NLIU LAW REVIEW

VOLUME – II **ISSUE – I**

FEBRUARY 2011

NATIONAL LAW INSTITUTE UNIVERSITY
KERWA DAM ROAD, BHOPAL - 462 044 (M.P.)

The NLIU Law Review is published by the students of National Law Institute University, Bhopal, India.

The NLIU Law Review publishes material on subjects of interest to the legal profession. It invites unsolicited manuscripts for publication. Such manuscripts should be sent in MS Word (.docs format) to *lawreview@nliu.ac.in* All citations and text generally conform to The Bluebook: A Uniform System of Citation (18th ed. 2005).

Recommended form of citation:

(2011) 1 NLIU L. Rev. <page number>

ADVISORY PANEL

PEER REVIEW PANEL

PUBLICATION AND DESIGN BOARD

Fourth Year Members
Archi Agnihotri, Bhavil Pandey and Vinesh Singh Chandel

Third Year Member
Prateek Mishra

First Year Members
Ayush Thaosen

CONTENTS

FOREWORD

ARTICLES

MESSAGE FROM THE DIRECTOR

The great painter Vincent Van Gogh said that "*Great things are not done by impulse, but by a series of small things b ought together.*" The Law Review was an effort on part of' a small number of students to instil in their colleagues within the University as well as in the other Law Universities, the quality of sound legal research and questioning. Seeing their enthusiasm for taking such an Initiative, it was a pleasure to watch their efforts bear fruit. On this note, it gives me immense pleasure to announce the launch of the Second volume of the NLIU Law Review.

The Law students in today's world are being exposed to a host of developments that are interconnected with the law. They are taught an extensive range of law subjects and current affairs, owing to the comprehensive nature of the academic structure in the Law Universities. It is therefore of utmost importance that these young minds are nurtured by encouraging debate and questioning. The Law Review seeks to provide for the same. It is a matter of immense joy to see how the students have, through hard work and perseverance, successfully launched the second volume of the Law Review.

I would like to take this opportunity to thank Justice Syed Rafat Alam, Hon'ble Chief Justice of the High Court of Madhya Pradesh for his encouragement and support as the Patron-in-Chief of the NLIU Law Review. I am also extremely grateful to Prof. Dr. Ghayur Alam, the Faculty Advisor; for guiding and assisting the students in their endeavour to achieve excellence. Finally, a note of thanks would be incomplete without the mention of the student body, whose untrammeled efforts have brought this Law Review into existence. I wish them all the best for the future.

Prof. Dr. SS Singh
Director, National Law Institute University, Bhopal

MESSAGE FROM THE FACULTY ADVISOR

The NLIU Law Review is an initiative of the student body of the National Law Institute University to provide an opportunity to the student community to develop their research and academic skills. The idea came alive with the publication of the First Issue of the NLIU Law Review which was received with great enthusiasm and encouragement by the legal fraternity.

Seeing the members of the Law Review come together to effectively tackle any problem posed before them with immense composure and focus has been indeed heartening. Meeting the expectations of the readers and surpassing the same has been a herculean task. The students have been able to marshal their past experiences in the present endeavor and also in charting out a future path. Their ability to work effectively and efficiently as a team in bringing this Volume of the Law Review has been commendable.

I on behalf of the student body and on my personal behalf would like to express my heartfelt thanks and gratitude to Hon'ble Justice Syed Rafat Alam, the Patron-in-Chief of the Law Review and the Chief Justice of High Court of -Madhya Pradesh for his constant encouragement and support. Our sincere thanks to Prof. (Dr.) S.S. Singh, the Patron and the Director of the University, for his guidance and support. We also thank the authors who have taken trouble to write articles for this Law Review.

We hope and pray that students keep working with the same zeal and vigour.

Prof. (Dr.) Ghayur Alam
National Law Institute University, Bhopal

EDITORIAL NOTE

With the firm belief that the young minds of today seek a medium of expression and debate, we came forth with the first issue with the hope that we may encourage them towards the same. On this note, with immense pleasure, we announce the launch of the second issue of the NLIU Law Review.

The issue contains ten articles which have been finalized for publication through a rigorous selection procedure. The articles deal with a plethora of topics ranging from Labour Laws, Constitutional Law, Intellectual Property Laws, Health Law, Corporate Laws and Alternative Dispute Resolution.

The changing face of the law to meet the changing social fabric has been elaborated in *Tracing the Right to Strike under the Indian Constitution*. The author seeks to highlight the loopholes in the landmark T.K. Rangarajan Case. It also explores the law in other jurisdictions such as South Africa and the USA pertaining to the same. In Biopiracy and its Growing Threat to Biodiversity in India: A Bird's Eye View the author has examined the relatively new concept of biopiracy and the legal scenario in India pertaining to the same.

In *Biopiracy and its Growing Threat to Biodiversity in India: A bird's Eye View* the author has examined the relatively new biopiracy and the legal scenario in India pertaining to the same, vis-à-vis the existing legal framework of Intellectual Property and Biodiversity Laws.

On a similar note, *Qua Vadis Advertising?: the Emerging Problem of Generic Disparagement* talks about the legal consequences of Generic Disparagement through case law analysis. The article also seeks to examine the issue from a constitutional point of view.

The usefulness of Arbitration in different areas of the law has sought o be explored in *In Court or No Court: Efficacy of Arbitration in IP Dispute Resolution.* The article also tries provides an interesting insight into the same with special reference to Intellectual Property Disputes. The Criminalization of HIV Transmission talks about causing spreading of the HIV virus to be viewed as a criminal offence. The article scrutinizes the issue keeping in view the basic principles of criminal law, as well as through a comprehensive understanding of international and domestic cases relating to transferring AIDS.

Functioning of Lok Adalats- A Critical Analysis attempts to comprehensively analyses the system of Lok Adalats and deals with the existing loopholes and makes an effort to provide solution for the same.

Insider Trading with Special Reference to the Satyam Saga seeks to provide a step-by-step analysis of the various stages of this incident of insider trading. The article analyzes the unique circumstances of this particular case and also discusses the evolution of insider trading laws in India. .

Ascertaining Investment: A Look at What is Bothering the ICSID talks about the issue of International Investment Agreements and attempts to establish an understanding about the history of the ICSID; the associated problems and solutions to the same.

Extra Territorial Operation of the Taxing Statute: The Income Tax Act, 1961 pertains to the extra territorial applicability of domestic laws. The author seeks to elaborate on the Income Tax Act, 1961 in India and the provisions of the Act which can have an extra territorial application.

We hope the issue fulfils the purpose of awakening the spirit of debate and inquiry in the readers and look forward to making the next issue an even bigger success.

Editorial Board

EXTRA-TERRITORIAL OPERATION OF TAXING STATUTE: THE INCOME TAX ACT, 1961

L Usha[*]

ABSTRACT

Jurisdiction is a sine-quo-non of sovereignty. It's an expression of power which the sovereign expresses over its subjects. While this principle is unambiguous, the power of a sovereign to legislate matters beyond its jurisdiction is a debatable one. There is no express prohibition with regard to the same in international law. But however states have to adhere to the doctrine of nexus in order to avoid arbitrariness. The position with regard to enforcement of taxing statutes beyond its territorial limits also functions on the same principle. It has resurfaced in the recent times especially with regard to the Indian Income Tax Act of 1961.There is no express provision in the Act which lays down that the Act shall have extraterritorial application. However based on the power granted by the parliament under Article 245 of the Indian Constitution it can be inferred that an Act which has extraterritorial operation cannot be declared to be illegal. Many cases have emerged before the Income tax authorities in the recent times with regard to enforcement of the Act vis-à-vis

[*]L Usha is a fourth-year student at Gujarat National Law University. The author may be reached at gnlu.usha@yahoo.com.

non-residents. This is so because the various provisions of the Act seek to charge tax based on particular criteria, for example based on residential status, place of accrual, deeming provisions and business connection. Therefore it can be said that the Act operates extraterritorially only when some nexus is established with the object sought to be taxed. This article seeks to explore this proposition.

The author has first attempted to establish the position in International Law with regard to extraterritorial operation of legislations of sovereign states. An attempt is made to delve into the doctrine of nexus is which is subsidiary to the above stated principle. Later the author has moved to the core issue of this article which is extraterritorial operation of the taxing statutes with special reference to the Income Tax Act, 1961. This involves discussion of various provisions of the Act which entail extraterritorial operation of the Act and also consideration of various topical judicial precedents on the position of Indian judiciary with regard to the same.

I. INTRODUCTION

A. Concept of Legislative Jurisdiction

Jurisdiction of a sovereign state is the power to affect the rights of persons, whether by legislation, by executive decree, or by judgment of the court. A state's jurisdiction flows from and is conditioned by the constituent elements of sovereignty i.e. independence in relation

to other states; territorial and political sovereignty. It is one of the most obvious forms of the exercise of sovereign power.[1]

Jurisdiction can be exercised through legislative, executive and judicial capacity. Legislative jurisdiction is basically the power of the state to enforce its laws or impinge legal interests. There is a however difference between the legislative competence of a country to make extraterritorial laws and their binding nature on the courts on one hand and the enforcement of laws on the other. Ordinarily, legislation does not apply to foreigners in respect of acts done by them outside the domains of the sovereign power enacting. This is one of the rules of international law which requires one state to respect the subjects and the rights of all other sovereign powers.[2]

However it is only a rebuttable presumption that the parliament does not assert or assume jurisdiction which goes beyond the limits established. But if a statute is clearly inconsistent with the international law it must be construed with whatever the effect of such a construction may be. Hence if the legislature in express terms applies to matters beyond its legislative capacity, the courts must obey the English legislature, however contrary to international comity such legislation be.[3]

Therefore although international law on one hand requires the states to respect other states territorial sovereignty it also doesn't prohibit extraterritorial operation of a legislative statute if the same is laid down in unequivocal terms in the municipal legislation.

As Cockburn CJ said in *R.* v. *Keyn:*[4] *"if legislature of a particular country should think fit by express enactments to render foreigners subject to its laws with reference to offences committed beyond the*

[1]Legal Status of Eastern Greenland Case, 1933 P.C.I.J. 48, Series A-B.
[2]R v. Jameson,(1896) 2 Q.B. 425.
[3]Niboyet v. Niboyet,(1878) 4 P.D. 1.
[4]R. v. Keyn,(1876) 2 Ex d 63.

limits of its territory, it would be incumbent on the courts of that country to give effect to the same".

The Permanent Court of International Justice in the case of *SS Lotus* (*France* v. *Turkey*) [5] has held that-

It does not however follow that international law prohibits a state from exercising jurisdiction in its own territory in respect of any case which relates to acts which have taken place abroad and in which it cannot rely on some permissible rule of international law. Such a view would only be tenable if international law contained a general prohibition to states to extend the application of their laws and the jurisdiction of their courts to persons property and acts outside their territory and if, as an exception to this general prohibition, it allowed states to do so in certain specific cases. But this is certainly not the case under international law as its stands at present. *Far from laying down a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of their courts to persons, and property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules*; as regards other states, every state remains free to adopt the principles which it regards as best and most suitable…In these circumstances, all that can be required of a state is that it should not overstep the limits which international law places upon its jurisdiction.

Hence it is apparent that international law doesn't limit the territorial jurisdiction of a particular state to its citizens only. Except in few cases, a state can exercise its sovereignty over aliens. It is imperative to note that the above inference is a rather extreme one because international law is being superimposed by what a municipal legislation prescribes. This is why the above cited judgment was met with widespread criticism. Although no legitimate connection was established Turkey's claim over French seaman for act of

[5]France v. Turkey, (1927) P.C.I.J., Series a, No 10.

manslaughter was upheld solely on the basis of Turkey's sovereign power to exercise jurisdiction.

It would therefore be intolerable if states were permitted without any justifying legitimate interest to attempt to control the doings of foreigners in their own countries.[6]

The modified position regarding exercise of legislative jurisdiction can be summarized as follows:

1) The two generally recognized bases for jurisdiction of all types are the territoriality and nationality principles
2) Extraterritorial acts can only lawfully be the object of jurisdiction if certain general principles are observed

- that there should be a substantial and bona fide connection between the subject matter and the source of the jurisdiction.
- that the principles of non-intervention in the domestic or territorial jurisdiction of other states should be observed.
- Jurisdiction is not based upon a principle of exclusiveness; the same acts may be within the lawful ambit of one or more jurisdictions. However an area of exclusiveness may be established by treaty.[7]

Hence, for a state to exercise jurisdiction there has to be some nexus between the person or property and the state seeking to exercise its jurisdiction. This is a more tenable approach because it is unacceptable that extraterritorial operation of legislation should be a matter of sovereign discretion.

[6]Extraterritorial Jurisdiction And The United States Anti Trust Laws, BYIL, 150-151 (1957).

[7] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 313 (Oxford university Press) (2003).

II. EXTRA-TERRITORIAL OPERATION OF TAXING

A. Position under International Law

We have looked into the legislative competence of a state to legislate with regard to person, property beyond its territorial jurisdiction. Now let us examine the same with reference to taxing statutes.

The principles discussed under the preceding head broadly apply to extraterritorial operation of taxing statutes. The power to tax is one of the attributes of sovereignty and the jurisdiction to exercise the power is coterminous with the bounds of sovereign jurisdiction; it's an incident of sovereignty and is co-extensive with that to which it is incident.[8] The taxing power of a state is unlimited and it is a generally accepted principle of international law that right to tax which is an aspect of sovereignty extends to aliens also.[9]

Further when tax is levied on aliens, the law of nations appears to offer few restrictions beyond the possible requirement that the tax be in a broad sense uniform and general in its operation and in the case of resident alien, income-tax may doubtless be assessed according to the amount of income from whatsoever source derived, and whether or not from assets outside of taxing statute.[10]

Therefore there is no express prohibition or principle which limits the tax jurisdiction of states. However these few restrictions on power of a state to tax and the undisputed right to tax of a sovereign seems good only in theory. This is because in this growing world of transboundary transactions it is not feasible to function with the concept of unfettered right to tax. If it were to be adopted, endless

[8]Joseph H Veale, Jurisdiction To Tax, HLR 32, 587 (1918).
[9]OPPENHEIM, OPPENHEIM INTERNATIONAL LAW256-220 (Oxford University Press 7th ed.,)(2005).
[10] I.P. GUPTA, INTERNATIONAL LAW IN RELATION TO DOUBLE TAXATION OF INCOME56 (LexisNexis Butterworths, New Delhi) (2007).

jurisdiction claims would arise. Therefore are practical limitations to the exercise of unbridled tax jurisdiction by the states.

Statutory imposition of tax on aliens becomes meaningless unless there is some person or property from which it can be recovered within the state. All countries have adopted a pragmatic approach, and do not attempt to exercise jurisdiction over matters, persons or things with which they have absolutely no connection.[11] Hence recognizing the practical difficulty and to avoid friction, states generally refrain from enforcing their taxing statutes to person, or property to which no connection can be established.

B. Position in Various Countries

The above stated principle is illustrated even in other countries. In *Colquhoun* v. *Brooks,*[12] Lord Herschell observed that "The British Income-tax Acts themselves impose a territorial limit, either that from which the taxable income is derived must be situate in the United Kingdom or the person whose income is to be taxed must be resident here."

Even, the US Supreme Court has held that visible territorial boundaries do not always establish the limits of a State's taxing power, but due process requires some definite link, some minimum connection between a state and the person, property or transaction it seeks to tax.[13]

Also in *Imperial Tobacco Co of India* v. *Commr. of Income Tax* [14] it has been held that international law prohibited Pakistan from

[11]Id.

[12]91889]014 AC 493, p 504, 2 TC 490, p 499 (HL). These observations were quoted and applied in Whitney v. IRC, (1926) A.C. 37, 10 T.C. 88 (HL).

[13]Miller Bros v. Maryland,(1954) 347 U.S. 342.

[14]Imperial Tobacco Co of India v. Commr. of Income Tax, (1958) 27 Int LR103. See also Johmon v. Commr of Stamp Duty, (1956) A.C. 331, where an Australian state, a subordinate legislature, was regarded as not competent to levy a tax when there is no relevant territorial connection with the state or no relevant nexus between the taxed property and the state.

imposing its tax on an Indian company resident in India with reference to its profits earned in India. It was stated that a legislature has authority to tax foreigners only if they earn or receive income in the country for which that legislature has the authority to make laws.

Thus, even though states are always trying to stretch their arms as far as possible to bring in revenue and explore every remote avenue, they are also mindful of the fact that arbitrary exercise of tax jurisdiction is unwarranted in international law. Therefore realizing:

(a) The futility of enacting laws which cannot be enforced adequately,

(b) The equality of sovereign states in matters of taxation.

(c) The need for certain minimum standards for the fiscal protection of aliens if there is to be any meaningful intercourse of investment or technology, the jurisdiction to tax aliens in customary international law has come to be intimately associated with certain standards which fall into two main categories:

- Taxation based upon the presence of alien property within the tax jurisdiction
- Taxation based upon the economic activity of the alien within the jurisdiction[15]

Therefore if a person has a property or is carrying out his business in a particular country of which he isn't a citizen then he is subject to the fiscal jurisdiction of that particular country. Although right to tax aliens without any limitations may be theoretically sound, but it's more plausibly and desirable to exercise the same adhering to the standards listed above

[15]AR Albrecht, The Taxation of Aliens Under International Law, BYIL, 145-185 (1952).

C. Position in India

We have understood the basic principle which governs tax jurisdiction under international law. Now let us examine position in India with regard to the same.

Sub-section (1) of 6 of the Independence Act 1947 ran "The legislature of each of the new dominions[16] shall have the power to make laws for that Dominion, including laws having extra-territorial operation". Sub-section (2) enacted "No law or provision of any law made by the legislature of either of the new dominions shall be void or inoperative on the ground that it is repugnant to the law of United Kingdom, or to any order, or to repeal or amend any such Act, order rule or regulations in so far as it is part of the law of Dominion".

It can be deduced from the above that the concept of extra-territorial operation is not of recent origin. These provisions had no restrictions with regards to its operation and were specifically inserted to do away with the limitations contained in the legislations on its operation.

Since then, India has assumed the status of sovereign Independent Republic and it enjoys complete legislative freedom.[17] This power has to be studied with special reference to Article 245 of the constitution of India. Sub-section (2) of Article 245 lays down that "No law made by the parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation". As explained by Justice Kania, C.J., "*In case of sovereign legislature, questions of extra-territoriality of any enactment can never be raised by the municipal courts as a ground for challenging its validity. The legislation may offend the rules of international law, may not be recognized by the foreign courts or there may be practical difficulties in enforcing them*

[16]India and Pakistan.

[17]A.C. SAMPATH IYENGAR, THE LAW OF INCOME TAX (Bharat Law House (P.) Ltd.,New Delhi, 10th ed.)(2005).

but these are questions of policy with which the domestic tribunals are not concerned."[18]

Hence the effect of this provision is that the parliament has been given power expressly by the constitution itself to make legislations which have extraterritorial operation and its incumbent upon the judiciary to give effect to the same without any qualification.

Doctrine of Nexus

Now that it is clear a statute can be given extra-territorial operation by the power granted under Article 245 of the constitution let us now looked at when extra-operation can be given effect.

An Act is said to have extra-territorial operation if it seeks to regulate, punish or directly deal with any act done beyond its territorial limits or seeks to impose a liability on property situate outside its jurisdiction or on a person resident outside.[19]

A parliamentary statute having an extra-territorial operation cannot be ruled out from contemplation in order to sub serve the object, but the object must be linked to something in India,[20]

Hence a state law can have extraterritorial operation subject to the doctrine of territorial nexus. The principle of territorial nexus is well illustrated in the landmark case of *Wallace Bros & Co. Ltd* v. *CIT*.[21] In this case a company which was incorporated in United Kingdom also had a subsidiary in India. The earning from business India contributed substantially to entire income of the company. It was held that India could not only levy an income tax on the portion accruing from India but also on the entire income of the company,

[18]A.H.Wadia v. Income Tax Comissioner, A.I.R. 1949 F.C. 18, 25.
[19]Wallace Bros & Co. Ltd v. CIT, (1945) 13 I.T.R. 39 (FC) affirmed on appeal to Privy Council in (1948) 16 I.T.R. 240 (P.C.); London & South American Investment Trust v. British Tobacco Co., L.R.(1935) A.C. 500; see also Raleigh Investment Co Ltd v. Governor-General in Council, (1947) 15 I.T.R. 332 (P.C.).
[20]Electronics Corporation of India Ltd v. CIT, (1990) 183 I.T.R. 43 (SC).
[21]Wallace Bros & Co. Ltd v. CIT, (1945) 13 I.T.R. 39 (FC).

since there was a sufficient territorial nexus between the company and India for this purpose.

Also in the case of *State of Bihar* v. *Charusila Devi,*[22] the Bihar legislature enacted the Bihar religious Trusts Act 1950, for the protection and preservation of properties appertaining to the Hindu religious trusts. Now question arose whether the Act would apply to trust properties situated outside the State of Bihar. This question arose because there were some cases where part of the property was situated in Bihar and part of the same property outside. The observation of the court is as follows:

"....The question, therefore, narrows down to this in so legislating, has it power to affect trust property which may be outside Bihar but which appertains to the trust situate in Bihar ? In our opinion, the answer to the question must be in the affirmative. The trust being situate in Bihar the State has legislative power over it and also over its trustees or their servants and agents who must be in Bihar to administer the trust. Therefore, there is really no question of the Act having extra-territorial operation. In any case, the circumstance that the temples where the deities are installed are situate in Bihar, that the hospital and charitable dispensary are to be established in Bihar for the benefit of the Hindu public in Bihar gives enough territorial connection to enable the legislature of Bihar to make a law with respect to such a trust. This Court has applied the doctrine of territorial connection or nexus to income-tax legislation, sales tax legislation and also to legislation imposing a tax on gamblingHence, so long as the Act selected some fact or circumstance which provided some connection or territorial nexus between the person who is subject to the tax and the country imposing the tax, its validity would

[22] State of Bihar v. Charusila Devi, A.I.R. 1959 S.C. 1002; Anant Prasad Lakshminiwas Ganeriwal v. State of A.P., A.I.R. 1963 S.C. 853; Shrikant Bhalchandra Karulkar v. State of Gujarat, (1994) 5 S.C.C. 459; State of Bombay v. RMDC, A.I.R. 1957 S.C. 699.

not be open to challenge on the ground that it is extra-territorial in operation…

Thus after a perusal of the above judgments it can inferred that the courts considered two things while deterring the extra-territorial operation of a legislation. The connection must be real and not illusory; there has to be a definite nexus and second, this connection should be attributable to the person or property sought to be charged. In the *Chaurusali Devi case* discussed above it could be argued that since the 1950 Act had the effect of affecting property situated outside its extraterritorial in nature. But here it is pertinent to note that merely because, while giving effect to a legislation within a territory, it has effect on the property situated outside its territory a law cannot be said to be extra-territorial.

D. Provisions of Income Tax Act which Entail Extraterritorial Operation

a) § 9(1) (I)

Below discussed are some of the provisions of the Income Tax Act which entail the extra territorial operation of the Act.

§ 9 deals with what categories of income are deemed to accrue or arise in India. *InRe Mustaq Ahmed* [23] has laid down the scope of § 9 as, certain income is deemed to accrue or arise in India, even though it may actually accrue or arise outside India. This section applies to all assesses irrespective of their residential status and place of business. Hence it can be seen that this section seeks to bring the income within its ambit by way of a deeming fiction which reflects upon the extra-territorial nature of the Act.

Further § 9(1) (i) deals with the concept of business connection. A business connection involves a relation between a business carried on by a non-resident which yields profits or gains and some activity in

[23]In Re Mustaq Ahmed, (2009) 176 Taxman 65 AAR New Delhi.

India which contributes to the earning of these profits or gains. A business connection can also arise between a non-resident and a resident if both of them carry on business and if non-resident earn income through such a connection.[24]

In the recent case of *Worley Parsons Services Pty. Ltd., In Re* [25] the court has laid down the meaning of business connection thus in order to be "effectively connected", the Permanent establishment should be engaged in the performance of royalty generating services. There must be a real and intimate connection and clear co-relation between the services giving rise to royalty and the permanent establishment.

Therefore when you seek to tax a permanent establishment business connection must be proved. Because it may so happen that the business carried out by the permanent establishment is not related to that of the main company.

Laso in another recent case of *CIT* v. *Eli Lilly and Company (India)*[26] the Court relying on the commentary by *Kanga, Palkhivala & Vyas, The Law and Practice of Income Tax,*[27] on the question of extra-territorial operation of the 1961 Act, has held thus:

> *"The general concept as to the scope of income-tax is that, given a sufficient territorial connection or nexus between the person sought to be charged and the country seeking to tax him, income-tax may extend to that person in respect of his foreign income. The connection can be based on the residence of the person or business connection within the territory of the taxing State; and the situation within the State of the money or property from which the taxable income is derived Applying the above test, if payments of home salary abroad by foreign company to expatriate has any connection or nexus with his*

[24]CIT v. Ashok Jain, (2002) 121 Taxman 328 (Del.).
[25]Worley Parsons Services Pty. Ltd., In Re, (2009) 312 ITR 273 AAR.
[26]CIT v. Eli Lilly and Company (India) Pvt. Ltd., (2009) 312 ITR 225 SC.
[27] KANGA, PALKHIVALA &VYAS, THE LAW AND PRACTICE OF INCOME TAX 10 (LexisNexis Butterworths, 7th ed.).

rendition of service in India, then such payment would constitute income which is deemed to accrue or arise to the recipient in India."

Therefore in deciding whether there exists a business connection various considerations come into play. For example if a person is acting on behalf of his employer, as an agent then the extent of authority of the agent, whether the employer carries out his business activities through the agent, the authority of the agent to act on behalf of the employer etc. All these are crucial in determining whether the Act can be applied extra-territorially since all these create a nexus with the object sought to be taxed.

b) § 9 (1) (II)

Sub-section (ii) of the same section provides that income earned under the head salaries is deemed to accrue or arise at the place where the services is rendered. Therefore if the service is rendered in India but the payment is made outside India still the income is deemed to have arisen in India. However sub-section (iii) of the § 9 further provides that salary paid by Indian government to an Indian national is deemed to accrue in India even if the salary is paid outside India.

The above provisions in a way are extra-territorial in nature because they seek to bring within their ambit even the payment which was made outside in India. These provisions however cannot be held to be arbitrary because the accrual of the salary in India and in case of Sub-section (iii) nationality is taken into consideration. These are sufficient grounds to bring salary income within the purview of Income Tax Act.

c) § 9 (1) (V), (VI) AND (VII)

Sub-Section (v), (vi) and (vii) of § 9 deal with income by way of interest payable, by way of royalty and by way of fees for technical services. The relevant portion of the section is being provided below

(*v*) income by way of interest payable by

(*a*) The Government; or

(*b*) a person who is a resident, except where the interest is payable in respect of any debt incurred, or moneys borrowed and used, for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or

(*c*) a person who is a non-resident, where the interest is payable in respect of any debt incurred, or moneys borrowed and used, for the purposes of a business or profession carried on by such person in India;

(*vi*) income by way of royalty payable by

(*a*) the Government; or

(*b*) a person who is a resident, except where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or

(*c*) a person who is a non-resident, where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India:

(*vii*) income by way of fees for technical services payable by

(*a*) the Government; or

(*b*) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for

the purposes of making or earning any income from any source outside India; or

(*c*) a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India:

Now the explanation to these sub-sections is what has to be considered. It reads as-

for the removal of any doubts, it is hereby declared that for the purposes of this § where income is deemed to accrue or arise in India under clauses (v)(vi) and (vii) of Sub-section (1), such income shall be included in the total income of the non-resident, whether or not the non-resident has a residence or place of business or business connection in India.

Under this explanation if the income falls under any one of the heads mentioned in clauses (v), (vi) and (vii) then, income of a non-resident will deemed to have arisen in India without the requirement of residence or business connection. This overtly reflects upon the extra-territorial nature of the Act since it doesn't take into account the doctrine of nexus.

Predictably the question of constitutionality especially of § 9 (1) (vii) was referred by the Supreme Court to a larger bench. The Supreme Court very aptly pointed out that the issue here is whether the various heads mentioned under § 9 (1) (vii) adhere to the nexus principle or not. The Supreme Court held that the issue is one of substantial importance as it concerns collaboration agreements with foreign companies and others for development of industry and commerce in the country.

An opinion of the same reflected in *Kanga, Palkhivala & Vyas, The Law and Practice of Income Tax'*[28] is worth making a mention:

"If the scope and validity of these clauses are questioned before a court of law, the alternatives before the court would be either to strike down the provisions as *ultravires* to the to the legislative powers of the Indian parliament or to read down the provision so as to restrict their scope only to those cases where on facts a sufficient nexus exists between India and the foreigner's income accruing or received abroad."

d) § 6 (2)

Another instance of extra-territoriality as affecting non-residents would be where a firm or a Hindu undivided family carries on business outside India but it is treated as resident in India on the ground that its control and management is not wholly without India. This is contained in Section 6 (2) of the Act. Now how do we determine what is control and management? The courts have laid down that control and management means *de facto* control and management and not merely the right to control and manage. It is basically the place where the head, the seat and the directing power are situated. The head and the brain is situated at a place where vital decisions concerning the policies of the business, such as raising finance and its appropriation for specific purposes, appointment and removal of staff, expansion and extension, or diversification of businesses., are taken into consideration.[29]

Therefore based on the above criteria unless and until the control and management of its affairs is situated wholly outside India it will be amenable to tax. Also if a firm's place of control is partly in India and partly outside India then it will be treated as a resident firm. The defense that part of the management and control is situated outside

[28] Id.

[29] CIT v. Nandlal Gandalal, (1960) 40 ITR 1 SC; San Paulo Railway Co. v. Carter,(1886) AC 31 (HL).

India cannot be taken by the plaintiff. Hence this reflects as to how the Income tax Act is given extra-territorial operation based on residential status.

e) § 195 (1) & (2)

This is another grey area with regard to extra-territorial operation of the Act. The relavent portion of § 195 reads as follows:

(1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest or any other sum chargeable under the provisions of this Act (not being income chargeable under the head Salaries shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force….

(2) Where the person responsible for paying any such sum chargeable under this Act to a non-resident considers that the whole of such sum would not be income chargeable in the case of the recipient, he may make an application to the [Assessing] Officer to determine, [by general or special order], the appropriate proportion of such sum so chargeable, and upon such determination, tax shall be deducted under sub-section (1) only on that proportion of the sum which is so chargeable.

Under this § if any person is making payment to a non-resident and if the same falls under one of the heads of income then the person has to deduct tax. Also if he feels that the income is not chargeable then he has to obtain a certificate for the same from the Assessing Officer. The problem arises when the transaction is between two non-residents. This is because the section reads as "any person responsible for payment…" Now, does the word person include non-resident is the main question.

In order to answer the same let us first look at the scope of § 195, of the Act as illustrated in the commentary *'Kanga, Palkhivala & Vyas, The Law and Practice of Income Tax'*:

> *"This section does not apply to payments made outside India by one foreigner to another even if that other has rendered services in India. A country does not recognize or enforce the revenue laws of another country. Therefore, if a payer in a foreign country, bound to make the payment under a contract governed by the laws of that land, were to seek to deduct Indian income-tax, the payee would be entitled to object to the deduction on the ground that no deduction can be made in that country, which is not authorized by the laws of that country or by the terms of the agreement.*[30]

The above commentary makes it amply clear that when transactions is between to non-resident he can't be subjected to the revenue authorities of India.

Now let us take a look at the judicial decisions. In *Shrikumar Poddar* v. *Dy. CIT*.[31] it was held that if the payment is not made in India provisions of § 195 could not be applied to such a payment and consequently there would be no liability to deduct tax by a non-resident out of the payment made to a non-resident outside India. In absence of a nexus, no tax can be imposed on a subject without words in the act clearly showing an intention to.

Furthermore, where the salary is paid for the services rendered in India then such payment becomes chargeable to tax in India under the head 'salaries' and consequently, the provisions of § 192 become applicable. The fact that the employees as well as employer were non-resident, the fact that the payment was made outside India and the fact

[30]KANGA, PALKHIVALA & VYAS, supra note 27.
[31]Shrikumar Poddar v. Dy. CIT, (1998) 65 ITD 48 (Mum.); Coltness v. Black, 287 316 (HL); CIT v. Hindustan Bulk Carriers, (2003) 179 CTR (SC).

that contract of employment was also out of India, are not relevant. What is relevant is the place where the services are rendered.[32]

The Court in *Satellite Television Asian Region Ltd.* v. *DCIT* [33] held that the expression used in § 195 is "any person responsible for paying to a non-resident" has qualified the character of the recipient/payee as "non-resident". If the payment is made to a non-resident whether it is in India or outside India or in any manner, the person making the payment is liable for deducting the tax at source.

Shrikumar Poddar case emphasises upon the place of payment. It lays down that if payment is not made in India then there can be no nexus to bring the income under the purview of Income Tax Act. Babcock power case however dismisses all other considerations and lays down that the place where the service is rendered is decisive and deciding factor. But the recent Satellite television case clearly states that if a person is making payment to non-resident then he has to deduct tax at source.

Therefore although the question whether the expression "any person" used in 195 includes a non-resident has not been answered in clear terms, the concept of non-resident taxation revolves around the place of payment, place where the services were rendered which have been decided on case to case basis. Hence there is no straight jacket formula for the same.

However the recent case of *Vodafone International Holdings B.V. v. Union of India & Anr*[34] has clarified the position with regard to non-resident taxation to a certain extent. In this case Hutchison Telecommunications International Limited (HTIL) transferred certain shares of CGP Investment to Vodafone International Holdings BV

[32]Babcock Power (Overseas Projects) Ltd. v. Assistant Commissioner of Income Tax,(2002) 81 ITD 29 (Del.).
[33]Satellite Television Asian Region Ltd. v. DCIT, (2006) 99 ITD 91 (Mum.).
[34]Vodafone International Holdings B.V. v. Union of India & Anr, (2008) 175 Taxman 399 (Bom.).

(Vodafone NL), which is a wholly-owned subsidiary of Vodafone. CGP Investments, held 67 per cent stake in Vodafone Essar Ltd (VEL), which is an Indian company. The Indian tax authorities issued show-cause notices to both the buyer Vodafone NL. This is because it was being treated as 'assessee in default' for failure to withhold tax at source when they made payment to HTIL. The same was challenged before the High court of Bombay.[35]

The court held that

"……Prima *facie, the petitioner has not only become the successor in interest in that Joint Venture to HTIL, but also has acquired a beneficial interest in the license granted by the department of Telecommunications in India to its group companies, now known as VEL It is an admitted fact that VEL (earlier HEL), a subsidiary of the petitioner in which the petitioner has acquired 67% interest, was a group company of HTIL and now a group company of the petitioner. Any profit or gain which arose from the transfer of a group company in India has to be regarded as a profit and gains of the entity or the company which actually controls its, particularly when on facts, the flow of income or gain can be established to such controlling company (HTIL). Therefore, the recipient of the sale consideration was none other than HTIL and this was a consequence of divestment of its Indian interests in H-E Group, liable for capital gains. The petitioner themselves, by their various declarations, made it apparent and clear that the purpose of their acquiring shares in GDP was to acquire the controlling interest of 67% in HEL*.

..... where the dominant purpose of entering into agreements between two foreign companies was to acquire business and economic interests in an Indian company controlled by the other foreign company, the transaction would be subject to municipal laws

[35]Mr Pranav Sayta, Tax Leader Transaction Tax, Ernst & Young Business Line, Tax Leader Transaction Tax, Ernst & Young, (Dec 13, 2008), http://www.thehindubusinessline.com/2008/12/13/stories/2008121350060900.htm

of India, including the Income-tax Act, as income from such transaction would be deemed to accrue or arise in India. The Petitioner has admitted that HTIL has transferred their 67% interests in HEL qua their shareholders, qua the regulatory authorities in India (FIPB), qua the statutory authorities in USA and Hong Kong and the Petitioner has also admitted acquiring 67% held by HTIL in HEL. This being the case, a different stand cannot be taken before the tax authorities in India and a different stand cannot be put forth by either HTIL or the Petitioner.

The court in this case made a reference to the international principle of effects doctrine.

"……*Another aspect to be noted is the American principle of "Effects Doctrine" which is as follows: Any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state represents....*"

Therefore, merely because the transaction is between two non-resident companies it can't be said it is not subject to the municipal laws of India. If this transaction has effect on India, then definitely the Income Act can be made applicable to the transaction.

III. CONCLUSION

The concept of extra-territorial operation of taxing statutes is rooted in the concept of legislative jurisdiction. In International Law a state can exercise jurisdiction beyond its legislative competence only on if it can establish nexus to the person, property it seeks to impose penalty upon. The position seems to be the same with regard to application of taxing statutes. Even States have more or less adopted a pragmatic approach and have refrained from exercising their fiscal jurisdiction arbitrarily.

In the recent times the extra-territorial operation of the Income Tax Act 1961 has become a moot point. The power to enact extra-territorial laws is provided in the constitution itself. Applying the act extra-territorially will not be illegal if it adheres to the doctrine of nexus. In many cases which have been discussed above the Indian income tax authorities have imposed tax liability based on place of accrual, residential status, place of payment of income, place where the services were being rendered because they constitute nexus. However the nexus must be real and not illusionary. The issue therefore is not whether these grounds constitute nexus for application of the act.

This brings us to the recent case of *Vodafone International Holdings B.V case.* In this case the court held that the act would be applicable although the transaction was between two non-residents based on the source rule i.e. the capital asset situate in India. This is in consonance with Direct Tax Code 2010 which seeks to tax certain indirect transfers based on the source rule.

It can be seen that where the tax authorities have imposed liability in the above discussed cases they have successfully established nexus (territory, source etc) which is real. Therefore I would like to conclude that so long as the authorities impose the tax liability based on some definite, real connection it can't be said that the extraterritorial operation is arbitrary.

BIOPIRACY AND ITS GROWING THREAT TO BIODIVERSITY IN INDIA: A BIRD'S EYE VIEW

Subham S. Chatterjee[*]

ABSTRACT

In this paper, an attempt has been made by the author to provide an overview of the concept of biopiracy and its modern day significance in the world of IPR, especially in context with biodiversity in India. Biopiracy is a very new concept and so it has been a sincere attempt of the author to familiarize the readers about the importance of biodiversity, the issues relating to it e.g. benefit sharing, the correlation between biodiversity and biopiracy and how grave the consequences of biopiracy can be to the nation and to some other sections of the society, especially the traditional communities. The paper stresses on the importance of the issue at the international level and the efforts that have been taken at the national as well as international level to combat biopiracy. The paper also explains some of the other important concepts, closely associated with biopiracy, such as traditional knowledge, TKDL etc. The author has also stressed on the legal angle of the entire issue i.e. Indian legislations to combat the menace as well as the various international agreements and

[*]Subham S Chatterjee is a third-year student at ILS Law College, Pune. The author may be reached at chatterjeess024@gmail.com.

conventions, which have been enacted or entered into by the world community to make biopiracy legally impossible. For a better understanding of the concept, in context of the current scenario, and the procedure to combat it, the author has discussed real world cases where such attempts have been foiled by the government of India or where the government failed to prevent such a traditional knowledge from being patented. In conclusion, the author has proposed certain novel efforts which, if adopted and executed effectively, might go a long way in protecting the "Green Gold" (i.e. bio-resources).

I. INTRODUCTION

India is home to infinite number of, including some of the very rare species, of plants and animals. Nature has gifted the sub-continent with a rich biodiversity. Coupled with this, India is also home to well-developed indigenous systems for gainful utilization of these biological resources. For centuries, the people of India have applied these various gifts of nature for several purposes, for example, traditional medicines made from animal and plant resources- 'neem', 'pudina' etc. and till date they are using them for their various needs. Unfortunately, the rich biodiversity of India and the traditional knowledge of the indigenous people and the local communities is under threat owing to the global economic and social development coupled with the development of science and technology ('biotechnology'). The term coined to refer to this threat to the biodiversity and traditional knowledge is **"Biopiracy"**.

'Biopiracy' is the term that is becoming extremely common nowadays, in the field of intellectual property laws. As the term

suggests it involves some illegal activity (due to the term 'piracy'). Now let us make an attempt to understand its meaning.

Biopiracy means obtaining patent (or other IPRs) on resources which are originally found in various species of plants and animals for exploiting them commercially and maintaining a monopoly control over the same.

Biopiracy can include either (or both) of the following:

a) Obtaining IPRs (usually patents or PBRs) to gain monopoly control over biological resources, related traditional knowledge, or commercial products based on these resources or knowledge, without the consent of, or any benefits going to, the original holders of the resources/knowledge.
b) Commercially exploiting biological resources or related traditional knowledge without the consent of, or any benefits going to, the original holders of the resources/knowledge.[1]

So, in a nutshell, biopiracy involves theft of biological resources (resources from species of plants and animals) and depriving the traditional communities from using such resources and related knowledge. Biopiracy takes place when biological resources or knowledge is commercially used without the consent of the 'traditional communities' or when IPRs and exclusive rights are claimed over such resources/knowledge.

II. IMPORTANT TERMS ASSOCIATED WITH BIOPIRACY

For a better understanding of the term of biopiracy and getting a clear picture of its consequences, we need to first understand the meaning of some of the terms which are closely associated with biopiracy.

A. *Traditional Knowledge*[2]

[1] T. Apte, A Simple Guide to Intellectual Property Rights, Biodiversity and Traditional Knowledge, Kalpavriksh, Grain & IIED. Pune/New Delhi.
[2] Id.

This refers to the knowledge which is held by the communities and cultures over generations, and has a deep cultural and economic significance. It includes a diversity of knowledge such as literary, artistic and scientific works, medical practices, agricultural techniques, handicrafts, songs and dances. Traditional knowledge about biodiversity can include the healing, agricultural and sacred properties of plants and animals, as well as conditions of cultivation and processing methods. Traditional knowledge is found in ancient texts, traditional sciences, folklore and in continuing practices and beliefs of communities. Most often it is transmitted from generation to generation as oral knowledge. It is important to note that traditional knowledge is not static, but dynamic, constantly being shaped and changed by the innovations and practices of each generation. The social process of learning, sharing and shaping the knowledge is a core aspect of the knowledge tradition.

B. *Traditional Communities*[3]

This refers to the communities whose way of life is largely shaped by generations of their ancestors. They are distinct from urban or fast changing societies and lifestyles, maintaining a shared body of cultural, environmental, economic and familial customs that are based on traditional occupations, knowledge, values and social hierarchies. Traditional communities may include farming and fishing communities, forest-dwelling communities, indigenous people, nomadic communities etc.

C. Original Holders of Traditional Knowledge

'Original holders of traditional knowledge' are those traditional communities to whom the origin of the knowledge can be traced back to, and who have been making application of the knowledge handed down from time immemorial.

In the case of the traditional knowledge that is widely known or in common use (i.e., in the public domain), where the origins of the

[3]Apte, supra note 2.

knowledge cannot be traced to a particular local community, the 'original holder' of the knowledge would be the country of origin of the knowledge, with the government holding it on behalf of its people.

D. Biodiversity[4]

Biodiversity is short for 'biological diversity'. It includes;

- Wild species and varieties of plants, animals and micro-organisms.
- Domesticated species and varieties like crops, livestock and poultry.
- Natural ecosystems like forests, deserts and coasts.
- Agricultural ecosystems like farmlands.

Simply put, it means the diversity of life in all its forms. Biodiversity encompasses diversity and variety between species and within species of plants, animals and micro-organisms. It also includes diversity of eco-systems, such as marine, wild or agricultural ecosystems.

E. Biological Resources[5]

Biological resources are any living organism or biological component which is of use or value to humans. This includes almost all kinds and parts of plants, micro-organisms and animals (including animal products like milk).

"*Biological resources*" includes genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity.[6]

F. Bioprospecting[7]

Bioprospecting is the exploration of biodiversity for commercially valuable biological and genetic resources. It refers to the investigation of biological resources for new commercial uses.

[4]Apte, supra note 2.
[5]Apte, supra note 2.
[6]Convention on Biological Diversity, art. 2, 1992.
[7]Apte, supra note 2.

The term bioprospecting has acquired strong negative connotations for the reason that bioprospecting often leads to biopiracy or environmentally unsuitable practices (such as collecting large number of samples from an area). Traditional knowledge has, for decades, been exploited and misappropriated in the name of bioprospecting.

G. Benefit Sharing[8]

Benefit sharing refers to: (a) the process of an outsider accessing and using a country's/community's biological resources or related traditional knowledge, and (b) subsequently sharing any resulting commercial proceeds with the concerned community. For example, a national government may grant access to a company to collect samples of medicinal plants in a forest. The local forest community may collaborate with the company in locating plants and explaining their traditional medicinal uses. The company may use the research in making a commercial drug. In return, the company would share financial benefits with the local forest community, on terms that are mutually acceptable to both. Benefits can also be non-monetary, for example training and collaboration for making the drug within the source country thus generating employment or leading to infrastructure development.

III. IMPORTANCE OF TRADITIONAL KNOWLEDGE

Traditional knowledge plays an important role in the conservation of biodiversity and its traditional uses as follows:

1. **Healthcare & Pharmaceuticals:** Indian systems of medicine (Ayurveda, Unani, Siddha) are part of the official healthcare system in India, and depend on a diversity of biological resources and traditional knowledge. For decades, new drugs have been found in various species and sub-species of plants and animals. Traditional knowledge has also been the source for the manufacture of various cosmetics.

[8]Apte, supra note 2.

2. **Agriculture:** Farmers and livestock keepers have improved and nurtured diverse varieties of crops and domesticated animals over generations. This has been invaluable to food security and in providing clothing, healthcare and shelter.
3. **Wild biodiversity:** All over India the local communities have independently conserved wild areas, including natural ecosystems, sometimes deemed to be sacred and inviolate (eg. 'Sacred groves', some thousands of years old, dedicated to a local deity).[9]

IV. IMPLICATIONS OF BIOPIRACY

The exploration and investigation of biological resources for new commercial uses (i.e. 'bioprospecting') has been an inherent part of global economic and social development. The problem arises when bioprospecting leads to biopiracy. Biopiracy is a violation of the rights of traditional communities over their biological resources and traditional knowledge. The implications of biopiracy are economic as well as ethical.[10] They can be summarized as follows:

A. *Deprivation of the traditional communities from the Profits*

When the biological resources are commercially exploited by the corporations through obtaining of IPRs (or other related rights), the original holders of biological resources and traditional knowledge i.e. the traditional communities, do not get any share in the profits made from commercializing the products based on their resources/knowledge. Due to their low levels of awareness and literacy, they also do not get any recognition for nurturing and developing the resources/knowledge in the first place.

[9]Prof. S Kannaiyan, Biological Diversity and Traditional Knowledge, (September 5, 2010), http://www.nbaindia.org/docs/traditionalknowledge_190707.pdf.
[10]Id.

B. *Preventing the traditional communities from commercially using the biological resources:*

Business corporations want to stop anyone else from commercially exploiting the findings of their bioprospecting and research activities. Huge sums of money is invested on research and development of a new product, and an effective way to ensure that the money is recouped is to have exclusive use, production, marketing and sales control over the research findings and the resulting product. For this purpose, the business corporations find it necessary to assert IPRs over biological resources and traditional knowledge. Once an IPR is acquired by a 'biopirate' (the business organization which has acquired the IPR over the resources) on any of the biological resources, the original holders of a biological resource or related traditional knowledge are barred from making any commercial use of the IPR-protected knowledge or resource despite the fact that they have preserved and used such resources for generations and have nurtured and developed the natural resources and related knowledge over generations to its present form. There also lies a threat that in future the traditional communities may have to buy the products of these companies (holding the patents) at a high price.

C. *Loss of control and access of the traditional communities of their resources/knowledge*

Once an IPR is acquired over a particular resource or a knowledge, the IPR holder may dictate the terms of use of the IPR-protected resource/knowledge which might lead to preventing of the traditional communities (who are the 'original holders') from having any control over or access to their resources/knowledge.

V. EFFORTS TO PREVENT BIOPIRACY

A. The Convention on Biological Diversity, 1992

The Convention on Biological Diversity (CBD), 1992 was one of the first measures taken by the international community towards prevention of biopiracy and safeguarding the interests of the traditional communities and of the States over their natural resources. The CBD was one of the key agreements adopted by world leaders at the 1992 United Nations Conference on Environment and Development (also known as the 'Earth Summit') in Rio de Janeiro. The CBD came into force in December 1993 and till date has been ratified by 176 countries.

The main goals of the CBD are the conservation of biodiversity, sustainable use of biological resources, and the equitable sharing of benefits arising from the use of biological resources. This is a *sui generis* agreement as it focuses on biodiversity as a whole.

The most important IPR related provisions of the CBD are:

a) **Sovereign control:** It was agreed by each contracting party (country) in the CBD that states have sovereign rights over their own biological resources. 'Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the governments and is subject to national legislation.'[11]

b) **Equitable benefit sharing:** One of the main objectives embodied in the CBD is sharing equitably, the benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components, with the indigenous and local communities who are the traditional holders of the resources. Their dependence on the biological resources was also recognized.

[11]Convention on Biological Diversity, art. 15(1), 1992.

c) **Consent of governments and local communities:** In the CBD, it was agreed that each contracting party shall facilitate access to genetic resources for environmentally sound uses by other contracting parties.[12] Access to genetic resources shall be subject to 'prior informed consent' of the contracting party providing such resources.[13] Access shall be granted on mutually agreed terms.[14]

d) **Access to biotechnological results:** It was agreed that each contracting parties shall share the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the contracting party providing such resources, on mutually agreed terms.[15] This would facilitate the access to biotechnological results to those countries which are lagging behind in the field of biotechnology, especially the developing and the underdeveloped countries with a rich biodiversity.

e) **IPRs should not run counter to CBD objectives:** The CBD recognizes that every contracting party shall ensure that rights with regard to patents and other IPRs related to biological resources and related traditional knowledge should be supportive of and do not run counter to the CBD objectives.[16]

Furthermore, the CBD was an attempt to bridge the gap between the technologically developed nations and the developing nations and LDCs. This was done by incorporating provisions regarding exchange

[12]Convention on Biological Diversity, art. 15(2), 1992.

[13]Convention on Biological Diversity, art. 15(5), 1992 -'Prior informed consent' is permission taken from the traditional holders of biological resources/knowledge, to access and commercially exploit the resources/knowledge. Taking the prior informed consent of the traditional holders must be based on providing them with information such as the reasons, risks and implications of accessing and using the resources/knowledge (including the implications of obtaining IPRs on resulting products or innovations). It is assumed that prior informed consent would lead to mutually agreed terms of benefit sharing.

[14]Convention on Biological Diversity, art. 15(4), 1992.

[15]Convention on Biological Diversity, art. 15(7), 1992.

[16]Convention on Biological Diversity, art. 16(5), 1992.

and transfer of technologies and information relevant to the conservation and sustainable use of biological diversity or making use of genetic resources in a manner not causing significant damage to the environment, taking into account the special needs of the developing countries. [17] The contracting parties further agreed towards the promotion of international scientific and technical cooperation in the field of conservation and sustainable use of biological diversity advancing fair and equitable access of the results and benefits arising from biotechnologies, to the developing countries.[18]

All these provisions aim towards one objective i.e. to prevent biopiracy. This was sought to be achieved by facilitating the transfer of technologies and exchange of information whereby the nations with a rich biodiversity and which have entered into 'benefit sharing agreement' would come to know whereby any of the contracting parties have committed biopiracy or whether they are receiving equitable share of the benefit which is being derived by the corporation by using the biological resources and/or related traditional knowledge.

B. Bonn Guidelines, 2002

The Bonn Guidelines were officially adopted at the 6th Conference of Parties in 2002. The Bonn Guidelines was another initiative made at the international level with the objective of controlling biopiracy. The Bonn Guidelines are voluntary and not binding. Like the CBD, the object of Bonn Guidelines is also to facilitate equitable benefit sharing thus providing recognition to the knowledge and practices of traditional communities.

One of the objects of the Bonn Guidelines is also to facilitate prior informed consent of local communities and national governments before local genetic resources and related traditional knowledge are accessed and exploited. It also suggests that while applying for IPR protection of an innovation, the applicant must disclose the

[17]Convention on Biological Diversity, art. 16 & 17, 1992.
[18]Convention on Biological Diversity, art. 18 & 19, 1992.

geographical resources and traditional knowledge used in formulating the innovation. Such a measure has direct bearing on controlling biopiracy as well as ensuring prior informed consent and benefit sharing.

But the biggest drawback of the Bonn Guidelines is that the suggestions contained herein are not binding on any nations.

C. Indian Legislations

In India also, there are various laws which relate to IPRs and which are especially concerned with the protection of biodiversity and traditional knowledge. The main laws which relate to IPRs, biological resources and traditional knowledge are:

a) the Biological Diversity Act (BDA), 2002
b) the Protection of Plant Varieties and Farmers' Rights Act, 2001
c) the Geographical Indication of Goods (Registrations and Protection) Act, 1999 (hereinafter referred to as the GI Act, 1999)
d) the Patents Act, 1970 (as amended in 1999, 2002, 2005)

The Biological Diversity Act, 2002 was enacted to implement the CBD in India, post ratification. Therefore, its aims and objectives are very similar to those of CBD. The BDA aims to set up decision making bodies at national, state and local levels. The National Biodiversity Authority (NBA) set up at the national level will have the right to grant approval to foreigners wanting to access biological resources and related traditional knowledge and to those who want to apply for patents or other IPRs on innovations based on biological resources and traditional knowledge obtained in India.[19] The NBA will also ensure that granting access to resources also includes equitable benefit-sharing with local communities.[20] The act also provides for various other kinds of benefit sharing with local

[19] The Biological Diversity Act, §19(1) r/w §§ 3 & 6 (2002).
[20] The Biological Diversity Act, § 6(2) (2002).

communities- transfer of technology, monetary compensation, joint research and development, venture capital funds and joint ownership of IPRs.[21] Biodiversity Funds will be set up at national, state and local levels which will receive money from individuals and organizations who access and utilize the biological resources and related traditional knowledge and this fund will be utilized for the benefit of the local communities.[22]

The Protection of Plant Varieties and Farmer's Rights Act, 2001 aims to establish an effective system for protection of plant varieties, the rights of farmers and plant breeders and to encourage the development of new varieties of plants. Under this legislation, a plant breeder can acquire a plant breeders' right (PBR) on a new variety of plant or seed which it has bred, evolved or developed, if it is distinct, stable, uniform and novel. A plant breeder, after registering the new plant variety with the registrar of the Plant Varieties Registry,[23] gets the exclusive right to produce, sell, market, distribute, import or export the variety.[24] This prevents any other person or organization to sell protected variety of plants and seeds under any brand name thus protecting the rights of the original breeders. Since all new varieties are based on traditional varieties, the plant breeders have to pay money into a National Gene Fund,[25] from which a share will be paid to the farmers as a reward for their traditional knowledge. This ensures benefit sharing with the farming communities, through the National Gene Fund.

The Geographical Indications of Goods (Registrations and Protection) Act, 1999 covers agricultural, natural and manufactured goods, where the quality or reputation of the product depends on its geographical origin, i.e. the place where it is grown or manufactured

[21]The Biological Diversity Act, § 21(2) (2002).

[22]u/s. 27 of the Act, National Biodiversity Fund will be constituted; u/s. 32 the State Biodiversity Fund will be constituted; u/s. 43 the Local Biodiversity Fund will be constituted.

[23]Protection of Plant Varieties and Farmers' Rights Act, § 12 (2001).

[24]Protection of Plant Varieties and Farmers' Rights Act, § 28(1) (2001).

[25]Protection of Plant Varieties and Farmers' Rights Act, § 45(1) (2001).

(eg. Tirupati laddoos, Basmati rice, Darjeeling tea, Kashmiri shawls). The act allows a person or association to register a Geographical Indication (GI) at the Geographical Indications Registry. [26] Registration provides GI protection for a product against infringement of registered geographical indication by an 'unauthorised user'.[27] Like PBRs, GI is very useful for protecting products based on collectively held traditional knowledge. It protects authorised users by preventing unfair competition from a person, not an authorised user, who by wrongful representation and designations of the goods indicates or suggests that the goods originate in a geographical area other than the true place of origin of such goods, thus misleading consumers about the geographical origin of such goods.[28]

The Patents Act, 1970 (as amended in 1999, 2002, 2005) has excluded traditional knowledge and derived inventions from patentability. Apart from that, it states that the source and geographical origin of biological resources used in the invention must be declared in order to obtain a patent. Failure to provide correct information can lead to the patent being cancelled. Such a provision reduces the risk of biopiracy as it provides recognition to the source and origin of the resources and the traditional communities.[29]

D. Traditional Knowledge Digital Library (TKDL)

Traditional knowledge, as we have earlier discussed, can be utilized for varied and diversified purposes and be put to use in different fields (especially healthcare and agriculture). Traditional knowledge in India has for long been susceptible to biopiracy, the chief reason being, in most of cases the information relating to the traditional knowledge is non-codified (i.e. not available in documented form, which are generally transmitted orally for generations). Documentation of such traditional knowledge is especially important

[26] Apte, supra note 2.
[27] Any person not registered as an authorised user u/s. 17 of the GI Act, (1999).
[28] GI Act, § 22(1)(1999).
[29] Apte, supra note 2.

as oral knowledge is not accepted as evidence of prior art. Those which are codified are available in regional languages due to which the patent offices, across the world, are unable to search this information as prior art, before granting patents to inventions and many a times patents are granted to such inventions which do not satisfy the novelty clause. In 2000, a TKDL (Traditional Knowledge Digital Library) expert group estimated that about 2,000 wrong patents concerning Indian systems of medicine were being granted every year at the international level, mainly due to the fact that India's traditional medicinal knowledge existed in languages such as Sanskrit, Hindi, Arabic, Urdu, Tamil etc.[30] Another issue is that as the traditional knowledge is in public domain, the persons or corporations who claim patents on an invention based on such knowledge are under the impression that the traditional communities have given up all their rights over them. The problem arose when patents were granted to those inventions which were based on traditional knowledge or the utilities of which were already known to the traditional communities of the developing countries (in this case India). The need to create a database which will record, in electronic form, the utilities of various plant species and which would be made available to the patent offices worldwide was given utmost priority. Thus, the Traditional Knowledge Digital Library (TKDL) came to be considered as the solution to this problem.

The need for the Traditional Knowledge Digital Library (TKDL) was also felt post 'turmeric case' where two US based Indians obtained a patent[31] from the USPTO (US Patent and Trademark Office) for the wound healing properties of turmeric. In this case, CSIR (Centre for Scientific and Industrial Research), which had challenged the novelty of the invention, had to search 32 findings from different scriptures written in Hindi, Urdu and Sanskrit which revealed that the wound

[30]Kounteya Sinha, India foils Chinese bid to patent 'pudina' for bird flu treatment, TOI, June 24, 2010 [hereinafter Kounteya Sinha].

[31] Patent No. 5-401-504.

healing properties of turmeric (*Haldi*) have been known in India for hundreds of years. Subsequently, the patent granted, was revoked by the USPTO. Thus, the need was felt for a database where the details of the medicinal properties of the plant species would be recorded so as to make aware the other patent offices worldwide about those inventions which lacked novelty.

The Traditional Knowledge Digital Library (TKDL) is a Government of India initiative to create a digital database of traditional knowledge related to medicinal plants. The TKDL is a collaborative project between CSIR (Council for Scientific and Industrial Research) and the health ministry's department of 'Ayush'. TKDL is a database which will record, digitally, the details of the medicinal plants, alongwith their uses and properties, in a searchable and easily accessible manner available on DVD and on the internet. The information is compiled and classified using a software programme that makes it compatible with International Patent Classification. The information will be available in five international languages *viz.* English, German, French, Japanese and Spanish; in addition to Hindi. By 2002, a team of 40 experts had compiled about 8,000 formulations from a total of 35,000 'slokas' that relate to the Ayurvedic medicinal system.[32] Only plants and knowledge that are already in the public domain will be included in the database. Such information made available to the patent offices worldwide, would help them in verifying the novelty of the inventions or whether such inventions are based on traditional knowledge for eg. a minor value addition or modification to the knowledge, which was known to the traditional communities. The aim is to prevent biopiracy by making the database available to patent offices worldwide, and to alert them to existing knowledge of the plants and their medicinal uses. It is hoped that TKDL will save the enormous costs as well as time involved in legally challenging a patent that has already been granted. TKDL is

[32]Apte, supra note 2

being considered as one of the most significant initiatives which the Government of India has taken to prevent biopiracy.

Dr. Raghunath Mashelkar, former director-general of the Council of Scientific and Industrial Research (CSIR), who is heading the initiative, says that such databases are essential for India to avoid expensive legal battles over patent applications in this field.[33]

VI. CONTRIBUTION OF TKDL

The recent contributions of TKDL towards prevention of biopiracy can be summarized through various instances as stated below:

(i) India foiled a major Chinese biopiracy bid to patent the use of medicinal plants *'pudina'* (mint) and *'kalamegha'* (andrographis) for the treatment of avian influenza or bird flu. The European Patent Office (EPO) decided to grant patent to Livzon, a major Chinese pharmaceutical company, on February 25, 2010, on the medicinal properties of 'pudina' and 'kalamegha' for treating bird flu. In this case, the Council of Scientific and Industrial Research (CSIR), with the help of India's TKDL, dug out formulations from ancient Ayurveda and Unani texts, like 'Cakradattah', 'Bhaisajya Ratnabali', 'Kitaab-al-Haawi-fil-Tibb' and 'Qaraabaadeen Azam wa Akmal' dating back to the 9th century, to show that both 'pudina' and 'kalamegha' have been widely used in India for ages for influenza and epidemic fevers and have been long known in the Indian systems of traditional medicine. In the TKDL, there have been several references where andrographis and mint are used for the treatment of influenza and epidemic fever. Hence, there was no novelty or inventive step involved in the patent application. On June 10, 2010, a three-member

[33] K.S. Jayaraman, Biopiracy fears cloud Indian Database, http://www.scidev.net/en/news/biopiracy- fears-cloud-indian-database.html.

panel set up by the European Patent Office (EPO), to study the evidences, decided to cancel the Chinese patent claim.[34]

(ii) India prevented a Danish company, Claras Aps, from acquiring a patent on its invention of the fat burning properties of ginger, jeera (cumin), onion and turmeric. Claras Aps had filed a patent application at the European Patent Office saying its invention of ginger, jeera (cumin), onion and turmeric as slimming agents was novel. Like the earlier case, even in this case the Council of Scientific and Industrial Research (CSIR), with the help of India's TKDL, dug out formulations from ancient Ayurveda texts like *'Astanga Samgraha'*, *'Yogaratnakarah','Yogatarangini' and 'Gandanigrahah'* dating back to the 5th century, which contained evidences regarding their use for ages in India, as fat burners. Director of TKDL, Dr. V. K. Gupta submitted a letter to the European Patent Office stating that all the four have long been known in Indian systems of traditional medicine for their use as slimming agents or fat burning agents and there references were made from the TKDL regarding these uses. The novelty of the invention was challenged and subsequently the Danish company was forced to withdraw its patent claims.[35]

VII. DRAWBACKS

In the preceding the paragraphs, we have discussed about the weapons, we have with us in our fight against biopiracy. But in this process, inspite of cooperation among the nations at the international level, we have also experienced certain drawbacks. Let us make an attempt to realize the drawbacks, which stand strong in the way of success.

[34]Kounteya Sinha, supra, note 31.

[35]Kounteya Sinha, India beats back Danish firm's biopiracy bid, TOI (Jul. 02, 2010).

A. Weaknesses of the Convention on Biological Diversity (CBD)[36]

As discussed earlier, CBD was one of the initiatives made at the international level to protect the traditional knowledge from biopiracy. But it suffers from certain weaknesses. Some of them can be enumerated as below:

(i) **Weak Enforcement:** Though the CBD is legally binding on all the member countries yet it has little power to ensure that its members comply with the CBD requirements.

(ii) **National Sovereignty over biological resources:** The CBD is based on the notion that member states have sovereign rights over their biological resources; however this means that the rights of local communities over their biological resources depend on their national government and are not spelled out in the CBD. It is an inherent weakness of international law in general, that it tends to be mainly national government-centered.

B. The controversy relating to the TKDL

There is no denial to the fact that the TKDL is a unique strategy to combat biopiracy. The contribution of the TKDL as discussed above stands testimony to the fact. However, we cannot afford to overlook certain drawbacks with respect to the TKDL because doing so might be disastrous. TKDL is supposedly to contain the details relating to the uses and properties of the plant species which have been used by the traditional communities in India for ages and which find their place in the traditional Indian medical system. Such information will be made available to the patent offices worldwide to ensure the novelty of the inventions before granting them patents. In this process there is a constant fear clouding the minds of the intellectuals that whether the TKDL would end up facilitating biopiracy.

[36]Apte, supra note 2.

One of the initiative's strongest critics is Devinder Sharma, president of New Delhi based 'Forum for Biotechnology and Food Security', who argues that the country's indigenous knowledge, which has so far been protected by language and cultural barriers, "is now being handed over officially to drug companies on a readily accessible digital platter."[37] Information about the medicinal properties of plants will be made available means that people outside the country would come to know about those plant species and their uses which they were not even aware of. This also means an easy way for the business corporations to discover about the traditional knowledge. Now, the important thing which we should understand here is that mere recording of the information about the various plant species in the TKDL does not ensure 100% protection from biopiracy. Many a times, corporations (biopirates) manipulate or modify the original medicinal remedy of the plant species and also modify its application so as to give a covering of novelty to the invention, though they are actually based on the traditional knowledge, and then go ahead to patent it and commercially exploit it. There have been similar instances in the past.

The USPTO (United States Patent and Trademark Office) had granted patent to the ailment 'dry eyes'. In the Indian literature, 'dry eyes' control has been spelled out through the use of leaves of Kumari plant (aloe vera). The remedy is to take few leaves of aloe vera, wash these in clean water and then crush the leaves. Put some drops of the solution that is extracted from the leaves into the eyes and the 'dry eyes' problem is taken care of. In the patent application that has been granted by the USPTO, the only difference is that clean water has been replaced with chlorinated water. Also, there was enough technical jargon, like temperature etc., and thus the condition of novelty was satisfied.[38]

[37] K.S. Jayaraman, Biopiracy fears cloud Indian Database(Aug. 30, 2010), http://www.scidev.net/en/news/biopiracy- fears-cloud-indian-database.html.

[38] Devinder Sharma, Another Tool for Biopiracy, (Aug. 30, 2010)http://www.indiatogether.org/agriculture/opinions/ds_tkdl.htm.

C. Weaknesses in the Indian Legislations

Though the government of India has enacted laws in this respect yet there are certain weaknesses in the legislations (about which we have already discussed in the paper). They can be summarised as follows:

a) Biological Diversity Act, 2002

The main weaknesses in the BDA, 2002 are:

(i) Weak participation of traditional communities- the BDA has provisions relating to the constitution of National Biodiversity Authority (NBA) and State Biodiversity Board (SBB) which performs functions relating to decision making, granting of approvals and other advisory functions. But the members of the traditional communities are not members of the NBA or SBB. The act is also silent about the members in the Biodiversity Management Committees (BMCs)[39], which shall consult the NBAs and SBBs whenever their advice is sought, as to whether they should have representatives from the traditional communities. This defeats the object of 'prior informed consent', as has been stated in the Convention on Biological Diversity, 1992, as a result of the weak participation of the traditional communities in the process of granting approvals to foreigners or any citizen of India or a body corporate relating to accessing of biological resources or related traditional knowledge; transferring the results of any research relating to any biological resource occurring in India; or in case of any person wanting to apply for IPRs on innovations based on biological resources and traditional knowledge obtained from India.[40]

(ii) Ambiguity relating to Equitable Benefit Sharing- the actaims at equitable sharing of benefits arising out of the use of biological resources, knowledge and related matters. But it has not been stated as to what will be the proportion in which the benefits will be shared

[39]BMCs to be constituted u/s. 41 of The Biological Diversity Act, 2002.
[40]The Biological Diversity Act, §§ 3, 4 & 6, 2002.

between the corporations and the traditional communities. The act does not even define the word 'equitable', which leaves scope wide controversy and exploitation of the traditional communities.

b) *The Protection of Plant Varieties and Farmer's Rights Act, 2001*

The main problem with the PPVFR Act, 2001 is that under this act, the onus is on the farmer to register the plant or seed variety for securing protection for it. In India, due to lack of awareness among the farmers it is highly unlikely that an average farmer would be able to register his/her variety. Further, the level of literacy, time and money the process requires, a farmer would generally avoid making efforts to register his variety, leaving scope for some other player in the market to acquire the rights over the traditional variety thus culminating into biopiracy.

VIII. HOW CAN BIOPIRACY BE PREVENTED?

Biopiracy, as an act, has huge money potential in it. Obtaining patent for biological resources, related traditional knowledge and the commercial products based on these resources and knowledge means having the right of exclusive use of the resource, its production, marketing and sales in the global market. Such facts itself stand evidence to the fact that the corporations stand to gain huge revenues which can be generated through biopiracy and preventing an act which is backed by such enormous wealth potential will not be easy. Efforts have to be made for long term systemic change.

In order to combat biopiracy, the government should, first and foremost, take up initiatives to find out the various biological resources which have commercial value for human beings and which, traditional communities of India, have been using for centuries. For this purpose, an effective survey needs to be done state-wise, by committees which will have members from the village 'panchayats' and grassroot organizations, who have knowledge about the traditional uses of various resources and who have nurtured their utilities for ages. Prior to this initiative, awareness needs to be

generated about the immense commercial value which such traditional practices have for the country as well as the severity of the losses if the uses of such biological resources are patented by some foreign or private player. At the same time, the villagers must be made aware of IPRs on bio-resources which is a concept alien to the traditional communities. Information needs to be disseminated among the traditional communities regarding the efforts of the government relating to prevention of biopiracy- for e.g. TKDL. This is to secure their confidence so that the traditional communities take up the initiative to register with the government the traditional uses of resources, if any, being used for ages.

No doubt the Biological Diversity Rules, 2004 aims to achieve this by the preparation and maintenance of "People's Biodiversity Register"[41] by the Biodiversity Management Committee (BMC) in consultation with local people, the approach can be more comprehensive in order to combat biopiracy. This is because there are activists and groups who feel that putting traditional knowledge into the public domain (through PBR and other databases such as TKDL) who make it easy for commercial exploitation of the knowledge by Indians and foreign bodies alike. There are valid fears regarding who regulates the use of centralized databases and for whose benefit.[42] In order to gain their confidence, it is necessary to assure such groups of the measures which the government will take to prevent unfair exploitation of such resources and knowledge. This can be done more effectively by some people from their own community. So, such committees should consist of members of the village community and farmers/adivasi unions (when the survey is being is being done in a particular village) who can gain the confidence of the community at large on behalf of the government and through whom the Government can hold consultations with the traditional communities relating to benefit

[41]Biological Diversity Rules, § 22(6), 2004.
[42]Apte, supra note 2, at 56.

sharing prior to licensing the traditional knowledge to some private or foreign individual or corporation. The above discussed initiative cannot become successful without the cooperation of traditional communities at the grassroot level.

The information gathered about traditional practices from these sources should be documented in the People's Biodiversity Register and measures must be taken by the government to ensure its secrecy i.e. until patent or a status of Geographical indication is obtained, no outsider should come to know about it. Undertaking such surveys, maintenance of People's Biodiversity Register and searching biological resources in various places can also help in determining whether Geographical Indication status can be granted to any of the products if they satisfy the required conditions as stated in the GI Act, 1999.

Another crucial issue which we need to take into consideration is that the litigation costs which the government of India has to bear while challenging the patents which are granted by the other nations on the bio-resources and traditional knowledge of India. Under such circumstances, government should undertake some other strategy to counter biopiracy as there are hundreds of such patents which have been granted by the other nations on utilities of bio-resources based on Indian traditional knowledge and countering all of them through litigation might put a heavy burden on the government.

For instance, let's take into consideration this recent issue. India has won the battle for 'Ponni Rice' in a Malaysian Court. 'Ponni' rice was produced along the Cauvery river in Tamil Nadu and Karnataka. A Malaysian firm 'Faiza Sdn Bhd' had attempted to register it as its own trademark for its rice products. This was objected by the Agricultural and Processed Food Products Export Development Authority (APEDA)[43] and four others who filed litigation against the firm in

[43]The Agricultural and Processed Food Products Export Development Authority (APEDA) was established by the Government of India under the 'Agricultural and Processed Food Products Export Development Authority Act', 1985.

Malaysian High Court in Kuala Lumpur. The Malaysian High Court in Kuala Lumpur ruled that Faiza Sdn Bhd should not use the 'Ponni' label for its rice products.[44] This costly litigation could have been avoided if the 'Ponni Rice' had been given the geographical indications status under The Geographical Indications of Goods (Registrations and Protection) Act, 1999.

While combating biopiracy, in order to keep it economical, the government of India should grant the status of GI on as many goods as possible (which are genuine). Such a step will help prevent costly litigations in case of international IPR related disputes as under such circumstances no outsider would be able to register the products of that particular region as its own trademark, for e.g. no outside tea manufacturer can claim trademark for selling its tea under the brand name- 'Darjeeling Tea'. Though the geographical indications statute, for conferring patent-like protection to an exclusive product of a particular region, was enacted in 1999,[45] no more than 120-odd products have so far been registered.[46] Such a statement is itself evidence to the fact that the government has not fully exploited the bio-resources and the associated traditional knowledge of the country. Taking into consideration, the enormous amount of time and money required to combat biopiracy efforts have to be made at the international level to make biopiracy legally impossible. A crucial step in this regard would be to amend the '**TRIPS Agreement**'. The TRIPS Agreement does not provide IPR protection for traditional knowledge which is mainly available in the developing countries. India and other developing countries have often argued that it should provisions (which are present in the CBD) whereby IPR applicants would be obliged to:

[44]G. Srinivasan, India wins 'Ponni' rice trademark row in Malaysia, THE HINDU, (Aug. 28, 2010), http://www.thehindubusinessline.com/2010/08/18/stories/2010081853880100.htm.

[45]Though it came into force with effect from 15th September 2003, (Aug. 30, 2010),http://www.patentoffice.nic.in/ipr/gi/geo_ind.htm.

[46]What is Indian is India's, BUSINESS STANDARD, Aug. 27, 2010.

(a) disclose the geographical origin of biological resources/traditional knowledge used in innovation;
(b) obtain the prior informed consent of local communities who are the customary holders of traditional knowledge;
(c) share the subsequent benefits with traditional communities.[47]

The absence of the above mentioned provisions in the TRIPS puts the developing countries like India (rich in traditional knowledge) on a highly disadvantaged ground making traditional knowledge of India vulnerable to biopiracy.

Also, TRIPS does not extend strong GI protection to products other than 'wines' and 'spirits'. This was the main reason for the American RiceTec company to be able to sell its American Kasmati brand as 'Indian-style Basmati'. Thus, amendment needs to be made in the TRIPS, introducing provisions, providing strong GI protection to products other than wines and spirits.

IX. CONCLUSION

After discussing so long about the concept of biopiracy, its implications and efforts at the national and international level to prevent it, I would like to come to the conclusion that legal battle against every act of biopiracy will not be a feasible solution to prevent it, taking into consideration the vast resources of time and money involved in the legal embargo. So, it is time we start thinking of certain other measures for preventing biopiracy.

There have been suggestions such as abolition of any monopoly rights on the use of biodiversity and related traditional knowledge, especially those which are socially or medicinally useful e.g. medicinal plants for the purpose of research and production of pharmaceuticals. Such a step is suggested, perhaps, to prevent

[47]Apte, supra note 2.

exploitation of the traditional communities. But we have to keep in mind that the bio-resources and the related traditional knowledge available with the traditional communities, if not exploited will never be available for the benefit of mankind, due to the lack of awareness of the outside world. Such a step, again, would not be justified from the point of view of humanity. Providing the business corporations, the licenses and rights to produce or distribute the products, which are the outcome of the traditional knowledge, is a necessary incentive for such corporations to exploit such traditional knowledge. But in such cases, what has to be kept in mind is that the traditional communities should not be deprived of their rightful share in the profits earned by the business corporations from the sale of such products. The government should ensure, on behalf of the traditional communities, that the share which they are getting in the profits is justified. The government should stress on clauses, during the agreements with the corporations exploiting the resources, such as a particular percentage of the profits incurred from the distribution should be aside as the share of the traditional communities of that particular region and transfer of technology know-how to the government, on behalf of those communities. A *novel* strategy with regard to benefit sharing can also be giving equity shares by the company, which acquired patent or license over the traditional knowledge, to the traditional community against their knowledge. Such shares can be held by cooperatives consisting of members of those communities and can provide them long term security by way of dividends.

But, the most crucial aspect with regard to prevention of biopiracy is generation of awareness. Not only the villagers and the indigenous communities but also members of the educated sections of the society e.g. engineers, lawyers, politicians, students etc. are unaware about the menace of biopiracy and its consequences on biodiversity and at the end of the day, on the economy of India. Such a step is can be significant, the reason being, in case of any instance of biopiracy taking place in India, people would not be sitting at home totally

unaware of the situation. They can voice their opinion through mass media and create strong public opinion thereby creating pressure on the administration to take strong and effective measures to prevent the theft of our bio-resources and traditional knowledge.

Few measures which should be adopted by the government and which can be effective with regard to this objective are suggested below:

(a) organizing awareness generation camps in the villages with the help of NGOs, active in that region (such NGOs must be provided all possible support by the government at the administrative and financial end);

(b) organizing frequent seminars and public lectures, by intellectuals in the field, at various colleges and institutes to spread awareness among the student community;

(c) raising the issue in talk shows (in the TV channels) and exploiting the other mediums of electronic and print media to generate awareness, among the masses, mainstreaming the issues like conservation of biodiversity and community rights (till date the media has not given the issue the necessary importance.

Thus, I would like to conclude with the hope that the government of India takes all possible effective measures, both at the national and international level, to prevent biopiracy. On an optimistic remark, that the government realizes the importance of conservation of biodiversity, I would like to quote Dr. Devinder Sharma – "……..that plant and animal biodiversity is to India (and for that to other developing countries) what oil has been for the Middle East." [48]

[48]Devinder Sharma, Selling Biodiversity: Benefit Sharing is a Dead Concept, (Sep. 4, 2010), http://www.mindfully.org/WTO/2004/Selling-Biodiversity-Sharma3may04.htm.

INSIDER TRADING WITH SPECIAL REFERENCE TO THE SATYAM SAGA

S. Harish[*]

ABSTRACT

The outflow of crucial information diminishes the confidence of the investor in the fairness and security of capital market. Insider trading specifically refers to such outflow. This research paper traces the evolution of Insider Trading and in the light of the facts presented analytically ruminates whether the Satyam saga has an insider trading chapter to it. This paper primarily focuses on the trading of Satyam stocks between 23rd December, 2008 and 5th January, 2009 i.e. a week before the Rama Linga Raju's public revelation. The alleged trading activity has been chronologically presented and inferences from the same have been drawn. What is price sensitive information? What would constitute publication such information? Whether information allegedly leaked was unpublished price sensitive information? The paper seeks to answer such intriguing questions and thereby delve deeper into the investigation of the matter. No official complaint has yet been filed by the SEBI. The regulator is still waiting

[*]S. Harish is a fourth-year student at Gujarat National Law University, Gandhinagar. The author may be reached at harishiyer718@gmail.com.

for fool proof evidences to hold that the promoters did indulge in insider trading. Media reports, which seem to be confident on Insider trading, have been elaborately discussed. Regulation 3 of SEBI (Prohibition of Insider Trading) Regulations 1992 has been elucidated to determine whether the said transactions fall within the contours of Insider Trading. The possible justifications that the institutional investors may give for losing their confidence in Satyam resulting in such massive trading have also been deliberated. As a conclusion a SWOT analysis has been done to check the adequacy of the assumption made in the research paper.

I. INTRODUCTION

If stock market experts were so expert, they would be buying stock, not selling advice.

Norman Augustine[1]

In times of war, massacres destroy human resource while in times of peace they obliterate economy. One's perception of life is relevant in determining whether the astounding disclosure of Raju could be termed a massacre or not. What happened on the 7th of January 2009 will surely in future be known as an event which destroyed investor confidence, crimsoned India's IT visage and brutally assassinated the assets of many inflicting excruciating pain. It would be known as a massacre that hit all and wounded many. The fluctuating nature of the

[1](March 04, 2009), http://www.quotationspage.com/quote/36807.html.

market does not allow one to predict any present or future trends with stamping confidence, as they involve a plethora of risks. But such risks have umpteen numbers of takers. As a result, economies in the last two decades, due to investment and rampant growth, have been introduced to an unimaginable size of the capital market. From $ 4.7 trillion in 1980 to $ 27.5 trillion in 1998 the world stock capitalization lets the numbers speak for itself.[2] But no growth is independent of lacunas and side effects. With the massive size of the markets, issues of fraud have silently crept up the ladder. One such grave issue is insider trading.

Insider trading is the trading of a company's stock or other securities (e.g. bonds or stock options) by individuals who have access to information of the Company which is not present in the public domain. Insider trading has twin facets to it, legal and illegal. When the above trading is done by people such as corporate insiders like officers, directors or employees of the company then it is a legal trading. But when insider trading results as a breach of fiduciary duty or relationship of trust and confidence while in possession of material, non-public information about the security, it is the illegal form of insider trading.[3] Insider trading may also be used to refer to a practice whereby an insider or related party trades the shares of the company on the basis of important information which he had obtained during his nexus with the company as an insider. "Tipping"[4] information, securities that have been traded by person "tipped" and securities trading by those who misappropriate such information are all different

[2] R.N. Agarwal, Capital Market Development, Corporate financing Pattern and economic growth in India (Mar. 4, 2009), http://www.ieg.nic.in/dis_rna_20.pdf.

[3] Insider Trading, U.S. Securities Exchange Commission (Mar. 04, 2009), http://www.sec.gov/answers/insider.htm. See also Shapiro, Susan P.,Wayward Capitalists: Targets of the SEC., NEW HAVEN, CONN.: Yale University Press, 1984.

[4] The act of providing material non-public information about a publically traded company to a person who is not authorized to have the information is called tipping (Mar. 04 2009), http://www.investopedia.com/terms/t/tipping.asp.

aspects of insider trading violations.[5] Such misuse of confidential information is unethical amounting to breach of fiduciary position of trust and confidence. Being *au fait* is the primary requirement of a capital market and that is why transparent flow of information becomes indispensable. Insider trading obstructs this flow and diverts it in another direction. Having traversed this long path when the information reaches the investors there remains a very little chance for effectuating damage control. The outflow of crucial information diminishes the confidence of the investor in the fairness and security of capital market. Therefore adequate restrictions are placed by law so as to check this activity which buttresses the beliefs of people that the markets are a fair arena for transacting stock trades. By prohibiting individuals who have material, price-sensitive information from trading, insider trading restrictions attempt to neutralize the advantage of being an "insider" and, thus, invite participation by outsiders who would not trade if they thought the market was rigged against them.[6]

This paper seeks to bring forth the laws in force in India regarding Insider Trading, amendments to them and deliberate upon their application in the present context of a suspected insider trading in the Satyam Scandal.

II. EVOLUTION OF INSIDER TRADING LAWS IN INDIA

"He that worketh deceit shall not dwell within my house: he that telleth lies shall not tarry in my sight"

Bible[7]

[5] R. Chandrate, Evils of Insider Trading, 4 CORPORATE LAW CASES 245 (2001).

[6] Nancy Reichman, Insider Trading,Beyond the Law: Crime in Complex Organizations, 18 CR.& JUS., 55-96, (Mar. 07 2009), http://www.jstor.org/stable/1147654.

[7] Bible quotes, (Mar. 15, 2009), http://thinkexist.com/quotation/he-_that_worketh_deceit_shall_not_dwell_within_my/277429.html.

The bible has it and so, must all laws. Deceit of any form should be curtailed and crushed so that the *Love Thy Neighbour* philosophy remains strong and omnipresent. 125 years into history stock markets in India have flourished, diminished, kept stable and undergone reforms of path breaking nature. The deceit i.e. insider trading was an unregulated part of this network. It was in 1970s that for the first time it was considered to be a practice fatal to the economy and investor confidence. Before the strict regulatory framework came into existence there were certain significant contributions of preceding committees.[8] On the basis of the recommendation made by the Abid Hussain Committee wherein it was suggested that SEBI should formulate legislations so as to empower itself while dealing with such frauds, the Securities and Exchange Board of India (Insider Trading) Regulations 1992 were formulated. The regulations have prohibited this fraudulent practice and a person convicted of this offence is punishable under S. 24 and S. 15G of the SEBI Act 1992. The 1992 Regulations were short with just 12 clauses, divided into three chapters, "Preliminary", "Prohibition on Dealing, Communicating or Counseling" and "Investigation". The Regulations were later amended exhaustively in 2002 and renamed as SEBI (Prohibition of Insider Trading) Regulations 1992 (hereinafter referred to as the "SEBI Regulations") bringing these in line with the parent SEBI Act. Two Schedules were added, the first having two parts, Part A, a model code of conduct for prevention of insider trading for listed companies, and Part B, a similar code for other entities; the second, a model code of corporate disclosure practices for prevention of insider trading. The prime basis of such a drastic amendment was the case of *Hindustan Lever Ltd. v. S.E.B.I.*[9] wherein major loopholes of the 1992 Regulations were brought to the floor. The definitions of "insider",[10]

[8] The Sachar Committee of 1979; Patel Committee 1986; the Abid Hussan Committee 1989.
[9] Hindustan Lever Ltd. v. S.E.B.I., (1998) S.C.L. 311 (S.C.).
[10] Regulation 2 (e) of The SEBI Regulations.

"price-sensitive information", [11] "unpublished" [12] were further armoured to make law free from ambiguity and check the escapist tendency of the corporates whose use such ambiguity for their benefits. Addition of regulation 3A is also an aftermath of the HLL case. The 2008 amendment to the same has increased the scope of the word "insider" without making any additions or deletions in the previous definition but by just deleting a comma from the same and by breaking the definition up into two paragraphs.

III. INSIDER TRADING DISSECTED

Like a coin even insider trading has flip side. It is not totally negative in nature. Empirical studies have shown that the direction of price can be traced form insider trading.[13] This can lead to accurate valuation of market trend and thereby control the loss that is inevitable. Say for example the officials of a company 'A' have inside information as to probable fall in the stock prices in future. As they begin selling shares on this premise the market is guided towards thinking in the same direction as money is being moved out of the company. The investors can react fast and affect at least the quantum of their losses.

But this is probably the only advantage without too many conflicts as the other advantages of insider trading in a way prove to be disastrous from the perspective of the small shareholders. For example it is considered that the large shareholders who can suffer massively because of the price fluctuations can benefit from insider trading[14] by selling or buying at relevant stages and also that such money does not

[11]Regulation 2 (ha) of The SEBI Regulations.
[12]Regulation 2(k) of The SEBI Regulations.
[13]Lisa K. Meulbroek, An Empirical Analysis of Illegal Insider Trading, J47 J. OF FINANCE,1661–1699(1992):
[14]Harold Demsetz, Corporate Control, Insider Trading, and Rates of Return,76 AMERICAN ECONOMIC REV. 313–316(1986):

come from the corporate profits comes in handy.[15] But such benefit can be translated into diversion of wealth form the small to the big shareholders arbitrarily thereby creating conflicts between the two.[16] Insider trading as monetary remuneration for managers for innovation are seen as advantages but it has it has own lacunas. Money may have to be paid for mere access of information, rather than its production.[17] Insider trading may also serve as cushion for corporate disasters by increasing tolerance for possible failures[18] but all such advantages can fall upside down if the insider has intentions to profits totally to themselves rather than directing market trends.

Thus, in order to comprehend the true nature of insider trading we need to look at the factors that determine whether such illegal activity has been perpetrated or not. In the course of such deliberations we must consider the following basis tenets regarding Insider Trading.

Following are the basic elements of Insider Trading:

A. **Materiality:** The duty to disclose or abstain from disclosing "insider information" is both incidentally and intrinsically connected to the aspect of materiality of information. When a public issuer or one of its insiders is in possession of undisclosed material information, the issuer or insider must either disclose the material information before trading in the issuer's securities or abstain from trading in the issuer's

[15]Jie Hu& Thomas H. Noe,The Insider Trading Debate, Federal Reserve Bank of 82 ATLANTA ECONOMIC REV. 34–45(4th Quarter 1997):

[16] Maug, Ernst., Insider Trading Legislation and Corporate Governance,46EUROPEAN ECO. REV. 1569–159 (2002).

[17] David R. Henderson, Concise Encyclopaedia on Economics, Stanislav Dolgopolov, Insider Trading, (Mar. 15, 2009), 276-281, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1305210.

[18] James D. Cox, Insider Trading and Contracting: A Critical Response to the 'Chicago School', DUKE LAW J. 628–659(1986).

securities.[19] The following factors are used to determine materiality:

1. Significance of Information with the alleged perpetrators
2. Market reactions at the disclosure of such information or when it becomes generally.
3. In the cases tippee[20] trading, source of information assumes momentousness
4. The specificity of the tip is another important factor.

B. **Inside Information**: Any information which is price sensitive in nature and can affect the trade of shares of the company can be termed as Inside Information. The word "insider" has been covered under regulation 2(e) of the SEBI Prohibition of the Insider trading regulation, 1992. As per the U.K. Law[21] the information must relate to particular security or particular issue and not in general. Furthermore, the information must not have been made public.

C. **When Information becomes Public:** Information becomes public when it is made known to an investing community at large through the dissemination of the information. If a reasonable number of people have knowledge of the information, then any trade in the stocks of the company would not come under the purview of Insider Trading. But if that is not the case, then the trade in stock would come in the purview of Insider trading.

[19]John Macleod Heminway, Materiality Guidance in the Context of Insider Trading: Call For Action (Mar. 07 2009), http://www.wcl.american.edu/journal/lawrev/52/heminway.pdf?rd=1.

[20]Tippee is a person who with the knowledge of the disclosed information received through a company insider, makes a trade out of it thereby braech his/her fiduciary duty.

[21]Criminal Justice Act, §56 (1993).

D. **Unfavourable News:** The price of the securities of a corporation might be adversely hit because of any news having adverse financial impact upon the corporation or any impending change in the management of the company. The SEBI regulations consider both favourable and unfavourable news as constituting "price sensitive information" provided it is likely to materially affect the price of the securities.

Now that we have a fair idea of how these laws in India have evolved and what are the elements which need to be reckoned for detecting insider trading in a company/corporate we must refer to the detailed facts of the Satyam issue. We shall then test such facts on the above laws and deliberate whether Satyam falls within the ambit of insider trading or not.

IV. THE SATYAM MASSACRE

You can fool some of the people all of the time, and all of the people some of the time, but you cannot fool all of the people all of the time.

Phineas T. Barnum[22]

Satyam Computer Services Ltd. (hereinafter referred as SCSL) was undoubtedly not oblivious to the aforementioned fact. In their bid to fool all the people all the time they ended up shocking the entire world, ridiculing themselves and denting India's corporate image. For most of the part of their existence as IT giants, who not only found a place in the BSE but also in the NYSE, SCSL have breached multitudinous laws[23] of our country. The following are the allegations that SCSL faces today:

[22](Mar. 10 2009), http://www.worldofquotes.com/topic/Deceit/index.html.
[23]Companies Act, §§ 205A, 207, 297, 299, 300, 372A.

1. Inflation of financial position fallaciously to the tune of over Rs. 5,000-6000 crore by falsifying account books.
2. Faking Public Financial Statements by mutilating banks and cash balance.[24]
3. Utilization of capital receipt for revenue payment like dividend, managerial remuneration and other cash outflow which are usually done out of profits.
4. Insider trading.

This paper focuses in its entirety on the aspect of Insider Trading.

V. DID THEY?: PECULIAR FACTS ON THE TABLE

Preliminary investigations have disclosed that there has been major off-loading of the shares of the company by Institutional Investors days before the Satyam massacre happened. Institutional investors like DSP Merrill Lynch, DSP Blackrock, ILFS Financial Services and Deutsche Bank had offloaded their Satyam shares before Ramalinga Raju's startling revelation of fudging the accounts of the company to the tune of over Rs 7800 crores.[25] This has led to grave suspicions regarding insider trading in the Satyam arena. These sales took place after Satyam's bid to acquire Maytas proved disastrous. This could have been a reason for the loss of confidence of the Institutional Investors in the SCSL resulting in the said off-loading. But when we delve deeper into the issue certain dates emerge as of massive significance. The sales made between 23rd December 2008 to 5th January 2009 have been under the scanner as a mammoth trading of

[24]The report said that there may have been window-dressing of published financial statements with an intention to allure investors, resulting in false value of shares appreciating in the stock exchanges. Press Trust of India, RoC Reports hint at Insider trading, (Mar. 10, 2009), http://economictimes.indiatimes.com/articleshow/4003328.cms.

[25] Initial probe into insider trading, (Mar. 10 2009), http://www.deccanherald.com/CONTENT/Jan152009/business20090114112538.

2.5 crore shares of the company had taken place. The trading involved pledged shares of the Raju Family with various entities. A trust Company namely IL&FS Trust Company facilitated these transactions for the above debenture holders as well as lenders. The trading can be presented chronologically as follows[26]:

December 23rd 2008

DSP Merrill Lynch sells 39 lakh shares. Average Price per share on NSE was Rs. 146.80.

December 23rd and 24th 2008

DSP Blackrock sells a little over 74 lakh shares. On 24th December, though the price averaged quite below the previous day at Rs. 125.88 per share.

December 29th and 30th 2008

Deutsche Bank sells over 47 lakh shares. The average price per share had bounced back and was even higher than what it ended at in the previous week being Rs. 146.66 and Rs. 156.72 respectively.

January 2nd 2009

HDFC Mutual Fund offloads 50 lakh shares. By now the prices had got even higher being averaged at Rs. 177.10 per share.

January 5th 2009

ILFS financial services trades 35 lakh shares and opts out too. Prices average at Rs. 168.22 much higher than what it became later on the

[26]The facts have been derived from Doval, Pankaj; Diwakar, Government Suspects Insider Trade in Satyam scam (Mar. 10 2009), http://economictimes.indiatimes.com/articleshow/3975169.cms.

9th of January when it touched all time lows for the first time at Rs. 6.30.

January 7th 2009

Raju's heart trenching confession.

In addition to these there have are media reports that suggest that the newly appointed CEO of Satyam Mr. A. S. Murthy sold 40,000 shares before Satyam's attempt to acquire Maytas failed.[27] But Murthy's case does not seem to as severe as the ones chronologically suggested because he is believed to have sold the shares in his personal capacity and also the fact SEBI had the knowledge of such sales made by him before they appointed him as the CEO favours his side.[28] All these may be independent events but if they are viewed as a chain of events then there is certainly a hint of a mass fraud. Let us examine whether these events could be encompassed within the scope of insider trading provided under the SEBI regulations.

VI. ANALYSIS

Regulation 3 of the SEBI Regulations categorically provides that:

[27]Satyam CEO could come under SEBI scanner for insider trading, INTERNATIONAL BUSINESS TIMES, (Mar. 13, 2009), http://www.ibtimes.co.in/articles/20090209/satyam-ceo-murty-could-come-under-sebi-scanner-insider-trading_3.htm.

[28]Murthy sold Satyam shares before plunge, THE INDIAN EXPRESS(Mar. 13, 2009), http://www.indianexpress.com/news/murty-sold-satyam-shares-before-plunge/419988/.

1. An insider cannot deal in securities neither on his own behalf nor on behalf of the any other person while he is in possession of any[29] unpublished price sensitive information.
2. An insider also cannot communicate, counsel or procure directly or indirectly the above information to another person who while in possession of such information shall not deal in securities.

Regulation 3A on the other hand puts a direct bar on companies and restrains them from dealing in securities of another company or it's associate while it is in the said information.

In order to determine whether charges of insider trading can be imputed on SCSL we must scrutinize Regulation 3 read with other regulations and test them on the facts of the matter at hand.

A. Whether Information Leaked was Unpublished Price Sensitive Information

"Price Sensitive Information" (hereinafter referred as to as "PSI") has been defined under Regulation 2 (ha) of the SEBI Regulations as any information which relates directly or indirectly to a company which if published could materially alter the price of the securities of the company. The explanation appended to 2 (ha) does not cover what has instant situation. But the explanation is not exhaustive of the

[29] 'While in possession of' was not originally present in the SEBI Regulations but is a consequence of the Amendment of 2002. The major reason for bringing about this change was that in the HLL case the fact that the decision to purchase the share was not "on the basis" of any unpublished price sensitive information as was required under regulation 3 but was based on general policy of Uniliver was used by HLL to escape the allegation placed on it. The burden of proving that the perpetrator had acted "on the basis" of the information was too large and had to be brought down so that such loopholes in law could not be used to escape from frauds committed. What is shocking is that even after the amendment, 15G of the SEBI Act, 1992 retains the words "on the basis of" and no substitution as in the above case has happened.

aforementioned regulation. It only suggests that conditions contained in regulations from 2 (ha) (i) to (vii) shall be deemed to be PSI. In this scenario the only question that needs to be answered is that whether the information which was brought to the public forum, by the no more sacrosanct Ramalinga Raju on the 7th of January 2009, was fatal enough to paralyse the economic front of the company. As expected the answer is not something out of the dreaded books of derivative mathematics or physics, it is *res ipsa loquitur*. The Satyam fiasco suggests that the information that got divulged was sensitive enough to bring down shares trading in the 150's to an abysmal single digit low of around Rs. 6.30 per share.

In order to deliberate further the definition of "unpublished" is also crucial. Regulation 2 (k) as amended by the 2002 amendment Act has been curtailed and the term "unpublished" now means information which is not published by the company or its agents and is not specific in nature. The explanation appended to the regulation very cautiously eliminates speculative reports in print or electronic media from the ambit of published information thereby strengthening the definition further. It previously contained the words "generally known" because of which the term "unpublished" became meaningless as even trivial speculative newspaper columns could be presented as evidence by the perpetrators. It is therefore abundantly clear that the information if divulged before 7th of January was unpublished prior to the said date. Since on the said date Raju had as an agent of the company disclosed information in front of live media and therefore such reports cannot be said to be "speculative reports" hence information published post 7th January is published information.

Since it has been previously established that the information tendered by Ramalinga Raju was price sensitive information and knowledge of such information prior to its publishing could fall strictly within the contours of regulations 3 and 3A as there have been blatant dealings

in securities (chronologically suggested) while in possession of such an information. Consequently in accordance with regulation 4 of the SEBI Regulations the above act can be called Insider Trading and the punishment for the same has been prescribed under section 15G of the SEBI Act.

VII. FURTHER STEPS

No official complaint has yet been filed by the SEBI. The regulator is still waiting for fool proof evidences to hold that the promoters did indulge in insider trading. Media reports though seem to be rather confident on their stand. The HINDU had published an article namely '*Insider Trading in Satyam established*'[30] which sought to put forth the view that insider trading is prima facie visible in the Satyam episode. **Then why is the regulator not taking necessary steps?** The precise reason being, that SEBI is not sure of the source of insider trading. Currently SEBI has been investigating about the possible fraud that could have been committed. In pursuance of the Securities and Exchange Board of India Act 1992 (hereinafter referred to as the "SEBI Act"), the SEBI has powers to investigate[31] any intermediary or person associated with the securities market if it has reasonable grounds to believe that the transactions in securities are being dealt with in a manner detrimental to the investors or the securities market or when such persons have violated the SEBI Act or rules or regulations made or directions issued by the SEBI. Under section 11C (2) the managers, managing directors, officers, employees and every intermediary or every person associated with the securities market have to assist the investigating authority by

[30]N. Rahul, Insider Trading in Satyam established, THE HINDU, (March 14, 2009), http://www.hindu.com/2009/01/31/stories/2009013159921500.htm.

[31]Section 11 inserted by the 2002 Amendment to the SEBI Act, 1992 provides powers regarding investigation. (Section 11C (1)).

preserving and producing books, registers, documents, records of the company or the intermediary or such person, or relating to the company or intermediary or such person.[32] By virtue of such powers the Board has acted rather swiftly by ordering investigation and sending its officials to Hyderabad as soon as the news of the scam came to light.[33] The process though has not been smooth. When SEBI sought to investigate it was not allowed as Ramalinga Raju had already surrendered to the Hyderabad Police. SEBI moved a petition to the city court of Hyderabad for investigating him but to no avail as the 6th Additional Chief Metropolitan Magistrate rejected its plea along with the petition of the Serious Fraud Investigating Office (hereinafter referred to as "SFIO) holding for the Board that it was not an investigating agency and it did not have the permission from the chairman of SEBI[34] and for the SFIO that the petition was not filed within the relevant provisions. The holding of the trial court with respect to the Board seems to be prima facie contrary to section 11C of the SEBI Act. The SEBI then approached the High Court through a writ petition wherein the High Court adjourned the proceedings on Friday, January 30th 2009 and posted it February 9th 2009.[35] Considering the urgency of the matter the SEBI approached the Supreme Court. The apex court deliberated over the arguments of Mr. Goolam E. Vahanvati, the advocate for SEBI and solicitor General

[32]SEBI Act, § 12.

[33]Anupama Katakam, Off SEBI Hook?,FRONTLINE (Feb. 13, 2009) 14-15.

[34]Court rejects SEBI, SFIO pleas to quiz Raju's, THE TIMES OF INDIA (Mar. 14, 2009), http://timesofindia.indiatimes.com/Business/India_Business/Court_rejects_SEBI_SFIO_pleas_to_quiz_Rajus/articleshow/4022334.cms. See also, SEBI plea to quiz Ramalinga Raju Rejected, THE HINDU(Mar. 14, 2009), http://www.thehindubusinessline.com/2009/01/24/stories/2009012451780100.htm.

[35]SEBI's Plea to quiz Raju's posted for February 9th, THE HINDU (Mar.14, 2009), http://www.blonnet.com/2009/01/31/stories/2009013151741400.htm. See also AP High Court adjourns hearing on SEBI petition, THE ECONOMIC TIMES (Mar. 14, 2009), http://www1.economictimes.indiatimes.com/Infotech/Software/AP_High_Court_adjourns_hearing_on_SEBI_petition/articleshow/4049820.cms.

and granted permission to interrogate the Rajus.[36] The Board questioned the Rajus as soon as the above order was pronounced. Concrete findings are yet to be produced as to Insider trading as SEBI seems to be waiting for clear evidence on the indulgence of the promoters in the leak and use of the unpublished price sensitive information.

VIII. CONCLUSION

"The evil that men do lives after them; the good is oft interred with their bones."

William Shakespeare[37]

Written in 1599 this statement still stands tall. Ramalinga Raju was Andhra's poster boy, people made huge money, many got jobs and thousands flourished but still the question remains, **Will the world remember him for what he was and the hopes that he gave?** The answer most blatantly is no. The Satyam saga will be embedded in the hearts of all those who lost and they are the ones who are going to tell the future tales. Insider trading allegations if proved will serve as another a scar not only in the face of Satyam but also in the face of corporate India. The aborted deal with the Maytas and the World Bank bar on Satyam for 8 years could be used as the scapegoat by all the institutional investors for having lost their confidence in the Satyam. The preferable argument from their side can be that their

[36]Venkatesan J., SC allows SEBI to quiz Raju brothers for 3 days, THE HINDU (Mar. 14, 2009), http://www.thehindubusinessline.com/2009/02/04/stories/2009020452150100.htm.

[37]From the Speech of Mark Antony on Caesar's Funeral in the Play Julius Caesar by Shakespeare. Julius Caesar quotes, (Mar. 14, 2009), http://thinkexist.com/quotation/the-evil-men-do-lives-after-them-the-good-is-oft/589518.html.

greatest fears came true when the 7th January incident happened. It was something they had sensed and therefore wanted to move out of the sinking ship though not like rats but like wise men with extra boats. It is for the investigation to reveal whether this was the actual reason or whether there was trading within the walls of Satyam prohibited by law. Considering Satyam's background the evidence in favour of insider trading would not come as a shock. But the discovery regarding Satyam cannot be called the final destination. They may still be others with same tales to unfold. One fish generally spoils the pond but who knows how many such fishes are ready to unleash their ravenous jaws. Satyam was an alarm bell for the market regulator. Prevention has always been regarded as better than cure. It is time SEBI realizes this and makes arrangements for effective implementation of laws. The laws in India have generally been very strong but what they lack is implementation. SEBI may in the course of time crack the case and do justice to all and sundry but is that all we want? As Germany grew in the 1920's under nose of Chamberlain and later desecrated the peace of the World by giving Hitler and World War II to it, what will be remembered is that Satyam grew under the nose of SEBI and SEBI never knew. The RoC though has been vigilant enough in signalling to the Board about the transactions that happened between 23rd December 2008 and 5th January 2009 and the Board has taken necessary steps by investigating the Rajus. Yet, till date the fact remains that no concrete findings have been arrived at. Practical problems do arise and investigation is not as easy as it seems in a half hour long detective TV show but still we cannot be left waiting for ages.

Market investigating agencies like SEBI and SFIO should be further empowered by law to avoid such situations. Had SEBI tracked the fraud rather than the public confession that brought forth the news, the story would have scripted differently. The time wasted for deciding whether Rajus could be interrogated would have been surely used by the perpetrators for destruction of evidence. In the light of the

fact that in such cases direct evidences are not always available and the case invariably depends circumstantial evidences, the time lost may prove fatal. Insider trading may never be found in the light of the time wasted. The ramifications of this are yet to be found. The trading pattern of the institutional investors must be considered. The pattern reveals that all the Institutional Investors sold their shares prior to the judgement day i.e. the 7th. The deal failed in the end of December and the offloading began and within two weeks huge numbers of shares were traded. There seems to be a chink in the armour. I wish to reserve my observation till any material evidence is produced by SEBI but am surely inclined towards there being an insider trading. Let us, for the sake of the capital market, hope that my inclination does not come true because if it does then SEBI will have to do more than just patch work and India will need more time to recuperate from yet another corporate governance scar. So whether insider trading happened in Satyam actually depends on the findings of SEBI

A SWOT analysis can probably throw more light on the present situation. This can be used both as means to know what is going on and recommendations for future.

Strengths

The chronological order in which the shares were sold displays how fast transactions took place. Thus the institutional investors gained from the whole affair and none of them suffered losses. One failed deal cannot be the sole reason for losing trust in a flourishing company

Weaknesses

The deal with Maytas had aborted disastrously so investors lost confidence and pulled out money. Also the World Bank had banned Satyam for 8 years so this could also serve as a reason for major

selling of shares. Thus offloading of shares was not due to leakage of unpublished price sensitive information.

Opportunities

Information collected from the Rajus should be used and all transactions, including phone calls, messages, email id's should be checked for some source on the leak of this information.

Threats

The time consumed in interrogating Rajus including the time wasted in taking permission for investigating may have resulted in loss of important information regarding insider trading.

THE FUNCTIONING OF *LOK ADALATS* IN INDIA— A CRITICAL ANALYSIS

Vinita Choudhury[*]

ABSTRACT

When laws are equal for all irrespective of one's social, economic, cultural and educational background, then why not justice which is contemplated widely in the Constitution of India? Lok Adalats were introduced in the country to give effect to the Constitutional mandates. The idea of propounding a system of Lok Adalats found its base in the system of resolving disputes through the Panchayat mechanism that prevailed in our country. In the course of time, Lok Adalats received statutory recognition. However, in the long run, Lok Adalats have been unsuccessful. The existence of gross inefficiency, illegality and coercion in the system of Lok Adalats causes a great deviation from the standards of justice. Moreover, there is a flaw in the very procedural and functional aspect. The emphasis is on "disposal of cases" rather than on "justice". Supporters of the system tout on the fact that it helps reduce burden on the formal system of courts. However, the

[*]Vinita Choudhury is a third-year student of law from Gujarat National Law University, Gandhinagar. The author may be reached at vinita.gnlu@gmail.com.

harsh reality is that, in the effort to reduce the burden on the judiciary, no real benefit reaches the needy. Besides, in cases between people who can afford formal courts and those that cannot, the less-desperate party is at a greater advantage. The disadvantaged party is forced to settle for the less. Consequently, although the broader objective of 'access to justice' has been attained, to what extent this access has ultimately resulted in justice is the big unanswered question. The article seeks to inspect the working of the Lok Adalats, critically analyse its positive as well as negative aspects, and throw light on why the negatives far exceeds the positives and annihilates the very objective of the institution of Lok Adalats.The material for this project has been obtained using books, cases and the internet. A descriptive method is used in completion of this paper.

I. JUSTICE-WHAT DOES IT CONTEMPLATE?

The notion of justice evokes images of the rule of law, of the resolution of conflicts, of institutions that make laws, and of those that enforce it.[1] Justice implies fairness and the implicit recognition of the principle of equality.[2] Justice is the supreme objective of the Constitution of India. Justice is envisaged in its widest sense in all its forms whether social economic and political in the Preamble to the

[1]S. MURLIDHAR, LAW, POVERTY AND LEGAL AID: ACCESS TO CRIMINAL JUSTICE 1 (1st ed., 2004) [hereinafter S. MURLIDHAR].

[2]JOHN RAWLS, A THEORY OF JUSTICE 11 (Harward University Press, 1st ed., 1971); see alsoS. MURLIDHAR, supra note 2.

Constitution itself. This paramount goal have been realised by the framers of the Constitution through Parts III and IV of the Constitution that deal with fundamental rights and the Directive Principles of State Policy respectively. Articles 14, 22, 32 and 226 are some of the provisions which presuppose effective justice for all.

Moreover, justice can be viewed as a fundamental human right as reflected under Article 8 of the Universal Declaration of Human Rights which reads: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law." Article 14 of the International Covenant on Civil and Political Rights provides that all persons shall be equal before the courts and the tribunals. The denial of justice challenges the very legitimacy of a legal system. It is a basic service that a welfare state owes to its citizens.

A mere proclamation of justice for all is not sufficient and does not encompass justice in the true sense of the term. In order to effectuate the justice which the fathers of the Constitution have proposed for, it is necessary that the state guarantees effective access to justice by affirmative action.

II. ACCESS TO JUSTICE

Access to Justice inheres in the notion of justice. Two basic purposes which are intended to be served by providing access to justice are:

a. to ensure that every person is able to invoke the legal processes for redressal, irrespective of social or economic status or other incapacity; and

> b. that every person should receive a just and fair treatment within the legal system.[3]

In other words, the term 'Access to Justice' signifies the opening up of the formal systems and structures of the judiciary to all sections in the society including the disadvantaged groups. It implies the removal of legal, economic, social, political etc. hurdles to justice. This shall go on to ensure equal access to justice by all.

In the late 1970s, an attempt was made by the judiciary of our country to give effect to the right of access to justice in the form of Public Interest Litigation. This device has gone a long way in enforcing the right to access to justice. Furthermore, judicial decisions have declared legal aid to be a part fundamental right to life under Article 21 of the Constitution.[4] Although the construction of the right of access to justice as a part of the scheme of Article 14 and 21 had to await judicial interpretation till late 1970s, the constitutional right of an arrested person to legal representation was seen as being contained under Article 22.

Article 22 (1) provides that "no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult a legal practitioner of his choice". *In Re Keshav Singh*,[5] the Hon'ble Supreme Court observed "*The existence of judicial power in that behalf must necessarily and inevitably postulate the existence of a right in the citizen to move the court in that behalf."*

In *Bihar Legal Support Society v. The Chief Justice of India & Ors*[6], the Court observed:

[3]S. MURLIDHAR, supra note 2.
[4]M H Hoskot v. State of Maharashtra, (1978) 3 S.C.C. 544 (India).
[5]Keshav Singh v. Speaker, Legislative Assembly, A.I.R. 1965 S.C. 745 (India).
[6]Bihar Legal Support Society v. The Chief Justice of India & Ors., A.I.R. 1987 S.C. 38 (India).

"the weaker sections of Indian society have been deprived of justice for long long years; they have had no access to justice on account of their poverty, ignorance and illiteracy...The majority of the people of our country are subjected to this denial of 'access to justice' and overtaken by despair and helplessness, they continue to remain victims of an exploitative society where economic power is concentrated in the hands of a few and it is used for perpetuation of domination over large masses of human beings…"

Thus, the constitution and the judiciary calls for and accentuates equal access to justice. This means that the poorest in society should not be excluded from the legal system when they cannot afford court fees or a lawyer. The other important judicial intervention in this regard was the Constitution (42nd Amendment) Act 1976 which inserted Article 39-A which provided for equal justice and free legal aid. The inclusion of the right to legal aid as a directive principle does not dilute its importance or enforceability.

III. DEVELOPMENT OF LOK ADALATS

According to an estimate the majority of the people in India live below the poverty line. People living in 5,18,000 villages are poor and ignorant of their rights.[7] The life span of a civil case in India is expected to range between eight and twelve years.[8] The ratio of judges per million in India is approximately nine whereas it is 115 in the United States of America.[9] The ratio of advocates per population is also very low in India compared to other developed countries. There are around five lakhs advocates for more than one billion

[7]MADABHUSHI SRIDHAR, ALTERNATIVE DISPUTE RESOLUTION: NEGOTIATION AND MEDIATION 115 (1st ed., 2006).
[8]Id.
[9]Id.

population in India.[10] These facts bring into view the existence of a tremendous strain on resources which further detaches many people from justice and a need for a system which would fill this existing void.

A system of *lok adalats* was introduced in India in the year 1982 in Gujarat with the long term objective of providing 'access to justice'. Soon the endeavour took the form of an institution which spread across the country. Necessity of an informal system of settlement of disputes was all the more important in a country like India where poverty dominates almost all aspects of governance.

It is pertinent to mention that a system of resolution of disputes through conciliation is rooted in the Indian culture and society since time immemorial in the form of the Panchayat System. However, the concept of legal aid and informal mechanism of dispute settlement gained support in 1980 when Justice Bhagwati propounded the creation of the Committee for Implementing Legal Aid Schemes (CILAS) after the judgement in the *Hussainara Khatoon case.* [11] Initially CILAS focussed on spreading legal education and awareness. *Lok adalats* were conceptualized later.

The purpose for the institution of *lok adalats* was manifold. It envisaged providing free legal aid to the needy in order to ensure that justice is not denied to them. It made an attempt in reducing the role economic status played in seeking justice. It also aimed towards relieving the pressure upon the overburdened formal court system in India. *Lok adalats* were expected to transform the society through law.

Moreover, the fact that *lok adalats* relate to the system of the indigenous system of justice that prevailed in India enabled it to be popular which called for further institutionalization and expansion. In

[10]Id.
[11]Hussainara Khatoon v. State of Bihar, A.I.R. 1979 S.C. 1369.

1987 the lok sabhapassed the Legal Services Authorities Act which provided statutory powers to *lok adalats* and cemented their role in the legal aid movement.

In the year 2002, two significant changes took place in the arena of *lok adalats* in the form of amendments. These developments changed the power and purview of *lok adalats*. Firstly, the Code of Civil Procedure, 1908 was amended as a result of which, the formal courts were empowered to refer cases to *lok adalats* whenever there existed a possibility of a compromise in the opinion of the Court.[12] However, the amendment is silent as to the consent of both parties.[13] The second development was the amendment to the Legal Services Authorities Act which created a modified form of *lok adalat* called a "permanent *lok adalat.*"[14] Parmanent *lok adalats* sit in a permanent location all through the year, rather than being held only on certain dates. The result of these two amendments is that it is now legally permissible for a judge to refer a case to a permanent *lok adalat* without the parties' consent, and further, for the judge in the *lok adalat* to decide a settlement to a case without consent of either party. However, a 2004 ruling reinforced the idea that *lok adalat* rulings are invalid without the consent of both parties.[15] The award by a *lok adalat* is deemed to be a decree of a civil court and thus enforceable.[16]*Lok Adalats* are held within the Court premises and the bench comprises of a judge, a lawyer and a social worker. There are no appeals from the decisions of a *lok adalat* that record a compromise. *Lok Adalats* can also dispose of compoundable criminal cases.[17]

[12]The Code of Civil Procedure, 1908, No. 05, Acts of Parliament, 1908 (India), § 89.
[13]Id.
[14]The Legal Services Authorities Act, 1987, No. 39, Acts of Parliament, 1987 (India), § 22-B [hereinafter LSA Act, 1987].
[15]State of Punjab and ors. v. Phulan Rani and anr., (2004) 7 S.C.C. 555 (India).
[16] LSA Act, 1987, supra note 15, amendments to Sections 19, 21 and 23.
[17]S. MURLIDHAR, supra note 2.

IV. PRACTICAL WORKING OF LOK ADALATS- ACCESS TO JUSTICE, BUT NO JUSTICE!

Encouraged by the settlement of a large number of cases, the government had proposed to strengthen the Legal Services Authorities Act by permitting *lok adalats* to dispose off a case on merits if no settlement is reached.[18] On one hand the holding of *lok adalats* is encouraged by the judiciary to settle accident claims, insurance claims and claims by banks against defaulters etc., while on the other hand it is unclear as to what is happening to the litigants in individual cases on account of the 'mass settling' of cases.

It is submitted that the organization of *Lok Adalats* and legal aid camps has not been a success in the strict sense of the term. This is either because of the manner in which they are conducted or because they were a farce with the cases being referred to themeven after a settlement has been arrived at.[19] In criminal cases too such exercises raise more questions than they resolve. In fact, the term '*Lok'* is perhaps a misnomer since there is a little involvement of the people in the actual decision making process.[20] This distinguishes *lok adalats* from the traditional modes of mediation and other informal dispute resolution mechanisms that had existed.

Moreover, the lawyers who appear for the accused in criminal cases go with the object of quick disposal of the cases by encouraging guilty pleas. [21] The prospect of immediate release after being sentenced to the period of detention already undergone is enough of

[18]Scope of Lok Adalat to be widened, THE HINDU (Jan. 9, 2002), at 13.
[19]SUJAN SINGH, LEGAL AID: HUMAN RIGHT TO EQUALITY 313 (1st ed., 1996) — where he notes that 36% of the lok adalat cases were already settled and kept pending for declaring an agreement at the next lok adalat.
[20]S. MURLIDHAR, supra note 2, at 380.
[21]Id. at 381.

an incentive to an accused to admit to his guilt. This manner of disposal does not answer the demand of the accused for a just, fair and reasonable procedure but perhaps answers the need to preserve the legitimacy of the legal system that is beleaguered by lack of infrastructure and resources. The available resources are also poorly utilized.[22] This situation is primarily due to the general lack of awareness, the belief that a person who gets help for free is disabled from demanding quality service, the disinterestedness of lawyers and other concerned administrators; the uncompensated costs incurred by the parties etc.

The objective behind *lok adalat* was to avoid strict rules of procedure and evidence which would enable the poor litigants who likely know nothing of law to interact plainly with the judge and explain the merits of their case. This would free them from the need to hire a lawyer, and make the courts more accessible. Additionally, as there lies no appeal from thedecision of *lok adalats*,the poor litigants get liberated from the cycle of a never-ending case in which their opponents exploit the legal system to avoid paying compensation.[23] However, this objective has not turned real in the present *lok adalat* system. Poor litigants are often unable to get a chance to speak before the case is quickly "resolved" in a compromise proposed by the lawyers. The stronger party is able to settle cases to their advantage enabling them to avoid cost which would have been imposed on them otherwise.[24] The emphasis is on "settlement" of cases rather than

[22]Id.

[23] Scott J. Shackelford, In the Name of Efficiency : The Role of Permanent Lok Adalats in the Indian Justice System and Power Infrastructure (Apr. 27, 2009), http://ssrn.com/abstract=1395957 [hereinafter Shackelford].

[24]Id.

'justice". When settlement was not reached "subtle and coercive" pressures used to convince litigants to come to a compromise.[25]

Often the rewards given by these courts are a small fraction of what would be prescribed by a formal court, and many times this amount is decided before the hearing has begun, settled beforehand in negotiations between lawyers.[26]

For many, using *lok adalats* instead of formal courts is not a choice. But at the same time, CILAS and others have claimed that one of *lok adalats* greatest achievements is providing legal access to the poorest in society who do not have the resources to pursue litigation through formal courts.[27] Works in support of *lok adalats* have stated that they are "the only alternative"[28] for the poor and that the poor "do not have the staying power which litigation inevitably involves".[29] Surely there are segments of the poor in India who are only able to pursue legal action through *lok adalats*. And for these citizens, and any others who find they simply cannot afford court fees or legal representation, *lok adalats* are their only option. These citizens are not evaluating the costs and benefits of *lok adalats* to make an informed decision, as *lok*

[25]Robert Moog, Conflict and Compromise: The Politics of Lok Adalats in Varanasi District, 25(3) LAW & SOCIETY REV., 545-570 (1991), http://www.jstor.org/stable/3053726 [hereinafter Robert Moog].
[26]Marc Galanter & Jayanth K. Krishnan, Bread for the Poor: Access to Justice and the Rights of the Needy in India, 55 HASTINGS LAW JOURNAL,801 (2003), http://www.gsdrc.org/docs/open/SSAJ115.pdf.
[27]Sarah Leah Whitson, Neither Fish, Nor Flesh, Nor Good Red Herring Lok Adalat: An Experiment in Informal Dispute Resolution in India, Hastings 15 INTERNATIONAL AND COMPARATIVE LAW REV., 391-445 (1991-1992) [hereinafter Sarah Leah Whitson].
[28]Shiraz Sidhava, Lok Adalats: Quick, Informal Nyaya, LEX ET JURIS 38 (1986).
[29]RAJEEV BHARGAVA, POLITICS AND ETHICS OF THE INDIAN CONSTITUTION 19-20(1st ed., 2008).

adalat supporters often do, but rather are pursuing justice through the only means possible.[30]

There exists a persistent unwillingness to settle matters of fact as the focus is on speedy compromise. *Lok adalats* are regularly unable or unwilling to treat questions of fact adequately. Thus, cases are 'disposed off' rather than solved. This deviates the system from its objective of 'justice to all'. 'Disposal' does not ensure 'justice'. This harms the citizens who use *lok adalats.* Moreover, the compromise settlements that *lok adalats* produce do not meet standards of justice. Victims are often under-compensated and the accused faces lowered sanctions.[31]

Lok adalats have frequently been described as courts in which conclusions are often shaped by the views of the mediating judge, and where questions of fact rarely intrude.[32] In one particular case, a judge completely ignored the lawyer's arguments regarding whether or not an employer was legally responsible to provide the specific type of insurance demanded by the claimant, scolding the lawyers for what he viewed as obstruction of compromise.[33] According to the lawyers interviewed about *lok adalats,* judges skimming complex issues or avoiding evidence entirely is a common thing.[34]

At another *lok adalat,* defendants entered one by one and presented the judge with their case file and an attached plea agreement. The judge signed it and within a few moments, the case was recorded as

[30]An observation made by Josh Stark, International Research Associate (Canada), Research Foundation for Governance: In India, Ahmedabad [hereinafter Josh Stark].
[31]Id.
[32]Marc Galanter & Jayanth K. Krishnan, Bread for the Poor: Access to Justice and the Rights of the Needy in India, 55 HASTINGS LAW J.,801 (2003), http://www.gsdrc.org/docs/open/SSAJ115.pdf [hereinafter Marc Galanter & Jayanth K. Krishnan].
[33]Id. at 818.
[34]Id.

being settled. There were no lawyers, no investigation or presentation of evidence, negotiations towards a plea agreement occurred long before the so-called *lok adalat.*[35] While this practice is not condoned explicitly by law, it has been observed commonly in *lok adalat*s. For example, at another *lok adalat,* criminal cases were disposed off in a similar fashion. A quick plea bargaining session followed by confession and vastly lowered fine or prison sentence as the case was.[36]

In a case brought to a *lok adalat,* twenty-six villagers were seeking compensation from a state-owned bus company after they were injured during a traffic accident. While an account of the accident was given, and x-rays were provided to the chief district judge, they had no direct impact on the settlement of the case. The compromise was crafted through negotiation between the lawyer of the claimants and the bus company officials, with pressure applied by the chief judge to come to an agreement which, predominantly favoured the proposals by the bus company officials.[37]

In this case, and in many other cases, matters of fact only influences the outcome if they affect the preferences of any party to accept one compromise over another. A case is not resolved when it is determined that the driver was at fault, or that the x-rays showed negligible injuries. A case is resolved when negotiations reach an end. Perhaps the x-rays might embolden the claimant's lawyer to demand a higher settlement, or might persuade the judge to pressure the bus company officials into accepting a larger compensation to the injured. But, these facts in a case do not play any necessary role.[38]

It cannot be ignored that settling matters of fact is necessary in order to ensure a just outcome. In certain cases, the very issue at the centre

[35]Id. at 826.
[36] Sarah Leah Whitson, supra note 28, at 417.
[37]Marc Galanter & Jayanth K. Krishnan, supra note 33, at 816.
[38]Josh Stark, supra note 31.

of the case is whether or not the allegations are true. A claimant who claims not to owe money to an electricity company due to a blackout that prevented him from accessing any power has brought the matter to a *lok adalat* so as to determine whether this is true, and if so, provide a legal guarantee that he does not have to pay for services he did not receive. An individual brings a case to a *lok adalat* contending that a particular contract stipulates that pension is paid in certain circumstances. The *lok adalat* is supposed to rule on whether or not these circumstances are met, and if so, compel the employer to pay the required pension. Using *lok adalats* to settle a dispute is ineffective when the dispute requires determining certain facts, and having determined those facts, proceeding to see that justice is provided according to legal standards.

The result of this flaw is that one party may have to relinquish what they deserve in order to make the compromise function by securing the consent of the guilty party. For example, a man who has not received the amount of pension he deserves – a fact that the *lok adalat* is unwilling to determine – must sacrifice some of what he is entitled to in the form of a reduced compensation in order to secure a conclusion to his case, allowing the guilty party who under-compensated him originally to do so again.[39] Thus, the victims are rather penalized as they are forced to waive the benefit they deserve by law.

This view of compromise in *lok adalats* was endorsed in a 2004 Supreme Court decision. In *State of Punjab and others v. Phulan Rani and another,*[40]the Hon'ble Supreme Court considered the validity of a decision by a *lok adalat.* Phulan Rani claimed she had never received the pension that owed to her deceased husband by his employer which was a corporation owned by the state of Punjab. Her petition was settled in her favour at a *lok adalat* in 2000. But the state government

[39]Id.

[40]State of Punjab and others v. Phulan Rani and another, (2004) 7 S.C.C. 555.

claimed that it had not been represented at the proceedings. The Supreme Court's decision considered two tests to determine whether or not the matter had properly been settled at the *lok adalat.* The first was whether both parties to the case had agreed to the settlement. To this, the Hon'ble court discovered that the state of Punjab or its representatives had not consented. The second test was whether the settlement could be described as a compromise. Because of the fact that the ruling by the *lok adalat* was in complete satisfaction of Phulan Rani's demands, the Supreme Court stated that this was not a compromise. The Hon'ble Court opined that a compromise is *"an agreement reached by adjustment of conflicting or opposing claims by reciprocal modification of demands"*[41]. Thus any decision that was a complete satisfaction of one party's demands could not be a compromise, and thus could not be a legal conclusion of a *lok adalat.*

Ideally, in a *lok adalat* a conclusion should reach when all parties including the judge agree on a particular compromise.[42] In order for the *lok adalat* to resolve a case all parties must agree on a compromise. A case may be returned to the formal courts if no agreement can be made. Nonetheless, there is a high possibility that in many cases litigants accept a compromise because of persuasion, coercion, etc. Consent to a compromise is the only necessary requirement for the conclusion of a case. Thus, questions of fact influence the outcome only at the edges. The victim is made to relinquish the compensation owed to him by law in order to secure the consent of the party that is accused.

The 2002 amendment to the Legal Services Authorities Act created permanent *lok adalats* where the presiding judge is entitled to rule on the merits of the case. However the permanent *lok adalats* are free from the restrictions imposed by the Code of Civil Procedure. The

[41]Id.

[42]The exceptions to this are permanent lok adalats in which a judge can decide a case on merit.

only statute regulating the behaviour of judges in such courts is the Legal Service Authorities Act, by which, the judges are required to apply principles of natural justice, objectivity, fair play, equity and other principles of justice.[43] The biggest loophole is that, the standard provided which includes the completely undefined "other principles of justice" seems almost impossible to apply or use to hold judges accountable.[44] Therefore, judges are in effect free from any legal or institutional restriction on their behaviour and methodology in permanent *lok adalats*.

Proponents of *lok adalats* focus more on the number of cases that are solved and the number of rupees distributed in compensation.[45] There are multiple accounts of *lok adalats* serving as a venue to simply rubber-stamp predetermined plea agreements for criminal cases.[46] A plea agreement is reached in private negotiations that go unrecorded. The defendant is brought to a *lok adalat* where the presiding judge approves the settlement. Moreover, not all of the plea bargaining meetings results in compromise. The Legal Services Authority office does not keep statistics of what transpires within these plea-bargaining meetings.[47] This process serves to hide the true percentage of cases resolved through plea bargaining. This could be one of the reasons of how a single *lok adalat* solves thousands of cases in a day.[48]

Furthermore, it is very unfortunate to state that the officials running *lok adalats* have even gone to the extent of asking the police to fine as many rickshaws and scooters as possible and instructing the drivers to have the matter settled at the *lok adalat* scheduled for the next day.[49]

[43]LSA Act, 1987, supra note 15, § 22-D.
[44]Shackelford, supra note 24.
[45]Marc Galanter & Jayanth K. Krishnan, supra note 33, at 829.
[46]Id. at 825.
[47]Id. at 826.
[48]Robert Moog, supra note 26, at 545-570.
[49]Id. at 558.

This increases the number of cases resolved at a *lok adalat* as more cases are 'created' for it to solve. CILAS provides federal funds to states for the promotion of *lok adalats*[50]. And in many states, judges are paid at least partially based on the number of cases they dispose.[51] From state governments to legal aid boards to individual judges, there are powerful political and monetary incentives to promote *lok adalats* and to ensure that they appear popular and prodigious.[52]

Officials and judges also create incentives for lawyers so that they help maximizing case disposal. Lawyers are paid through a percentage compensation system which means that they earn a certain percentage of the compensation that is awarded in their favour. Thus it is in the lawyers' interest to settle as many cases as possible and as quickly as possible.[53] In one particular case, a lawyer who was defending several clients at once did so because of his professional aspirations. He sought to impress the officials and judges who oversaw the *lok adalats.*[54]

Additionally, in criminal cases a lowered sentence can be an efficient way to convince a defendant to plead guilty thus securing a quick, voluntary resolution to the case. At a *lok adalat* observed by Robert S. Moog in 1987 in Varanasi fines were being imposed that were only 10% of the statutory minimum limit.[55] A senior attorney suggested that such low fines were used as a way to convince defendants to plead guilty in order to speed up the resolution of cases.[56] In a 1985 *lok adalat* in Rajasthan, criminal trials were carried out through quick

[50]Id.
[51]Shackelford, supra note 24.
[52]Josh Stark, supra note 31.
[53]Sarah Leah Whitson, supra note 28, at 425.
[54]Marc Galanter & Jayanth K. Krishnan, supra note 33, at 816.
[55]Robert Moog, supra note 26.
[56]Id. at 558.

plea-bargaining sessions, and the accused was rewarded for pleading guilty with shortened sentences.[57]

Lawyers often pressurise their clients to accept lower settlements.[58] However, it is pertinent to mention at this juncture that despite lower rewards, *lok adalats* may result in an overall savings to litigants. The larger settlement amount provided by formal courts may take years to receive and may require the litigant to hire a lawyer and pay court fees. Nonetheless, it should not be forgotten that penalties such as fines and sentences are imposed not with the sole objective to punish but also to dissuade so that it acts as a disincentive and prevents the commission of future crimes. However, lower sanctions in *lok adalats* serve to lessen the legal system's authority to create disincentives for criminal acts.[59]This is particularly problematic if one considers the use of *lok adalats* by large companies.[60] A company may be tried often for very similar crimes. For example, a significant portion of *lok adalat* cases are motor vehicle accident claims, and in many of these the defendants are state owned bus companies. Because they are tried again and again for similar crimes they can easily take advantage of the savings that *lok adalats* offer. They would not try and make an effort to prevent such accidents from happening.

An example worth mentioning is how an electricity company in Delhi uses *lok adalats* to reduce the amount of damages that it is legally supposed to pay to the customer. Using *lok adalats* the electricity company can settle thousands of cases against it in a short period of time, paying out settlement amounts far lower than they would in a formal court.[61] Many of the cases involve unpaid bills where the customer refused to pay because the service was faulty or non-

[57]Sarah Leah Whitson, supra note 28, at 417.
[58]Id. at 425.
[59]Marc Galanter & Jayanth K. Krishnan, supra note 33, at 807-809.
[60]Id.
[61]Supra note 51, p. 40

existent, and in the majority of cases the customer is forced to pay some portion of the bill.[62] Therefore, the electricity company has less incentive to fix the infrastructural problems which cause inconvenience to its customers. This forces the customers to pay for the electricity they did not receive.[63]

Certainly the existence of these courts provides an access where there was none at one point of time for many individuals to pursue legal solutions to their disputes. However the legal aid movement was not concerned only with access. The aim of 39-A was to ensure that economic inequality prevalent in India would not erode the goal of equal access to justice. It is found that *lok adalats* have not met this goal. While *lok adalats* have enhanced the situation of those who are unable to afford the formal court system, they have not reduced the inequality within the legal system between rich and poor and thus failed to meet one of the central goals of the legal aid movement.

Considering the two broad groups of the rich and the poor, there can be four basic cases:

> 1. those between two parties who cannot afford the formal system;
> 2. those between two parties who can afford the formal system;
> 3. those between a plaintiff who can afford the formal system and a defendant who cannot;
> 4. those between a plaintiff who cannot afford the formal system and a defendant who can.[64]

In cases where both the plaintiff and the defendant are unable to afford the formal court system, the *lok adalat* is the only legal remedy they can afford. Both secure a speedy verdict, but the plaintiff will be

[62]Id.
[63]Id.
[64]Josh Stark, supra note 31.

awarded less money than what they would have received in a formal court and the defendant is punished less than that in a formal court. In cases where both the plaintiff and the defendant are able to afford the formal court system, they will not prefer *lok adalat*. Both parties benefit from the reduced backlog in the formal courts as a result of cases like the first instance (where both parties cannot afford the formal mechanism) being settled in a separate institution.

In cases where one litigant can afford the formal court system but the other cannot, the matter becomes worse for the disadvantaged one. In cases where the plaintiff cannot afford the formal system but the defendant can, *lok adalat* is the only option for the plaintiff. This benefits the defendant. Because the *lok adalat* proceeds by compromise, the defendant has a veto over any particular compromise.

In cases where the defendant cannot afford the formal system but the plaintiff can, things become more complex. The defendant's only option remains the *lok adalat*. The plaintiff may prefer the formal courts. However, the case may be transferred to a *lok adalat* if the judge is of the opinion that the case is appropriate for a *lok adalat* either due to the substance of the case or due to the inability of the defendant to pay the court fees. In both these cases, the less wealthy party is likely to be more desperate to secure an award, and thus more willing to accept a compromise that falls short of their demands.

Thus, *lok adalats* benefits those who can afford the courts (by sequestering the poor litigants into an alternate system of justice) rather than those who cannot afford. One of the goals of the constitution is to transform the society by abolishing practices that promote discrimination and social hierarchy. *Lok adalats* resolve disputes not by reference to existing laws but by compromise, and thus the parameters of the decision are shaped by the litigants and the

judge, leaving any attempt at social transformation to rest on the personal attitudes of those involved in the case.[65]

V. THE SOLUTION

The inability to invoke the processes of law by those whom the law is meant to empower highlights the need to spread awareness of the existence of the institution of *lok adalats.* This inability owes to a variety of reasons, principally the fear of reprisal from the upper castes. Moreover, there is a lack of study and research in the area of how the poor perceive the laws, the legal system and the personnel they encounter within it. There is a need for constant review and assessment of the programmes and plans to ensure their continued relevance to those they are meant to serve. There ought to be a regular check on the functioning of *lok adalats.*

Lok adalats were functioning perfectly well in many provinces without regulation or statutory powers.[66] Bringing them under the influence of state legal aid boards only served to destroy the concept of informal community dispute resolution that was the strength of the pre-1987 *lok adalats.*[67] Rather, modern *lok adalats* are simply an imitation of the formal court system, a "disrobed ineffectual tribunal" that lacks the benefits of the original model.[68] In other words, the institutionalization of *lok adalats* paved way for the central government to increase its control over the rural population.

In order to get a meaningful insight into the actual working of *lok adalats* it is necessary to introspect whether the rich, the middle

[65]Id.
[66]KRISHNA IYER, LEGAL SERVICES AUTHORITIES ACT: A CRITIQUE 13 (1st ed., 1988).
[67]Id. at 49.
[68]Id.

classes, the poor, or the extremely poor most often use *lok adalats;* whether any discrepancies exist between how *lok adalats* treat the cases of each; whether cases are between litigants of similar economic status, or there are cases in which one litigant has significantly greater financial resources; whether this has any effect on the outcome of these cases; whether lawyers are involved in a considerable number of cases or not; whether this has an effect on the outcomes of the trials; whether the individuals using *lok adalats* have come into contact with a legal institution for the first time, or they are predominantly individuals who had previously been engaged with the formal courts but prefer *lok adalat*; whether *lok adalats* have provided the most vulnerable in the Indian society with a first chance to pursue legal solutions, or whether they have largely moved cases from one legal system into another, or both. However, there is an absence of adequate data and empirical research in this arena.[69] Moreover, there is a lack of interest on the part of officials to answer the questions which are not reflected by means of empirical data. Only when such facts become known, can the success of *lok adalats* be ascertained and the mechanism of *lok adalats* be developed to its full potential and to the benefit of the litigants, judiciary and the country at large.

VI. CONCLUSION

The denial of access to justice has its impacts directly on the liberty of those who are arraigned as victims or accused, many of whom belong to the economically and socially weaker sections of the society.[70] *Lok Adalats,* is undoubtedly is a big step towards the achievement of such a system. However, it has drastically failed in its endeavour. While *lok adalats* may seem successful to its staff and the parties who use

[69]Josh Stark, supra note 31.
[70]S. MURLIDHAR, supra note 2.

them, this success exists only in comparison to the woefully inadequate formal court system. *Lok Adalats* might have had a big hand in tackling the hindrances in the formal mechanism. However, it has its own hurdles to overcome. Although the situation is not ideal, the fact that *lok adalats* have helped reduce burdens on the formal courts and have provided access to justice to the poor litigants cannot be overlooked.

Assessed as courts, *lok adalats* appear to be inadequate for the various reasons discussed. Assessed as a social reform aimed at promoting equality under the law *lok adalats* are once again inadequate. For many, using *lok adalats* is not a choice but the only possible means to access the law. *Lok adalats* increase access to justice for poor litigants, but by doing so they maintain the divide in power between the rich and the poor. The drive towards broad social transformation appears to have no place in *lok adalats*.

"QUA VADIS ADVERTISING?": THE EMERGING PROBLEM OF GENERIC DISPARAGEMENT AND TRADEMARK INFRINGEMENT

Sanskriti Rastogi[*]

ABSTRACT

The high growth in disposable income and general buoyancy in consumer sentiments have contributed to the trend of reduced seasonality. The consumer is tempted to ask for branded items being advertised. Maturity of markets is related to maturity of consumers as well as producers where entire set of right and relevant information about the product is available to the consumer. In India, this does not happen, as neither the consumer protests nor the producer protects the interest of the consumer and intervenes to educate the consumer on right lines. An ad for Heinz shows a mother worrying about her son being teased by his friends as "half ticket" because he is short in height. In Maharashtra FDA has filed a charge sheet against Complan's advertising claim that it can add two inches to Children's height i.e. an exaggerated advertising claim. The competition for shelf space and ultimately the mind space has lead

[*]Sanskriti Rastogi is a third-year student at Gujarat National Law University, Gandhinagar. The author may be reached at sanskriti6@gmail.com.

to infringement of trademark, design, and packaging besides the comparative advertisements.

Competitive strategies employed by firms range from ethical business practices that reflect simple marketing rivalry to hostile posturing against competitors. A particularly malign form of competitive interaction involves predatory conduct by reducing the competitive viability of actual or potential competitors. This form of competitive interaction involves a firm's attempts to benefit and advance in the market at the direct expense of its rivals through unethical intent and product disparagement. The cases of generic disparagement have drawn the attention of legal luminaries for quite some time.

The present article critically analysis the various aberrations in the field of advertising which involve law violation. It also gauges the efficacy of various legal instruments in our country. It concludes giving suggestions has to how the unethical practices can be curbed.

I. GENERIC DISPARAGEMENT IN THE FIELD OF ADVERTISING

Advertising is potent promotional tool for specific product and a cost effective way to disseminate messages for the consumers. Higher

advertising expenditures reduce the total cost of selling as well as buyer's price sensitivity. In the backdrop of the cut throat competition, companies set their promotion budget to achieve share of voice parity with their competitors. These aggressive promotion wars many times transform into commercial aberrations manifested through neglect of message creativity and business ethics. This problem has manifested itself in various forms such as passing off, ambush marketing, infringement of the trademarks, comparative advertisement etc where the advertisers are resorting to red ocean strategy where persuasion is going undetected. Consumer goods giants Hindustan Unilever, Procter and Gamble, ITC, Godrej, Philip Morris, Coca-Cola and Nestle are among those who have all figured or continue to feature in the list of firms fighting over brands in courts.

Five of the Brand Wars being fought in Indian Courts

ITC	Philip Morris
The Coca-cola company Limited	Bisleri Intl.
Societe Des Produits Nestle S.A.	Saif Ali Khan
Dabur India	Booty Pharma
Unilever Australasia	Shinger Cosmetics
	Source: LLS (Lall Lahiri & Salhotra)

As defined in Black's Law Dictionary, disparagement is "A false and injurious statement that discredits or detracts from the reputation of another's property, product, or business. To recover in tort for disparagement, the plaintiff must prove that the statement caused a third party to take some action resulting in specific pecuniary loss to the plaintiff."

Disparagement of goods is thus defined as "A statement about a competitor's goods which is untrue or misleading and is made to

influence or tends to influence the public not to buy." It is false and injurious statement that discredits or detracts from the reputation of another's property, product or business.

II. GENERIC DISPARAGEMENT VIS-À-VIS THE CONSTITUTION OF INDIA

Article 19(1) (a) guarantees to all citizens the right to "freedom of speech and expression." Under article 19(2), "reasonable restriction can be imposed on the exercise of this right for certain purposes." i.e. to say that the freedom of speech under article 19(1)(a) includes the right to express one's views and opinions at nay issue through any medium e.g., by words of mouth, writing, painting, pictures, film, movies etc. It thus includes the freedom of communication and the right to propagate or publish opinion. But this right is subject to reasonable restrictions being imposed under art 19(2).

In *Dabur India Ltd v. Colortek Meghalaya Pvt. Ltd & Godrej Sara Lee (DHC)*[1] it was held that if an advertiser extends beyond the grey areas and becomes a false, misleading, unfair or deceptive advertisement, it would not have the benefit of article 19(1)(a) of the constitution of India.

Any producer under the garb of article 19(1)(a) cannot take advantage of the same and go on to increase it's sale at the cost of it's rival product. The same was held in *Eureka Forbes Ltd v. Pentair Water India Pvt. Ltd*[2] it was held that an advertiser can say that his goods are better but he cannot say that his competitor's goods are bad because it would amount to slandering or defaming competitors.

[1]Dabur IndiaLtd v. Colortek Meghalaya Pvt. Ltd & Godrej Sara Lee, (2010) 1 M.I.P.R. 195.

[2]Eureka Forbes Ltd v. Pentair Water India Pvt. Ltd., (2007) 4 Kar.L.J. 122.

A. Judicial precedents on Generic Disparagement

There have been many cases where the court has intervened and granted injunction for telecasting a commercial disparaging a particular product in the market. In *Karamchand Appliances Pvt Ltd v. Sh. Adhikari Brothers &* Ors,[3] the court held that the defendant shall not telecast the commercial advertisement in its original form. To the same effect are the decisions of the Court in *Dabur India Ltd. v. Emami Ltd.*,[4] *Dabur India Ltd. v. Colgate Palmolive India Ltd*[5]and *Dabur India Ltd. v. Colgate Palmolive India Ltd.*[6]

In Karamchand case, the defendant's commercial, which provoked the filing of the suit, showed the pluggy device of the plaintiff and dubbed the same as an obsolete 15 years old method of chasing away mosquitoes. On a comparison with its own product the defendant's advertisement claimed that it was the latest machine available in the market which chased away the mosquitoes at twice the speed. This Court's order found that advertisement to be disparaging and restrained its telecast. In appeal the Division Bench made a modification to the extent that the advertisement can go on but without disparaging the plaintiff's product. The defendant's case now was that it has modified the advertisement and instead of showing the pluggy device which resembled the plaintiff's machine, it had shown a different device which had a different design and colour combination. The plaintiff cannot, therefore, complain of any disparagement in the modified commercial which simply puffs up the plaintiff's product - something that the defendant in law is entitled to do.

Two aspects were examined in that backdrop as had been contested by Ram Jeth Malani. The first is whether the altered design of the pluggy device makes any material difference in the matter of

[3]Karamchand Appliances Pvt Ltd v. Sh. Adhikari Brothers &Ors., (2005) 31 P.T.C. 1 (Del.).
[4]Dabur India Ltd. v. Emami Ltd., (2004) 112 D.L.T. 73.
[5]Dabur India Ltd. v. Colgate Palmolive India Ltd., (2004) 29 P.T.C. 401.
[6]Dabur India Ltd. v. Colgate Palmolive India Ltd., (2004) 115 D.L.T. 667.

conveying the message which the commercial intends to convey to the viewers. The second aspect is whether a disparagement of a general concept is actionable in law, if such disparagement is otherwise unsustainable on the touchstone of any technological advantage, which the defendant's product may be enjoying over the product that is, disparaged. Eventually the court held that the commercial will not be telecast either in its original form or in its modified form.

In *Reckitt &Colman of India Ltd. v. M.P. Ramachandran and Anr*. 1999 (19) PTC 741, the facts were that the plaintiff was the manufacturer of blue whitener under the name and style of "Robin Blue". The defendant had also started manufacturing blue whitener and with a view to promote their products they issued an advertisement allegedly making disparaging representations to the plaintiff's Robin Liquid Blue. The defendants had depicted the product of the petitioner showing the container in which the product of the petitioner was sold and in regard to which the petitioner had a registered design. It was further shown in the advertisement that the product contained in the said container was priced at Rs.10.00. By giving the price, the respondent had in no uncertain terms identified the product of the petitioner since the only blue whitener sold in the market at the relevant time priced at around Rs.10.00 was the product of the petitioner. It was contended in the advertisement that the said blue was uneconomical and it was then contended that at Rs.10.00 the average blue is the most expensive to whiten the clothes. Thereafter it was added "What is more, you have to use lots of blue per wash". By making this comment the container of the petitioner had been shown upside-down and had been further shown that the liquid was gushing out. The object was obviously to show that the product of the petitioner priced at Rs.10.00 gushed out as a squirt and not in drips while being-used and, therefore, it was expensive way to whiten the clothes.

It was in these circumstances that the Court held that the assertion made in the advertisement was clearly related to the product of the petitioner in that case and was made with a view to disparage and defame the petitioner's product. The Court had based its decision mainly on the fact that the price of the container shown in the advertisement was Rs.10.00 and no other blue whitener except that of the petitioner was at the relevant time priced at. Rs.10.00 and it, therefore, held that the advertisement was directly related to the product of the petitioner. The Court, therefore, in that case restrained the respondent from issuing the advertisement in question.

Similarly, in *Reckitt Benckiser (India) Ltd v. HLL* (DHC): the court passed a decree of injunction in favor of plaintiff and restraining the defendant from issuing or telecasting the impugned advertisement of Lifebuoy product.

In *Dabur India Ltd. v. Colgate Palmolive India Ltd*[7] the defendant's advertisement claimed that Lal Dant Manjan was harmful for the teeth. The plaintiff who manufactured Lal Dant Manjan successfully complained to the Court who found the statement and the comparison disparaging. The plaintiff was granted an injunction against the defendant as the plaintiff held 85% of the share of the market in that product. The disparagement was considered generic for a class of goods or services as a whole.

Similar cases as *Reckitt & Colomen of India v. Kiwi TTK Ltd,*[8] *Pepsico Inc. and ors vs. Hindustan Cococola Ltd and Anr*[9]*, Dabur India Ltd vs. Emami Ltd,*[10] *Dabur India Ltd vs. Wipro Lts* CS(OS) no. 18 of 2006 decided on 27.3.2006 reveal that following elements shall have to be proved for an action of product disparagement.

a. false or misleading statement about the product

[7]Reckitt Benckiser (India) Ltd v. HLL (DHC), (2004) 115 D.L.T. 667.
[8]Reckitt & Colomen of India v. Kiwi TTK Ltd., (1996) 63 D.L.T. 29.
[9]Pepsico Inc. and ors v. Hindustan Cococola Ltd. and Anr., (2003) 27 P.T.C. 305 [*hereinafter* Pepsico Inc].
[10]Dabur India Ltd. vs. Emami Ltd., (2004) 29 P.T.C. 1.

b. Statement has the capacity to deceive the potential customers
c. The deception is likely to influence the consumer's purchasing decision

Interestingly, in *Colgate-Palmolive (India) Limited v Anchor Health & Beauty Care Private Limited*,[11] a judge at the High Court of Madras held that false claims by traders about the superiority of their products, either directly or by comparing them against the products of their rivals, were not permissible. The Court held that it was ultimately to the benefit of consumers to allow truthful "exposures" and to restrain traders from making "false representations, incorrect representations, misleading representations or issuing unintended warranties (as defined as 'unfair trade practice' under the Consumer Protection Act)."
This balancing of trader interests with consumer interests means that an advertisement which makes false claims, whether comparative or not, may be subject to an injunction or restraining orders from a court. The Madras High Court further observed that:

"*Recognizing the right of producers to puff their own products even with untrue claims, but without denigrating or slandering each other's products, would be to 'de-recognize' the rights of the consumers guaranteed under the Consumer Protection Act 1986.*"[12]

[11]Colgate-Palmolive (India) Limited v. Anchor Health & Beauty Care Private Ltd., (2008) 7 M.L.J. 1119.
[12]Ameet Datta, Comparative advertising in India -Puff under scrutiny, LUTHRA & LUTHRA LAW OFFICES (2009).

III. GENERIC DISPARAGEMENT VIS-À-VIS COMPETITION ACT (REPEALED MRTP ACT)

MRTP Act has acted as in effective tool in curbing this activity of disparagement and as assisted courts to decipher the meaning of disparagement.

In *Lakhanpal National Ltd. v. M.R.T.P. Commission and Anr,*[13] the expression "unfair trade practice" has been defined in Section 36-A as a trade practice which adopts any or more of the practices enumerated in the section. Section 36A defines unfair trade practice as under:
'Unfair trade Practice' means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any services, adopts one or more of the following practices and thereby causes loss or injury to the consumers of such goods or services, whether by eliminating or restricting competition or otherwise namely:

(1) The practice of making any statement, whether orally or in writing or by visible representation which-
(i) Falsely represents that the goods are of a particular standard, quality, grade, composition, style or model; ----------

(V) represents that the seller or the supplier has a sponsorship or approval or affiliation which such seller or supplier does not have.

In the above case, u/s 36 A and 55 of Monopolies and Restrictive Trade Practices Act, 1962 respondent commission instituted proceeding to inquire whether appellant company was indulging in unfair trade practices prejudicial to public interest, appellant denied to have made any wrong representation and impugned advertisements

[13]Lakhanpal National Ltd. v. M.R.T.P. Commission and Anr., A.I.R. 1989 S.C. 1692.

not capable of causing any loss or injury to consumers. Hence the proceeding instituted by respondent was quashed.

In *Pepsi Co. Inc and Ors. v. Hindustan Coca Cola Ltd. and Anr*,[14] the defendants' commercial, said that Pepsi was for children because children like sweet things. The Court found that statement disparaging, and therefore, restrained the telecast of the advertisement.

In *Paras Pharmaceuticals Ltd v. Ranbaxy Laboratories Ltd,* (2008) 38 PTC 658 (Guj), The court solved the legal battle between Moov and Volini for using a particular colour falling within the ambit of section 29(8)(a) of Act. The court applied reasonable man's test and accordingly Ranbaxy was directed to use some other colour.

On the basis of the recommendation put forth by the Raghavan committee, the MRTP Act, 1969 was repealed and was replaced by Competition Act 2009. It was held that cases relating to giving false or misleading facts disparaging the goods, services or trade of another person under the MRTP Act: All such pending cases shall be transferred to the Competition Appellate Tribunal which will be dealt in accordance with the provisions of repealed MRTP Act.

Interestingly, the definition of "unfair trade practice" used by the now repealed Monopolies and Restrictive Trade Practices Act is found with a substantially similar meaning in the Consumer Protection Act 1986. This act protects two key rights, namely:

> a. the right of the consumer to be informed about the quantity, potency, purity, standards and price of goods to guard against unfair trade practices; and
> b. the right to consumer education.

[14]Pepsi Co. Inc., supra note 10.

The pending UTP cases in the MRTP Commission may be transferred to the concerned consumer Courts under the Consumer Protection Act, 1986. The pending MTP and RTP Cases in MRTP Commission may be taken up for adjudication by the CCI from the stages they are in.

IV. TRADEMARK INFRINGEMENT

It's surprising to note that the government permitted the use of a competitor's trademark in comparative advertising in 1990 in its White Paper on the Reform of Trade Marks. However it was warned that the advertisers should still not be free to ride on the back of the competitor's trademark. This came in form of section 10(6) of the Trademarks Act, 1994. In landmark cases such as *Barclay's Bank plc v. RBC Advanta*,[15] Laddie J stated that to succeed under this section the onus was on the one who was alleging (Barclays) to show that the use complained of was:

1. Not in accordance with honest practices; and
2. Without due cause took unfair advantage of, or was detrimental to, the distinctive character or to the repute of the trademark.

India enacted its new Trademarks Act 1999 (the TM Act) and the Trademarks Rules 2002, with effect from 15th September 2003, to ensure adequate protection to domestic and international brand owners, in compliance with the TRIPs Agreement. Section 29(8) of the Trademarks Act, 1999 prescribes above two conditions which constitute TM infringement in advertising. Section 30(1) makes

[15]Barclay's Bank plc v. RBC Advanta., (1996) R.P.C. 307 [*hereinafter* Barclay's Bank].

exceptions to acts constitution infringement under section 29. Now the question arises whether a particular advertisement is in accordance with honest practices or not? In *Pepsi Co. Inc* and *Ors. v. Hindustan Coca Cola Ltd. and Anr.,* the court observed that mere puffing is not dishonest and mere poking fun at a competitor is a normal practice of comparative advertisement and is acceptable in the market. McCarthy says puffing is exaggerated advertising, blustering and boasting upon which no reasonable buyer would rely upon and is not actionable.[16]

However, the advertisement has to be sufficiently misleading or materially false in order to be dishonest.[17] Unfortunately the burden of proof lies on trademark owner that the trademark has been utilized dishonestly.

In a subsequent case of Vodafone Group v Orange,[18] it was held that the use of complained of was not honest it went without saying that it "takes unfair advantage of" or is "detrimental to" the distinctive character of the repute of the mark.

It was finally held that to show that the advertising is misleading; they will be able to take action to prevent us of their marks.[19] This again is subject to the CAD.[20] However, a comparative advertisement which

[16]J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION 27-66 (4th ed., Thomson, West Misesotta, 2005).
[17] Barclay's Bank, supra note 16; DSG Retail Ltd (t/a currys) v. Cornet Group Plc, (2002) F.S.R. 899.
[18]Vodafone Group plc & Anr. v. Orange Personal Communications Services Ltd., (1997) F.S.R. 34, Jacob J. referred to a virtual moratorium in the motor industry on the enforcemnt of claims under § 4(1)(b) TMA 1938.
[19]Emaco Ltd and Akriebolagte Electrolux v. Dyson Appliances Ltd, Pat. C. 26 Jan. 1999.
[20] Directive, 97/55/EC.

satisfies all the conditions set out in Article 3a (1) of the Comparative Advertising Directive will be protected from Article 5(1).[21]

However if the trademark is not registered and even then the claims of malicious falsehood or passing off are proved then the original trademark owner can get remedy.

Malicious Falsehood: To succeed in a action for malicious falsehood the plaintiff must show

1. The words complained of were false
2. They were published maliciously
3. They were calculated to cause the plaintiff pecuniary damage.

In cases of *Vodafone v. Orange*, Compaq case[22] and *De Beers Abrasive Products Ltd International v. General Electric Co. of New York Ltd*[23] to avoid an action for malicious falsehood, the creator of a comparative advertisement should take all reasonable steps to verify the accuracy of the material that is to be published, and ensure that products that are identified as "equivalent" of basically the same are for all practical purposes equivalent or else to specify the distinction.

In the case of *Dabur India Ltd. v. M/S Colortek Meghalaya Pvt. Ltd*, the court viewed that impugned advertisement of Goodnight cream against ODOMAS cream does not fall prima facie within the tort of malicious falsehood.

Passing off: It can be defined when the customer's are deceived into believing as a consequence of the advertisement that both brands emanate from the same manufacturer. The same happened in the case

[21] L'Oréal and Ors v. Bellure and Ors., C-487/07 E.C.J. (First Chamber) (18.06.2009).
[22]Compaq Computer Corpn v. Dell Computer Corpn Ltd., (1992) F.S.R. 93.
[23]De Beers Abrasive Products Ltd International v. General Electric Co. of New York Ltd., (1975) 2 ALL E.R. 599.

of *Mc Donald's Hamburgers Ltd v Burger King (UK) Ltd*[24] where the court held that consumers were unlikely to read the small print of the advertisement (given the positioning of the advertisement inside the underground trains) and the remainder of the text unclear. The case of *Ciba Geigy v. Parke Davis*[25] is another case of passing off. In any comparison of competing brands using unregistered trademarks should leave the consumer in no doubt as to the origin of each product or an action for passing off may follow.

V. DESIGN INFRINGEMENT

Recently Reckitt Benckiser the maker of Dettol antiseptic soap and Cherry blossom shoe polish has served a legal notice to Bharti Wal-Mart demanding that the cash-and-carry joint venture company withdraws its great value toilet cleaner as it infringes upon bottle design and cap of Reckitt's Harpic brand, the domestic market leader in this category holding 75% plus share. Great value is top selling market brand of Wal-Mart. The brand was launched 17 years ago to offer price sensitive consumers cheaper products compared to national brands. In this era of globalization, the private brands of organized retailers are increasingly challenging the existing national brands. In such cases the advantage is with the IP rights holder subject to specific jurisdiction.

Thus it can be inferred that:

(i) Puffery is permissible even though it results in extolling the virtues of ones own goods- which may not be quite in accord with reality. A trader cannot most certainly denigrate a rival

[24]Mc Donald's Hamburgers Ltd v. Burger King (UK) Ltd., (1994) F.S.R. 45.
[25]Ciba Geigy v. Parke Davis., (1994) F.S.R. 8.

trader's goods. [See Reckitt & Colman of India ltd v. M.P. Ramachandran & Anr, 1999 PTC (19) 741 (Cal)].

(ii) Comparative advertisement is permissible as long as it does not attain negative overtones; [see Godrej Sara Lee Ltd v. Reckitt Benckiser (I) Ltd, 128 (2006) DLT 81 and Dabur India Ltd v. Wipro Ltd 129 (2006) DLT 265].

(iii) Generic disparagement being tortuous, it makes no difference whether it is overt' or covert' for it to be held as tortuous. In that sense, generic disparagement falls foul of the law and can be injuncted. [See Dabur India Ltd. Vs. Colgate Palmolive India Ltd. 2004 (29) PTC 401(Del.), Dabur India Ltd. Vs. Emami Ltd. 2004 (29) PTC 1 (Del.) and Karamchand Appliances Pvt. Ltd. vs Sri Adhikari Bros. & Ors. 2005 (31) PTC 1 (Del)].

(iv) Truth is a complete defence to a charge of tort of defamation or slander of goods; (v) advertising is a form a commercial speech and hence, protected under the provisions of Article 19(1) (a) of the Constitution; which will have to adhere reasonable restrictions.[26]

VI. POSITION IN OTHER COUNTRIES

House of Lords in White v. Melin,[27] first examined the situations in which an action would lie against a tradesman for an advertisement campaign considered objectionable by his rivals. The Court held that the plaintiff would not be entitled to an injunction unless he

[26]Tata Press Ltd. v. Mahanagar Telephone Nigam Limited, A.I.R. 1995 S.C. 2438.
[27]House of Lords in White v. Melin, (1895) A.C. 154.

established that a tort had been committed and that merely puffing up one's goods by saying that the same are the best, would not amount to a disparagement of the goods of the rival. The law was pithily summarized by their Lordships in the following words: "But, my Lords, I cannot help saying that I entertain very grave doubts whether any action could be maintained for an alleged disparagement of another's goods, merely on the allegation that the goods sold by the party who is alleged to have disparaged his competitor's goods are better either generally or in this or that particular respect than his competitor's are".

Finally the position was made clear through the following judicial precedents which have been time and again been used by the Indian courts to decipher the true meaning of actionable wrong under such kind of practices.

White v. Mellin (1895) AC 154 HL, *The Royal Baking Powder Company v. Wright Crosssley & Co.* (1901) 18 R.P.C. 9595 (where it was enumerated that three main ingredients should be included in a malicious prosecution, namely, the impugned statement in untrue, the statement is made maliciously, without just cause or excuse and that the plaintiffs have suffered special damage thereby) and *De Beers Abrasive Products Ltd. & Ors. v. International General Electric Co. of New York Ltd.* (1975) 2 ALL ER 599, seem to in nut shell lay down the following principles:

> (i) Trader is entitled to say his goods are best in the world. In doing so, he can compare his goods with another.
>
> (ii) While saying that his goods are better than those of the rival traders he can say that his goods are better in this or that or other respect.

(iii) Whether the impugned statements made to disparage the rival trader's goods, is one which would be taken seriously 'by a reasonable man'. A possible alternative to this test would be whether the defendant has pointed out the specific defect or demerit in the plaintiff's goods.

(iv) A statement by the defendant puffing his own goods is not actionable.

A falsehood that tends to denigrate the goods or services of another party is actionable in a common law suit for disparagement. The same conduct is also actionable under certain state statutes and can form the basis for an F.T.C (Federal Trade Commission) complaint in USA. There is no private federal cause of action for disparagement under the Lanham Act (U.S. Trademark Act)." However, section 43(a)[28] of the Lamhan Act is the federal law used for asserting claims in private litigation against two types of unfair competition (i) infringement of unregistered trademarks, trade names and trade dress, and (ii) false advertising and product disparagement. A survey[29] reveals that there are two kinds of advertisement ways:

1. Non-Comparative Advertisement (NCA)

[28]§ 43(a)(1): Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which--(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

[29]The Development of a contingency Model of Comparative Advertising, Working paper No 90-108, Marketing Science Institute, Cambridge, MA.

2. Comparative Advertisement (CA) which can be further sub divided into:
    a. Indirectly Comparative Advertisement (ICA)
    b. Directly Comparative Advertisement (DCA)

The UK is an example of European country that allows both (ICAs and DCAs, within limits) whereas Germany is an example for one that allows neither. In UK, the legal position concerning comparative advertising is complex. It is regulated by matrix of statutory regulation, torts, and regulation codes of practice. Comparative advertisement is permitted in UK to the extent that a third party is allowed to use trademark to refer to the goods and services of that trademark owner. However, any such use otherwise than in accordance with honest practices in industrial or commercial matters would be treated as infringing the registered trademark if the use without due course rakes unfair advantage of or is detrimental to, the distinctive character or repute of the trademark. Also, for plaintiffs, statutory trade mark law offers a less cumbersome option. In contrast, courts in India have indulged tortious disparagement claims and shown a greater willingness to infer malicious intent. Indian judges have also allowed claims alleging generic disparagement, ie the disparagement of a broad group of unspecified traders rather than a specified trader.

In developing a tort of generic disparagement, Indian courts have ignored English precedents. Judges have stressed on the need to protect consumers from misleading statements, even if not targeted at a particular trader. Courts have also included venial puffing and commercially honest denigration within the ambit of generic disparagement. By recognizing a tort of generic disparagement, it is argued that Indian courts have unduly curbed commercial freedom of speech and opened the floodgates for frivolous litigation among rival

businesses. For these reasons, courts should not recognize this tort and permit only specific disparagement claims.[30]

U.S.A. has a separate law to deal with such a menace. Competition law is known in the United States as "antitrust law". Both the Federal Trade Commission (FTC) in the US and the Commission of the EU have expressly promoted comparative advertising on the basis that it enables consumers to reach a more informed decision. However there has been lack of evidence to substantiate the claim that comparative advertisements are effective in terms of their persuasive value.[31] The net result remains that Comparative advertisements actually result in changed purchasing decisions.

Thus product defamation, trade libel or slander of goods -- is a false statement about a product that hurts its maker. Victims of product disparagement can sue the perpetrators under both state product disparagement laws and the federal Lanham Act, the law that protects trademarks.

The EC Directive on Comparative Advertising: Comparative Advertising is only permitted when the following conditions are permitted: CAD (Comparative Advertisements Directive) which are set out in art 1(4) and can be summarized as follows

1. Good or service meeting the same needs or intends for the same purpose
2. One or more material, relevant, verifiable and representative features (which may include price); and
3. Products with the same designation of origin (where applicable)

[30]Arpan Banerjee, Comparative Advertising and the Tort of Generic Disparagement, 5 J. OF INTELLECTUAL PROPERTY L. & PRACTICE 11, 791–802 (2010).
[31]William L. Wilkie & Paul W. Farris, Comparison Advertising: Problem and Potential, 39 J. OF MARKETING 7 (1975).

It must not:

1. Mislead
2. Create confusion
3. Discredit or denigrate the goods/service, trademarks or trade name of a competitor
4. Take unfair advantage of the reputation of a trademark, or of the designation of origin of competing products; or
5. Present goods or services as imitations or replicas of goods/services bearing a protected trademark.

It will be important to state that in U.S., Comparative advertisement is not considered a distinct area of advertising law other than the tort of disparagement whereas in EU, the proposed directive would establish specialized and unique rules meriting treatment. This is because each of the EU members has contributed to the formulation of the EU rules.[32]

Producers end up mocking the rival product which eventually affects the sale and market of the competitor. This concern was shared by Economic and Social Committee of the European Parliament in its opinion on the proposed Comparative Advertising Directive, which stated that:

"… the committee considers the presentation of a product …as an imitation or replica of another is simply an unfair enticement to the consumer which seeks protection (exploit the reputation of another product while recognizing the inferior nature of the product being advertised. Such presentation should be banned, as it doesn't not respect the principles of consumer protection (the consumer would be misled) nor of the protection of the product being compared."

[32]Petty D. Ross, Public Policy and Marketing, American Marketing Association, (1997).

Laws are sufficiently toothed to curb such an act but the society at large must also be aware of its ethical standards and practice within its limits. If the CAD rules are not applied then it will result into eroding the exclusivity of the brand owners and the balance between the interests of brand owners and competing demands of a market economy.

VII. CONCLUSION

- Advertising as a marketing tool is being misused in the blind urge to outperform the competitors. The recent judicial pronouncements in favour of Consumers, inclusion of venial puffing and commercially honest denigration within the ambit of generic disparagement have posed new challenges. The balancing of trader interests with consumer interests means that an advertisement which makes false claims, whether comparative or not, may be subject to an injunction or restraining orders from a court. Internationally, the trend goes in favour of consumer rights protection. It is likely that the judicial pronouncements may witness some inconsistency until the Supreme Court makes a definitive ruling.
- The comparison should be made fair and should not bring disrepute to competing products, trademarks or services.[33] Though India does not make "generic disparagement" as an offence per se yet is strongly in need of provisions to be incorporated where the menace of generic disparagement should to be dealt with stringent measures. Comparative advertisement will be harmful to the consumer in particular and society at large if it consists of false,

[33]Uphar Shukla, Comparative Advertising and Product Disparagement Vis-à-vis Trademark Law, 11 J. OF INTELLECTUAL PROPERTY RIGHTS, 409-414 (2006).

wrong and concocted information. Thus, the stringent punishment should also be incorporated in the existing legislations to prevent disparaging in comparative advertisement.

- The models, the creative agencies and the companies should be prosecuted and penalized for disparagement in order to have effective check on such malicious advertising. The celebrities should enquire before endorsing a product that whether their endorsement tantamount to disparaging.
- All advertiser's claims should be monitored and extended beyond food as FMCG marketers and durable manufacturers make all kinds of unsubstantiated claims in their advertisements to woo the customers. Advertising is legalized lying. In market economy the consumers need free flow of information to make informed choices, appropriate to their needs, It sullies the industry's reputation for being irresponsible and deceitful, it also generates a fair bit of reactionary regulations. The best ads are created within the constraint of restrictions and regulations. Unfortunately, the self regulation does not work. Companies continue to use ads to get noticed in the clutter, making unsubstantiated claims. Advertising Standard Council of India (ASCI) is self regulatory body which rules out falsification, indecent, illegal and unsafe practices or unfair contraventions of ethical codes in any advertisement.
- Law can't fix greed, regulation can't instill character. The Sarbanes Oxley Act did not prevent further collapses in financial sector in US. Perhaps reaction is more regulation. We don't need regulation as it is not sufficient to stop greed and avarice. Lord Leverhume said that nothing can be greater than a business however small it may be that is governed by conscience and nothing can be more meaner than a business however large governed without honesty and brotherhood. Idealism and romance are getting tempered with age, responsibility and time. Idealism is getting replaced by pragmatism, which is euphemism

for expediency. We trade long term values with short term gains and end up with a bad bargain.

- Courts gives due consideration to intent, manner, format, frame of advertisement to assess the iota of ridicule or condemnation of other competitive product. If the manner is only to show one's product better or best without derogating others products then that is not actionable. Comparative advertising is beneficial as it increases consumer's knowledge and awareness and helps in taking the informed decision but certain regulations must be in place to put a cap on its misuse. The consumer is not aware enough to assess the dishonest intent of the advertiser. Further courts are not equipped enough to decide the dishonest/false/ disparaging remarks and verify the truth in certain technical products and services.
- Recently Supreme Court has set the timelines for the Competition Commission of India to resolve disputes on competition between the companies. The apex court ruled that every order of the commission is not appealable before Competition Appellate Tribunal (COMPAT) as it will choke the early disposal of the cases and defeat the purpose of the law under which quasi-judicial body has been established. The Competition Act, 2002 and Regulations, 2009 are suggestive of speedy and expeditious disposal of matters and concept of reasonable time is to be construed meaningfully.
- The complementarities between the Competition Act, 2002, Consumer Protection Act 1986 and Trade Marks Act, 1999 need to be identified and gaps plugged in to fructify the legislative intent. The consumer awareness needs to be enhanced by removing the marketing aberrations and unhealthy competition.

The day is not far where instead of consumer being the king; the producer would sit on the throne enslaving the consumers through the powerful medium of visual advertising. It's time for an introspection and change indeed.

THE CRIMINALISATION OF HIV TRANSMISSION

Varun T. Mathew[*]

I. INTRODUCTION

In 1981 the U.S. Centers for Disease Control and Prevention identified a disease which since has grown to be one of the largest known killers in human history. Today, over 33.2 million people worldwide are affected with the HIV virus, making AIDS one of the largest growing concerns of the international community.[1] The horror of the HIV virus lies in the fact that it decimates the immunity system of an infected person making that person mortally vulnerable to even the most basic diseases such as a common cold or a flu. To this day there has been no cure discovered for this disease, though many drugs have been invented such as the anti-retroviral drugs which retard the progress of the HIV virus and slows down the entire process of Acquired Immuno-deficiency Syndrome. However these drugs are expensive and not easily available which mean that the majority of AIDS sufferers, who are concentrated in the developing and under-developed world, are denied access to them.

In response to the global threat posed by HIV/AIDS, the United Nations made the halting and reversal of the spread of HIV/AIDS, and provision of universal access to treatment for HIV/AIDS part of the 8 Millennium Development Goals to be realized by 2015.[2] Thus it is indeed clear that the world has finally woken up to the dangers of HIV/AIDS.

[*]Varun T. Mathew is a fifth-year student at National Law School of India University, Bangalore. The author may be reached at vtmathew@gmail.com.

[1]Robert C Gallo, A reflection on HIV/AIDS research after 25 years, University of Maryland, 2006, http://www.retrovirology.com/content/3/1/72.

[2] United Nations Millennium Development Goals – url: http://www.un.org/millenniumgoals/#.

Unfortunately this has not translated into effective measures to curtail the spread of AIDS, specifically that of intentional or reckless transmission of the virus. The steps taken to criminalize the transmission of HIV/AIDS worldwide are few and faulty, and in India they are virtually non-existent. The few attempts made at imposing liability drew their legitimacy from the certain provisions of the Indian Penal Code which are too archaic and outdated to deal with as multi-faceted and serious as that of HIV/AIDS transmission. This project deals specifically with the liability for the transmission of HIV/AIDS and looks at it from the judicial standpoint.

The arguments in favour of criminalizing HIV/AIDS are numerous, but the costs of implementing it are large. However, if India wants to take steps towards the curtailing of the growth of its HIV population, then drastic measures are needed. Apart from reviewing the existing situation, this project will also seek to establish a suitable method of penalizing HIV transmission whenever they satisfy the requisites of a crime, thereby ensuring that the offender is punished and a potential offender is deterred.

But at the very outset it is essential to keep in mind that India is a nation where the majority of the people are unknowledgeable, let alone illiterate, and thus their awareness on HIV/AIDS and its associated risks is negligible. If the Indian people are not educated on all the issues relating to HIV/AIDS, criminalizing its transmission will not have any effect. Indeed, the number of AIDS cases that are reported itself are negligible compared to the official estimates of NACO[3], and thus there is very little history of AIDS related suits and judgements in India. While in countries around the world the transmission of AIDS has not only attracted criminal liability, but also developed into a tort which mandates the provision of ample compensation to the victim, even in cases of no infection but only exposure, India has seen almost no development in this regard.

[3]National AIDS Control Organization.

It is therefore a desire of the researcher to evolve within this paper a scheme of dealing with the transmission of HIV/AIDS both as a crime and a civil offence in a manner suitable to India, but drawing inspiration from all over the world since AIDS truly is a global threat.

II. THE CASE FOR CRIMINALIZING HIV TRANSMISSION

A. Defining HIV transmission as a crime

There exist numerous definitions on what a crime is. Many define it as the act or omission to do an act which results in the breaking of the law.[4] However, the definition most apt to the aims of this paper is the one given by Sergeant Stephen, which says that a *crime is the violation of a right, considered in references to the evil tendency of such violation as regards the whole community*.

It is indeed the violation of the right to life under Article 21 of the Constitution of a person when that person is infected with the HIV virus against their will or without their knowledge. But to make this act legally punishable or to fulfill the legal definition of a crime, there are three essential requirements that must be satisfied, as specified by Cecl Turner – (1) that it is a harm, brought about by human conduct, which the sovereign power in the State desires to prevent; (2) that among the measures of prevention selected is the threat of punishment; (3) that legal proceedings of a special kind are employed to decide whether the person accused did in fact cause the harm, and is, according to law, to be held legally punishable for doing so.[5]

As regards the first point it is clear that the onset and spread of AIDS is something that the state is bent on preventing. It is this that led to the formation of NACO, into which substantial funds have been invested. It is the second and third point of the three requisites

[4]Paul W. Tappan, Sir William Blackstone etc.

[5]J.W.C.TURNER, KENNY'S OUTLINES OF CRIMINAL LAW (Cambridge University Press: London, 1966).

specified above that this project will seek to establish – whether punishment should be applied to the act of transmitting the HIV virus and what kind of legal proceedings are instituted to determine the criminal liability and the punishment in each scenario. Essential to this is the presence of the two necessary phases of a crime – the *actus reus* and *mens rea*.

B. Characteristics of the Crime

Actus reus refers to the result of human conduct, either an action or an omission, which the law seeks to prevent.[6] Thus the *actus reus* in HIV related crimes is the infection of a person with the HIV virus. In *State* v. *Smith*[7], the accused was convicted of attempt to murder for biting a corrections officer while knowing that he himself was HIV+. Here, the actus reus is the act of biting the officer which may or may not involve transmission of the virus leading to the HIV infection of the officer. In recent times, there have been attempts to classify acts where one 'knowingly exposes another to the risk of HIV infection' as a prohibited act, i.e. *actus reus* even if the act does not result in infection. In the case *Smallwood* v. *State,*[8] refused to follow judicial trends that sought to increase liability for all risks associated with the contraction of HIV/AIDS and held that merely committing an act that had risk accompanied with knowledge of the risk would not satisfy the condition of prohibited act/*actus reus.* However in a number of other cases it has been held that anyone who intentionally or with full knowledge does an act that could lead to the infection of another with the HIV virus is committing a prohibited act that is opposed to public health, even if the act does not result in infection. Thus there exists differing judicial opinion on this point. If all acts which cause the exposure of another to the HIV virus thereby increasing the risk of contraction of the virus are prohibited, then the personal liberty of

[6]Id. at 17.
[7]State v. Smith, 621 A. 2d 493, 495 (NJ Super. Ct. App. Div. 1993).
[8]Smallwood v. State, 680 A.2d 512 (Md. 1996).

HIV+ people will be severely curtailed. Indeed the situation will arise where HIV people are treated like criminals and incarcerated which is exactly what happened in *Lucy R. D'souza* v. *State of Goa*[9] where a HIV+ person was forced into solitary confinement by the state on the ground that he posed a health risk to society at large. The Supreme Court even upheld the isolation which arose out of Section 53 of the Goa, Daman and Diu Public Health Act, 1985. Thus, if such extreme measures are to be forced upon those affected by the HIV virus it is certain that the transmission itself must be severely penalised.

The problems with the classification of the act of transmission into *actus reus* can be resolved with reference to *mens rea*, or the intention of the person while committing the act. It is established law, such as in the case of *Thabo Meli*[10], that for a crime to be committed there must be concurrence of both *actus reus* and *mens rea*. In the above case, it was found that when an act was committed with the intention of causing death, it did not result in death but instead death was caused by an act which was not at all intended to cause death but merely dispose of a body which was thought to be lifeless. Hence, the conviction for murder was unsustainable. Thus the importance of *mens rea* and its concurrence is evident, and we shall not look at the corresponding portion of the transmission of HIV/AIDS.

Mens rea refers to the mental framework of the accused during the commission of the crime. It literally means guilty intention, thereby indicating that the person committing the *actus reus* must have necessarily intended to commit that very same act. In the case of transmission of HIV virus, either the intention to infect someone else with HIV/AIDS or the knowledge that through the commission of the act the victim might acquire HIV/AIDS would be sufficient to disclose *mens rea*. However, the problem of discerning *mens rea* is that it has to be inferred from the actions of the accused and in most transmission of HIV virus cases it is difficult to prove that the

[9]Lucy R. D'souza v. State of Goa, A.I.R. 1990 Bom. 355.
[10]Thabo Meli v. R.,(1954) 1 All.E.R. 373.

intention was that the victim be infected with the HIV virus or that the accused had the knowledge that he was HIV+. The following cases elaborate this point.

In *Doe* v. *Dilling*[11] the plaintiff accused the parents of her fiancé of intentionally concealing from her the fact that their son was HIV+, which led to her also getting infected by the virus. However it could not be proved beyond reasonable doubt that the parents knew of the HIV+ status of their son and hence the appeal was dismissed. In *Weeks* v. *State*[12] the conviction of the accused was upheld when he spat on a prison guard after he was confirmed as HIV+. Here the knowledge that he was capable transmitting the virus was present and the fact that he spat on them proved intention to infect them. Similarly in *State* v. *Haynes* the defendant had thrown blood into the eyes and mouths of police officers and paramedics who were trying to restrain him from committing suicide. He told them to leave him alone and to let him die in peace since he was suffering from HIV/AIDS. Thus once again both knowledge and constructive intention is present and the defendant was convicted of attempt to murder.

However, the problem arises in cases where the accused has no idea of his/her HIV+ status and then proceeds to commit the *actus reus* with regard to HIV/AIDS crimes. In such cases, it is against the principles of criminal law to hold the accused guilty since he/she had no intention to pass commit the offence of criminal transmission of the HIV virus. In *R* v. *Lee*[13] the accused indulged in unprotected sex which led to the transmission of the virus, but he had no knowledge of the fact that he was HIV+. In most cases such as this an inquiry into the lifestyle of the accused has been used by the judiciary to determine constructive knowledge, mainly because risky, irresponsible or negligent behaviour in such matters cannot be tolerated. Thus if the accused was in the habit of indulging in

[11]Doe v. Dilling, 2008 W.L. 879039 (Ill.).
[12]Weeks v. State, 834 W.2d 559 (Tex. Ct. App. 1992).
[13]R v. Lee, 3 O.R. (3d) 726 (Gen. Div) (1991).

unprotected sex with myriad people, or was in the habit of consorting with prostitutes etc. and then passed on the virus to an unsuspecting victim, the accused would be held guilty of criminal transmission of HIV/AIDS since the kind of lifestyle led by the accused necessitated caution and possible testing for the virus.

This makes the liability for HIV infections rather high, i.e. it places it on power with other crimes that attract strict liability. This is in keeping with the high risk nature of the disease, the fact that it has no cure and will in all probability result in death. The spread of HIV/AIDS is highly opposed to public order and health, and a tremendous amount of resources will have to be directed toward healthcare for the infected people by the state. The association of the spread of HIV/AIDS with other prohibited activities such as prostitution and homosexuality is undeniable thereby adding to the criminal link. Most importantly, the criminal transmission of HIV/AIDS to an innocent victim is blatant violation of human rights and akin to murdering the person. Thus, according to criminal jurisprudence, punishment must be meted for the above act.

Thus, in all cases where the accused has knowledge that he/she is suffering from HIV/AIDS and commits an act whereby someone either contracts the virus or is under the risk of contracting the virus, that person can be said to have the requisite *mens rea* necessary to make the *actus reus* a punishable offence. Rashness or negligence on the part of the accused resulting in the transmission of or exposure to the virus will also entail criminal liability.

C. The Case for criminalisation

However, there are a number of arguments both for and against the criminalization of the intentional/knowledgeable transmission of HIV/AIDS. The necessity for criminalizing any act depends on two factors – (1) the conduct must be wrongful, and (2) it must be

necessary to employ criminal law to prevent such conduct.[14] As regards the first fact it is beyond doubt that the criminal transmission of HIV/AIDS is wrongful. It is with regard to the second point that the discussion will proceed, i.e. on whether it is necessary to employ criminal law to prevent the transmission of HIV/AIDS, with arguments both for and against being provided.

(1) If people liable to spread the HIV/AIDS infection are punished using criminal law, and thereby incarcerated it completely reduces the risk of them interacting with the rest of society and thereby spreading the virus.
However, it has been seen from experience that the number of HIV/AIDS infections that happen in prisons are numerous. Rather than preventing the accused from indulging in sexual activity that runs the risk of transmitting the HIV virus, incarceration places the person in a setting where high risk sexual behaviour is common and occurs with alarming frequency. The only solution then would be to place the HIV+ criminal in solitary confinement, but this would clearly violate their human rights guaranteed under A21, as per the case *Sunil Batra* v. *Delhi Administration*[15] where it was held that some fundamental rights are available to prisoners and even those on the death row. The object behind incarceration is to rehabilitate the prisoner, but in the case of HIV/AIDS criminals the rehabilitation can never occur since they will always be HIV+ and thus the risk will never cease. They will in effect be serving out a life sentence. Thus, incarceration is clearly a double edged sword.

(2) Criminalizing HIV/AIDS transmissions would however serve the purpose of retribution. In cases of all wrongful transmissions accompanied by sufficient *mens rea*, it is clearly justified if the state

[14]C.M.V. CLARKSON & H.M.KEATING, CRIMINAL LAW – TEXTS AND MATERIALS 4 (4th ed. 1998).
[15]Sunil Batra v. Delhi Administration, A.I.R. 1978 S.C. 1675.

takes retributive action against the offender just as it does in most other criminal cases.

However in cases where there is no *mens rea* but only carelessness, negligence or rashness, retributive action would not be proportional and thereby become unjust. Thus, in other cases where people is not aware of their own HIV+ status the only punitive action would possibly be the compensation of the person to whom the virus was transmitted. This is a civil liability and thus opens a necessary loophole in the criminalization of HIV/AIDS.

(3) Deterrence of future HIV/AIDS related crimes is another possible benefit of the criminalization of HIV/AIDS transmissions.

Yet, there proponents against the deterrence theory that throw up the example of capital punishment for murder not being effective deterrence to the extent the murders continue to happen in plenty. Realistically speaking criminal law is going to have minimal significance in influencing conduct, and thus we cannot be very sanguine about the use of criminal law to compel changes in human sexual behaviour. The deterrence effects of law on the human psyche are very subjective and dependant on social and economic factors, which is proved by the fact that the rich man need not worry about the law since he has the resources to save himself and the poor man does not worry about the law since he either does not know it or understand it.[16]

Indeed the procedural difficulties of criminalizing the spread of HIV/AIDS are numerous and seemingly insurmountable. Proof of knowledge or intention will always be difficult to establish, thereby making the very basis of the criminality of the act suspect. Then there is the danger that criminalizing HIV/AIDS transmissions will lead to less number of people testing themselves for the disease. Since the disease itself is virtually incurable and the available medication is

[16] Criminal Law and HIV/AIDS: strategic Considerations, www.aidslaw.ca/durban2000/crimifinal.pdf.

unaffordable for most of Indian society, people who do not test themselves and therefore do not know their HIV status will not fulfill the knowledge or intention, i.e. *mens rea*, requirement of the crime. Thus they cannot be held criminally liable and this would further lead to a stigma surrounding HIV/AIDS and portray all HIV+ people as potential criminals.

In the case *Dr. X* v. *Hospital Z*,[17] the Supreme Court held that it was within the limits of duty of care of the doctor to reveal to the concerned persons that a patient of his was HIV+. In the given case, the doctor revealed to the fiancé of one of his patients that the patient was HIV+, thereby saving her from being infected with the HIV virus. This invasion into the privacy of the patient and breach of doctor-patient confidentiality was upheld as justified in the circumstances. Although the conduct of the doctor was admirable and a young girl's life was saved through his act, the case itself resulted in fewer HIV+ people wanting to take the test since it could lead to a disruption of their normal lives at the very least. Thus, given the civil fallouts, if criminal consequences were to be attached to HIV/AIDS then many more problems would crop up.

However it is now clear that the transmission of the HIV virus is a criminal act, especially when accompanied with the requisite intention or knowledge. Yet, the answer to whether the transmission of HIV/AIDS should be criminalized is a very difficult one to give, but the researcher is of the opinion that it must be criminalized without further delay. This is because the transmission of HIV/AIDS is one of the worst fates that can befall a human being, since they become like one of the living dead. The act of transmitting the disease should always entail liability – if there is a lack of *mens rea* then civil liability to compensate the victim must be present, and if there is *mens rea* then criminal liability must be attached. The problem that now arises is that

[17]Dr. X v. Hospital Z, A.I.R. 1999 S.C. 495 [*hereinafter* X v. Z].

To determine how to criminalise the transmission of HIV/AIDS we need to ascertain under which bracket of criminal law this crime can be placed. In the following chapter, the classification of the criminal transmission of HIV/AIDS under the various existing criminal provisions of the Indian Penal Code shall be discussed in detail.

III. TREATMENT OF TRANSMISSION UNDER INDIAN LAW

The Indian Penal Code is possibly one of the best drafted legislations in Indian history, and the fact that it has been amended so few times since its inception in 1860 stands testimony to this fact. Yet, almost 150 years after its enactment there are many provisions which do not cover situations and crimes that arise in today's context. The need to draft a Patent Law protecting intellectual property was apparent after it was realised that the ordinary provisions of theft under S.378 of the I.P.C. did not cover the offence. Similarly, today it is apparent that S.269 and S.270 of the I.P.C. which criminalize a negligent act and a malicious act (respectively) that is likely to spread infection of a disease dangerous to life, does not cover an offence as repulsive as the infection of HIV/AIDS.

The reason for this is firstly the quantum of punishment. S.269 prescribes a maximum term of merely six months while S.270 prescribes upto two years. HIV/AIDS is today the worst known disease in human history and its effects spread to all areas life. Death is almost certain but the manner of live which the sufferers are forced to lead is what makes this disease the horror that it is. There is no known cure for HIV/AIDS and the only medication available is extremely expensive and only serves to prolong life, i.e. retard the progress of the virus against the immunity system. Thus, the penal provision for this offence must be of a much higher degree.

Second, the Sections do not contemplate the differences that may arise in intention of knowledge. The same standard of *mens rea* is presumed throughout. However, in the case of HIV/AIDS transmissions many different scenarios may arise. A husband may acquire HIV/AIDS through a blood transfusion and then pass it on to his wife unknowingly. The husband may contract the disease from a third party through sexual intercourse and then pass it on to his wife unknowingly. The husband may intentionally pass the disease onto his wife because he cannot control his lust. A man may suspect that he has HIV/AIDS, but not take the test for fear of confirmation of his fears, and then he may pass on the virus to an unsuspecting victim. Can this count as knowledge? In these cases are very different from each other and cannot be covered by a single section which does not take into account the differences in degrees of intention or knowledge.

In the case of *Rakma*[18] the plaintiff had sexual intercourse with a prostitute suffering from syphilis. However, the prostitute did not convey to the plaintiff that she had syphilis and thus the plaintiff unknowingly contracted the disease. The Court, using the provisions of S.269 and S.270, held that since the plaintiff was a willing accomplice in the act of sexual intercourse, all incidental results cannot be waived by the plaintiff and it is assumed that he consented to the disease. However it can never be assumed that a person voluntarily consented to contracting HIV/AIDS virus as that would be akin to suicide, and is therefore prohibited by law. Thus it is clear that while S.269 and 270 were first drafted to cover the transmission of such diseases, it lacks the depth and the foresight to combat criminal transmission of HIV/AIDS since infecting someone with HIV/AIDS is akin to causing them.

[18]Rakma Kom Sadhu, (1887) I.L.R. 11 Bom 59 [*hereinafter* Rakma Kom Sadhu].

To better illustrate this, let us look at an incident which took place in 2004 in Maharashtra.[19] A medical practitioner in the Nashik district of Maharashtra was accused of injecting his wife and baby daughter with the HIV virus because he wanted to marry another woman. The wife affirmed that she had been constantly tortured for dowry, and that her husband was in love with another woman but had married her only for monetary purposes. Soon after the birth of their baby girl, the husband – Ajay Sharma – gave both the mother and the daughter an injection which he said was a routine hepatitis shot. A few days later both the mother and the daughter tested positive for the HIV virus. Criminal proceedings against Ajay Sharma were instituted but he avoided capture by the police. In such a case Ajay Sharma would clearly invite the provision of S.270, which provides for the punishment of a malignant act likely to spread infection of disease dangerous to life, under which he would received a maximum punishment of 2 years. However, the act is more akin with that of murder or attempt to murder, given the heinous nature of the offence and the surety of eventual death of both the victims. This proves the need for a new approach to dealing with HIV/AIDS related crimes.

A. Possible Solutions under the existing framework

We shall now examine the existing provisions of Culpable Homicide – Murder, Attempt to Murder and Grievous Hurt vis-à-vis the criminal transmission of HIV/AIDS.

a) Culpable Homicide

All murder is culpable homicide but all culpable homicide is not murder.[20] Thus for an act to be proven as murder, it must first satisfy the requirements of culpable homicide. The difference between the two is the degree of knowledge and intention in both cases. With regard to Culpable Homicide, the requisites are that the act must be done with:

[19]Dnyanesh Jathar, A Dose of Death, THE WEEK (May 23 2004), 14-16.
[20]Vishnu v. State, (1997) Cri. L.J 2430 Bom.

i) the intention of causing death.
ii) the intention of causing such bodily injury as is likely to cause death.
iii) the knowledge that he is likely by such an act to cause death.

The problem with the first postulate is that the accused must have committed the act which transmitted the HIV virus to the victim with the intention of killing the victim by that act. However, in most cases the intention is not to kill but merely to have sexual intercourse with the victim. If a doctor unknowingly administers infected blood to a patient during an operation, the intention is not to kill but the act is merely negligent. It is the same argument that holds good for the second postulate, since the intention is invariably not to cause bodily injury but to satisfy carnal appetite.

As regards the knowledge mentioned in the third postulate, the only thing to be proved here is that the accused had knowledge of his/her positive HIV status. This is an extremely difficult proposition for the prosecutors since an affirmation of HIV+ status can only be given through a medical test and in most cases the accused did not undergo a medical test or even if they did, proving it is an uphill task.

However, the most fundamental problem with classifying the criminal transmission of HIV/AIDS within the genus of homicide is that the death of the victim takes so long to occur that if the actual intention was to cause death then the accused would have used a much more direct method of killing. Transmitting HIV/AIDS does not always fulfill the motive of killing since in some cases it can take upto twenty years for the virus to kill the victim. Thus in most cases, the victim would be alive and well while the prosecution would be making its case for conviction of the accused on the grounds of culpable homicide/murder and this would amount to a logical inconsistency.

b) Attempt to Murder

The next provision is that for Attempted to Murder. Under S. 307, the intention or knowledge to cause death is required, just as it is under S.

299 and S. 300. However in this case the act does not result in death, but could result in bodily injury. What is important in this case is not the effect on the victim, though extent of injury will determine the sentence, but the intent of the accused and the act carried out. Thus the accused can be charged for attempt to murder as long as he commits an act with the intention of causing death, though the death of the victim has not been caused immediately. Thus, S.307 would cover instances where the accused has intentionally infected the victim through some overt act, and would also extend to situations where the accused commits the act but it does not infect the virus. For e.g., if the accused indulges in sexual intercourse with the victim with the intention of transmitting the virus to the victim but after the sexual act it is found that the victim is not infected, the accused would still be liable. The only problem with the application of this section is that there exists a qualitative difference between murder and transmission of HIV/AIDS. Murder is the expunging of life of the victim while transferring HIV/AIDS destroys the quality of life of the victim without killing him/her.

Yet, the provision of Attempt to Murder has been applied in many HIV transference cases by judiciaries around the world. In *Weeks* v. *State*[21] the Texas Court of Appeals upheld the conviction for attempt to murder when the accused had spat on a prison guard after knowledge had been brought to him that he was HIV+. In *State* v. *Haines*, the defendant had tested positive in a HIV test previously and as a result attempted to commit suicide. When prevented from doing so by prison guards and paramedics, he threw blood into the eyes and mouths of those restraining him. He was convicted of Attempt to Murder. The same principle was upheld in *State* v. *Smith.*[22]

[21]Weeks v. State, 834 W. 2d 559 (Tex. Ct. App. 1992).
[22]State v. Smith, 621 A.2d 493, 495 (NJ Super. Ct. App. Div. 1993).

However, the difficulties in using this section to criminalize all HIV transmissions are amply demonstrated in *Smallwood* v. *State*[23]. In this case the defendant, D.R. Smallwood was convicted of raping and robbing three women. The trial court had also convicted him of attempted second degree murder and assault with intent to murder for exposing the women, through rape, to the risk of contracting HIV/AIDS. Although there was no extrinsic evidence of intent behind the crimes, the prosecution used Smallwood's knowledge of his own HIV+ status, his awareness that sexual intercourse could transmit the disease and his failure to use a condom during the crime. The Maryland High Court however held the evidence insufficient to justify intent to murder since there was no reasonable proof that Smallwood intended to kill his victims. Mere circumstantial evidence, such as Smallwood not using a condom, was not good enough to sustain an attempt to murder charge. While holding the death is the natural result of HIV/AIDS, it is not the most probable results since the victim could go on living for twenty years during which he/she could be killed in an air crash or an earthquake, thereby defeating the charges against the accused. It also pronounced that knowledge of his HIV status did not betray an intention to kill, especially if that was the only evidence available that adduced intention. Thus, going according to legal provisions the accused could not be held guilty of Attempt to Murder.

A fallout of this decision is that it underplayed the knowledge angle in criminal HIV transmissions. That is to say that since Smallwood had sexual intercourse with the victims in spite of the fact that he knew he was HIV+, it betrays an utter disregard for the safety of the victims, an careless indifference as to whether his victims contracted the HIV virus or not. Thus, this opens up the charge of causing death by a rash and negligent act punishable under S. 304A of the I.P.C. However, this rules out all cases with intention, since under S. 304A there can be no intention or knowledge to commit murder or to transmit the

[23]680 A.2d 512 (Md. 1996).

HIV virus. Thus, S. 304A can only apply to instances where the accused has no idea of his HIV+ status and thus unwittingly transfers the virus onto an innocent victim, but his conduct is backed up by a rash and negligent lifestyle which ordinarily would lead to the high risk of acquiring the virus, such as frequenting brothels, indulging in extra-marital sex etc.

c) Grievous Hurt

Finally we come to causing Grievous Hurt. The offence of Simple Hurt is not being considered since in no way does the infection with the HIV virus qualify as Simple Hurt. Apart from the same problems of intention and knowledge, the inapplicability of Grievous Hurt to the criminal transmission of HIV/AIDS is that all instances of grievous hurt are laid out in a list comprising eight clauses.[24] The first seven clauses require the showing of immediate injury and the eighth clause requires the showing of injury within twenty days, thereby excluding HIV/AIDS from its ambit since in most cases the virus takes years to show a symptom. Thus, the offence cannot be classified under S. 319 or S. 320.

This leads us to the conclusion that the present criminal statutes are not capable of criminalizing an offence such as the transmission of HIV/AIDS. The legislatures should enact criminal statutes that specifically designate as a felony the knowing exposure of another to HIV and thus the offence requires a new legislation enacted specifically for this purpose, or else requires a new approach from the judiciary which lays down the guidelines in the absence of any law from the legislature. The following chapter will discuss the necessary steps to be taken both by the judiciary, and by the legislature in enacting an anti-AIDS legislation that would cover all aspects of AIDS and effectively serve to retard its growth.[25]

[24]The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India), § 320.

[25]Jennifer Grishkin, Knowingly Exposing Another to HIV: Smallwood v. State, 106 THE YALE L.J., 5, 1617-1622 (Mar., 1997).

IV. CRIMINALISING HIV – THE JUDICIAL AND LEGISLATIVE ACTION REQUIRED

A. The Indian Judicial Approach

The importance of having a pro-active judiciary towards the issues of HIV/AIDS and a legislation that effectively addresses the related problems cannot be undermined. The aim of the legislation should be to curb and curtail the spread of HIV/AIDS through various civil and criminal provisions that would effectively stop the transmission of the virus from person to person. The judiciary should be able to provide relief and succour to all HIV patients themselves, and interpret each case scenario so that justice and equity is delivered and maintained respectively.

The first important HIV related case was that of *Lucy R. D'souza* v. *State of Goa*[26] wherein a HIV positive person was forcibly put in solitary confinement. In the subsequent court proceedings brought about by the mother, the court found isolation necessary in the case of HIV+ people although it was a violation of personal liberty, and a suspension of principles of natural justice. It completely ignored credible material such as the WTO report on AIDS which clearly demarcated the dangers of HIV infected people making it clear that they could lead normal lives with ordinary contact with the rest of society. This case particularly marked the highpoint of insensitivity of the Indian judiciary towards HIV/AIDS patients.[27]

This was later corrected in *Indian Inhabitant* v. *M/s ZY*[28] wherein a labourer who was selected to be regularised as a permanent employee of the corporation for which he worked, was disqualified because a medical test revealed him to be HIV+. The Courts here laid down two important points of law with respect to HIV infected people. Firstly,

[26]Lucy R. D'souza v. State of Goa, A.I.R. 1990 Bom. 355 [*hereinafter* Lucy R. D'souza].

[27]Arun Roy, Judicial Response to HIV/AIDS in India – A Critique, 87 A.I.R. 1039, 100 (2000).

[28]Indian Inhabitant v. M/s ZY, A.I.R. 1997 Bom. 406.

that they would have the right to maintain their anonymity in Court cases, thereby giving their right to privacy a major boost. Secondly, after intensive study on the matter it brought about a distinction between a HIV+ condition and a condition of fully blown AIDS, finding that the former condition would in no way affect a person's ordinary work habits. Thus there would be no difference between a HIV+ person and a normal person apart from the fact that the HIV+ person could spread the virus. It was only on the onset of AIDS that the physical condition of the person started to deteriorate, but this would normally occur many years after the infection, in some cases over 20 years later. Also, there was no way that the virus could spread in the ordinary course of employment. Thus the Court struck down the action of the corporation and gave succour to millions of HIV+ people in the country.[29]

In the case *Dr. Tokugha Yepthomi* v. *Apollo Hospital Enterprises Ltd.* also known as *Dr. X* v. *Hospital Z,*[30] the Supreme Court put the protection of citizens against the HIV virus over and above the right to privacy of the HIV+ people. In this case a doctor revealed to his patient that he was HIV+. On learning that the patient was engaged to a girl and set to marry her in the due course of time, the doctor informed the girl of the HIV+ status of her fiancé thereby saving her from falling prey to the virus herself. In this case the Court held that if anyone with the knowledge that they are HIV+ marries another, then that person commits the offence laid out under S. 270 of the I.P.C. The decision itself was commendable apart from the usage of S.270 and S.269 to address the problem of criminal transmission of the HIV virus.

However there have been few cases in Indian jurisprudence relating to the criminal aspect of HIV/AIDS and all of them are still pending, such as the *Bharati Sharma case.*[31] There is also no HIV/AIDS

[29]Lucy R. D'souza, Supra note 27.
[30]X v. Z, supra note 18.
[31] Rakma Kom Sadhu, supra note 19.

specific legislation in India leaving a void in matters regarding the transmission of this disease. Thus, for purposes of this project this chapter shall focus on foreign jurisprudences and their experiences with anti-AIDS legislations and judgements.

B. The judicial approach in the United States

In the state of Iowa, United States, the intentional transfer of the HIV virus is termed as murder. The special difference here is that the courts have equated the indifference that a HIV+ man exhibits towards his victim when he indulges in sexual intercourse with her, with the intent to kill and thus the same punishment for murder is attracted for criminal HIV transmissions, as seen in *State* v. *Hunter*.[32] This is judicial fiction created by the courts to serve the purpose of criminalizing the HIV infections. In rape cases, intention is derived from the depraved heart of the accused who proceeds to indulge in forcible intercourse with the victim even though he knows that this will inevitably result in the victims death, as seen in *State* v. *Schrier*.[33] Indeed the court here has seen the HIV virus as a dangerous weapon. Attempt to Murder is used in cases where the person wilfully tries to infect someone with the HIV virus, irrespective of whether they are infected or not.[34]

In other states in the U.S. the police are given the right to arrest any woman they find who is indulging in prostitution, take her to a police station and force her to give blood samples for HIV testing. If she is confirmed positive, then she will be arrested again on the grounds of felony, since she was attempting to solicit customers to have paid sexual intercourse which would have led to her passing on the HIV virus. Indeed the freedom of many people are now being curtailed because they are seen as high risk HIV individuals and therefore the state is empowered to take action by either isolating them or testing

[32]State v. Hunter, 51 N.W.2d 409 (1952).
[33]Statev. Schrier, 300 N.W.2d 305 (Iowa 1981).
[34]Linda K. Burdt & Robert Caldwell, The Real and Fatal Attraction: Civil and Criminal Liability for the Sexual Transmission of AIDS, 37 DRAKE L. REV. 657 (1987/1988).

them for the virus. However this is not the way to go forward, as curtailing the freedom of people is always a regrettable measure.[35]

The Ryan White Comprehensive AIDS Resources Emergency (CARE) Act of 1990 was a catalyst which sparked legislative action to provide a means to prosecute for the intentional transmission of HIV. This Federal Act provides emergency AIDS relief grants if a State has statutes which allow a person to be prosecuted for intentionally transmitting HIV to another person. The States can fulfill this federal requirement by: amending their public health statutes to include HIV on their list of sexually transmitted diseases; using traditional criminal law statutes to punish HIV transmission; or enacting specific criminal statutes targeted at HIV transmission.

The Article 12-16.2 (a)(1) of the Illinois Constitution itself specifically provides that one can commit the felony of criminal transmission of HIV only "when he or she, knowing that he or she is infected with HIV engages in intimate contact with another". In the case *People* v. *Russell*[36] the validity of this provision vis-à-vis many constitutional rights was challenged. The debate itself is beyond the scope of this project since it is a constitutional law issue, but the Article itself was held unconstitutional showing the anti-AIDS legislations need to be given a lot of care and attention so that they do not trample upon the rights of the people infected with the HIV virus in an attempt to prevent its spread to non-infected people.

C. Recommendations for a Suitable Legislation

To draft an entire criminal legislation here is beyond the scope of the project, but essential points shall be taken from all of the examples provided above to put together key points that need to be included in any legislation that seeks to criminalize and thereby prevent the spread of HIV/AIDS.

[35]Stephanie Kane & Theresa Mason, AIDS and Criminal Justice, 30 ANNUAL REV. OF ANTHROPOLOGY, 457-479 (2001).

[36]People v. Russell, (1993) W.L. 13016169 (Ill.).

First, the penal provisions of intentional HIV/AIDS infection must be high, making the punishment on power with that of murder, i.e. a maximum of life-imprisonment where the prisoner would be isolated from the other prisoners. This is because of the depravity of the crime itself, wherein the accused does not take away the life of the victim but instead destroys the life in a slow and excruciating manner. An example of such a case is the *Bharati Sharma* case wherein the maximum punishment possible must be meted out to the accused.

Second, steps must be taken to protect the spouse from transmission of the HIV virus. For this, testing of the HIV virus prior to the marriage must be made statutorily compulsory. Also, the spouse must be given the right to withdraw from sexual relations in the event of suspicion of marital unfaithfulness or a STD/HIV-AIDS. Currently, the available remedies to one spouse when the other spouse gets infected with HIV/AIDS are provided in the specific marriage acts they got married under. These cases also deserve some criminal liability and thus the new statute must provide for that.

Then, distinctions must be made between degrees of intention and knowledge and the principle of constructive knowledge must be applied. For example since Adultery is a crime under S. 497 of the I.P.C., if a spouse contracts the HIV virus through an extra-marital affair and then unknowingly transmits the virus to his wife, constructive knowledge must be applied to his case and thus he must be made criminally liable. If a person indulges in high risk sex, i.e. with prostitutes or many different people who have the probability of having the virus, and that person unknowingly passes on the virus to an innocent third party, then by virtue of the kind of life he leads criminal liability devolve upon him through the principle of constructive knowledge.

Even the Attempt to infect a person with HIV/AIDS must be made punishable since they have the same intention as a person who succeeds in infecting a person. This would in fact be covered by S. 511 of the Indian Penal Code. The only case wherein criminal liability

is not entailed must be in situations where the accused contracts the virus through no fault of his own and then unknowingly passes it on to an innocent victim. There must also be civil liability entailed upon the transmitters of the HIV virus to the extent that they must pay compensation to the persons they infected. Such liability can be enforced upon their estate and need not be liquidated in the Act itself, but depending on the circumstances and facts of each case. The entire specifics of the statute cannot be laid down here but in the above mentioned provisions lie the bare essentials that must go into the statute. This would sufficiently penalise all cases of HIV/AIDS related crimes depending on the degree of *mens rea* and also seek to protect the victim. As India currently has one of the largest HIV+ populations in the world, the need for the legislation cannot be undermined. It is a national priority to do all in our power to prevent the progress of this dreaded disease.

V. CONCLUSION

The criminality of the wilful HIV/AIDS transmissions is beyond doubt. Unfortunately, the majority of the transmissions occurring in the country are those without criminal intent. It is the uneducated and unaware part of the population that contracts this disease through high risk sexual encounters and then pass them on to their families. Studies in India have shown that truck drivers that ply our national highways are one of the main carriers of this disease, since they visit sex workers in locations across the country. The criminalization of this offence will not make too much difference to them unless they can be made aware of HIV/AIDS and all its related consequences.

The larger questions that this issue throws up are numerous. For example, would it then come within the ambit of a crime if two adults who are HIV+ decide to have a child between them, with the undeniable result that the child itself will be HIV+? These are questions that cannot be answered immediately and require the application of legislative and judicial thought.

However, the crux of this paper is that the criminal transmission of HIV/AIDS cannot be ignored and must be penalised. Existing penal provisions are not capable of dealing with this offence and thus a new legislation catering specifically to the needs of an anti-AIDS legislation is required. Judicial intervention in this area will fill the gaps that a statute will always leave in redressing the issues that crop up in society.

It is possible that in the future HIV/AIDS would have risen to become such an important global issue that the governments will have to take stern measures to control it. People with the virus would have to be rounded up and isolated. Perhaps they would have to wear an identification symbol on their bodies so that people can identify them and thereby abstain from having any interaction with them that could lead to a transmission of the virus. If the issue goes out of hand and infections begin to rise drastically, the governments may be forced to initiate a movement to wipe out all HIV/AIDS infected people and thereby rid the world off the disease, bringing back memories of the holocaust. Indeed hope only remains in two scenarios – 1) that a cure is discovered, or 2) that the spread of HIV/AIDS is retarded effectively with the requisite legislations and enforcement mechanisms. Unless either of these occur, a situation where the virus kills off most or all of humanity is not unforeseeable.

IN COURT OR NO COURT: EFFICACY OF ARBITRATION IN IP DISPUTE RESOLUTION

*Shruti Khanijow & Sugandha Nayak**

Intellectual property arbitration can be defined as an arbitral procedure in which at least one intellectual property right[1] is in issue. Intellectual property is the source of many of the most dynamic world enterprises. It is the foundation of the publishing industry, the entertainment industry, the pharmaceutical industry, and the most rapidly developing industry of all--that based on information technology. The computer industry generates much of the interest in intellectual property with the vast commercial activity in new genres of work such as semiconductor designs, computer programs and digital databases. Only the exercise or the challenge of the intellectual property right, or the contesting of the existence or the validity of an intellectual property right, makes the dispute an intellectual property dispute.

Intellectual Property Arbitration refers to methods of resolving IP disputes without having to start court proceedings. IP disputes are resolved in aid of expert opinions. Increasingly, arbitration is chosen as a means of objective, amicable and final adjudication of commercial disputes. Thus, the emergence of arbitration of intellectual property matters is a study which merits serious

*Shruti Khanijow & Sugandha Nayak are fourth-year students at Hidayatullah National Law University, Raipur. The authors may be reached at shruti.indis@gmail.com and sugandha18@gmail.com.

[1]See, Art. 1 (2), Paris Convention for the Protection of Industrial Property; Art. 1 (2), TRIPs Agreement; Art. 2 (viii), Convention Establishing the World Intellectual Property Organization.

consideration.[2] IP addresses principally the allocation of rights under license agreements. Similar considerations exist with respect to arbitration involving matter such as anti-trust,[3] securities regulation,[4] and bankruptcy.[5] These dispute all implacable public rights, whose violation could result in a loss to society at large, which never signed the agreement to arbitrate.

It is the sovereign prerogative of the state to grant legal protection to IP rights, conferring certain exclusive rights on the beneficiary to use and to exploit the IP in question These rights need to be registered with a governmental or quasi-governmental agency, which alone can grant amend or revoke these rights and determine their scope.

I. REASONS FOR INTELLECTUAL PROPERTY'S INCREASING INTEREST IN ARBITRATION

A distinctive feature of IP disputes is that they often contain technical subject matter. Thus, settlement of such a dispute should be conducted by an arbitrator with specialized knowledge in IP. A major concern is to ensure the selection of an arbitrator with an understanding and familiarity of the IP transaction, the nature of the rights concerned and the particular issues in dispute. The advantage of arbitration is that the arbitral tribunal may be chosen to possess the technical skills which necessary to comprehend the IP dispute at issue.

[2] See, Worldwide Forum on the Arbitration Of Intellectual Property Disputes, WIPO Publication No. 728(E), I (1994) (explaining that both intellectual property and arbitration have in recent years experienced a growth of activity and have come to occupy increasingly prominent positions in national and international commerce).
[3] See, Mitsubishi Motors Corp v. Soler Chrysler-Plymouth Inc, 473 U.S. 614 (1985).
[4] See, Scherk v. Alberto-Culver Co., 417 US 506 (1974).
[5] See, Sonatrach v. Distrigas Corp., 417 US 506 (1974).

Arbitration has been a widely used dispute resolution mechanism in international commerce for a long time. It satisfies the parties' demand for an amicable, inexpensive, expeditious way to settle their dispute, providing them with a neutral forum, a competent tribunal of their own choice familiar with the subject-matter, and with a procedure that preserves privacy and confidentiality. [6] Even the parities flexibility in the powers that permit the arbitrator to exercise and choose the applicable procedures, usually by including reference to the rules of an arbitration institution makes people to opt for arbitration on IP disputes.

Arbitration is a less formal procedure than litigation, but still shares some of the elements of a court procedure. The increasing interest in intellectual property arbitration reflects the growing economic importance and the globalisation of intellectual property rights. There has been a dramatic increase in the demand for such rights within the last 15 years. The number of patent applications, for instance, has grown worldwide between 1986 and 1990 from 1.25 to 1.65 million.[7] Today, the economic weight of intellectual property rights in some countries surpasses the relevance of traditionally important sectors of commerce.

Arbitration is the classic way to eschew problems which stem from contracts involving a multitude of national laws. It possibly becomes the vehicle to enforce the global intellectual property code in *statu nascendi*. The TRIPs Agreement, which has already been signed by over 100 states, is an indication that some intellectual property principles, as expressed in the Berne, the Paris and the Rome Conventions, have become recognised worldwide and now build up

[6] See, Niblett, Worldwide Forum on the Arbitration of Intellectual Property Disputes, WIPO Publication No. 728, 1994, p. 198.
[7] See, Gurry, in Objective Arbitrability, Antitrust Disputes, Intellectual Property Disputes, Paper presented at the ASA Conference held in Zurich on November 19, 1993, p.111.

part of the *lex mercatoria*.[8] Accordingly, they would be directly applicable in arbitral procedures as far as the choice of law lies in the arbitrator's discretion.

II. THE CHARACTERISTICS OF INTELLECTUAL PROPERTY DISPUTES

Arbitration in the field of intellectual property shows no unique features but common characteristics, typically the involvement of highly technical questions and the need for confidentiality as well as for a quick dispute settlement.

1. **Technicality**- Disputes involving intellectual property rights tend to be highly technical and complicated. Only a technical expert can decide, for instance, whether an invention contains an inventive step. By choosing an arbitrator who is a specialist in the particular field, the parties minimize the need for additional experts and thus costs.
   Recently, however, doubts have arisen as to whether the nomination of technical experts for arbitrators is advisable; "*having an arbitrator fully equipped for dealing with whatever legal issue might arise during the course of the proceedings is more important than having an arbitrator able to grasp the factual substantive issues of the case*".[9]

2. **Confidentiality-**Intellectual property disputes often deal with

[8]See, Schmitthoff, TheLaw and Practice of International Trade, 9th Ed., 1990, p. 655(The lex mercatoria embraces internationally accepted principles of law governing contractual relations); See also Dasser, Internationale Schiedsgerichte und lex mercatoria, 1989, p. 100 (International legislation is one source of law of the lex mercatoria).

[9] See, Werner, Application of Competition Laws by Arbitrators, (1995) 12 J.INT.ARB. 1 at 21.

confidential information, such as trade secrets or patents. Therefore, the parties are often keen to preserve privacy and confidentiality, which are said to be best preserved by an arbitral procedure. In practice, however, often neither the underlying contract nor the law governing the arbitral procedures or the *lex arbitri* provide for confidentiality. In such cases, it is far less than clear to what extent arbitration is private and confidential.[10]

3. **The speed of procedure-**Intellectual property rights are inseparably connected with technological evolution. The life cycles of technical innovations get shorter and shorter; product life cycles are currently between 9 and 14 months.[11] This brings about the need for quick dispute resolutions.
   Practice, however, shows that it is sometimes a myth to believe that arbitration will bring about a quick end to a commercial dispute. It depends on many different factors, especially on the chosen arbitrators, whether an arbitral procedure saves cost and time.[12]

III. THE ARBITRABILITY OF INTELLECTUAL PROPERTY DISPUTES

Arbitrability means the capability of being properly subject to arbitration. Disputes as to validity, effect and royalties due under licensing agreements intended to lead to IP rights are generally

[10]Supra at 6, p.199; See, Esso/BHP v. Plowman, (1995) 11 ARB. INT. 3, 234.; See also Paulsson & Rawding, The Trouble with Confidentiality, p.303; Collins, Privacy and Confidentiality in Arbitration Proceedings, p. 321.
[11]See, Hill, in Conference on Rules for Institutional Arbitration and Mediation, Reports published by WIPO (1995), p. 137.
[12]See, Arnold, in Worldwide Forum on the Arbitration of Intellectual Property Disputes, WIPO Publication No. 728, 1994, p. 306, (mentions an arbitration case in California that was expected to last six to eight weeks. The award, rendered after four-and-a-half years, was eventually set aside to a substantial part by a court).

considered to be arbitrable. These more often does not have a direct effect on the third parties. Problems concerning arbitrability arise when the question arises not in respect of the validity of IP rights but on the contracts that has been concluded in the exercise of such right. The dispute between the licensor and the licensee although being a private affair is referable to arbitration. Such disputes are generally referred to international arbitration.

In India, the power of reference to arbitration has been contained in Section 8 of the Arbitration and Conciliation Act, 1996. [13] It empowers the court to refer the parties to arbitration when there is a violation of any agreed terms of the contract and contains an arbitration clause. Even an arbitration clause may give the power to the parties to select their arbitrators and assures confidentiality of arbitral proceedings, which is of vital importance to safeguard trade secrets. In the absence of specific provisions in the applicable intellectual property statutes, the question of arbitrability has to be decided according to the *lex arbitri*, which usually deems all disputes arbitrable that are at the free disposal of the parties or involve property.[14]

According to Article II (3) of the New York Convention, the court will decide whether it will accept the action or refer the plaintiff to arbitration. Moreover, a state court at the place where enforcement is sought may refuse recognition of the award on the ground that the subject-matter of the dispute is inarbitrable under the national law.[15] This provision enables the country where enforcement is sought to impose, on a limited scale, its national law on an international award. In practice, however, most parties comply with the award voluntarily. What is more, decisions that deny the exequatur of an award on the

[13] … Power to refer parties to arbitration where there is an arbitration agreement…
[14]Art. 5 of the Swiss Intercantonal Arbitration Convention.
[15]Art. V (2) (a), of Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958.

grounds set up in Article V (2) are extremely rare.[16]

In some countries, 'intellectual property claims' have been considered non-arbitrable, albeit these are the areas where the arbitration is becoming more acceptable as an alternative to litigation. Some countries, such as France,[17] deny the arbitrability of disputes related to public policy. In US, 'patent claims' were excluded from arbitration until 1981, when the Congress allowed patent disputes to be arbitrated.[18] In European Union, disputes directly affecting the existence or validity of a registered IP right are still not considered to be arbitrable. By contrast, in Switzerland where the law contains a comparable definition of arbitrability, the opposite is true: arbitration awards are recognized by the Swiss patent and trade mark office as a basis for revoking the registration of a patent.[19] Most of the other legal systems do not exclude IP rights as a whole, from the jurisdiction of arbitration tribunals but usually draw a distinction between those rights which have to be registered, i.e., patents and trade marks, and those which exist independently of any such formality, such as copyright.

However, most related issues such as ownership, infringement, transfer or violation of the patent can be freely arbitrated in all major jurisdictions. The general acceptance of the arbitrability of IP disputes is reflected in the arbitration system under the WIPO Rules.[20]

Usually, even countries which allow the arbitrability of all intellectual

[16]See, Hanotiau, in Objective Arbitrability, Antitrust Disputes, Intellectual Property Disputes, Paper presented at the ASA Conference held in Zurich on November 19, 1993, p. 36.
[17]Id., p. 26.
[18] By addition of Section 294 to title 35 of the US Code.
[19]See Blessing, Arbitrability of Intellectual Property Disputes, 12 ARB INTL 191 at 200, 1996.
[20]See Lew, Mistelis and Kroll, Comparative International Commercial Arbitration, 2003, p. 209-210, ¶ 9-66.

property issues do not accept an award as a sufficient basis to alter the registration.[21] But it should be kept in mind that the subject matter of disputes arising under any of these statutes, in view of the provisions of Section 2(3) of the Arbitration and Conciliation Act, 1996 will not be arbitrable under this Act.

IV. POWER OF TRIBUNAL TO CHALLENGE VALIDITY OF IPR

There is controversy over whether the arbitral tribunal has the power to challenge the validity of an intellectual property right. The validity issue primarily challenges the arbitrability of registered rights, such as patents and trademarks. In the course of registration, the law often provides a special administrative procedure under which third parties may oppose.[22] Generally, such procedures cannot be replaced by arbitration. Therefore, these jurisdictions may also decide to reserve to themselves the right to adjudicate any disputes challenging the validity of the granted rights. However, as Francis Gurry has rightly pointed out, there is an inconsistency when the same state, which is common practice, allows the settlement of invalidity claims in a pre-trial stage by an agreement between the parties which restricts the ambit of the contested right or by licensing the contester.

[21]Exception is Switzerland, where awards are recognized by the Federal Office for Industrial Property if they have been declared enforceable by the competent authority.

[22]For instance, S. 47 (4) of the U.K. Trade Marks Act 1994, according to which the Registrar, in the case of bad faith in the registration of a trade mark, may apply to the court for a declaration of the invalidity of the registration

V. MANDATORY RULES OF LAW

Mandatory rules of law are compulsory provisions of law which, owing to public policy considerations, are to be applied irrespective of the *lex contractus*.[23] Noncompliance with mandatory rules of law is a ground to set an award aside.[24]

The arbitral tribunal would have to apply the mandatory provisions of the place where enforcement would probably be sought.[25] Yet this may clash with the parties' choice of law. It is arguable that in such a situation the arbitral tribunal leaves its mission and thereby sets a ground for setting the award aside.[26] Even if the award is not challenged, enforcement might be refused on the ground that the award deals "*with a difference not contemplated by or not falling within the terms of the submission to arbitration*".[27]

The now predominant view seems to endow arbitrators with the power to adjudicate competition law issues, at least as long as competition law is not at the very heart of the dispute. The crux of the matter, again, lies in the question which (competition) law is to be

[23]See, Hochstrasser, Choice of Law and Foreign Mandatory Rules in International Arbitration, (1994) 11 J.INT.ARB. 1 at 67.
[24]Art. V (2) of the New York Convention allows the refusal of the recognition and enforcement of a foreign award, if the subject-matter of the difference is not capable of settlement by arbitration or if this would be contrary to public policy under the law of the country where enforcement is sought. Many jurisdictions have similar provisions for the setting aside of domestic awards (cf., Art. 27, Swiss Federal Private International Law Act1987, especially S. 1 (refusal of enforcement if a decision contradicts the Swiss Ordre Public)).
[25] See, Dessmontet, in Objective Arbitrability, Antitrust Disputes, Intellectual Property Disputes, Paper presented at the ASA Conference held in Zurich on November 19, 1993, p. 70; See also Hanotiau, id, p. 33; Art. 26, ICC Rule (the arbitrator shall make every effort to make sure that the award is enforceable at law).
[26]Art. V (1) (e) of Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958.
[27]Id.

applied. The applicable law depends prima facie on the law governing the contract. [28] By choosing the law of a Member State of the European Union, for instance, the parties inevitably opt for the application of E.C. competition law. However, the parties cannot simply evade the application of a certain competition law by opting for a "neutral" body of law governing their contract.

VI. THE WIPO RULES ON ARBITRATION

In September 1993, the WIPO General Assembly unanimously approved the establishment of the WIPO Arbitration Center, now called the WIPO Arbitration and Mediation Center. The Center offer services for the resolution of IP disputes between private parties through arbitration and mediation. The Centre also administers special administrative procedures for the resolution of disputes arising out of the registration of Internet domain names. The WIPO is currently the only institution offering specialised services designed for intellectual property disputes. The increased resort to international protection opens new possibilities for the use of ADR. The existence of more rights raises the potential for a larger number of conflicts involving those rights.

WIPO has developed an online system for administering commercial disputes involving IP. To be administered by the WIPO Arbitration and Mediation Centre, the WIPO system will be used for disputes involving Internet domain names, where certain assumptions can be made about the technical sophistication of the parties, but also for other types of e-commerce disputes, such as those arising out of the

[28]See Bebr, Arbitration Tribunals and Article 177 of the EEC Treaty, (1989) 22 C.M.L.R. 489; See also Competition and Arbitration Law, ICC Publication No. 480/3 (1993).

online conclusion of licensing agreements.[29] WIPO plans to work with content and service providers in order to tailor the system to their specific customer needs. In increasing procedural efficiency, the system will also lend itself to facilitate the resolution of conventional commercial disputes.[30] The WIPO Rules reflect standard practice in international arbitration, combining the "best features of established and recognised arbitration rules" and presenting the state of the art of commercial arbitration rather than unique features of intellectual property disputes. Yet they support academia's view on the characteristics of intellectual property disputes. They encompass special provisions dealing with the technicality and the confidentiality of such conflicts. Several Articles aim to accelerate the procedure.

A WIPO procedure is commenced by a request for arbitration submitted to the WIPO Arbitration Center,[31] which administers the arbitral procedures conducted by the WIPO Rules. The Center neither reviews the qualifications nor confirms the nomination of the chosen arbitrators; it is not supposed to get involved in any questions that can be solved by the arbitral tribunal or the state courts. Only in exceptional cases is it called on to nominate the arbitrators.[32] The request can, but does not have to, be accompanied by a statement of claim.[33] The claimant, in his request for arbitration, has to include a brief description of the nature and circumstances of the dispute, especially of the technology involved.[34] This reflects WIPO's concern

[29]See E Wilbers, WIPO International Conference on Electronic Commerce and Intellectual Property, September, 1999 available at http://ecommerce.wipo.int/meetings/1999/index.html, last accessed on 1st October 2010.

[30]See F Gurry, Dispute Resolution on the Internet, paper presented at the Fifth Biennial International Dispute Resolution Conference, International Federation of Commercial Arbitration Institutions (ICFAI), New York, May 1999.

[31]Hereinafter referred to as 'the centre'.

[32] But, contrary to the ICC Court, the Center does not confirm the parties' nomination.

[33]WIPO Rules, Art. 10.

[34]WIPO Rules, art. 9 (iv).

to appoint arbitrators familiar with the specific subject-matter of a dispute. In order to assist the Center in this task and to give recommendations when it is asked to do so, the Center maintains a list of persons who are specifically qualified to act as mediators and arbitrators in intellectual property disputes.[35] Unfortunately, WIPO has not so far published this list.

The WIPO Rules safeguard under specific conditions and limitations the confidentiality of the existence of the arbitration, of disclosures made during the arbitration and of the award. The provisions bind the parties, the arbitrators and the Center. The Rules also regulate the disclosure of trade secrets and other confidential information.[36] Truly innovative is the introduction of a "confidentiality adviser", who decides under exceptional circumstances in lieu of the arbitral tribunal whether a piece of information is to be classified.[37] This proviso may evoke the particular interest of a party who utterly distrusts a member of the arbitral tribunal. It is difficult to assess whether there is a real need for the introduction of specific intellectual property arbitration rules. In practice, it seems that the choice of the arbitrators and the parties' willingness to cooperate are far more important than the selection of the applicable set of rules.

However, because of the perception of a low level of IP protection provided by WIPO Conventions and the perceived inability of WIPO to enforce IPR in 1986 the US govt. shifted its efforts for international IP protection to the GATT in the Uruguay Round negotiations. Under the GATT, a detailed agreement entitled TRIPS was created which provided both national treatment and extremely detailed rules for minimum standards of protection of a very broad spectrum of IPR.

[35]In January 1996, the list encompassed 527 persons from 53 different jurisdictions.
[36]WIPO Rules, Art. 52.
[37]Ibid.

VII. INTERIM RELIEF IN INTELLECTUAL PROPERTY ARBITRATION

Interim relief is of pivotal importance in the field of intellectual property; the majority of such disputes brought before the state courts are likely to end at the interlocutory stage.[38]

The applicable arbitration rules sometimes do not explicitly refer to the arbitral tribunal's power to grant interim relief. Moreover, the request for interim relief may arise before the arbitral tribunal has been constituted. In such situations, the claimant almost inevitably will have to turn to the state courts. Some courts, however, have denied their competence and referred the parties back to arbitration.[39]

Up to now, there have been no institutional arbitration rules providing for timely instant relief at an early stage of the dispute.[40] The WIPO is about to introduce an Emergency Interim Arbitral Procedure, which would be available as an additional feature on an optional basis under the WIPO arbitration rules. This speedy procedure would be applied by a standby panel of arbitrators who would be available on 24 hours' notice. In the absence of the parties' agreements on the person to act as Emergency Arbitrator, the Center would be called on to appoint the arbitrator out of the members of the standby panel. Under certain conditions, the Emergency Arbitrator would be empowered to permit

[38]See Niblett, Arbitrating the Creative, (1995) 50 DISPUTE RESOLUTION JOURNAL 1 at 67.

[39]See Redfern, Arbitration and the Courts: Interim Measures of Protection--Is the Tide About to Turn?, (1995) 30 TEX. INT'L L.J. 1, 71 at 84; See also Wagoner, Interim Relief in International Arbitration, (1996) 62 Arbitration 2, 131 at 132.; Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd, [1993] 1 All E.R. 66 (The U.S. and the English courts are little inclined to grant interim relief in a dispute which is subject to international arbitration).

[40]In the ICC Pre-arbitral Referee Procedure (in effect since January 1, 1990), it takes a minimum of eight days after the receipt of the request for interim relief for the appointment of the referee

an *ex parte* hearing.[41]

The proposed WIPO procedure would be most valuable for parties seeking relief in a number of jurisdictions or in a country where timely relief is not available. However, for the time being the enforceability of such interim orders is in limbo because some national arbitration laws only allow the enforcement of final or partial awards, or do not recognise an arbitral tribunal's power to grant interim relief at all.[42]

VIII. CONCLUSION

From a procedural IP arbitration raises issues that are not too different from other forms of private binding resolution. True, IP disputes often implicate interim measures and technical expertise, which played a part in the elaboration of IP arbitration rules by WIPO. However similar concerns exist in other areas, including arbitration related to corporate acquisitions, joint ventures, investment and finance.

Again the absence of appeal on the merits of an award can be an advantage as well as drawback, particularly in international transactions. The better approach might be to provide by statute that courts shall respect the litigants' clear agreement for judicial review on legal and factual merits. Otherwise some parties may shy away because of the fear of risk involved in the error of the arbitrator.

There has also been reluctance among the IP lawyers to arbitrate, one oft-overlooked element which might be called the "loss of face factor". Thus it will not be surprising to see law firm conducting

[41]Art. IX (b) of the draft Emergency Rules.
[42]Consultation Document on Proposed WIPO Supplementary Emergency Interim Relief Rules, prepared by the International Bureau, April 19, 1996.

lawsuits than going for arbitration proceedings. It is often easier and safer to be ignorant than to learn. Until more counsel have experience with international arbitration, they will understand it as a risky business.

TRACING THE RIGHT TO STRIKE UNDER THE INDIAN CONSTITUTION

Ashish Goel and Piyush Karn[*]

ABSTRACT

This paper highlights the loopholes in T. K. Rangarajan case, reevaluates it from a comparative perspective and presents the uncertainty in judicial approach towards this sensitive issue of strike. In doing so, it also revisits the previous judgments of Indian constitutional courts and uses Kameshwar Prasad and B. R. Singh and others v. Union of India to conclude that there is a fundamental right to strike under the Indian Constitution.

Although there have been pronouncements by the Indian judiciary on the validity of the right to strike and its nature, if as a fundamental right and in context of government employees there needs to be greater unanimity in its constitutional status. It is in this context that a comparative analysis is drawn from the judiciary trends in South Africa, US & Canada.

[*]Ashish Goel and Piyush Karn are fourth-year students at the National University of Juridical Sciences, Kolkata. They are grateful to Mr. Saurabh Bhattacharjee for his helpful comments and guidance.

In pursuance of understanding & comparing the cogent and clear reasoning propounded by the constitutional courts in the said countries an appraisal of the 'comparative constitutional' approach is attempted. The imbibing of the significance of equality, individual autonomy, and dignity in human life as seen in the mentioned countries is argued for to be incorporated in the Indian approach so that it is not at loggerheads or asynchronous to international norms and standards on the right to strike.

I. INTRODUCTION

No political party or organization can claim the exercise of their fundamental, legal, or moral rights which, in effect, results into an illegitimate encroachment on other peoples' rights. [1] Also, fundamental rights of the people as a whole cannot be subservient to the claim of fundamental right of an individual or only a section of people.[2] The underlying principle is that while it is constitutionally permissible to be 'rights-conscious', it is equally important to be aware of one's duties towards others.[3] However, there are stray cases where it becomes impossible to adhere to a particular set of absolute rules that would reconcile competing interests harmoniously. This comment is a glaring example of such stray cases i.e. suspension of economic relations by the working people with management in the pursuit of their self-interests and apparently in sheer non-observance of the interest of their employers.

[1]Communist Party of India (M) v. Bharat Kumar and others, (1998) SCC 1201.
[2]Ibid.
[3]See generally, infra note 9.

By its very nature, strike has the competence of breaking down the contract of employment for the fulfillment of certain long terms objectives.[4] In addition, it is a tool in the hands of employees against the economically dominant management enterprises who have traditionally been conceived to possess soaring bargaining powers and skills. [5] This clash of interest between the employers and the employees, we argue, can be reconciled through a harmonious construction of the competing rights and duties of people involved, in accordance with, and not in derogation of, the underlying spirit behind rule of law and embodied in the Indian Constitution.

In order to achieve economic independence and enjoy cordial working environment[6] the authors posit that the legal right to strike of workers should be constitutionalised and made free from deprivation except in accordance with the 'procedure established by law'. In this context, it is only imperative to ask this question: Is there a fundamental right to strike under the Indian Constitution?

The use of expression 'employed' in Chapter V of the Industrial Disputes Act, 1947 ("**I.D. Act**") is largely understood to include within its ambit, self-employed persons who do not necessarily satisfy the definition of 'workmen' as provided in the Act.[7] Hence, it can be argued that a statutory right to strike is limited not only to workmen working in an industry but also extends to any employer-employee relationship. To argue for a citizen's right to strike as opposed to

[4]O. P. MALHAOTRA, THE LAW OF INDUSTRIAL DISPUTES 385 (1998).
[5]Andhra Pradesh State Road Transport Corporation Employees Union v. Andhra Pradesh State Road Transport Corporation, [1970] Lab I. C. 1225; Bangalore Water Supply v. A Rajappa, [1978] Lab. I. C. 467.
[6]See, Articles 41 – 43, THE CONSTITUTION OF INDIA.
[7] "22. Prohibition of Strikes and lock-outs – No person employed in a public utility service shall go strike in breach of contract…" Also, section 23 which provides; "No workman who is employed in any industrial establishment shall go on strike in breach of contract and no employer of any such workman shall declare a lock-out…"

worker's right to strike, one of the public law commentators went ahead to address this issue from a 'duty' perspective and in a thought-provoking article persuasively concluded that there exists a fundamental duty to strike under the Indian Constitution.[8]

While conceding to the fact that even if right to strike assumes a fundamental status in the Constitution, the difference would be insignificant in terms of 'availability' of such a right given its statutory existence, the authors argue for a fundamental right to strike for the following two reasons. *First* and the most obvious, fundamental rights are more sacrosanct and are put on a higher pedestal than other legal or statutory rights and as a consequence, ensure minimum institutional interference and maximum judicial review on grounds of 'reasonableness' of State action. *Secondly*, it shall minimize economic abuse of workmen by the management since the actions taken have to be justified from the parameters of 'reasonable restrictions' and 'procedure established by law' enumerated in Part III of Constitution.

In India, *T.K.Rangarajan v. Government of Tamil Nadu and others*[9] is the latest division bench judgment delivered by the Supreme Court ("**SC**") on the constitutionality of the legislation restricting right to strike of government employees in India. Here, the SC validated the dismissal of government employees by the Tamil Nadu Government and echoed *All India Bank Employees' Association v. National Industrial Tribunal and others*[10] and *Kameshwar Prasad v. State of*

[8]Shubhankar Dam, Strikes through the Prism of Duties: Is there a Duty to Strike under the Indian Constitution?, 5 (1) ASIA PACIFIC JOURNAL ON HUMAN RIGHTS & THE LAW 68-82 (2004); available online at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=953787 (Last visited on March 19, 2010). (Dam argues that the citizens would be failing in their constitutional duty (to cherish and follow the noble ideas which inspired our national struggle for freedom) by not striking as a means to fulfill their legitimate demands. In doing so, he successfully creates a linkage between Directive Principles, Fundamental Duties and the Gandhian notion of 'ahimsa' and 'Satyagraha').

[9]A.I.R. 2003 SC 3032.

[10]A.I.R. 1962 SC 171.

Bihar[11] to say that there is no fundamental right to strike under the Indian Constitution. The SC went on to say that so far as the government employees are concerned – there is no moral, legal or fundamental right to strike.[12] This paper highlights the patent loopholes in *T. K. Rangarajan*, reassesses it from a comparative perspective and presents the uncertainty in judicial approach towards this sensitive issue of strike. In doing so, it also revisits the previous judgments of Indian constitutional courts and uses *Kameshwar Prasad* and *B. R. Singh and others v. Union of India*[13] to conclude that there is a fundamental right to strike under the Indian Constitution.

Needless to say, on several occasions the superior courts in India had sought for a uniform constitutional answer to the question whether right to strike is at all a right, if not a fundamental right and if yes, where does it derive its validity from.[14] Although the recognition of right to strike as a statutory right for non-government employees' is well settled,[15] there still lacks patent unanimity[16] in judicial reasoning

[11] A.I.R. 1962 SC 1166.

[12] Supra note 9 at ¶ 14 – 21.

[13] A.I.R. 1990 SC 1.

[14] Supra note 11 (Although this case limits itself to deciding the constitutionality of right to 'demonstrate' since right to strike was not unfortunately argued, the author posits that "strike" is essentially a form of "demonstration" and similar laws should be applied mutatis mutandis); supra note 10 (Where the discussion was when article 19(1)(c) guarantees the right to form associations, is a guarantee also implied that the fulfillment of every object of an association so formed is also a protected right), Radhey Shyam Sharma v. Post Master General Central Circle Nagpur, A.I.R. 1965 SC 311; Dharam Dutt v. Union of India, AIR 2004 SC 1895; Ex-Capt. Harish Uppal v. Union of India and Anr, 2002 Supp 5 S.C.R. 186 (While deciding the legitimacy of strikes by lawyers, Court ruled that for just or unjust cause, strike cannot ever be justified given its adverse impact on the society at large). Also, supra note 9 (Although, it concerned itself primarily with the determination of a right (fundamental, legal, moral or equitable) to strike applicable in cases of government employees).

[15] §§ 22-25 of the I.D. Act, 1947 by differentiating between 'legal and 'illegal' strikes, have implicitly recognized the statutory nature of this right. Besides, §§ 18 and 19 of the Trade Unions Act, 1926 confer immunity from civil actions on (legal and justified) strikes called upon by trade unions. The word 'employee' includes not only workmen but also people working in other establishments. However,

over its constitutional status. The dilemma over according right to strike a fundamental status had also troubled the constitutional courts in South Africa, [17] U.S., [18] Canada, [19] among others'. The only difference is that while Indian judiciary is still struggling to come up with a constitutionally sound response, or at least seems to be doing so, some of its foreign counterparts have not only recognized and accepted this right but have also read it into the core principles of an ideal democracy through their comparative discourse on the significance of equality, individual autonomy, and dignity in human life.[20]

In addressing the above issues, the paper is divided into four small parts. The authors here *first*, emphasize upon the different international human rights covenants and conventions, particularly the

T.K.Rangarajan categorically upheld the dismissal of government employees for calling strike, on reasons that there is no legal/statutory, fundamental, or moral right to strike for government servants carrying out public utility services.

[16] For instance, in B R Singh a division bench of the SC argued for the right to strike as a form of demonstration in freedom of association guaranteed under article 19(1)(c). Also, See, Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha, 1980 S.C.C. 2 593.

[17]National Union of Metal Workers of South Africa v. Bader BOP (Pty) Ltd and the Minister of Labour, 2003 (2) B.C.L.R. 182; National Education Health and Allied Workers Union v. The University of Cape Town and others, 2003 (3) SA 1.

[18]Charles Wolf Packing Company v. Court of Industrial Relations, 262 U.S. 522 (1923); Dorchy v. Kansas, 272 U.S. 306 (1926) Lyng v. Autoworkers, 485 U.S. 360 (1988).

[19] Health Services and Support Facilities Sub-sector Bargaining Association v. British Columbia, 2007 2 S.C.R. 391.

[20] For instance, Health Services and Support Facilities Sub-sector Bargaining Association (Although this case does not concern right to strike, the argumentation favoring collective bargaining is indeed helpful in building a strong case towards a right to strike in the Indian context. Here the SC of Canada while arguing on grounds of liberty and equality held that 'collective bargaining' complements and indeed promotes the values enshrined in § 2(d) of the Canadian Charter. Influenced by Wallace v. United Grain Growers Ltd, [1997] 3 S.C.R. 701, Judge McLachlin reiterated; "the right to bargain collectively…enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over…work"); supra note 18 (on liberty grounds); supra note 17 (on dignity grounds).

International Labour Organization to argue for international recognition of a fundamental right to strike and *secondly* attempt to compare and analyze different constitutional provisions among the selected countries viz. U.S., Canada and South Africa to elaborate upon the reasoning the constitutional courts have advanced in the conclusive determination of the issues surrounding right to strike. *Thirdly*, we argue for the constitutionalisation of right to strike by employing the comparative constitutional analysis which is to act as a guiding course of action for the Indian constitutional courts. *Fourthly*, as a part of the conclusion we also underscore the inadequate appraisal and replication of these foreign decisions by Indian courts and argue in favour of the incorporation of "comparative constitutionalism" in the adjudication of issues of "constitutional importance" so that our principles do not conflict with the international norms and standards so far as the examination of the validity of the right to go on a strike is concerned.

II. INTERNATIONAL NORMS AND STANDARDS

The International Labour Organization ("**I.L.O**."), [21] largely considered to be the 'Magna Carta' of the rights of the working people, in a stream of Conventions, Resolutions, and Recommendations has established a fundamental basis for right to strike [22] and demands universal obedience under the 'customary

[21]Post World War I, on April 11, 1919, I.L.O. was established by the Paris Peace Conference under the Treaty of Versailles as an autonomous organization associated with the League of Nations which also, later in 1946, became the first specialized agency of the United Nations.

[22]Resolution Concerning the Abolition of Anti-trade Union Legislation in the State Members of the I.L.O. on (Adopted by the International Labour Conference at its 40th Session in 26 June, 1957) (Calling upon Member States to abolish all laws and administrative regulations hampering or restricting the free exercise of union rights and adoption of laws which ensure the effective and unrestricted exercise of union rights, including the right to strike) (emphasis on the original). The text of this Resolution is available at http://www.ilo.org/public/libdoc/ilo/P/09734/09734(1957-40).pdf (Last visited on April 22, 2010); See also, article 15 of the Resolution Concerning Trade Union Rights and their Relation to Civil Liberties (Adopted by

international law'. Other international human rights instruments have also accepted right to strike as being fundamental, although not absolute.[23] The sole aim and objective behind the creation of I.L.O. is to protect internationally recognized fundamental rights of the working people.

Although, the I.L.O. Constitution does not explicitly mention about right to strike, the Committee of Experts on the Application of Conventions and Recommendations ("**C.E.A.C.R**.") had removed the ambiguity[24] by according right to strike a fundamental status on an interpretation of Convention 87[25] which concerns itself primarily with the Freedom of Association and Protection of the Right to Organize. Several concerns have been raised over the blind appreciation of the reasoning given by the C.E.A.C.R. on the issues of the fundamentality of right to strike. The most significant of them is the difficulty in the adaptation of non-binding guidelines for national policy and action advanced by a Member Committee which does not hold the authority

the General Conference of the I.L.O. in 1970) which, among others, sought for comprehensive studies and preparation of reports on law and practice relating to inter alia right to strike, with a view to considering further action to ensure full and universal respect for trade union rights in their broader sense. Also, article 1(d) of Convention (105) Concerning Abolition of Forced Labour Convention (Adopted on 25 June, 1957) which implicitly acknowledges the importance of right to strike by providing that each ratifying Member State of the I.L.O. undertakes to suppress and not to make use of any form of forced or compulsory labour as a punishment for having participated in strikes. Also, See article 7 of Recommendation (92) on Voluntary Conciliation and Arbitration, 1951 which explicitly acknowledges this right by stating that "no provision of this Recommendation may be interpreted as limiting, in any way whatsoever, the right to strike".

[23]Article 8(d) of the International Covenant on Economic Social and Cultural Rights ("I.C.E.S.C.R.") (The State parties to the present Covenant undertake to ensure right to strike provided it is exercised in conformity to the laws of the country); Article 22 of the International Covenant on Civil and Political Rights ("I.C.C.P.R.") (Although it does not explicitly provide for a right to strike, the freedom of association guaranteed in the article can be interpreted to include right to strike).

[24]Bernard Gernigon et.al., Principles of the Committee on Freedom of Association Concerning Strikes, 126 INT'L LAB. REV. 543.

[25]Convention 87, adopted by the General Conference of the I.L.O. in its Thirty-first Session on July 09, 1948 is a 'core' Convention and forms part of the I.L.O. Declaration of Fundamental Principles of Right at Work, 1998.

under international law to decide upon the probabilities of domestic constitutions.[26] This argument is bad since having conceded without any issues that I.L.O. Recommendations are only in form of guide to action and shall not be binding upon non-ratifying Member States, it must not be forgotten that it is the duty of each State which is a party to the I.L.O. to comply with the recommendations laid down therein in 'good faith'.[27] As regards the former issue, however, a liberal interpretation of article 3[28] read with article 10[29] of Convention 87 establishes the appreciation of the fundamental character of right to strike since it firmly recognizes the rights of organizations to "organize their administration and activities and to formulate their programmes" in furtherance of the interests of the working people.

Indian Government, however, has not ratified Convention 87 due to problems of "technical nature" relating to prohibitions of certain rights for government employees.[30] However, the author posits that "core" I.L.O. Conventions must be adhered by Member States even if they have not ratified them. The authority for such a conclusion is derived straight away from the I.L.O. Declaration on Fundamental Principles and Rights at Work, 1998, which clearly states that the

[26]See generally, C. E. Landau, Influence of ILO Standards on Australian Labour Law and Practice, 126 INT'L LAB. REV. 669 (1987).

[27]Infra note 31.

[28] Article 3 of Convention 87 reads thus;

Workers' and employers' organization shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities to formulate their programmes (emphasis in the original).

The public authorities shall refrain from any interference which would restrict the right or impede the lawful exercise thereof.

[29] Article 10 of Convention 87 provides; "In this Convention the term organization means any organization of workers or of employers for furthering and defending the interests of workers or of employers".

[30] These rights, among others, include the right to strike and criticize openly government policies, the right to accept freely financial contribution, the right to join freely foreign organizations etc. See, http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_decl_facb_ind.pdf (Last visited on March 7, 2010).

Member States, from the very fact of their membership in the Organization, "have an obligation to respect, promote and to realize, in good faith and in accordance with the I.L.O. Constitution, the principles concerning the fundamental rights which are subject to those Conventions".[31]

In India, under article 51(c)[32] read with article 37[33] of the Directive Principles' of State Policy ("**D.P.S.P**."), State is obliged to "introduce" and "implement" international laws and instruments and ensure compliance to treaty obligations. Given the presence of such mandates in the Constitution, it is not left to the discretion of constitutional courts whether to harmonize international law and constitutional law because the courts in India are courts of "law" and not of "justice" and are bound by the Indian Constitution.[34] Right to strike, being explicitly enshrined in the I.C.E.S.C.R.[35] and understood to be guaranteed by the I.L.O. Convention 87 is a cardinal principle of

[31]ILO Declaration on Fundamental Principles and Rights at Work, 86th Session, Geneva, June 19th 1998, available online at: www.csmb.unimore.it/on-line/Home/Prova/documento36007698.html(Last visited on March 22, 2010).

[32] "51. The State shall endeavour to – (c) foster respect for international law and treaty obligations in the dealings of organized peoples with one another…"

[33] "37. The provisions contained in this Part [Part IV] shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply this principle in making laws".

[34]See generally, Shubhankar Dam,. Vineet Narain v Union of India: "A Court of Law and not of Justice" – Is the Indian Supreme Court beyond the Indian Constitution?, [2005] PUBLIC LAW 239.

[35] Right to strike, essentially being a recognized fundamental right in Article 8(1)(d) of I.C.E.S.C.R. is one such mechanism to bolster the legitimate interests and demands of working people and if exercised in conformity to the domestic laws must be a 'protected activity' under article 3 and 8 of Convention 87. India being one of the signatories to I.C.E.S.C.R. is obliged to ensure bona fide compliance of this mandate under article 2(1) which obligates ratifying States to give effect to the provisions stipulated in the Covenant. Moreover, since right to strike has been given a special mention in article 8 which is designed exclusively for guaranteeing "labour and fair practices" and protecting association and formation of trade union rights in the preceding clauses, it can always be argued that right to strike if not a predecessor to right to form associations, must be understood as a concomitant right that logically follows from right to form association.

international law and must be read, as is else where argued, in freedom of association protected under article 19 of the Indian Constitution. At the same time, it is, however, conceded that constitutional absolutism is impermissible in any democracy and (also in view of the C.E.A.C.R.), while strikes of a "purely political nature" does not fall within the ambit of the principles of freedom of association, there can also be permissible limitations in the exercise of right to "occupational" and "trade union" strikes in the event of an acute national emergency or exercise of such right by government or public servants empowered or authorized to carry forward public utility services.[36]

However, the acknowledgment of a right as a constitutional right is a different enquiry and structuring the exceptions to it is another. In India, surprisingly, Courts have constantly validated the restrictions imposed on right to strike using Constitution as a shield, without actually determining the correctness of the hypothecation of the right as a constitutional right.

III. BORROWING FROM OTHERS

In this section we try and compare constitutional provisions of three important countries viz. South Africa, U.S.A and Australia and highlight the reasoning of courts in an attempt to provide for a constitutional guarantee to the right to strike in India.

A. *South Africa*

The concept of strike in South Africa can be traced to Gandhi's experiment with Satyagraha against the imposition of £3 tax on

[36] Freedom of Association and Collective Bargaining, a General Survey of Conventions No. 87 and 98 conducted by the C.E.A.C.R. in 1994. In the Indian context, the Essential Services Maintenance Act (ESMA), 1981, in § 3 of the Act provides that if the Central government is satisfied that in public interest it is necessary or expedient so to do, it may, by general or special order; prohibit strikes in any essential service. Moreover, the Central Civil Services Rules lay down certain restrictions on "political" enjoyment of the right to strike by government servants who do not fall under the purview of the I.D. Act, 1947.

indentured Indian labourers.[37] In Natal, a Bill was passed in 1985 under which an ex-indentured India was exempted from paying the tax if he "left for India on the termination of the indenture or entered into further indenture".[38] To Gandhi, the indentured labourers were "victims of gold hunger" and "passive resistance" by striking was the primary duty of every Indian in South Africa.[39]

The South African Constitution explicitly guarantees in article 23 inter alia the right of workers to participate in the activities and programmes of a trade union and *to strike*.[40] This right, however, is not absolute and is subject to restrictions on grounds specified in article 36(1).[41] Moreover, the Labour Relations Act was passed in

[37]Supra note 8.
[38]Ibid.
[39] Vol. 13 Interview to Rand Daily Mail at 375 in Vol. 20 Satyagraha in Complete Works of Mahatma Gandhi 39 (New Delhi, Government of India: 2002) as cited in supra note 8 at 76.
[40]"23. Labour relations.---
(1) Everyone has the right to fair labour practices.
(2) Every worker has the right –
to form and join a trade union;
to participate in the activities and programmes of a trade union; and
to strike.
(3) Every employer has the right –
to form and join an employers' organization; and
to participate in the activities and programmes of an employers' organization.
(4) Every trade union and every employers' organization has the right-
to determine its own administration, programmes and activities;
to organize; and
to form and join a federation.
(5) Every trade union, employers' organization and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).
(6) National legislation may recognize union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)."
[41] Section 36 is titled "Limitation of Rights" and clause 1 provides;
"(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open

1995 to give effect to this constitutional provision of right to strike and "protections to strikes in the collective bargaining context and for strikes, defined as protest action in the socio-economic context".[42]

In an unprecedented decision, the constitutional court of South Africa in *National Union of Metal Workers of South Africa v. Bader BOP (Pty) Ltd and the Minister of Labour* [43] elaborated upon the contemporaneous significance of right to strike in terms, both of democratic order and compliance to international standards. The court while emphasizing the importance of collective bargaining, held that right to strike being an intrinsic component of collective bargaining must be held in high esteem so as to promote human dignity of workers and as a consequence, a just and fair working environment free from "economic coercion". [44] In an earlier case, [45] while reiterating right to strike as an essential mechanism to bargain collectively with the employers and emphasizing upon the importance of collective bargaining in any industrial jurisprudence, the court held

---

and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
the nature of the right;
the importance of the purpose of the limitation;
the nature and extent of the limitation;
the relation between the limitation and its purpose; and
less restrictive means to achieve the purpose."

[42] D M Davis, The South African Position on Strikes: Viewed from the Perspective of Health Services BC, (2009); available online at: http://www.law.utoronto.ca/documents/conferences2/StrikeSymposium09_Davis.pdf (Last visited on March 12, 2010).

[43]Supra note 17.

[44]Ibid. at ¶ 13, per Judge O'REGAN:
"This case concerns the right to strike. That right is both of historical and contemporaneous significance. In the first place, it is of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees. Secondly, it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system. In interpreting the rights in section 23, therefore, the importance of those rights in promoting a fair working environment must be understood".

[45]In Re: Certification of the Constitution of the Republic of South Africa, [1996] 10 B.C.L.R. 1253.

that "the right to strike for workers has led to it being far more frequently entrenched in constitutions as a fundamental right than is the right to lock out.[46] While also rejecting the indispensability towards the entrenchment of right to lock in domestic laws once right to strike has been included, it added further, that "right to strike and right to lock out are not always and necessarily equivalent".[47]

B. *U.S.A.*

Although the U.S. Constitution did not originally provide for the right to freedom of association, the constitutional courts have constantly read this right in the speech and assembly clauses of the First Amendment,[48] the slavery and involuntary servitude clause of the Thirteenth Amendment,[49] and the due process and equal protection clause of the Fourteenth Constitutional Amendment.[50] These clauses are understood to recognize a constitutional right to freedom of association.[51] The right to strike necessarily follows from freedom of

[46]Id. at ¶ 66.

[47]Id. See also, Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd (1999) 20 I.L.J. 321 at ¶¶ 27-28 quoted in Eskom Holdings (Pty) Ltd v National Union of Mineworkers and Others [2009] 1 B.L.L.R. 65 at ¶ 28

[48]U.S. CONSTITUTION FIRST AMENDMENT – Religion and Expression – "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances".

[49] U.S. CONSTITUTION THIRTEENTH AMENDMENT – Slavery and Involuntary Servitude – "Section 1 – Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the U.S, or any place subject to their jurisdiction".

[50]U.S. CONSTITUTION FOURTEENTH AMENDMENT – Rights Guaranteed Privileges and Immunities of Citizenship, Due Process and Equal Protection – "Section 1 – All persons born or naturalized in the US and subject to the jurisdiction thereof, are citizens of the US and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the U.S.; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

[51] See generally, James Pope, The Right to Strike under the United States Constitution: Theory, Practice, and Possible Implications for Canada, (2009);

association, individual autonomy and human dignity and equality rights introduced to the U.S. Constitution by these amendments.[52]
In the landmark 1923 case of *Charles Wolf Packing Company*,[53] while addressing the constitutionality of a Kansas State law, the U.S. Supreme Court declared unconstitutional a 'wage-fixing' law as being ultra vires to the due process clause of the Constitution Fourteenth Amendment in that it infringed upon the right to contract of workmen. The court used equality as a tool to overturn key provisions of anti-strike law and stated that "although the worker is not required to work, at the wages fixed, he is forbidden, on penalty of fine or imprisonment, to strike against them, and thus is compelled to give up that means of putting himself on an equality with his employer which action in concert with his fellows gives him."[54] This case, therefore, established a constitutional right to strike in U.S.A.[55]

In *Lyng v. Auto Workers*,[56] the SC of U.S.A while considering the constitutionality of a federal statutory provision that denied food stamps to the families of workers out on strike,[57] held that denial of food stamps did not "directly and substantially interfere"[58] with the

available online at: http://www.law.utoronto.ca/documents/conferences2/StrikeSymposium09_Pope.pdf (Last visited on February 17, 2010).
[52]Id.
[53]Supra note 18.
[54]Ibid. at 540.
[55]Philip Kurland Ed., FELIX FRANKFURTER ON THE SUPREME COURT, 141 (1970) (reprinting Frankfurter's unsigned editorial from the New Republic, June 27, 1923) as cited in James Gray Pope, The Right to Strike under the United States Constitution: Theory, Practice, and Possible Implications for Canada (2009); available online at: http://www.law.utoronto.ca/documents/conferences2/StrikeSymposium09_Pope.pdf (Last visited on February 17, 2010).
[56]Supra note 18.
[57]James Gray Pope, The Right to Strike under the United States Constitution: Theory, Practice, and Possible Implications for Canada (2009) available online at: http://www.law.utoronto.ca/documents/conferences2/StrikeSymposium09_Pope.pdf (Last visited on February 17, 2010).
[58]Ibid.

constitutionally recognized right to freedom of association. The Court also held that the statute did not "prevent" future associations but at the same time acknowledged that such a denial "made it harder for strikers to maintain themselves and their families during the strike and exerted pressure on them to abandon their union".[59] This judgment is important in that it was a reiteration of the constitutional guarantee given to the right to strike under the U.S. Constitution

C. *Canada*

The Canadian Charter of Rights, in section 2(d), categorically declares that "everyone has a number of fundamental freedoms, including freedom of association". Section 2(d) makes formation of association a positive right by stating that "everybody has the freedom of association". This right includes the freedom to "establish", "maintain" and "belong" to an association.[60] Although right to strike has not been given a special mention by the constitutional courts, the right to and freedom of "collective bargaining" is now a well settled principle after the Court's unprecedented judgment in *Health Services and Support – Facilities Sub-sector Bargaining Association v British Columbia.* [61] This case did not concern right to strike but the argumentation favoring 'collective bargaining' is indeed helpful in building a strong case towards a right to strike in the Indian context.
While answering whether the guarantee of freedom of association in section 2(d) of the Canadian Charter of Rights protects 'collective bargaining', the Court ruled:[62]

> "*We conclude that section 2(d) of the Charter protects the capacity of members of labour unions to engage, in*

[59]Ibid. See, also supra note 18 at 368.
"Exercising the right to strike inevitably risks economic hardship, but we are not inclined to hold that the right of association requires the Government to minimize that result by qualifying the striker for food stamps".
[60]Canadian Egg Marketing Agency v Richardson, [1998] 3 S.C.R. 157.
[61]Supra note 19.
[62]Ibid. at ¶ 19.

> *association, in collective bargaining on fundamental workplace issues. This protection does not cover all aspects of 'collective bargaining' as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it ensure a particular outcome in a labour dispute, or guarantee access to any particular statutory regime. What is protected is simply the right of employees to associate in a process of collective action to achieve workplace goals. If the government substantially interferes with that right, it violates section 2(d) of the Charter*".

The Court articulated four propositions upon which the ration was based.[63] The propositions laid down in Para 20 of the judgment are as follows;

> "*Our conclusion that section 2(d) of the Charter protects a process of collective bargaining rests on four propositions. First, a review of the section 2(d) jurisprudence of this Court reveals that's the reasons evoked in the past for holding that the guarantee of freedom of association does not extend to collective bargaining can no longer stand. Second, an interpretation of section 2(d) that precludes collective bargaining from its ambit is inconsistent with Canada's historic recognition of the importance of collective bargaining to freedom of association. Third, collective bargaining is an integral component of freedom of association in international law, which may inform the interpretation of Charter guarantees. Finally, interpreting section 2(d) as including a right*

[63]Brian Langille, The Freedom of Association Mess: How We Got into It and How We Can Get out of It, 54 MCGILL LAW JOURNAL 177 (2009).

> *to collective bargaining is consistent with, and indeed, promotes, other Charter rights, freedoms and values*".

Therefore, it is well settled in Canada that collective bargaining of which strike forms an inseparable part is employed to overcome the "inherent inequalities of bargaining power in the employment relationship and to protect themselves from unfair, unsafe, or exploiting work conditions"[64] and acts as a tool to "influence the establishment of rules that control a major aspect of their lives".[65] However, right to collective bargaining flowing from the freedom to form association must always be exercised with proper care and caution in a lawful and justified manner. In other words, the people engaging in expressive or associational activities that constitute violence cannot later seek the protection under section 2(d).

IV. CONSTITUTIONALIZING RIGHT TO STRIKE IN INDIA

T.K.Rangarajan is the latest division bench judgment delivered by the SC on the constitutionality of a legislation restricting right to strike by government employees in India. In that case, the Tamil Nadu Government in accordance with Rule 22 of the Tamil Nadu Government Servants Conduct Rules, 1973 terminated services of all employees who have resorted to strike. On a writ petition filed by the aggrieved persons, the Court held that there is no statutory provision empowering the government employees to go on strike and any kind of economic misconduct is "required to be dealt with in accordance

[64]Supra note 19 at ¶ 84.
[65]Supra note 19 at ¶ 85. See also, 1968 Woods Report at p. 96 quoted in BC Health Services:
"One of the most cherished hopes of those who originally championed the concept of collective bargaining was that it would introduce into the workplace some of the basic features of the political democracy that was becoming the hallmark of most of the western world. Traditionally referred to as industrial democracy, it can be described as the substitution of the rule of law for the rule of men in the workplace".

with law".[66]

This judgment evoked "passionate reactions"[67] because it suffers from the vices of judicial reasoning and indiscipline and is also not final because of the following reasons. *First*, and the most obvious, *T. K. Rangarajan* restricts itself to the determination of constitutionality of strike from the perspective of government services and holds no authority so far as non-government employees are concerned. *Secondly*, it is not only a radical restatement and affirmation of the earlier SC jurisprudence on right to strike, but also lacks "judicial creativity" as it conveniently disregards some of the core principles of Indian industrial jurisprudence. For instance, T.K.Rangarajan blatantly disregards the statutory right to strike under the I.D. Act for government employees and also concludes, with sheer non-observance to international human rights standards to which India is a party, that there cannot be a fundamental or moral right to strike.

T.K.Rangarajan, unlike *Enerji Yapi-Yol Sen,*[68] was partially right in its ruling since although it correctly acknowledged that the right to strike was not an absolute right and could be subject to certain conditions and restrictions (by highlighting the exceptions of "public utility services"), it completely failed to identify that only certain categories of civil servants could be prohibited from taking strike action. The prohibition on strikes cannot under any circumstances extend to all government employees who are otherwise entitled to a legal and justified strike action under the I.D. Act, 1947. On the facts in *Enerji Yapi-Yol Sen,*[69] a union of civil servants founded in 1992 that were active in the fields of land registration, energy, infrastructure services and motorway construction and are a member of the Federation of Public – Sector Trade Unions challenged the validity of Circular No. 1996/21 issued by the Prime Minister's

[66]Supra note 9 at ¶ 24.
[67]Supra note 8.
[68]Enerji Yapi-Yol Sen v. Turkey, Application No. 68959/01, available online at: http://www.echr.coe.int.
[69]Id.

Public Service Staff Directorate. The Circular prohibited public-sector employees from taking part in a national one- day strike organized in connection with events planned to secure the right to a collective bargaining agreement. The ECHR allowed the application on grounds (a) adoption and application of the circular did not answer a "pressing social need"; (b) there has been a disproportionate interference with the applicant union's rights and; (c) the prohibition on the right to strike does not extend to all kinds of public servants employed in State-run commercial or industrial concerns.

Back to the Indian position, in *All India Bank Employees Association* (1962), decided forty one years before *T. K. Rangarajan*, the point for discussion before the Court was whether Article 19(1)(c) which guarantees right to form association, also implicitly protects the long term fulfillment of collateral objectives of an association so formed, from constitutional or legal interference save on recognized grounds set out in Article 19(4). This question, unfortunately, was answered in the negative. The Court as a justification for its conclusion laid down a distinction between "formation" and "objective" of an association, and ruled that article 19(1)(c) not being an absolute right will only include those actions which partake the character of an association and not the objectives of it. Simply put, although article 19(1)(c) is a protection against the formation or set up of an association or trade union, it cannot be liberally construed so as to include consequential "aims" and "objectives" that the association or trade union so formed seeks to accomplish. The Court, unmindful of the "purposive approach" to fundamental rights, erred in its reasoning by giving "objectives" a go by and failing to understand that if "aims" and "objectives" of an association were not conceded, rights protected under article 19(a) and (b) would lack any substance and become at best, illusory.

In the second major case on right to strike, *Kameshwar Prasad*, a constitutional bench of SC was confronted with a writ petition challenging the constitutional validity of Rule 4-A introduced into the

Bihar Government Servants' Conduct Rules, 1956 [70] on various grounds including inter alia that it interfered with the rights guaranteed to the petitioners by sub-clauses (a), (b) and (c) of clause (1) of article 19 of the Constitutional of India. Judge Ayyangar, speaking for the majority, ruled that particular forms of demonstrations fall within the purview of article 19(1)(a) and 19(1)(b) and cannot be restricted unreasonably save permissible restrictions enshrined in the article itself. The Court could have inferred right to strike into right to demonstration since the definition that it gives for "demonstration" technically possess all the essentials of a strike.[71] This did not presumably happen because the SC decision of an equal bench strength in *All India Bank Employees' Association* negated right to strike as a constitutional guarantee and thus, the validity of Rule 4-A so far as it prohibits strikes, was no longer under challenge thereby confining the arguments to the sole question of the legality of the provision as regards the right to hold demonstrations. Nonetheless, the SC could have constitutionally justified its intervention in the issue, under the wide residual powers endowed upon it for doing "complete justice" between parties principled in article 141(1)[72] read with article 32 [73] of the Indian Constitution. This power to do "complete justice" includes inter alia the authority to allow a fresh point of law to be taken up *suo moto* in any constitutional litigation.[74]

[70]"4-A. – Demonstrations and Strikes – No Government servant shall participate in any demonstration or resort to any form of strike in connection with any matter pertaining to his conditions of service."

[71]¶ 15 of the judgment, "Without going very much into the niceties of language it might be broadly stated that a demonstration is a visible manifestation of the feelings or sentiments of an individual or a group….."(emphasis in the original).

[72]"142(1)- The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India…"

[73]Under this article the SC has unfettered powers to enforce Part III rights and guarantees standing by "appropriate proceedings" as also through the issuance of directions or orders or writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto, and certiorari.

[74]Prem Chand v Excise Commissioner A.I.R. 1963 SC 996.

By failing to exhaust constitutional provisions, the SC demonstrated a rarest disposition of "judicial convenience" which was neither expected nor desired by a constitutional bench given the nature of significant issues of constitutional importance involved in the facts of the case.

To bridge the gap between *All India Bank Employees' Association* and *Kameshwar Prasad*, in *B R Singh* (1990) a division bench of Apex Court went a step further to examine the constitutional validity of "objectives" of an association. However, *B R Singh* does not give right to strike a fundamental character, worse, reiterated the restrictions on this right under the Indian industrial jurisprudence and echoed its non-absoluteness.[75]

What *B R Singh* gives is a sound justification for future benches to read right to strike in "right to demonstrate" which is implicit, both on principles and precedents, in right to speech and expression and peaceful assembly guaranteed under article 19(1)(a) and (b) of the Constitution. Another important aspect of B R Singh is the emphasis upon "purposive approach" to fundamental rights i.e. the acknowledgement of the fact that article 19 (freedom of association) like other fundamental rights in Part III has no exclusive purpose of formation of a union, but also has in its purview other foundational rights (for instance, right to strike) which cannot be accomplished without due recognition of their implicit existence.

In fact, a combined reading of *B R Singh* and *Kameshwar Prasad*, makes it amply clear that since there is a fundamental right to "peaceful demonstration" flowing from the right to speech and expression and peaceful assembly explicit in article 19, and strike in a given situation being one such mode of "peaceful demonstration" by workers for their rights should also be understood to be implicitly guaranteed and protected under art 19.

[75]Although B R Singh stated that right to association would be a mere lip-service right to workers if the fulfillment of "objectives" are not taken into consideration.

V. SOCIALISM AS A "VALUE"

The Indian Constitution is not a Constitution without Fundamental Rights and Directive Principles of State Policy.[76] Socialism, which although was not mentioned in the drafting of Preamble to the Constitution of India, was affirmed in 1976 by the Forty-second Amendment.[77] As it presently stands, the Preamble proclaims India to be a Sovereign, Socialist, Secular, Democratic, Republic union of States. The aims and objectives specified in the Preamble constitute the basic structure of the Constitution and cannot be amended through an Act of Parliament[78]. Socialism, being included in the Preamble, also, is a basic feature of the Indian Constitution.[79] Also incorporated in the D.P.S.P. (Part IV, Art.37-51), the essence of socialism requires equality at workplace and quality in work standards.

However, the constitutional courts in India had never sought for a liberal, coherent and harmonious interrelation of the range of rights enshrined in Part III and IV to create a linkage between D.P.S.P. and Fundamental Rights that in turn leads to a linkage between right to strike and fundamental rights. Article 21, the god father of several concomitant rights, is constantly held to be of paramount importance in the Indian constitutional set up. It confers on every person, the right to life and personal liberty. Although, personal liberty explicit in the article itself can be a sufficient ground to confirm the *vires* of right to

[76]Per JAGANMOHAN REDDY J., Keshavananda Bharati v State of Kerela (1973) 4 S.C.C. 225 at 637.

[77]THE CONSTITUTION (FORTY-SECOND AMENDMENT) ACT, 1976
"2. Amendment of the Preamble.- In the Preamble to the Constitution,-
(a) for the words "SOVEREIGN DEMOCRATIC REPUBLIC" the words "SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC" shall be substituted; and….."

[78]Keshavananda Bharti v State of Kerela A.I.R. 1973 SC 1461; Indira Gandhi v Raj Narain A.I.R. 1975 SC 2299; Minerva Mills v Union of India A.I.R. 1980 SC 1789

[79]Sanjeev Coke Manufacturing v Bharat Coking Coal Ltd. A.I.R. 1983 SC 239.

strike,[80] the right to life also explicit in the article read with other directives laid down in Part IV of the Constitution, includes right to live with human dignity.[81] For instance, article 21 is meaningless if the objectives in article 39, 41 and 42 of the D.P.S.P. are not fulfilled by the government to preserve human dignity of bonded labourers.[82]

In the context of a legal and justified strike, the workers shall have the constitutional protection of legitimate demands which protects their human dignity by ensuring reasonable amenities and work-satisfaction. In order to guarantee basic amenities and overall work satisfaction, and as a consequence, their right to dignity, the working people must have a pro-active tool in the nature of strike or threat to strike as a reasonable means of protest. This right to strike implicit in right to human dignity can best be appreciated through a careful reading of the range of directives stipulated in Part IV.

Despite there being a specific reference to the non-enforceability of these principles, the importance of D.P.S.P. is evident from the use of word 'directive' in Part IV as also from the phrase alive in article 37 "principles laid down therein are fundamental in the governance of the country..." The rights and directives enshrined in Part III and IV form the essence of the Constitution and the creation of a harmony and balance between these two supplementary constitutional frameworks is a basic feature of the Constitution.[83] The "promotion of economic welfare" in article 38, "right to adequate means of livelihood", "operation of economic system for the common good" in article 39, making of "effective provisions for right to work" in article 41, and most importantly, the spirit of article 43 which provides that

[80]The author posits that the right to go on a strike for the achievement of legitimate demands of working people in effect bolsters the non-derogable right to "personal liberty" insofar as it strengthens the participation of the working people in the decision making of the management.

[81]Bandhua Mukti Morcha v Union of India, A.I.R. 1984 SC 802.

[82]Id.

[83]Kerela Education Bill, Re, 1957 A.I.R. 1958 SC 956; Minerva Mills Ltd. v Union of India A.I.R. 1980 SC 1789.

the "state shall endeavour to secure, by suitable legislation…….to all workers, agricultural, industrial or otherwise, work, a living wage, *conditions of work ensuring a decent standard of life and full enjoyment of leisure*…"(emphasis on the original) are the clearest enunciation of the founding fathers of the Constitution to protect the human dignity of the working people as implicitly secured in article 21 though judicial activism. Any contrary view shall result human dignity in article 21 to be an ineffective fundamental right, worse a mere lip-service propounded by the SC supposedly guaranteed to persons without any consequential relief.

Unfortunately, not on a single occasion, had the constitutional courts in India approached right to strike from the underlying jurisprudence of right to life and liberty in article 21 and the implied right to human dignity read in harmony with the D.P.S.P. which, although unenforceable in courts of law, pave a long way in the melodious construction of constitutional rights in order to attenuate the legitimate expectations of working people.

It is, therefore, seen that even assuming the constitutional incompetence of article 19 to stand as a guarantee for striking employees, the constitutionalization of right to strike is clearly justified through the establishment of a link between "human dignity" principled in article 21 and the combined spirit behind the D.P.S.P.

VI. CONCLUDING REMARKS

Precedents established by the constitutional courts in common law jurisdictions "…have become the primary catalyst behind the growing importance of comparative constitutional law".[84] In the areas of

[84]K. G. Balakrishnan, The Role of Foreign Precedents in a Country's Legal System, Lecture at Northwestern University, Illinois (October 28, 2008); available online at: http://www.supremecourtofindia.nic.in/speeches/speeches_2008/28%5B1%5D.10.08_Northwestern_University_lecture.pdf (Last visited on March 19, 2010).

"public interest litigation" and "conflict of laws", the "persuasiveness" of comparative constitutional laws has become a daily affair.[85] In India, too, foreign precedents can be incorporated into the line of judicial thinking through three different ways viz. vertical means,[86] horizontal means [87] and mixed vertical horizontal means. [88] Comparative constitutional analysis, a "useful strategy" to deliberate upon constitutional adjudication may "insert a fresh line of thinking".[89] Moreover, as is argued by Balakrishnan, "one of the functions of judges in a constitutional court is to protect the counter-majoritarian safeguards enumerated in the Constitution… [which] can benefit from an evaluation of how similar provisions have been interpreted and applied in other jurisdictions". [90] Reliance on comparative constitutionalism must be seen as a "vital instrumentality" for the Indian constitutional courts in extending "constitutional protection to several socio-economic entitlements and advanced causes such as environmental protection, gender justice and good governance among others".[91]

Right to strike is essentially meant to bring employees, if not higher, than on an equal pedestal, with the employers. The putting of employees at par with the employers if the latter is granted a fundamental right to lock out on the granting of a fundamental right to strike to the employees would prima facie be a dangerous example of equal treatment of unequals. *All India Bank Employee Association*,

[85]Mark Tushnet, The Possibilities of Comparative Constitutional Law, 108 YALE LAW JOURNAL 1225 (1999).
[86]When a reference is made to international instruments to which it is not a party, for example the decisions of the E.C.H.R. Id. at p.4.
[87]When a reference is made to precedents from other national jurisdictions for domestic interpretation; Id.
[88]When a reference is made both to foreign judicial precedents and international instruments. Refer: Anne- Slaughter, Marie, The typology of transjudicial communication, 29 UNIVERSITY OF RICHMOND LAW REVIEW 99-137 (1994) as cited in Balakrishnan, supra note 84.
[89]Id.
[90]Supra note 84 at p.9.
[91]Id.

Kameshwar Prasad and *T.K.Rangarajan* are glaring examples of the lack of commitment in the India judiciary towards the replication of and compliance to international laws and spells sheer disregard to the idea of "persuasiveness" of comparative constitutionalism" in their approach to proper adjudication of constitutional dilemmas.

ASCERTAINING 'INVESTMENT': A LOOK AT WHAT IS BOTHERING THE ICSID

Nikita Appaswam[*]

ABSTRACT

Supposing for a moment that X, an investor from say Cambodia, visits India to overlook and supervise her investment there and en route gets hit by a motorcyclist while X was taking a sojourn in a tourist village. Will the International Convention on Settlement of Investment Disputes (ICSID) decide to hear the matter? Does it fall under its jurisdiction? The answer is most probably not as, though there is a vague attribution to 'investment' issues in this example, ICSID will refrain from entertaining claims because of the lack of relation between the matter in issue and the investment itself. But supposing again, X was injured en route to her factory or back, then this matter would fall under the ambit of ICSID. Now the confusion is as to what activity can be called an 'investment'. Is the ICSID justified in construing the definition in such a restrictive scope when the Convention itself has refrained from giving a form to it?

[*]Nikita Appaswam is a third-year student at Gujarat National Law University, Gandhinagar. The author may be reached at nikki.appaswami@gmail.com.

This article, will discuss in depth the central and peripheral issues regarding the confusion that often boggles both the Bilateral Investment Treaty (BIT) parties as well as tribunals regarding what economic enterprise suffices as 'investment'. The author has discussed two very prevalent approaches to this viz *the restrictive and deferential approach. Though there are pros and cons to both, the author has found that every approach has its roots in the consent agreement between the contracting parties itself. Thus, flexibility given to States and flexibility practiced by ICSID in determining the scope of an activity will douse the perplexity and difficulty in adjudging cases before the ICSID Tribunals.*

I. INTERNATIONAL INVESTMENT AGREEMENTS (IIA'S)

International Investment Agreements (IIA's) are paper work that are signed between two countries who agree on protection of their investments made in each others country. The entire mechanism tends to make such Foreign Direct Investments transparent and multifaceted thereby making the policy-drafting regarding investments a thousand fold protected by these agreements. These agreements, in a way, also promote good relations between States and nationals and countries around the world thereby promoting the development of International Law by creating such healthy relations. The need for such a protection has continued to be comprehended soon after the end of the Second World War, when political stability in international relations was the paramount need of the day. Several countries such as the Latin

American states, Asia and Africa were not exactly stable as far as development was concerned. In such scenarios, foreign investments seemed to provide a back-bone for their existence.[1] This not only ensures a stability for their forward development but also a firm holding in their economy.

Boskey and Sella in their article titled *Settling Investment Disputes*[2] have sharply pinned down the advantages of a foreign investment such as it not being only a monetary improvement but also the fact that it provides the country with workforce, technical competency and local managerial skills. Some countries are hesitant to accept public-sector investments with their frills and inadequacy such as sovereignty issues, as against investments from non-governmental sources that are termed 'private'.[3] This can be a reason why nationalization on a large scale is sure to ward off investors, such as what happened during the Cuban nationalisation in 1962, which stalled American investors, thereby causing loss to the Cubans to the tune of $300 million as investment[4] or even the nationalisation by Iran of the Anglo-Iranian Oil Company assets way back in 1952. The Executive Directors believe that private capital will continue to flow to countries offering a favourable climate for attractive and sound investments, even if such countries did not become parties to the Convention or, having joined, did not make use of the facilities of the Centre. On the other hand, adherence to the Convention by a country would provide additional inducement and stimulate a larger flow of private international investment into its territories, which is the primary purpose of the Convention.[5]

[1] JOY CHERIAN, INVESTMENT CONTRACTS AND ARBITRATION (Sweet & Maxwell) (1975).

[2] Finance and Development, THE FUND AND THE BANK REVIEW,129-134 (1965).

[3] From the speech made by G.D.Woods, Former World Bank President, to the Association of Swiss Bankers, Oct 27, 1967.

[4] A.A. FATOUROS, GOVERNMENT GUARENTEES TO FOREIGN INVESTMENT 50 (Columbia Press University) (1962).

[5] ICSID Convention, Regulations And Rules (September 25 2010) http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

II. SOLUTIONS IN THE PAST

In the past, several States have taken concrete measures to protect their nationals who made a foreign investment. Initially, probably the only practical recourse available for investors was to draft a petition to their government of the respective home State for assistance. Their remedy solely depended on whether the host State agreed to arbitrate such investment dispute else, investors could not make claims under the International Law.[6] For this purpose, bilateral treaties,[7] that are even prevalent today, were entered into by parties and clauses that protected the economic and military stability of a nation were added. It prevented expropriation without compensation.[8] And in case of any dispute, an *ad-hoc* arbitral tribunal was set up for resolution. For this purpose, many treaties that were concluded during the closing curtains of the First World War (1914-18) were used to guide such proceedings. Understandably, they were not very effective due to lack of sophistication and unsuitable means of settling investment disputes.[9] Another way of protecting investments by capital-exporting nations, is by way of mild blackmail such as a threat to withdraw aid for the capital-importing country until and unless they fulfil certain restrictions and conditions[10]. But such an antagonistic approach only created an acid environment for future amicable negotiations and possible arbitral dispute settlement.

[6]Kenneth J. Vandevelde, A Brief History of International Investment Agreements, 12 UC DAVIS J. INT'L L & POLICY 159, (2005).

[7]Introduced in the early 1950's. According to UNCTAD, World Investment Report 2009, there has been an exponential rise in the number of BIT's, with the present number totally upto 2600.

[8] For more on BIT and its characteristic feature, refer, RULDOLF DOLZER & MARGARETE STEVENS, BILATERAL INVESTMENT TREATIES, 1995.

[9]Sassoon, The Convention on the Settlement of Investment Disputes between States and National and other States, 1 ISRAEL LAW REVIEW 27, 28 (1966).

[10]For instance the Foreign Assistance Act 1961 of the United States.

Setting up international insurance agencies with schemes [11] to safeguard the capital-exporting nations also failed during the inception of the idea due to uncited political reasons. These above mentioned back-up measures were only to deal with instances of expropriation, but as seen from above they were not very effective. That is the reason behind why arbitration on a more serious note was resorted to.

Arbitration recognises or rather does not point out the obstructive nature on the part of only one party that creates a conflict between the foreign investor and the host nation. Secondly, it will be better to acknowledge a possible event of an investment dispute by including an arbitration clause in the international investment agreement (IIA). This is preferable due to the multiple complex issues that might ensue as a consequence of misinterpretation.[12]

III. DEBUT OF THE ICSID

Following a string of failed measures to protect investment in foreign countries, in the year 1965, the International Centre for Settlement of Investment Disputes (hereafter, ICSID) was established under the aegis of the Convention on the Settlement of Investment Disputes between two States or Nationals of Other States. The convention is alternatively referred to as the Washington Convention. ICSID was the birth child of the International Bank for Reconstruction and Development (IBRD). The principle motto of ICSID is to invigorate healthy financial and investment relations between two foreign countries. Besides this, the Centre provides conciliation and arbitration measures (by initiation of those mechanisms, and directly involved in multifarious procedural and administrative matters)[13] to

[11]Such as the Australian Export Payments Insurance Corporation.

[12] P.F.Sutherland, World Bank Convention on the Settlement of Investment Disputes, THE INTERNATIONAL AND COMPARATIVE LAW WEEKLY, 28, 367 (1979).

[13]ICSID has a panel of arbitrators and conciliators from which the parties are free to choose. a complete list of all arbitrators and conciliators for all contracting states can be found at

settle ensuing investment disputes between Nation States. The ICSID serves a forum by itself, thereby a country's role is reduced to the extent of just enforcing an award passed by the Centre. This indirectly connotes that ICSID functions well as an independent individual body free from the clutches and perplexity that surrounds differing legal systems around the world.

Though on a cursory glance, one might infer that ICSID is a Centre that takes up the responsibility of deciding investment disputes, the author would like to point out the misconception here. On many surprising occasions, ICSID has detoured from the commonly treaded path for the reason that, that particular dispute brought before it does not fall under the definition of a *foreign investment*, irrespective of what the contract between the arbitrating parties reads. A very commonly cited instance of this nature is the shocking rejection on the part of ICSID to refuse to hear claims was the resultant dispute of U.S.-Congo-Kinshasa Treaty[14] on grounds that their relationship did not suffice the definition of a foreign investment. To recall, the defining feature of an investment is that the investor is guaranteed an expected level of friendly treatment in exchange for the resources, man-power and technical assistance in the needed arenas. When a host country expropriates a factory, repudiates a utility concession agreement, gerrymanders regulations to shut down a business venture, or denies even-handed justice in its domestic court system, foreign

http://www.worldbank.org/icsid/pubs/icsid-10/icsid-10.htm.

[14] Treaty between the United States of America and the Republic of Zaire Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Zaire, art. I(c), Aug. 3, 1984, S. TREATY DOC. NO. 99-17 [*hereinafter* U.S.-Congo-Kinshasa BIT] (Investment means "every kind of investments . . . including equity . . . ; and includes: tangible and intangible property, including all property rights . . . ; a company or . . . interests in a company or interests in the assets thereof; . . . licenses and permits issued pursuant to law . . . ; [and] . . . any right conferred by law or contract, and any licenses and permits pursuant to law."). Zaire became the Democratic Republic of the Congo in 1997 (refer http://www.harvardilj.org/articles/257-318.pdf)

investors can bring claims before an ICSID tribunal[15] seeking redress for the violations of their rights under international law.

IV. THE PROBLEM AT HAND

What happened in the U.S.-Congo-Kinshasa treaty was that the ICSID refused to recognize the relationship within its definition of 'investment' under Art. 25 of the ICSID Convention.[16] As the cases come in, a spectator can perceive the change in track the ICSID is adopting in the past few years: that is, becoming stricter in their interpretation or rather application of the term 'investment', before accepting a matter for adjudication. Christoph H. Schreuer, *The ICSID Convention : A commentary* 121-25 (2001), opines that *"The concept of investment is central to the Convention. Yet, the Convention does not offer any definition or even description of this basic term. The working paper's draft on jurisdiction did not even contain a reference to investments'.* Though almost all interpreters of the relevant Article under debate have advised against a water-tight construction of the provision, the actions of the ICSID seem to force a contradictory opinion in the recent past. Before the final version of the Convention was passed, it attempted a futile exercise of defining the term 'investment', and later found it highly unsatisfactory.[17] As

[15]Julian Davis Mortenson, The Meaning of 'Investment': ICSID's Traveaux and the Domain of International Investment Law, 1 HARV. L. REV., 51, (2010).

[16] Article 25: (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

[17]A first draft introduced the following definition of the concept: "For the purposes of this chapter (i) "investment" means any contribution of money or other assets of economic value for an indefinite period or, if the period be defined, for not less than five years;". The definition mentioned above was however considered unsatisfactory. The Secretariat of the Convention then presented another definition of the concept :"The term "investment" means the acquisition of (i) property rights or contractual rights (including rights under a concession) for the establishment or

the final draft clearly indicates, the Washington Convention conveniently omitted to mention or even at the least hint at a proper reference point to interpret what an investment might be. In the initial years of the inception of the Centre, there was a liberal outlook[18] on the meaning of investment. There was a coherent understanding that the definition was dependent on the nature of the relationship between the investing parties and thus, book-definitions or dictionary results are incapable of defining the concept[19]. It was popular consensus that *prima facie* the contract entered into by the capitol-importing and the investing nations would play a determinative role in the definition of whether it was an 'investment' indeed.

In *E.S.I. Spa, ASTALDI Spa v. Algeria*[20] a July 2006 decision, in its Para. 72 (French), the arbitrators have tried compartmentalising what constitutes an 'investment' as per the contractual agreement:

a. the contractor has realised a contribution in the country concerned,

b. this contribution is made for a certain duration of time and,

c. it incurs a certain risk for the investor.

It does not explicitly state whether economic welfare of a country is being furthered by such an investment. However, from the analysis of those three elements made by the arbitrators, they have added that there is an investment only if the contributions have an economic

in the conduct of an industrial, commercial, agricultural, financial or service enterprise ; (ii) participations or shares in any such enterprise ; or (iii) financial obligations of a public or private entity other than obligations rising out of short term banking or credit facilities" (refer http://www.imakenews.com/iln/e_article000763642.cfm?x=b11,0,w#_ftn3).

[18]Such as including 'any kind of asset' as an investment.

[19]C.F. Amerasinghe, The jurisdiction of the International Centre for the Settlement of Investment disputes, 19 INDIAN JOURNAL INT'L L. 166, 180.

[20]ICSID case no. ARB/05/03.

value attached to them. Further, this economic furtherance should be for a considerable amount of time. The arbitrates go on to say that an element of risk is required in the contract entered. And thus, it would be unfair, if only an insurance contract is brought under the ambit of the Convention, instead of any kind of contract that has a risk for the investing party. This risk, if realized must not be capable of being settled by any domestic jurisdiction but by the ICSID only. This 2006 decision seems to lend the interpretation of the Article 25[21] a broad scope, however not only has the tribunal estranged from such an approach but also, there are certain pitfalls in adopting such a path. By broadly constructing this provision, the case load on ICSID was ever-increasing thereby hampering the working of the ICSID mechanism itself. Many a country taken to ICSID arbitration find themselves obliged to compensate companies for loss incurred on their territories. This situation, and the broadening of the scope of ICSID arbitrations, has brought about some reflexion in a number of states. The Philippines, which had lost a determinative case, decided that they would no longer accept the recourse to arbitration with foreign companies and modified a new BIT [22] agreement accordingly.[23]

V. IDENTIFICATION OF THE CAUSE

This categorization of activities into 'economic' or otherwise reflects a restrictive and tight interpretation. One can argue that this restrictive scope, rather than doing good, will shake the foundation of

[21]The jurisdiction of the Centre shall extend to any legal dispute arising directly out of or in relation to an investment between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the Parties to the dispute consent in writing to submit to the Centre.

[22]Bilateral Investment Treaty.

[23]http://www.imakenews.com/iln/e_article000763642.cfm?x=b11,0,w#_ftn6

international investment regime as there are other commercial activities/ventures that fall outside the scope of this interpretation.

The cause for such stringency can be attributed to myriad reasons:

- Firstly, there is a common misconception that the drafters of the Convention were unsure themselves when it came to defining the term 'investment'. The truth of this statement would require a study of the history behind drafting of the Convention[24]. The fact is, the drafters did not intend to restrict the meaning of 'investment' and hence refrained from defining it. It was hoped to be concluded on a case-to-case basis.
- Secondly, many a times, some tribunals feel that defining the term 'investment' is unjustified as it overlaps with the question of consent of the parties. This is what happened in *Grusiin v Malaysia* ICSID Case No. ARB/99/3, Award, pp. 13.5-13.6 (Nov. 27, 2000)
- Thirdly, the consent theory behind Art. 25 determines the jurisdiction of ICSID. If the consent document (contract) or the BIT agreement between the parties contains a definition of 'investment', then the Tribunals follow that definition. Cases refer *Parkerings-Compagniers v Republic of Lithuania*.[25]

VI. OBJECTIFYING 'INVESTMENT' : RIGHT APPROACH?

Christoph Schreuer[26] objectified this definitive approach and laid down five points that are necessary and characteristic for an activity to constitute an 'investment':

- Certainty of duration
- Regularity of profits and returns
- Assumption of risk
- Commitment by the investor

[24]David Sassoon, Convention on Settlement of Investment Disputes, 13 J. BUS. L. 334, 337 (1966).

[25]ICSID Case No. ARB/05/8 Awards, pp. 249-54 (Aug. 14, 2007).

[26]CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY (Cambridge University Press) (2001).

- Substantial changes in the host State as regards development

Schreuer opines that this marginalization should not be characteristic of jurisdiction but regular features that determine an 'investment'. These guidelines only further curtail the extent of the debated word. This approach was adopted in the celebrated *Salini Costruttori v. Morocc case,*[27] where this exclusiveness of interpretation was applied. The factual situation is that the Moroccan company refused to pay the money due from them according to the contract and therefore, was taken before the ICSID. The tribunal, rather than treating Schreuers parameters as merely determinative, suggested that they be made 'mandatory' for defining 'investment' or rather, making it as a 'test' for determination.

In *Alcoa v Jamaica,*[28] Alcoa Minerals, a US company, entered into an agreement with the government of Jamaica, which has ICSID arbitration clause. Jamaica undertook to give Alcoa bauxite-mining rights and tax concessions for twenty years. Alcoa agreed to construct an alumina refining plant, which would operate to extract alumina from the mineral bauxite. Alcoa filed for ICSID arbitration alleging that the collection of additional tax constitutes breach of agreement.[29] The Alcoa tribunal considered the jurisdiction where 'a [private] ... company has invested substantial amounts in a foreign State in reliance upon an agreement with that State'. Therefore, the tribunal held that the contribution of capital was a type of 'investment'.[30]

[27]ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 23, 2001).
[28]Case No ARB/74/2,4 Y.B. Com. Arb.206 (1979).
[29]W.M. Tupman, Case Studies in the Jurisdiction of the International Centre for lnvestment Disputes, 35 ICLQ., 815, 816.
[30](September 12, 2010) http://dergiler.ankara.edu.tr/dergiler/38/281/2553.pdf.

In *PSEG Global Inc. and Konya Ilgin Elektrik Uretim v Ticaret Limited Sirketi v. Republic of Turkey*[31] popularly dubbed as 'Turkey Case', the tribunal was once again confronted with the tedious task of defining 'investment'. The definition of 'investment' is provided in Article I(1)(c) of the Treaty between the United States of America and the Government of the Republic of Turkey Concerning the Reciprocal Encouragement and Protection of Investments (Treaty). The dispute in this case was raised by the Respondents who claimed that there was no investment as such as the subject matter for construction was still under negotiations and thus no consensus had been reached yet. The tribunal ruled otherwise stating that the Turkish Council of States (*Danistay)* had approved the concession contract. The language of the contract and mode of negotiations conveyed the intentions of the parties to confirm the deal. As a result of the contract being in existence, valid and binding on the parties, the tribunal held the contract between the Claimants and Respondents as satisfying the requirement of 'investment'. The ICSID has resorted to *Salini* case, and since 2006 has rejected only two cases on that basis.[32]

VII. CONCLUSION

The ICSID renders financial interests such as promissory notes, loans, stocks and shares etc., as uncertain regardless of their price and value. Does that mean that these instrument are likely to be shelved as well? [33] The alternative available to such unfortunate investors is ad-hoc arbitrations or the International Chamber of Commerce, but this may be implausible if the Contract specifies ICSID as the forum.

[31]ICSID Case No. ARB/02/5, Award of 19 January 2007. (September 13, 2010) http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewPleadings&PleadingNo=10.

[32]Biwater Gauff (Tanz.), Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award (July 24, 2008) and Malaysian Historical Salvors v. Malaysia, ICSID Case No. ARB/05/10, (May 17, 2007).

[33] Michael Waibel, Opening Pandora's Box: Sovereign Bonds in International Arbitration, 101 AM. J. INT'L L. 711, 718–32 (2007).

In the background of all this confusion, there arises a question as to who decides the admissibility of a dispute under the care of ICSID regarding 'investment': the tribunal itself or do the States categorize their disputes to be subject to ICSID, according to the issues and the present scenario such as in United Kingdom. This is where the concept of *deference* can be contemplated.[34] By this, the tribunals can defer the State's legal interpretation of their contractual terms and policies. The advantage of this option is that it offers the parties to flexibly interpret the clauses (such as whether their economic enterprise is an 'investment') at that moment and situation and at the same time, have the backing of the ICSID. Secondly, this approach can change the landscape of the investment law regime as State's can experiment their policies and reduce the number of uncertain approaches, as multifarious economic activity can be tested for protection. This flexibility ensures the sanctuary of ICSID's purpose '*to promote economic development by increasing the flow of foreign investment into interested host countries.*'

Another reason for adopting the differential approach is that many States are beginning to question the efficacy of BIT's and its legitimacy. Deference to the state's definition ensures their claim to legitimacy and competence on this debated issue in a pluralist world. This approach has been doctrinally dealt with in the *Vienna Convention on the Law of Treaties,* wherein States interpretation is called for in cases of ambiguity in definition. The doctrinal bite to the deferential approach is due to Vienna's Convention injunction to interpret treaty terms in light of the agreement's object and purpose and the fact that 'subsequent state practices that are counted'.[35]

The author would like to conclude this rather extensive discussion by summing up in brief the deferential approach as follows and suggestions as to why the restrictive approach might work:

[34]Julian Davis Mortenson, The Meaning of 'Investment': ICSID's Traveaux and the Domain of International Investment Law, 1 HARV. L. REV., 51 (2010).
[35]The Vienna Convention, art. 31 (1) and (3).

- This proposition upholds the objective of the ICSID Convention and protect the transnational investments to a larger extent.
- It extends the scope of the ICSID protection to BIT's thereby bringing under its umbrella several new economic activities that can potentially be 'investment'. Though this will be defeated when BIT mentions ICSID as a forum.
- It enables State policy flexibility, giving them time and choice for deciding their course of action.

Another suggestion that would work is for the ICSID to refrain from entertaining purely trade activities though this is purely a theoretical suggestion as practically no BIT would include just trade activities. Now, given that many States do not actually comprehend the effect of the BIT's they sign, a restrictive approach will help sieve the provision, to prevent other unforeseeable complication arising out of the BIT. The tribunals mode of ensconcing restrictive definitions will render those provisions non-amendable, thus forming the perfect case of difficulty of unalterable multilateral treaties.

The best recourse above all, would be for the Sates to refrain from giving absurd, vague and unalterable definitions of 'investment' as a consequence of which both, the States are at a loss for remedy and the ICSID is rendered helpless. I would like to add that ICSID should not be a stumbling block in the route of State's interpretation and inclusion of various economic activities to be considered as 'investment', thereby making ICSID wholly beneficial to those who subject themselves to it.