the Supreme Court's Novartis Judgement*, available at: http://pxvlaw.wordpress.com/2013/04/04/analysis-of-the-supreme-courts-novartis-judgement, accessed 18th October 2013.

46 *Novartis Judgement Will Hit Investments in Medicine: Says US Commerce Body*, FIRST POST BUSINESS, available at: http://www.firstpost.com/business/ novartis-judgement-will-hit-investments-in-medicine-us-commerce-body-681990.htm, accessed 18th October 2013; Suhrith Parthasarathy, *Adverse Reaction*, THE CARAVAN, 1st June 2013, available at: http://caravanmagazine.in/reportage/adverse-reaction, accessed 18th October 2013.

47 *Ibid.*

48 *Ibid.*





a patent. It simply stated that the product needed to satisfy a certain, reasonable at that, criteria. Had Novartis fulfilled that criterion, it would have been granted the patent. The keyword here is *limited.* Utilitarians do not argue that rights completely free of restrictions should be granted as and when authors and inventors ask for them. That would lead to a complete monopoly with everyone making insignificant variations and obtaining rights, with society being the ultimate sufferer. Such a scenario would be the anti-thesis to the Utilitarian theory.

Here, the Supreme Court ruling in addition to only conditionally denying Novartis patent rights, also saw to it that society benefitted, which is the true spirit utilitarianism. The benefit that society can receive has been maximized, keeping the rights granted to the inventors in control. Thus, the *Novartis* judgement really is in consonance with the jurisprudence behind intellectual property rights and not otherwise, as so many have claimed.

It can safely be concluded that although our Constitution may not have incorporated the concept of intellectual property as well as the United States Constitution, it certainly is *on par* with the philosophy of intellectual property rights, even if not all of them simultaneously. Article 300A of the Constitution is an example of Locke's Labour Theory, while Article 51A is the embodiment of the Utilitarian Theory. By way of the Madras High Court's interpretation, Articles 51 and 243 as well as Entry 49 of List 1 belong to the Utilitarian school as well. Today, many talk of granting intellectual property rights a constitutional status. Whether it is time to devote a specific provision for intellectual property rights in the Constitution or not, there is still a long way to go in the development of proper intellectual property jurisprudence in our country. Also, there is always that mammoth roadblock to the very concept of intellectual property, namely, the freedom of speech and expression which is given such an exalted status in the Constitution. Despite this, it cannot be stated that the Indian Constitution is devoid of, or not in consonance with the philosophies that have justified the very existence of intellectual property rights. And that gives us all cause for believing in the evolution of our existing law into a fully developed intellectual property law, within the framework of the Constitution.

# WHO SHOT THE ARROW IN THE DARK? : DETERMINING THE RIGHTS AND OBLIGATIONS OF CYBERSPACE ACTORS UNDER A VEIL OF ANONYMITY

*Utkarsh Srivastava*

*The days of the use of projectiles and bullets in inter-state offensives are nearing an end. So are the days of fraud and extortion where the criminal and the victim stood face to face. The world today is a digital one. Crimes and methods of war are taking a similar form as well. There has been a rampant rise in cybercrimes and the concept of cyber-warfare has also evolved, with the demarcating lines between the two getting increasingly blurred over time.*

*The emergence of Distributed Denial of Services (DDoS) and its use for both commission of crime and warfare creates a situation where the world experiences difficulty in differentiating between the two. The recent case of the alleged cyber-attack by North Korea on Sony has once again brought the indeterminacy regarding the rights, obligations and liabilities of cyberspace actors out into the limelight. Keeping these observations in mind, the problems associated with the anonymity of the perpetrators that plagues cyberspace shall be analyzed by keeping DDoS as a sample.*

*The article tries to explore the existing law to solve these riddles and to lay down the possible measures that a victim state could take. It would be argued that the domain of cyber laws is founded upon a system of analogies which is effective to a limited extent. Cyber laws are fraught with definitions of a traditional nature, and the emerging cyber activities do not fall squarely within these definitions in every case. The scattered attempts to codify cyber law and to lay down a conclusive rules are too few and lacking in acceptance. The conclusion is an acknowledgement of the need for a separate body of laws which are specifically designed for the cyberspace and more importantly, the acceptance of such laws.*





## I. Introduction

"*The Internet is perfect for plausible deniability.*"[1]

When Gadi Evron, a computer security expert from Israel, used the above set of words to describe the ambiguity regarding the nature of the series of digital attacks that were conducted against Estonia in the year 2007, and the identity of the attackers, he was highlighting a major problem that the world has recently come to face.

Throughout the history of mankind, the commission of crimes and indulgence in warfare had involved the use of such mechanisms and weapons which had the notion of identification attached to them. These activities were conducted in the physical world, where visibility and transparency are maintained.[2] Since then, the clock has chimed a countless number of times and with that the *modus operandi* of the perpetrators has undergone a sea change. The world today is a digital one, and the crimes and methods of war are taking a similar form as well. With the emergence of cyberspace as a domain where criminals operate and nations attempt to gain an advantage over each other, the identification of the nature of crime or attack, and the source from which it emanates, has become as daunting a task as there could be. This is because the use of cyberspace for crimes and war allows the perpetrators to defy identification.[3] In such a scenario, the very nature of an attack along with the related rights, obligations and sanctions becomes hard to be put down in black and white.

This article seeks to study the complications that arise as a result of the anonymity that exists in cyberspace. The article further attempts to lay down the right, obligations and liabilities of nations and individuals in case the link between the attack or crime and such cyber actor can be established in the first place. For this purpose, the article is divided into seven parts. Part I is a brief introduction where the recent trend of the use of cyberspace for crimes and also inter-state struggles has been highlighted. In Part II, the author would put forth definitions of the

1 Mark Landler and John Markoff, *Digital Fears emerge after Data Siege in Estonia*, NEW YORK TIMES, 29th May 2007, available at: http://www.nytimes.com/2007/05/29/ technology/29estonia.html?pagewanted=print&_r=0.

2 SUSAN BRENNER, CYBERTHREATS: THE EMERGING FAULT LINES OF THE NATION STATES 7 (Oxford University Press, 1st ed. 2009).

3 *Id* at 7-8.

concepts of cybercrimes and cyber-warfare in order to differentiate between the two. In Part III, the concept of a Distributed Denial of Services (DDoS), which is rampantly being used for crimes, by individuals as well as for inter-state attacks, shall be explained in relation to the legal questions it poses. This shall be followed by Part IV where the author would look at a few prominent DDoS attacks that have occurred in the recent years and highlight the related issues which are still unresolved. An application of the *lex lata* to DDoS attacks shall be carried out in Part V of the article to determine the retaliatory measures that would be legally available to victim states against cyber attackers and also the situations when the existing domestic criminal laws are unable to cover individual cyber activities. Part VI shall look into the Tallinn Manual and the European Convention on Cybercrimes and mark out the reasons for the need to have other treaties which are more comprehensive and popular. Finally, Part VII shall be a short conclusion.

## II. Laying Down the Definitional Groundwork

At this juncture, it is imperative to understand the concept of a cybercrime and to differentiate it from cyber-warfare. One of the primary obstacles in combating cybercrime is the difficulty faced in satisfactorily defining it. In the absence of internationally recognized legal definitions, there are functional definitions that focus on general offense categories.[4] Cybercrimes are crimes of the digital age and are basically the violations of long standing criminal law, which are perpetrated through the instrumentality of computers or information networks.[5]

Compare it to cyber-attacks, and the major point of difference is that the objective to bring about disruption is essentially in the political

sphere or in relation to national security.[6] For these attacks to be characterized as cyber-warfare, the involvement and participation of nation-states is a necessary requirement, as war is a struggle between nations.[7] This has been the traditional understanding of the concept as it

4 Nicholas Cade, *An Adaptive Approach For An Evolving Crime: The Case For An International Cyber Court And Penal Code,* 37 BROOK. J. INT'L L. 1139 (2011).

5 Mrinalini Singh and Shivam Singh, *Cyber Crime Convention and Trans Border Criminality*, 1 MASARYK U. J. L. & TECH. 53 (2007).

6 Reese Nguyen, *Navigating Jus Ad Bellum in the Age of Cyber Warfare,* 101 CAL. L. REV. 1079 (2013).

7 YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 5 (Cambridge University Press, 1st ed. 2005).





was assumed that only nation-states could garner the resources needed to wage war.[8]

The Black's Law Dictionary definition of war requires the involvement of armed forces,[9] which is absent in cases of cyber-warfare. This understanding of the inability of individuals to perpetrate an attack of war-like nature[10] and the strict requirement of armed forces has come to be challenged with the advent of cyberspace as a medium of war, in effect leading to a question mark over these traditional definitions. To add spice, the involvement of non-state actors raises further questions as to the manner in which they may be dealt with. With such haziness existing between the definitions of cybercrimes and cyber-warfare, accurate categorization of a particular attack into any of these definitions becomes an almost impossible task.[11]

## III. Distributed Denial of Services: The New Player in the Field

A recent trend in the province of cybercrimes has been the emergence of Distributed Denial of Services (hereinafter "DDoS"), a new form of cybercrime which flexibly traverses the distance between cybercrime and warfare. A DDoS attack is a coordinated effort that sends out massive bursts of data at the targets of the attack, and attempts to overwhelm websites and their servers or consume their bandwidth.[12] While DDoS attacks have been used for traditional crimes such as extortion,[13] the case of the 'Mafiaboy' in Canada served as an indicator of the potential of this crime to wreck large scale havoc by shutting down a number of widely used websites.[14] Mafiaboy, a teenager used a DDoS attack to deny legitimate access to users of prominent websites such as CNN.com, Yahoo.com, eBay.com and Amazon.com by barraging them

8 *Supra* note 2.

9 BLACK'S LAW DICTIONARY 1720 (9th ed. 2009).

10 *Supra* note 2, at 14.

11 Joshua Kastenberg, *Non-Intervention and Neutrality in Cyberspace: An Emerging Principle in the National Practice of International Law,* 64 A.F. L. REV. 43 (2009).

12 *Supra* note 2, at 1.

13 Jose Nazario, *Cyber Extortion, A Very Real Threat,* IT-OBSERVER, Jun. 7, 2006, available at: http://www.it-observer.com/articles/1153/cyber_extortion_very_real_threat/.

14 Pierre Thomas and D. Ian Hopper, *Canadian Juvenile Charged in Connection with February "Denial of Service" Attacks*, CNN.COM, 18th April 2000, available at: edition.cnn.com/2000/TECH/computing/04/18/hacker.arrest.01/.

with huge amounts of data.[15] The potential of cybercrimes to cause far greater impact than the conventional forms of crime is evident.[16]

The flexible nature of the DDoS mechanism which allows it to be used at larger scales than private commission of crimes has encouraged nation-states to tap this potential as a means for carrying out cyber-attacks. This trend of the usage of DDoS at the level of nation-states raises certain conundrums. The issue that needs to be addressed is with regard to the category into which a particular instance of DDoS, or for that matter any form of cyber-attack, would fall. Factors such as the identity of the perpetrators, the scale of commission and the nature of the targets of the attack end up as the relevant ones for such a determination. In light of the recent spurt in the use of DDoS as the preferred form of cyber-attacks across the globe,[17] the author would attempt to explore these cyberspace related issues in general by understanding them in context of DDoS in particular.

## IV. The Complexity Involved in Determining the Nature of the Attack

The identification of the nature of the attack is paramount for the subsequent determination of the rights, obligations and suitable sanctions in every particular case of DDoS attacks. While a DDoS attack by a private entity, motivated by self-profit would be covered by the domestic laws of a nation, it is the presence of nation-states in the fray which raises issues of whether or not a DDoS attack would amount to the illegal use of force on part of the attacking nation, or could the victim nation claim the right to self-defense under the United Nations Charter[18] by contending that the DDoS attack had satisfied the essentials of an armed attack being carried out by the attacking nation. It all boils down to the categorization of the attack, which is an extremely tricky task considering that the nature of the attacker is very often unknown and the smoking gun is not traceable. This is best understood by delving into the kind of DDoS attacks that have taken place and the ambiguity regarding

15 DR. TALAT FATIMA, CYBERCRIMES 157-158 (Eastern Book Company, 1st ed. 2011).

16 Shalini Kesar, *Is Cybercrime one of the weakest links in Electronic Government?,* 6 J. INT'L COM. L. & TECH. 243 (2011).

17 Rick Rumbarger, *Viewpoint: DDoS attacks are evolving to take advantage of mobile,* BBC News, 10th July 2012, available at http://www.bbc.com/news/technology-18786815.

18 Charter of the United Nations, Art. 51, 1 U.N.T.S. XVI. (hereinafter UN Charter)





their nature that still persists.

### *A. Estonia, 2007*

The DDoS attack on Estonia in the year 2007 provides the best depiction of the complex issues involved. Towards the dying days of the month of April 2007, a series of sustained digital attacks were targeted at various components of Estonia's infrastructure.[19] Both civilian and government agencies such as banks, ministries and even the Estonian Parliament's email server were targeted by this anonymous attack,[20] leaving the country at the brink of helplessness. The absence of a visible army firing bullets and launching missiles at Estonia brought forth the problem of identification at its best. While initially, the Estonian authorities blamed the country of Russia for being involved in cyber-warfare against them,[21] very soon the realization that the series of attacks was within the capabilities of mere civilians dawned upon the Estonians. The idea that the attacks were an instance of cyber-warfare on part of Russia was abandoned and the Estonian Prime Minister ended up describing the entire scenario as a "criminal activity".[22] The notion that only nation-states can assemble the manpower, equipment and other resources to wage attacks of this proportion was dispensed with and the capacity of private individuals to use cyberspace in this manner was recognized. To put it ironically, the confusion, ambiguity and lack of clarity were crystal clear in this case, all by virtue of the malleable nature of the DDoS attacks.

### *B. Georgia, 2008*

Shortly before the armed offensive by Russia in Georgia in 2008, the Georgian President's official website, along with the website of the central government and the Ministry of Defense came under a DDoS attack.[23] This affected the government's ability to connect to its people

19 *Supra* note 2, at 1.

20 Jeffrey T.G. Kelsey, *Hacking into International Humanitarian Law: The Principles of Distinction and Neutrality in the Age of Cyber Warfare*, 106 MICH. L. REV. 1427 (2007).

21 Ian Traynor, *Russia Accused of unleashing cyber war to disable Estonia,* THE GUARDIAN, 17th May 2007, available at: http://www.theguardian.com/world/2007/may/17/topstories3.russia.

22 *Supra* note 2, at 5-6.

23 Jon Swaine, *Georgia: Russia 'conducting cyber war',* THE TELEGRAPH, 11th August 2008, available at: http://www.telegraph.co.uk/news/worldnews/europe/georgia/2539157/Georgia-Russia-conducting-cyber-war.html.

and its sympathizers around the world.[24] While Georgia claimed that Russia was behind the attacks, the Russians washed their hands off the entire episode. The exact identity of the ones behind the attack remained an unsolved mystery,[25] and so did the question of whether or not Georgia was involved in a cyber-war with Russia.

### C. South Korea And USA, 2009

The DDoS attack that targeted the United States government websites, the Pentagon and the White House in 2009[26] was in addition to a similar attack that affected the South Korean defense ministry, Presidential Blue House and the National Assembly in the same year.[27] These attacks were alleged to have been the handiwork of the North Korean government.[28] It is relevant to note that North Korea was merely suspected to be behind these attacks. Even after the attacks were traced back to North Korea, there was no conclusive evidence to suggest that the government in Pyongyang was behind the attacks.[29] It is only when the government can be conclusively linked to the attacks, that questions regarding North Korea's breach of its international law obligations can be resolved.

### D. Japan, 2010

Japan had its own share of cyber-attack related problems when its Defense came under a DDoS attack. Japan suspects it to be the Chinese response to a row between the two nations over the collision between a Chinese fishing trawler and a couple of Japanese Coast Guard vessels.[30]

[24] John Markoff, *Before the Gunfire, Cyberattacks,* THE NEW YORK TIMES, 12th August 2008, available at: http://www.nytimes.com/2008/08/13/technology/13cyber.html?_r=0.

[25] *Ibid.*

[26] *U.S. eyes North Korea for 'massive' cyber-attack,* NBC NEWS, 9th July 2009, available at: http://www.nbcnews.com/id/31789294/ns/technology_and_science-security/t/us-eyes-n-korea-massive-cyber attacks/#.VJqGR14BWA.

[27] *Governments hit by cyber-attack,* BBC NEWS, 8th July 2009, available at: http://news.bbc.co.uk/2/hi/technology/8139821.stm.

[28] *Ibid.*

[29] *South Korea hit by cyber-attacks,* BBC NEWS, 4th March 2011, available at: http://www.bbc.com/news/technology-12646052; *Supra* note 26.

[30] Pauline C. Reich et al., *Cyber Warfare: A Review of Theories, Law, Policies, Actual Incidents - and the Dilemma of Anonymity,* 1 EUROPEAN J. L. & TECH., 2010 available at: http://ejlt.org/article/view/40/58#_edn97.





### E. South Korea, 2011

A couple of years later, South Korea once again became the target of DDoS attacks on government ministries, banks and the military headquarters, suspected to have been orchestrated by North Korea.[31] Once again the problem of identification of the attacker in cyberspace continued to pose major obstacles in dealing with the menace.

### F. Attack On Sony And The Alleged Retaliatory DDoS Attack By USA, 2014

These DDoS attack cases are not the only instances of the use of cyberspace for widespread disruption and damage,[32] with the most recent skirmish in cyberspace being the one related to the attacks on Sony. While the FBI attributed them to North Korea, there has been widespread questioning of the evidence that the FBI has been relying upon to mark out North Korea as the perpetrator by experts.[33] Proof of who is and who is not behind a cyber-attack is extremely difficult to garner.[34] Thus the situation as it stands currently is that by no stretch of imagination can North Korea's role in these attacks be proven beyond reasonable doubt which is essential for FBI's attribution to hold ground.[35]

The DDoS attack on North Korea's limited internet facilities was suspected to be a retaliatory measure against the attack on Sony, by USA.[36] This may be defended as being a countermeasure by USA, along with the sanctions that it has recently imposed on North Korea.[37] The legality of such measures, if indeed these were the handiwork of USA, can be determined after an analysis in Part V (A) and (B) of this article.

As of now, with nothing to conclusively pin point the source of the

[31] *Supra* note 29.

[32] *Burma hit by massive net attack ahead of election*, BBC NEWS, 4th November 2010, available at: http://www.bbc.com/news/technology-11693214.

[33] Dave Lee, *What is FBI evidence for North Korea hack attack?,* BBC NEWS, 19th December 2014, available at: http://www.bbc.com/news/technology-30554444.

[34] *Ibid.*

[35] Brian Todd and Benn Brumfield, *Experts doubt North Korea was behind the big Sony hack,* CNN.COM, 27th December 2014, available at: http://edition.cnn.com/2014/12/27/tech/north-korea-expert-doubts-about-hack/index.html.

[36] *North Korea loses its link to the internet,* THE NEW YORK TIMES, 22nd December 2014, available at: http://www.nytimes.com/2014/12/23/world/asia/attack-is-suspected-as-north-korean-internet-collapses.html?_r=0.

[37] *Sony cyber-attack: North Korea faces new US sanctions,* BBC NEWS, 3rd January 2015, available at: http://www.bbc.com/news/world-us-canada-30661973.

cyber- attack due to spoofing or the creation of intermediaries which hides the location of the attacker,[38] the nature of the attack remains an unsolved mystery. This in turn seriously impacts the manner in which the nations respond to and regulate such activities.

## V. Determination of Rights and Obligations in the Background of the Blurring Line Between Cybercrimes and Cyber-Warfare

It is imperative for each nation to note that actors in cyberspace are evolving and mechanisms such as DDoS are being used by both individuals and nation-states as is evident from the Russian DDoS attack on Georgia.[39] With the same mechanism being employed by both, and the problems regarding identification of the perpetrators in cyberspace looming over as a perpetual complexity, the victims, whether individuals or states, would continue to be in a state of dilemma. Whether or not a nation is at war would remain an unanswerable question. Whether or not an individual would have recourse to law in case a pure DDoS does not satisfy the elements of the traditional crimes would again remain a grey area in the present situation. Also, assuming that the involvement of North Korea or Russia had been established, what recourse would the injured state have had against the perpetrators of cyber-warfare? In the absence of judicial precedents or state practice related to an armed conflict having started due to a cyber-attack, answering these questions would require a foray into unexplored territory.

### *A. When It Amounts To Cyber-Warfare*

> *"We will respond proportionately and in a space, time and manner that we choose."*[40]

These were the words of US President Barack Obama in response to North Korea for allegedly conducting the cyber-attack on Sony. First and foremost, the question that arises is can USA respond in any manner that it chooses? The answer which would be in the negative does not imply that President Obama would be without any recourse whatsoever. A

38 *Supra* note 6, at 1105.

39 *Supra* note 24.

40 *Sony Hack: Obama vows response as FBI blames North Korea,* BBC NEWS, 19th December 2014, available at: http://www.bbc.com/news/world-us-canada-30555997.





determination of the manner in which cyber-attacks would be dealt with under international law can only be made after analyzing such attacks in the backdrop of the existing treaty law and customary international law.

Once it has been established that nation-states are involved, the attacks may be categorized in accordance with international law itself. Art. 2(4) of the UN Charter prohibits the threat or use of force by Member States. In the absence of any definition of the phrase "threat or use of force" in the Charter, reliance may be laid on the *travaux preparatoires* which shows that a proposal to include economic coercion under Art. 2(4) of the UN Charter was specifically rejected.[41] Thus, political, psychological or economic coercion such as trade sanctions are not covered under Art. 2(4)[42] and is confined to the use of military force.[43]

In contrast, Art. 51 being an exception to Art. 2(4), allows a nation to exercise its right to self-defense against an armed attack. A preliminary but crucial doubt may be pertaining to the possibility of the use of computer networks amounting to an armed attack as opposed to guns and bombs. The ICJ's *Nuclear Weapons* advisory opinion provides the answer when it lays down that armed attacks are not to be restrictively associated with specific weapons.[44] The relevant requirement is the use of force, irrespective of the kind of weapons used.[45] Thus, cyber-attacks can amount to an armed attack subject to the fulfilment of the armed attack threshold.

Once again definitional ambiguity persists in relation to the term "armed attack".[46] Armed attack is narrower and more restrictive than the term "use of force"[47] and calls for the satisfaction of a gravity threshold.[48]

41 *See* Doc. 2, G/7 (e)(4), 3 U.N.C.I.O. Docs. 251. 252-53 (6th May 1945) (Brazilian amendment proposal to include economic coercion under Art. 2(4) of the Charter). For rejection of this proposal *see* Summary Report of Eleventh Meeting of Committee 1/1, Doc. 784, /1/27, 6 U.N.C.I.O. Docs. 331, 334, 559 (4th June 1945).

42 Sheng Li, *When does Internet Denial Trigger the Right of Armed Self-Defence?*, 38 YALE J. INT'L L. 179 (2013).

43 Michael Gervais, *Cyber-attacks and the Law of War,* 1 J. L. & CYBER WARFARE 8, (2012).

44 The Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶39 (8th July, 1999).

45 *Ibid.*

46 Christine Gray, *The Use of Force and the International Legal Order, in* INTERNATIONAL LAW 589 (Malcolm D. Evans ed., 2003).

47 *Supra* note 42, at 184.

48 Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶35 (Jun. 27). (hereinafter Nicaragua.

The International Court of Justice in the *Nicaragua* case determined that the "scale and effects" test needs to be fulfilled for an armed attack to be constituted.[49] The Court further highlighted this distinction between "use of force" and "armed attack" in the *Oil Platforms* case, and ruled an "armed attack" to be the "gravest" form of "use of force".[50]

The pertinent question is whether a cyber-attack such as DDoS, carried out by a nation, taking Russia as an example, would amount to an armed attack and allow a nation like Estonia to exercise the right to self-defense under Art. 51. An effects based approach would require that the DDoS attack proximately cause some kind of release of kinetic energy and resultant physical damage in order to satisfy the armed attack threshold.[51] The requirement is physical damage arising as a direct and foreseeable consequence in a manner similar to a conventional attack.[52] A major flaw in this approach is that it fails to consider the non-physical effects of cyber-attacks that may turn out to be equally, if not more, damaging as physical attacks.[53] Adopting such an approach would mean that only an attack such as the Stuxnet virus attack carried out in 2010, which resulted in physical damage being caused to the Iranian nuclear facility at a level comparable to the air strikes that were conducted by Israel on nuclear reactors in Baghdad and Syria, would be regarded as an armed attack.[54]

Assuming that the DDoS attack on Estonia was the work of the country of Russia and not a group of individuals, could it be argued that it amounts to an armed attack against Estonia, giving it the right to self-defense under Art. 51. It seems that the effects based approach would yield an answer in the negative as a DDoS attack always has non-physical effects. Thus, it can never be considered to be an armed attack. This is an illogical conclusion as the severity of the consequences is rendered to be an irrelevant consideration. The absurdity of this conclusion flows from the possibility that an aggressor nation would resort to a DDoS attack to bring down critical infrastructure of its victim nation and thereby cause

[49] *Id.* at ¶195.
[50] Case concerning Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, ¶ 64 (Nov. 6). (hereinafter Oil Platforms)
[51] *Supra* note 42, at 188.
[52] Michael Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework,* 37 COLUM. J. TRANSNAT'L L. 885 (1998).
[53] *Supra* note 42, at 188-189.
[54] *Supra* note 6, at 1082-1083.





damage of a comparable proportion to a physical armed attack, but would still not be legally subject to retaliation under Art. 51 of the UN Charter.

If this were true, then each state would use DDoS attacks instead of physical attacks to cripple its adversaries to the same extent that an armed attack would have done, and still manage to walk away without any sanctions or liabilities. This illogicality can be revealed by equating a DDoS attack to some kind of action that takes place in the physical world, and by then understanding its nature in an analogous manner. The Estonian Defense Minister had highlighted the similarities between the 2007 cyber blockade on Estonia and naval blockades on ports.[55] Can an analogy be drawn between the two?

Way back in 1956, the then Israeli foreign minister Golda Meir had declared to the UN General Assembly that blockades by Egypt against the ships carrying the Israeli flag in the Gulf of Aqaba and the Strait of Tiran would be considered to be an armed attack by Israel.[56] Israel's stance that this would trigger its inherent right to self-defense was accepted by the international community.[57] The possibility of naval blockades amounting to an armed attack is therefore a real one.

Drawing an analogy between naval blockades and DDoS attacks, it may be argued that since naval blockades have been recognized as armed attacks[58] and involve the restriction on the flow of trade imposed through such a blockade, DDoS attacks may also be recognized as armed attacks if they satisfy the requirements of scale and effect,[59] as these affect the flow of information.[60] Naval blockades, in a manner similar to DDoS attacks, may not satisfy the kinetic energy requirement as discussed above,[61] which further highlights the feasibility of this analogical extension. The basis of this categorization would be the subjective blurring of the distinction between physical and non-physical goods.[62]

[55] NATO Parliamentary Assembly, *NATO and Cyber Defence,* 173 DSCFC 09 E bis., 2009, ¶ 59.
[56] U.N. GAOR, 11th Sess., 666th plen. mtg. at 1275-1276, U.N. Doc. A/PV.666 (1st March 1957).
[57] Jonathan E. Fink, *The Gulf of Aqaba and the Strait of Tiran: The Practice of "Freedom of Navigation" After the Egyptian-Israeli Peace Treaty,* 42 NAV. L. REV. 121 (1995).
[58] *Supra* note 42, at 194-196.
[59] *Supra* note 48.
[60] *Supra* note 42, at 196.
[61] *Id* at 193.
[62] *Id* at 196.

Cyber-attacks that result in fatalities by affecting critical life support systems that shut down computers that control dams and waterworks resulting in large scale floods or severely incapacitate state security by denial of access to the designated persons, are equivalent to armed attacks.[63] A DDoS attack is capable of bringing about these effects, all of it without a single bomb explosion or a bullet shot. In a scenario where a cyber-attack such as a DDoS fulfils the requirement of severity and foreseeability,[64] it would be extremely absurd to deny the inherent right of self-defense to a victim nation where the identity of the attacker nation has been established, merely due to the fixation with kinetic energy which has come about due to the traditional form of warfare.

In cases where a cyber-attack violates Art. 2(4) of the UN Charter without crossing the scale and effects threshold, the victim state cannot resort to retaliation under Art. 51. It is to be noted that the customary international law obligation of non-intervention in the internal affairs of another nation[65] complements Art. 2(4) and has come to be recognized as coterminous with Art. 2(4).[66] Therefore, a use of force would be in violation of the obligation of non-intervention as well. In the absence of the right under Art. 51, the victim state can fall back upon the option of non-forceful countermeasures or retorsions in case of low-intensity attacks.[67]

Retorsions and countermeasures, which are commensurate to the injury suffered,[68] are lawful retaliations to international law violations by other states.[69] As such, even if the kinetic energy fixation is allowed to have the limelight and is not ignored, a victim of a DDoS attack such as Estonia or even South Korea and US may resort to countermeasures against the violation of the customary international law obligation of

63 MARCO ROSCINI, CYBER OPERATIONS AND THE USE OF FORCE IN INTERNATIONAL LAW 73-74 (Oxford University Press, 1st ed. 2014).

64 Oona Hathaway et. al., *The Law of Cyber-Attack,* 100 CAL. L. REV. 817 (2012).

65 Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/RES/2625(XXV) (24th October 1970).

66 *Supra* note 48.

67 U.N. Int'l Law Comm'n Draft Articles on Responsibility of States for Internationally Wrongful Acts, Rep. of the Int'l Law Comm'n, U.N. GAOR, 53d Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001), at 31, 75; MICHAEL REISMAN & JAMES E. BAKER, REGULATING COVERT ACTION 90 (Yale University Press, 1st ed. 1992).

68 Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7 (25th September 1999).

69 *Supra* note 64, at 845.





non-intervention by the states of Russia and North Korea respectively. As a last step, retorsions such as limiting diplomatic relations[70] or economic coercion such as withdrawal of voluntary aid are lawful but unfriendly steps that the victim states may take against the cyber attacker state instead of military action.[71] The weight that a nation like North Korea may attach to a retorsion of this kind, taken by South Korea or USA might not be much, in effect leading to doubts regarding the effectiveness of such measures as a response to cyber-attacks by foreign nations.

### *B. When Non-State Actors Are Involved*

The complex nature of the process of link establishment between the attack and the suspected nation gives it ample opportunity to deny culpability, and instead put the blame on individuals or private hacker groups.[72] As has been already discussed, cyberspace blurs the traditional demarcating line that exists between the strike potential of individuals on one hand and states on the other. As such, the possibility of non-state actors such as individuals or private groups carrying out terrorist activities through cyber-attacks would not be too distant. In a scenario where a cyber-attack such as a DDoS attack, resulting in a threat to national security, is carried out from the territory of North Korea on USA, it would be interesting to see if an argument can be made on behalf of USA which triggers Art. 51 of the UN Charter in its favour. Or would USA have to be satisfied with the option of countermeasures?

It is to be noted that Art. 51 allows a state to act in self-defence against an "armed attack". It may be put forth on behalf of USA that the inherent right to self-defence has nowhere been restricted to an armed attack which has been conducted by a nation-state.[73] The Security Council Resolution[74] after the 9/11 terrorist attacks on USA recognizes international terrorism as a threat to international peace and security. A threat to international peace and security can be dealt with by the Security Council under Chapter VII of the UN Charter. The Security Council can resort to use of armed force to deal with such a situation.[75] This implies that the Security Council could

70 *Ibid.*

71 *Supra* note 43, at 19; *Supra* note 64, at 857.

72 *Supra* note 6, at 1105.

73 Thomas Franck, *Terrorism and the Right of Self-Defence,* 95 AM. J. INT. L. 839 (2001).

74 Security Council Resolution. 1368, U.N. Doc. S/RES/1368 (12th September 2001) on the "Threats to International Peace and Security caused by terrorist acts.

75 United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Art. 42.

take actions against the terrorist group Al-Qaeda under Chapter VII of the UN Charter. By logical extension, so can a state take action against an armed attack under Art. 51, irrespective of the nature of the attacker.[76] The Resolution allows "individual or collective self-defence".[77]

According to international law as stated above, cyber-attacks amounting to armed attacks, carried out by terrorist or hacker, would give the victim state to act in self-defence against that particular group. But this debate has not yet been settled in light of the ICJ's advisory opinion in the *Legality of the Israeli Wall*[78] and the *Armed Activities*[79] case which have held the exercise of the inherent right under Art. 51 to be exercisable solely against nation-states.

Another path to Art. 51 in case of non-state actors may be traced by the attribution of the conduct of these actors to the state in question. The test of "effective control"[80] for attribution was laid down by the ICJ in the *Nicaragua* case, which has been diluted to the level of the "overall control" test in the recent years.[81] The high levels of evidentiary proof required for the satisfaction of these tests makes these methods of attribution of conduct as not the most suitable courses of action in context of the conduct of various actors in cyberspace.[82]

Where the cyber-attack originates from the territory of a particular nation, a victim state may invoke the *sic utere tuo* principle, which obligates states to prevent the use of their territory in a manner which harms the

interests of another nation. The landmark *Corfu Channel*[83] decision

76 *Supra* note 73, at 840.

77 *Ibid.*

78 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 139 (9th July 2004).

79 Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, ¶ 147 (19th December 2005).

80 *Supra* note 48.

81 Prosecutor v. Tadic, Case No. IT-94-1-A, Appeals Judgment, ¶ 120 (Int'l Crim. Trib. for the former Yugoslavia, 15th July 1999); Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Pre-Trial Chamber I's Decision on the Confirmation of Charges, ¶ 211, International Criminal Court (29th January 2007.

82 Vijay Padmanabhan, *Cyber Warriors and the Jus in bello,* 89 INT'L L. STUD. SER. US NAVAL WAR COL. 288, (2013); *Supra* note 42, at 209 (highlighting the near impossibility of gathering evidence in cyberspace to satisfy the high threshold of the 'effective control' test); *Supra* note 43, at 45 (explaining that the overall control test was applicable to participants in a structured and hierarchically organized group, which is difficult to establish in case of cyberspace actors).

83 Corfu Channel Case (U.K. v. Albania), 1949 I.C.J. 4, at 22 (9th April 1949).





recognized this principle, which has now come to be regarded as a customary international law norm as it has found recognition in a number of cases[84] as well as General Assembly Resolutions.[85] So in case North Korea knowingly allows Lizard Squad or any other hacker group to carry out attacks on any other nation such as USA or South Korea, from its own territory, the victim state can claim responsibility of the state harbouring the cyber-attackers as there has been a violation of an international law obligation. The entire law dealing with countermeasures would be applicable in response to a breach of an international law obligation.

Additionally, in case Estonia or South Korea and USA can garner proof against Russia or North Korea to show that it was organizing or funding a non-state actor involved in the attack, it may be able to successfully make a claim of the violation of the customary international law obligation of non-intervention.[86] Furthermore, in *Nicaragua* case, the arming or training provided to the rebel forces by USA was considered to be graver than mere supply of funds and was held to be in breach of Art. 2(4).[87] Thus, attacks by non-state actors can be regulated in this manner.

### *C. When It Amounts To A Cybercrime*

Cybercrimes are unconnected to national security and political issues and do not raise legal issues of international law.[88] The identification of these activities as a crime attracts the application of domestic rules and laws,[89] after which an attempt is made at this juncture to bring the DDoS within the ambit of one of the traditional crimes by aligning the features of the DDoS with one of the traditional crimes and drawing analogies. Cybercrimes are personal in nature[90] and do not

84 Trail Smelter Arbitration (U.S. v. Canada) 1938/1941, R.I.A.A. 1905; Lake Lanoux Arbitration (Fr. V. Spain), 24 I.L.R. 101 (1957); Settlement of the Gut Dam Claims (U.S. v. Can.), 8 I.L.M 118 (1969). (These arbitral decisions concretize the Corfu Channel principle which states that a state cannot knowingly use its territory in a way which is harmful to the interests of another nation).

85 Cooperation between States in the field of the Environment, G.A. Res. 2995 (XXVII), 15th December 1972; International Responsibility of States in regard to the Environment, G.A. Res. 2996 (XXVII), 15th December1972.

86 *Supra* note 48.

87 *Id* at ¶ 292(4).

88 *Supra* note 64, at 831.

89 *Supra* note 6, at 1090.

90 *Supra* note 8, at 10.

involve the furtherance of political ideologies or raise issues of national security. A DDoS attack on Feedly, a news aggregator, and Evernote, an online notes service, involved the demand for money in return for putting an end to the attack.[91] This attack can be conveniently labelled as a cybercrime as it fits into the scope of the traditional crime of extortion.

Unfortunately, cyber-attacks do not take up such simplistic shapes on most occasions. There exists a possibility that a DDoS attack in its "pure" form, may not fit into the boundaries of any of the traditional crimes such as extortion, theft, fraud and the like. DDoS attacks, such as the one carried out by the Mafiaboy, may be carried out for no consequential reason with the sole objective of creating widespread disruption and inconvenience to people.[92] Similarly, the hacker group Lizard Squad used DDoS to topple the online gaming networks of Xbox and Sony Playstation, with the intention to simply cause mayhem.[93] The kind of harm that such a pure cybercrime inflicts cannot be replicated by any of the traditional crimes of the physical world.[94] In such scenarios, the system of analogies to regulate cyberspace conduct is rendered ineffective.

What then is the nature of such an attack? It falls outside the scope of cybercrimes and also fails to satisfy the elements of warfare. Is it cyber-terrorism? Cyber-terrorism requires that the attack be aimed at some political or social objective.[95] In those cases where the purpose is simply to create a ruckus without the advancement of any political ideology, the elements of cyber-terrorism also stand unfulfilled. The exact categorization of such activities thus remains unknown.

## VI. Searching for the Light in the MIST

A few general observations made over the course of the last few pages are that cyberspace is plagued with issues of identification of the nature of attack and the perpetrator. The demarcating line between

91 Leo Kelion, *Feedly and Evernote struck by denial of services cyber-attacks,* BBC NEWS, 11th June 2014, available at: http://www.bbc.com/news/technology-27790068.

92 *Supra* note 2, at 33-34.

93 Tony Dokoupil, *Hacked? Xbox and Playstation Networks Both Go Down for Christmas,* NBC NEWS, 26th December 2014, available at: http://www.nbcnews.com/tech/tech-news/hacked-xbox-playstation-networks-both-go-down-christmas-n274821.

94 *Supra* note 2, at 34.

95 *Supra* note 8, at 15-17.





cybercrimes and cyber-warfare is getting hazy. While *de jure* warfare would remain in the hands of nation-states due to the definitional requirements of warfare which calls for the involvement of nation-states, the fact that civilians are capable of launching cyber-attacks of humongous proportions, and satisfying the scale and effects threshold of wars between nation-states, would mean that *de facto* warfare would not remain in the exclusive domain of nation-states.[96]

In light of the evolving trends and crimes in this realm, it is of paramount importance that the system of analogies to determine rights and obligations in the cyberworld be dispensed with. This approach is similar to the pigeon-hole theory of torts propounded by Salmond.[97] If the action fits the definition of one of the crimes or traditional understanding of war i.e. falls within one of the pigeon holes, it is regarded as a cybercrime or warfare as the case may be. Else there is no recourse. Such an understanding of and approach towards cybercrime and cyber-warfare cannot withstand the test of time. It is imperative to accept the fact that the ambiguity that haunts cyberspace erodes the efficacy of the traditional law enforcement mechanisms.[98] Similar is the case with the international law governing inter-state relations. The conclusion being that the tactics we use to control chaos in the real, physical world would be ineffective when it comes to the cyberworld.[99]

The issue of identification of the perpetrators presents a major obstacle in policy formation and implementation in this field. Nations such as the Netherlands believe in the practical feasibility of analogous application of existing international law on a case by case basis.[100] The Netherlands is of the stance that a global cyber treaty is not a necessity,[101] but that is possibly one of the most practical solutions to all these quandaries. Multilateral treaties can go a long way in establishing the boundaries of the crimes and defining the customary international law associated to such crimes.[102]

96 *Supra* note 2, at 107.

97 RK BANGIA, LAW OF TORTS 16 (Allahabad Law Agency, 22nd ed. 2010).

98 *Supra* note 8, at 17.

99 *Supra* note 2, at 8.

100 Jody M. Prescott, *The Law of Armed Conflict and the Responsible Cyber Commander*, 38 VT. L. REV. 103 (2013).

101 *Ibid.*

102 *Supra* note 4, at 1169.

Moving onto the domain of cybercrimes, it is observed that the Council of Europe's Convention on Cybercrimes is the sole international agreement which attempts to define cyber-attacks.[103] While it attempts to combat cyber fraud, copyright infringement and pornography, unfortunately, it does not enjoy widespread acceptance. Therefore, it has been unable to crystallize into a norm of customary international law.[104] The global treaty discussed above would also act as the foundation upon which domestic legislations can be structured and international co-operation fostered in relation to cybercrimes as well.[105]

Specific laws at the domestic level such as the United Kingdom legislation[106] outlawing DDoS attacks and envisaging the possibilities in the cyberworld are required. Such grass root action would be imperative to internalize the structure that a global cyber treaty related to cybercrimes would create, and allow the movement towards a system of regulation which brings about transparency in the domain of cybercrimes.[107]

The Tallinn Manual[108] is a prime example of attempted codification of the UN Charter and the laws of armed conflict as applicable in a cyber context.[109] It is a result of the NATO's invitation to an international team of experts to put together the laws governing cyber-warfare and to bring about some semblance of clarity.[110] The Manual, more or less, follows the same line of reasoning and analogies as has been discussed in Part V(A) of this article and therefore lends authority to such analogical extensions being made. One of the striking and appreciable features of the Tallinn Manual is that it sheds the kinetic energy fixation by recognizing that cyber-attacks without physical destruction may qualify as armed conflicts.[111]

103 *Supra* note 43, at 19.
104 *Id* at 20.
105 *Id*
106 UK Police and Justice Act, 2006.
107 *Supra* note 4, at 1169.
108 MICHAEL SCHMITT (ED.), TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE, (Cambridge University Press, 2013). (hereinafter Tallinn Manual)
109 Brett Esptein, *The Rules of Cyber-Warfare: What are the Issues with these Rules, How Can the United States Respond to an Attack when Applying these Rules, and Should New Rules be Enacted?,* 18 HOLY CROSS J.L. & PUB. POL'Y 247 (2014).
110 *Id.* at 269.
111 Tallinn Manual, Rule 13.





However, the problem still persists. The Manual itself lays down that it is a non-binding document, which merely reflects the opinion of the group of experts, acting in their private capacities.[112] It can be said that the Manual is no more than an iteration of the *lex lata,* and Michael Schmitt, the Project Director of the drafting of the Tallinn Manual, has himself accepted that *lex ferenda* was strictly off limits for the expert body.[113] A major criticism is that the work is a mere restatement of existing treaty provisions with the addition of the word 'cyber',[114] a fact accepted by the Manual itself.[115] On the other hand, it may be argued that it can be accepted to be the "teachings of the most highly qualified publicists", which is a subsidiary means for the determination of the rules of law.[116] Such teachings assume greater significance in the absence of state practice or *opinio juris,* as is the case in the cyber context.[117] In any case, if it cannot be considered to be a source of law, it can serve in a manner similar to the Lieber Code,[118] which was an aspirational attempt at regulation of warfare during civil wars, which finally became a core text in the modern laws of war[119] and gave a fair indication of the legal thinking of that time.[120]

With due respect to all the arguments in favour of and against the Tallinn Manual, it is submitted that it is overly dependent on analogical references to international law as it stands, which is further diluted due to its non-binding nature. The indeterminacy plaguing Art. 2(4) would anyway seep into any such application of the existing law to cyber activities. The Manual, if at all of any relevance, should only be considered to be so at an ad-hoc level, and should in no way block the formulation of a global cyber treaty.

112 *Supra* note 108, at 23.
113 Michael Schmitt, *The Law of Cyber Warfare: Qua Vadis?,* 25 STAN. L. & POL'Y REV. 269 (2014).
114 *Supra* note 63, at 31.
115 *Supra* note 108, at 6.
116 Statute of the International Court of Justice, Art. 38(1)(d).
117 Lianne Boer, *Restating the Law "As It Is": On the Tallinn Manual and the Use of Force in Cyberspace,* 5 AMSTERDAM L. F. 4 (2013).
118 Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24th April 1863.
119 *Supra* note 109, at 270.
120 William Boothby, *Cyber Deception and Autonomous Attack – Is there a Legal Problem?,* in the 5th International Conference on Cyber Conflict, Tallinn, 2013.

The need for a treaty that lays down clear cut definitions of cybercrimes and cyber-warfare by shedding the skin of being defined in terms of conventional crimes and acts of use of force, is the need of the hour.[121] For such a treaty would allow a distinction to be made between the two and will provide nations with the much needed support to identify the avenue through which these problems can be combated. Such a treaty needs to go beyond analogies and also come up with international guidelines on evidence collection and prosecutions related to illegal conduct in cyberspace.[122] It needs to be a product of the combined efforts of the nations from across the globe. The global treaty may very well be founded upon the Tallinn Manual and take the well-suited parts from the Manual itself, but it is imperative that it be structured and designed exclusively for cyberspace.

The legal regime governing the outer space consists of specific treaties which were formulated with the belief that they would further the purposes and principles of the UN Charter.[123] The Outer Space Treaty does not completely exclude the application of international law and the UN Charter,[124] despite being a treaty designed especially for the regulation of activities in outer space. Judge Manfred Lachs has highlighted the dangers related to analogies in his work on outer space law, but it has also been accepted by him that the system of analogies cannot be utterly discarded.[125] The author at this stage submits that cyberspace needs something similar - a legal regime governing cybercrimes and warfare, where analogical references are not the only means of regulation of conduct. Instead, it should be a regime where analogies are restricted to a supportive role.

Above all, acceptance of such a treaty or treaties by various States, as and when it comes into force, is of paramount importance.

121 *Supra* note 64, at 881.

122 *Ibid.*

123 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 610 U.N.T.S. 205 (1967), Preamble. (hereinafter Outer Space Treaty)

124 Outer Space Treaty, Art. III.

125 MANFRED LACHS, THE LAW OF OUTER SPACE: AN EXPERIENCE IN CONTEMPORARY LAW MAKING 20-21 (Martinus Nijhoff Publishers, 1972).





## VII. Conclusion

With inspiration from the words of Justice Bhagwati of the Supreme Court of India who was speaking in relation to the concept of equality,[126] I would argue that cyberspace activities are dynamic in nature with various facets and dimensions and these cannot be "cribbed, cabined and confined within traditional limits". At the slightest change in the facts and circumstances, attacks such as DDoS are seen to diffuse from the sphere of crimes to the province of warfare and vice versa, thus highlighting the need for a comprehensive body of law to deal with the situations that take birth in cyberspace, but end up affecting the physical world at large. The emerging field of cybercrimes and warfare needs its own set of laws. The need is further magnified in light of the increase in the use of cyberspace for crimes and inter-state skirmishes.

This would be a set of laws that does not attempt to compress these actions taking place in cyberspace within the confines of the already existent laws, leading to debates over what is applicable and what is not. Such a compression should be practised to prevent cyber activities from being left completely unregulated, but only until a global and comprehensive treaty does not come into force. In this way, the recognition of cybercrimes, cyber-warfare and cyber-attacks as a separate body of laws would serve as the panacea to all the maladies hindering the regulation or prohibition of the existent and emerging cyber activities.

126 E.P. Royappa v. State of Tamil Nadu, (1974) AIR SC 555.

# COMMUNAL-SECULAR DICHOTOMY: ARE THE COMMUNAL VIOLENCE BILLS ADEQUATE TO TACKLE THE 'FRANKENSTEIN'S MONSTER'?

*Vatsal Joshi and Ananya Kumar Singh*

*The framers of the Constitution had intended our nation to be a secular one. It was envisaged that unlike the Western concept of secularism, the Indian state would not be indifferent, but equally respectful towards all the religions. This conception of Secularism is peculiar to India, and so is the phenomenon of Communalism. This Communalism-Secularism Dichotomy is viewed as a major force in sustaining this phenomenon in the country. Communalism may be defined as a feeling of antagonism between various communities, usually along religious lines. Communalist sentiments may manifest themselves in a silent and imperceptible manner, and also in the extreme form of violence and riots. The authors seek to analyze the various causes which are responsible for endemic communal violence in India. India has been the site of one of the worst communal riots that the world has ever witnessed. These include the Post-Partition riots (1946-47), the Bhagalpur Riots (1989), Sikh Riots (1984), Bombay Riots (1994), Godhra Riots (2002) and the more recent Muzaffarnagar Riots. The unparalleled frequency of communal frenzy in India makes it relevant to examine the various Bills which were introduced to tackle the menace of communal and targeted violence. The authors have attempted to analyze these Bills and examine their actual practicality and applicability. The authors have also given certain recommendations which would enable the Government to tackle Communal Violence.*

## I. DIMENSIONS OF COMMUNALISM IN INDIA

*"Long years ago we made a tryst with destiny, and now the time comes when we shall redeem our pledge, not wholly or in full measure, but very substantially. At the stroke of the*





*midnight hour, when the world sleeps, India will awake to life and freedom. A moment comes, which comes but rarely in history, when we step out from the old to the new, when an age ends, and when the soul of a nation, long suppressed, finds utterance."*[1]

As Jawaharlal Nehru announced India's arrival at the world-stage the entire country came to a standstill and listened with rapt attention. The country was engulfed with a sense of pride and elation. On the same day, in marked contrast to the seemingly ubiquitous utopia, were the lanes of Noakhali and other cities in Bihar, Bengal and Punjab which were torn apart by communal riots and instances of violence and atrocities. This is known as the "Communal Holocaust",[2] which was a direct consequence of the partition of India on the basis of religion. The brunt of partition was borne equally by minorities on both sides of the border as they were victims of unspeakable atrocities. In the span of a few months 500,000 people were killed and property worth thousands of millions of rupees was looted and destroyed.[3] Ironically, the moment of India's birth or coming to 'life' was marred by death and despair due to large scale communal violence.

India is one of the most culturally diverse countries of the world. The diversity of our nation has been beautifully captured by Dr. S. Radhakrishnan who described India as a symphony where there are, as in an orchestra, different instruments, each with its particular sonority, each with its particular sound.[4]

Its population consists of people belonging to all major religions of the world , 22 scheduled languages belonging to four different families,

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1 Excerpt from the historic speech by Jawaharlal Nehru while addressing the Constituent Assembly on August 15th 1947. This speech has been rated as one among the 14 great speeches of 20th century by The Guardian.

2 As per the Oxford Dictionary, Holocaust means "destruction or slaughter on a mass scale, especially caused by fire or nuclear war." Historically, it refers to the mass killing of Jews under the German Nazi regime during World War II. A parallel has been drawn between the killing of Jews (who were minorities) and the atrocities perpetrated upon minorities during the partition in both India and Pakistan.

3 BIPAN CHANDRA, INDIA SINCE INDEPENDENCE, 98 (Vikas Publishing Home, New Delhi, 2008).

4 CONSTITUENT ASSEMBLY DEBATES, Vol. I , Part III (Part of address made on 11th December, 1946) (available at: http://parliamentofindia.nic.in/ls/debates/vol1p3.htm) (accessed 10th January 2014).

namely Indo Aryan, Dravidian, Austro Asiatic and Tibeto-Chinese along with 179 other languages and 544 dialects. Thus, the cultural landscape of India assumes mind boggling cultural diversities. We must understand that this Diversity is a double edged sword, which may act as strength, as well as a hindrance to the unity of a nation. There is a tendency among communal forces to despise plurality in a society, they lay undue emphasis upon homogeneity. This is true of Hitler's fascist regime in Germany, which was hell bent upon ethnic ''cleansing'' by wiping out the Jews. A similar model remains the unfulfilled dream of the communal forces operating in our country, who view this diversity as a weakness. The richness of our culture cannot be fathomed by an individual with an exclusivist and constricted outlook towards cultural identity.

Two hundred years of British rule were marked with social, political and economic inequalities, exploitation, bigotry and attempts to divide our culturally divergent society along communal lines. Leaders of our nation had envisaged restructuring of the social order to eliminate all such evils and establish an egalitarian society. They believed that modern democratic tradition and exposure to modern scientific education would enable people to break the shackles of orthodoxy and rise above all fickle religious affiliations. Sadly, we have failed our leaders, as communalism and communal violence are still seen as a serious threat to the unity, integrity and secular fabric of our nation.

Communalism may be defined as a feeling of antagonism between two groups based on their religious affiliations. Discrimination may be a milder manifestation of that antagonism, whereas the extreme form of such antagonism is communal riots, which involve loss of life and property. However, riots are only an overt manifestation of the existing animosity. The communalist sentiments are always present in a silent and unapparent manner. The imperceptible undercurrents play a major role in inciting communal violence. Both these aspects can be seen to form as components of the same continuum, each complementing the other.

Therefore, communalism is inevitably a conflict between the supposed interests of majority and the minority communities in a society. In India, communalist sentiments with respect to religion have always been a fertile ground for political actors to exploit and they have skillfully used it to further their vested interests. The political class has played a vital role in keeping these evil and vengeful communalist sentiments





alive even today and transforming it to an ideology .Fortunately, aggressive communalist beliefs and tendencies with respect to language subsided post the creation of states on linguistic basis.[5] Therefore, in common parlance communalism has come to be associated with religious narrow mindedness or religious fanaticism, which is in opposition to the principle of Secularism embodied in our Constitution. We shall examine the principle of Secularism in the next section, and the threats posed by Communalism.

## II. Secularism Within the Constitutional Framework: An Antithesis to Communalism

*"Render unto Caesar the things that are Caesar's and to God the things that are God's."*

Communalism is antithesis to the principle of Secularism. Secularism was essentially believed to be a western concept and its roots could be traced to the Bible. This oft quoted phrase from *The Bible* presents a very vivid demarcation between the affairs of the State and the Religion. This was possibly the first conception of what secular actually means.

In modern context Secularism has been most aptly defined by Amartya Sen as the principle which basically demands symmetric treatment of different religious communities in politics and in the affairs of the State. As a principle, Secularism was not incorporated in the Constitution initially, as the framers of our Constitution were of the opinion that the creation of Pakistan along communal lines had already solved our problems to a large extent and it would not raise its ugly head in independent India.[6] Understandably, apprehension of instances of violence led the Muslims to keep a low profile and resulted in non-

[5] BIPAN CHANDRA, INDIA SINCE INDEPENDENCE, 115 (New Delhi: Vikas Publishing Home, 2008).) The State Reorganisation Commission was established in 1953 to look into the creation of states on a linguistic basis. It consisted of Fazl Ali, KM Panikkar and HM Kunzru. The Commission submitted its report in 1955, and recognized that the boundaries of Indian states should be altered on the basis of language, and recommended the formation of 16 States and 3 Union territories. In pursuance of the recommendation of the Commission, Andhra Pradesh was the first State to be formed on a linguistic basis in 1956.

[6] ASGHAR ALI ENGINEER, COMMUNAL RIOTS AFTER INDEPENDENCE 1 (Centre for Policy Research, 2009).

assertiveness. Figures suggest that after the post partition violence had subsided, there was a relative calm on the national scene for almost a decade. The focus had now shifted from mindless violence to the huge task of nation building which involved carrying out land reforms, chalking out a viable economic framework for the infant nation and tacking the linguistic hardliners.[7]

The word 'Secularism' was included in the Preamble by the 42nd Amendment Act, 1976. Indira Gandhi was the chief architect of this Constitutional Amendment Act. It is pertinent to understand secularism from the perspective of the framers of Constituent Assembly and the architect of 42nd Constitutional Amendment Act to grasp its fundamental nature. Indira Gandhi was of the opinion that Secularism or *Dharmanirpekshta* should not be taken literally to mean religious non alignment, but equal alignment with each religion.[8] This was practically a reiteration of the view of the Constituent Assembly through Dr. S. Radhakrishnan. The Constituent Assembly opined that no one religion should be given preferential status or unique distinction. According special privileges to any religion would be a violation of the basic principles of democracy and contrary to the best interest of religion and government. No group of citizens shall arrogate to itself, rights and privileges which it denies to others.[9]

Thus, there was an emphasis on extending the principle of democracy to the arena of religion. It was envisaged that the Indian state would not be indifferent, but equally respectful towards all the religions. It must be understood that noble values like secularism, democracy and equality would go a long way in binding together the vastly fragmented Indian society.

The essence of secularism in Indian context differs from the western

[7] RAMACHANDRA GUHA, INDIA AFTER GANDHI 187 (Harper Perennial; Reprint edition 2008). The decade following India's independence was marked with linguistic violence. Demands had crept up in the southern region for division of states on the basis of language and serious conflict between Gujarati and Marathi speaking population in the province of Bombay. The existing situation was exacerbated by continued violence and death of a Gandhian Telugu activist Potti Sriramulu, following which Andhra was created and demands for making states on linguistic basis was recognised. Post the creation of states on linguistic basis, such instances of violence have come to an end.

[8] P. CHATTERJI, SECULAR VALUES FOR SECULAR INDIA 2 (Paula Press, 1995)

[9] S. RADHAKRISHNAN, RECOVERY OF FAITH 202 (Indus Publishing Company, 1981)





conception. The western understanding "secularism" is indifference towards all religious matters. For example, secular system in USA is such that religion is regarded as a private matter and the State is not concerned with it in any way. The conception of secularism in India is slightly different; it is characterized by the State's respect for all religions. The authors consider this to be a reason for the fragility of Indian Secularism. The importance of Secularism in the scheme of Constitution has been recognized by the landmark case of *Kesavananda Bharati v. State of Kerala*,[10] which lay down the *basic structure doctrine*. Justice Sikri while elaborating upon the *basic structure*[11] mentioned Secularism as one of its essential components. This view was supported by the whole bench comprising of 13 judges. S.R Bommai Case,[12] Ismail Farookhi's[13] and a catena[14] of recent cases have also reiterated that secularism is a part of the basic structure.

## III. Communalism as an Ideology: Factors Which Sustain the *Frankenstein's Monster*

> *"The basic cause for communal frenzy is the same: poverty, economic deprivation and a history which has been perverted and misused by religious zealots."*[15]

Communalism has been an endemic feature of Indian political system and social life since independence. Interestingly, historical accounts show that communal sentiments and instances of communal violence were not unknown, but insignificant, even in the Medieval Ages.[16] Diversity had always been a characteristic feature of Indian

[10] Kesavananda Bharati v. State of Kerala, (1973) AIR SC 1461.

[11] *Ibid*. Basic Structure Doctrine was propounded by Justice HR Khanna. Khanna held that there is no implied limitation on the amending power of the Parliament but that does not include the power to abrogate the Constitution. The powers of the Parliament are wide but they cannot destroy the basic structure of the Constitution. The basic structure has not been explicitly defined anywhere, the 13 judges on the Bench had differing opinions on what constituted the basic structure. J. Sikri was of the opinion that secularism formed the basic structure of the Constitution. This view was reaffirmed in a catena of cases as discussed later.

[12] S.R. Bommai v. Union of India, (1994) AIR SC 1918.

[13] Ismail Faruqui & Ors. v. Union of India & Ors., (1995) AIR SC 605.

[14] Bharatiya Janta Party & Anr. v. The State of West Bengal & Ors., (2013) AIR Cal 215; Joseph Sriharsha Educational Society & Ors. v. State of AP, 2014 (1) ALT 16.

[15] M.J. AKBAR, RIOT AFTER RIOT 2 (Penguin Books India, 1991)

society, but a communal hue was added to it by the British Rule.[17] It was an essential cog in their Divide and Rule policy. The vices of electoral politics and inherent defects in our society sustain it in modern day India. This part shall deal with the causes of communal violence.

On the exterior, communalism appears to be a result of the politics of identity and is believed to be entirely grounded in religion, caste or linguistic group. This assertion is not completely correct. Religion is emotionally appealing and thus acts as powerful tool of mobilization of the masses. Indian society is the perfect reflection of Marx's religion and opiate analogy. But there are several other factors, which are so not apparent, but at the same time very important in propagating communalism as an ideology. Attempts to define communal violence in purely religious terms would be fallacious. Diversity as a progenitor of communalism has already been discussed in detail.

Religious and cultural differences in a society as diverse as India are unavoidable and inevitable. But these differences assume antagonistic proportions as a result of manipulation, deceit and misrepresentations by the political parties. Scholars agree that modern democratic politics and capitalism being essentially competitive in nature aggravate the problem.[18] The process of democratization has made the minorities more assertive of their rights. This in turn has led to a tendency amongst the political class to pacify them. Leading political parties have often been accused of following a policy of "Muslim Appeasement" to strengthen

[16] Harbans Mukhia, *Alternative to Communalism,* FRONTLINE Feb 1989 Issue. The medieval period in Indian history was marked by a dominant Muslim rule, beginning with the Delhi Sultanate in 1206 and the great Mughal Empire later. Even in situations when the medieval Muslim State was engaged in life and death political conflicts with various religious groups- the Jats, Maraths, Hindus and the Sikhs, peace prevailed at the social level. This was because political mobilisation was far less then, and very seldom when it did exist, it had the State as its target rather than another community.

[17] JINNAH V. GANDHI, RODERICK MATTHEWS 37 (Hachette India, 2010) The British had created separate religious electorates by the Morley Minto Reforms of 1909, and this continued till 1947. It was envisaged to be an attempt to ensure that minority interests were adequately represented. They were not given substantial executive powers, but were expected to voice their opinion and vote according to what they were. This ensured that religious identity came before policy in Indian electoral politics from the very beginning. Thus, the seeds of communalism were sown by the British.

[18] ASGHAR ALI ENGINEER, COMMUNAL RIOTS AFTER INDEPENDENCE 1 (Center for Study of Society and Secularism, and Shipra, Delhi, 2004).





their vote banks. The Shah Bano[19] Controversy was a classic example of communal appeasement.

*Shah Bano Controversy: The Irreversible Chain Reaction*

Shah Bano, a divorced Muslim woman approached the Court for maintenance. The Supreme Court obliged by allowing her maintenance under Section 125 of Criminal Procedure Code.[20] This section provides for maintenance to a divorced woman who has no means of income and is unable to maintain herself. The judgment had come as a huge relief to the destitute and deprived women, who had been driven out of their matrimonial homes. Invocation of Section 125 would provide relief to every woman irrespective of her caste, creed or religion. But the Muslim orthodoxy, comprising of the influential *ulemas* and *maulvis* viewed it as a derogation of the Muslim Personal Law. The grant of alimony to a Muslim woman was seen to be in conflict with the Islamic law. The current Government headed by Rajiv Gandhi wilted under pressure as elections were scheduled to be held in many states that year and Muslim votes would play a decisive role. The Parliament hurriedly passed the *Muslim Women (Protection of Rights on Divorce) Act 1986*, with the aim of nullifying the Shah Bano judgment to pacify the Muslim clerics. The passing of the said act would eclipse Section 125 of CrPC when dealing with Muslim women.[21] This case prompted a debate on the importance of

[19] Mohd. Ahmed Khan v. Shah Bano Begum, (1985) SCR (3) 844

[20] Code of Criminal Procedure 1973, § 125;
Section 125: Order for maintenance of wives, children and parents.
(1) If any person having sufficient means neglects or refuses to maintain-
(a) his wife, unable to maintain herself, or
(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or
(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or
(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct: Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means

having a Uniform Civil Code in the country, which would treat all citizens equally irrespective of their religion.

This controversy triggered a chain of events which have had serious implications on the society and politics in India. This controversy revived the communally charged atmosphere and gave the communalist forces a fresh lease of life. An immediate consequence was seen in the district of Bhagalpur in Bihar in 1989.[22] This controversy triggered a chain of events, which led to the opening of the gates of Babri Masjid on the request of VHP (a right wing Hindu organization, Vishwa Hindu Parishad) and then its consequent demolition.[23] The Bombay riots in 1993 and the serial bomb blasts in Bombay in the same year were serious ramifications of the perverted approach followed by our political masters. This was probably the first instance of a terrorist attack on India and many were to follow in future. Thus, policy of minority appeasement turned into a *Frankenstein's Monster* and even today, India is reeling under the impact of the Government's response to the Shah Bano judgment.

Religious and cultural differences in a society as diverse as India are unavoidable and inevitable. Naturally, they give rise to divisive and disruptive tendencies. It is the duty of the political class to curb such tendencies and promote a sense of brotherhood amongst different communities. Mahatma Gandhi, Maulana Abul Kalam Azad, Jawaharlal Nehru and Sardar Patel represented the brand of catholic, idealistic and broad minded leaders who supported and promoted communal harmony. Sadly, these *leaders* have been replaced by a class of shrewd *politicians* who are devious and shorn of principles. They would not hesitate in

[21] The Latin maxim Lex specialis derogat legi generali shall operate in this case. This maxim forms an essential component in the Interpretation of Statues. It means that an existing general law (in the instant case, Section 125 of CrPC) governing a particular subject shall be eclipsed on the formation of a specific law governing the same subject.

[22] *Supra* note 18. Bhagalpur Riots were a direct consequence of the Government's orders to reopen the gates of the Babri Masjid post the Shah Bano judgment. The entire issue was communalised by the Vishwa Hindu Parishad and Bharatiya Janta Party by appealing to the religious sentiments of the Hindus by raising the question of Ram Janma Bhoomi and issuing the clarion call for the construction of the Ram Mandir at the site of the Masjid. VHP had organised a procession at Bhagalpur for collecting bricks for the construction of the Ram Mandir. Bhagalpur has a sizeable Muslim population, and the entire incident took a communal turn. This resulted in the worst riots India has seen since independence.

[23] Malik Rashid Faisal, *The Ghost of Shah Bano,* BUSINESS AND ECONOMY, 17th January 2014, available at: http://www.businessandeconomy.org/14052009/storyd.asp?sid=4364&pageno=1.





flaring the communal passions to pit one community against the other.

There have been noticeable economic trends behind communal violence in India. These trends are not visible on the exterior, but they are intricately and surreptitiously wound up with the seemingly broader religious purpose. Vying for economic resources and the subsequent economic competition has been identified as a major cause of communal violence in India. However, this dimension has not been explored or highlighted by the media or socio political analysts. The politicians and opportunistic individuals are adept in imparting a communal color to such conflicts and reap benefits. Thus, a class struggle in Marxian context is transformed into a religious conflict.

The most striking example of this phenomenon is the town of Godhra in Gujarat. It has always been a communally sensitive town as a result of rivalry between the Ghanchi Muslims and Sindhi community. The hostility may be traced back to partition after which a lot of Sindhi businessmen migrated to this small town and threatened the monopoly of the Muslim businessmen. Ensuing tensions were given a communal color to fulfill certain vested political ambitions. The landscape of India is littered with such examples, where economic factors were camouflaged as communal tensions.[24] Thus, the root cause of spreading endemic violence is economic: religious, linguistic and ethnic differences provide the excuse and motivation to indulge in it.

Lack of Education and awareness makes the people susceptible to a communally charged atmosphere. Low level of literacy has played a major part in making communal violence endemic in India. The Sachar Committee[25] Report suggested that a plethora of reasons were responsible for low levels of education amongst the Muslims. The

[24] *Supra* note 18. Moradabad Riots (1980) were caused by economic competition between the Punjabi Hindu traders and upcoming Muslim artisans, challenging the Punjabi monopoly of brass artefacts. Similarly, Varanasi has traditionally been a site of communal conflicts as a result of animosity between the Muslim julahas and the Marwaris and other Hindu business communities. A Land dispute between two parties sparked off the riots in Bihar shariff in 1980.

[25] This was a High Level Committee set up under the chairmanship of Justice Rajinder Sachar in 2005. The objective was to prepare a Report on the Economic, Educational and Social status of the Muslims in India. The Committee was formed on 9 March 2005 by a notification of the PMO and submitted its 405 page Report on 17 November 2006. Available at: http://www.minorityaffairs.gov.in/sites/upload_files/moma/files/pdfs/sachar_comm.pdf, accessed 8th January 2014.

literacy rate among Muslims in 2001 was 59.1 % which is far below the national average (65.1 %).[26] The report suggested that the ''communal'' contents of the textbooks, as well as the school ethos have been a major cause of concern for Muslims in many states.[27]

The Report also pointed out that education was not easily accessible to all sections of the Muslims easily. Education being a State subject[28] for a very long time did not come under the ambit of Central Government. Textbooks were distorted as per the whims and fancies of State Government and there is lack of uniformity. At large, the task of educating the Muslims is left to the *madrasas* and *maktabs*, which is preventing a holistic integration of the community with the mainstream. Education in *madrasas* might be deemed to be ''culturally appropriate'' by the clerics, but it has done little to fetch the students jobs or sufficient economic opportunities.[29] It has led to further isolation and alienation of the Muslims from the mainstream. This sense of alienation leads them to secluded and somewhat sheltered existence in the ghettos. ''Ghettoisation''[30] insulates them from the rest of the society and often they are viewed with suspicion. Sachar Commission has recognized this aspect as a major cause of their backwardness, and also a major cause for communal violence. The minority community tends to develop a sense of collective belonging or solidarity which can be harnessed and channelized by unprincipled and unscrupulous elements for destructive purposes.

[26] Sachar Committee Report, 52, available at: http://www.minorityaffairs.gov.in/sites/upload_files/moma/files/pdfs/sachar_comm.pdf, accessed 8th January 2014.

[27] *Id* at 16.

[28] CONSTITUTION OF INDIA 1950, Seventh Schedule. Education had been a part of State List till 1976 (Entry 11 of List II). However, by the 42nd Amendment Act of 1976, it was deleted from the State List and added to the Concurrent List (List III) as Entry 25.

[29] *Supra* note 26. The employment of Muslims in Govt. jobs and PSU's is abysmally low. The rate of employment of Muslims is not in proportion to their share in the population of the country. Less than 6% Muslims are employed with PSU's or Government. Their share in Class I Government Services and other State services- IAS-3% ,IFS-1.8 % , IPS-4% , Indian Railways- 4.5%, Education Department (State Level)- 6.5 %, Home Department (State Level)- 7.3%, Health Sector-4.5%, Transport Sector-6.5% , Judiciary-7.8 % . The most striking feature of this Report was that a large share of Muslim population was self-employed, which clearly shows a bias or prejudice of the employers against them.

[30] Definition of Ghetto: A ghetto is a part of a city in which members of a minority group live, especially because of social, legal, or economic pressure. The term was originally used in Venice to describe the part of a city to which Jews were restricted and segregated. OXFORD ADVANCED LEARNERS DICTIONARY (2010)





Rumors play a significant role in instigating communal violence. Mostly, instances of communal violence have been instigated over trivial issues which were blown out of proportion, and led to massive riots. Rumors are used as an instrument to flare the communal passions by appealing to religious sentiments of various communities. The infamous and brutal Noakhali Riots in 1946-47 were sparked by rumors of the alleged ill-treatment of Hindus in certain districts of the erstwhile East Bengal. Bhagalpur Riot of 1989 (considered to be one of the worst since independence)[31] was also a result of rumors that around 200 Hindu students had been killed by Muslim a mob; another rumor was spread that 31 students had been mercilessly murdered and dumped in the compound of a College.

*(This part has discussed the various socio-political and economic aspects which are responsible for this phenomenon. It is essential to have a thorough understanding of these aspects to examine the effectiveness and efficacy of the various Communal Violence legislations that the Government introduced in the years 2005, 2011 and 2013. The next part shall analyze these legislations and their significance in tackling communal frenzy in light of the causes mentioned above.)*

## IV. Critical Assessment of Bills Against Communal Violence

*'All violence is the result of people tricking themselves into believing that their pain derives from other people and that consequently those people deserve to be punished.'*[32]

The Unity, integrity and the secular fabric of our country has been constantly threatened by Communal violence since Independence.[33] The problem of communal riots arises when two or more communally identified groups clash with one another. The inception of this problem can be traced back to the late 18th century riots in the modern day

[31] Asghar Ali Engineer, *Bhagalpur Riot Inquiry Commission Report,* ECONOMIC AND POLITICAL WEEKLY, Vol. 30 No. 28, July 15, 1995.

[32] Marshall Rosenberg, He is a well-known American Psychologist and Author and is known for his remarkably work titled Nonviolent Communication (NVC) which helps to resolve differences and conflicts between the parties peacefully.

[33] B. Rajeshwari, *Communal Riots In India-A Chronology* 1, Institute of Peace and Conflict Studies Research Papers (2004).

Ahmedabad.[34] Communal tension and riots began in India only during the last quarter of 18th Century.[35] As already discussed, communal violence is very seldom the result of immediate actions or religious animosity; in fact they are the result of the conflicting political and economic interests.

An event is identified as a communal riot if there is violence and two or more communally identified groups confront each other or members of the other group at some point during the violence.[36]

Since independence, riots arising out of communal tensions have claimed approximately 20,000 lives and have resulted in umpteen causalities. The Indian procedural and substantive laws have provisions dealing with Offences Relating to Religion,[37] but they have been found to be inadequate. The psyche of the nation has been scarred by the Godhra riots in 2002, 17 other riots of varying magnitudes and the more recent Muzaffarnagar riots. In light of these developments, there is a need for effective laws dealing with communal violence. It was only after the barbarous Godhra riots of Gujarat that the human right activists' demanded for a separate legislation which could comprehensively discuss and redress the menace of Communal Violence. There was a demand to add teeth to the laws dealing with this issue and they should be able to provide proper justice and rehabilitation to the victim. It was only then that the Central Government came up with the Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005, followed by the Prevention of Communal and targeted violence (Access to justice and Reparation) Bill, 2011 and finally the Prevention of Communal and targeted violence (Access to justice and Reparation) Bill, 2013.

Unfortunately, none of these Bills assumed the force of law as they were not approved by the Parliament. It has also been alleged that the bills were introduced by the government in specific time-frames so as to hide its incompetence to fight the menace of Communal violence and at the same time targeting the religion based vote-bank politics. The government was even blamed that through these bills they are attempting to complicate the issue of communalism and concentrating on the

[34] *Ibid.*

[35] BIPAN CHANDRA, COMMUNALISM IN MODERN INDIA 4 (Vikas Publishing Home, New Delhi, 1984).

[36] ASHTOSH VARSHNEY, ETHNIC VIOLENCE AND CIVIC LIFE 309 (Yale University Press, 2002).

[37] Indian Penal Code, 180, Chapter XV.





politics of Communal Polarization.

### *A. Communal Violence (Prevention, Control And Rehabilitation Of Victims) Bill, 2005*

The very first bill i.e. the Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005 was questioned and criticized on the primary ground of its comprehensiveness and effectiveness.

It was perceived to be inadequate to address the root causes of Communal violence by the Rajya Sabha.[38] Clause 55 of the Draft Bill was criticized by the States,[39] as it provided that 'if the state is unresponsive or inactive, then the center shall have the power to take all immediate measures to suppress and control the situation to prevent violence'. The "power to take all immediate" action was so open to interpretation and that it would have opened a Pandora's Box. Thus, this clause could very conveniently be used as a tool by the Central Government to belittle the autonomy of the States.

The Bill laid down the procedure for payment of immediate compensation to the victims. But it failed to address the very fundamental questions like *when*, *by whom* and *how* would the compensation be paid.[40] Such incoherent and inconsistent provisions lay scattered throughout the Bill, as a result of which it was never passed. After a gap of five years the government proposed another bill with a number of modifications and it was introduced as the Prevention of Communal and targeted violence (Access to justice and Reparation) Bill, 2011.

### *B. Prevention of Communal and Targeted Violence (Access to Justice and Reparation) Bill, 2011*

The explanatory note of the draft bill aims to enhance the State

[38] 122nd Standing Committee report on The Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005.

[39] *Ibid.* In all, 12 states responded to the inclusion of Clause 55. Gujarat, Jharkhand, Mizoram, Rajasthan, Uttar Pradesh, Tamil Nadu, Madhya Pradesh and Maharashtra were among the major states who openly opposed the inclusion of clause 55 in the bill whereas, states like Arunanchal Pradesh and Punjab refrained from commenting upon it. Himachal Pradesh was the only State to have accepted it.

[40] Parliamentary Research Service, Legislative Brief, Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005, available at: http://www.prsindia.org/uploads/media/1167470057/legis1167477972_legislative_brief_communal_violence_bill_2005_FINAL.pdf, accessed 17th January 2014.

accountability and attempts to correct discriminatory exercise of State power in the context of identity-based violence. The bill received staunch criticism since it was alleged that it included several clauses which could exacerbate the problem of communal violence in our country.

There were certain clauses in the draft bill which were subject to severe criticism and condemnation. One such clause was Clause 3(c), which defines "communal and targeted violence" which is dependent upon the definition of ''group''. As per the definition of "group" in clause 3(e)[41] of the Bill, ''group'' would include only religious and linguistic minorities. This was widely criticized as an outcome of poor draftsmanship. Clauses 3(e) when read along with clause 3(k),[42] which defines a ''victim'', would mean that only a person belonging to religious and linguistic minorities could technically be the 'victim' of a riot. The use of terms like 'psychological harm' in clause 3(k) and 101(f)[43] has made the provisos of the clauses very subjective and has opened flood gates of people claiming compensation. This can be explained with a help of a simple example

Scenario 1: A teacher in a class gives an example of the serial blasts in Bombay in the year 1992, and highlights the role of the alleged terrorists who belonged to a particular religious group, A student belonging to that minority group might consider it to be the cause of psychological harm and the teacher would be booked under this Clause

1. For making the environment hostile and offensive (under clause 3(f) (v))[44] and
2. Causing mental and psychological harm to the student (under

[41] Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005, Clause 3(e): "group" means a religious or linguistic minority, in any State in the Union of India, or Scheduled Castes and Scheduled Tribes within the meaning of clauses (24) and (25) of Article 366 of the Constitution of India;

[42] Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005, Clause 3(k): "victim" means any person belonging to a group as defined under this Act, who has suffered physical, mental, psychological or monetary harm or harm to his or her property as a result of the commission of any offence under this Act, and includes his or her relatives, legal guardian and legal heirs, wherever appropriate;

[43] Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005, Clause 101(f): psychological injury caused to such person;

[44] Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005, Clause 3(f) (V): any other act, whether or not it amounts to an offence under this act that has the purpose or effect of creating an intimidating, hostile or offensive environment.





clause 3(k))

3. The student would be entitled to claim compensation under clause 101(f).

Therefore such provisions and their provisos in the draft bill might lead to its misuse by a minority (non-dominant) group.

Clause 3(f)(v) provided that any act, whether or not it is an offence ,according to the bill would be considered an offence, if in any manner it might add to the making of a ''hostile environment''. This proviso is vague in nature and it seems that the intention here was to bring anything and everything under the ambit of an offence.

Modesty of a woman is not contingent upon her religion. This was the major question which was raised against the draft bill of 2011 with reference to clause 7 which defines 'sexual assault'. The clause provided a very strong and comprehensive definition of sexual assault. But it covered only women belonging to minority group and no possible means of redressal was provided for the victims of sexual assault belonging to the majority community. It was condemned by the National Commission for Women and other feminist institutions and activists. It increased the possibility of false allegations of rape and frivolous charges of sexual assault by women belonging to minority (non-dominant) groups.

This bill was not only criticized by eminent legal jurists,[45] state governments[46] and opposition parties,[47] but also by army men and public servants. Clause 13 along with clause 14 talks about 'dereliction of duty' and 'offence by public servant on breach of command responsibility'; it

[45] 'Justice J.S. Verma and Srikrishna were among the key eminent jurists who disapproved for the draft bill against Communal Violence.' Seema Chishti, *Justices Verma and Srikrishna red-flag NAC draft anti-communal violence Bill,* INDIAN EXPRESS 23rd January, 2014 available at: http://archive.indianexpress.com/news/justices-verma-and-srikrishna-redflag-nac-draft-anticommunal-violence-bill/808751/0

[46] State Government of Gujarat, Uttar Pradesh, Odisha, and Tamil Nadu were some of the major states who disapproved the bill. There were many other states who considered that the legislation was a subject of state list and my making legislation on such a subject the central government tried to infringe the matters under the state list.' Vinay Kumar, *Cabinet clears Communal Violence Bill*, THE HINDU, 17th December 2013.

[47] 'Bhartiya Janta Party (BJP) and other state parties registered their dissent in relation to the draft bill against Communal violence.' *BJP to oppose communal violence Bill in Parliament,* THE HINDU, 20th January 2014, available at:http://www.thehindu.com/news/national/bjp-to-oppose-communal-violence-bill-in-parliament/article5418405.ece.

aims to punish the officials including the policemen and army men if they fail to prevent the communal disturbance. Under clause 15 of the bill an officer would be vicariously liable for an act done by his or her subordinate, if there was a breach of command responsibility. Presence of such clauses would disillusion the officers, as it effectively leaves no room for them to make an error in judgment. Under this Clause, they can be punished for the same. As a result, they would be hesitant or reluctant to either give, or even take orders from their seniors. Thus, a situation which demands immediate and effective remedial action may be left unattended for the fear of a penalty. The Government should have focused upon empowering the officials to tackle instances of communal frenzy, instead of curtailing their powers. Thus, this Clause which was intended to be a panacea to the menace of communal violence would in effect, indirectly inflame it.

Clause 20 of the bill states that the government should establish a National Authority of Communal Harmony Justice and Reparations (NACHJR). The NACHJR was proposed to have seven members out of which four of them would belong to the non-dominant (minority) group. The powers of the NACHJR were laid down from clause 31 to 36. These clauses empowered the NACHJR to conduct an independent inquiry[48] and for that matter it can engage any national or state agency for its investigation. It even shared the status of a civil court[49] and also has a power of issuing summons; receiving evidence on affidavits and other powers which may relate to the incident and can be prescribed.[50] Clause 36 of the draft bill empowered the NACHJR to consider the complaints against the armed forces of its own accord. They were not required to intimate the Government of any such action being taken by them. Thus, the Government created a body with both judicial as well as administrative functions. Detractors have questioned this aspect of the Bill as a gross deviation from the principle of separation of powers, which forms a basic structure of our Constitution. However, this is a very feeble argument and does not hold good as special powers are

[48] Prevention of Communal and Targeted Violence (Access to justice and Reparation) Bill, 2011, Clause 32.

[49] As mentioned in Clause 31(5) of the draft bill, NACHJR would act as a civil court when any offence as is described in section 175, section 178, section 179, section 180 or section 228 of the Indian Penal Code, 1860 is committed.

[50] Prevention of Communal and Targeted Violence (Access to justice and Reparation) Bill 2011, Clause 31(2) (a) to (e).





required to tackle emergency situations. Contrary to the popular perception, a major flaw in this Clause was the composition of the Committee and the manner of decision making. The Committee would consist of 7 members, out of which 4 would belong to the minority community. The decisions would be made on a majority basis. Thus, there is a possibility of such decisions being biased, and an inclination towards favoring the minority community cannot be ruled out. The Government should have refrained from imparting a ''communal'' character to a Commission whose primary task was to tackle communalism itself.

The nominal rights which are endowed to an accused by the Indian justice system were also ignored and overlooked in the draft bill of 2011. The basic structure of our constitution includes the application of the principles of natural justice like 'Innocent until proven guilty'. But, Chapter VI[51] of the draft bill of 2011 reverses this principle, and gives preference to the illogical and absurd sounding principle 'Guilty unless proven otherwise'. This was not only ultra-vires the constitution as violative of the basic structure, but was also found to be against the fundamental human rights, to which every accused is rightfully entitled.

This Bill would further render the functioning of the Police ineffective. Clause 58 of the draft bill deals with the procedure and remedies which a complainant can seek if his complain is not registered accurately. However, the use of words like 'if satisfied'[52] has made the provision very subjective and open ended. Chances of misuse of such power and attempts made to hamper and mislead the investigation would increase. Instead making an official as high as a Superintendent of Police duty bound to the complainant, the Parliament should have opted for a scrutinizing mechanism so that the complaint gets duly registered, and the police or any other competent agency may proceed with the investigation. Prima facie, this Clause

[51] Prevention of Communal and Targeted Violence (Access to justice and Reparation) Bill 2011, Clause 71, 72 and 73.

[52] Prevention of Communal and Targeted Violence (Access to justice and Reparation) Bill 2011, Clause 58 provides that if a complainant is not fully convinced that his complaint is accurately then he can approach the officials as high as the Superintendent of Police and register his complaint there and the officer in-charge his bound to conduct the enquiry either by himself or should order his junior to do the same.

appears to be of great utility to a victim and gives him a wide range of powers. But on closer examination, it seems to a populist move to create an impression of increased accountability. Such provisions would seriously impair the functioning of the Police. This provision was another instance of poor draftsmanship.

Clause 72 of the bill deals with the presumption of evidence against the accused. The said clause presumes the existence of evidence unless the otherwise is proved. This provision takes into consideration the mayhem caused during a communal violence and imposes the liability merely on the basis of suspicion. This is a blatant abuse of the process of law and would certainly shatter the faith of the masses in the judicial process.

The Prevention of Communal and Targeted Violence (Access to Justice and Reparations) Bill, 2011 not only discriminates between groups of people by distinguishing them as majority and minority, but its provisions are also ultra-vires and in direct conflict with the basic structure[53] of the Constitution. The Bill was full of loopholes and inconsistencies as a result of which it would not have been able to fulfill the object of its enactment effectively.

### *C. Prevention Of Communal And Targeted Violence (Access To Justice And Reparation) Bill, 2013*

The central government was under hibernation for a year and yet again in 2013, another Bill was introduced with minor changes. The opposition parties and many political thinkers are of the opinion that it was after the recent Muzaffarnagar (U.P.) riots[54] which galvanized the Government to table the new Prevention of Communal and Targeted Violence (Access to justice and Reparation) Bill, 2013. The two Bills tabled previously had to face a lot of criticism and were not accepted by the Parliament. The recent attempt to come up with a comprehensive legislation was also scrutinized and frowned upon by the opposition

[53] 'Basic structure' is not explicitly defined in the Indian Constitution nor does the Supreme Court of India laid down a strict definition of the same but in the case of Kesavananda Bharti v. State of Kerala, the Constitutional bench of Supreme Court has enlisted the subjects which form the basic structure of the Indian quasi federal system.

[54] Ajoy Ashirwad Mahaprashasta, *The Riot Route*, FRONTLINE, 4th October 2013.





parties, legal scholars and the state governments. Chief Ministers of many Indian states have voiced their dissent and termed the Bill as a 'recipe of disaster'.

There are certain improvements in the Bill, but it is still not free from anomalies. The ambiguity with respect to clause 3(f) (v) remains and this clause has been in the line of fire yet again. On the very same lines clause 3(e) when read with clause 4[55] can easily be misused by any person belonging to a minority (non-dominant) group. Under this section, any act of a person against another person belonging to the non-dominant group can be given a communal color irrespective of the fact whether the said act was done with or without the intention to cause communal violence. Thus, such a clause would become a potent instrument in the hands of certain people to add a communal connotation to any trivial matter.

Clause 10(b) of the new bill elaborates on the breach of command responsibility and on a similar line like that of the 2011 bill, it has made public servants, police and security agencies criminally liable if they fail to prevent the communal riots. It is contented that such laws would make the security agencies, public servants reluctant to take any drastic measures, and leave them vulnerable to political victimization. They may be made scapegoats to shield the incapability or malicious motives of the political class. This would seriously retard the effective functioning of these public servants. Many States were of the opinion that by making such a law, the Centre in trying to infringe the subject ambit which in provided in the state list in the seventh schedule[56] of the Indian constitution. Subject matters like 'law and order' and 'public order' are a part of the State list, therefore making such laws is not only equivalent to

[55] Prevention of Communal and targeted violence (Access to justice and Reparation) Bill, 2013, Clause 4, Knowledge.- A person is said to knowingly direct any act against a person belonging to a group by virtue of such person's membership of that group where:
(a) he or she means to engage in the conduct against a person he or she knows belongs to that group; or,
(b) With the knowledge that the person belongs to a group, he or she means to cause injury or harm to such person because of the membership of such person to that group.

[56] DR. J.N. PANDEY, CONSTITUTIONAL LAW OF INDIA, 44th Edition (2010) "State List includes 66 different subjects but entry 19, 20, 29 and 36 has been deleted by constitutional amendments. These include the subjects on which the state has exclusive power to make laws on subjects mentioned in the list."

offending the Indian constitution but is also against the principle of separation of powers between the Centre and the State.

Certain points of criticism remain unchanged even in the 2013 bill. The inclusion of clause 3(k) and 101(f) from the 2011 bill to the new draft bill of 2013 has been subject to tremendous criticism as it provides for an immeasurable and subjective ground[57] for classifying an individual as a victim and making him eligible for compensation.

There are definitely some key additions to the new bill of 2013. Clause 6 of the draft bill defines 'Hate propaganda'.[58] The government attempts to control the spread of communal violence by restricting the publication of articles which might hurt the religious sentiments of a community. But it may potentially infringe article 19(1) (a) of the Indian constitution. The clause starts with a non-obstante clause[59] which itself was questioned and criticised. Hate propaganda includes anything published or communicated or is made visible through sign or graphic representation which may incite or has potential to incite the communal violence. Clause 6 ends by stating that anything done in promotion of the fundamental right of speech and expression[60] and freedom of press[61] would not be included in 'hate propaganda'. However, there exists a very thin line between content published while exercising the fundamental right and content inciting hatred, so there should be a proper examination of content before fixing its category. But the draft bill does not provide for any mechanism or standard for the same. Leaving it solely to the government to decide the category in which certain content would lie not only restricts the freedom of press but would also lead to the victimization of press and the general public as well. A similar provision under the Indian Penal Code, Section 153A also exists with the same penal provision and punishment as that of the

[57] The said ground is of 'psychological harm' which would have opened the flood gates of victims claiming compensation.

[58] Prevention of Communal and targeted violence (Access to justice and Reparation) Bill, 2013, Clause 6, "whoever publishes, communicates or disseminates by words, or signs inciting hatred causing clear danger of violence against persons having a particular religious or linguistic identity"

[59] The non-obstante clause in a statue makes the provision independent of other provisions contained in the law, even if the other provisions provide to the contrary. See Brij Raj v. S.K. Shah (1951) AIR SC 115.

[60] Dr. Ambedkar's Speech in Constituent Assembly Debates, VII 980 (1st December, 1948).

[61] Indian Express Newspaper v. Union of India (1985) 1 SCC 641.





above mentioned clause. The existence and requirement of clause 6 is questioned on that ground as well.

Thus, even the draft bill of 2013 did not get enough support in the parliament to become in-effect law. Due to the above mentioned drawbacks in the 2005, 2011 and 2013 bills the dream of a comprehensive law against communal violence in India is still a utopia. The criticism, timing of introduction and the provisions of the above mentioned bills questions the 'political will' of the parties to remove the cancer of communal violence. The need of the hour should be to bring up an unbiased and comprehensive law against Communal violence and this can only be achieved when all the political 'agendas' and motives of the political parties to make against by exploiting the communities would be set aside.

## V. Recommendations & Conclusion

The above discussion deals with the fallacies in the proposed legislations and their inadequacy in dealing with the anti-social and unscrupulous elements, which fan the communal sentiments to fulfill their evil designs. The Government should avoid imparting a communal character to a legislation which was enacted to tackle communal violence itself. Various provisions of the Bills have been discussed, which would aid in furthering the communal propaganda instead of tackling it.

The time of introduction of these Bills these in the Parliament was sufficient to raise a suspicion over the motives of the Central Government. The popular perception is that the Government is using this Bill as an instrument to appease the minority to acquire an upper hand in the General Election scheduled to be held in 2014. Exploiting religious differences for vote-bank politics may have disastrous consequences, like the Shah Bano Controversy. Unscrupulous and power hungry politicians must be deterred from indulging in such petty tactics for electoral gains. Such acts threaten the unity of the nation, and undermine its integrity. These acts mount a direct attack on the very idea of an India based on egalitarian principles like Secularism. We propose that persons against whom charges of inciting communal violence are proven should be punished under Chapter VI of IPC, which covers Offences against the State or similar provisions under the new legislation which is likely resurface in some time. The

forthcoming bills should include proper provisions including the penalization of the anti-social and unscrupulous elements of the society. Such provisions would have a deterrent effect on those who use the existing communal divide of our society as a staircase to fulfill their political ambitions.

The fact that India still lacks proper education and awareness mechanism cannot be denied. The tendency of educated people getting involved communal violence is comparatively lower than that of uneducated people. The uneducated section of our society lacks economic opportunities. Therefore, they are an easy catch for the perpetrators of communal violence, as they can be easily brainwashed and used against one another spreading communal violence. Awareness is required to sensitize people to the cultural and religious differences. We need to perceive our historical past from a secular perspective. Misrepresentation has created such a deep gulf between various communities that reconciliation becomes very difficult. A narrow-minded approach would leave us vulnerable to everlasting conflicts and violence.

Further, the Indian definition of secularism also needs a reassessment. Communalism on such a large scale is considered to be specifically an Indian phenomenon, where the cause of each religious group is perceived to be essentially in conflict with the other group. Such a conception of Secularism indirectly promotes the Communal propaganda, and renders Indian Secularism fragile. Thus, there exists a communalism-secularism dichotomy which is the basic reason for widespread communal violence in the country.

It is pertinent to note that these legislations will merely help in mitigating the effects of a communally charged incident or communal riot. Policy makers need to take into account the various underlying factors responsible for endemic communal incidents. An attempt should be made to eliminate such instances in the first place, so that a legislation would not be needed to tackle the same. This is in line with the age old saying 'Prevention is better than cure'. The government may set up a Special Commission to identify the possible reasons and try to curtail such instances. This would require assistance and active involvement of experts along with adequate political backing.





The UNESCO constitution lies down that "Since wars begin in the minds of men, it is in the minds of men that defences of peace must be constructed**".** We know that cultural identity plays a major role in shaping up the personality of the individual and hence it is imperative that liberal approach to religious and cultural issues is inculcated in the people right from the start. It is but obvious that different people have different mind-sets and societies as a whole also have their own temperaments, so the idea is not to homogenize but to create an attitude of accommodating the other. The concept of respecting "*plurality and diversity*" would act as glue that would bind societies and make them tolerant towards other faiths.